Podcast 2 – What is Law – Legal Theory in a Nutshell

PROFESSOR FORCESE: Welcome back to our virtual Orientation for the University of Ottawa’s JD program. In this podcast, we look at the idea of legal theory, concepts of law. What is it? Why does it matter? How do we understand it? To this end, I converse with Professor Angela Cameron. I began by asking Professor Cameron about her career in teaching.

PROFESSOR CAMERON: My name’s Angela Cameron; I’ve been teaching here at the Faculty for five years. I did my graduate work out west at the University of British Columbia and University of Victoria and part of my PhD and Master’s work was thinking about the role of legal theory in primarily activism but now that I’m teaching law about the role of legal theory in teaching and thinking about law.

PROFESSOR FORCESE: So we wanted to talk about this concept of legal theory. Why don’t we start with the basics. What do we mean by “legal theory”?

PROFESSOR CAMERON: We can think of legal theory as a set of super-basic questions that we want to ask ourselves about law. So an analogy might be if when you’re learning tort law and criminal law and property law, you’re learning about how the machine of law works, legal theory is more questions like “why did we put that part into the machine” or “who made the machine?” or “what kind of power does the machine run on?” so it’s super-base questions, like “what is law?”. “Is law only what we write down in legislation?” Is law the way that we govern ourselves when we go to the grocery store? The sort of unspoken, unwritten rules about where you stand in a lineup and how you drive your cart around? So there are different theories or ideas about what we should include in law, in the study of law, in making decisions about law.

Another super-basic question is “who gets to make law and for whose benefit?”. So if we think about the composition of our legislatures, if we think about the composition of our courts, that’s one aspect of legal theory but if we talk about the unwritten rules of what we might call law or not, things like how do we interact with one another socially? Why do some groups people make more money than other peoples? And what role does law play in that? Those are some of the other kind of small “p” political questions that legal theory can beg us to ask.

PROFESSOR FORCESE: So why should law students or lawyers care about legal theory?

PROFESSOR CAMERON: Law students should care about legal theory because they are the future lawmakers. They are the people who are going to be sitting in the legislatures and sitting on the bench and some of them will be activists lobbying those lawmakers. So a basic understanding of what do we mean by law, why do we lobby for certain kinds of legal change, why do we write laws in certain ways, is super-important. It’s also, I think…Ottawa U is a social justice law school…We talk a lot about what that means. It’s also a really good way to get behind some of the basic ways in which laws are written and understand the ways that law works on people’s lives and in people’s lives. So legal theory is a great entry or entrée into watching the way that law works in the real world.

PROFESSOR FORCESE: Now you mentioned social justice – what do we mean by that terms?

PROFESSOR CAMERON: Social justice has had lots of different definitions but I think probably a good working definition would be the ways in which law and non-legal rules – so again, how do we comport ourselves in relation to other people? Why does society work so that some people have housing and some people don’t? – so written and unwritten rules that work together to ossify or stratify society in particular ways, often along the lines of race, gender those sorts of things. So social justice would be a holistic view of justice that takes into account both the written and unwritten rules of law.

PROFESSOR FORCESE: So there’s potentially a connection between social justice and legal theory.

PROFESSOR CAMERON: I would say so.

PROFESSOR FORCESE: What sort of legal theories exist?

PROFESSOR CAMERON: There’s a massive body of legal theory out there. I think the important thing to remember about legal theory is that it, unlike maybe the black letter study of law, dips into other disciplines in very important ways. So we have legal theory that comes from philosophy, that comes from metaphysics, that comes from bioethics, that comes from feminism, that comes from what we think of as sort of mainstream philosophy. So legal theory, because it purports to talk about things that exist outside of the written word of law, can be a pretty big field.

There are certainly in the past, there have been specific theorists who have worked on kind of the more mainstream or narrow areas of law, for instance the question of “what is law?” is a classic legal theory question, so people have been writing about that since the 1600s. What should we include in law, what should we exclude from law? So within that kind of classic legal theory, there are a couple of schools of thought. Positivism is one of those schools of thought that links very closely to this notion of “what is law” to that kind of big theoretical question. So a positivist take on law would posit the notion that it is possible to know what the content of law is. It’s easy to walk into a law library or go on-line and look at the legislation as it exists and look at the common law as it exists from judge-made law and say “that’s law, and that is correct and right and normatively good because that’s whats on the books.” So for a long time, legal theorists came from the perspective that it wasn’t necessarily the content of the law, that it was legitimate for instance to call what was on the books in say Nazi Germany, it was easy to call that law and you could categorize it or classify it the same way we would classify let’s say our Canadian constitution or our human rights law, that they were equal in the positivist vein.

Starting in the early 1950s, even in the late 1940s, there was a legal theory movement that kind of pushed back against that and said really when we’re talking about law we need to start asking more questions about what’s right and what’s wrong. So simply because it’s been passed through a democratic process or has come from the mouth of a monarch or a dictator and is written down as law, that we need to start digging deeper into what the content of law is.

And that has led to some of the more contemporary threads of legal theory, things like feminism, post-structuralism, post-modernism, queer legal theory, that even looks at our Canadian laws that are on the books today which we would, probably as most Canadians say, are normatively correct or normatively reflect the values that Canadians like and support, but still find questions to ask the ways in which those laws perpetuate or keep in place certain structures of power. So starting in the early era of legal theory we move from this notion of positivism that whatever is written down in the law *is* the law, and we shouldn’t ask any questions about it, that whether it’s normatively correct or not is irrelevant since it is the law and therefore you should follow it, to these more contemporary legal theories which ask us to ask questions about power and social justice all the time even about laws that on their face would normatively seem to comply with our Canadian constitutional values and affects.

PROFESSOR FORCESE: Another term that students might hear is something called “natural law”. What’s that?

PROFESSOR CAMERON: Natural law comes from the basic idea that there is an external source to the laws that we have on our books or there is an external measuring stick that we should use to judge whether the laws that are on our books are normatively good or bad. So one form of natural law is religious law, so external to let’s say the Canadian constitution or Canadian criminal law, there is another text or another set of values and ideas that we should measure our laws against so those would be the primary texts that come from major religions and the values and ethics that come from those major religions. The origins of natural law are actually more in this idea of “nature”, that aside from variable notions of God or a higher power, things that happened in nature would change the way that human beings interacted with one another or were able to survive or participate in what we would think of as forms of governance or democracy, so things like the ways that earthquakes or weather would intervene in society was originally considered to be a form of natural law.

Probably in the contemporary Canadian legal context there are two major ways that natural law finds its way into our debates, our legal theory debates about the right and wrong in law. The first comes from the major religious traditions. The second one comes from Indigenous laws and legal orders. So Indigenous laws and legal orders are often identified as coming from an external source of power both in nature but also in the supernatural so the ways in which let’s say ancestors or the Spirit world might influence how you act in relation to other people.

PROFESSOR FORCESE: Let me ask: how do you apply legal theory in some of your regular teaching and by regular I mean your more “black letter” teaching, say in Property? Is there room for legal theory in the mainstream, more positivist teaching of law?

PROFESSOR CAMERON: Sure. Ya, I think so and I think almost every professor regardless of how kind of positivist or black-letter, or rules-driven they think they’re being engages in questions of legal theory. Two examples that I use in my first year Property Law course are to talk about new forms of property that are coming into Canadian society, so how do we treat parts of our bodies? Eggs, sperm, blood platelets, organs…So we have legal regimes in Canada that deal with whether we want to commodify those, which means not necessarily property in the sense that you can buy and sell them but they’re the subject of contract, they’re the subject of regulation, so you can’t just walk into a hospital and take somebody’s kidney, there’s a legislative and a policy protocol that surrounds that.

So we go back to basics on that, so what kind of norms and values do we want to use to decide whether someone should be allowed to sell their kidney, or sell their sperm, or sell their egg or even sell their body for the purposes of surrogacy and that brings us right back out to questions of “what is law?”. Should natural law play a role in this? Should we look at the major religions views on how we treat parts of our bodies or whether we can buy and sell them, in particular in relation to sperm and eggs because they obviously have this special potential to create human life, do we or should we treat them differently? So that draws on theoretical traditions from bioethics, from philosophy, from very basic legal theory, as in how much should we regulate and how should we regulate it and also and some of the more contemporary, critical veins of theory - feminist legal theory queer legal theory, those sorts of things. So that’s one place where I do it.

And then another spot where I use legal theory in the first year Property Law class is in talking about public and private spaces, so the regulation of things like shopping malls and parks. Those places where we might see groups of young people or people who are homeless or people who are underhoused – people who need to use those public or semi-public spaces to kind of live their daily lives, eat, go to the bathroom, sleep, build shelters those sorts of things. And we have a variety of levels of law in Canada, in Onartio, in Ottawa actually - municipal law, city law, provincial law, national law on regulating those spaces and the uses people can put them to. So again, we look to legal theory to ask those basic questions about: Should we even be regulating those spaces? Should it be sort of a laissez-faire approach to ok so this is one place where we’re not going to write anything down and have a set of rules. Maybe we should let those more informal ways of regulating our behavior in relation to one another take over. If we are going to regulate, why should we regulate and in what direction should we regulate? And if we’re talking about things like social justice then we can look to things like critical race theory, queer theory, feminist theory; there’s a lot of legal theory that comes out of the Marxist and socialist traditions that look at the ways in which law and economics work together to let’s say maintain stratifications in society so again going back to the very basics about why we regulate, how we regulate and what are the values and norms that we use to underpin those decisions. So I think in a lot of cases, in most courses, students are being asked to ask those very basic questions about the ways that we choose to regulate – and the ways that we choose not to regulate – pretty much every aspect of our lives.

PROFESSOR FORCESE: Can I end this conversation by asking you a little bit more about social justice and specifically the social justice Option this law school has and in which you’re involved? It’s an opportunity for students to pursue an interest in social justice. Are you in a position to say a few more words about that?

PROFESSOR CAMERON: Sure. I think, the first thing I would say about the social justice stream at the University of Ottawa is that it has attracted the most amazing students I have ever met in my…I’ve been involved in legal academic for over a decade and worked with lots of non-governmental organizations and activist groups and I can honestly say that the students who come to Ottawa U to do the social justice work are some of the most accomplished, dedicated, intelligent and creative students that I’ve ever met – humans – that I’ve ever met in my life so it’s an incredibly exciting place to teach for that reason. I’m excited to meet the social justice students that are coming in this year. I think we have a unique program or a unique collection of professors and people who work within and around the university setting. I think it’s a great opportunity to learn about what social justice means and the ways in which students who are here to become lawyers and become advocates and become policy-makers can both take advantage of the learning that they get here at law school in relation to social justice but also, everybody, regardless of whether they’re in the social justice stream or come here for the purpose of sort of furthering their social justice aims, to start to realize and think about the ways in which a law degree gives you a special set of powers within society that also comes with a special set of responsibilities. And whether social justice is your bent or not, I think having that imbued into, especially, the first year courses gives us all an opportunity to reflect on the kind of privilege that having a law degree conveys upon us and the kinds of ways that we can use that power to make positive change within society.

PROFESSOR FORCESE: Thank you very much.

PROFESSOR CAMERON: Thank you.