

Law Is Justice: Notable Opinions of Mr. Justice Cardozo (Book Review)

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treaty obligations falls far short of giving a true picture of the "law in action".

The wholesale repudiation of treaties in times of stress must not, in the light of the data collected in this book, be deemed a failure of international law. It must rather be construed as the prevalence, for the time being, of new forces which make necessary the avoidance of accepted legal principles. The same thing happens in private law when unforeseen circumstances bring about legislative moratoria that interfere with normal enforcement of the obligations of contract. One cannot be pedantic about any legal principle because it is of utmost importance to realize that behind every decision of a court or other tribunal stand the economic, political and social forces of the world. It is only through the light of these that a true appreciation of the course of law can be had at all.

At least in democratic countries, however, the effort to return at the earliest possible moment to the rule of the strict law in private matters is constantly being made. It is of equal importance that in international affairs a similar effort be put forth with utmost force. The task of enforcement in private law is difficult in many cases and frequently impossible where the law is out of tune with the social desires, as, for example, in the case of national prohibition in the United States. So, too, in international affairs treaties negotiated, which do not have a solid basis in the expression of the wishes of the peoples who are to be bound by them, will find the rule's enforcement difficult, if not impossible, to achieve.

These are the lessons of history, but they make all the more important the true understanding of the law of treaties. In this book Professor McNair has made a complete and distinguished contribution to that subject.

MAURICE FINKELSTEIN.*

LAW IS JUSTICE: NOTABLE OPINIONS OF MR. JUSTICE CARDOZO. Edited by A. L. Sainer. New York: Ad Press, 1938, pp. xv, 441.

Mr. Hendrick Van Loon in *The Arts* says that the poet is one who expresses his dreams in universal rhythm, which perhaps is another way of expressing Socrates' concept of "beauty in the inward soul". No reading, even the most cursory, of Justice Cardozo's opinions can fail to convey the impression of the attunement of his soul to the universal rhythm. He himself has likened the work of a judge to that of an artist, who, although he must know the handbooks, should never trust them for his guidance. On the basis of Mr. Van Loon's definition, we may permissibly classify Justice Cardozo not only as a great artist but also as a poet.

The opinions, drawn from Justice Cardozo's eighteen years on the bench of the New York Court of Appeals, and his more than five years as a member of the United States Supreme Court, illustrate the striking feature of his supremacy in two divergent fields of the law. The work of the two courts is of

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course widely dissimilar. It is perhaps not merely a fortuitous circumstance that the notable juridical achievements of so many of the present members of the Supreme Court have been accomplished despite the fact that none of them had ever functioned as a judge prior to his original appointment to that bench. Equally, however, as a judge and chief judge of a court administering for the most part justice in connection with the everyday affairs of men, and as a member of the most important constitutional court in the world, Justice Cardozo has attained eminence in both of these divergent fields.

The temptation to generalize, even in the space available, is too strong to overcome. The underlying philosophy in Justice Cardozo's opinions in the court of everyday human affairs, was his application of a broadly sketched humanity to the decision of conflicting civil interests.¹

But when Justice Cardozo turned reluctantly to the larger realm of constitutional law, his immense capacity for correlating human needs and experience into a design based upon humanity's ultimate goal burst forth in jovian splendor. In times such as these—which the nation and the Supreme Court have been facing since February, 1933—rules governing the conduct of men in ordinary times must either bend or break. We have within this period already moved a long way from the doctrine enunciated by Justice Brewer in 1905 in *South Carolina v. United States*,² that "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted it means now." The same thought was repeated in 1937 by Justice Sutherland, dissenting, in *West Coast Hotel Co. v. Parrish*:³ "The meaning of the Constitution does not change with the ebb and flow of economic events." The reason for such an intransigent philosophy of constitutional interpretation has been best expressed by Justice Holmes: ⁴ "Perhaps one of the reasons why judges do not like to discuss questions of policy or to put decisions in terms upon their views as lawmakers, is that the moment that you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reason seem like mathematics. But the certainty is only an illusion nevertheless."

Professor H. S. Commager in his admirable paper, *Constitutional History and the Higher Law*, republished in *The Constitution Reconsidered*, edited in 1938 for the American Historical Association, points out how the rise of Transcendentalism in the 1840's, fathered by Ralph Waldo Emerson and Theodore Parker, "challenged society to show, before the bar of reason, its title to the accepted order of things". The Transcendentalists failed, however, to socialize the higher law; but the Supreme Court, beginning with the broadening of the

¹ See *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916) (the defective wheel case); *Marks v. Cowdin*, 226 N. Y. 138, 123 N. E. 139 (1919) (the Statute of Frauds case); *Allegheny College v. National Chautauqua Bank*, 246 N. Y. 369, 159 N. E. 173 (1927) (the promissory estoppel case); *Meinhardt v. Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928) (the joint adventure case); *Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931) (the accountant case).

² 199 U. S. 437, 448, 26 Sup. Ct. 110 (1905).

³ 300 U. S. 379, 402, 57 Sup. Ct. 578 (1937).

⁴ HOLMES, COLLECTED LEGAL PAPERS (1920) 126.

construction of the due process clause of the Fourteenth Amendment, has recognized the "inarticulate major premise" of Justice Holmes.⁵ The inarticulate major premise has been articulated by Justice Cardozo, in constitutional law, with an emphasis secondary only to that of Justice Holmes himself.

The Constitution may be interpreted from the viewpoint of ascertaining the intention of the framers from the language used, viewed from then existing conditions, but in such case—since its framers were less than prophets—the breaking point would soon be reached. It may be interpreted, as many would have the court to do, in any way which a strained and highly unrealistic but nevertheless literal interpretation of the words used would permit, whereupon our constitutional government would be saved but its living essence disappear, with liberty soon to become merely "*nominis umbra*". Lastly, the great instrument may be interpreted as a broadly sketched framework of principles, immutable now as when formulated, but adaptable to changing circumstances in a changing world. This is the course which Justice Cardozo has, with conscious or unconscious wisdom, followed.

The following quotations are illustrative of his philosophy of constitutional interpretation: "The (commerce) power is as broad as the need that invokes it."⁶ "It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of moneys of the nation to relieve the unemployed * * * is a use for any purpose narrower than the promotion of the general welfare."⁷ "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the time. The hope behind this court is to save men and women from the rigors of the poorhouse as well as the haunting fear that such a lot awaits them when the journey's end is near."⁸

⁵ *Id.* at 167; *Lochner v. New York*, 198 U. S. 45, 76, 25 Sup. Ct. 539 (1905).

⁶ *Carter v. Carter*, 298 U. S. 238, 328, 56 Sup. Ct. 855 (1935). The same theory is expressed in Chief Justice Hughes' dissenting opinion, in which Justice Cardozo concurred, in *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 55 Sup. Ct. 758 (1935); and by Justice Cardozo in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1935), dissenting from the majority opinion which held the "hot oil" provision of the Recovery Act to be an unconstitutional delegation to the President of legislative power.

⁷ *Stewart Machine Co. v. Davis*, 301 U. S. 548, 57 Sup. Ct. 883 (1937). This position was foreshadowed a year before in Justice Stone's dissent, in which Justice Cardozo concurred, in *Butler v. United States*, 297 U. S. 1, 56 Sup. Ct. 312 (1935).

⁸ *Helvering v. Davis*, 301 U. S. 619, 57 Sup. Ct. 904 (1937); *cf.* O'Toole, *Sociology and the Law* (1931) 5 ST. JOHN'S L. REV. 173, 184: "No longer can law be considered *sui generis*, but must rather be treated as a force contributing to or detracting from the social weal, in proportion to its adaptability or non-adaptability to the culture in which it finds itself. The legal science of to-day is characterized by a functional attitude, an attitude of asking what law does and how it does it, and how it may do better, rather than asking what it is and how it came to be what it is."

See also *Schechter v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935) (where the N. I. R. A. code provisions were held to be unconstitutional); *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 55 Sup. Ct. 525 (1935),

In *Palko v. State of Connecticut*⁹ his expression of the "absorption" of the provisions of the first nine amendments into the Fourteenth Amendment takes on majestic form like the rolling of celestial drums. "So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgment to include liberty of the mind as well as liberty of action * * * there is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." Here genius speaks and we hear once more, over five years since the Chief Judge of his beloved Court of Appeals became Justice Cardozo of the Supreme Court, the beat of unseen wings.

There cannot be too many collections of opinions such as those of this "great and beautiful spirit".¹⁰ It is regrettable that Dr. Sainer has confined his editing, in the main, to rephrasing the statements of facts into lay language, which has been done happily, and to excerpting, as headings of the respective cases, key phrases taken from the opinions, which have been so felicitously chosen that they afford at least as comprehensive a clue to the thought of the opinions as musical notes in a symphony program. Since the editor's note indicates that the work is for laymen as well as lawyers, it should be remarked that the actual holding is not adequately revealed in all cases. Thus in *Baldwin v. Seelig*¹¹ it would be very difficult for a layman to determine how the case was decided. One would have wished, moreover, to see included in any collection of notable decisions of Justice Cardozo the cases of *Oppenheim v. Kridel*,¹² *Woodworth v. Bennett*,¹³ *Booth v. Knipe*,¹⁴ *Bristol v. Woodward*,¹⁵ and many of the constitutional opinions such as *Schechter v. United States*¹⁶ (which is briefly quoted from at page 425), *Helvering v. Davis*,¹⁷ *Panama Refining Company v. Ryan*¹⁸ and *International Milling Company v. Columbia Transportation Company*.¹⁹ There is a table of contents but no index. Both the subject matter of the book and the learning and ability of the compiler merited more comprehensive selection and more laborious editing. All in all, the book is a worthwhile contribution to Cardozo bibliography.

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dissenting from a decision that a state sales tax graduated according to volume was invalid.

⁹ 302 U. S. 319, 58 Sup. Ct. 149 (1937).

¹⁰ Letter of Justice Holmes to Dr. John C. H. Wu, Holmes, Book Notices, Uncollected Papers, Letters, p. 202.

¹¹ 294 U. S. 511, 55 Sup. Ct. 497 (1935); also, SAINER, LAW IS JUSTICE (1938) 363.

¹² 236 N. Y. 156, 140 N. E. 227 (1923).

¹³ 43 N. Y. 273 (1871).

¹⁴ 225 N. Y. 390, 122 N. E. 202 (1919).

¹⁵ 251 N. Y. 275, 167 N. E. 441 (1929).

¹⁶ 295 U. S. 495, 55 Sup. Ct. 837 (1935).

¹⁷ 301 U. S. 619, 57 Sup. Ct. 904 (1937).

¹⁸ 293 U. S. 388, 55 Sup. Ct. 241 (1935).

¹⁹ 292 U. S. 511, 54 Sup. Ct. 797 (1934).

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