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The immorality (and morality) of morality-based judging

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R v Zentner, 2012 ABCA 332

Introduction

On November 22, 2012, in its decision in *R v Zentner*, 2012 ABCA 332, the Alberta Court of Appeal reversed the sentencing decision of Provincial Court Judge G.K. Krinke, in which Judge Krinke imposed a conditional discharge on a funeral director convicted of fraud. The Court did so on the grounds that Judge Krinke failed to follow applicable (and binding) precedent and did not comply with the requirements of the *Criminal Code*. The Court held that the "legal foundation of the sentence imposed was either non-existent, or was installed upside down" (para 60).

After briefly reviewing the Court of Appeal's decision, this comment will place Judge Krinke's actions in the broader context of judicial ethics. It will suggest that a failure to follow the law is a fundamental violation of the ethical duties of the judge, even though there is no judicial "code" that applies to Judge Krinke and which he can be said to have violated. The requirement that judges follow the law is inherent to the judicial office. It will further suggest that this failure to follow the law is wrongful, even if the law appears to the judge to conflict with ordinary moral values, such that following the law can, in that sense, be said to involve the judge in moral wrongdoing. A judge who bases his decisions on morality despite the fact that the matter has been legally determined, acts unethically.

Finally, though, it will suggest that direct regulation of this sort of misconduct is undesirable, even though the misconduct is serious and relates to fundamental aspects of the judge's ethical obligations. While a judge has an obligation to subordinate his moral beliefs to the law, the relationship between the law and morality is both contested and complicated, and identifying the point at which a judge has improperly substituted moral judgment for legal judgment even more so. Further, regulation of the substance of judicial decision-making has the potential to undermine judicial independence and impartiality. Judges who are concerned that their judgments may be viewed as improper substitutions of morality for law may embrace unduly conservative approaches to law making. While judges have an irreducible obligation to comply with the law, it does need to be remembered that today's lower court judgment substituting moral principles for law may anticipate tomorrow's legal norms. Open moral dissent can help to turn bad laws to good. Further, it is better for judges to make the moral basis of their disagreement with the law transparent, rather than hiding the true moral basis for their decision in dubious findings of fact or doubtful legal interpretations. It is only in truly extreme circumstances that a judge's refusal to comply with legal norms ought to be sanctionable.

R v Zentner

Ralph Zentner was a funeral home director who committed fraud by charging for services he did not provide. His main victim was the provincial government, which has a fund to pay for funerals of those whose families cannot (para 2). Judge Krinke imposed a conditional discharge on Zentner, largely on the grounds that deterrence ought to be less significant in sentencing than factors such as mercy, rehabilitation and reparation (para 33), and that the publicity associated with criminal charges and conviction can be sufficient to create general deterrence (para 45).

The Alberta Court of Appeal reversed. It suggested that Judge Krinke's decision amounted to "gutting the leading case" on the granting of discharges – he "more or less said that he refused to follow this *MacFarlane* precedent. And he did not follow it" (para 6). The Court acknowledged that Judge Krinke relied on two Supreme Court decisions; however neither judgment was in fact relevant or on point (para 9). The Court also noted that to the extent Judge Krinke followed *MacFarlane* he did so erroneously, finding that its factors had been met when they were not (para 13). Judge Krinke ignored *MacFarlane*'s central point that discharges should be granted only sparingly: "the approach of the sentencing judge here was the opposite" (para 14). The Court viewed Judge Krinke as having "effectively repealed *MacFarlane*" (para 16).

In the Court's view Judge Krinke was essentially refusing to follow any precedent at all – "The sentencing judge expressly refused to follow any court decisions on sentencing of which he himself did not fully approve. He said that no precedent bound him" (para 17). This was the "unilateral declaration of independence" which the Court viewed as improper, stating that the fact that "the trial court judge thinks the previous Court of Appeal precedent mistaken, is no excuse for disobeying it" (para 21).

The Court was also of the view that Judge Krinke ignored the terms of the *Criminal Code*. They described his judgment as mounting "several head-on attacks on deterrence as a sentencing principle" (para 29) despite the fact that deterrence is expressly adopted as a principle of sentencing by section 718(b) of the *Criminal Code*. The Court referred to and denounced Judge Krinke's criticism of the "political winds" that were blowing against taking mercy and rehabilitation into account in sentencing. The Court acknowledged that no judge ought to take "his or her marching orders" from the political climate, but that every judge was bound by the law:

> [D]emocracy in a modern country (as opposed to ancient Athens) means that legislation is drafted by civil servants, passed by politicians, and given Royal assent. Legislation is legitimate, because Canada has had responsible government since about 1857, and the "politicians" are elected and re-elected by free universal balloting (para 33).

The Court was also critical of Judge Krinke's reliance on "publicity" as a factor relevant to sentencing, and of his suggestion that denunciation was only appropriate for "the most egregious crimes" (para. 52). The Court viewed the latter stance as inconsistent with section 718 of the *Criminal Code* and a wide variety of appellate decisions (para 54-55).

In the result the Court quashed the conditional discharge, substituted convictions and imposed a fine of $5000 on Zentner.

It closed its judgment with an epilogue criticizing the conduct of Judge Krinke:

> We end with a few words to the sentencing judge himself. His Reasons and sentence repeatedly illustrate unwillingness to apply well-known and multiple binding precedents, even legislation. Nor were the judge's fallacies and canards novel. A judge's duty is to obey the law and apply all of it, not just the parts of it which he or she likes. What he or she wishes were the law, is not what a judge is authorized to impose on the parties or the public. Neither appellate courts nor the two Houses of Parliament are mere debating societies. Their words contain law which commands the judge. For courts to ignore that would remove a corner of our society, our constitution, the rule of law, and democracy (para 97).

Analysis

The Judicial Code for Quebec judges starts with the principle that "The judge should render justice within the framework of the law" (*Courts of Justice Act* (RSQ), c T-16, r 4.1, s 1). The Canadian Judicial Council's Ethical Principles for Judges (here) do not include compliance with the law as one of the five central obligations of judges – independence, impartiality, integrity, diligence and equality. They do, however, repeatedly emphasize the importance of judges in maintaining the rule of law (e.g., Independence, Commentaries 3 and 5), the importance of judges making decisions "on the basis of the law and the evidence" (Purpose, Principle 3), and the judge's duty "to apply the law as he or she understands it" (Independence, Commentary 3).

Neither of those codes of judicial ethics applies to Alberta provincial court judges, and to my knowledge Alberta's provincial court does not have a code of conduct for its judicial appointees. Nonetheless, when a provincial court judge in Alberta deliberately chooses to ignore the law, and to prefer his own moral assessments to those the law contains, he commits an ethical violation. Specifically, he violates the central duty imposed by his role.

In making this claim I am making four subordinate claims. First, I am arguing that Judge Krinke's central error was that he preferred his own moral assessment of justice to justice as defined by the law. Second, I am arguing that the role of judge imposes an ethical obligation on a judge to follow the law. Third, I am arguing that this duty to follow the law exists and must be complied with even if it requires that the judge violate her moral beliefs; judicial independence is defined and constrained by legality. Fourth, I am arguing that violating that duty – preferring morality to the law – is unethical and wrong, even if from the point of view of morality-apart-from-law, it might be considered to result in a better – more moral, more just – outcome.

On what basis can those claims be made? With respect to the first, it seems from reading the Court of Appeal's judgment that Judge Krinke was motivated by moral concerns, and in particular his belief in the moral centrality of mercy and rehabilitation in determining how the criminally convicted ought to be treated. His judgment reflects moral dissent from the legislatively and judicially codified belief that punishment deters crime, and that deterrence is a primary moral good. Judge Krinke was not incompetent or unable to discern what the law required; he just disagreed with it and believed that, as a judge, it was within his mandate to decide based on his moral assessment rather than on the law.

In holding that belief about his mandate, Judge Krinke misapprehended the fundamental nature of the judicial role. In a democracy the role of law is to achieve social settlement given the fact of moral pluralism. It can be assumed in a community that people will disagree, and will disagree profoundly, on moral questions such as what ought to be treated as criminal conduct,

and as to how those convicted of crimes ought to be treated. The role of law is to permit that disagreement to persist without social destruction. It allows people like Judge Krinke and I to maintain our belief in mercy and rehabilitation, while other people believe in the virtues of deterrence, while nonetheless constructing a society in which we can live peaceably together, resolving our disputes through the force of law, not the force of arms. At no point am I required to deny my moral beliefs, but those beliefs reside within a social settlement of law that may or may not accept them.

For law to achieve peaceful social settlement requires, however, that there be a system for the adjudication of disputes, and that that system adhere to the social settlement that the law creates. If appearing before a judge meant only that the result would follow from the judge's own moral beliefs, social settlement would have been replaced by judicial autocracy, with the moral beliefs of judges counting for more than that of the citizenry. Raw power would be substituted for the political settlement of moral disagreement.

Requiring judges to respect the law imposes moral costs on those judges. As noted, within the social settlement of law a citizen (small 'c') can maintain her moral beliefs, and usually will not need to take any actions contrary to them, even if the law does not accept those beliefs. Thus, for example, an ordinary citizen who is ardently anti-abortion can choose not to get an abortion, can discourage those around her from doing so and can engage in active political protests against the absence of legal restriction on abortions in Canada. The fact that the law disagrees with her may be disturbing, but it does not require her to act inconsistently with her moral belief. By contrast, if that ordinary citizen became a judge, and a case came before her in which the ability of women to obtain abortions was being improperly interfered with by abortion protesters, she would be required to make a decision consistent with the law's stance on abortion, not on her own moral beliefs. Doing so is necessary to ensure that the legitimate settlement of legality is not replaced by the illegitimate exercise of raw power.

But it would be facile to suggest that imposing that particular task on a judge imposes no moral cost. As Bernard Williams has explained, (e.g. in *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981) our subjective moral values are irreducible, and to suggest that a person ought to be comfortable with violating those values because it is what her role required, is to profoundly misunderstand the nature of moral action and moral conviction. The judge in that case is left with a moral remainder: she must sacrifice her personal moral convictions or her professional moral obligations; she cannot act consistently with both.

The imposition of that cost upon the judge does not, however, change the judge's role, or make it any less wrongful for her to ignore what the law requires. As some legal ethicists have argued, the assessment of the ethics of actors within the legal system occurs at the wholesale level, not the retail. That is, the question is whether a legal system which contains judges and lawyers who are obligated to comply with law, and not with morality-apart-from-law, can be morally justified, not whether a decision to comply with the law instead of morality-apart-from-law in any given case can be justified, or leads to the morally optimal result. That justification – the wholesale justification – follows from the justification of legality itself, from the role that the law can play in creating and protecting our ability to achieve peaceful social settlement in the face of moral pluralism. And the consequence of that justification is that a judge who complies with morality-apart-from-law, instead of with the law, acts wrongfully, even if the outcome in a specific case is morally optimal.

What follows from that observation? One might argue that what follows is that judicial regulators ought to be concerned with judges who ignore the requirements of law, and ought to

impose appropriate sanctions upon them. If ignoring the law is wrong, and a violation of a fundamental aspect of the judge's role, is it not obvious that regulatory consequences ought to follow?

In my view, and to the contrary, imposing regulatory consequences on judges who prefer morality to law is undesirable, at least in cases where the judges express their moral dissent publicly and in good faith – i.e., without engaging in other additional forms of wrongdoing such as manipulation and deceit. This is for several reasons.

First, while I have argued for the distinction between morality and law, it must be acknowledged that the jurisprudential relationship between morality and law is contested and complicated. For example, even a positivist like H.L.A. Hart has argued that at some point, and in some cases, the guidance provided by the law can run out, and at that point the judge will have to look elsewhere to determine the appropriate outcome. Other philosophers of law have argued that morality inheres in the law, implying perhaps that a judicial determination that is consistent with the internal rationality of the law (its morality), but inconsistent with precedent, has greater legitimacy than mindless observance of prior judicial stupidity. One noted legal ethicist, William Simon, has argued, following Ronald Dworkin, that the very act of legal interpretation necessarily incorporates discretionary moral judgments, and that the proper approach to any interpretive question (such as purposive versus formal analysis of a legal rule) depends on one's assessment of the deeper moral issues implicated by a judgment.

Even though none of these philosophical perspectives would justify a judge ignoring the law altogether, they do suggest that the complexity of the relationship between morality and law, would make it difficult – if not impossible – to construct a sensible and applicable rule to guide judges on how to use (or not use) morality in determining the appropriate outcome in any given case.

Further, while we might say that ignoring the law in favour of the judge's own moral assessments is improper, and even wrongful, that does not necessarily mean that it is undesirable, at least sometimes. Because the law is a response to the problem of moral pluralism – i.e., it makes democratically legitimate choices between competing identifications of the best approach to a problem, morally speaking – it changes and evolves with our moral understanding. Things that the majority of society accepts as morally good and desirable today, and reflects in its system of laws, may well be viewed as morally abhorrent later. Our legal system is replete with examples of this, with respect to the legal treatment of women, homosexuality, racial difference and so on. One way in which that moral growth occurs is through moral dissent from people in positions of power, from the people who ought to follow the law expressly refusing to do so on moral grounds.

That does not neutralize the violation of the judicial role that moral dissent creates, but it does mean that we may be legitimately reluctant to sanction it.

Further, judges who wish to pursue their moral beliefs in contravention of the social settlement of law have the means to do so covertly. Most obviously, they can make findings of fact that align the law with the moral outcome they want to pursue (e.g., that a young person lacks the capacity to consent to a medical procedure that the judge views as immoral). Sanctioning judges for openly engaging in moral dissent has the potential to foster these more covert forms of dissent and, by doing so, exacerbate the wrong of ignoring the law by adding to it concealment and manipulation of the facts. Further, that sort of covert moral dissent takes away the positive

role that moral dissent can play – a decision reached by manipulating the facts does not create any thought-provoking challenge to our current legal norms.

This is not to suggest that there is no case in which regulatory sanctions are warranted for ignoring the law. In an exceptional case, where a judge repeatedly shows disdain for, or ignorance of, the requirements of the law, regulatory action ought to be taken. The removal of Paul Cosgrove from the bench is an example of that sort of exceptional case, Cosgrove having conducted a murder trial with a continual and egregious refusal to observe the procedural and substantive requirements of the criminal process. Cosgrove's removal was warranted and appropriate.

Nonetheless, where a judge has in a single instance, and openly and respectfully, declined to follow the law in favour of moral values, that decision may be wrong, but it ought not to be sanctioned.