November 9, 2011

Law: Intro to Legal Studies

Lecture #9

Interpreting Cases and Precedent

- Justice – "Like wrongs deserved like remedies"
- Morton – "Reasoning by example"/Balance innovation and continuity
- Morton – the authority of judges derives from the perception that they are "merely applying pre-exiting rules" to resolve disputes/reality of policy-making
- ***Stare Decisis*** (Morton's 2 Main Functions)
    - "Stand by what has been decidied" (V&N)/ "Like cases treated alike" (Morton)
    - "Continuity and certainty" (prereq for civilized society)
    - Guarantees "rule of law, not rule of men" (link to Dicey)

Anatomy of a Judicial Decision

- Points of law different than points of fact and it's the point of law that are binging, that are precedent
- Every crime is different, committed by someone that is different at a different place. So no crime is the same and therefore there's no precedent on facts because no is exactly the same as the other.
- Question: what are the relevant legal facts, why is that cases are decided in these particular ways?
    - Ratios: the reason for the decision
    - Opener Dictum: outside information
- Only certain courts bind other courts.

Who is "bound" by who (e.g. ON)? (CHART ON SLIDE SHOW)

- Not all courts are bound by other courts. So the decisions of lower courts don't necessarily bind upper courts. The only court that binds you is the one that is above you.
- Source: Whether the decision is binding

Atiyah – Doctrine of Precedent

- The idea that like cases should be decided alike. The idea that we should treat them equally is great in theory but the reality is that its not that easy. If you look one of the main problems around this are the top limitations.

- 2 Limitations:
    - Theoritically clear, often “blurred” in practice

Multiple Reasons

1. While it may seem clear in theory that a court makes a ruling and they have one reason for their decision, the fact of the matter is that there may be multiple reasons for why they decided upon what they decided. When you deal with appeal levels it gets even more complicated

Multiple Judges

- Unwelcomed cases “distinguished”

2. There is more than one judge. Appeal court, Supreme Court level they are tied before more than one judge. There are always at least three judges. Lower court levels and trial level there is almost always a singular

    - Higher courts bind lower courts and highest court no longer bound by its own decisions
- Who binds who in Canada?

Llewellyn and the Realist take…

- “Strict view” vs. “loose view” of precedent
- Scalpel analogy
- Strict View (Orthodox)
    - Read precedents very narrow
    - In this way by reading confine its impact to fend off the precedent.
    - Used on “unwelcome” precedent
    - Casting off the weight of past cases (jud. & lawyers)
- Loose View
    - Broadest view of a decision (multiple – ratios)
    - Used to “capitalize on welcome precedent”
    - Using cases as “spring-boards’ for your own argument
- Doctrine of precedent is ‘Janus – faced” (two faced, do both things at the same time)
- One approach is “gets rid” of a case and the other seeks to “include” cases to support claims (same pool)
- Lawyers (must) seek to “maximize” the value of a precedent – to do this mean to know both sides. Must be able to persuade the judge of your argument
- The past remains a common-ground but permits change just as much as not
- We must appreciate “how little. In detail, you can predict *out of the rules alone”* and how we must turn, *“for the purposes of prediction, to the reactions of the judges to the facts and to the life around them”* (p.163) (Internal view insufficient?)

- Precedent is not a kind of clear formula that often is idealized.
- Llewellyn's last words: if you think that precedent is that clear and just because a decision has been tried in the past it will remain like that in the future similar cases, you don't understand how precedent works.
- Question to think about: (SLIDE SHOW)

TODAY'S FOCUS

Dispute Resolution (v. management)

- Adjudication = formal court process (judging)
    - Civil & criminal (focus on right and duties (not outcome?))
    - One of the things that make court decisions important is that they tend to focus on the right of individuals before them. Individual remedies are what they are supposed to be dealing with.
    - V & N says: this kind of dispute resolution which is about achieving particular remedies for the people before the courts. This kind is only one kind. But there are a whole variety of other ways we can resolve disputes. These can be more or less formal. The court system is a formal system, its about procedure and process and treating everyone equally. But we can also have informal systems as well. These informal systems are not necessarily good or bad.
        - Negotiation as the kind of dispute resolution
        - Informal – range from negotiation to dueling
            - Mnookin – "private ordering"
                - What exactly that's trying to be resolved. If its just the disagreement between two individuals, some of these systems may work better.
                - Says: the thing is that we need to always consider the notion of private ordering, we shouldn't have to rely on courts. Try and allow people to order their lives as well as they could.
                    - Ex. Divorce or child custody – not quite as easy as getting married or having the child. Why is it that you can get married easily, but you can't get divorced without the courts interventions? Why is it that you don't need courts to have kids but you need it in order to keep kids?
    - Community based (shaming – "reintegrative shaming") vs. Ritualized (court process) → goal same? = resolution
    - Link back to positivists & Hoebel's "law jobs"
    - A court case always results in a "winner" and a "loser"

- Sometimes there could be two loser, the parties may not be satisfied with the court resolutions
- The conflict may be resolved rather than ended.

Lempert on Role (from V & N)

1. Establish Norms (framework for priv. ordering)
2. Ratification (e.g. support & custody)
    a. Divorce. We always think of the courts engaged in the trial process
3. Increase Costs
    a. May seem to be a bad thing, but people point it out as a good thing as well. Forced individuals to not take the courts time with unreasonable disputes.
4. Educative Function
    a. Getting people to realize what the cases are about, because individuals are forced to frame their disputes in the languages of law
5. Court staff mediate encourages settlement
    a. Lawyers mediate and promote settlement
6. Narrow decisions – promote agreement
    a. If you can prove that you've been wronged, you can essentially seek damages
    b. Divorces are always messy, there's a series of events occurring in the background. Forces people to narrow their disputes into a practical question. What is it really I want here? May promote agreement.
7. End Cases – (not) resolution
    a. Judge always has to come to a solution
    b. Always a winner and a loser
    c. Decision has to be made

Law operates as a constant pressure and presence in people's lives and pushes them in a particular direction.

Reality of the Court's Role

- Vast majority of Criminal Offences (around 90%) are "plead out" before reaching the court.
    - Monkey bars began to be eliminated. Not because there was any problem with them, but the thing is in order to avoid potential lawsuits, cities and town have been removing them from public parks and playgrounds because they fear lawsuits. Shadow of law. Pushing people to act in a certain way without necessarily engaging the process.
    - SHADOW OF LAW – ON THE EXAM
    - 3 Different kinds of plea bargains
        1. Pleading for facts: make sure that the crown doesn't reveal certain facts about the case or your during the trial in order for you to plead guilty.

Macaulay's contention that courts are "the last resort" for contract enforcement

- Vast majority never see a court.

    - Operates in the shadow of law.
- Mnookin says Court less and less involved in divorce and custody today
- Court must invoke one or more "styles" of social control (Black)
    - Compensation
    - Conciliation
    - Punishment
    - Treatment
    - Courts begin to operate in a much more paternalistic way (we're here to help you out)

Essential Characteristics of Canadian Courts

1. Adversarial System
2. "Open and Accessible"
    - Young Offenders & Publication bans
        - Publication Bans: We shouldn't allow this info to become public because it will affect the outcome of the trial
        - Young Offenders: Names cannot be published. Seems to violate the public's right to know.
    - Violation of public's "right to know"?
        - Public should have the right to know who was being caught up in the justice system vs. the publics rights of these people because they haven't done anything wrong yet, they've just been accused, they have not been acquitted.
    - TV cameras in low level Courts?
3. "Air of formality" – ritualized
    - Manners versus merit
        - Judges sit above everyone, dressed formally in robes, particular terminology and language, variety of etiquette.
        - Some people may thing that while having this ritualization is important because it helps you understand the gravity of the process going on, other people may suggest that this is problematic because using terminology that's not used everyday distances you from the court system. If it remains highly ritualized and you don't do the things you're supposed to do in a court room, will lead you to possibly not have a favorable outcome in your case
    - Exclusion & "alienating" (Christie)
        - Mastering the rituals of the courts shouldn't be taken in consideration when making decisions.

Adversarial vs. Inquisitorial System

- Adversarial: "A procedural system in which the parties and not the judges have the primary responsibility for defining the issues in dispute and carrying them forward through the system" (Brooks p.341)
- Inquisitorial: The Court, or part of the Court has an active role in uncovering facts in the case (e.g. "investigating agents of the court")
- Inquisitorial System

Adversarial VS Inquisitorial System CHART ON SLIDESHOW

In adversarial system, judges have a very limited role. Their job is to determine the winner of the fight. They are forced to pick. They always have to pick someone so even when neither side is particularly good at making a case, there is always a winner.

There is a Truth A and Truth B judges have to pick one.

Decide between two competing sets of truths that may not be actually what happened at all.

In the inquisitorial system, judges can ask questions of witnesses and are actively involved in getting to the truth. When they render their decision, the can try to get closer to this.

One of the big difference is that the actul makeup of judges are different. Judges are drawn from the bar. You ave to be a lawyer to be a judge in Canada. They have to be a lawyer. So you've gone to law school and usually been involved in practice. We assume that the fact that you are a lawyer, you can also be a judges. But there is not training to be a judge. What you are trained to do it to understand the law and apply it as a lawyer.

In the inquisitorial system, Europe, you are trained as a judge. There is a difference because you have professional judges. Different idea of where judges come from in the adversarial system.

2 Main Principles of Adversarial System

1. Party – Autonomy (2 aspects) (Court Reactive)
    a. Limits the judges function to only disputes brought before them
    b. Parties bear sole responsibility for defining the disputes to be adjudicated.
2. Party Prosecution (2 Assumption)
    a. Parties have right and responsibility to bring forward disputes and evidence to settle dispute

More Legitimacy? (4 Reasons)

1. In line w/dom. Liberal political and economic ideology
    a. Self – interested individual
    b. Suspicion of the state
    c. Participation of the individual (responsibilization)

2. Cathartic Effect (battle atmosphere)