LEGAL REASONING AND LEGAL THEORY

NEIL MacCORMICK

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BY

NEIL MacCORMICK

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ERRATUM

p. 232. The penultimate paragraph on this page should begin

'If we are to achieve a clear conceptual distinction between'

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PREFACE

In this book, I try to describe and explain the elements of legal arguments advanced in justification of decisions, or claims and defences put to the courts for decision; to relate that to the general theory of law; and to do all that in the framework of a general theory of practical reason which owes a great deal to David Hume. I hope that my efforts will be of some interest to lawyers, jurisprudents, and philosophers. I have therefore tried to write it in such a way that it will be comprehensible to non-philosophical lawyers and to nonlawyer philosophers. Each group will find a great deal which is from its own point of view rather elementary and obvious, for which I apologize in advance. Conversely, I hope that neither group will find undue obscurities in the less familiar points of the text.

The book originated in a series of lectures given in Queen's College, Dundee (now the University of Dundee), under the guidance of Professor I.D. Willock in 1966 and 1967; various parts of it have been tried out in various forms in lectures in Oxford University from 1967 till 1972, and in Edinburgh University from 1972 till the present. I intended to finish it long ago, but a combination of laziness and administrative responsibilities delayed me, perhaps to good effect.

Naturally, I owe a lot to innumerable students who put up very courteously with my efforts to master my thoughts on the topics discussed, and gave all manner of useful criticisms. Even more I am indebted to many colleagues for helpful discussions and criticisms, in particular to: J. Bjarup, Z.K. Bankowski, A.A.M. Irvine, H.L.A. Hart, D.R. Harris, N.R. Hutton, Ch. Perelman, G. Maher, R.M.J. Kinsey, M.J. Machan, D. Small, I.D. Willock, W.A.J. Watson, and A. Zuckerman. Karen MacCormick suffered my earliest attempts to cast the first version of the lectures in acceptable form, and prodded me into finally completing the present version, and Isabel Roberts gave all manner of help. To them all, I am profoundly grateful. Naturally, I accept full responsibility for any defects remaining in the book as it now appears.

Edinburgh, 2 May 1977 NEIL MacCORMICK

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INTRODUCTION

(a) *The Perspective of the Inquiry*

The idea that reason has a part to play in the ordering of human affairs has a long history. It is associated with the view that some things are 'by nature' right for human beings; others so, merely by convention or by enactment. Whether or not there were enforced laws prohibiting murder, it would be wrong for human beings wantonly to take each others' lives. On the other hand, it seems strange to suppose that parking a car in a particular street could be considered a wrongful act in the absence of some consciously adopted scheme of regulations.

If there are some actions which are always wrong simply in virtue of the nature of human beings—or, more generally, the 'nature of things'—it may be thought to follow that the exercise of reason should suffice to disclose which actions are by nature right or wrong. And even in case of more apparently arbitrary matters such as parking regulations, or regulations concerning weights and measures, it can be argued that reason discloses to us the need to have some rule as a common standard.

If there are numerous private cars, lorries, etc., there will be grievous congestion if parking is quite unrestricted, and no amount of attempts at intelligent self-denial by individuals will resolve the problem: let there then be some public enactment of parking regulations aimed at securing over-all public convenience by balancing the inconvenience of restraints on parking against the inconvenience of excessive congestion of the streets. If there is a market in commodities, let there be some established common system of weights and measurements reasonably suited to the measurement of the range of quantities most commonly marketed.

The idea, expressed in one form by Lord Stair in the terms that 'Law is the dictate of reason determining every rational

being to that which is congruous and convenient for the nature thereof',[1] is at least as old as the writings of Plato and Aristotle, and has of course exercised a profound influence upon the development of western legal thought, in which it has been stated and restated many times and in many forms. Whether or not it is well founded, it is a belief which has profoundly influenced the form and the substance of the legal systems (in their various 'families') which have developed in Europe, and been carried therefrom to the ends of the earth.

It is not, however, a belief which has gone unchallenged, nor has the challenge in its turn failed to be influential. To David Hume, above all others perhaps, belongs the credit—if such it be—for the most fundamental scepticism about the limits of reason in practical affairs.[2] Reduced to its essentials, his argument is that our faculty of reasoning can operate only upon given premisses; assuming certain premisses, we can by reason ascertain the conclusions which follow from them. And indeed reason can guide us in seeking to verify or falsify assertions concerning matters of fact or existential propositions generally. In the latter case, however, reasoning has a secondary role, since it can work only with evidence already given in our various sense impressions.

So too in relation to practical affairs: if I have an appointment which I ought to keep on Wednesday, then if today is Wednesday, today is the day on which I ought to keep my appointment. The necessity of that conclusion is indeed a matter determined by reasoning. But the conclusion has *practical* force for me (*Am* I going to keep my appointment?) only so far as the premisses have: that I ought to keep appointments is in effect one of these premisses, no doubt in its turn derived or derivable from 'Everyone ought to keep appointments'. but wherein consists the rational demonstration of that proposition?

[1] James, 1st Viscount Stair, *Institutions of the Law of Scotland* (2nd edn., Edinburgh, 1893, or subsequent edns., also Edinburgh) I.i.1.

[2] See especially David Hume, *A Treatise of Human Nature* (many edns.) Book II, Part III, § III; and Book III, Part I, § § I and II, and Part III, § § I and II; for a clarification and partial retraction see Hume, *Enquiry Concerning the Principles of Morals* (many edns.), Appendix I. Hume himself regarded the *Enquiry* as his own best and final statement on the topic in question.

Perhaps it can be shown that the use of various forms of speech whereby people can 'make appointments' with each other makes possible great convenience for people in ordering their affairs, provided only that people do treat as binding their appointments made (or other types of promise). But is it a matter of 'reason' to prefer that general convenience to the alternative, the inconvenience of leaving it to chance to determine when we shall meet even those with whom we have business to do? Is it not rather a matter of a disposition of the will founded upon some simple sentiment of preference or approbation which we feel toward the former state of affairs, a sentiment which indeed we express in calling it 'convenient'?

And so too in the simpler cases: why say that reason tells us we ought not to kill each other? Is it not rather the case that we have in ordinary circumstances a simple and direct sentiment of revulsion from acts of violence perpetrated by human beings upon human beings? And indeed, if that were not so, is it conceivable that we would ever *do* anything about it? Conceivable that we would actually make a point of keeping appointments, or of reining in our more violent reactions towards our fellows? Or that we would take steps to censure others for breaking appointments or to restrain them from violence toward others?

Such, in summary, are the arguments whereby Hume sought to justify his well-known remarks about 'reason' being 'the slave of the passions'[3] and about the underivability of an 'ought-statement' from an 'is-statement'[4]

To Hume's arguments there has been only one effective reply, first advanced by his younger contemporary Thomas Reid[5] (successor to Adam Smith in the Chair of Moral Philosophy at Glasgow University). What Reid said was that Hume was correct in asserting that reasons cannot be given for ultimate moral premisses; there are no statements of 'pure fact' which we can give to back up whatever we set forth as

[3] Hume, *Treatise* Book II, Part III, § III, 5th paragraph.

[4] Hume, *Treatise* Book III, Part I, § I, final paragraph.

[5] See Thomas Reid, *Essays on the Powers of the Human Mind* (Edinburgh, 1819), vol. iii, Essay V, esp. ch. VII (i.e. Essay V of the *Essays on the Active Powers*); on 'is/ought', see p. 578 of vol. iii of the 1819 edition of the Essays.

our ultimate premisses in moral arguments. Moreover, it is the case that these ultimate moral premisses are necessarily associated with dispositions of the affections and of the will. But it is not true that they are not also apprehended by reason and in that sense rational. Our adherence to general principles—e.g. that no acts of violence ought to be perpetrated on human beings save in certain justifying or excusing circumstances—is a manifestation of our rationality, by contrast with our merely impulsive and animal reactions to circumstances. Reason for Reid is not and certainly ought not to be the slave of the passions. (In part this is, not uncharacteristically of Reid, an unfair rejoinder to Hume, who certainly recognized (e.g.) a difference between our more settled 'calm passions' and the more violent and impulsive of our reactions to circumstances. There remains an important difference between them on the question whether all our more cool and consistent attitudes to conduct are an aspect of our 'reason'.)

It deserves to be added that the work of thinkers such as Adam Smith,[6] Adam Ferguson,[7] John Millar,[8] and Karl Marx[9] has pretty convincingly demonstrated a strong correlation between the moral opinions and legal norms actually subscribed to by human beings, and the changing forms of social and economic life. That people ought to be left as far as possible free to conduct their own affairs by means of voluntary contracts which ought, once made, to be rigorously and impartially enforced by public authorities is, for example, an opinion both characteristic of and indeed peculiar to that mode of social organization which Smith called 'commercial' and Marx 'bourgeois':

Whether this should be interpreted along Humean lines as

[6] Adam Smith, *Lectures on Justice, Police, Revenue and Arms*, ed. E. Cannan (Oxford, 1896); a new text edited by P.G. Stein and R. Meek is due to be published at Oxford in 1977 or 1978. For an illuminating account of Smith's views on this matter, see Andrew Skinner, 'Adam Smith: Society and Government', in *Perspectives in Jurisprudence*, ed. Elspeth Attwooll (Glasgow, 1977).

[7] Adam Ferguson, *Essay on the History of Civil Society* (1st edn., Edinburgh, 1767; a new edition by Duncan Forbes, Edinburgh, 1966).

[8] John Millar, *The Origin of the Distinction of Ranks* (Edinburgh, 1806); reprinted, together with selections from other works in W.C. Lehmann, *John Millar of Glasgow* (Cambridge, 1960).

[9] See E. Kamenka, *Marxism and Ethics* (London, 1969).

implying that the dispositions of our sentiments and wills are simply and inevitably shaped by the social environment in which we find ourselves, or along lines more favourable to Reid (or Smith, or Marx) as implying that only in certain circumstances can reason achieve its full development, is a question which need not for the moment detain us. Suffice it that we have sketched the essentials of our problem: the problem how far the determination of order in human affairs is a matter of reason. There are, as we see, substantial arguments on either side; and both sets of arguments have been in important ways influential.

In the ensuing chapters of this book, I shall follow the point which is common to both Hume and Reid in assuming that any mode of evaluative argument must involve, depend on, or presuppose, some ultimate premisses which are not themselves provable, demonstrable, or confirmable in terms of further or ulterior reasons. In that sense, our ultimate normative premisses are not reasoned, not the product of a chain of logical reasoning.

As we shall see, that does not mean the same as saying that no reasons at all can be given for adhering to such ultimate normative premisses—'principles'—as grounds for action and judgement. But the reasons which can be given are not in their nature conclusive, nor equally convincing to everyone. Honest and reasonable people can and do differ even upon ultimate matters of principle, each having reasons which seem to him or her good for the view to which he or she adheres.

To that extent I go along with Hume in supposing that a determinant factor in our assent to some or another normative principle lies in our affective nature, in our sentiments, passions, predispositions of will—whatever be the proper term. That people have different affective natures, differences of sentiment, passion, predisposition, can then be advanced in explanation of fundamental moral disagreements. Moreover, that our affective natures are in important ways socially moulded, if not entirely socially determined, so that our individual attitudes contain much that is rather a reflection of than a reflection upon the material conditions set by the economic forms of the society to which we belong seems also to be true.

Nevertheless, the point which Reid and after him Kant[10] alike urged as to the significance of 'practical reason' cannot be overlooked. That our adherence to ultimate principles in the evaluative and normative spheres is not derived by reasoning from ulterior factual or scientific knowledge of the world nor justifiable by reasoning of that sort, does not show that our adherence to such principles is other than a manifestation of our rational nature.

Human beings are not organisms set in motion by mere reaction to stimuli in the environment. Not merely can we give explanatory reasons to account for the actions of humans as for the ebb and flow of the tide; but it is also the case that human beings act *for reasons* when they act at all, and no 'explanation' or human behaviour which omits reference to the subjective reasons for which it is performed can be a full or adequate one. To any variety of behaviourism which expressly or impliedly denies that, there is a conclusive reply as devastating as it is simple; that it cannot be wrong to be anthropomorphic about people.

Whatever the basis of our adherence to such principles of conduct as we take to be ultimate, it is the case that for human beings they belong among the category of reasons for acting and of reasons for judgments about and critical or approbative reaction to others' actings. What is more, because they are not *ad hoc* or *ad hominem* but universal in their tenor and their reference to human beings as such, or categories of human beings, there is indeed (as Reid and Kant urged) good ground for distinguishing them from simple emotional or animal reactions to immediate circumstances, and even from what Hume called 'calm passions'. They represent an attempt to impose a rational pattern on our actings—rather as scientific endeavour imposes general schemata on observed events in an effort to provide a rational and structured explanation of them. At least at the formal level, there are worthwhile analogies to be drawn between 'practical' and 'pure' reason.

The attempt to articulate principles for action belongs

[10] See H.J. Paton, *The Moral Law* (London, 1948), being a commentary on and translation of Kant's *Groundwork of the Metaphysic of Morals*; also Jeffrie G. Murphy, *Kant: the Philosophy of Right* (London, 1970).

in the realm of reasoning concerning the practical affairs of life; it is concerned with the guidance of decisions, judgments, appraisals, and all the rest of it. That is not to say that all our reasons for acting are principled, nor to say that people do not often act in a merely impulsive way. But to the extent that we do, sometimes at least, act and judge upon principle rather than for some *ad hoc* reason, it is our rational as well as indeed our affective nature which is manifested in such acting. That is so even though it must be admitted that affectivity at least as much as rationality is engaged in our adherence to some particular principles rather than others.[11]

All that has been said so far is unavoidably abstract and rarefied. Even if intelligible, it is in no sense proved or justified as yet. It is in effect a programmatic declaration of the opinion to be advanced in this book, with reference to one particular sphere of practical activity: the making and justifying of decisions in law.

The book has therefore two purposes. One is to explain, concretize, and justify the thesis already sketched in abstract form about practical reasoning. The other is to advance an explanation of the nature of legal argumentation as manifested in the public process of litigation and adjudication upon disputed matters of law. In so far as I am a jurist, I hope in particular to contribute to a better understanding of what is often called 'the judicial process', and if I am even partially successful in that endeavour this book will have served some purpose. But I do not believe that one can say much that is illuminating about the rationality of the judicial process without some wider philosophical perspective of the kind sketched already. Accordingly I hope also to make some contribution to practical philosophy in elaborating that perspective. At least I may perform some small service in making more accessible to philosophers who are not lawyers some elements of what is perhaps a uniquely public and published form of reasoning, and therefore a resource of great potential interest to philosophers:

[11] Subject to the assertion of a more active role of 'reason' than Hume admits, this view is not at all dissimilar from that stated in *Enquiry*, Appendix I; but see also Chapter X of the present book.

namely, the recorded judgments and justifying opinions of courts of law.

(b) *The Subject Matter of the Inquiry*

The subject matter of my inquiry is the process of reasoning which is revealed to us in published decisions of Courts of Law. There are two legal systems, English law and Scots law, with which I am reasonably familiar, and most of my examples will be drawn therefrom, though I shall also advert to aspects of other legal systems, including that of the U.S.A., and other 'common law' countries within the Commonwealth; and, so far as my little knowledge will carry me, to Roman law and modern civilian systems, in particular the French.

The conclusions which I reach, so far as based on particular evidence, are therefore going to be restricted in range, and I do not pretend to be demonstrating necessary truths about legal reasoning everywhere. Nevertheless, in so far as I am able to explain my particular instances in terms of more general philosophical premisses, I shall be aiming to give suggestive hypotheses worthy of testing for their explanatory value in relation to other legal systems, a task which would call for comparative study beyond my present compass. If any legal systems are illuminated by this approach it must be those of the contemporary United Kingdom; and if they are not explained and illuminated satisfactorily, the book is of no value whatever; if they are, it may be of more general value and interest.

Over the past three centuries at least, there has developed a practice of reporting on the decisions of the superior courts in England and Wales and in Scotland; and the same is true of other western countries. No doubt a particular reason for the practice of reporting decisions has been the importance of precedent as a formal source of law in the British systems (historically, more so in England than in Scotland); but there has also been a development of similar reporting in other jurisdictions such as the French, in which there is no similar doctrine of binding precedent—not in the strict and formal sense, at any rate.

Such reports always contain some recital of the facts relevant to the matter at issue in the case reported, often

some outline of the arguments of advocates in either side, and invariably (in more recent times) a report of the opinion stated by the judge in justification of his decision as well as (invariably) a statement of the specific decision given as between the parties to the litigation.

A feature of the British systems, shared by most 'common law' systems of law, is that most trials, both civil and criminal, are conducted at first instance before a single judge who may or may not be assisted by a jury responsible for deciding on matters of fact where there is a dispute about facts. It is only when one of the parties to a case chooses to challenge the decision at first instance by way of an appeal that a dispute normally comes before a court which comprises more than one judge.

By contrast, in most civilian systems, the normal rule is that all save the most insignificant cases are taken by collegiate courts having more than one professional judge, and there is a further rule normally observed that the Court itself pronounces a single judgment which in no way discloses any disagreement among the members of the Court as to the appropriate decision for the case. That rule—or convention—holds good at all levels of the court system in such jurisdictions, so that even (e.g.) the Cour de Cassation in France publishes only a single statement—and that a very schematic one—for its most important decisions as the final court of appeal on civil and criminal matters in France.

In Scots or English law, on the other hand, appellate courts follow quite the opposite pattern. In them there almost invariably sit several—three or more—judges, each of whom normally states in a discursive way his own opinion on the points raised in the case, so that the decision of the court is based on simple majority decision among the judges, who may elaborate quite different, even opposed points of view in arguing for the decision which they favour.

This style of judging makes it much more candidly and publicly visible than does the continental style that in many disputed legal questions more than one point of view is possible; more than one answer may be given and supported by reference to 'the law'. Few if any continental lawyers would deny that, but many would strongly support the