Legal Thinking Revised

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REVIEWS


What are the right mental processes by which issues of law are to be determined? This question of the "right" legal method has prominently occupied the minds of legal thinkers, especially of the earlier decades of the twentieth century. Mental processes which had been applied during the nineteenth century and had come to be regarded as being self-evident and as the only possible ones, came to be questioned and attacked, and different approaches came to be advocated as more appropriate for the solution of the legal problems of the new century. The country in which the methodological question was raised earliest was Germany, where the traditional method of the nineteenth century Pandectists was attacked in the 1860s by von Buelow and somewhat later, more violently and with greater efficacy, by von Jhering. Around the turn of the century the question de la méthode was raised in France by Gény, Saleilles and Duguit. In the new century, the Methodenstreit was continued in Italy by Ferri and, with particular vigor, in Germany by the advocates of so-called Free Law and their less radical brethren of the school of jurisprudence of interests. Here in the United States, the critique of the traditional methods of judicial thought was initiated by Roscoe Pound's postulate of a sociological jurisprudence, exemplified by the creative activities of great judges such as Brandeis, Cardozo and Holmes, and radicalized by the realists such as Jerome Frank, or Thurman Arnold. A group of methodological innovators to whom the same name of realists also came to be applied, arose in the Scandinavian countries. Their battles with the traditionalists in their part of the world was no less heated than the battle that was fought in this country in the 1920s and 1930s.

In Scandinavia the realist movement was started by Axel Haegerstroem, professor at the University of Uppsala, not of law but of history and philosophy. Historical investigation had made him aware of the connection which had existed in very early Rome between legal thinking and magical ideas. From this observation he drew the conclusion that in our times, too, such notions as justice, right, or guilt had no existence other than in the realm of superstition, that they were basic for all thinking in modern law, and that no scientifically valid system of legal thought would be possible until we disabused ourselves of these archaic ideas and all conclusions derived from them, and began "realistically" to develop an entirely new set of legal norms being solely guided by the desire to achieve the highest possible state of public welfare. Haegerstroem's discoveries were enthusiastically received by his disciple Lundstedt, who, as professor of law at Uppsala, devoted his life to
the propagation and elaboration of the new "scientific" method of legal realism by which, he hoped, our obsolete structure of society could be transformed into that better society which social science would rationally elaborate by using methods of the same kind as those by which science had brought about the great achievements of modern medicine and technology. With the conviction of the prophet to whom after millenia of darkness the truth has at long last been revealed, Lundstedt regarded it as his task to bring the light not only to Scandinavians but to all who have lived in darkness. He thus presented his ideas not only in his native Swedish but also in books written in languages of larger linguistic communities. French and German versions of Lundstedt's thought were published during his lifetime. The English version was completed by him shortly before he died on August 20, 1955. Its final publication was faithfully carried through by the Faculty of Law of the University of Uppsala. The title of the handsomely printed book, *Legal Thinking Revised. My Views on Law*, aptly indicates that it constitutes the final, and most mature, version of a scholar whose influence on Scandinavian legal thinking has been enormous, but whose ambition it was to bring about the total revision of legal thinking not only in Scandinavia but everywhere, and quite particularly in the English speaking countries whose methods of legal thought he found to be as obsolete as those of the countries of the civil law.

The book is passionately written. The English is not that of an author to whom it is his own tongue, but it reads well and is apt to convey to English speaking readers the train of the author's thought and argument, although not in all detail. Certain technical terms of the civil law are rendered by English terms which are either misleading or devoid of meaning. What American reader will know, for instance, that "vindication right" is meant to refer to the right of action of the owner of a chattel or immovable who finds himself deprived of its possession and who seeks to recover not just money damages but the possession itself, so that the term refers to the civil law counterpart of the common law actions of ejectment and replevin? Only a reader familiar with the German term "materielles Recht" will know that "material law" is to refer to that notion which in English is commonly expressed by the term "substantive law" as contrasted with "procedural law." "Hire of a thing" should be bailment or lease, "judicature" should be case law, and "law of damages" should be law of torts. The full understanding of Lundstedt's argument is thus not easy.

How significant is this argument itself? What does Lundstedt have to tell the American readers whom he so eagerly sought to reach? That he has a message, there can be no doubt. But the same
message has been stated by other thinkers, American, and European, and by quite a few of them it has been stated more clearly and more effectively. Lundstedt's message is in its essence no different from that of those other attackers of nineteenth century methods of legal thought who have been mentioned above. Their attack and that of Lundstedt are directed against the same target, i.e., that method of legal thought which has come to be called "conceptual jurisprudence." That new method which Lundstedt wishes to set into its place is the same as that which was once advocated by the German adepts of Free Law and the most radical of the American realists. Like these fellow warriors, Lundstedt has a point, but he overstates it, both in his critique of traditional legal thought and in his positive proposals.

Insofar as traditional legal thought has been bent at deriving solutions to controversies of actual life solely from those concepts which have come to be used in legal thinking, criticism has been justified and come to be accepted. If a court or a legislature is to decide whether or not the benefit of limited liability shall be available to a person who owns the entire stock of a business corporation, we all agree that the answer ought to be found upon the basis of such considerations as those by which we try to ascertain what dangers, if any, are involved in such a situation for members of society engaging in transactions with the "one-man corporation" and whether such dangers overbalance the benefit which the economy may derive from the use of the device of limited liability by a single enterpriser. Few lawyers will find it satisfactory to answer the problem by simply concluding that by definition the concept of corporation means a plurality of members and that a one-man corporation is thus conceptionally impossible. We have come to be equally dissatisfied with that line of thought which maintained that by logical necessity a contract cannot be "governed" by any law other than that of the place at which there occurred the last act necessary to render it binding. Here in the United States, as well as abroad, we have come to approach this problem of the law of conflict of laws by considering which answer serves best the social interests at stake, such as the expectations of the parties or the governmental interests of the states in question. Old-style conceptual jurisprudence in the sense just exemplified is not entirely dead, but it has come widely to be replaced by that new method which has been defined by the German writers on the jurisprudence of interests,1 in the more recent writings of Karl Llewellyn,2 or in Scandinavia by Frede Castberg.3 This "new jurisprudence"4 does,

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1The Jurisprudence of Interests (Schoch ed. 1948).
2Llewellyn, On Reading and Using the New Jurisprudence (1940).
3Castberg, Problems of Legal Philosophy (1957).
4See also J. Esser, Prinzip und Rechtsnorm (1956).
of course, not dispense with using concepts or logic; otherwise it could not be an application of reason. But it seeks to replace outmoded concepts of a purely formalistic nature by concepts which express the interests which are at stake in a given conflict and the evaluations by which a given society tries to achieve their balance at a given time. At present, we are thus no longer concerned with the establishment of the new jurisprudence as such but rather with its elaboration, refinement and application to concrete problems.

In this situation the publication of a book which still sounds the original battle cry and which sounds it as shrilly and noisily as it is done by the Swedish champion, constitutes an anachronism. Perhaps, the violence of the attacks of Lundstedt, Fuchs, Frank or Arnold was necessary to shake the fortress of the “old jurisprudence.” But today we can also see that Lundstedt widely overshot his mark both in his critique of the traditional methods of legal thought and in his design of a new method. His description of the traditional method is a caricature rather than a portrait. Lundstedt’s untenable analysis of the method applied by those judges who decided *Rylands v. Fletcher*\(^5\) constitutes a typical instance. As to his proposed method of “scientifically” exploring what is best for the common welfare, we, who have experienced two world wars, the atom bomb and the cold war, can only admire, but no longer share, the optimism of so many of the thinkers of Lundstedt’s generation. We have come to learn that the complexities of modern society rarely allow any clear prediction of the results of any social measure, as well as that men can and do disagree as to what constitutes the social welfare. As a “self-evident assumption” of his method of social welfare Lundstedt postulates that “legal activities,” i.e., the activities of law makers, judges, attorneys, etc. “are pursued by people of a sound mind and those who are not corrupted by private interests.” We can only envy a country in which one can dare to make such an assumption. But even if the assumption of general unselfishness of all the law people could be made, we can no longer believe that the social scientists can lead us into the good society. At best they can every now and then predict the proximate results of some measure of social engineering, but they can never tell us what kind of society mankind ought ultimately aim to achieve. The ultimate good is a matter of individual decision but not of scientific cognition.

Yet, when all these criticisms have been stated, *Legal Thinking Revised* is a book very much worth reading. The book documents an important phase in the modern struggle about the right method of legal thought. To American readers it illustrates the universal-

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ity of the situation in which we are finding ourselves. Lastly, and most important, Anders Vilhelm Lundstedt was a powerful personality with a powerful mind. The book is replete with brilliant ideas, striking formulations, and significant insights. Our thoughts will be clarified by Lundstedt's analyses of liability without fault or of eminent domain. His highly original ideas about English viewpoints of jurisprudence, of Pound's view of legal matters, of Fowler Harper's view of law, as well as his "concluding remarks on American jurisprudence" make familiar problems appear in a new light and will thus significantly help us in our present efforts to consolidate the new jurisprudence.

MAX RHEINSTEIN†


The symposium submitted for review offers an abundant source of information and suggested source material to those students of Mexican law to whom that subject is novel. Of even greater importance, it also provides a delightful and invigorating refresher course for those American and other non-Mexican lawyers who have previously enjoyed the privilege of "doing business," engaging in banking operations, or organizing and guiding corporate enterprises in Mexico or through Mexican associates.

Frankly, the work is good. Any criticism — if "criticism" be the appropriate word — which might be directed at it would be in relation to its brevity, not its quality. Each contributor to the symposium could, with complete justification, have expanded his contribution into a "leading article" of the American law review type, with footnotes. Understandably, however, in view of the all too scanty space allocated to each author, unavoidable restrictions of expression and reference to authorities have been imposed. Be that as it may, the several authors have accomplished a masterful performance of summarization and condensation.

In the mind of the reviewer, who has benefited by modest experience in the practices and procedures of Mexican law, the greatest practical value of the symposium results from the fact that it is the product of exclusively Mexican scholars and men of letters. Collectively, the authors are representative of the Faculty of Law of the National University of Mexico, the Mexican Bar, the Free School of Law of Mexico, and of the practicing (duly licensed) lawyer-notaries (Notaries Public) of the Federal District of Mexico.

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