

BENJAMIN  
CARDOZO'S  
OPINION ON  
JUDICIAL PROCESS

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## CHAPTER 1

### INTRODUCTION

**Benjamin Nathan Cardozo** (May 24, 1870 – July 9, 1938) was an American jurist who served on the New York Court of Appeals and later as an Associate Justice of the Supreme Court. Cardozo is remembered for his significant influence on the development of American common law in the 20th century, in addition to his modesty, philosophy, and vivid prose style. Cardozo served on the Supreme Court only six years, from 1932 until his death in 1938, and many of his landmark decisions were delivered during his eighteen-year tenure on the New York Court of Appeals, the highest court of that state.

Cardozo was born in New York City, the son of Rebecca Washington and Albert Jacob Cardozo. Both Cardozo's maternal grandparents, Sara Seixas and Isaac Mendes Seixas Nathan, and his paternal grandparents, Ellen Hart and Michael H. Cardozo, were Sephardi Jews of the Portuguese Jewish community, affiliated with Manhattan's Congregation Shearith Israel; their families emigrated from England before the American Revolution, and were descended from Jews who left the Iberian Peninsula for Holland during the Inquisition.<sup>[1]</sup> Cardozo family tradition held that their ancestors were Marranos from Portugal although Cardozo's ancestry has not been firmly traced to Portugal.<sup>[3]</sup> "Cardozo" "Seixas" and "Mendes" are common Portuguese surnames.

Benjamin Cardozo was a twin with his sister Emily. He was a cousin of the poet Emma Lazarus. He was named for his uncle, Benjamin Nathan, a vice president of the New York Stock Exchange and the victim of a famous unsolved murder case in 1870.

Albert Cardozo, Benjamin Cardozo's father, was a judge on the Supreme Court of New York (the state's general trial court) until he was implicated in a judicial corruption scandal, sparked by the Erie Railway takeover wars, in 1868. The scandal led to the creation of the Association of the Bar of the City of New York and Albert's resignation from the bench. After leaving the court, he practiced law until his death in 1885.

### **Early years**

Rebecca Cardozo died in 1879 when Benjamin was young. He was raised during much of his childhood by his sister Nell, who was 11 years older. One of his tutors was Horatio Alger. At age 15, Cardozo entered Columbia University where he was elected to Phi Beta Kappa, and then went on to Columbia Law School in 1889. Cardozo wanted to enter a profession that could materially aid himself and his siblings, but he also hoped to restore the family name, sullied by his father's actions as a judge. When Cardozo entered Columbia Law School, the program was only two years long; in the midst of his studies, however, the faculty voted to extend the program to three years. Cardozo declined to stay for an extra year, and thus left law school without a law degree. He passed the bar in 1891 and began practicing appellate law alongside his older brother. Benjamin Cardozo practiced law in New York City

until 1914. In November 1913, Cardozo was narrowly elected to a 14-year term on the New York Supreme Court, taking office on January 1, 1914.

### **New York Court of Appeals**

In February 1914, Cardozo was designated to the New York Court of Appeals under the Amendment of 1899, and reportedly was the first Jew to serve on the Court of Appeals. In January 1917, he was appointed to a regular seat on the Court of Appeals to fill the vacancy caused by the resignation of Samuel Seabury, and in November 1917, he was elected on the Democratic and Republican tickets to a 14-year term on the Court of Appeals. In 1926, he was elected, on both tickets again, to a 14-year term as Chief Judge. He took office on January 1, 1927, and resigned on March 7, 1932 to accept an appointment to the United States Supreme Court.

His tenure was marked by a number of original rulings, in tort and contract law in particular. This is partly due to timing; rapid industrialization was forcing courts to look anew at old common law components to adapt to new settings. In 1921, Cardozo gave the Storrs Lectures at Yale University, which were later published as *The Nature of the Judicial Process* (On line version), a book that remains valuable to judges today. Shortly thereafter, Cardozo became a member of the group that founded the American Law Institute, which crafted a Restatement of the Law of Torts, Contracts, and a host of other private law subjects. He wrote three other books that also became standards in the legal world.<sup>[5]</sup>

While on the Court of Appeals, he criticized the Exclusionary rule as developed by the federal courts, and stated that: "The criminal is to go free because the constable has blundered." He noted that many states had rejected the rule, but suggested that the adoption by the federal courts would affect the practice in the sovereign states.

### **United States Supreme Court**

In 1932, President Herbert Hoover appointed Cardozo to the Supreme Court of the United States to succeed Justice Oliver Wendell Holmes. The *New York Times* said of Cardozo's appointment that "seldom, if ever, in the history of the Court has an appointment been so universally commended." Democratic Cardozo's appointment by a Republican president has been referred to as one of the few Supreme Court appointments in history not motivated by partisanship or politics, but strictly based on the nominee's contribution to law. However, Hoover was running for re-election, eventually against Franklin Roosevelt, so a larger political calculation may have been operating.

Cardozo was confirmed by a unanimous voice vote in the Senate on February 24. On a radio broadcast on March 1, 1932, the day of Cardozo's confirmation, Clarence C. Dill, Democratic Senator for Washington, called Hoover's appointment of Cardozo "the finest act of his career as President". The entire faculty of the University of Chicago Law School had urged Hoover to nominate him, as did the deans of the law schools at Harvard, Yale, and Columbia. Justice Harlan Fiske Stone strongly urged Hoover to name Cardozo, even offering to resign to make room for him if Hoover had

his heart set on someone else (Stone had in fact suggested to Calvin Coolidge that he should nominate Cardozo rather than himself back in 1925). Hoover, however, originally demurred: there were already two justices from New York, and a Jew on the court; in addition, Justice James McReynolds was a notorious anti-Semite. When the chairman of the Senate Foreign Relations Committee, William E. Borah of Idaho, added his strong support for Cardozo, however, Hoover finally bowed to the pressure.

Cardozo was a member of the Three Musketeers along with Brandeis and Stone, which was considered to be the liberal faction of the Supreme Court. In his years as an Associate Justice, he handed down opinions that stressed the necessity for the tightest adherence to the Tenth Amendment.

## **Death**

In late 1937, Cardozo had a heart attack, and in early 1938, he suffered a stroke. He died on July 9, 1938, at the age of 68 and was buried in Beth Olam Cemetery in Queens. His death came at a time of much transition for the court, as many of the other justices died or retired during the late 1930s and early 1940s.<sup>1</sup>

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<sup>1</sup>[en.wikipedia.org/wiki/Benjamin\\_N.\\_Cardozo](https://en.wikipedia.org/wiki/Benjamin_N._Cardozo)

## CHAPTER 2

### 1. The Method of Philosophy

Benjamin N. Cardozo book *The Nature of the Judicial Process* deals with four chapters: I. The Method of Philosophy; II. The Methods of History, Tradition and Sociology; III. The Method of Sociology and the Judge as a Legislator; IV. Adherence to Precedent, the Subconscious Element in the Judicial Process.

Benjamin Cardozo's discussion on the nature of the judicial process begins with a series of questions asking precisely what a judge does when he decides a case. In the *The Nature of the Judicial Process*, he posed the problem thus:

"What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, how do I reach the rule that will make a precedent for the future?"<sup>2</sup>

He sees as the force formulating "judge made law" some principle whether it is unavowed, inarticulate, or Subconscious. Conscious principles which are to guide the judge in arriving at decisions in appellate cases are latent within the cases, and they may be separated and classified. Of the subconscious forces which lie behind a judge's decision he says: "All their lives, forces which they do not recognize and cannot name, have been tugging at them-inherited instincts, traditional beliefs, Acquired convictions, and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of the total push and pressure of the cosmos,"<sup>3</sup> Which, when

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<sup>2</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process*, page no 10

<sup>3</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process*, page no 13



reasons are nicely balanced, must determine where choice will fall.-These subconscious forces, however, and their influence in decision, were never treated very completely by Cardozo. The questionnaires as to where the law is to be found that the judge will apply. Cardozo does not deny that when constitution and statute are clear, the judge's search is at an end. In this event the role of the judge becomes secondary. But not so clear is the area left by the gaps in the law. For these exigencies he advocates a method *of* interpretation by the judges within the interstitial limits of the *Jus scriptum* suggested by Geny and Ehrlich “ a method of free decision- *Libre recherché scientifique*”<sup>4</sup> of this judicial interpretation he says “ the function flourishes and persists by virtue of the human need to which it steadfastly responds”<sup>5</sup>. It is important to note that Cardozo is urging this method of free decision in the instance where statute and constitution fail. At this point the common law as interpreted by the judge comes into play in filling the gap. He freely admits that *stare decisis* is “at least the everyday working rule”<sup>6</sup> of the law. Yet he sees the method of free decision as the process that gives a system of living law. Finally, he points to the need for a guide to govern the choice of the judgments potentially applicable in a given case, in order that the judgment rendered is not the personal whim or caprice of the judge.

Cardozo warns that common law, though a gradual development of judicial decisions over the years, does not work from “pre-established truths of universal and inflexible

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<sup>4</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 16

<sup>5</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 18

<sup>6</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 20

validity to conclusions derived from them deductively.<sup>7</sup>” Rather, it developed inductively, moving from the particular to the general. He observes the phenomenon of changes in judicial decisions in specific areas of law, construction of spite fences, and ones allowed, is now prohibited, rights of action, formerly non-assignable, may now be assigned. He has seen the process of gradual change in man-made law come full circle, holding something lawful that was formerly unlawful, and it prompts the remark: “nothing is stable. Nothing is absolute. All is fluid and changeable.”<sup>8</sup> There is an endless “becoming” we are back with Heraclitus.” from these observations of ceaseless change in law, the need for a stability upon which to predicate decision emerges clearly. This is the heart of his problem.

Cardozo states this problem that confronts the judge as twofold:

“He must first extract from the precedent the underlying principle, the ratio decidendi, he must then determine the path or the direction along which the principle is to move or develop, if it is not to wither and die”.<sup>9</sup> He does not dwell long on the first part of the judge’s method, the extraction of the principle from the cases decided in the past, but turns quickly to his main concern, the application of the principles extracted to the case before the judge. Edwin Patterson has observed, concerning the lectures comprising the *Nature of the Judicial Process*, that they are “the most philosophically native and yet the most vigorous and constructive of the three books” which Cardozo wrote on the philosophy of law. The vigour and urgency of this work stems from the

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<sup>7</sup> Benjamin N. Cardozo, *the nature of the judicial process*, page no 22

<sup>8</sup> Benjamin N. Cardozo, *the nature of the judicial process*, page no 28

<sup>9</sup> Benjamin N. Cardozo, *the nature of the judicial process*, page no 28

formulation of what have now become the famous four methods of applying a principle or rule of law to a case.

Cardozo states the four methods: “the directive force of principle may be exerted along the line of logical progression, this I will call the rule of analogy or the method of philosophy, along the line of historical development, this I will call the method of evolution, along the line of the customs of the community this I will call the method of tradition, along the line of justice, morals and social welfare, the mores of the day, and this I will call the method of sociology.”<sup>10</sup> These methods outlined, he turns to the first method, the method of philosophy, to analyse and describe it.

Cardozo treats the method of philosophy first because it has certain “presumption” in its favour. “it has the primacy,” he says “that comes from natural and logical and orderly succession”<sup>11</sup> Again he speaks of “ the principle of philosophy, I.e., of logical development”.<sup>12</sup> In the absence of some sufficient reason to the contrary, the method of philosophy is to be used. It might seem that for Cardozo the method of philosophy is equivalent to the method of logic, or that philosophy is viewed by him as being simply logic. But perhaps his real thought may be found in his observation on the need for the use of this “logical” method”: “adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.”<sup>13</sup> Thus Cardozo did not simply equivalent philosophy and logic, but rather considered that simple adherence to precedent was a logical, and hence a philosophical, approach. Moreover, it seems that in this method

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<sup>10</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 30 &31

<sup>11</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 31

<sup>12</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 32

<sup>13</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 34

Cardozo saw a partial solution to the problem of giving stability to judge-made law. He views the work of the judge in applying this method as the task of “keeping the law true in its response to a deep-seated and imperious sentiments.”<sup>14</sup>

To describe Further the method of philosophy he turns to case in which the method is applied. The cases analysed are predominantly those in which a strictly logical and unbending application of a principle of law has worked a grave injustice, or that class of cases in which an injustice was averted by restoring to an opposite principle. It is when two lines of logical progression converges, both stemming from an established legal principle, that “history or custom or social utility or some compelling sentiment of justice.....must come to the rescue of the anxious judge, and tell him where to go. He realizes that sentiment cannot yield to logic and the reason must control the play of sentiment. Justice and sentiment guide in the choice between the two principles, and reason “in its turn reacted upon sentiment by purging it of what is arbitrary, by checking it when it might otherwise have been extravagant, by relating it to the method and order and coherence and tradition.”<sup>15</sup>

Cardozo points out that the misuse of this method of Philosophy “being when its method and its ends are treated as supreme and final.”<sup>16</sup> With Geny, he recognizes the need for a human positive law that grows with the times. The method of philosophy will furnish in part that principle of growth for human positive law. For the essence of the method of philosophy is “the derivation of the consequence from a rule or a principle or a precedent which, accepted as a datum, contains implicitly within itself

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<sup>14</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 35

<sup>15</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 45

<sup>16</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 46

the germ of the conclusion.”<sup>17</sup> It will be interesting for one reading Cardozo’s first philosophical work to note the frequent reference to Francis Geny.

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<sup>17</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process*, page no 49

## CHAPTER 3

### Lecture II: The Methods of History, Tradition and Sociology

Cardozo describes the other three methods or principles of selection guiding the judge in the path of developing the system of living law. This is the methods of history, custom and sociology. It does not delay long on the method of history, For him the method of history is predominantly an investigation of origins as opposed to the method of philosophy or the logic which is mainly the work of reason. It is clear that in his development of the method of history he limits that method to clarifying a problem in law rather than solving it. Equally clear is Cardozo's refusal to approve of historical school of jurisprudence, such as that advanced in the nineteenth century by F.C. Von Savigny (1779-1861). Of this historical school A.P.D "Entreves has this to say:

" the historical school had begun by stressing the growth and development of law, it ended by fostering its scientific study. It had begun with an apology for history. It ended with an apology for jurisprudence.' To such a narrow view of jurisprudence Cardozo did not give his approval. For him the duties of a judge went beyond bare historical exegesis of the problems occurring in judicial process.

Cardozo admits that the development of positive law has taken place in a historical context. He realizes also that the development of positive law considered apart from that context would be meaningless for those interpreting it. It seems clear that his

sympathy does not lie with this historical method, though he admits its utility in areas such as the interpretation of the law of feudal tenures and contracts.

The third method or principle of selection to guide the judge in determining the application of a principle of the law is the method of custom. Cardozo rejects Coke's theory that the common law is separated from customs, and Blackstone's that custom pervades all of the law. These were the old views, the views that prevailed at different times in the thought of English Jurisprudence. Cardozo's view is more moderate. "In these days," he says, "at all events, we look to customs, not so much for the creation of new rules, but for the tests and standards that are to determine how established rules shall be applied." Customs, if it is to obtain the dignity of positive human law must do so through legislation. It is enough for Cardozo that the method of custom exercise its creative power "not so much in the making of new rules as in the application of the old ones." But the potential of custom to be extended until it becomes identified with "customary morality, then prevailing standard of right conduct," brings the method of custom or tradition to the point of convergence with the last method, the method of sociology.

## CHAPTER 4

### Lecture III: The Method of Sociology. The Judge as a Legislator

From the first three methods of selection, i.e., of philosophy of history and of customs, we see that no one method is free from all trace of one or more of the other methods. The same phenomenon is true of the last method, the method of sociology. Cardozo understands the method of sociology as a larger and more all-inclusive method than any of the former three. Of this method he says: “finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and bend custom in the pursuit of other and larger ends.” He states as the final cause of law the welfare of society, and points out that all other methods are dominated by this cause. Since this method of sociology is to be the tool or instrument of the judge, there must be some limit to the method to prevent its uncontrolled exercise by the judge. The method of sociology is, for Cardozo, the method par excellence for filling up the “gaps in the written law.”

Many jurists and philosophers of the law have stressed the restrictions on the discretion of the judge in his “filling in the gaps” Few summed it up more tartly than Holmes: “ I recognise without hesitation,” he said , “ that judges must and do legislate, but they do so only interstitially, they are confined from molar to molecular motions.” But Cardozo is concerned not so much with the rise of the gap to be filled as he is with “the principle that shall determine how they are to be filled, whether their size be great or small.” Here again the emphasis is placed on the method of selection rather than on what is selected, and the method of sociology in making this selection



he takes as its criterion the social welfare. Difficult enough is the task of formulating the methods of selection, but more difficult by far is the task of interpreting them. “social welfare”<sup>18</sup> is sufficiently broad in scope to resist any telling definition. Cardozo realises that social welfare can mean public policy or the social gain from adherence to a standard of right conduct- the mores of a community. “In such cases,” he says “its demands are those of religious or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind.” That Cardozo’s theory of law within the judicial process had a high moral content will emerge more clearly with time. One may see, however, that he constantly stresses the need for a moral content in law within his concept of the social welfare so essential to his method of sociology. This concept of the social welfare is in many respects analogous to the *bonum commune* in the Thomistic definitions of law. For Cardozo insists that one must look not only to individual reason for the rule but to the social welfare, the common good as well.

Cardozo analyses and describes the method of sociology with a class of cases both in constitutional law and in certain branches of private law. He regards the area of constitutional law as perhaps the most suited to the application of this method, since the constitution extends to a larger area than other rules and laws. Accordingly, the treatment of certain rights must be in larger and more general concepts. In the reduction to the particular case, there is the opportunity and need for the judge to rule whether an act or a statute is violative of or in accord with the restriction or guaranty stated in the constitution.

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<sup>18</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process*, page no 25

Liberty within the due process clause of the constitution clearly requires the interpretation of the judge to set its limits in particular cases. For Cardozo, the method of sociology is to be used to define liberty in these cases, but with the reservation that it may include a part of one or more of the other methods. Cardozo realizes the need for an interpretation of the “liberty and property” are, but he also realizes the need for an objective criterion to control the judge’s interpretation. It is interesting to note the conclusions of his passages urging a technique of “free decision”<sup>19</sup> consistently and with a caution against extreme subjectivity. His position may be said to be moderate, though at the beginning of his philosophical writing on the judicial process he was regarded as a liberal.

Of Cardozo’s method of sociology Edwin Patterson says: “the fourth method’ that of sociology, is not coordinate with the other three. In a sense it is subordinate or inferior to them, because of the probability that the logical attainment of established rules will give the court a guide which will be adequate to the needs of justice.” The method of sociology signifies, for Patterson, “an appeal to ‘equity’ in the Aristotelian sense” But to view the method of sociology merely as an appeal to equity is unnecessarily to limit that method. Closer to Cardozo’s estimate of the role of that method is the description of it by Helmut Coing, Dean of the Law Faculty, University of Frankfurt, Germany; he Cardozo understands by this method of sociology the decision on consideration of the Bonum commune, equity and social justice.’ The decision spoken of by Coing is that of the appellate judge. So the method of sociology, rather than being limited to determining exceptions to the law (as is equity), would provide

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<sup>19</sup> Benjamin N. Cardozo, the nature of the judicial process, page no 16

material for the formation of new laws where adherence to old laws would simply result in injustice because of social change. Beyond a mere appeal to “equity,” then, the method of sociology seems the method par excellence to exert the principles of natural law. And though the method lacks the definiteness that may attach to the other methods, it cannot, for that reason alone, be subordinate or inferior. The very fact that for Cardozo this method of sociology regulated the other methods when they were in conflict with one another militates against any such conclusions.

The method of sociology is for Cardozo the method by which the end of law i.e, the social welfare, is served. He believes the teleological conception of law is constantly before the judge, and he concludes that the “common law at bottom the philosophy of pragmatism.” But Cardozo insists that the fact that a law is successful has nothing to do with its validity. He urges that such an extreme position would be destructive of the consistency and uniformity secured by using the other methods. This method of sociology is guided by viewing the end of law. As Cardozo puts it: “The final principle of selection for judge, as for legislators, is one of fitness to an end.” But he is careful to stress the duty of the judge in attaining this end: “nothing less than conscious effort,” he says, “will be adequate if the end in view is to prevail. The standards or patterns of utility and morals will be found by the judge in the life of the community. They will be found in the same way by the legislator.” The analogy between the function of judge and legislator now emerges in Cardozo’s thought. The legislator creates by framing new laws suited to the needs of the community for which he legislates, the judge legislates only in the gaps left by the legislation, but cannot, in Cardozo’s opinion, be blind to the same needs he observes in the community. The

judge's function is performed by using one of the methods of selection, in this way he is said to legislate.

Cardozo points out the divergence of thought on the question of whether the judge should use a subjective or objective standard to determine the norms of right and useful conduct. He notes and approves the need for an objective standard to prevent "what the Germans call "Del Gefuhlsjurisprudenz," a jurisprudence of mere sentiment or feeling. He rejects the view that the subjective standard should prevail, and says the standard should be that of the community, the mores of the time. But here he cautions that this does not mean "that a judge is powerless to raise the level of prevailing conduct." Cardozo is concerned with the case in which practices that do not meet accepted standards of morality have gained a temporary hold. In such a case he believes that it is the duty of a judge to hold to the accepted standards of morality. This action he seems to equivalent with a subjective measure, when in reality it would be objective if measured by the "accepted standards of morality" in the event that they are not interpreted subjectively. The predominating desire is to raise the standards of morality at a high level and keep them there. This is one of the notes in his concept of the judicial process the judge must insure that the law its application has a high moral content.

Misleading both in its brevity and simplicity is his analysis of the judicial process itself: "my analysis of the judicial process comes then to this, and little more: logic and history and custom and utility, are the accepted standards that singly or in combination shape the law" here the search for Cardozo's concept of the judicial process might stop, if this scant statement did not contain within itself the obvious

question as to what determines the application of one method in preference to another, and at what point the desirability for symmetry the *elegantia juris* should be sacrificed for larger interests. In the main, he urges adherence to precedent. But equity is not administered by legislatures. “the social interest,” says Cardozo, “served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.” The balance of these interests in the proper choice of methods is the hall-mark of judicial process.

If it is the judge’s function to balance the social interests, there must be a standard by which to check his action. That standard is the same for the judge as it is for the legislator life itself. In exercising his functions the judge should be guided and restrained by tradition, the members of his own profession, example of the other judges, and the spirit of the law. Yet his work within these limits is still creative. “The law,” Cardozo says, “is not found, but made.” If this remark is taken at face value, he advocates usurpation of the legislative function. But Cardozo’s view is not so broad, although he sees an analogy between the functions of judge and legislator. He notes the development of the analogy in countries where the judicial initiative is more restricted than in the U.S. drawing on Geny to state the limits of the judicial function, he quotes the following passage

While the legislator is not hampered by any limitations in the appreciation of a general situation, which he regulates in a manner altogether abstract, the judge, who decides in view of particular cases, and with reference to problems absolutely concrete, ought, in adherence to the spirit of our modern organisation, and in order to escape the dangers of arbitrary action, to disengage himself, so far as possible, of

every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.

Both in Cardozo's own remarks and in those he cites as authorities in support of his view of the judicial process as creative, the need for free decision coupled with an objective standard stand out clearly.

In affirming the power of the courts to declare law "and within limits the duty, to make law when none exists," Cardozo careful to point out that he does not ally himself with Coke, Blackstone and Hale, who held that judges do not legislate, nor with Austin, Holland, or Gray, who held that there is no reality in law but the decisions of the courts. Rules of law which are embodied in decisions do not, for Cardozo, lose their force as law merely because judges overrule them. Rather, the rules retain their force as law independent of the pronouncement of the judge in a given case. Thus the creative work of the judge lies in his choice of methods of selection, the law embodied in the precedent applied has existence apart from its application by the judge. Concerning natural law Cardozo point out the revival of its older notion, but observes that it is in a form "profoundly altered." He expresses no desire to enter into verbal speculation concerning the problem, but says: "what really matters is this, that the judge is under a duty, within the limits of his power of innovation., to maintain a relation between law and morals, between the precedents of jurisprudence and those of reason and good conscience." There will be a fuller discussion of this question of natural law in the writings of Justice Cardozo in this third chapter of this thesis.

## CHAPTER 5

### **IV Adherence to Precedent. The Subconscious Element in the Judicial Process.**

Cardozo then turns his attention to the weight and importance that should be placed upon precedents. He analyzes a number of cases in the fields of substantive and adjective law, and sees the need for development in those fields. Although impressed by the growing discussion as to whether the rule of adherence to precedent ought to be abandoned, he reasserts his position that adherence to precedent should be the rule and not the exception. He will not sacrifice stability and symmetry of the legal order for a number of isolated cases. The change he envisions is by degrees, and not by a violent reversal of direction in the wake of a more stable policy of adherence to precedent. In discussing adherence to precedent, Cardozo distinguished between static and dynamic precedents. The outcome of a case which involves a "static" precedent is not of great importance; such a case can seldom admit of any decision but one, and does not affect jurisprudence one way or the other. "Dynamic precedents," however, are those which when decided will have an effect on jurisprudence, and will effect as well a development in the law. "These are the cases," says Cardozo, "where the creative element in the judicial process finds its opportunities and power." In conclusion, then, in this first work, the Nature of the Judicial Process, Cardozo elaborates the four methods of judicial decision. Their importance for understanding his philosophy cannot be overestimated. He placed stress definitely upon the first and fourth methods, the method of philosophy or logic, and the method of sociology. The method of philosophy gave to the law certainty and stability--the symmetry needed

for reasonable predictability. The method of sociology gave room *for* the exercise of judgment by the court to mitigate the harshness of strict application of a rule which would work a hardship. The latter calls for the interstitial legislation of a judge in his application of precedent to fill the gaps left by the law in certain instances. In his other writings on the philosophy of law, Cardozo elaborates those principles, giving more precise expression to his concept of the judicial process.



## CHAPTER 6

### THE CENTERS IN THE NATURE OF THE JUDICIAL PROCESS.

#### Truth

One can locate it in Cardozo's exposition of the first of his four forces-the method of philosophy. He believes the merit of this method lies in governing the "affairs of men with the serene and impartial uniformity which is of the essence of the idea of law" and it will help shape "great and shining truths" from the "sordid controversy of the litigants". The strong belief that there are singular truths which all knowledge should strive for is one of the most fundamental traits of the Modern. Cardozo does not introduce this concept into legal discourses but he does indirectly make a case for it. However, he refuses to engage with the contours of this truth, and thereby sidesteps one of the most contested spaces within the modern. The major ideological battles within the modern have been fought for the control of the terrain called truth. Often these claims were made on the basis of the "rational" or the "scientific", which were acknowledged as the only possible way to reach the "truth". For example, Lenins much quoted claim for maxims is a classic example of such a technique- "Marxism is true, because it is scientific" Cardozo, though ideologically far removed from lenin, shares this fascination for truth and also believes in the qualities that the path should have- order, uniformity. It is highly problematic to claim one singular truth, since it is subsequently likely to become the site of major operation of power. Power seeks to enforce its own version of truth and in the process silences the various other "truth". So when power imposes the "truth" that "heterosexuality is natural ", homosexuals

become “unnatural” and therefore “criminal”. This insensitivity to the order is not uncommon in Cardozo’s work.

### **Logic**

The second center which Cardozo engages in is a center common to most post-enlightenment philosophical discourses-logic. Aware of the realist argument, Cardozo first acknowledges that a perfect logical consistency in judicial decisions is something that is rare in practice. Nevertheless, he strongly argues for the need for logic in the judicial process and the inherent good that is associated with a logical approach in litigation. He argues that if there are “inconsistencies”, then history, custom or sociology (the other forces) may step in, but in case of a perfect legal problem, logic must be adhered to.

Thereafter, he establishes a link between logic and impartiality. He assumes, like many other modernist scholars, that a logical analysis and solution to a problem is essentially impartial and unbiased.

### **Uniformity**

One particular sentence of Cardozo’s says that the lack of uniformity may “raise a feeling of resentment in my (litigants) breast”. The phrase of Cardozo’s regarding the resentment arising out of the non-uniformity of justice also illustrates the particular historical context in which Cardozo operated. Cardozo served as a judge in a nation which purported to function on liberal capacities principles. Due to the rather short remembered history of the white American man, he never had to deal with the feudal

structure of justice delivery. In a feudal judicial process, justice delivery is not uniform but personal and tangible. An Indian scholar has to deal with this sort of a judicial process not only because this was a prevalent feature of the present for a vast number of Indians. In India, justice delivery does not end with the high court's and the Supreme Court but extends to the Panchayats and gram Sabhas where village elders dispense justice. Such personalised and tangible justice is often more valued than the impersonal and uniform kind handed out by courts. Therefore, unlike Cardozo, it is not easy for an Indian scholar to claim that the lack of such qualities would lead to resentment in the mind of the justice seekers.

### **The “Mores” of the Day.**

On the method of sociology, which later scholars have termed the greatest of his four methods in terms of its impacts, Cardozo's belief was that “the final cause of law is the welfare of society.” And he hoped that judges would always strive to shape the law in such a way as to promote “the welfare of society” acting within the limits imposed by the constitution and with respect for precedent, traditions and history. At this early stage, the technique contemplated is a rather vague expression of a noble intention. Cardozo stated that there may be occasions when the mores of the day may conflict with the personal views and morals of the judges. His solution was simple. He felt that in the event of a conflict, the mores of the community must prevail. “a judge, I think would err if he were to impose upon the community as a rule of his life his own idiosyncrasies of conduct or belief” he elaborated that a judge is “under a duty to conform to the accepted standards of the community”. This, however, is to beg the

question- how does one ascertain the accepted standards of the community? One is inclined to believe that Cardozo was talking of a majoritarian principle, whereby the morals of the majority are those which the judge should follow.

The problem of the mores of the day is heightened in the Indian Context where the judges sometimes do not share class consciousness as the majority of the population and therefore often have a drastically different set of moral and ethical values from that of the majority. The ,mores of the day then end up becoming the mores of certain educated elites who have come to control power in post-colonial India. At the risk of generalisation, one could easily point to the example of environmental litigations in India to bear out the arguments. Judges have often been sympathetic to environment causes (like automobile pollution) which trouble the urban middle class (with whom the judges often share a consciousness rather than those which are important to the rural poor. Cardozo brushed this issue aside by saying that the different moralities of the different judges would cancel each other out.<sup>20</sup>

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<sup>20</sup> <http://www.manupatra.co.in/newsline/articles/Upload/A149DB6F-9D09-4B63-B963-D493286739D5.pdf>

## CHAPTER 7

### CONCLUSION

Judicial process is a method of free decision or –librem recherche scientifique" as it was called by Francois Geny. This free decision is the common-law as interpreted by a judge in a case where statute or constitution are silent and precedent absent. In this sense, free decision fills the gap in the Scriptum, but it is balanced by stare decisis as at least an everyday working rule. Free decision also gives a partial explanation of the phrase "judge-made law." For the judicial process is more than a description of the merely static, imitative and administrative function of the judge applying an existing rule or principle to a case before him for decision. Secondly, judicial process is both science and art. The judge must first turn to statutes and precedents to extract the underlying principle, the ratio decidendi then he must determine the path or direction along which the principle is to move or develop. As the extraction of the underlying principle or rule implies a science, the application of that principle to a case implies an art. Although Cardozo's emphasis is on the latter of the two aspects of judicial process, his concept of the whole process involved both elements of science and art. Thirdly, judicial process is a methodology for applying the principle or rule of law to a case to be decided according to one or more *of* the four methods: the method *of* philosophy or Logic, the method of history, the method of custom, and the method *of* sociology. The emphasis here is placed on the fact that judicial process is a method; in other words, Cardozo's view of the judicial process was radically structural rather

than contextual both in its origin and development. This concept of judicial process as a methodology greatly influenced his notion on the question of natural law or the meaning and genesis of law. For Cardozo's almost exclusive concern with method undoubtedly influenced his decision to leave the more basic and fundamental questions of natural or moral law to "the statesman and the moralist." Fourthly, judicial process insures to law in general a high moral content. Cardozo freely admits that the judge must be objective in rendering his decisions. There must be no mark or trace of personal whim or caprice. This does not mean, however, that the judge is powerless to raise the level of the prevailing standard of conduct. And though the judge must be controlled by an objective standard, he should not be forbidden to take the initiative when either failure to act or resort to the legislature would leave the threatened wrong unremedied or unchecked. This concern for insuring a high moral content in law will be treated more specifically when we treat his notion of legal justice. Fifthly, judicial process balances the use of the four methods of decision in such a way as to serve the social interests. The standard by which this balance is achieved is the same for the Judge as for the legislator--life itself. In other words, the Judge should be guided or restrained by such things as the example of other judges, the spirit of law, and the examples of the members of his own profession. Yet with all this as a guide the judicial Process is still creative, since creation consists in applying principles and rules of law or in choosing the method for applying these things; this means that law has an existence apart from its application by the judge. Here again the methodology of Cardozo shows the structural rather than the contextual approach to the question of law in the judicial process. Sixthly, Judicial,

process looks to social welfare as an end to measure the effectiveness of law. The four methods of decision are not ends in themselves but means to the end of securing social welfare. Social welfare is measured by a judge's experience of life, his understanding of the prevailing canons of justice and morality, and his study of the social sciences. But for a given case, in default of objective standards furnished by the social sciences, the judge must be guided by his own set of values. In this Cardozo differs from those positivists who would maintain that in the absence of an objective standard determined by the legislature the judge is not free to decide a case using his own set of values. Seventhly, judicial process is an indispensable agency of growth for law. Though Cardozo admits that the majority of law does and must come from the legislature, he denies that the legislature is a sufficient agency for the growth of law. Central to this notion is his insistence that the actual work of legislating occupies only part of the time for those members of our government who act in the legislative branch. While the judiciary devotes full time to the work of deciding cases and dispensing justice. The creative action of judicial process is, for Cardozo, a necessary principle of growth for law. Eighthly, judicial process insures legal justice which is "so much of morality as the thought and practice of a given epoch shall conceive to be appropriately invested with a legal sanction, and thereby marked off from morality in general." In other words, Cardozo's concept of the judicial process would have this process translate a moral norm to a legal norm. With this, duties formerly considered only as moral, may be translated into law and invested with the sanction of the power of society. While Cardozo agrees that the legislature can take steps to insure legal justice, he would maintain that legal justice cannot be attained

without the aid of judicial process. ninthly, judicial process operates on a hierarchy of values. In cases where there are conflicting interests, the judge should prefer moral to economic interests, and economic to aesthetic interests. These values are to be read in the social mind--a phrase sufficiently vague to resist telling definition--but in the event that the legislature has furnished no guide for the appraisal of values, and the judge is unable to read the social mind, the judge is then to turn within himself to determine these values.. It is in this instance that the judge is to be guided by the hierarchy of values of the judicial process. Finally. Judicial process must work closely with legislative process. This cooperation between legislature and judiciary Was Cardozo's dream at the beginning of his career as a judge; and it furnished him with a topic for discourse on more than one of his. Frequent speaking engagements. Indeed, he advocated and promoted a plan for a ministry of justice that coordinated the work of the the judicial and legislative branches of the government of New York State. In his opinion. once a statute has been framed it must. if, its effectiveness curtailed, be sufficient general to be applicable in many instances. It is then for the court to determine in conjunction with the legislature, when a given case falls within the purview of a statutory provision. Judicial process must, therefore, insure a close rapport with the legislative branch if the work of either is to be effective. It seems clear that Cardozo's. Contribution to the field to legal philosopher must be measured in terms of his work on the concept of judicial process. This limitation was urged by Cardozo himself, and most of the evaluations of his work have been made in these terms. Certain writers however, have not been content to limit their criticism to Cardozo's expressed purpose. Some would value his work by Judging his writings &



as an attempt to state a strict and complete philosophy of law. This is to misinterpret his purpose. In the last analysis, Cardozo was a jurist and a judge not a philosopher. It is true that he stressed the need for a philosophy as an aid to define the ends of law and to govern its Application and growth. But his aim was to examine only one process to which the name "law" could be applied. It see possible therefore, to separate what he has done on method from the technical Implication and consequence of his writings when this work is viewed as an attempted philosophical analyses of the entire field.

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