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"Practical Reason in Law and Morality", Neil MacComick, Oxford 2008 : [recenzja]

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NEIL MACCOMICK:
PRACTICAL REASON IN LAW AND MORALITY.
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The name of Neil MacComick is familiar to every contemporary legal theorists and philosopher of law. MacComick happens to be a very distinguish scholar and prolific influential writer, especially well known for his widely read theory of institutional legal facts, a result of collaboration with Otta Wienberger. Their theory has been presented in their famous book "An Institutional Theory of Law: New Approaches to Legal Positivism." (MacCormick 1992). His prominent works have become much esteemed and had a real impact both in the sphere of legal theory and practice of law.

His intellectual approach is focused on practical questions, which is apparent in the book under review, „Practical Reason in Law and Morality."

Prof. N. MacCormick has been an icon in European legal academic world, still dominated by the positivist analytical approach. Unfortunately, he remains fairly unknown as a figure who stretches borders of the positivistic approach to law.

He modified the theoretical position and developed his views in this numerous books.[1] MacComick presents for instance: the developed concept of normative institutional legal order, or grasp of issues regarding law and the state in the context of European Community which pose questions about sovereignty and autonomy of the Member States and supremacy of Community law.

There are many reviews and comments written on his ideas and publications. My aim is to familiarize the reader of this journal with his latest book „Practical Reason in Law and Morality".

The volume under review concludes the series "Law, State and Practical Reason." The series approaches law and legal concepts from the point of view of the theory of law "as an institutional normative legal order,"[2] deals with the state in the context of its sovereignty and post-sovereignty (MacCormick 2007) looming as a consequence of development of the European Union, (MacCormick 1999) and depicts legal reasoning as a compilation of rhetoric, demonstrative logic and general practical reason (MacCormick 2005).

The book "The Practical Reason in Law and Morality" closes the series in a natural way, by posing the question which arises from the previous books: "Can reason be practical? Most certainly, it can!" as MacCormick replies provocatively in the introduction to his work. In the following passages of the book this statement is put the test.

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[1] In "Rhetoric and the Rule of Law. A Theory of Legal Reasoning" wrote that he no longer accepted the non-cognitivism derived from David Hume that he adhered to at the time of "Legal Reasoning" and already mentioned the possibility of marrying Adam Smith's and Kant's moral conceptions.

[2] The starting point, the assumption of the series of book is the understanding of law as an institutional normative order that is dispatched for the state and that there is no neccesary analitycal nexus between law and the state, the normative order, morality and politics. Normative order involves judgments which are sometimes entirely personal and autonomous, conventional without being intitutionalized.

The book concentrates predominantly on problems tackled by practical reason and measures by means of which the reason deals with the nature and moral dimensions of human action and judgment. The title refers to Kantian practical reason, but McCormick reformulated Kant's approach, advancing a synthesis of Immanuel Kant's and Adam Smith's thoughts. As regards the structure of the book, one can say that the first part deals with the problem how the moral character of reason influences judgments and the second part deals with the role and character of reasoning in the practical domain of positive law.

The book starts with an overview of arguments concerning reasons behind human actions, and especially good reasons which allow us to act well and wisely. In the situation of moral freedom agents must balance/weigh values from the point of view of their broad plan of life. As pointed out in the second chapter, good reasoning concerning what is worth doing in the public domain should be employed on the basis of a quantitative element, but the choice is also guided by the agent's commitment to values adhered to in private or public life (MacCormick 2008).

The very heart of the book, presents the synthesis of Smithian and Kantian theories of practical reason. MacCormick tried to merge the Kantian universal will with Smith's sentiments in order to form a foundation for moral judgments. What he tried to do was to combine the strong rationality of universal Kantian "golden rule" and the theory of emotionally grounded moral judgment explained by A. Smith. in his early book "The Theory of Moral Sentiments."

Kant's "golden rule" provides that one should act towards others as one would wish them to act towards him/her as if one were in their shoes and they in his/hers. According to Kant, morality is concerned with reason and universality. On the contrary, emotions belong to the animal nature of human beings, they are variable and contingent – which is why they should be excluded as grounds of moral judgments. At this point a "Smithian categorical imperative" should be applied, as MacCormick claims. Smith gave close attention to the idea of "sympathy" (which in more a contemporary context could be called "empathy"), because sentiments are the foundation of our capacity to form moral judgments. They are based on the approval or disapproval of our own conduct and conduct of others. A "Smithian categorical imperative" as McCormick called the synthesis that never took place before, emphasizes that feelings and reasons come together in the motivation of our judgments. The "Smithian categorical imperative" is depicted as follows:

> *Enter as fully as you can into the feelings of everyone directly involved in or affected by an incident or relationship, and impartiality form a maxim of judgment about what is right that all could accept if they were committed to maintaining mutual beliefs setting a common standard of approval and disapproval among themselves (…) Act in accordance with that impartial judgment of what is right to do in respect of the given incident or relationship.* (MacCormick 2008)

MacCormick is trying to extract from Kant the principle of universalism and adapt for his own purposes, now grounded not only in reason but also in human emotions.

In the subsequent part of the book the questions of trust as promises, contracts, reliance are raised and considered from the point of view of autonomous agents acting within the framework of institutional ethics. Emphasis is put on the statement that moral judgments are of contextual character. There exist universal standards of right and wrong and they are framed by each of us, even though we can often be disappointed

by them. The lesson given by the author is that the particularity of a given case makes the last instance in the process of in chain of decision taking process. As the next step, the author stresses the necessity of autonomy of action. We can hardly speak of any action in legitimate terms without autonomy, otherwise the agent becomes an object acted upon. The idea of autonomy is considered in the light of practical reason and in connection with Kantian freedom of law within the context of a liberal state and Adam Smith's "system of natural liberty."

While considering the legal perspective on practical reason, McCormick is trying to adapt Viscount Stair views – particularly his rationalist natural law theory. The author presents some basic rules which we are obliged to follow. By following them we become free agents. According to Viscount Stair there are three prerequisites of equity: "obedience, freedom and engagement." As long as these basic duties are fulfilled, the principle of freedom is observed. Through self-restraint we can also incur obligations towards others, by entering into contacts and making promises. It may be added that Jeremy Bentham's utilitarianism is also considered a sound approach to practical reason, however Viscount Stair's triple principle account of the practical reason is evaluated more favorably by the author than J. Bentham's single-principle approach.

In the summary of the book the author examines how practical reason works within legal and moral contexts – by searching for differences and similarities between two exemplary cases. In one of them, the author concludes that practical reason leads to different solutions from the moral and legal points of view. In the second case results were almost identical from both of these perspectives. By the examples the author stresses that the practical reason leads to different solutions in a legal and moral contexts and through this he shows that legal reasoning is a form of practical reasoning – different from moral reasoning. In spite of the differences, the categorical imperative develops our understanding of the case and builds – an aspiration to objectivity in exercising discretion, – just the aspirations – to objectivity but no less than that.

The **last chapter**, sums up the book with the affirmative answer to the question whether reason can be practical. As we can read in conclusion "nothing is more important (…) that one apply reason and intelligence to the course one takes through life. This applies both to observing the common moral and legal norms that bind us to other people and define our duties (…) and come our way in the domain on moral freedom." (MacCormick 2008)

The common thread for all the chapters of the book is the McCormick philosophical outlook on the nature of humans as partly rational and partly emotional creatures. Such an attitude seems unusual for an adherent of legal positivism, the doctrine which generally inclines us to think of ourselves as mere subjects in the legal reality, while judges who actually hear cases cease to be individuals and instead assume in a magical way the position of impartial spectators in order to deliver decisions in the name of "justice" which is blind.

The Continental European case-law teaches that the conception of rational subject boils down to deciding in the practical moral discourse.

N. MacCormick's proposition could become an important voice in post-positivistic times, in the realm of practical discourse.

The contemporary legal world is unprepared for the conclusion that it grows out of the analytical positivistic paradigm. Contemporary legal culture is in the process of searching for identity prefers to play postmodern games, rather than open up to dif-

ficulties deriving from a more complicated picture of humans living under normative pluralism. Universalistic proposals of Kantian type do not work in the realm of law, because they avail of a reductionist concept of human being perceived as a rational creature, which was perfectly suited for the period of Enlightenment, but not so well for the postmodern world.

Instead of accepting authentic problems stemming from pluralism in the discourse of individuals, legal practitioners prefer their narratives of objectivity.

McCormick's efforts to combine Kant and Smith into a universal formula not only disclose problems which arise from the strongly rationalistic approach, but also provide a proposal of what could be done with these problems and how to resolve them. The author demonstrates how law and its practical discourse could deal with its subordinates who are not only rational subjects but also emotional individuals living in a pluralistic world. Such a standpoint, which seems worlds apart from irony and cynical attitude of postmodernism, is to my mind the strongest point of the book.

"Practical Reason in Law and Morality" is in my opinion undeservedly underestimated and became lost among the author's earlier and more famous book explicating the theory of institutional facts. It is underestimated especially here in Central Eastern Europe.

Readers who disagree with the analytical philosophical position could surprisingly find in the later works of the author a more developed and complex approach which takes into account the reality of legal practice and its real problems. The picture of a very complex legal reality depicted in the book foreshadows uneasy answers and at the same time finds a surprising harmony in the concept of legal subject, understood as a human being. Human nature is presented as a compilation of emotions and rationality. This is exactly the bridge that allows the author to combine Adam Smith's account of moral sentiments with a Kantian universalistic moral philosophy and make this merger defensible at the end.

In the light of his very famous theory of institutional facts which will be instantly associated with Prof. MacComick, his later position deserves a wider reading and could change the picture of legal positivism nowadays. It could be the case not only because of the valuable new insight into the old problems invoked in philosophical thoughts achieved by means of dialogue with the contemporary context of legal theory, but also because of the deepness, reflective and provocatively original insight presented in MacComick's last book. I strongly recommend this book to every lawyer.

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