Cleveland State Law Review

Volume 9
Issue 1 *Intellectual Property (A Symposium)*

Article 21

1960

The Judicial Process

Lee E. Skeel

The Judicial Process

*Judge Lee E. Skeel**

THE JUDICIAL PROCESS is that technique by which coherent direction of thought on the basic principles of social rights and duties is made available for judicial officers. No one will contend that the judicial process should depend only on a judge's personal concepts of justice, social rights and duties, or manner of discerning the truth in litigation so that the rules of law may be correctly applied. It is the duty of such officers diligently to seek out the rules which must be used as the bases of judgment. The sources from which they must seek help are as wide and varied as the sum total of past and present human experience.

To begin with, some of the most obvious sources are the settled declarations of law found in our Constitutions and Statutes. True, the background of each of these specific declarations of law is to be found in its historical development. The common law may be employed to explain ambiguity in the words used or the meaning to be ascribed to these written declarations, but where there is no ambiguity and the facts are clear, there is nothing for the judge to do but follow the printed word.

The custom of attempting codification of law, in the modern sense, began under the civil system of Rome. Of course some attempts long antedated Rome—such as those of the Bible, Babylonia and Sumeria. These writings are historical landmarks in preserving the legal philosophy of our past and present civilization and can afford tremendous help in pointing the way to the best administration of justice in an ever changing civilization. Yet, attempts at codification, which have ever been with us, can never provide complete mastery of the judicial system. Codes, Constitutions and Statutes do not render the judge superfluous nor his work perfunctory and mechanical. The written word can never completely cover the varied fields of human relations.

---

* Of the Ohio Court of Appeals in Cleveland; President of Cleveland-Marshall Law School; author of works on trial and appellate practice; etc.

[*Editors' Note*: This is the outline used by Judge Skeel in presiding as Chairman of a recent *Seminar For Municipal and County Court Judges* on "The Nature and Function of the Judicial Process." That seminar was one of a series of ten weekly conferences for judges and judicial officers and administrators, conducted as a public service by Cleveland-Marshall Law School. Presided over by a judge or law professor in each case, the discussion meetings attracted many jurists, public officials, attorneys, and others from northern Ohio. Their enthusiastic participation and appreciation indicated that such seminar series offer a valuable vehicle for the self-improvement of the Bench, Bar, Courts, and allied agencies.]

> Cardozo once said: "The same problems of method, the same contrasts between the letter and the spirit, are living problems in our own land and law. Above all, in the field of constitutional law the method of free decision has become, I think, the dominant one today. The great generalities of the constitution have a content and significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. * * * Codes and other statutes may threaten the judicial function with repression and disuse and atrophy. The function flourishes and persists by virtue of the human need to which it steadfastly responds. Justinian's prohibition of any commentary on the product of his codifiers is remembered only for its futility."

Dealing with the source of the law and the function of finding the law is the inherent duty imposed upon the judicial office. It has been said, of this, that: "Courts are to search for light among the social elements of every kind that are the living force behind the facts they deal with. The powers thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it." In the long run, "there is no guaranty of justice except the personality of the judge."

Aside from the sources of the law found in Codes, Constitutions and Statutes, the background of all rules guiding legal relations in our time is to be found in study of the common law. The habits of looking to the decided cases, and of following precedent as the authority for settling legal controversies, have been stabilizing factors in the development of our social rules.

Following that which has been said before in similar-facts cases, that is, logically following precedent in deciding cases, in the main explains much of the judicial process. But such a process in no sense circumscribes the duty of a judicial officer in composing social disputes. While a stable society requires uniformity in legal decision, it also requires growth in recognition of advancing social standards. The desire not to have to work over again that which has been done, in order to create the authority of the case under consideration, must not be a stumbling block to progress. The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from their deductivity. Its method is inductive, and it draws its generalizations from particulars.

The process has been admirably stated by Munroe Smith:

> In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the

> lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be reexamined.

The line of inquiry to be pursued, where no precedent is clearly in point, is to seek a logical development of the principles to which the decided law already has given sanction. It has been said "a judge should not mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason which will commonly be the same consideration of history or custom or policy of justice." (Cardozo). A judge must be logical as much as he must be impartial. It is indeed disconcerting for a lawyer to have a court decide issues of fact and law against him when he represents a plaintiff, and then for him to lose on identical facts when representing a defendant. If several cases involve the same facts, the several parties have a right to expect the same decision in each.

Adherence to well established and unchallenged precedent is desirable for the common good, and must then be the rule rather than the exception if litigants are to have confidence in the administration of justice. Again, in the words of Cardozo:

> But as a system of case law develop, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and transitory will yield to the essential and the permanent. The Judge who molds the law by the method of philosophy may be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in response to a deep seated and imperious sentiment. * * * In default of other tests, the method of philosophy must remain the organ of the courts if chance and favor are to be excluded and the affairs of men are to be governed with the serene and impartial uniformity which is of the essence of the idea of law.

Such an analysis of the duty of the judge, in not conceiving his work to be confined merely to deciding cases, but rather in dealing with the controversies of litigants to be guided by the basic philosophy of the rules (to which his work contributes) by which society is to be governed in furtherance of harmony, peace and prosperity, calls to mind the words of Lord Pollock in his lecture on the *Expansion of the Common Law*:

> For the law is not a collection of propositions but a system formulated on principles, and although judicial decisions are in our system, the best evidence of the principles, yet not all decisions are acceptable or ultimately accepted, and principle is the touchstone by which particular decisions have to be tried. Decisions are made, principles live and grow.