

The Meaning of Statutes:

What Congress Says or What the Court Says

by Robert H. Jackson • Associate Justice of the Supreme Court of the United States

■ Listening to Mr. Justice Jackson's reflections, before the American Law Institute on May 20, concerning the continual conflict between the intent of the Congress as expressed in the text of a statute and what the Supreme Court says the legislative branch meant or should have meant in its enactment, brought back to mind a passage in Lewis Carroll's *Through the Looking-Glass*, which, as often on problems in government, summed up the issue very well:

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that is all."

The address was admirable in spirit and content; it dealt candidly with problems which confront our Courts, Bar and people — the conflict between two concepts of Courts, law and justice. "To carry out the Soviet conception requires a judge only to know which side he is on," declared the speaker. But as to our concept he added that "as the Courts are obligated by the principles of our representative government to independence in construing the language of statutes, so they owe a similar duty of fidelity to the legislative bodies in applying their policies". As to what is taking place in the guise of examining putative "legislative history" to determine intent, he declared that "The custom of remaking statutes to fit their histories has gone so far that a formal Act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client or a lower Court decide a case. . . . I do not see how Congress can know, even roughly, the effect that will ultimately be given to any language it may use". He seemed to indicate a belief that a statute should mean to a Court "what its language reasonably conveys to those who are expected to obey it".

In any event, this utterance by a member of the great Court was significant and timely, and should be read carefully by those concerned for the future of law.

■ It is an honor to greet this body of lawyers and a pleasure to see old personal friends as you gather for a work session in the nation's capital. It is altogether appropriate, of course, that a member of the Supreme Court participate in the wel-

coming rites. You represent the legal profession in a great undertaking to restate the law; I am sure it has not escaped your attention that the institution of which I am a member is actively engaged in the same enterprise. [Laughter] The consideration

that you show me on this occasion I take to be an example of the fine sportsmanship which should prevail among competitors. [Laughter]

I was told by your president that "too elaborate an address is unnecessary". Your president is a master of the art of dressing up his desire for brevity in the cloak of forbearance for the speaker. But I shall say a few of the things that are on my mind, in spite of the admonition.

Some of us who began attending these sessions close to a quarter of a century ago look back on those days with a certain nostalgia. Perhaps we were all a little naïve; perhaps I was more naïve than the others. But as I remember it now, what may be called the "climate of opinion" at those earlier gatherings was quite different than it is today. The labor on the Restatement of the law was commenced on the assumption that the body of private law as embodied in Court decisions was reasonably settled and fairly stable—at least, that most of it would hold good while the Restatement was being formulated. Of course, we knew that from time to time particular decisions would be overruled and that some rules of law would and ought to be changed by legislation. But we did not anticipate any fundamental change in the attitude of Courts to the law itself, or toward its development with traditional regard for its

continuity which is a characteristic of the common law method.

A System of Laws Dictated by "Ideological Theories"

A few days ago, however, Lord Macmillan, known pleasantly to many of us, in lecturing on "Law and Custom" at St. Andrews University, said something that may awaken a response in you. It was this:

The lover of our ancient laws and institutions, which we have inherited from our fathers, cannot but look on with some dismay at the process which we see daily in operation around us whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws which have no regard for the usages and customs of the people, but are dictated by "ideological theories".

There will soon be little of the common law left either in England or in Scotland, and the statute-book and the vast volumes of statutory rules and orders will take its place. The work of our Courts is more and more concerned with the interpretation of often unintelligible legislation, and less and less concerned with the discussion and development of legal principles. Advocacy has consequently lost much of its intellectual interest and scope.

Impatience with Gradual Growth Under the Judicial Process

When I read that, I could not help but think of our own Mr. Justice Cardozo, whose reverence for the common law and common law methods was so poignantly expressed in his address at our third annual meeting almost twenty-five years ago. On that occasion he compared the common law to a magical coat described by one of Swift's characters—a coat which, it was said, would grow in the same proportions as the body of the wearer. Mr. Justice Cardozo said with some feeling that the common law had done just that—and that it was "still a good coat"—"far too good to be thrown away".

It is not easy from where I sit to judge whether Lord Macmillan's present fears or Judge Cardozo's earlier hopes represent current conditions in this country as a whole. The Supreme Court, except incidentally and not too successfully, was

never an expounder of the common law. By *Erie Railroad v. Tompkins*, 304 U. S. 64, and related cases, and by its practice of declining to review State law questions in diversity cases, the Supreme Court has closed its own door to independent speculation as to common law principles. What, therefore, appears to me as a decline in the place of the common law in our scheme of things may be a Washington disturbance which does not reach State Courts or other federal Courts. But I suspect it is a part of a more or less world-wide impatience with the gradual and deliberate pace of growth under the judicial process.

The titanic struggle for power now being waged between nations and between classes within the nations is as much one to change legal systems as to change political or economic systems. This involves far more than changing rules of property to achieve greater socialization, far more than imposing a Continental system of judicial procedure, far more than setting up a secret political police force. It goes to the very nature of the Court itself and would alter the foundation on which our Western civilization has built its legal systems.

Communist Concept of the Role of Courts

The concept which dominates all Communist teaching has been stated by Soviet authority in these simple words: "The Court has been, and still remains, as it ought to be according to its nature—namely, one of the organs of governmental power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests".

The most striking feature of this concept is its primitive mingling in the Court of the two functions that Western civilization years ago divided between the Courts and the legislature. This is not surprising, for it comes to us from a country whose legal institutions are at least 300 years behind the Western world in legal development and which has had little experience with representative legislatures. It comes from a people whom the Renaissance, the

Reformation and the great democratic awakening that followed our own and the French Revolution, have never touched. Their history has no Magna Charta, no Bill of Rights. Their heroes include no Lord Chief Justice Coke to remind the Czar that he rules "under God and the law", no Jefferson, no Montesquieu. Lenin, Stalin and their compatriots stepped into a system of customary law deeply influenced by centuries of absolutism, and their view of the function of a Court, instead of being an advance over ours, is simply an adherence to an old authoritarian practice.

Legal System Based on Judicial Acceptance of Legislation

Of course, we democratic peoples recognize that the policy of the law is, and should be, made by what you may call a "ruling class". Under our own system, legislation is shaped by a majority of the representatives of majorities of electors in the various constituencies. Our concept of the Court presupposes its acceptance of decisions on policy by the legislative majorities that from time to time prevail, except where an overriding policy is set forth in the Constitution.

But when a ruling majority has put its commands in statutory form, we have considered that the interpretation of their fair meaning and their application to individual cases should be made by judges as independent of politics as humanly possible and not serving the interests of the class for whom, or a majority by whom, legislation is enacted.

The danger of the competition between our Western and the Eastern concept of Courts is that the latter is so much easier to apply. To carry out the Soviet conception requires a judge only to know which side he is on. But to observe the democratic separation of functions so as to leave policy making to the political bodies and make the function of interpretation a professional matter, requires training, constant intellectual effort, deliberation and detachment. And it is guided and aided by the experi-

