Cornell Law Review

Volume 82
Issue 5 *July 1997*

Article 6

Comment on Maccormick

William Ewald

COMMENT ON MACCORMICK

William Ewald†

Institutional Normative Order: A Conception of Law is a characteristically rich and wide-ranging article; I have space to discuss only a few of the issues Professor MacCormick raises. Let me begin by briefly summing up the principal points in his article. His central purpose is to elucidate the relationship between law, morality, and politics. Specifically, he wishes, first, to distinguish law from morality and from politics; but, second, to show that law shares certain central features with both morality and politics.

MacCormick begins by describing his conception of morality and of politics. *Morality* he takes to belong to the realm of the *normative*—that is, to the realm of ideal narratives that tell you what ought to happen (rather than what is in fact the case). Although he speaks of "narratives," he emphasizes that these normative ideals are not merely subjective, and points out that in many cases it is easier to be certain of what *ought* to be the case than of what *is* the case. For example, he says, it is often easier to be certain that a murder *ought not* to have been committed than to be certain that it *was not* committed.

This point is important for his general theory, and gives his realm of the normative a certain nonrelativistic stability across different human societies. It is also important to observe that, on MacCormick's view, there can be multiple, distinct normative orders. But within the general realm of the normative we can distinguish the particular and fundamental case of *morality*, which is the normative order aspired to by a fully autonomous moral agent.

If morality belongs to the realm of the "ought," politics, by contrast, belongs to the realm of the "is." Where morality is concerned with autonomy and with the normative, politics is concerned instead with power and with the functioning of human institutions. In particular, politics involves the power to direct certain broad social ends, especially through the structures of government.

Having thus characterized morality and politics, MacCormick turns his attention to law. Law, he says, is an institutional normative order. It is thus both related to, and distinct from, morality and politics. As an institutional order it partakes in the concerns of politics; but as a normative order, it partakes in the concerns of morality.

† Professor of Law and Philosophy, University of Pennsylvania. B.A. and A.M. 1976 (Harvard); D. Phil. 1978 (Oxford); J.D. 1981 (Harvard).

MacCormick draws several important and interrelated conclusions from this conception of law. First, law "confer[s] powers that are normative rather than coercive in their intrinsic character."[1] In other words, coercion—and, in particular, coercion by a state—is not central to the concept of law. Secondly, even the most morally acceptable form of law is crucially distinct from morality *simpliciter*. Law is to be sure a normative order; but it is only one normative order among many. The ultimate touchstone of how to act is given, not by the law, but by the judgments of the autonomous moral agent; and this means that law is fully binding—that it should guide conduct categorically—only when it receives the endorsement of morality.

Third, and most importantly, MacCormick rejects Hans Kelsen's identification of law and state. This is a natural step for him to take; for once one has severed the connection between law and coercion, there is no reason to maintain a tight conceptual link between law and the state. As he puts it, "state law is simply one form of law . . . . [a]nd the law-state is simply one form of state."[2] MacCormick links this rejection of Kelsen to the emergence of supra-state law, as represented by such institutions as the European Court of Human Rights or the various legal institutions of the European Union.

This last claim rejecting the equation of *law* with *state* law seems to me to raise the most novel and interesting issues. For most modern legal theorists, at least tacitly, accept Kelsen's identification of law and state. That is, they take it for granted that the primary task of legal theory is to explicate the legal systems of the modern nation-state. The modern state is taken as the paradigm case; and on those occasions when supra-national or international law is discussed, this form of law is generally treated as a marginal case, if not neglected altogether.

I wish here to sketch what seem to me to be some of the implications of MacCormick's argument—to point out some historical affinities, to suggest ways in which his ideas might be developed further, and to identify some of the theoretical problems that need to be addressed.

To fix ideas, let us begin by considering the position MacCormick rejects, namely, Kelsen's identification of law and state. Kelsen, of course, comes at the end of a long line of nineteenth-century and early twentieth-century thinkers who speculated about the relationship between law and state. Very roughly, the positions taken on this issue fall into one of four possible camps, and it will help us to see the

---

1 Neil MacCormick, *Institutional Normative Order: A Conception of Law*, 82 CORNELL L. REV. 1051, 1063 (1997).

2 *Id.* at 1067.

implications of MacCormick's theory if we locate it within a more general framework.

The first camp, whose intellectual ancestors include various thinkers of the natural-law tradition, views the state as the creature of law. The argument is perhaps clearest in Locke's theory of the social contract. Locke's state of nature, recall, is a condition in which human beings are governed by natural law. They possess *property* in virtue of the natural law; they enjoy certain *rights* in virtue of this law; and they are entitled to *punish* transgressors against the law. In order to protect their rights and to solve what are today referred to as "coordination problems," they band together to create the state. But the crucial point is that the state exists *under* law: it exists to serve and to enforce the law of nature, and always remains subordinate to it.

The second camp, in contrast, is represented by the followers of Hobbes. Rather than viewing the state as the creature of law, this camp views law as the creature of the state. Again, the idea of the state of nature and of the social contract can help to fix ideas. In the Hobbesian state of nature, there is no law, there is no property, and there are no legal rights. These things only come into existence with the creation of the state. It is the state that, by its commands, creates law and binding obligations; so to treat the state as bound by the law is a contradiction in terms. This view of the relationship between law and state is often associated with the familiar Austinian view which conceives of law as the commands of the sovereign.

These first two camps are familiar and have well-known historical antecedents. The third camp emerged towards the end of the nineteenth century, primarily in Germany, and provides the immediate background to Kelsen's work. It emerged in response to a particular set of theoretical problems that had been brought to the forefront by the process of drafting the German civil code; and we need to understand those problems if we are to understand what this third camp was attempting to do.

The story is complicated, and I can here give only a schematic outline.[3] But very roughly, the central problem encountered by the Code's drafters was how to treat the institution of private property. In the eyes of the critics, the Code represented the interests of the well-to-do, of the capitalists and landowners and industrialists who had exerted such an influence over its drafting. Now, the important point is that the defenders of the Code fell into one or the other of the first two camps I have just mentioned. Either they took the view that the state is superior to the law, and can decree whatever property rules it

[3] A much lengthier account, with citations to the literature, is given in William Ewald, *Comparative Jurisprudence (I): What Was It Like To Try a Rat?*, 143 U. PA. L. REV. 1889, 1990-2095 (1995).

chooses; or they took the view that the state exists to protect a private realm of absolute property rights and untrammeled freedom of contract.

The critics of the Code—notably Otto von Gierke—attempted to combat both these tendencies. It was of particular importance to them to argue that the state was not above the law. But it is also not quite right to say that they thought of the state as *subordinated* to the law, in the way Locke had done. Instead, they conceived of the state as *embedded* within the law.

There were a variety of reasons why they took such a position. One was undoubtedly skepticism about a law of nature, existing prior to and independent of the state. Another was a tendency to see law and state in historical terms, as an *emergent* phenomenon, rather than in the ahistorical terms of traditional natural-law thinking. In addition, it was important to Gierke to combat the individualism of traditional social-contract defenses of private property, of the sort one finds in Locke and in certain nineteenth-century interpreters of Kant. Gierke, for all these reasons, proposed a theory which saw law, not as the creation of the state, but as an organic feature of human associations—of medieval guilds, of corporations, of villages—out of which associations the modern state arose. In other words, Gierke saw the state and its law as *emerging* out of these other human institutions, which continued to exist, and continued to enjoy their sphere of legitimacy even within the modern state. In particular he saw private property as a human and social creation, instituted for the good of the community as a whole, and not as an absolute natural right of individuals. Likewise, he saw such controversial associations as labor unions and political parties, not as subordinate to the state and created by it, but as existing alongside of it, and as having their own law and their own sphere of authority. In sum, he ended by endorsing the theory of a pluralistic social-welfare state, bound by law, respecting human rights, but capable of restricting abuses of the right of private property, and of redistributing wealth from the rich to the poor.

This theory—represented by thinkers like Gierke, Hugo Preuss, and Albert Haenel in Germany, and by F. W. Maitland, G.D.H. Cole, and J.N. Figgis in England—was well-known at the time Kelsen was writing in the nineteen-twenties. It came under attack, not only from Kelsen, but also from advocates of the "total state," and from thinkers like Carl Schmitt, who treated the pluralistic theory with particular scorn.[4] The pluralistic theory, he held, confused the crucial difference between human associations such as labor unions or political parties, which have only modest powers of coercion, and the state,

4 CARL SCHMITT, DER BEGRIFF DES POLITISCHEN (1932).

which has the crucial power to distinguish between friend and foe, and to compel its citizens to kill or be killed in defense of the state.

Kelsen's identification of law and state should be seen against this intellectual and political background. Essentially, he holds the pluralistic theory to be analytically obscure, and he denies that law can be created by human groupings other than states. After these criticisms, the pluralistic theory dropped out of sight in Germany; and, as I said earlier, most modern legal theorists have tended, at least tacitly, to accept the view that law is primarily a phenomenon associated with the state.

The interesting question raised by MacCormick's article seems to me to be this: In view of the present legal situation in Europe, and particularly in view of the emergence of the European Union and of the European Court of Human Rights, should we consider reviving the pluralist theory of law? And, if we do so, what becomes of the concepts of *sovereignty* and of the *state*? Do those concepts disappear, or do they still serve a useful function in legal theory? It seems to me that MacCormick's historical affinities lie most closely with what I have identified as the "third camp." He does not think of law as the creation of the state, nor as the creator of the state, nor as identical with the state, but as an "institutional normative order." If I understand him correctly, institutional normative orders can be exemplified, not just by the state, but by supra-national and sub-national human groupings as well—just as Gierke and the pluralists argued.

It is worthwhile at this point to recall how tenuous the modern concepts of sovereignty and the nation-state in fact are, whether we consider them historically or philosophically. Let us first consider them historically. It should be noted first that they arose only in relatively modern times. Before the end of the sixteenth-century, legal theorists, particularly of the *ius commune* tradition, did not operate with the conception of a single, absolute, territorial sovereign, but rather with the idea of multiple, overlapping legal systems, each having its own sphere of authority. Canon law, Roman law, the law merchant, feudal law, local customary law, and the edicts of the local prince typically jostled together within the same geographical territory. These systems of law were all recognized as binding. Marriages and contracts fell within the jurisdiction of Church law; property relations within the jurisdiction of feudal law; business transactions within the jurisdiction of the law merchant, and so on. The jurists of the Middle Ages developed a highly complex set of rules about which body of laws should be applied to which persons under which circumstances.[5]

---

5 *See* JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE 5-10 (1990).

By the same token, the Middle Ages did not have the modern conception of the state—not, at any rate, of a state that was the unique source of law within its territory, and which could be thought of, *à la* Kelsen, as coextensive with the realm of the legal. These facts about the law of the Middle Ages are of course intimately connected with the pluralism of Gierke and Maitland. It is no accident that these nineteenth-century thinkers were among the greatest of medievalists, deeply versed in the legal thinking of the *ius commune* tradition. Nor is it an accident that Maitland could suggest that, from many points of view, the medieval Church was as much a state as the various medieval kingdoms. (To be sure, a critic might protest that the medieval Church did not satisfy all the criteria of modern statehood. But I take Maitland's point to be that neither did the Holy Roman Empire, or the kingdoms of France or England, satisfy the criteria of modern statehood—at any rate, not until Henry VIII broke with the Roman Church, and declared himself the sole legal authority in the realm.)

So the modern concepts of sovereignty and the state are of comparatively recent historical date. It is also worthwhile to look at these matters philosophically, and to recall that the classical, Austinian conception of sovereignty has come under criticism from legal philosophers, notably in H.L.A. Hart's *Concept of Law.* Austin, of course, argued that in every genuine legal system, there must necessarily exist a sovereign—that is, a person or group of persons whose commands are habitually obeyed by the rest of the population, and who themselves obey nobody. But that idea is no longer as compelling as it once seemed. (Incidentally, it should be remembered that even Bentham took a more cautious view of sovereignty than did Austin, holding that a legal system might contain multiple sovereigns, and that their power need not be absolute.)

To sum up: the theory that law is to be identified with *state* law seems so obvious and natural, partly because of the contingent historical fact that we live in the age of nation-states, and partly because legal theorists have tended to assume that state law is the paradigmatic form of law. But in other times Kelsen's theory would scarcely have made sense; and MacCormick's article raises the question of whether the historical period of nation-states is drawing to an end, and whether the recent legal changes in Europe should lead us to adopt a different, more pluralistic conception of law of the sort urged by Gierke, Maitland, and their colleagues.

Let us now consider MacCormick's rejection of Kelsen more closely. This rejection comes in two parts. First, MacCormick claims that one can have law in the absence of the state—as he puts it, "state

law is simply one form of law."[6] Second, he claims that one can have a state in the absence of law—as he puts it, "the law-state is simply one form of state."[7]

The second of these two claims seems to me puzzling, and perhaps rests on a misstatement of Kelsen's position. MacCormick attributes to Kelsen the view that every state is a *Rechtsstaat*; and indeed Kelsen says something of the sort in the *Reine Rechtslehre*.[8] But in translating Kelsen here it is necessary to proceed with caution. The term *Rechtsstaat* in German has a fairly precise historical meaning.[9] Roughly, it means a state in which legal rules are formulated in general terms, and impartially applied to all; in which the judiciary is independent; in which the legislature is democratically elected; and in which the legislature is independent of the executive. As Kelsen was aware, the very idea of the *Rechtsstaat*—in this sense—was a nineteenth-century innovation, and was a rallying cry for legal reform. It certainly could not be assumed as a given. Kelsen's claim is not that every state is a *Rechtsstaat*—a claim that would be no more plausible than the roughly equivalent claim that every state is a liberal democracy. Instead, he is asserting something weaker, and using the term *Rechtsstaat* in a different sense: his claim is that no state can exist in the absence of some sort of body of positive law.[10] This claim, in contrast, appears to me unexceptionable, and also true. At any rate, I can think of no good reason to reject it, and can think of no clear historical example of a state that did not also have some sort of a legal system associated with it. So it seems to me that this part of MacCormick's argument is better discarded, and that we can grant to Kelsen that no state can exist without law.

With the other of his two claims—the claim that law can exist outside of the state—MacCormick appears to me to be in a much stronger position. Here he stands on the same ground as Maitland and Gierke and the theorists of the Middle Ages; and here he can point to clear historical examples—such as the medieval Church—of institutions that unquestionably possessed legal rules, but that were not equivalent to modern, sovereign, territorial nation-states.

---

6 MacCormick, *supra* note 1, at 1067.

7 *Id.*

8 HANS KELSEN, REINE RECHTSLEHRE 126 (1934) ("*weil jeder Staat ein Rechtsstaat sein muß*"—"because every state is necessarily a *Rechtsstaat*").

9 For a recent discussion, with an extensive bibliography, see DELF BUCHWALD, PRINZIPIEN DES RECHTSSTAATS (1996), or the discussion in Ewald, *supra* note 3, at 2046-65.

10 In Kelsen's words, "[t]his conception of the *Rechtsstaat* must of course not be confused with the conception that refers to a legal order with a determinate content, namely, one that singles out certain institutions like rights of freedom, guarantees of legality in the functioning of the political organs, and democratic methods of lawmaking. To see a 'true' legal order *only* in such a system of norms is a natural-law prejudice." KELSEN, *supra* note 8, at 127 (author's translation from original German).

So suppose one were to take seriously the idea that law is an institutional normative order, and the consequent idea that law can be an attribute of institutions other than the state. What would be the implications for legal theory?

It does not seem far-fetched to suppose that such a conception would put theoretical pressure on the very idea of the state as a central, organizing legal concept. The pressure would come from two directions. From above, the law of the state would become enmeshed in the law of supra-state institutions, such as the European Court of Human Rights or the European Union. And, from below, the state would contain within itself various sub-state institutions, possibly operating across political boundaries, that are themselves institutional normative orders, and thus themselves more or less autonomous sources of law.

One would be left with a picture of numerous overlapping legal systems, whose lines of influence cut across national boundaries, and in which citizens owe their loyalties to a variety of different institutions. That such a picture represents a possible state of affairs is shown by the *ius commune* tradition of the Middle Ages. But it is not clear that, within such a picture, the classical idea of the sovereign, territorial nation-state would still play a central role in legal theory. Its laws would as it were bleed away, both from above and from below; instead of *all* law being *state* law, state law would represent just one institutional normative order among many. Such a picture would answer to a political situation in which, within Europe, power had devolved away from the present national governments, towards the Union on the one hand, and towards local, sub-state institutions on the other. Europe and Scotland and Lombardy would rise in legal importance, even as Britain and Germany and Italy decline.

Such a picture has its attractions. But a great deal of theoretical work still needs to be done; and before we rush to embrace it, we would do well to reflect briefly on some important ways in which our present situation differs from that of the medievals, and to recall why the older *ius commune* tradition came to an end.

First, medieval law, and in particular, medieval canon law, enjoyed the backing, throughout Europe, of a shared set of religious beliefs—and religious beliefs, moreover, that could be enforced by a powerful and efficient Church bureaucracy. Indeed, for most of the medieval period the Church was in possession of the most sophisticated legal minds, of the most effective judicial administration, and of powerful legal sanctions; and this meant that the supra-national law promulgated by the medieval Church had a kind of power and popular acceptance that is not enjoyed today by the institutions of the European Union.

Second, the medieval period did not know the phenomenon of modern nationalism. People owed their allegiance to their local communities and to their feudal overlords, but not to abstract, linguistically-defined groups like the French nation or the German nation. These two phenomena are of course historically related, and the wars of religion of the sixteenth and seventeenth centuries are intimately bound up with the emergence of the modern nation-state.

It seems to me that these historical examples, although they do not settle the issue, at least help to show where the deep problems lie with any proposal to separate law and state in the manner MacCormick proposes. The question is whether it is possible to put the genii back in the bottle—whether, in an age in which national feelings are still intense and in which the coercive powers of supra-national law are still weak, it makes sense for legal theorists to place great emphasis on the idea of law that is independent of the state. To put the point in more abstract terms: the central issue here seems to be the question of the objectivity of MacCormick's realm of the normative, and in particular the question of the extent to which cultural relativism threatens to undermine the conception of law beyond the state, both as a theoretical matter and a practical one.