

THE LEGAL REALISTS AND THE JUDICIAL PROCESS: WHAT COURTS DID, AND WHAT THEY SAID THEY WERE DOING, IN THEIR OPINIONS

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I published, four decades ago, a monograph entitled *Judicial Review in the English-Speaking World*. I had, at the time, freshly arrived at the University of Toronto Law School after four years as a very young faculty member at the Yale Law School and the Yale Graduate School. The Yale University Press had accepted the manuscript for publication but, on my transfer to the University of Toronto, I felt it more appropriate to give it to the University of Toronto Press, especially since the book was an empirically-based, comparative study of appellate judicial behaviour in the United States and the main Commonwealth countries, including Canada. Years later, when the Director of the Press, Marsh Jeanneret, and his editors revealed the truth to me, I learned that the manuscript had caused some immense political-diplomatic problems for the Press. In accordance with their required practice, the editors of the Press had handed the manuscript over to two outside readers for what was expected to be a *pro forma*, rapid endorsement. Instead, one of the readers, an eminent, if somewhat traditional, English jurist had written back to say that it was a dangerous, heretical work that would undermine respect for the authority of the courts. A second reader had predicted a rift in relations between the University Law Schools and the judiciary if the work were ever published.

In any event, Marsh Jeanneret told me that the University of Toronto Press had decided to grit its teeth and get two further outside opinions. I believe they were from Paul Freund of the Harvard Law School, the then doyen of American Constitutional Law professors, and Alexander Brady of the University of Toronto Political Economy Department, the top scholar of the day on British and Commonwealth constitutional institutions. Both of these new opinions were affirmative; both scholars were intellectually forward-looking. Thus, in 1956, the Press published my treatise which over the next thirteen years ran through four separate, expanded and revised editions.¹ Even so, the Dean of the University of Toronto Law School of the day, Cecil ("Caesar") Wright, who had agreed to write the Foreword, and who was, in his day, a crusading radical in his approach to traditional legal doctrines (Justice Ivan Rand once characterized him, accurately,

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¹E. McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1956). The latest edition is E. McWhinney, *Judicial Review*, 4th ed. (Toronto: University of Toronto Press, 1969).

as a “militant scholar”), felt it advisable to sound certain caveats in what a review described as less a conventional Foreword than a dissenting opinion.²

Looking back over the changes in dominant legal philosophy over four decades, it is difficult not to be a little amused at the intellectual-legal furore that the book and its main thesis created on its first publication. Anglo-Saxon common law legal thinking outside of the United States, at that time, was still dominated by what may be called the “celestial omnibus” theory of law: somewhere, floating in the medieval skies, there was a complete and self-contained body of legal rules and precedents that would provide a ready-made, immediate answer to every new problem coming before the courts. Somewhat less reverently, that particular thesis as to the judicial role in decision-making was described as the judicial slot-machine approach. Characterized as a purely mechanical operation, it was said that if one put in a coin, out would come the right answer. It was a period when Canadian and other Commonwealth law schools were dominated by legal positivism – “black-letter-law”. Courts insisted on “legal logic” and a narrow, grammatical, logical exegesis of the written texts which came before them, and absolutely excluded all else, especially references to social or economic policies underlying the law.

It is often forgotten that legal positivism, as the dominant philosophy in British legal institutions and law schools, did not reach its apogee until the close of the 19th century, after hundreds of years of creative judicial interpretation, extension and modification of the common law, such as it may have been, or was imagined to have been, in its original, pristine, medieval form. Max Weber, in his transcendental, national, legal comparisons, identified “logico-formal-rationality” as the ultimate historical development of the legal systems of states that had attained free market, capitalist economies.³ That was, in fact, true of Great Britain and the British Empire at the close of the 19th century, and of a number of Great Britain’s emerging, commercial rivals in continental Europe in the years immediately leading up to the outbreak of World War I. In contrast to Great Britain, however, in continental Europe, legal positivism – what the Europeans called jurisprudence-of-concepts – was under challenge at the moment of its apogee: in France, by the embryonic legal sociologists like Duguit, Durkheim, and Gény; in Germany, by social utilitarians like von Ihering and Stammler and neo-Hegelian legal historians like Kohler.

In the United States, Roscoe Pound, the long-time Dean of the Harvard Law School from the early years of the present century onwards, founded the school of sociological jurisprudence. Its basic ideas found formulation in a series of lucid,

²E. Kahn, [untitled] (1958) 75 S. Afr. L. J. 112.

³M. Weber, *Law in Economy and Society*, 2d ed., trans. E. Shils & M. Rheinstein (Cambridge: Harvard University Press, 1954).

short monograph and essay studies by Pound,⁴ but were given perhaps their most disciplined and intellectually comprehensive presentation in the writings of his best student, and sometime junior colleague, the English-born Australian jurist, Julius Stone.⁵ At the Yale Law School, Charles Clark and Wesley Sturges, as successive Deans, recruited a ministry of diverse talents, ranging from the philosophers Filmer Northrop and Felix Cohen, to applied jurists like William O. Douglas (later Justice of the U.S. Supreme Court), Underhill Moore, and Jerome Frank (later of the U.S. Court of Appeals).⁶ The last three, with Karl Llewellyn of the University of Chicago, completed the legal realist group. They insisted on getting behind the legal myth propounded by legal positivism and studying what judges actually did – what social interests they advanced or denied – as distinct from what they said they were doing in their formal judicial opinions, written, as the legal realists contended, only after the event to rationalize decisions already reached, based on other, extra-legal considerations. The seminal phrase, for the legal realists, was the celebrated dictum of the great Justice Oliver Wendell Holmes, uttered in the most celebrated dissenting opinion in U.S. Supreme Court history, on the inarticulate major premises of social and economic policy that shape and influence court decisions in great political-social causes célèbres.⁷

My introduction to the legal realists came at the Yale Law School where I was a student, and then the young colleague, of Filmer Northrop and Jerome Frank, and where I also met Wesley Sturges, Charles Clark, and William O. Douglas who was a frequent visitor. I made the pilgrimage to the Harvard Law School to meet Roscoe Pound, then in retirement but continuing in full literary production. I also met Paul Freund, who put me in touch with his former teacher, Felix Frankfurter, then on the U.S. Supreme Court; and I made the journey to Washington, lunched with the judge and later exchanged some letters with him.

These meetings with former academics who had become latter-day judges, like Clark, Frank, Douglas, and Frankfurter, were crucial in providing the bridge between the competing philosophical approaches to the judicial role – judicial positivism *versus* legal realism, free-law-finding and sociological jurisprudence – and the actual processes of decision-making which conflict on the main appellate tribunals. Add in a dash of Harold Lasswell and Myres McDougal's "policy-

⁴See, for example, R. Pound, *The Spirit of the Common Law* (Boston: Marshall Jones Company, 1921), *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922), and *Social Control Through Law* (New Haven: Yale University Press, 1942).

⁵J. Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control: A Study in Jurisprudence* (Buffalo, N.Y.: William S. Hein & Co., 1950).

⁶In particular, see J. Frank, *Law and the Modern Mind* (Garden City, N.Y.: Anchor Books, 1930).

⁷*Lochner v. New York*, (1905) 25 S. Ct. 539 at 546-547.

oriented" approach,⁸ with its neo-Hegelian historical influences (which McDougal, at least, would deny), and you have the key to the philosophical argumentation and demonstration in *Judicial Review in the English-Speaking World*. It has more to say on the intellectual conflicts between William O. Douglas and Felix Frankfurter *qua* judges of the same tribunal, both of them post-legal realist and post-sociological jurisprudence in their thinking, than on the original scientific-legal sources like Roscoe Pound and Jerome Frank. Further, the discussion is projected in terms of *judicial activism* as opposed to *judicial self-restraint*, rather than in the more precise judicial categories and classifications established by the academic jurists cited.

In my early ventures into Canadian law, I was easily able to identify Justice Ivan Rand as a pioneer judicial activist of unusual clarity and succinctness of literary formulation, with a keen knowledge of constitutional history and a sensitivity to long-range societal goals. I met Justice Rand, and we exchanged letters and opinions for some time. I had had some intentions of attempting a judicial biography of him and had collected some preliminary notes, but it was never completed. Instead, largely by chance, I have had the opportunity, in the last few years, to complete two other judicial biographies of members of another tribunal, the International Court of Justice. One of these, the Japanese judge Shigeru Oda, is an academic lawyer by formation (at the University of Tokyo and the Yale Law School) with a keen interest in legal history and its progressive development to meet changing societal conditions.⁹ The other, the Polish judge and sometime President of the World Court, the late Manfred Lachs, was an erudite scholar and experienced diplomat to whom I had the pleasure of introducing the writings of Jerome Frank, William Douglas and Felix Frankfurter.¹⁰ Judge Lachs was a pioneering judicial activist on a tribunal that was still dominated by legal positivism at the time of his first election to it. I think Lachs helped guide the World Court to an approach more in line with its *U.N. Charter*-based mandate for the progressive development of International Law. In the process of building a liberal majority, he knew how to temper judicial activism by deferring to considerations of timing, manner and degree while developing the principles of the new International Law. This effects synthesis and reconciliation of judicial activism and judicial self-restraint, and is the key to what the Dutch Foreign Minister, in his post-mortem valedictory to Judge Lachs, identified as

⁸See their seminal essay, H.D. Lasswell & M.S. MacDougal, "Legal Education and Public Policy: Professional Training in the Public Interest" (1942-43) 52 Yale L. J. 203, and multiple later works.

⁹E. McWhinney, *Judge Shigeru Oda and the Progressive Development of International Law: Opinions (Declarations, Separate Opinions, Dissents) on the International Court of Justice, 1976-1992* (The Hague: M. Nijhoff Publishers, 1993).

¹⁰E. McWhinney, *Judge Manfred Lachs and Judicial Law-Making: Opinions on the International Court of Justice, 1967-1993* (The Hague: M. Nijhoff Publishers, 1995).

“judicial wisdom” – the ultimate quality of historically relevant and effective judicial decision-making.¹¹

¹¹P.H. Kooijmans, “In Memoriam: Manfred Lachs,” in *Law as a Vehicle for Change: Speeches in Honour of Manfred Lachs* (The Hague: M. Nijhoff Publishers, 1994) 20.