Philosophy 338
Philosophy of Law
2017
Note Four

This note is mandatory reading

1. The Court ruled 5 to 2 that the Criminal Code violated *s*. 7 of the Charter and could not be saved by the Charter's *s*. 1.

2. The majority consisted of three different reasons for judgment, with none having more than two signatures. By virtue of majority *vote* the finding of the Court was effective, and the offending provision was struck down.

3. However, if we take the *Court*'s reasons for judgment as the aggregate of the majority's three individual opinions, then the *Court*'s reasons for judgment lack sufficient internal coherence, and so couldn't be used as a blueprint for how future courts would understand the Court's finding. Two points should be emphasized:

   - The Court's *ratio decedendi* gave Parliament no usable instruction as to how the abortion law should or could now be crafted.

   - The *ratio decedendi* gave no sufficient guidance to future courts as to how they themselves should apply it.

4. There is an important lesson here about how legal precedents are created. \it is often said that just two elements are required:

   - the *finding* of the court of origin.

   plus

   - the *stare decisis* rule.

   As we now see, a further condition is needed:

   - *coherency of the majority opinion.*

5. The *finding* is secured, and legally effective, by majority vote. The majority opinion is secured by the aggregation of individual reasons for judgment by judges voting for the majority. If, in the aggregate, the majority opinion lacks internal coherence sufficient for effective parliamentary and judicial employment, the *stare decisis* rule can't be applied.

6. So, in sum, precedents are

   - findings effected by the Court's majority vote

plus

- the aggregated *ratio decedendi* of the majority's justices.

plus

- *sufficiency of coherence* thereof for *principled* future employed

plus

- *stare decisis*

7. If we turn to the latest version of today's Criminal Code and turn to *s.* 287, you'll come upon something strange. You'll find the very measures struck down in *R v. Morgentaler* 27 years earlier. It occurs there in the very same wording it had at the beginning, and with no indication that it's not been law since 1988.

8. Why haven't successive governments removed this invalid law from the Code – neither Mulroney's, Campbell's, Chretien's Martin's and Harper's – in all this time? The usual way of doing so would have left *s.* 287 blank, except for a note of reference to the judgment that struck it down. (John Turner was very briefly prime minister in 1984, but he never had occasion to sit as prime minister in the House.)

9. The delay is explained as follows: Dropping the contents of 287 requires an Act of Parliament. As with all legislation, each legislative stage would have to be taken, and with it debate in the Commons, examination if Parliamentary Committees, the sober second thought of Senate and the Senate's own committees, intervention by interested parties, further discussion in the House and finally a vote. Not once in those twenty-seven years has the governments of five prime ministers been willing to permit parliamentary discussion of abortion of any kind to occur to say nothing of parliamentary action.

10. Why this circumspection? (Some would say craven bipartisan cowardice.) It is an interesting (and important) question to reflect upon. Be my guest!