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REVIEWS

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REVIEWS

Thus, when he says the Organization may only make agreements which are specifically authorized (supra), he fails to consider (as a logician would and as the International Court did) the "necessary implications" to be drawn from the specific powers. After all, it is a primary function of logical analysis to deduce consequences from postulates and thereby to broaden the scope of principles and widen the range of possibilities.

Kelsen's apparent use of "logic" to support restrictive interpretation results largely from his tendency to give the concepts of the Charter fixed and limited meanings, almost as though they were precisely defined mathematical symbols. Obviously this tendency makes it easier to find logical inconsistencies and technical deficiencies. But there are certainly no "logical" reasons why the admittedly vague and imprecise language of the Charter must be restricted in meaning. The Charter is surely not to be construed like a lease of land or an insurance policy; it is a constitutional instrument whose broad phrases were designed to meet changing circumstances for an undefined future. Any doubt as to the flexibility and adaptability of the Charter must surely have been resolved by recent developments.

These observations seem so close to truisms that one is inclined to wonder whether Kelsen's neglect of them is not due to his own bias—or, to put it another way, whether his "purely juristic" analysis has not actually been influenced by ideological (or shall we say, crypto-political) considerations. For throughout the book there seems to be so sustained an effort to discover the maximum of inconsistency—even absurdity—in the Charter, to characterize provisions as "superfluous" and "meaningless", to cast doubt on the legal basis of even the most innocuous decisions of U.N. organs that one is apt to infer that Kelsen's underlying objective is a revision of the Charter (see p. xvii) and a building of a new Organization closer to his own heart's desire. This is not the place to debate the political wisdom of tearing down to build anew; but it might be said that in the present state of affairs, many of us are grateful that we have at least an imperfect instrument for world order and, more important, that this instrument is being construed not in terms of its deficiencies but in order to make effective its principles and purposes.

Oscar Schachter*


Although he begins with a statement as to the "pretense" of law, Dr. Levi's book is much more temperate than most of what has been said of the

7. There is even the suggestion that the General Assembly had no legal basis for adopting a U.N. flag or declaring "United Nations Day"! (p. 194, footnote 5).

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judicial process of late. It is exceptionally well written in a clear style, with no attempt at brilliant paradox or challenging over-statement. In this respect it is an encouraging sign in contemporary juristic writing and is a promising beginning of what I confidently expect will prove a notable career in the science of law. The real contribution of the book is its thesis that the choice of a starting point for legal reasoning, as well as the development of the starting point when chosen, is a logical process. That is, the judicial process is to be looked at as logical, not merely as psychological. The concluding paragraph, pp. 73-74, is well put and calls for thoughtful consideration.

This is true despite the dogmatic assertion at the outset (p. 1): “The pretense is that the law is a system of known rules applied by a judge.” It is not so much that as a postulated ideal of a complete body of norms or patterns of decision known to or knowable by courts and practising lawyers. Like most of the postulates of practical activities it may be a useful postulate even if it is not in complete accord with the facts. It is true there is much more to a system of law than an aggregate of precepts each attaching a definite detailed legal consequence to a definite detailed state of facts. When there is such a rule it is a known rule mechanically found and mechanically applied. Thus, given a judgment of A against X, execution thereon and sale by the sheriff of a horse belonging to Y to B under the execution, and an action by Y against B to replevy the horse, the judge before whom the matter comes finds in the law book he consults this rule: “A sheriff’s sale of a chattel on execution conveys only the title of the judgment debtor.” He has then to apply the known rule. Or, again, A by deed duly executed and delivered conveys a tract of land to “X and Y.” Afterwards X sues Y to quiet title and claims that the grantor intended the title to be in X only. In this case the trial judge and the judges of the appellate court affirming his judgment knew or could find in the books they consulted that “the legal effect of a deed delivered to a grantee is to vest title in him free from any conditions, and its operation cannot be defeated by parol evidence of an intention on the part of the grantor that it should have an effect different from that apparent on its face.” If conveyance by deed eventually is superseded by transfer of a certificate or conveyance on the record of a court, then the rule is obsolete except as it may be used by analogy in some cases under the new practice where no rule is provided. Thus, although mortgage of land by pledging of title deeds became obsolete, the analogy was useful afterwards in connection with pledging of a letter of credit.

On the other hand, where it was claimed that one could acquire by adverse user a prescriptive right over navigable airspace necessary to beneficial use of the land beneath, the judges in the appellate court did not know a rule applicable nor was one set forth in the books. But they did know certain authoritative starting points for legal reasoning from which it was their duty to choose one, develop it by legal reasoning, and apply it to the case. It is this sort of case to which Dr. Levi’s book is addressed. Since in the
In the history of law at first a rule in the narrower sense, a precept prescribing a definite detailed legal consequence, is established for each definite detailed state of facts. Thus in the laws of Ethelbert (600 A.D.) a definite money composition is prescribed for injuries to the body, beginning with the hair and scalp, specifying each finger separately, providing "for every nail a shilling," and in some thirty sections covering every specific possible injury including a distinction between a bruise covered by the clothes and one not so covered. The lay public very generally believes this possible for every kind of controversy even today. Those who drew up Frederick the Great's proposed code believed it could be done and business men now urge something of the sort for the law as to restraint of trade. But the idea was given up by jurists long ago. It was rejected by those who drew up the French Civil Code of 1804 and by Austin in his notes on codification. The Roman jurists of the classical era saw that authoritative starting points for legal reasoning rather than rules in the narrower sense had to be relied on for new cases and even for new forms of old cases. In the eighteenth century it was often held that while there could not be a rule for every case, there could be a body of principles so complete that a rule for every case could be deduced from them. But there was nothing to prescribe which of the principles, which often were of equal authority and any one of which might be chosen, was to be used as the starting point for reasoning in a particular case. Paley in 1785 saw that there was "a competition of analogies."

If the postulate of precepts known to the judge is said to be a "pretense," how much more may we apply that epithet to the "mutton beefsteak interpretation" of which we have seen so much in recent years.

Again we are told that "in an important sense rules are never clear." This depends on what is meant by rule. A rule in the narrower sense, attaching a definite detailed legal consequence to a definite detailed state of facts, may be perfectly clear as to those facts although it may not be clear whether or how far it will be extended by analogy to facts outside its detailed pronouncement. In the case of a statute there may be general words raising difficult questions of interpretation or of application. But not even in a constitution is any rule necessarily ambiguous. For example: It is laid down that no one shall be "held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." Here "otherwise infamous" might call for interpretation, although it is a term of art with a historically settled meaning. But "capital crime," "presentment or indictment" and "grand jury" are certainly not ambiguous. Standards do not have clearly defined margins. Legal conceptions are clear at the core but shade off at the periphery. Legal principles more often than not come into competition. But every day practice shows that a great mass of rules are applicable and
applied without serious question. If this were not so the economic order would lapse back to the oriental type in which no long time enterprise was possible.

When legal principles have to be applied by analogy and there are competing analogies, the competition is determined by comparison of results with reference to the ideal element of law. This is the kernel of truth in the theory of natural law. But in the last century it was sought to determine such competitions by either an analytical or a historical method. It was asked, what solution would fit most logically into the general system of law; would it tend to make a consistent body of interdependent legal precepts? Or, it was asked, what solution would most accord with a continuous historical development showing the unfolding or realizing of the idea? When I was a student of law, sixty years ago, these were the questions always put and debated. But while jurists thought and taught in this way, courts thought and decided in terms of a received ideal of the end or purpose of law. The ideal in the last century was one of liberty as free opportunity; of a maximum of free individual self-assertion. It came to be one of security as the natural-law idea of a body of moral precepts was given up. In the present century "security" has been taking on a newer and wider meaning. In 1908, Ames saw the basis of liability as fault. There had been and continued to be a historical view of the doctrine of *Rylands v. Fletcher* as realization of an idea of liability to be found in cases in the Year Books. Later the idea of security was stressed and by means of it that doctrine has had a large acceptance in the law of today. But we have been going beyond it to an idea of repairing all loss and injury by imposing it on the public by way of some one able to pass it on ultimately. There is much to indicate possible extension to a basis in shifting loss to some one better able to bear it.

But the statements I have been considering are not necessary to the author's real thesis. Nor does that thesis require admitting what he cautiously advances with proper reservations, namely, the identity at bottom of legal reasoning from adjudicated cases and interpretation of legislation. In each case there is thought to be extension or restriction of a formulated proposition by analogical reasoning. In the one case, however, authority is in what was done. The formulated reason may not be authoritative. In theory, I suppose, it has been persuasive only. In the other the text is authoritative. In the one case we are not interpreting what a court said. We are seeking a principle behind what it did. In the other case we are seeking to find what the lawmaker meant by the words used. It is here we get the abuse of "legislative history" so frequently. As it has been used of late almost anything can be proved from it. As Mr. Justice Frankfurter has put it, there is "judicial interpolation into a statute of a wholly unrelated problem not envisaged by Congress." Dr. Levi's statement does have in it this truth, that in the one case there is, as Paley put it, a competition of

analogy, and in the other a competition of interpretations, determined in each case, as I see it, by measuring the result of choice by a received ideal. In this sense there is the comparison of cases which Dr. Levi points out. But it is comparison of the results of cases with an ideal result. The comparison also is made from adjudicated cases which are authoritative in the system of law.

In the long line of cases on liability of the seller of an article which causes injury to a person who did not buy the article from the first seller (beginning with *Langridge v. Levy*, 2 M. & W. 519 (1837) and ending, at least for the time being, with *McPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) and *Donaghue v. Stevenson* [1936] A.C. 85) the problem is not so simple as one of interpreting a category of "dangerous articles," nor in the cases on the extent and application of the constitutional power of Congress to "regulate commerce... among the several states" quite so simple as one of interpreting the word "commerce," nor one of interpreting the phrase "commerce among the states." It came in the first to defining negligence and choice between negligence and the warranty in a sale of goods as the basis of liability. It came in the second not only to defining commerce but to determining what was allowable in regulating it in view of the division of jurisdiction between the federal government and the states and the restriction upon exercise of federal power in the Fifth Amendment. It is noteworthy that with the rise of a new idea of the end of law in the service state, there is a proposal to give up negligence as the ground of liability, go back to the law of sales, and make the warranty run with the chattel after the analogy of a covenant running with the land in the law of property. It is not so much one of what Paley called competing analogies as one of competing starting points for reasoning. Moreover, the proposed commercial code under the auspices of the American Law Institute adopts the idea of a warranty running with a manufactured article.

It should be noted that in the line of development of liability for something marketed as the author tells us "the pattern begins with commodities mischievous through want of care" (p.8), that in *Langridge v. Holliday*, Baron Parke was reaching for the idea of casting an unreasonable risk of injury on the plaintiff, and so, as Dr. Levi tells us, there is an attempt to "find some great over all rule which can classify the cases, as though the pattern was not a changing one." This is something more than pretense. William James put it as: "Men's struggle from generation to generation to find the more inclusive order." The neo-Scholastics would say the quest of a rule of positive law according with natural law. William James would say that up to date liability for casting an unreasonable risk of injury on others is the more inclusive. I should say that it maintains the general security more completely; it satisfies more of the whole scheme of wants, desires, demands.

Indeed the *Palsgraf* case\(^3\) should be taken into account. *McPherson v. Buick Motor Co.* does not give us the whole story of development of the idea of negligence. In what Dr. Levi calls “Brett’s flight” in *Heaven v. Pender*\(^4\) (p. 8), we came very near to the “more inclusive order” of liability for casting an unreasonable risk of injury on others. There is a parallel in the search for the more inclusive order ending in working out the conception of a public utility after the analogy of the common carrier had been stretched to the breaking point. We begin with the carter and the merchant ship. In a straight line we get stage coach, canal, railroad, motor bus, motor truck, airplane. But at the same time we were making the common carrier category carry telegraph, telephone, gas company, electric power company, and radio. Public utility gave us a legal conception of a more inclusive order which could hold all and in which common carrier and the direct analogues could stand as a useful subordinate category. The search may be for a legal principle or for a legal conception.

Dr. Levi comments (p. 17) on Cardozo’s remark that “logic and utility still struggle for the mastery.” Here, as generally, Cardozo writes in the social utilitarian fashion. What is in conflict, or perhaps better is in competition, is the social interest in the general security and the social interest in the individual life. If we have our eye on the general security we impose liability at one’s peril where he maintains something or carries on some activity, harmless in its ordinary action or operation but in ordinary experience likely to get out of hand or get beyond its bounds and do damage. If we have our eye on the individual life we consider liability a consequence of fault in putting something in circulation so defectively made as to cast an unreasonable risk of injury upon others. But only for fault. When we turn to look again at the general security we get the proposition to eliminate the idea of negligence in cases like *McPherson v. Buick Motor Co.*

When Lord Atkin in *Donaghue v. Stevenson* emphasises the element of control, he is putting the case on absolute liability where one has control of something or some activity likely in ordinary experience to get out of hand and do damage. This was used also to justify the family automobile doctrine in *Durso v. A.D. Cozzolino, Inc.*\(^5\) But legislation has taken over the family automobile problem. What it remains to notice is that ultimately it is not a competition of analogies or a logic of comparison of likenesses in cases, or, as Cardozo thought, a competition of logic and utility that is ultimate. It is an adjustment of competing interests to secure as much as we can with the least friction and waste. This is the practical ideal in the judicial process. It is important to recognize it as an authoritative, received ideal, not a personal ideal of a particular judge or bench of judges. Choice of starting point and the course of reasoning from the starting point chosen

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\(^4\) 11 Q.B.D. 503 (1883).

are determined by the received ideal. Dr. Levi, indeed, brings this out in his concluding paragraph, if in different words.

As to the discussion of the long line of cases on interstate commerce, two things which entered into the decisions need to be noted. One is the quest for the more inclusive order of things or persons passing over state lines with the increasing economic unification of the country, and the other restrictions upon regulation because of the apportionment of power between nation and state and because of the limitation on exercise of federal power in the Fifth Amendment. In the cases on the commerce clause in the nineteenth century and the forepart of the present century in connection with extent of exercise of the power over commerce, we must reckon with the doctrine of the nineteenth-century historical school, then dominant in juristic thinking, that the end of law was liberty and hence a law, as a restraint on liberty, had to be justified. It had a certain presumption against it. So it was not entirely a question of interpretation of "commerce among the several states," nor of the relation of nation and state, nor of applying the Fifth Amendment. It was one of applying that amendment as declaratory of an ideal of as little restraint upon free action as was consistent with general free action.

Sir Courtney Ilbert says truly that Parliament is not interested in lawyer's law. This is coming to be no less true in America. There is little of the publicity which is vital to the politician, faced by primaries and elections, in the everyday adjustment of the relations of man with man. Economic controversies, humanitarian projects, extension of state aid to voters and projects of internal improvement take up the time of crowded sessions. Cardozo spoke feelingly of the failure of the legislature to do what it should for the courts in providing needed laws. One result of this is that there is heavy pressure on the courts to do by judicial decision what ought to be done by legislation. When they are thus given a roving commission to legislate there is an immediate effect on interpretation. A good deal may still be said for the criteria in Heydon's case: The old law, the mischief, the remedy and the reason of the remedy. It is as to the mischief, the remedy, and the reason of the remedy that legislative history, so much relied on recently, may be relevant. But it is often nowadays an excuse for what Austin called spurious interpretation—extensive or restrictive interpretation to make a new act.

Gray pointed out that much of the difficulty in interpretation of statutes comes from statutes covering a whole field to the exclusion of the common law which the courts must apply to all controversies within that field even if the legislators had never thought of and so had not provided for a state of facts now arising in it. The courts must ascertain a legislative intent which did not exist. These cases call for a technique of interpretation and application which the less ambitiously comprehensive lawmaking of the past did not require. The abuses of interpretation which have grown up have been
pointed out by Mr. Justice Frankfurter 6 and by Mr. Justice Jackson. 7 Here is a field of judicial (one can hardly call it legal) reasoning which calls for better juristic treatment than it has received.

But to return to the main current of Dr. Levi’s discussion, he approaches the subject of the judicial process, which has now the place in the science of law held in the last century by the nature of law and the relation of law and morals, in a much better way than most of those whose reference of everything to economics and abnormal psychology has held the ground so fully in the present generation. Along with Llewellyn’s work upon the task of the legal order and the relation of sociology and jurisprudence, Dr. Levi’s book promises a more real realism and augurs well for the science of law.

Sir Frederick Pollock used to say that a man who would publish a book without an index ought to be banished ten miles beyond Hell where the Devil himself could not go because of the stinging nettles. Things one wants to refer to may be hidden even in 74 pages.

**Roscoe Pound†**

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