As is well known, Ronald Dworkin maintains that legal positivism is an inadequate theory of law, partly because it has nothing of interest to say about legal reasoning.\(^1\) Interestingly, one of today’s most prominent practitioners of jurisprudence and a defender of legal positivism, Neil MacCormick, has offered in response a theory of legal reasoning that he considers to be “essentially Hartian, grounded in or at least fully compatible with Hart’s legal-positivistic analysis of the concept of law.”\(^2\) He does not, however, explain in so many words what this means for his theory, except to say that his insistence on the centrality of rules to his theory of legal reasoning matches Hart’s focus on the union of primary and secondary rules in his analysis of the concept of law, and that we can identify the law using of some kind of rule of recognition.\(^3\) But, as he himself notes, even some natural lawyers would seem to accept the latter, rather modest claim.

Nevertheless, MacCormick’s theory is well worth analyzing. In crude outline, he recommends that, in the case of statutory and constitutional interpretation, the judge begin with a textual analysis of the relevant statutory provision; that if a textual analysis does not yield a determinate result, he proceed to consider systemic arguments; and that if neither textual nor systemic arguments nor any combination of these arguments yields a determinate result, he resort to consequentialist, including teleological, arguments.

In this article I intend to explore the action-guiding capacity of MacCormick’s theory. More specifically, my aim is to determine whether this theory will take us further than the so-called legal method, and, if so, whether it can give us the kind of concrete guidance we need when confronted with a hard case. Suppose a judge or an attorney or an administrator really understood and could apply this theory. Would it be of any use to him when faced with a hard case? Would it be able to guide him to a decision when the interpretive arguments conflict with one another?

I am going to argue that in many cases MacCormick’s theory can indeed give judges the kind of concrete guidance they need. The reason why MacCormick’s theory is successful in this regard is that it offers judges a reasonably firm ranking of the interpretive arguments, and that it is rather easy to understand and apply. The importance of the latter fact can hardly be exaggerated, because it means that judges will be able to apply the theory even though they may lack a deep understanding of the relevant field of substantive law.

To support this claim I am going to apply the theory to three cases decided by the Supreme Courts in the Sweden, Germany, and United States, respectively. This is not a sociological investigation, however. I am not trying to find out whether judges in these countries or elsewhere reason in accordance with MacCormick’s theory – I am concerned solely with the action-guiding capacity of the theory. The cases I discuss simply provide a realistic testing ground.

---

4 I will give a brief account of the legal method in Section 2.