



1939

# MR. JUSTICE CARDOZO

H. V. EVATT

Follow this and additional works at: <http://digitalcommons.law.yale.edu/ylj>

## Recommended Citation

H. V. EVATT, *MR. JUSTICE CARDOZO*, 48 *Yale L.J.* (1939).

Available at: <http://digitalcommons.law.yale.edu/ylj/vol48/iss3/3>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

## MR. JUSTICE CARDOZO

MR. JUSTICE CARDOZO first became known to Australian lawyers and students by reason of his published studies in the art and the science of judicial decision, which some of our Law Schools have prescribed as textbooks. Gradually attention came to be directed to the author's opinions delivered by him as a member of the New York Court of Appeals. The decisions of that tribunal, although only of persuasive authority in Australia, came to be cited to and used by some of the judges of the courts of appeal. On one occasion, the High Court adopted the reasoning of the New York Court on an important question of principle affecting the interpretation of workmen's compensation legislation, and rejected a contrary ruling of the English Court of Appeal.

Recourse to Cardozo was the more welcome because of the form in which his judgments were couched. His style was always attractive, often picturesque, sometimes almost dramatic. He presented a strange spectacle, a judge who, in every word he wrote, showed that he had thoroughly enjoyed his search for the just judgment but in the end had resolved all doubts. Even the tendency towards metaphor, seldom promoting lucidity, was justified in his case as a reasonable means of persuading the less imaginative minds.

For Cardozo possessed one very special genius. In deciding an ordinary case according to admitted and well-established rules of law — was there a duty to take care?, was there negligence?, was the negligence the cause of the plaintiff's injury? — he was able to reconstruct the concrete factual situation existing at a time long past and to do this in such a way that his legal conclusions appeared almost inevitable. This great gift derived from an imagination fully disciplined and controlled by great learning and experience. This explains the fact that, in Cardozo's hands, the apparently trivial case often turned out to be of telling significance.<sup>1</sup> He must have been fully aware of the psychological proc-

---

<sup>1</sup> See Frankfurter, *Mr. Justice Cardozo* (1938) 24 A. B. A. J. 638

esses involved, for "learning," he had written, "is the spring-board by which imagination leaps to truth."<sup>2</sup>

But it was his handling of constitutional questions, after his elevation to the Supreme Court of the United States, which most interested Australian lawyers. For not only in general principle, but in important details the Australian constitution is modeled upon that of the United States. In the Supreme Court, Cardozo's success was immediate and sustained. Confronted with grave constitutional questions at a time of unexampled economic crisis, he held the balance between the Nation and the States. He perceived that the evils of unemployment could not be confined within the borders of any one state, so that the economic situation called for national action. On the other hand, he insisted that all federal legislation must not only call in aid some specifically granted subject matter of power but must be sufficiently related to that subject matter.

Shortly before his death, his career seemed to have entered upon a golden period, when, his intellectual greatness universally recognized, Cardozo was about to take the lead in the restatement of fundamental constitutional principles upon lines which should be just to the Nation and to the States, but also just to the people, some of whom had discovered that the rapid enforcement of guaranteed civil liberties is beset with great difficulties.

His actual record of achievements is so remarkable that it is important to discount easy generalization. For instance, it is (I suppose) a profound mistake to group Cardozo with Holmes and one or two foreign jurists as the founders of what is called "Sociological Jurisprudence."<sup>3</sup> The particular theory is that after the death of Lord Mansfield (and apparently in obedience to the teachings of John Austin!) the judges of England came to regard the common law as a completely closed system quite incapable of further development or of adjustment to the changing needs of society in the then rapidly expanding price system. But, within the restricted area of "free decision," many of the nineteenth-

---

<sup>2</sup> THE PARADOXES OF LEGAL SCIENCE (1928) 60.

<sup>3</sup> Cf. Aronson, *Cardozo's Doctrine of Sociological Jurisprudence* (1938) 4 J. SOCIAL PHILOSOPHY 5, 9-10.

century judges both in England and the British self-governing dominions endeavored to fashion doubtful principle along lines which were just to human rights as well as to business needs. It is more historical to group Holmes and Cardozo *with* the best of such judges than to assert that, of all judges since Mansfield, they alone "recalled that law, in the final analysis, is a function of civilization."<sup>4</sup> In Australia one immediately thinks of great judges like Griffith (first Chief Justice of the High Court), Higinbotham (a Chief Justice of Victoria), Higgins (a great pioneer of industrial jurisprudence) and Isaacs (first Australian Governor General of Australia). All these judges, alike in little else, refused to regard legal rules as constituting ultimate ends. In the United States, to take one example only, the same can be said of Mr. Justice Field, who seldom failed to regard constitutional questions in the light of the economic revolutions of his own day, even of his own state.

In truth, it is quite inadequate to say that Cardozo's main achievement lay in his efforts to treat constitutional and legal issues as functionally related to modern society. One has to pursue the analysis further. Reverting for a moment to the four Australian judges whom I have named, one can say that whereas Griffith emphasized State rights as against those of the Commonwealth, and Isaacs emphasized Commonwealth rights as against those of the States, and Higinbotham emphasized the rights of colonial self-government as against the claims of British imperialism, Higgins' principal concern was that, wherever possible, the law should lay its protecting shield over the poor, the weak and the oppressed.

Australian students would suggest that, after a full analysis, it can be said that Cardozo's true approach to law and legalism resembled that of Higgins. Neither was content to regard any legal controversy as a game. Each was in deadly earnest. Each was endowed with true nobility, and "the nobler a soul is, the more objects of compassion it hath." Today when, to the horror of every just man, cruelty and oppression have actually been elevated into a principle or practice of national policy and have been

---

<sup>4</sup> *Id.* at 9.

*MR. JUSTICE CARDOZO*

directed against the great race to which Cardozo belonged, lawyers from all civilized countries must draw closer together not only to find solace and inspiration in his work but to combat the evils he hated most. *Sidere mutato, mens eadem.*

*H. V. Evatt.*

MELBOURNE.