BOOK REVIEW

THE NATURE OF THE JUDICIAL PROCESS

Max Radin[†]

What is the judicial process? Kantorowicz (Rechtswissenschaft and Soziologie, p.5) tells us that according to popular conception in Germany, it consists, or ought to consist, in dropping an appropriate section of a statute into a hopper, turning the crank and pulling out the correct decision at the bottom. Doubtless the current American belief is very similar, except that we are likely to credit the judge with a perverse ingenuity in so turning the crank that a wrong decision comes out. In this admirable little volume, Mr. Justice Cardozo tells us that turning the crank is far from being a purely mechanical process, that it is a matter of minute and delicate adjustments, that in its conscious form it is an application of philosophy, history and sociology, and that subconsciously powerful forces direct and help determine it.

Judge Cardozo is a member of one of the busiest and most influential tribunals on the face of the earth, the Court of Appeals of New York State. That he can find time to subject his thinking and procedure to so close an analysis is a sign of high encouragement. He is quite abreast of the New Learning – new, that is to say, to lawyers trained in the common-law tradition – a learning that consists in treating the profoundly significant work of modern continental jurists not as a mischievous irrelevancy, but as a source of guidance and light. If he quotes mostly from the valuable series on legal philosophy and continental legal history issued by the American Association of Law Schools, that is apparently for the convenience of

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his readers, since he gives ample indication of being conversant with the original sources. All this is important to note, for the quite extraordinary width and depth of his learning have largely contributed in giving his decisions those qualities which have earned for them an almost general commendation. If any man can completely describe the nature of the judicial process, it will be a man like the Storrs lecturer of 1921.

Judge Cardozo somewhat over-dignifies the method which he calls that of philosophy. Properly it is rather the method of the formal syllogism. It is a way of dealing with facts that can never become obsolete. Drawing correct inferences from premises is a discipline that must always be valuable, but is limitations are obvious and over-emphasis of it has done real harm. For a syllogism can tell us nothing that was not already implicit in the major premise. Progress is impossible in a theory that recognizes no other method except by the surreptitious devices of fictions and verbal quibbles. It is a judicial method that too closely for comfort resembles the turning of the handle, and it deserves some of the odium into which it has recently fallen.

The historical, sociological, and psychological methods which the author sets forth are really different in kind. They assist the judge in performing his really judicial task – of selecting his major premise, or they constitute his apology and justification for selecting a bad one. Judge Cardozo overstates, I think, the force that a single precedent has had for common-law judges. The fiction that judges find and do not make the law had at least this advantage, that courts have not hesitated to leap over a fence consisting of but one case which did not commend itself to them. While they have not insisted on the *series longissima rerum similiter indicatarum,* it was always a course of decision, a weight of authority, that forced them to accept a rule they would otherwise have rejected, and the popular fancy of a judge in 1922 confronted with a single unreversed decision of 1422, or even of 1777, and helplessly succumbing to it, is not really borne out by the facts.

Judge Cardozo is inclined to limit the functions of the judge as a legislator to the "gaps in the law" which the "Free-law" school as

well as Zitelman's book, has made famous. Only in the obvious silence of statute or precedent, should the judge follow the injunction of the Swiss Civil Code and legislate, but then he should legislate consciously. However, determining the existence of a gap is itself the difficult task. A law which is the essence of reason has no gaps, and a law which makes no such profession may have none. Under the common-law writs, under the Roman *leglsaction*, there were no gaps. The law concerned itself with facts that could be fitted into rather unyielding frames. There were no gaps, not because there were no cases in which injuries were left without remedy, but because the system did not pretend to do more than classify the injuries it would consent to remedy. And again a system that refuses to admit the existence of *damnum absque iniuria* has no gaps.

When the facts of Riggs v Palmer 115 N.Y. 506 were presented to a New York court, was there a gap in the law? Should a legatee who murdered his testator take under the will? That question will be answered differently in exact accordance with the desire of the judge to assume legislative functions. If a judge decided that a gap existed, he would act as a legislator, that is, he would apply the sociological method; he would decide what public interest demanded and determine accordingly without troubling himself to construct a syllogism. But suppose he did not wish to legislate and did feel bound to construct a syllogism. He would have then to determine what his major premise should be. In this case at least three were open to him, one of which would have led to a result different from the others. Is it not obvious that he would – that he must – choose the premise which will secure what to him is a desirable result, and that the result will be desirable in accordance with his views of society?

That is, he is applying the sociological method quite as much as in the other case. He is doing so, even when he selects of three possible major premises the one he thinks most important without regard to its application in the particular case. For he has no criterion of importance in the abstract, and his only way of deciding that question is to be convinced of the greater or smaller advantage which the inferences from conflicting premises will bring. Howev-

er, if he will not recognize a gap, and selects his premise by its fancied intrinsic importance, he runs the danger of being unduly influenced by the accident of his own legal studies, and this is a greater danger than that of being influenced by the accident of one's own economic and social theories.

The judicial process, then, as presented by Judge Cardozo, may be said to consist in using history and sociology to select the principles of our reasoning and logic in applying it. Where history, that is, precedent, permits a choice, sociology will make it, and here logic will not help us, for it is the conclusion that consciously determines the premise. Logic, however, is of especial application to statutes, for our judges will scarcely have the hardihood of "le bon juge," Magnaud, who declared in his speech to the Chamber of Deputies: "The law cannot have wished an unjust result. Therefore, if an apparently unjust result follows, the words of the law must have a sense different from what they seem to have." Our courts have performed feats in this direction without so open an avowal; but a salutary change is noticeable and we are not likely to see repeated the methods by which statutes are wrested from their declared sense to secure a result opposite to what was intended.

Enough has been said to show that in the author's presentation the judicial process depends on the learning, humanity and philosophy of the judge. That is doubtless not a new doctrine. The book, however, makes clear that in a complicated age, rude integrity and formal logic will not suffice to carry the process to a desirable result. The learning must be great, the humanity finely tempered and broadly established, the philosophy acute. Judge Cardozo is himself an example that such qualities are ceasing to be rare in our judiciary. ❶