LEGAL THEORY –II SEMINAR

TOPIC: BENJAMIN CARDOZO'S OPINION ON THE LEGAL PROCESS

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1. INTRODUCTION

BENJAMIN CARDOZO

Benjamin Cardozo was born in Winnebago City, Minnesota, on December 22, 1881; he was graduated from Yale College in 1905, and in 1907 received the degree of LL.B. *magna cum laude* from the Yale Law School, graduating at the head of his class. Throughout his career at Yale he was noted both for his scholarship and for his active interest in debating, which won for him first the presidency of the Freshman Union and subsequently the presidency of the Ya1e Union. He was also Class Orator in 1905, and vice-president of the Yale Chapter of Phi Beta Kappa.

Following his graduation from the School of Law he entered upon the Practice of his profession in New York City and early met with the success Anticipated for him by his friends, his firm, of which he was the senior member, being recognized at the time of his death as among the most prominent of the younger firms in the city. He was counsel for the Post-Graduate Hospital of New York, the Heckscher Foundation for Children, of which he was also a trustee, and from 1912 to 1914 served as associate counsel to the Agency of the United States in the American and British Claims Arbitration. By his untimely death the bar of the City of New York lost a lawyer outstanding for his ability, common sense, conscientiousness, and high sense of justice; and Yale University lost an alumnus of whom she was proud, who gave freely of his time and thought to his class on 1905, to the development of the Yale School of Law, and to the up building of the Yale University Press, which he served as counsel.[1]

[1] BENJAMIN CARDOZO The Nature Of The Judicial Process pdf at 5

2. The Method of Philosophy

Justice Cardozo states that the role of the judge while making law is difficult. He compares a judge deciding a case with a situation where a person is making a brew cauldron. He says several factors go in making of judgment. Some of which are logic, custom, personality, sub-conscious elements and even sociological facts. Judge should not be a silent spectators but the judge should also contribute in the law making. He also takes into consideration the social factors and under such sociological factors judges finds a solution to the problem. Before knowing the proportion of the ingredient it is just and necessary to know as to what are the ingredients needed and then decide about the proportion of it. The primary inquiry has to be done as to where the judge finds the law. The job of the judges becomes easier when the rules are supplied by the statute. The Constitution over-rides the statutes but the statutes if consistent with the Constitution overrides the law of the judges.[2] In other words he says judge made law is sub-ordinate to the Constitution and Statutory law. When the rule is provided by the Constitution, then the judge has to merely apply it thus the job of the judge becomes mechanical in nature. But where the rules are unavailable then the actual exercise of the judge comes into play. In such a case judge fills the gap, doubts and gives meaning to the ambiguous words by interpreting the same. According to him in absence of Constitution and Statute, judge must look to common law which suits the case. He says deciding the case based on the precedent does not show any intellectual capabilities of the judge.

[2] BENJAMIN CARDOZO The Nature Of The Judicial Process (Universal Law Publishing Delhi 5th Ed.2004) at 14

Lord Haldsburry in

Case Quinn Vs Leathem[3]

"A case is an authority for what it actually decides and cannot be quoted as a proposition logically flowing from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Holmes says that the life of the law has not been logic. But Cardozo states that Holmes did not tell that logic should be ignored when experience is silent.

According to Cardozo if a group of case contain the same fact then all can expect the same verdict, it cannot be possible to give one set of decision to one set of litigant and another verdict to another set of litigants. Thus it would lead to injustice if that is done.[4]

Precedent should be applied as a rule rather than an exception.

E.g.:- A agrees to sell chattel to b before title passes the chattels is destroyed. The loss falls on the seller who has sued at law for the price.

A agrees to sell house to b. before the person passes on the house to b house is destroyed. The seller sues in equity for specific performance. The loss falls upon the buyer.

[3] 1901, A.C. 495, 506
[4] BENJAMIN CARDOZO The Nature Of The Judicial Process (Universal Law Publishing Delhi 5th Ed.2004) at 33

Case:- Riggs V/s Palmer[5]

In this case the testator has made a will in favour of the legatee. The legatee murdered the testator. In this case there were many logical propositions which came forward like:-

1. Binding force of will
2. Civil Court should not decide Criminal Act
3. No one should get profit from his own wrong

   The last proposition was accepted.

In this case the logic was applied taking into consideration the social interest by refusing the criminal the profit by his crime is greater than the enforcement of the legal right.

Procedure laid down by justice Cardozo

Go forward with logic, analogies comparison and reach a point. At first, there is no problem when only one conclusion can be arrived. But when views are diverged, then we should make a choice between them or come up with a third proposition combining both. History, custom, social setup and some other compelling factors helps the judge in making the decision.[6]

[5] 115 N.Y. 506

[6] BENJAMIN CARDOZO The Nature Of The Judicial Process (Universal Law Publishing Delhi 5th Ed.2004) at 43

Secretary, Madras Gymkhana Club V/s Management of the Gymkhana Club[7]

Justice Hidayatulla coming from an elite background, educated in England and always socializing in the highest of social circles found it difficult to say that a " member club was industry."

Bangalore Water Supply & …… V/s R. Rajappa & others[8]

On the other hand J Krishna Iyer who is the leader of the Labourers in Kerala staunch communist and even a member of the Cabinet when the Communist Government came in power had no problem in holding that a "member club would be industry."

[7] 1968 AIR 554
[8] 1978 AIR 548

3. The Methods of History, Tradition and Sociology

The method of philosophy comes in competition, however, with other tendencies which find there outlet in other methods. One of these is the historical method or the method of evolution. Very often the effect of history is to make the path of logic clear.[9]

Development may involve either on investigation of origins or an effort of pure reason. Both methods have their logic. Some conceptions of the law owe their existing form almost exclusively to history. They are not to be understood except as historical growths. History has taken form and shape to a larger extent under the influence of reason or of comparative jurisprudence. They are part of jus gentium. In the development of such principles logic is likely to predominate over history. In such circumstances, consideration of custom or utility will often be present to regulate the choice. A residuum will be left where the personality of the judge, his taste, his training or his bent of mind, may prove the controlling factor. I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminate the future.[10]

History built up the system and the law that went with it, a page of history is worth a volume of logic. Restraints upon alienation, the suspension of absolute ownership, contingent remainders, executory devises, private trusts and trusts for charities all these heads of the law are intelligible only in the light of history and get from history the impetus which must shape their subsequent development.[11]

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[9] BENJAMIN CARDOZO The Nature Of The Judicial Process (Universal Law Publishing Delhi 5th Ed.2004) at 51
[10] Ibid at 52
[11] Ibid at 55

Lumley v/s Gye,[12]

In this case which established right of action against A for malicious interference with a contract between B and C., exhibit the same divergent strains, the same variance in emphasis. Often, the two methods supplement each other. Which method will predominate in any case may depend at times upon intuition of convenience or fitness too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended.

If history and philosophy do not serve to fix the direction of a principle, custom may step in. When we speak of custom, we may mean more things than one. "Consuetudo," says Coke, "is one of the maine triangles of the lawes of England; these lawes being divided into common law, statute law and custom." Here common law and customs are thought of as distinct.

According to Blackstone: "this unwritten or common law is properly distinguishable into three kinds:

1) General customs, which are universal, rule of the whole Kingdom, and form the Common Law in its stricter and more usual signification.

2) Particular custom, which for the most part affect only the inhabitants of particular districts.

3) Certain particular laws, which by custom are adopted and used by some particular courts of pretty general and extensive jurisdiction."[13]

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[12] 2 El. & Bl. 216

[13] BENJAMIN CARDOZO The Nature Of The Judicial Process (Universal Law Publishing Delhi 5th Ed.2004) at 59

According to Pound, “Custom is a custom of judicial decision, not of popular action.”

According to Gray, “whether at all stages of legal history, rules laid down by judges have not generated custom, rather than custom generated the rules.”

Good -win v/s Roberts,[14]

Capable of being expanded and enlarge to meet the wants of trade.” In the absence of inconsistent statute, new classes of negotiable instruments may be created by mercantile practice. The obligations of public and private corporations may retain the quality of negotiability, despite the presence of a seal, which at common law would destroy it.

In the memory of men yet living, the great inventions that embodied the power of steam and electricity, the railroad and the steamship, the telegraph and the telephone, have built up new customs and new law.

Custom must determine whether there has been adherence or departure. My partner has the powers that are usual in the trade. They may be so well known that the court will notice them judicially. Innumerable, also, are the cases where the course of dealing to be followed is defined by the customs, or more properly speaking, the usages, of a particular trade or market or profession.[15]

[14] L. R. 1O Exch 346

[15] BENJAMIN CARDOZO The Nature Of The Judicial Process (Universal Law Publishing Delhi 5th Ed.2004) at 62

Acc. to an English judge "Our common law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency and certainty, we must apply those rules when they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them in those in which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised."[16]

"The general framework furnished by the statute is to be filled in for each case by means of interpretation, that is, by following out the principles of the statute. In every case, without exception, it is the business of the court to supply what the statute omits, but always by means of an interpretative function."[17]

According to Dean Pound-

"Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude."

The method of sociology works in harmony with the method of philosophy or of evolution or of tradition.

The transition is interestingly described by Dicey in his "Law and Opinion in England." "The movement from individualistic liberalism to unsystematic collectivism" had brought changes in the social order which carried with them the need of a new formulation of fundamental rights and duties.[18]

[16] Ibid at 68
[17] Ibid at 70
[18] Ibid at 77

Courts have been led into error in passing upon the validity of a statute, not from the misunderstanding of the law, but from misunderstanding of the facts.

People v/s Williams,[19]

In New York A statute forbidding night work for women was declared arbitrary and void in 1907. Here the fact is to give freedom to the women.

People v. Schweinler Press,[20]

In 1915, with fuller knowledge of the investigation of social workers, a like statute was held to be reasonable and valid because company making women work at nighttime and due to this they are harassed, abused; they are the victim of rape. Therefore night work is forbidden by the court.

Munn v/s Illinois[21]

It was held by the Supreme Court that the legislature had the power to control and regulate a business affected with "a public use."

[19] 189 N.Y. 131
[20] 214 N.Y. 395
[21] 94 U.S. 113

4. The Subconscious Element in the Judicial Process

Concept of Subconscious forces

Justice Cardozo was called upon to the Yale University to deliver lectures and these lectures were published under the title of "The Nature of Judicial Process." He described it in simple language; the conscious and subconscious process by which judge decides a case. Even though, he was acting judge it was difficult for him to talk or to say whether law was certain or not. He discussed the sources of information to which judge appeals and the various factors on which he relies.

According to him judges declare openly about the conscious forces which shape the form and contents of their judgments. The existence and influence of these forces cannot be ignored. But the matter does not end with recognition of these forces, deep below consciousness; there lies other forces which influence the man, whether he is a judge or litigant.[22]

Meaning of Subconscious Forces

Subconscious forces form part of mind that is not fully conscious or aware but is able to influence actions. It is through these forces that judges are kept consistent with themselves and inconsistent with one another. Each judge is influenced by his own sub-conscious.

[22] BENJAMIN CARDOZO The Nature Of The Judicial Process (Universal Law Publishing Delhi 5th Ed.2004) at 145

Acceptance of this Concept

There has been lack of frankness in much of the discussions on sub-conscious or perhaps refusal to discuss it as if judges lose their respect and confidence by accepting that they are subject to human limitations. He is very firm on the concept of influence of subconscious forces. According to him judges do not stand aloof from the great tides and currents of subconscious forces. i.e. Judges cannot be isolated from the sub-conscious forces. He says that this truth of subconscious forces should not be suppressed by acting and speaking in that favour.

Declaratory theory of Law Vs Will of Judge

According to this theory, judges only declare the law and do not make it. This is an ideal objective truth towards which every system of jurisprudence tends.

Montesquieu: - The judges of the Nation are only the mouths that pronounce the words of the law, inanimate beings who can moderate neither its force nor its rigour.

Justice Marshall,

In Osborne Vs Bank of United States[23]

The judicial department "has no will in any case. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law."

[23] 9Wheat. 738, 866

On the opposite hand, French Jurist Saleilles says "One wills at the beginning of the result and finds the principle afterwards; such is the genesis of all juridical construction. Once accepted, the construction presents itself, doubtless, in the ensemble of legal doctrine, under the opposite aspect. The principle appears as an initial cause, from which one has drawn the result which is found deduced from it."

According to Cardozo, such statement represents the element of free volition (will). It ignores the factors of determination which combine and confuse the discretion.

President Roosevelt was not a jurist but his intuitions and perceptions were deep and brilliant. He said, the chief lawmakers in our country are often the judges because they are final seat of authority. Every time they interpret contract, property, vested rights, liberty, they involve law with social philosophy. The decision of the Judge is normally based on economic and social philosophy.[24]

Justice Cardozo considers that duty of the judge is to frame decision not according to his own aspirations, convictions or philosophies but according to the aspirations, philosophies of men and women at that time. It is not possible to eliminate altogether the personal measure of interpreter because if that is done, the judge will be that of translator reading signs and symbols. According to him judges must have sympathy or concern for the spirit of their times. But he says, it is difficult to find judge having spirit of that time. No revolution of mind will overthrow the empire of subconscious forces.[25]

[24] BENJAMIN CARDOZO The Nature Of The Judicial Process (Universal Law Publishing Delhi 5th Ed.2004) at 171
[25] Ibid at 173

According to James Harvey Robinson, “Our beliefs and opinions are standard of conduct which comes to us as product of our companionship with others and not as a result of personal experience and inferences we individually make from our own observations”[26].

If a judge is given training of judicial temperament it will help in some degree to free him from the suggestive power of individual dislikes and prepossessions, but these subconscious forces will never be completely extinguished from human nature. Play of all these forces balances each other so that something remains constant at a time.[27]

[26] Ibid at 175
[27] Ibid at 176

5. CONCLUSION

The ideas of Justice Cardozo are remarkable. To judge the soundness his conclusion one requires the same kind and extent of life experience. None can express his views without experiencing it with full depth and sincerity. His work as a judge and also as a person, who enlightens us on the nature of judicial process is worth remembering. Any person who reads his lectures would feel that he is in touch with an inspiring personality.

According to Justice Cardozo judges are not frank enough to discuss these subconscious forces. They are not interested or refuse to discuss these topics as they feel their respect will be lost by accepting the human limitations. The work of Justice Cardozo has explained the interplay of subconscious forces in the judicial process. To a great extent, the concept of subconscious forces is clear and correct but it cannot be fully accepted since it suffers from certain differences.

Similarly, the duty which he has cast upon the judge is not proper. On one side, his emphasis on the influence of sub-conscious force which are personal to an individual and on the other hand, he stresses on the need to reply on general tendency while adjudicating a matter which is an external factor. Thus, he contradicts his own concepts.

6. BIBLIOGRAPHY

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