THE LIMIT OF DEDUCTIVE REASONING IN LAW AND A STUDY OF NEIL MACCORMICK'S SECOND-ORDER JUSTIFICATION

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ABSTRACT

Among lawyers and judges, it is widely held that legal reasoning is characterized by deductive and inductive arguments. Although not many are prepared to accept this, the role of deduction and induction are not disputed. However, what is argued about is that whereas deductive reasoning holds true of factual propositions, it does not hold between norms. And even in clear cases, it is inappropriate to apply deductive reasoning; hence there is therefore, a limit to what deductive reasoning can go in law. MacCormick, for example, recognizes this limit and thus proposes a 'second-order justification' which, according to him, involves justifying choices; choices between rival possible rulings. These are choices to be made within the specific context of a functioning legal system. In this paper, attempt is made to demonstrate the extent to which MacCormick's theory on 'second-order justification' remedies the limitation engendered in law by deductive and inductive reasoning. Taking into cognizance the fact that theoretical framework of the individual judge in question plays a huge role in the determination of court cases and judgement, the work, having presented the author' own view, subjected same under critical interrogation, analysis and evaluation and found out that second-order justification is indeed defensible in law.

Keywords: **Legal Reasoning, Deductive Reasoning, Inductive Argument, Second-Order Justification**

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1. INTRODUCTION

Within the legal community, there is an assumption that lawyers have a particular pattern of reasoning called legal reasoning. Some say it is logical while others say it is not. Those who say it is logical argue that legal reasoning is characterized by deductive and inductive argument. Those who argue against say though deductive reasoning plays a role, it is not sufficient in guaranteeing sound legal judgment in court. There is a claim in other quarters that reasoning by analogy is also part of the character of legal reasoning. In all, what is disputed is the scope to which deductive reasoning can go in law.

Some jurists are of the view that there are limits to which deductive, inductive and analogical reasoning can go in law. These limits, they say, directly or indirectly, prevail on the judge to search for other alternative legal tool, technique or method in the discharge of his jurisprudential decisions and judgment. One of the jurists who have this opinion is Neil MacCormick.

Born on May 27, 1941 and died on the 5th of April 2009, MacCormick was a Scottish legal philosopher who studied in Oxford University where he met Professor H.L.A. Hart and developed interest in legal philosophy. MacCormick's academic contribution cannot be measured by the outstanding quality and sure legacy of his scholarship. He wrote numerous journal articles and books, concentrating both on law in a European context and philosophy of law. Works such as *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy* (1984), *Legal Reasoning and Legal Theory* (1978), *Rhetoric and the Rule of Law* (2005) and *Institutions of Law* (2007) all convey his particular brand of legal philosophy. *Legal Reasoning and Legal Theory* answers many of the Dworkinian criticisms of the Hartian conception of law, and it is seen by some as showing a middle ground between the two.

In this work, we shall consider MacCormick's argument on the limitation of deductive reasoning and his proposal and defense for 'second-other justification' in law.

2. Deductive, inductive and analogical reasoning in law

Every argument, says Cohen and Nagel (1978) ordinarily, involves a claim that its premises provide some grounds for the truth of its conclusions. Against this background, a deductive argument is believed to be concerned with the conditions under which particular or instantial propositions are inferable from universal premises. It is one which purports to show that one proposition, the conclusion of the argument, is implied by some other propositions, the 'premises' of the argument.

A deductive argument therefore, is valid if, whatever may be the content of the premises and the conclusion, its form is such that its premises do in fact imply (or entail) the conclusion. That is to say that a deductive argument involves a claim that its premises provide conclusive grounds for its conclusion. A correct reasoning in a deductive argument is said to be valid; it is invalid when it is incorrect, meaning that the claim it makes about its conclusive ground provided by its premises is not the case.

The essence of deduction is not the derivation of particular conclusions from universal propositions, but the derivation of conclusions which are necessarily involved in the premises. Thus a deductive inference moves from general to particular. For example, in a deductive argument, the statement: all humans are mortal; Socrates is human; therefore, Socrates is mortal shows that there is logically a necessary conclusion (Socrates is mortal) that is drawn from the major premises (all humans are mortal) and the minor premises (Socrates is human). Symbolically, deductive logic, according to MacCormick (1978: 229) can be represented thus: "A. in any case, if p then q. B. in the instant case p. C. therefore, in the instant case, q.

The above symbolic representation specifies that the self- contradictory character of denying (the conclusion) (C) while asserting the major premises (A) and the minor premises (B) is not dependent on either (A) or (B) being actually true. Even if either or both of (A) and (B) were actually false, somebody who asserted them (mistakenly, in that case) as true, would be unable without self-contradiction to deny (C). That (A) and (B) taken together imply (C) is necessarily true, and is true whether or not either or both of (A) and (B) is actually true.

On the other hand, inductive argument according to Cohen and Nagel (1978) is one whose premise provides some support for the conclusion drawn from its premises. Simply put, it is conceived as dealing with those inferences which enables us to derive universal conclusions from particular or instantial premises. For example, if we say that Hitler was a dictator and was ruthless, and Stalin was a dictator and was ruthless. If we now say also that Castro is a dictator; by the reason or logic of inductive argument, the conclusion necessarily would be that it is probable that Castro is also ruthless.

The major difference between a deductive argument and an inductive argument lies not so much on the fact that the former moves from general to particular and the later from particular to general but on the fact that an inductive argument may also have particular as well as universal propositions for its premises. Explaining this further, Cohen and Nagel (1978:27) write:

> *The strength of the claim about the relation between the premises and the conclusion of the argument is the nub of the difference between deductive and inductive arguments. We characterize the two types of arguments as follows: a deductive argument is one whose conclusion is claimed to follow from its premises with absolute necessity, this necessity not being a matter of degree and not depending in any way upon whatever else may be the case; in sharp contrast, an inductive argument is one whose conclusion is claimed to follow from its premises only with probability, this probability being a matter of degree and dependent upon what else may be the case.*

Obviously, inductive argument is arrived at after a collection and sorting of data. And the probable conclusion drawn from its premises can take off from the general or particular claims of such premises.

Additionally, reasoning by analogy, MacCormick says, is also a character of legal argument, some say. The English word 'analogy' simply means comparison between two things that are similar in some ways. In this way, it is often used to help explain something or make it easier to understand. In logic, analogy, as a form of reasoning, connotes logical inference, whereby it supports reasoning that if two things are taken to be alike in one way, they are alike in other ways.

In Law, generally, argument by analogy is an argument that a case should be treated in a certain way because that is the way a similar case has been treated. Argument from analogy therefore, complements argument from precedent in two ways. In the first instance, they are used when the facts of the case do not fall within the ratio of any precedent in order to assimilate the result of that in the analogical case. Secondly, they are also used when the facts of a case do fall within the ratio of the precedent as a basis for distinguishing the case at hand from the precedent.

The force of argument from analogy obviously, is different from that from precedent. This is because while an indistinguishable precedent must be followed unless the court has the power to overrule the earlier decision and does so, argument from analogy varies in their strengths. They do not bind, but only are considered along with other reasons in order to reach a result. That analogy is rejected in one case does not preclude raising the analogy in a different case.

3. The scope of deductive, inductive and analogical arguments in law

Having demonstrated that deductive, inductive and, to some extent, analogical arguments characterize legal reasoning, the question one needs to ask now is: To what extent are they sufficient in accounting for ethical lawyering? In other words, how sufficient are they in making the judge have a justified and justifiable decision over legal matter(s)? How well do they explain what reasons judges use in the justification of their decisions? To what extent can they explain that these are the reasons they (judges) ought to use? All these questions are begging for one and the same answer: the scope of deductive, inductive and analogical reasoning in legal argument.

There are claims that the so-called primary logic (deductive, inductive or and analogical reasoning) in law are not sufficient in guaranteeing sound ethical lawyering. According to Harris (1980) whereas deductive reasoning holds true of factual propositions, it does not hold between norms. In that case, for him, even in clear cases, it is inappropriate to apply deductive reasoning.

According to Hume (1978), factual propositions are not available in normative terms. The tool in legal argument is the use of words and such words are not instrument of mathematical precision. Therefore, logical reasoning would not be useful in the resolution of legal problems or human affairs.

In the words of Hart (1961), words have 'open-texture' hence the penumbra area of doubt do not give the judge pre-determined answers; and where alternative answers are available as in hard cases (where a judge has a discretion), logical reasoning becomes less useful. It is obvious that Hart is of the

view that in the midst of uncertainty created by rules, and the limitation of deductive logic as a tool in legal reasoning, the judge should resort to discretion.

According to him, discretion in law means that the judge has to choose between alternatives meanings to be given to the words of the statute or between rival interpretations of what a precedent 'amounts to.' He insists that it is only the tradition that judges 'find' and do not 'make' law that conceals this, and presents their decisions as if they were deductions smoothly made from clear pre-existing rules without intrusion of the judge's choice. Legal rule, he says, may have a central core of undisputed meaning, and in some cases, it may be difficult to imagine a dispute as to the meaning of a rule breaking out.

In the nutshell, what Hart is saying is that in the midst of uncertainty created by the limitation of deductive, inductive or analogical method of interpretation of legal matters, as the case may be, it becomes difficult to individuate the precise behaviour required by the rule in a particular case. This limitation creates gaps in law, which leave the judge with no other option than making use of his discretion. As explained by Hart (1961:123),

> *The discretion thus left to him (the judge) by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational; is in effect a choice. He chooses to add to a line of cases a new case because of resemblances, which can reasonably be defended as both legally relevant and sufficiently close.*

On the other hand, Dworkin (1977) too was once a student and successor of Hart as professor of Jurisprudence at Oxford University. He did not take the Hartian position very lightly. Instead, Dworkin attacks Hart on the ground that discretion does not exist except as an area left open by a surrounding belt of restriction, hence it is a relative concept. It is Dworkin's belief that there are no gaps in law, for it is the theory that claims that law is simply made up of rules that runs into this problem.

According to Dworkin, if a sergeant, for instance, is ordered to take his five most experienced men to patrol, Dworkin thinks that the sergeant has a weak discretion in that sense. Discretion in a strong sense, he says, would be when there are no standard set by the authority in question in the selection of his most experienced men. But the sergeant who has been told to pick any five men for patrol without standard set up uses his discretion; for the only standard he knows is take five men on patrol, no more no less.

Besides rules, Dworkin says law is made up of principles and policies. A principle is a standard that is to be observed, not because it will advance or secure an economic, political, or social goal but because it is a requirement of justice or fairness or some other dimension of morality. On the other hand, a policy is a standard that sets out a social or collective goal to be reached, generally an improvement in some economic, political or social feature of the community.

To give a practical elaboration of this point, Dworkin cites the US case of *Riggs v Palmer 115 NY 506, 22, NE 188 (1889*). In this case, a court had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court held that, because of the legal principle that no one should be permitted to profit from his own wrong, the murder was not entitled to inherit. Another example cited by Dworkin (1977: 22) is that of "*Henningsen v Bloomfield Motors, Inc, (1960) 32 NY 358)".* In this instance, Henningsen had bought a car, and signed a contract which said that the manufacturer's liability for defects was limited to 'making good' defective parts—'this warranty being expressly in lieu of all other warranties, obligations or liabilities.'

Henningsen argued that, at least in the circumstances of his case, the manufacturer ought not to be protected by this limitation, and, ought to be liable for the medical and other expenses of persons injured in a crash. He was not able to point to any statute or to any established rule of law that prevented

the manufacturer from standing on the contract. The court nevertheless agreed with Henningsen. Dworkin argues then that the standards set in these cases are not the sort we think of as legal rules but legal principles.

From what is said above, it is obvious Dworkin agrees that legal rules and principles are all sets of standards pointing to particular decisions about legal obligation in particular circumstances. But they differ in the character of the direction they give while rules are applicable in all-or-nothing fashion principles operate differently. Unlike rules, principles do not dictate results rather in Dworkin (1977: 35) "they incline a decision one way, though not conclusively, and they survive intact when they do not prevail."

The truth is that principles cannot be captured by any simple rule of recognition. But when two rules conflict, then only one can be valid. But when two principles lead to different conclusions, the judge must take into account the relative weight of each. In furtherance to this, he Dworkin (1977: 90) argues that "principles are propositions that describe rights, while policies are propositions that describe goals. The arguments of principles and policy, according to Dworkin, are intended to establish individual rights and community goals respectively.

As for hard cases, Dworkin argues that the judge will have to find out what institutionally fits, interpreting his data coherently as to find the right answer. In that sense, he sees law as an interpretive activity, and interpretation does not mean that what is described is an appeal to extra-legal material.

For MacCormick (1978), there is no doubt that there are limitations, which deductive reasoning posit in the decision making process of the judge/court. However, he thinks there is more to legal reasoning than mere deduction. MacCormick focuses primarily on the challenge of finding the appropriate normative premise(s) of the legal syllogism (deductive logic). He tried to explain the criteria to use to select minor premises. It is clear to him that law is not always clear and that it might harbour apparent contradictions and gaps, all of which would demand more rational resources than deductive argument can furnish. Therefore, MacCormick proposes what he referred to as 'second-order justification' to remedy the short-comings of deductive reasoning in law.

4. Second-Order Justification

According to MacCormick, second-order justification involves justifying choices; choices between rival possible rulings. These are choices to be made within the specific context of a functioning legal system. Simply put, it is suggested that second-order justification is concerned with 'what makes sense in the world' in that it involves consequentialist arguments which are essentially evaluative and therefore in some degree subjective.

This context of second-order justification, he says, imposes some obvious constraints on the process; hence it involves testing of facts as in the scientific arena. It is like the Popperian theory of scientific justification where the logical element constituting scientific discovery is the logic of testing and which do not happen in a vacuum. They deal with the 'real world' as do scientific hypotheses; hence it is in the context of the whole body of 'knowledge' and corpus of the normative legal system rather than descriptive and explanatory theory.

What MacCormick is driving at with this logic is to demonstrate that legal decisions make sense in the world and in the context of legal system. They are based on rulings which make sense in the context of the legal system. This is the case because just as scientific justification involves testing one hypothesis against the other, and rejecting that which fails the relevant test, so it is with second-order justification in the legal system. In MacCormick (1978: 75), it is clearly stated that:

> *Second- order justification in the law involves testing rival possible rulings against each other and rejecting those which do not satisfy relevant test—relevant test being concerned with what makes sense in the world, and with what makes sense in the context of the system.*

No doubt, Hart was aware of the insufficiency and limitation created by rules. He allows the judge with strong discretion in the sense that he is free from any form of legal constraint. Like Dworkin, MacCormick is not comfortable with this reasoning because, as he says, the judge is not completely free from every form of legal constraint. For instance, the judge is restricted by the constraint of formal justice, which includes universalization.

Universalization is the need to conceive of the decision at hand as reproducible in the future cases. He is also constrained by the principle of consistency. Principle of consistency is the need to avoid contradictions with other existing rules while principle of coherence is the need to look for a decision that fits well with the recognized principles of legal system. The principle of consequence is the need to avoid a decision that would yield absurd consequences.

The requirement of formal justice is that judges must treat like cases alike and different cases differently, and give to everyone his due. One may wish to know what it is to treat like cases alike and different cases differently. To treat like cases alike implies that one must decide today's case on the grounds that he will be willing to adopt for the decision of future similar cases, just as much as it implies that he must today have regard to his earlier decisions in past similar cases. This is a principle of adherence in law to formal justice.

Further implication of the constraint of formal justice is that no decision can be given which cannot be universalized. It amounts to irrationality to say, for instance, that X is the right solution in circumstance Y unless one is willing to accept that there is a class of Xs which will always be right for the class of Ys. For MacCormick, therefore, adherence to the principle of formal justice does not nullify the provisions of exception in law. Rather where the exception applies, there is something present beside Y.

One major question to ask MacCormick is whether these factors acting as constraints are provable. He does not think they are provable or demonstrable or confirmable in themselves in terms of any further or ulterior reasons. However, he does not think that because they are not provable, demonstrable or confirmable, no reasons at all can be given for adhering to them as grounds for action and judgment.

However, in addition to the principles of universalization, consistency and coherence as enumerated above are the correspondence principle, which seeks to define true statements as being those which correspond with a reality whose existence is independent of the statement.

5. MacCormick's Theory of Law

Neil MacCormick believes that any theory of legal reasoning requires and is required by a theory of law. And that any account of legal reasoning makes presuppositions about the nature of law. This means that theories about the nature of law can be tested out in terms of their implications in relation to legal reasoning. With this understanding, MacCormick proceeds to make known his idea of law. Initially, he has insisted that his concept of law can be extracted from the claim he makes about the presuppositions of deductive reasoning in law.

MacCormick is of the conviction that deductive model of reasoning operates within some basic presuppositions which make deductive arguments sufficient in justifying legal decisions in certain cases. However, in MacCormick (1978:41), it is equally made clear that "given (these) presuppositions about the nature of legal system and the obligations of legal officials, such justifications are conclusive." They operate within the framework of rules whose validity has been established according to the criteria set forth in a (Hartian like) 'rule of recognition.'

It is obvious law does not work in abstraction. It means there is already existing framework that accommodates law's activities. It is within this framework that law can be defined. MacCormick's position on the notion of law is summarized here under two main points. Firstly, the rule of law is to be understood as a law of rules (which is just another way that MacCormick develops the legacy of

Hartian positivism). Here, law is made up of rules. But the 'ruly' character of law is what enables law secures many valuable aims, such as predictability, stability of expectations, fairness and equality.

The ruleness of law on the other hand, MacCormick says, is not in itself sufficient to secure the rule of law. Instead, they have to be clearly formulated, should not contradict each other, and have to fit in a coherent scheme of principles and policies upheld by the community at large. In his conclusion, he admits that law is an institutional normative order which should belong to any acceptable ontology.

6. Conclusion

The conclusion states that although deductive logic plays a central role in legal reasoning, logic alone cannot solve hard cases in law. Like Huhn says, when we attempt to reduce the decision of a case to an argument of deductive logic, the aspects of legal reasoning that are not deductive are exposed. This explains why a system of pure logic works only in easy cases, i.e. cases where the validity of the rule of law is unchallenged and the terms of rule are unambiguous. Hard cases in law are resolved and resolvable by a complex balancing of intramodal and intermodal arguments, in which the court evaluates not only the strength of individual arguments, but also the relative weight of the values that support our legal system, as implicated in the particular case.

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