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Method of Interpretation and Sources of Private Positive Law (*Méthode d'Interpretation et Sources en Droit Privé Positif*), (2d ed.) by Frangois Géný. Translated into English by the Louisiana State Law Institute, with a critical introduction by Jaro Mayda. West Publishing Co., St. Paul, 1963. Pp. cxviii, 624. \$20.00.*

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BOOK REVIEW

Method of Interpretation and Sources of Private Positive Law (Méthode d'Interpretation et Sources en Droit Privé Positif), (2d ed.) by François GénY. Translated into English by the Louisiana State Law Institute, with a critical introduction by Jaro Mayda. West Publishing Co., St. Paul, 1963. Pp. cxviii, 624. \$20.00.*

The original contribution of François GénY to the science or philosophy of law is widely recognized among scholars throughout the world.¹ Due to the language barrier, however, exposure to GénY's thinking has until now been limited in American jurisdictions, since only fragments of his work were available in English translation. The Louisiana State Law Institute has performed another fine service by sponsoring the translation of GénY's major work, *Method of Interpretation and Sources of Private Positive Law*. Through its greater availability to American lawyers, GénY's *Method of Interpretation* may have long-range impact on American, and particularly Louisiana, legal thought, as it did in France itself, by furnishing another dimension to studies in the argument and decision of legal issues for which legislation has not explicitly provided.

"METHOD OF INTERPRETATION" AND FRANÇOIS GÉNY

François GénY was born in 1861 near Nancy in the Alsace-Lorraine region of France. He died in Nancy in 1959, at the age of ninety-eight, having spent almost his whole lifetime in that area. He was a Professor and Dean of Law from 1885 until he retired in 1931, serving at the University of Nancy from 1901-1931, as Dean of Law there from 1919-1925.

His *Method of Interpretation and Sources of Private Positive Law* was first published in one volume in 1899, when GénY was thirty-eight years of age. The work was revised and reprinted in two volumes in 1919. The revised edition contained no change

*Remarks delivered at the Twenty-Third Annual Meeting of the Louisiana State Law Institute, March 13, 1964, Alexandria, Louisiana.

1. See, e.g., DABIN, *LE CENTENAIRE DU DOYEN FRANÇOIS GÉNY* (1963); STONE, *THE PROVINCE AND FUNCTION OF LAW* ch. 7 (1961); 1 POUND, *JURISPRUDENCE* 181-84 (1949); FRIEDMAN, *LEGAL THEORY passim*, especially 284 (1960); LOUSSOUARN, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 LA. L. REV. 235, 242-43 (1958).

in the original text, but Gény's ideas were sharpened somewhat in the revision of the footnotes. However, the 1919 revision also included an epilogue of four chapters critically commenting upon various developments in theories of legal interpretation which occurred after publication of the 1899 text. A second edition of this 1919 text was published in 1954, shortly before Gény's death, with Gény himself, then aged ninety-three, assisting in the final reprint. The Law Institute translation is of this second or 1954 edition of the 1919 revision.

Gény was the author of many other legal works, most noted of which is his four-volume treatise, *Science et Technique en Droit Privé Positif (Elements and Technique in Private Positive Law)*, published by volume between 1914 and 1924. This work developed and made more explicit the themes of *Method of Interpretation*.

In his *Method of Interpretation*, Gény is not primarily interested in abstract legal theory. Rather, he has the purpose of analyzing, for practical use in decision-making, what considerations should be binding upon a judge in deciding a case, and what should be merely discretionary. Gény recognizes that the judge must decide cases in accordance with formal law where it is truly applicable. However, he seeks to delimit precisely the circumference of the legislative intent of a statute, within which the purely legislative directive is mandatory. Then, he attempts to set forth an objective method by which the judge may decide cases where legislation has not directly provided a law-rule to apply. Crucial to Gény's original conception of method is what he calls *libre recherche scientifique* — literally translated, "free scientific research." The concept is that of *free search* (that is, uncontrolled by formal law) for the elements from which to construct a decisional rule, based upon *objective* elements of law and society capable of being pragmatically verified or disproved.²

The rather formidable title is merely descriptive. The "method of interpretation" and the "sources" sought are limited to the area of "private" law, where the private interests of citizens *inter se* are primarily involved, and to "positive" law,

2. GÉNY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW (MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF) x-xii (2d ed., transl. by La. St. L. Inst. 1963). Footnote citations to the subject work will hereafter simply indicate the page number of any references to this edition.

consisting of the rules enacted or adopted or applied by proper authority of the government of an organized society. Yet Gény indicates that his method of analysis is valid in other fields of law also; he restricts his discussion merely to make it more manageable.

The work opens with a description and analysis of what Gény calls the "traditional" method of ascertaining the applicable legal rule. In the second part, he exposes the fallacies, weaknesses, and dangers in this traditional method. Finally, he sets forth a preferred method of interpretation, together with a systematic doctrine of the sources to be used, which he claims to be a more objective and more realistic method than the traditional one for assisting the courts to settle disputes.

CRITIQUE OF THE "TRADITIONAL" METHOD

In civilian jurisdictions such as Louisiana, where the bulk of private law is codified, the traditional method of finding the applicable legal rule is through the actual or presumed intent of the legislators. Gény points out that legislation is actually adopted by a group of human beings to apply to a contemporary problem or social scene. However, legislation can never be all-inclusive. It is impossible for the legislators to conceive of every possible variation of facts. Perhaps as important, the social conditions which the legislation is designed to regulate are in the process of constant evolution.

The author suggests that it is fictitious to ascribe any actual intention to the real legislators, when we interpret a statute to apply it to later or different type-situations than those the original statute was specifically designed to regulate. We, the interpreters, may *infer* that the legislators *would* have provided a similar rule for the new type-situation, which we, the interpreters, now choose to classify as similar to that *actually* legislated for. But it is we who make this inference, not the legislators. The author points out that it is also a fiction, with regard to *actual* legislative intent, to *presume* that we are accomplishing the same statutory purpose, or that we are applying an earlier statute to a different situation in a later era in the same manner as the earlier legislators *would* (that is, *might*) have, had they foreseen it. In fact, it is we, the later interpreters, and not the elected law-makers, who are expanding the original purpose

and scope of the earlier statute so as to regulate a later and different situation which was not within the actually intended purview of the statute.

Gény agrees that, in general, the functional or objective method of interpretation, by applying a presumed legislative intent, does accomplish a useful purpose. It stretches the old legislation so as to cover new type-situations, without constant resort to legislative revision or re-enactment, which as a practical matter would be impossible. He urges, however, that we recognize the fiction as such, and goes on to warn us of at least two dangers.

In the first place, by holding ourselves to a legislative text not specifically intended to apply, we are arbitrarily strait-jacketing legal reasoning. By so restricting the frame of initial reference we are limiting the choice of rules that might reasonably be applied to the new type-situation, although in fact the legislators did not consider regulating it and did not actually intend the old legislative rule to have the effect of limiting judicial reasoning.

In the second place, Gény suggests, the common restriction of judicial reference to the legislative text usually results in the erection of logical abstractions as the presumed basis of all deductions from the legislative rule. These abstract concepts are useful work tools to apply the legislation to the type-situation for which it was designed. However, when we use these abstract concepts to regulate new or different type-situations, we apply an artificial rule designed by the interpreter, not the legislator. Such a rule is not itself tied to reality by having been enacted for an existing social condition; it is formulated and applied on the basis of word-logic, without any attention to the fundamental purposes of legal rules, social utility, and fairness. These criteria are not, at least ostensibly, regarded in the "traditional" view as factors to be weighed in the formulation of the rule.

In applying an artificial rule so deduced, the interpreters themselves supply a "legislative" rule which is not in fact founded upon the will and authority of the legislature itself, but is instead formulated on the basis of abstract concepts not grounded in social life. In so doing, Gény says, the interpreters or judges themselves exercise legislative powers by devising the new rule for the new type-situation; and, worse, they do so

blindly and without ostensible consideration of the practical utility and fairness of the rule thus derived, ignoring the very criteria which should be the fundamental bases for the formulation of any legislative rule to apply in a living society.

CRITIQUE OF GÉNY'S METHOD

What different approach, then, does Gény suggest?

The problem in a civilian jurisdiction is, he says, "to determine how the powers and functions in the field of formulation and application of legal concepts should be distributed between the legislation and the jurisprudence, between the function of determining *in abstracto* the rules of law and that of putting them into practice and applying them *in concreto*."³

In summary, Gény feels that an interpreter or judge in deciding a case must apply (1) any rule furnished by written law actually applicable, (2) if none, any custom applicable (and he defines custom more broadly than many of us do), and (3) if neither written law nor custom directly furnishes the applicable rule, then the interpreter must engage in what he calls a "free objective search for rules" (*libre recherche scientifique*).⁴

The latter is a process by which the interpreter or judge is frankly recognized as having responsible discretion to apply — where written law is silent — a rule of his own devising, consonant with the ends of justice and the practical needs of society. Gény points out that by the traditional method of interpretation also, the judge has discretion in the inference or deductions he may make in the interpretation of the so-called legislative "intent" where the statute itself is silent; but, he suggests, this "traditional" discretion is actually more subjective in practice than that by his method, since the ostensible bases for the exercise of "traditional" discretion are not related to social needs and consequences but exist only in the mind of the judge or interpreter.

3. P. 71.

4. At p. 517 (in the 1919 epilogue), Gény says that article 1 of the Swiss Code of 1907 (which was adopted independently of Gény's influence but after publication of his *Method of Interpretation* in 1899) was the best summary of his arguments. This code article provides: "The statute governs all the matters within the letter or spirit of any of its provisions. In the absence of any applicable statutory provisions, the judge shall decide according to customary law, and in its absence according to rules he would enact as a legislator. In this he shall follow the established doctrine and decisional law."

Basically, then, Gény agrees that formal written law must be binding upon the judge-interpreter, if such law is reasonably designed to apply to the particular type-situation now to be decided. Gény insists, however, that in applying the statute as a binding directive we must not go beyond the specific and subjective intent of the legislators at the time the statute was enacted: the legislative rule must be applied to accomplish only the specific purpose and to regulate only the specific type-situation the real legislators had in mind when they enacted the statute. Otherwise, a statute grounded in justice and utility for one sort of situation may fail to achieve these ends when misapplied to a different and later type-situation.

However, it should be noted that Gény does not disapprove of new rules deduced intellectually from statutes initially designed specifically for other purposes. He simply says that, in so deducing a new rule, we must frankly recognize that we as judge-interpreters are acting on our own and are not carrying out any *legislative* intent. The importance in the distinction is that, while we *must* apply legislative intent (irrespective of whether the general rule produces results which seem fair to the interpreter), we are *not* so bound when the rule is devised merely from doctrine or interpretation rather than from actual legislative intent. Therefore, application of the new rule derived from interpretation (not legislation) may be evaluated in the light of its general fairness and utility; the judge-interpreter has complete discretion not to apply the new rule if it fails to meet these fundamental tests; and, if it so fails, the interpreter then may, if need be, formulate a new rule from objective sources other than the statute itself.

If no imperative written law is applicable, Gény says, the only other source of binding and unquestionable rule is that of "custom." This custom must be based upon (a) usage in fact, that is, upon a course of social conduct, plus (b) the conviction of the persons involved that the usage is binding under the sanction of law. He points out that customs arising from usage unrelated to formal law are playing less and less important a part in the mobile population of today's civilization with its rapidly changing industrial society, although custom from ancient times was the parent of much of today's written law. However, Gény suggests that another sort of binding custom is of growing importance in today's world: the custom of judicial decisions and

legal doctrines, upon which people actually rely in their day-to-day dealings, with the conviction that such usage represents binding law. That is, although the decisions and legal doctrines upon which the customs are based may not be grounded upon actual legislative intent, nevertheless the common consent to the custom as a binding regulation, with the social conduct in reliance upon it, secure for this custom a binding authority which the courts must without discretion apply in relevant fact-situations within its scope.

Aside from written law and custom, Gény recognizes no other sources of authority as truly binding upon the judge-interpretor. Legal decisions or doctrines which have not acquired the force of a custom by producing social conduct in reliance upon them, are, Gény says, merely persuasive as *one* of the sources, although perhaps one of the most important, upon which the judges may draw in deciding a concrete case now before them, in instances when an applicable binding rule is not directly furnished by statute or by custom.

Finally, when binding statute or custom does not provide the rule to apply to decide the concrete case before him, the judge should then decide the case by roughly the same considerations as those which influence a legislator in adopting a written statute. The rule so adopted should therefore be grounded upon its practical usefulness in accordance with the "norm of living life," and in accordance with concepts of justice and fairness which dominate all Western countries.

Law is not reduced to the level of subjective impressionism on the part of the interpreter, Gény says, when we recognize frankly that the interpreter has discretion to find the applicable rule, by the "free objective search for rules" (*libre recherche scientifique*).

In the first place, this free search by the interpreter for a rule is really just "an emergency method, which is a necessary part of any complete legal system"⁵ to fill in the gaps where written law does not provide an appropriate rule which is binding. Gény thus indicates that this "free search" method is only necessary in a small minority of cases, since in the great majority of cases we are furnished binding or all-persuasive rules

by formal authorities. In a 1961 law review article the late Judge Charles Clark of the United States Second Circuit estimated that only approximately ten percent of the cases in his high appellate court permitted discretion for the judge to determine by social value which was the most preferable legal rule to apply to resolve the dispute then before the court — an estimate, he pointed out, which was similar to Justice Cardozo's.⁶

In the second place, Gény felt that the discretion of the interpreter was not unlimited. By the method of interpretation advocated by him, certain objective sources provide the rules which interpreters should apply. In applying these formal sources under the free search method, the rule derived from these formal sources should be weighed to determine whether its application is justified by its practical utility and fairness in the type-situation then before the court. This new rule should be based on "the needs that result from the nature of the matters and the conditions of life."⁷

When formal law authority does not provide the rule, Gény says that the judge should adopt "an independent scientific procedure" by scrutinizing "the objective nature of things" and searching for "the balance of interests" practically affected, rather than finding the rule "by means of a forced interpretation of statutory texts."⁸ He explained that "law ought to be discovered in the realities of social life,"⁹ and that the aim of the judge is to discover the deeper realities upon which even the formal sources of law are based, in order to find the correct rule to apply where written law is silent.

Gény summarizes the judge's mission as follows: "How else can this inquiry be conducted if not through an investigation of our moral nature, a scrutiny of the principles of our political organization, penetration of the needs of our economic order, so as to find out the superior rules which express the conditions vital for our society at the present time, and which should therefore govern the individual will?"¹⁰

The positive sources from which the judge should draw, Gény says, in his effort to secure "justice and social usefulness

6. Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 256 (1961).

7. P. 142.

8. P. 420.

9. P. 493.

10. P. 424.

through an appropriate rule,"¹¹ and in an effort to base the rule upon the nature of things, remembering that "the purpose creates all law,"¹² are as follows:

First of all, by analogy we may draw from existing written law and customs. We seek the fundamental principle upon which an existing formal law is based, to derive from it a new rule, which, if it meets the test of justice and social utility, will then accord with the underlying legal thrust for equality before the law: that is, that similar fact-situations should be governed by the same general legal sanctions and principles. (By analogy, of course, we either deduce a general rule from a special text; or, from a general rule applicable to other situations, deduce by analogy a rule which is adaptable to a new type-situation and based upon the same legislative concepts as motivate the original statute.) But it should be remembered that the rule thus derived by analogy from written law can only be regarded as a rule which the legislators themselves did not provide as a binding directive, and which therefore may be discarded by the judge-interpreter if, as a general regulation, it does not meet the legislative tests of social fairness and utility.

Next, outside of the persuasive sources found in the formal legal system itself — represented by analogy from statute and by court decisions — Gény suggests that we should also take into consideration other extra-legal elements in the formulation of the rule to decide the unprovided-for case before us, such as: the ethical make-up and religious organization of the jural society in which the rule is to be applied, so that the rule adopted should be generally consistent with such ethical and religious ideals; the political structure and the political ideas upon which the society is founded, which represent a social force with which the legal rules should be consistent; the economic structure of the society, which in our Western civilizations includes the principles of private property, freedom of contract, and the succession of heirs to the property of their decedent; and the contemporary social organization of which judicial practice is only one component, insofar as the organization reveals a state of order and equilibrium with which the contemporary legal rules should accord, and to which historical and sociological considerations are pertinent.¹³

11. P. 354.

12. P. 363.

13. Pp. 391-99.

We must do our best, Gény says, to extract the essence from the pattern of human institutions, for the whole life of society should be the source of a legal rule rather than sterile logic which merely affords the deduction of abstract principles that are not necessarily based upon their social utility.

Gény concludes that, in order to maintain the balance of social interests which must be a fundamental guide to the interpretation of law, the interpreter should (1) recognize the legal interests actually involved in the situation, (2) evaluate their relative force, (3) weigh them to discover those interests of the greatest social importance, and (4) establish a rule which is in accord with the most desirable balance of the different interests involved.

The present reviewer's discussion of Gény's method of judicial interpretation has no doubt imperfectly and incompletely explained his thought. Further, it cannot be as interesting in the abstract, as described in this review, as it is in the text itself through Gény's development of his thesis by concrete illustrations, which bring home to the reader the force of his reasoning. For the reviewer, Gény's analysis and suggested method was not just an X-ray showing the internal arrangement of the legal system; it was more a sort of stethoscope, catching the living beat of the law in action.

THE TRANSLATOR AND HIS INTRODUCTION

This review should not be closed without comment on the really excellent and readable translation accomplished for the Law Institute by Professor Jaro Mayda of the Law School of the University of Puerto Rico. Professor Mayda, a native of Czechoslovakia who has taught law both in that country and in this, is an authority in the field of comparative law.

Professor Mayda's contribution includes an excellent eighty-page critical introduction. This introduction enables us to view Gény's work in the context of his times and of general legal theory, and with some perspective on subsequent and comparative legal developments. For this reason, the introduction should be read before reading Gény's work proper, even though, for a non-specialist such as the reviewer, the introduction is somewhat heavy reading due to the heavy concentration of legal thought in it.

Also, in suggesting to a non-specialist reader how best to enjoy *Method of Interpretation*, the reviewer is inclined to add that Gény's footnotes may be ignored without great loss by such a reader. For a specialist, they no doubt sharpen and illuminate Gény's thought; but they are often heavy going for the general reader, without adding much to his appreciation of the text itself.

CONCLUSION

As a final observation, we should discuss the possible query by a busy contemporary practitioner or judge: what practical value can there be for me in 1965 to read Gény's work?

I can only say for myself that Gény's analysis and the clarity of his ideas have exposed to me much more clearly and explicitly currents and values in judicial decision which generally we think of, if we recognize them at all, only as silent and unconscious influences upon the direction of the development of law. Gény's approach calls for frank and explicit recognition in a formal and open way of these decisional forces, so as the better to control and utilize them objectively.

I do not believe I am disclosing any secrets of the conference which have not been described by judges far more able and articulate and prominent than myself, when I say that the decision of close legal questions often involves more than the logical or mechanical application of prior recognized legal rules. Where explicit law does not provide direct guidance, decision often must involve in addition a value-judgment, based, whether consciously or unconsciously, upon the very elements of practical utility and fairness which Gény emphasizes are the mainspring of all law.

Perhaps, as Gény suggests, frank and open recognition of this discretionary element in the decisional process might actually limit potential subjectivism on the part of the judges if judicial discretion is openly exercised, where permitted by a legislative hiatus; but only through some formal system such as Gény suggests. This approach might furnish a more intellectual and objective basis for decision-making, as compared with using the discretionary elements of decision-making unconsciously or by blind instinct, or under the delusion that the use of word-logic is the sole basis of decision when actually the issue calls for a

discretionary selection between values. This approach might also permit the practicing bar to organize the proof and argument of their cases in conformity with the actual bases upon which they are to be decided, rather than to satisfy imaginary artificial concepts, the application of which only seems to be dictated by logic but which actually (unless the judge himself is mechanically applying rules without regard to their purpose) are selected as applicable only because of the fair and useful general results they will produce.¹⁴

In any event, Gény's analysis of the discretionary element in judicial decision-making is as valid today as it was when he wrote it in 1899, as is his critical analysis of any method of judicial interpretation which pretends to deny it. Likewise as timely is Gény's call for more explicit recognition that sometimes policy factors are necessarily basic elements in decision-making.

*Albert Tate, Jr.***

14. It should again be emphasized that Gény's "free objective search for rules," as well as the observations in this paragraph of the text, are intended to apply only to the relatively small proportion of cases to be decided where the legislature or formal law does not provide a rule intended to govern the decision and where therefore the court has discretion in the selection of the rule to apply to decide the case. See also text at notes 5 and 6 *supra*.

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