

January 1923

The Nature of the Judicial Process

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Recommended Citation

Thomas P. Hardman, *The Nature of the Judicial Process*, 29 W. Va. L. Rev. (1923).

Available at: <https://researchrepository.wvu.edu/wvlr/vol29/iss2/14>

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WEST VIRGINIA BAR ASSOCIATION NOTES:
NEWS OF THE PROFESSION

SUPREME COURT OF APPEALS—Judges George Poffenbarger and Harold A. Ritz, after many years of faithful, efficient and able service on the Supreme Court of Appeals, retired from the bench at the close of 1922. The Honorable M. O. Litz, of Welch, and the Honorable James A. Meredith, of Fairmont, were appointed to fill the respective vacancies. Honorable William H. McGinnis, elected to the bench in November, assumed his duties the first of the year.

BOOK REVIEWS

THE NATURE OF THE JUDICIAL PROCESS—By Benjamin N. Cardozo, New Haven: Yale University Press, 1921. pp. 180.

Until the appearance of this remarkable little book, or rather until the brilliant judge stated its contents in a series of illuminating lectures before the Yale Law School in 1921, the nature of the judicial process was largely a matter of non-judicial speculation. Of course a court's opinion generally reveals part of the process but there is always an unstated, and in part almost unstatable, residuum. It is much as Mr. Justice Holmes has said in a famous opinion: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." At all events in this valuable little book, one of the best and most influential judges on the bench has given us, in a series of absorbing lectures, a sort of expose of this mysterious process, at any rate as it functions in the mind of this very able judge, or as it should function in the judicial administration of justice generally.

"What is it that I do when I decide a case?" asks the learned judge and author. "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, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions" (p. 10).

There are four methods, the judge tells us, by which the directive force of a principle of law may be exerted: (1) the method of philosophy, *i. e.*, the force of the principle may be directed along the line of logical development, (2) the method of evolution, *i. e.*, the directive force of the principle may be applied along the line of historical development, (3) the method of tradition, *i. e.*, this force may be directed along the line of the customs of the community, (4) the method of sociology, *i. e.*, the directive force of a principle may be exerted along the lines of justice, morals and social welfare, the *mores* of the day (pp. 30, 31).

Three of the four lectures deal with these methods. The fourth and last deals with the question of adherence to precedent, and of the subconscious element in the judicial process. In the lecture on the method of sociology the author deals at some length with the judge as a legislator. In this lecture the author discards the theories of historical and philosophical jurisprudence that the judges do not legislate, and espouses the theory of sociological jurisprudence (which, in this respect, is also the theory of analytical jurisprudence) that often the judge legislates not only subconsciously but consciously.

Law, like most human institutions, has its vogues, its fashions, as it were, and perhaps its fads. In times gone by each of the first three so-called "methods of jurisprudence" has, under one name or another, had its vogue, sometimes, however, in combination with another method. At present it is the vogue, or it is becoming the vogue, in jurisprudence to follow the school of sociological jurists who in the words of Dean Pound, its most eminent exponent, regard "law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort." Until recently the law was largely individualistic, protecting individual interests at the expense of social interests. But under the influence of sociological jurists of today the approved tendency is to socialize the

law, to lay stress upon the social purposes which law subserves, and (since some interests, individual, public or social, must be sacrificed, to some extent at least) to secure as far as possible the more important interests and sacrifice the less important, *i. e.*, in balancing the conflicting interests to lay stress upon the securing of social interests rather than individual interests. In this book the learned judge, in disclosing the nature of the judicial process, espouses the cause of the sociological jurists and thus gives considerable impetus to the vogue of sociological jurisprudence.

How far do the theories of sociological jurisprudence lead a judge in applying the directive force of a principle in the decision of cases? One example will suffice to illustrate some of the interesting possibilities: "I am ready to concede," says the judge, "that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent If judges have wofully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." (pp. 150, 152).

Such frank judicial sanction of this aspect of the modern tendency of the law toward a state of fluidity will doubtless be condemned by many as ultra-progressive but not, it is to be hoped, by preponderant legal opinion. The judge's views deserve careful consideration by every lawyer. His analysis in outline of the judicial process is well worth quoting, particularly for its stamp of approval upon the tendency towards a socialization of the law. "My analysis of the judicial process," says the judge (p. 112), "comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."

The judicial process, at any rate the judicial process as it should be, is therefore a progressive process and a process of socialization of the law. To the historical and philosophical jurists and

even to the analytical jurists, the judge's theories are, of course, in some respects, erroneous; but if we adopt the sounder views of the sociological jurists the judge's conclusions are, in the main, "a consumation devoutly to be wished."

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