Philosophy 338
Philosophy of Law
2017
Note Nine

FOLLOWING UP ON JUDICIAL ACTIVISM

1. *Interpretation*

One of the fundamental questions of juridical jurisprudence (the study of law having to do with the duties and entitlements of high court judges) is this:

- Given that it falls to judges, by both duty and discretion, to interpret the Constitution, are there constraints on the exercise of this authority?

Normally, it is taken that when a court interprets a clause or section, it assigns a legal meaning to it. This in turn raises the question of how far a legally assigned meaning to a word or passage can deviate from its meaning in ordinary speech, that is, the speech of the people at large, all of whom are subject to the court's finding.

Judicial activists give this question a more permissive response than those whom, for the purpose of this course, we've decided to call judicial traditionalists (maybe passivists might be a better word). Both sides of this issue take it as given that juridical interpretation is, one way or the other, a *semantic* exercise.

2. *The living tree*

Canadian constitutional law enshrines the *living tree doctrine.* In *Edwards v. Canada* (Attorney General) 1929, the Law Lord Viscount Sankey of the Privy Council in London wrote:

> "The British North American Act planted in Canada a living tree capable of growth and expansion within its natural limits."

Lord Sankey's *ratio* was pursuant to a finding that provisions in the 1867 constitution precluding women's eligibility to hold public office (on grounds that they were persons not qualified to hold it) was unconstitutional in 1929, never mind its status in 1867. The office in question in this instance was the Senate.

Lord Sankey's doctrine has taken deep root – no pun – in Canadian jurisprudence. Its authority has been recognized in various instances by Canada's Supreme Court – for example, in *Re B. C. Motor Vehicle Act* 1985, *Reference re Same Sex Marriage 2004,* and *Marcotte v. Fédération des caisses Desjardin du Québec* 2014. In all these cases, the Sankey doctrine has been understood as a finding about the legal meanings of the texts of Canada's laws. If this is right, then the meaning of "a person not qualified for public office" in 1929 (and ever after) was different from the meaning of those words (in that combination) in 1867.

3. *Meaning change*

It is perfectly true that the meanings of words in public discourse can change over time. There was a time past when "deer" meant "four-footed fur-bearing animal". Later its meaning shrunk. It now means what Bambi's mother was. Words subject to this sort of meaning change

have gone through a natural process of adjustment, in accordance with the shifting usages of everyday language. Changes of this sort can be called semantically *natural.* This means that the meaning a word now has wouldn't in any way stand out as surprising or off-grid to people of the present day.

It is often different in judicial settings. When a court rules that the meaning of a word is not this but that, its judge-mandated interpretations would strike the present-day neurotypical speaker of that language as off-grid. The reason why is that such changes are wrought by *semantic coercion,* and therefore can be dubbed (without pejorative intent) *unnatural* changes of settled meanings.

4. *The ambiguity of interpretation*

Let's briefly break-off for a related matter. Then we'll come back to *Edwards*. In his *System of Logic* (1843), J. S. Mill introduces a distinction between a word's *connotation* and its *denotation.* Roughly, the connotation of "man" in English is what is captured by the word "homme" in French. It is that in which its correct French translation is "homme". Its denotation is made up of the things it applies to. The predicate "is a man" has as its denotation everything whatever which happens to be a man; in other words the *extension* of that predicate. (Including, of course, all the men in France.) This is a tricky distinction to get right[1], and we haven't the time to do it. So we'll try to make do with a couple of examples.

- Take the predicate "is six feet tall", and consider the span from, say, 1950, to now. The denotation of that expression has expanded enormously, but its connotation has changed not at all.

- Take the predicate "uses Netflix" and consider the span from its comparatively recent origination until now. The denotation is very much larger, but there has been no change in connotation.

We now have the means to say something further about the living tree doctrine of 1929.

5. *Interpreting Lord Sankey*

Mill's distinction carries over to the concept of judicial interpretation. When we ask "What was the Sankey interpretation in *Edwards*, the seemingly straightforward answer is that "a person not qualified to hold public office" meant something different in 1867 from what it means now (i.e. 1929). Bearing in mind the ambiguity we just noticed, there are two different ways of reading this apparently straightforward answer. On the one hand, it could mean that

- the *connotation* of that expression had changed

or, on the other, it could mean

- the expression's *denotation* had changed.

Let's consider these in order.

[1] Most students of the philosophy of language will see it as an adumbration of Frege's famous distinction between a referring expression's *sense* and *reference.*

If the phrase's connotation in 1929 were different from its connotation in 1867, then anyone translating it into French today as it occurred in the BNA will have mistranslated it. To keep it simple, let's suppose that the correct translation in 1867 is X. If its translation today (or in 1929) were also X, that would count as a mistranslation on Sankey's ruling. Trouble is, no empirical linguist on earth would support that claim.

Very well, then, let's turn to denotation. In the period between 1867 and 1929, there were massive changes in the material life of the country. Some of these we reviewed in class on Tuesday (Jan. 31), and there's little point here in going over it all again in this note. By way of summary, during this period, the pressures and dislocations of war and the industrial leap in Canada subject women to economic, patriotic, and educational pressures which greatly changed the material conditions of daily life. One consequence of this change is that the denotation of the phrase "person not qualified for public office" had no one in it in 1929 simply in virtue of being a woman.

It bears on this that the Privy Council did not turn its mind to what the phrase denoted in 1867, leaving it moot whether women as such would be denoted by it.

6. *Conclusion*

- If we accept the connotation reading of juridical interpretation, the Sankey interpretation of "person not qualified for public office" is *empirically false.* The only way to give it standing would be by semantic coercion, in which the phrase is given, by force of law, a connotation it didn't n fact have. Given the empirical fact that this is not how connotations change, what we would have here is the appropriation of a combination of familiar words *sans* their connotation and assigning it a new denotation or extension.

- On the other hand, if we accept the denotation reading of juridical interpretation, we see that Sankey could have avoided his connotation error and obviated the need for semantic coercion. He could have turned his mind to the plain facts of Canadian material development during the period in question and come easily to see as a plain matter of fact that women as such didn't in 1929 belong in the denotation-class of that phrase. He would have been entirely right in so finding.

Canadian jurisprudence is heavily slanted towards the connotation/semantic-coercion approach to judicial interpretation and the doctrine of the living tree. This gives a considerable boost to judicial activists. Of one thing there is no doubt. Although the Privy Council insisted that the Canadian Constitution retain its "original structure" as inherited from English law, after its passage in Westminster in 1867 Canada would no longer be bound by English common law regarding the status of women or about any other matter it chose not to be.

Edwards is often referred to as the "Persons Case." Some scholars see the 1867 preclusion as a particular instance of the longstanding cultural diminution of women, expressed in the doctrine (or presumption) of their inferiority. I lack the scholarship to say much about this. To the best of my knowledge, nowhere in the cultural conditions of the past two millennia in the West has it been held with authority that women are inferior to men in *being*. The doctrine is not a metaphysical one. But there is no doubt that inferiority has been historically attributed in matters of rank, intelligence, character, physical prowess, and so on, subject to particular constraints on freedom. Some observers are of the view that elements of that doctrine remain in

the background belief of today's societies – albeit implicitly and tacitly so – never mind the many contrary provisions of our politics and law. What this tells us, if true, is that discrimination against women is largely instinctive today, rather than a matter of doctrine or public policy. If so, it helps us see how difficult it is to resist this still-influential hidden bias. (We say more about hidden bias in chapter 13.)

Still, the fact remains that after *Edwards*, whatever hostile presumptions may have been enshrined in the subconscious of the common law, Canada was free to give them no standing in its law after 1867. I'm inclined to think, therefore, that the historical prejudice against women was not on the Law Lord's mind in formulating the living tree doctrine. Of course, I could easily be wrong about this. Certainly, however, it is nowhere to be found in his *ratio.*