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## Book Review (reviewing Theodor Viehweg, *Topik und Jurisprudenz* (1953))

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review can be broadened in our system without impairing the efficiency of administrative action.

Professor Schwartz points out various aspects of the French system that appear to him to be in advance of Anglo-American administrative law, including simplicity in procedures for appeals to the courts, and reduction of the costs of litigation.

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VIEHWEG, T. *Topik und Jurisprudenz*. München: Verlag C. H. Beck, 1953. Pp. 75.

During the 19th and a considerable part of the 20th centuries, Civil Law jurisprudence, especially in Germany and Italy, was inspired by the idea that the totality of a legal order could be conceived as a logically closed and consistent system. In such a system, every case could be subsumed under a given legal proposition, all of which could in turn be derived, through successive steps of logical implication, from a few, or perhaps even one, supreme principle. It was regarded as the supreme task of "legal science" to discover and formulate this system, and to develop the method by which it could be used for the decision of every conceivable problem. Clearly, such a system could never be found, and the practice of the courts, attorneys, and legislators could not take too seriously that predominance which was claimed for it by some, although never by all, of the scholars. Nevertheless, the widespread belief that the science of law had as its task the development of the system and the derivation from it of rules of law directly applicable to every conceivable problem was an important element in the development of that peculiar method of legal thought which has come to be known as conceptual jurisprudence and which, in its impressive consistency, spread to, and achieved a not inconsiderable influence in, the countries of the common law. Not only in America, but also in the countries of its origin, conceptual jurisprudence has come under attack. In Germany, it has, indeed, ceased to be dominant. What seems to take its place, both here and in Europe, is that kind of legal thinking which is known as the functional approach, sociological jurisprudence, or jurisprudence of interests.

In the little book here under review, Doctor Viehweg, editor of the *Archiv für Rechts- und Sozialphilosophie*, contrasts the method of "axiomatic," i.e. systematizing jurisprudence, with another which he calls the "topical," and which he finds to have been the method both of the Roman jurisconsults of antiquity and of the Bartolists who sought to adapt the rediscovered Roman texts to the practical needs of the later Middle Ages. The name of the method is derived from Aristotle's *Topics*, in which it is analyzed as a tool of dialectical discussion. Its entrance into the law is found in the close connection which is said to have existed in ancient Rome between the jurists and the orators. In

its application to law, especially in later European practice, the topical method consisted in the formulation of certain maxims of broad significance, the totality of which had in no way to form a coherent logical system, but which rather contradicted each other often enough.

Which one of these manifold applicable maxims should be regarded as pointing out the solution of a concrete problem would be determined by the jurist not in the process of the syllogism but by that sure touch which develops from the jurist's being steeped in a fixed tradition and a definite style. The author's illustrations are taken from continental law. Fitting examples might also be found, however, in Anglo-American law, to which the "topical method" had spread especially through the habit of 18th century judges and chancellors to quote a good many of those *regulae iuris* which are listed in the 50th Book of the Digest, and which, as *maxims of equity*, have helped many a chancellor to find, or at least to justify, his decisions.

Doctor Viehweg's historical survey is of considerable interest for the scholar of comparative law, especially when it is read in connection with Max Weber's sociological comparison of methods of legal thought.<sup>1</sup> Of great value to the method of comparative law is also the author's emphasis upon the necessity in legal thought to start from the problem rather than from the rule of law. Only by comparing solutions of a common problem, and of the mental ways in which the solution is found, is it possible to develop a "functional" method of comparative law. We must be sceptical, however, as to the usefulness of the topical method in contemporary legal thought. Systematic conceptualism pretended to decide practical cases by the alleged application of purely deductive logic. In fact, this apparently deductive cognition frequently served to hide volitional decisions of the legislator, the judge, or both. By thus hiding the volitional policy decisions, the method tended to render them both inconsistent and uncontrollable. The same effect is achieved by the topical method, except that its non-systematic character is openly confessed. What jurisprudence has been working for in our days is a method which makes apparent to the lawmaker in the legislature and on the bench, as well as to the citizen, the policy considerations on which the decision is, or ought to be, based. No method hiding the policies of decision will be acceptable in the age of democracy, psychoanalysis, and political science.

MAX RHEINSTEIN\*

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<sup>1</sup> Law in Economy and Society (1954), esp. chapters 7-11.

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JACKSON, R. M. *The Machinery of Justice in England*. 2nd ed. Cambridge: at the University Press, 1953. Pp. ix, 372.

This is the second edition, partly rewritten and in various respects improved, of the outstanding work on the administration of justice in England. Since the first edition appeared in 1939, as the preface discloses, observation at close