

Aldo Schiavello*

Legal Reasoning and Legal Theory Revised

A Defence of the Original View**

*I believe in law. [...]
Simply: there is such a thing as law,
and where it exists it tends to improve
the lives of those who live by it.
Law exists, and has prima facie positive value.*

[N. MacCormick¹]

1. Introduction

Neil MacCormick has deeply influenced contemporary legal theory. The importance of his studies on practical reasoning in general and on legal reasoning and legal argumentation in particular, on legal institutionalism, on sovereignty, on the theory of rights and on the rule of law can hardly be exaggerated. It must be added that his researches on these different themes do not proceed along parallel lines but are pieces of a unitary perspective on law. This clearly results from his last ambitious research project, on the theme “Law, State and Practical Reason.”²

A remarkable and constant aspect of MacCormick’s intellectual pathway is his attention to European and Scandinavian jurisprudence and philosophy as well as, obviously, to the Anglo-American debate.³ This is a characteristic that is worth stressing in that it marks a major difference between MacCormick and most Anglo-American legal philosophy and jurisprudence scholars.

The aim of this paper is to present a diachronic reconstruction of MacCormick’s theory of law and of legal argumentation, some connected points being highlighted in which the difference between the theses upheld in *Legal Reasoning and Legal Theory*⁴ [from now on *LR & LT*] and the later writings is particularly marked.⁵

* University of Palermo, Italy (a.schiavello@unipa.it; <http://www.unipa.it/~a.schiavello/>).

** This is a Draft- please do not cite or quote.

¹ N. MacCormick, “My Philosophy of Law”, in L. J. Wintgens, *The Law in Philosophical Perspectives*, Kluwer, Dordrecht/Boston/London, pp. 121-145, quotation at p. 121.

² See N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, OUP, Oxford, 1999; Id., *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, OUP, Oxford, 2005; Id., *Institutions of Law. An Essay in Legal Theory*, OUP, Oxford, 2007; Id., *Practical Reason in Law and Morality*, OUP, Oxford, 2008.

³ See N. MacCormick, *My Philosophy of Law*, p. 141.

⁴ N. MacCormick, *Legal Reasoning and Legal Theory* (1978), OUP, Oxford, rev. paperback edition 1994.

⁵ MacCormick sums up the differences between *LR & LT* and his subsequent writings as follows: “the trajectory of my thought has been away from some elements of the legal positivism expounded by H. L. A. Hart and the value-

The first point that I intend to deepen concerns MacCormick's gradual break with legal positivism, and more specifically the thesis that the implicit pretension to justice of law proves legal positivism false in all its different versions.⁶

The second point concerns his acceptance of the thesis of the one right answer and the consequent thinning of the differences between MacCormick's theory of legal reasoning and that of Ronald Dworkin (and also of Robert Alexy).⁷

My intent, however, is not only to describe this change in MacCormick's thought but also to attempt a defence of the original perspective that we find in *LR & LT*. For this purpose, it is appropriate to start from a brief presentation of the main theses upheld by MacCormick in his 1978 book.

2. *Legal Reasoning and Legal Theory: an outline*

LR & LT is a book that in various respects can be set alongside Hart's *The Concept of Law*. This is not only because, as MacCormick himself observes, it is a book that is complementary to Hart's masterpiece, but also because these are two works that, at a distance of about twenty years from one another, have deeply influenced and oriented the legal philosophy debate.

At least five main general theses are defended by MacCormick in *LR & LT*.

The first thesis is that legal reasoning is a particular case of practical reasoning. Beginning from this assumption, MacCormick, in line with Hume, defends an interesting (and in my opinion convincing) version of practical reasoning that has the aim of "providing a middle way between Dworkin's ultra rationalism and the exaggerated voluntarism of most epistemic positivists."⁸ According to MacCormick, it is not always possible to identify the one right answer; nevertheless, a theory of legal reasoning makes it possible to distinguish between justified solutions and solutions that are not justified. Every judicial decision, at least every decision regarding a case that is not easy, presents "... an inexhaustibly residual area of pure practical disagreement."⁹

The second thesis, which connotes the very title of the book, is that the connection between legal theory and theory of legal argumentation is inseparable. With the due differences, it can be said that MacCormick anticipated the intuition by Ronald Dworkin that "legal praxis, unlike many other

scepticism derived from David Hume that formed the backcloth to the argument in *Legal Reasoning and Legal Theory*" [N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, p. 1].

⁶ See N. MacCormick, *Institutions of Law. An Essay in Legal Theory*, pp. 263-279. See also M. Atienza, "Entrevista a Neil MacCormick", *Doxa*, 29, 2006, pp. 479-489.

⁷ See N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, pp. 254-280.

⁸ C. Michelon Jr., "MacCormick's Institutionalism between Theoretical and Practical Reason", *Diritto & questioni pubbliche*, 9, 2009, pp. 53-62, quotation at pp. 60-61.

⁹ N. MacCormick, *LR & LT*, p. 251.

social phenomena, is *argumentative*.”¹⁰ MacCormick is aware that Hart’s thesis on the “open texture of law”¹¹ requires that a complete theory of law should not ignore or neglect the theme of argumentation.¹² He clearly states that “a theory of legal reasoning requires and is required by a theory of law.”¹³

The third thesis, intimately connected to the previous one, consists in recognizing ample room for legal principles in legal reasoning. Unlike Dworkin, however, MacCormick denies that there is no break between legal principles and moral principles; the fact is that legal principles are characterized by having an indirect relationship with the rule of recognition. This makes the principles compatible with a legal positivistic view of law. Nevertheless, he specifies that principles are not wholly determined by the rule of recognition in that “there may be more than one set of normative generalizations which can be advanced in rationalization of the rules which ‘belong’ to the system concerning a certain subject matter.”¹⁴ The majority judges in the *Donoghue* case, for example, guaranteed the principle according to which producers have to answer for damage caused to consumers by their negligent behaviour. This principle was also defended by the majority judges on the basis of a conception of justice that is alternative to that of the dissenting judges; this means that “here we find ourselves beyond that which can be reasoned out, although we got there *for reasons*. We got there because to the persons which whom the decision resided the state of affairs represented by a society in which the manufacturers’ liability ruling holds seemed in the light of their conception of justice public policy and common sense preferable to the alternative.”¹⁵

The fourth thesis is that interesting analogies exist between the justification of judicial decisions and the justification of scientific hypotheses. Scientific hypotheses have to make sense in the world and within a theory. According to Karl Popper – to whose thought MacCormick explicitly harks back – the scientist can confirm his or her explanation of natural phenomena connected to one another only through a suitable process of experimentation: he or she has to identify and set up some experiments that prove false all possible explanations of those phenomena except his or her own. It is evident that this is not a conclusive demonstration, since at a future date the explanation given can in turn be proved false. It is nevertheless just as evident that an explanation that overcomes the process of verification has to be preferred (at least until proof is given to the contrary) to explanations that

¹⁰ R. Dworkin, *Law’s Empire*, Fontana Press, London 1986, p. 13, italics in the original.

¹¹ See N. MacCormick, “On ‘Open Texture’ in Law”, in P. Amsselek, N. MacCormick (ed. by), *Controversies about Law’s Ontology*, Edinburgh University Press, Edinburgh 1991, pp. 72-83.

¹² In the *Postscript* Hart makes amends for not seizing on this important implication of his analysis open texture: “(...) I certainly wish to confess now that I said far too little in my book about the topic of adjudication and legal reasoning and, in particular, about arguments from what my critics call legal principles.” [H. L. A. Hart, *The Concept of Law*, Second Edition)-With a Postscript edited by P. A. Bulloch and J. Raz, Clarendon Press, Oxford 1994, p. 259].

¹³ N. MacCormick, *LR & LT*, p. 229.

¹⁴ N. MacCormick, *LR & LT*, pp. 234-235.

¹⁵ N. MacCormick, *LR & LT*, p. 254, italics in the original.

have been proved false. The second aspect of the scientific justification that is worth stressing is that it is submitted not only to the constraints imposed by reality, but also to constraints imposed by the basic theoretical assumptions.

A judicial decision is justified if it can be assumed that it is preferable to the alternative decisions. In this case too there are some “tests” allowing one to verify (or prove false) the different available decisions. But what kind of tests are we talking about? First of all MacCormick says that “(...) legal decisions must make sense in the world and they also must make sense in the context of the legal system.”¹⁶ The argument that allows one to establish whether a decision “makes sense in the world” exhibits three characteristics. It is a consequentialist argument: it has to be shown that the consequences that could spring from a decision are preferable to the consequences connected to the alternative decision. It is therefore also an evaluative argument, in that it is necessary “to appraise” the preferability of some consequences to others. Finally it is a partly subjective argument: different people can reach different conclusions.

The criteria allowing one to establish whether a decision makes sense in the legal system are “consistency” and “coherence.” Consistency requires that there be no logical contradictions between two (or more) general norms or between a decision in a concrete case and a general norm. Instead, coherence requires that every legal norm and every judicial decision be harmonized with the fundamental principles of the system. Dworkin’s example of the chain novel is particularly suited to explaining the role of coherence as a constraint on judges’ discretionary power.

The fifth thesis consists in recognising an important limit to Hart’s analysis of the internal point of view in the over-weak characterization of acceptance of law. The existence of some legal norms rather than others is due to the fact that from a moral point of view at least some members of the community prefer (or, at least, say they prefer) the scheme of behaviour identified by such norms as against alternative schemes of behaviour.¹⁷ Maintaining that the existence of a social rule implies that there is someone who deems the behaviour prescribed by a rule preferable to the alternative behaviours obviously does not mean that one denies the possibility that some people obey this rule out of idleness or hypocrisy, or that others rebel against it. The latter situations, nevertheless, can only be understood by presupposing the existence of a major group that accepts the norms from a moral point of view. All attitudes that can be imagined in relation to the norms are therefore “parasitical” in relation to the attitude of those people who deem the norms adequate from a moral

¹⁶ N. MacCormick, *LR & LT*, p. 103.

¹⁷ MacCormick observes: “That there can be common patterns of criticism of conduct or states of affairs depends upon our conceiving that some patterns are willed as common patterns for all people in given circumstances. We can conceive of that independently of our own will in the matter, but not independently of our beliefs about the will of other members of our social group...” [N. MacCormick, *LR & LT*, pp. 287-288]. Cf. R. A. Duff, *Legal Obligation and the Moral Nature of Law*, pp. 68-73; Id., *Trials & Punishments*, Cambridge University Press, Cambridge, 1986, pp. 74-98.

point of view. In other words, while it is possible to hypothesize the case in which a given norm is approved from a moral viewpoint by everybody, it is instead unthinkable that the behaviour prescribed by a rule is not effectively approved by some from a moral point of view.

These observations by MacCormick afford a non-banal interpretation of the separability thesis:

If human beings did not value order in social life, they wouldn't have laws at all, and every legal system embodies not merely a form of social order, but that form of order which is specifically valued by those who have control of the legislative executive or adjudicative process – or at least, it is a patchwork of the rival values favoured by the various groups taking part in such processes. The point of being a positivist is not to deny obvious truths of that sort. The point is rather in the assertion that one does not have in any sense to share in or endorse these values wholly or in part in order to know that the law exists, or what law exists. One does not have to believe that Soviet law or French law or Scots law is good law or the repository of an objectively good form of social order in order to believe that it is law, or to describe or expound or explain it for what it is.¹⁸

Analogous conclusions are also reached by Joseph Raz, who is convinced of the impossibility of accounting for law and legal interpretation putting in brackets the reasons that induce the participants to consider law morally correct or just:

...while the law may be morally indefensible, it must be understood as a system which many people believe to be morally defensible. While rejecting any explanation of the nature of law or legal interpretation which is true only if the law is morally good, we must also reject any explanation which fails to make it intelligible. This means that to be acceptable an explanation of the law and of legal interpretation must explain how people can believe that their law, the law of their country, is morally good.¹⁹

It is worth stressing that the thesis according to which acceptance of law implies that one believes that law is morally correct does not create any embarrassment for legal positivism. The fact that the participants are convinced that their own legal system is just does not constitute an adequate argument for defending the conceptual connection between law and morality. As a matter of fact this argument simply shows that those people who are legally forced to adopt a given form of behaviour also believe they are morally obliged to do so. However, this does not prevent one from predicating, at one and the same time, the existence of a legal system and its immorality, unless one accepts an objectivist and cognitivist moral perspective in the strong sense.

¹⁸ N. MacCormick, *LR & LT*, pp. 233-234.

¹⁹ J. Raz, "Intention in Interpretation", in R. P. George (ed. by), *The Autonomy of Law. Essays on Legal Positivism*, Clarendon Press, Oxford, 1996, pp. 249-286, the quotation is at p. 260. See S. Berteau, "A Critique of Inclusive-Positivism", *Archiv für Rechts- und Sozialphilosophie*, vol. 93, heft 1, 2007, pp. 67-81.

Summing up, *LR & LT* addresses theoretical and philosophical issues that go beyond the sphere of legal reasoning. MacCormick's intent is to work out a theory of law that takes Hart's thesis of open texture seriously. If it is true that law presents an open texture, then all theories that identify law with norms are unsatisfactory. Paradoxically, Hart's very conception of law is unable to address this objection altogether; in this connection, for Hart law is nothing but the sum of primary and secondary rules identified by a rule of recognition. MacCormick's main merit is precisely having clearly shown that interpretation is a constitutive element of the legal phenomenon at least as much as norms are. In short, we have to recognize that MacCormick succeeded in preserving and also making use of the best things in Hart's practice theory of norms.

3. *Legal Reasoning and Legal Theory* revised I: the implicit pretension to justice of law

The 1981 publication of the book on Hart symbolically marks the passage of MacCormick from the front of legal positivism to that of post-positivism.²⁰

In an important 1982 article, *Law, Morality and Positivism*,²¹ MacCormick already introduces the thesis of the implicit pretension to justice of law that he was to improve further in *Institutions of Law* in order to show the inadequacy of the separability thesis defended by legal positivism.

MacCormick's argument is well exemplified by the following passage from the 1982 article:

Take my example of trade union law. Many people hold recent legislation to be unjust. But surely it has to be supposed that those who laid it down honestly and for ostensibly good reasons thought it just. To make certain sorts of picketing offences or civil wrongs is to say that such conduct goes against important values. To see why that is so, consider this. Would it not be so absurd as to be pragmatically self-contradictory even if not contradictory in strict logic for Parliament to enact a Bill with as its short title 'The Unjust Restraints on Picketing Act 1970' or 'The Unjust taxation of the Wealthy Act'? But why would this be absurd? Is it not because those who exercise power and discretion *within* a legal system must always at least purport to be acting on the basis of seriously considered values?²²

²⁰ See N. MacCormick, *H. L. A. Hart*, Edward Arnold, London, 1981. Vittorio Villa distinguishes three different periods in MacCormick's work. See V. Villa, "Neil MacCormick's Legal Positivism", in M. Del Mar & Z. Bankowski (ed. by), *Law as Institutional Normative Order*, Farham, Burlington, Ashgate, 2009, pp. 45-64.

²¹ N. MacCormick, *Law, Morality and Positivism*, 1982, now in N. MacCormick, O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, Riedel, Dordrecht/Boston/Lancaster/Tokyo, 1986, pp. 127.144.

²² N. MacCormick, O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, p. 141.

MacCormick's argument follows on from Alexy's thesis of "*Anspruch auf Richtigkeit* (the argument from correctness)". Like MacCormick, Alexy defends the thesis of a bond of a conceptual type between law and justice, and therefore challenges the legal positivism thesis of separability.²³

Alexy imagines that a constituent assembly proposes as the first article of a new Constitution the disposition "X is a sovereign, federal, and unjust republic." In this article there is certainly something strange. The anomaly lies in the fact that the constituent legislator qualifies the new republic as unjust. What remains to be established is the nature of the anomaly that afflicts this disposition. We will proceed, following Alexy, by exclusion.

One could endeavour to link the defect highlighted to a banal question of political appropriateness: just as it is not advisable, during an electoral campaign, for the candidates to dwell on the cuts to government spending that they will propose once they are elected, so it is advisable for a legislator not to render explicit, in the text of the law that he or she is about to promulgate, that it is an unjust law. In relation to the concrete case mentioned by Alexy, it would hence be merely unwise for the constituents to stress the fact that the nascent republic is unjust. However, this explanation is not convincing. The two situations do not appear to be superimposable. The fact is that the injustice clause appears absurd, while a mention of the tax cuts may be unwise or politically risky but not absurd.

A second possibility is that the article in question is criticisable from a moral point of view: it is not a good thing, from a moral point of view, for a state to be explicitly founded upon injustice. However, this possibility is not entirely convincing either. The fact is that what really may be open to moral reproof are the norms that perpetrate specific injustices (for instance norms that exclude certain ethnic group from the enjoyment of certain rights) rather than a mere *petitio principii* claiming that the state is unjust.

A further hypothesis is that the article in question, breaking away from a well-rooted and widespread convention relating to the writing of constitutional texts, is impaired by a conventional flaw. Certainly, it is *also* a convention that a Constitution does not proclaim the injustice of the state. Nevertheless, it is not *only* a convention. Indeed, by their very nature conventions, even the most deeply rooted, can be replaced by others. The impossibility of qualifying a state as unfair in an article of its very Constitution instead appears to be a constitutive presupposition of the praxis of constituent legislation.

Having discarded these hypotheses, Alexy affirms that the article in question is impaired by a conceptual flaw. But what is a conceptual flaw? First of all, in the case which we are dealing with, it

²³ Cf. R. Alexy, "On Necessary Relations between Law and Morality", *Ratio Juris*, Vol. 2, no. 2, 1989, pp. 167-183; Id., *A Theory of Legal Argumentation*, Clarendon Press, Oxford, 1989, pp. 212-220; Id., *The Argument from Injustice. A Reply to Legal Positivism*, Clarendon Press, Oxford, 2002, pp. 35-39.

is not a logical contradiction. The utterance that expresses the first article of the Constitution of the imaginary state is not, technically, contradictory. Nevertheless, this utterance is eccentric and incongruous. According to Alexy, the eccentricity is analogous to that which characterizes assertions like ‘it is raining, but I do not believe it’, ‘I promise to come to the appointment, but I have no intention of keeping this promise of mine’, and so forth. What is wrong in the preceding assertions is that the second part “undoes” or “annuls” the speech act produced with the utterance in the first part. In short, affirming that it is raining and at the same time explicitly declaring that one does not believe it is raining annuls the act of affirming something, just as promising something and at the same time declaring that one has no intention of keeping the promise annuls the speech act of promising.²⁴ Analogously, according to Alexy, the fact that the first article of a Constitution qualifies the new republic as “unjust” makes it impossible to consider the document produced by the Constituent Assembly as a *true* Constitution and, in the last analysis, to treat this document as “valid law.”

The events narrated by George Orwell in *Animal Farm* help to render explicit some consequences that (apparently) can be derived from the argument of the implicit pretension to justice of law. The story is well-known: the animals on a farm rebel against the owner, and once they have freed themselves of his yoke on the farm create a new order that can be summed up in the principle that all animals are equal. Very soon, the ideals that have led the animals to rebel are adapted to the demands of the pigs, which acquire a position of dominion and establish a regime as oppressive as the previous one. The interesting aspect of the matter, for our purposes, concerns the way in which the new oppressors have reckoned with revolutionary values. They have not openly rejected them, but have at first modified them surreptitiously in a way imperceptible in the writing on the wall, and then they have summed them up in the single well-known principle that “all animals are equal but some are more equal than others.” This shows that even the worst regime cannot reveal its injustice and that the legislator that issues a law, the judge that applies it and even the common citizen that adopts it as a model of conduct, in support of their behaviour have to put forward moral reasons. This thesis is expressed very clearly by MacCormick:

One can just about imagine for example a public statement made around 1942 by some Nazi official about the desirability of re-settling Jews outside Germany, and some argument being offered for this. A proposal that the deportation of these persons take place, not for mere resettlement, but for systematic gassing and incineration is barely imaginable in any public forum. Even in the dreadful times in which this was actually done, albeit by the orders of a domestically unchallengeable one-party dictatorship, no public justification or even acknowledgement of the

²⁴ Cf. J. L. Austin, *How to do Things with Words*, Oxford University Press, Oxford, 1976.

extermination programme was ever attempted. There are things which humans can do yet which it appears they cannot avow. They certainly cannot avow the doing of them in the name and forms of law.²⁵

It is worth noting that a similar argument had already been put forward against Hart by Lon Fuller. Fuller notes that even the wickedest regime that one can imagine avoids rendering its “immoral morality” explicit through law. According to Fuller, this prudence arises “not from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable, which no man need be ashamed to profess.”²⁶

Nevertheless, this observation only shows that the word ‘law’ is often associated with a favourable emotional meaning that is largely due to the very close link, also stressed by Hart, between “law” and “justice.” What drives wicked legal systems to show prudence in rendering explicit, through the promulgation of legal norms, the most execrable aspects of the policies pursued by them is precisely the desire to exploit, as far as possible, this favorable emotional meaning associated with law.

However, it does not seem to me that this argument – which is of an empirical-sociological nature – can be used to disprove the thesis of the separability between law and morality and, in general, the legal positivism that defends this thesis.

MacCormick and Alexy use the argument of the implicit pretension to justice of law against the thesis of the separability between law and morality and, accordingly, against legal positivism. This argument, nevertheless, misses the target. The fact is that it is merely a formal argument, that is to say one relating to the form of legal norms (and of legal systems) and not to their content, and this considerably weakens its scope. It cannot for instance prevent a legal system as a whole or one or more norms belonging to that system from being profoundly unjust. Against MacCormick and Alexy’s argument, a legal positivist can borrow the words that Hart addresses to the “proceduralist” natural law doctrine of Lon Fuller: “... if this is what the necessary connexion of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.”²⁷ As Eugene Bulygin for instance observes, “even admitting that any legal system and any legal norm always claims to be morally correct or just, this fact, by itself only, would not be at all suited to guaranteeing the moral correctness of law.”²⁸

As I previously mentioned, MacCormick implicitly denies that the argument of implicit pretension to justice of law is merely formal. In particular, he maintains, in line with Gustav Radbruch, that

²⁵ See N. MacCormick, *Institutions of Law. An Essay in Legal Theory*, p. 277.

²⁶ L. L. Fuller, “Positivism and Fidelity to Law. A Reply to Professor Hart”, *Harvard Law Review*, 1958, 71, pp. 630-672, quotation at p. 637.

²⁷ H. L. A. Hart, *The Concept of Law*, p. 202.

²⁸ E. Bulygin, *Il positivismo giuridico*, ed. P. Chiassoni, R. Guastini, G. B. Ratti, Giuffrè, Milano, 2007, p. 58.

“...there is some moral minimum without which purported law becomes un-law, ‘no longer legal but rather a corruption of law’.”²⁹

Against this thesis it is possible briefly to express two doubts.

The first is that, unless one accepts a strong meta-ethical objectivist conception, reasonable disagreements on the moral minimum content of law are admissible. In other words, when does a norm “...absolutely violate any reasonable conception of justice?”³⁰ This point will be dealt with more at length in the next section on the subject of the one right answer thesis.

The second doubt forces one to wonder what the consequences are of denying the qualification as law of profoundly unjust norms. MacCormick maintains that in these cases, “... the duty of a decent human being is to evade, disobey, even to resist to the extent that this is feasible.”³¹ I believe that Hart would fully subscribe to these words.

As Michael Hartney very effectively explains:

Legal positivism is *simply a theory about what counts as law and nothing else*: Only rules with social sources count as legal rules. It is not a linguistic theory, a moral theory or a theory about judges’ moral duties. Some theorists may be legal positivists because they are moral skeptics or utilitarians or political authoritarians or because they believe all laws are commands, but none of these theories are part of legal positivism.³²

Further, the decision of legal positivism to distinguish clearly between the existence of law and its compulsoriness strengthens the awareness of each individual that he or she can always choose the moral option of not obeying the law. As Hart once again notices, a vigilant and critical attitude towards law is “...more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.”³³

4. *Legal Reasoning and Legal Theory* revised II: the “one right answer thesis”

As I said in the second section, MacCormick’s original theory of legal reasoning is meant to be somewhere between ultra-rationalism and voluntarism. This theory of legal reasoning is

²⁹ N. MacCormick, *Institutions of Law. An Essay in Legal Theory*, p. 277. A critical reconstruction of this statement by MacCormick can also be found è anche in J. Dickson, “Is Bad law Still Law? Is Bad Law Really Law?”, in M. Del Mar & Z. Bankowski (ed.), *Law as Institutional Normative Order*, pp. 161-183.

³⁰ N. MacCormick, *Institutions of Law. An Essay in Legal Theory*, p. 278.

³¹ N. MacCormick, *Institutions of Law. An Essay in Legal Theory*, p. 278.

³² M. Hartney, “Dyzenhaus on Positivism and Judicial Obligation”, *Ratio Juris*, 7, 1994, pp. 44-55, quotation at p. 48, italics added.

³³ H. L. A. Hart, *The Concept of Law*, p. 210. My attention was drawn to this passage by J. Dickson, “Is Bad law Still Law? Is Bad Law Really Law?”, p. 164.

complementary to the theory of legal interpretation defended by Hart, which in turn is meant as an intermediate way between interpretative formalism and anti-formalism. Some easy cases exist for which it is relatively simple to identify the correct solution through deductive logical reasoning (which MacCormick calls first level justification); in hard cases, instead, the interpreter's discretion cannot be entirely eliminated and legal reasoning makes it possible to exclude some solutions as clearly wrong but not to identify a single correct solution. In legal reasoning and in practical reasoning in general there exists an ineliminable space for practical disagreement. Further, distinguishing himself from Hart, MacCormick correctly observes that the distinction between easy cases and hard cases is not a clear-cut distinction, and this increases the interpreter's discretion. The distinction between easy cases and hard cases is not the presupposition but the result of interpretative activity; this means that the decision to treat a case as easy or hard is in turn an interpretative choice.³⁴

In *Rhetoric and the Rule of Law*, MacCormick abandons this intermediate position and moves closer to the ultra-rationalism defended by Dworkin and Alexy. In short, MacCormick maintains that legal reasoning is a particular type of practical reasoning (a thesis already upheld in *LR & LT*) and adds that "... all practical reasoning works on the presuppositions that there may be some matters upon which opinion can be right and wrong. It proceeds under a pretension of correctness, an implicit claim to being correct, not just to being boldly or confidently asserted."³⁵

This affirmation, which is closely connected to the thesis of the implicit pretension to justice of law, clearly marks MacCormick's turn from legal positivism to non-positivism or post-positivism. He now opposes two general models of interpretation in the legal sphere: the declaratory model and the decisionist model.

The former model (accepted by Dworkin, Alexy and MacCormick himself) maintains that in principle for every judicial case one right answer exists that does not coincide with the definitive answer. It hardly needs to be said that MacCormick's thesis is by no means a naïve one; indeed, he does not defend the thesis of the one right answer "...because there is in existence some item of law that can be 'read off' [...] but because appropriate arguments applied to the established body of law can persuasively establish one conclusion on the given problem as more acceptable than any other."³⁶ Hence the only correct answer is a sort of regulatory ideal that governs rational practical

³⁴ MacCormick observes: "There is a spectrum which ranges from the obviously simple to the highly contestable, and across that spectrum it could never be judged more than vaguely at what point some doubt as to 'relevancy' or 'interpretation' or 'classification' could be raised so as to clear the way for exploiting consequentialist arguments and arguments of principle or analogy", N. MacCormick, *LR & LT*, p. 230.

³⁵ N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, p. 277.

³⁶ N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, pp. 265-266.

discourse.³⁷ This means that in hard cases too the judges' task is to discover the correct answer. Thus judges can commit errors, but not exercise discretion.

The decisionist model (accepted, among others, by legal realists and by Kelsen in the later phases) maintains, instead, that a decision by a judge is correct because of the simple fact of having been taken and not having been annulled by a higher judge: "judges may decide in an unwise or impolitic way, but they can't actually make mistakes about the law in problem cases, since there is no anterior truth of the matter about which they could be mistaken."³⁸

My suggestion is that rejecting the decisionist model does not force one to accept the thesis of the one right answer. I also believe that the thesis of the one right answer (with its anti-positivist implications) is irrelevant and, in many respects, a cause of confusion. In this respect, the opposition between Hart and Dworkin is particularly instructive.

In brief, Dworkin maintains that anyone who rejects the *one right answer thesis* commits the error of believing that a proposition that cannot be proved true cannot be true or, more correctly, cannot be either true or false. According to Dworkin, the non-demonstrability argument – which presupposes acceptance of a rigidly empiricist epistemology and of a theory of truth as correspondence – has to be rejected for a series of reasons that here it is not necessary to go over. Here it is sufficient to stress that MacCormick too follows Dworkin on this point:

Rational legal argument [...] is not demonstrative argument. [...] It does not amount to logical demonstration of the correctness of the result reached in the light of uncontested legal and factual premisses. It is rationally persuasive, rather than rationally demonstrative. Its study is one department of rhetoric.³⁹

Let us suppose that Dworkin and MacCormick are right and therefore that for every judicial case there is a correct answer even if it is not possible to show conclusively which one it is. At this point, one has to ask oneself: what is the practical relevance, for a theory of legal reasoning, of postulating the existence of one correct solution and, at the same time, denying that conclusive criteria exist for identifying it? I believe none.

In this sense I believe that the perspective of legal positivism (and MacCormick's in *LR & LT*) is more convincing and also sufficiently distant from decisionism. As Hart puts it:

[In hard cases] judges may...make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity 'legislative'. These virtues are: impartiality and neutrality in surveying the alternatives;

³⁷ See M. Atienza, "In merito all'unica risposta corretta", *Ragion Pratica*, 34, forthcoming.

³⁸ N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, p. 266.

³⁹ N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, pp. 279-280.

consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be *demonstrated* that a decision is uniquely correct: but it may be made acceptable as a reasoned product of informed impartial choice. In all we have the ‘weighing’ and ‘balancing’ characteristics of the effort to do justice between competing interests.⁴⁰

This perspective, which is contrary to the one right answer thesis, can be clarified and strengthened with some conclusive reflections on ethical objectivism. An objection that is often made to this meta-ethical conception is linked to moral disagreement. The argument is the following: there are no ethical issues on which human beings are not divided in a very clear-cut way, to such an extent as not to be able to overcome the disagreements; this seems to conflict with ethical objectivism, since, if any objective values existed, these would have in some way to be recognizable by human beings. The existence of numerous insuperable moral disagreements therefore goes against a meta-ethical objectivist and cognitivist perspective.

What is relevant here is not the plausibility of the “moral disagreement” argument. Personally I am convinced that the mere existence of disagreements is not a decisive argument against ethical objectivism: after all, disagreements also exist between natural scientists, and this is not a good reason for doubting the existence of a world that is external to us.

What is interesting is the way in which some objectivists answer this objection. They adopt a perspective that we could call “metaphysical objectivism”: the fact that in the world there exist some objective values does not imply that there are criteria making it possible to establish with certainty what these values are and, accordingly, to settle the controversies. This form of objectivism, however, expresses a philosophical thesis which is of slight interest. As Jeremy Waldron observes, “...moral disagreement remains a continuing difficulty for realism, even if it doesn’t entail its falsity, so long as the realist fails to establish connections between the idea of objective truth and the existence of procedures for resolving disagreement.”⁴¹

The problem with the one right answer is exactly the same. If procedures do not exist for establishing which of the possible solutions is the most reasonable, the thesis of the one right answer is irrelevant.

At the beginning of *Rhetoric and the Rule of Law*, MacCormick affirms: “the basic forms of legal argument still appear to me to have been well described in the 1978 book.”⁴² In this paper I have

⁴⁰ H. L. A. HART, *The Concept of Law*, p. 200, italics in the original.

⁴¹ J. Waldron, “The Irrelevance of Moral Objectivity”, in R. P. George (ed.), *Natural Law Theory. Contemporary Essays*, Oxford University Press, Oxford, 1992, pp. 158-187. The quotation is at p. 173.

⁴² N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, p. 1.

also tried to offer a partial defence of the “backcloth” of *LR & LT*, which MacCormick abandoned in his last works. Probably, the quotation at the start of this paper clearly identifies the crucial point of my disagreement with the later MacCormick. I share MacCormick’s thesis that law has a “*prima facie* positive value”; I believe, however, that it is merely an instrumental value that, in line with Raz,⁴³ can be compared to the sharpness of a knife. After all, a sharp knife can be used both to cut food and to cut throats.

Regardless of who is right, I hope at least to have shown that *LR & LT* maintains intact, like all classics, the ability to interpret contemporary legal reality brilliantly.

⁴³ J. Raz, “The Rule of Law and Its Virtue” (1977), now in Id., *The Authority of Law. Essays on Law and Morality*, Clarendon Press, Oxford, 1979, at p. 210.