The Catholic Lawyer

Volume 11
Number 2 *Volume 11, Spring 1965, Number 2*

Article 13

Méthode D'Interprétation et Sources en Droit Privé Positif

Miriam Theresa Rooney

BOOK REVIEWS

METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF

by *François Gény*

West Publishing Company, Saint Paul, Minnesota, 1963. Pp. 742. $20.00.

(Transl. by Dr. Jaro Mayda.)

Reviewed by

MIRIAM THERESA ROONEY*

In 1963, under the auspices of the Louisiana State Law Institute, there was published a long-desired translation of one of the most important contributions to Jurisprudence that the twentieth century has seen. The book is by François Gény, sometime Dean of the Faculty of Law of Nancy, France. It was his first major work, with the title of *Méthode d'Interprétation et Sources en Droit Privé Positif,* issued in 1899, with a second edition in 1919, the latter being reprinted in 1954. This translation into English by Jaro Mayda, of the University of Puerto Rico Law School, has been made from the 1954 printing.

Gény's work has long been acclaimed by the foremost American jurists, including the late Deans John H. Wigmore of Northwestern University Law School, and Roscoe Pound of Harvard Law School. Shortly after the second edition of 1919 became available, Judge Benjamin Cardozo cited it in numerous footnotes to the pioneering lectures he gave at Yale Law School, under the title of *The Nature of the Judicial Process.* Indeed, it would appear that some of the insight which prompted the Cardozo lectures may well have been derived from the stimulus provided by the books of Gény.

Because of the intrinsic merit of the book itself, and because of its undoubted influence on the so-called "new realists," which effected a changed orientation in law school teaching in the United States between World Wars I and II, it is a matter for keen regret that the entire work has not been hitherto available to American jurists and students generally. Excerpts were included in the invaluable *Modern Legal Philosophy Series,* under the editorship of Dean Wigmore—in the volume on Method (1917), and in that on Stammler (1925)—but these have long been out of print, and scarcely known to most law students of the last twenty years or so. Revived interest may be anticipated following the high praise accorded Gény in the important posthumous collection of Karl Llewellyn's essays, published by the University of Chicago Press in 1962, under the title of *Jurisprudence: Realism in Theory and Practice.* Since Professor Llewellyn did not hesitate to use the word "genius" in referring to the work of Gény, it is to be hoped that the latter's expanded four-volume study, entitled *Science et Technique en Droit Privé Positif,* published between 1914 and 1924 in France, will also

* Professor of Law, Seton Hall University School of Law.

find its way into English, but soon.

The problem which confronted François Gény as a teacher and jurist grew out of his concern with the French Code. The problem, however, is not unique for the French. Von Ihering had had similar difficulties twenty-five or thirty years earlier with the German Code; difficulties which had not been resolved fifteen or twenty years afterwards, when Eugen Ehrlich established his seminar of "living law" at Czernowitz. In the United States, where principles of law had been established by judicial decisions instead of by legislative enactments, the problem was no less troublesome, although less consciously recognized as of universal significance. The peaceful change described by Mr. Justice Robert H. Jackson in his book on the United States Supreme Court crisis of 1937, entitled *The Struggle for Judicial Supremacy,* has scarcely yet been acknowledged as evidence of a world-wide struggle for a shift from rigid legalism toward more responsible reasonableness in the application of legal rules to the facts of life. For too many judges the problem has been an isolated, interior one, confronting their own consciences alone. The teachers of the law have rarely provided enough help from the thinking aloud of the great jurists of modern times. The task of making Gény, Hauriou and Rénard, Von Ihering, Ehrlich and Radbruch, and Cardozo, Llewellyn, and Jackson, better known, is the first step in approaching the situation properly.

The precise problem which confronted all these jurists is nothing more nor less than the most insistent problem that faces all men of the law—the problem of interpretation—of codes, legislative enactments, and legal documents—the problem of decision-making, of reaching a judgment. The result cannot become an arbitrary fiat, at the price of arousing dissatisfaction, if not outright revolt. The resolution must convince, as being reasonable, in order to merit respect. In effect, the problem of the interpretation of legal rules is implicitly recognized on all sides as a function of the intellect rather than the will. It is a matter involving judgment rather than power. It calls for acceptance, rather than fearsome obedience, in its application to reasoning human beings.

Unfortunately, not all writers about law and its foundations have been clear on this point. Since the time of Francisco Suarez, who wrote perhaps the most extensive treatise concerning the laws as such, an overemphasis on the function of the will increased, paralleling the rise of nation-states, until authority or power, rather than judgment or justice, became primary in reaching decisions designed for enforcement. Command tended toward identification with law. That this overemphasis on will had not always been characteristic, notwithstanding the testimony of positivistic theorizers like Hobbes, Bentham, Austin, Kelsen, and others, is manifest in writings from Glanvill, Bracton, and Aquinas, in the twelfth and thirteenth centuries, to Francisco de Vitoria, in the sixteenth—roughly from the time of Magna Carta to the years when Columbus was discovering America. With the latter writers, judgment was recognized as an intellectual task (one cannot choose what one does not know), in apportioning to each his own. Its appeal was for acceptance by dignified human persons, not intimidated subjects. It is the merit of modern writers like Gény that their work has tended to shift the emphasis away from command and enforcement, toward judgment and fairness. In doing so,

they restore the intellect to its proper function of directing the will, or choice, in legal decisions. The dignity of the individual, whether judge or judged, is thereby enhanced through the respect accorded the reasoning powers of the persons involved.

The contemporary revolution of rising expectations, which is seen to be going on all over the world, is in fact an appeal not toward violence but rather toward participation in responsible self-government. It is more properly based on the intellectual capacities of human beings than on their accustomed subordination to arbitrary commands. Jurists trained in the prevailing theories of the last two or three centuries tend to voice alarm over growing disrespect for law. Had they been more familiar with the earlier, or with the latest writings on interpretation of law, they would be more likely to remember that most people observe the law naturally, because it is reasonable to do so, and not because they are afraid of getting caught in non-observance. It is only the unusual, or abnormal person, the uninformed, or irrational one, generally, who is inclined toward a breach.

In restoring the intellect to primacy in the interpretation and application of law, individual jurists are just beginning to find, through comparative law conferences, that they are not working alone on problems which are in fact common to all legal systems. Neither are they working in isolation from comparable disciplines, especially theology. Current developments in the latter field, in this Ecumenical era, particularly those concerned with Biblical interpretation, serve to recall that early pages of the *Harvard Law Review*[1] made reference to discussions among three eminent Harvard law professors — James Bradley Thayer, John Chipman Gray, and Oliver Wendell Holmes, Jr.—over the so-called Bangorian controversy in the Church of England, in which the Bishop of Bangor, Benjamin Hoadley, preaching before the King on March 31, 1717, interpreted his text in such a way as to give ultimate authority to the Bishops instead of the King. Interpretation, being subsequent to the command of the lawgiver, was seen to be more final, and therefore to give greater power. It was the power aspect, apparently, which intrigued Mr. Justice Holmes, and may well have strengthened his view of the importance of judges in giving effect to law. That the Bangorian controversy remained vividly in his memory over many years is evidenced by his allusion to it in paying tribute to Professor Gray in 1915, almost a quarter of a century after it had been mentioned in the pages of the *Harvard Law Review*.[2]

Because of this obvious concern with interpretation on the part of Mr. Justice Holmes, it is all the more disappointing to find that he, practically alone among American jurists, failed to appreciate the original contribution made by François Gény to the field. Perhaps it was Harold Laski, knowing the Holmes concern over interpretation, who suggested that he review the Gény volume on *Science et Technique* which reached these shores as World War I was closing. At least Laski reprinted, in the *Collected Legal Papers* of Justice Holmes which he edited in 1920, the in-

[1] Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 33 n.1 (1892); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[2] See HOLMES, BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 134 (Shriver ed. 1936).

adequate review of the Gény volume which was written by Holmes in 1918.[3] Countless readers since have formed their attitude toward natural law on the basis of the Holmes criticism without ever having read Gény or having gained any real comprehension of the problem of interpretation involved. Rereading the Holmes review over forty years later, and noting its distressing petulance, one cannot fail to agree with the suggestion that Holmes could not have read very far into the Gény book before presuming to review it.[4] The Holmes comment differs so completely from Cardozo's appreciation of the Gény approach to the problem of legal interpretation that it is all the more astonishing, coming from a jurist who was earlier concerned with the problem of interpretation in theology.

The fact that François Gény is spoken of as a neo-scholastic jurist may repel some and attract others. He does mention Thomas Aquinas occasionally. However, he does not appear to have studied Aquinas' writings extensively at first hand. Most of Gény's references to scholastic principles appear to come from Suarez, and his own attempts at reconciling will and intellect in the interpretive task disclose a Suarezian rather than a Thomistic influence. What is of more importance is the date of his work with reference to the Encyclical Letters of Pope Leo XIII. The latter had not only called for fresh attention to the writings of Thomas Aquinas in confronting contemporary problems, but he had, in 1891, published the novel Encyclical on the Social Order *(Rerum Novarum)* whose influence increases with the years. This Encyclical did make an implicit appeal to jurists. It is to the merit of François Gény that his first book, in 1899, took up seriously the Papal challenge to re-think legal institutions and the social order. The result should not be misunderstood in the Holmes manner. Rather, the powerful analysis of the relation of custom to the French Code, the rejection of juridical conceptualism, and the call for a free search for objective rules of interpretation based upon the functioning of reason and conscience, disclose not a priori philosophical thinking, but rather an extraordinarily competent legal mind which can be favorably compared with the most fruitful jurists of recent times.

As a pioneer study, Gény's book on *Méthode* says the first, not the last word, on the technique of legal interpretation. It provides challenge and stimulus for inventive thinking in the new atom-space era. It presents a model for dedicated legal scholarship. If the struggle for judicial supremacy by the United States Supreme Court since 1937 is to be seen in proper focus in the contemporary world-wide demand for law instead of war, and in the call for greater recognition of the reasoning power of human beings in participation in self-government and responsibility, this book must become better known.

The Louisiana State Law Institute, Dr. Jaro Mayda, and the West Publishing Company, deserve profound thanks for making this classic available to American students of the law and its philosophy.

---

[3] Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

[4] LLEWELLYN, JURISPRUDENCE 500 n.20 (1962).