Is Law An Autonomous Discipline Essay, Research Paper

The autonomy of law and in particular the alleged separateness of law and politics has been the subject of debate since time immemorial. Many legal theorists have made the assertion that law is autonomous and is different from politics; many others have gone as far as to call the supposed separation of law and politics a mere myth.

It is the intention of this paper to make a very humble contribution to this debate. This paper is premised upon the refutation of the autonomy of law and the separation of law and politics. I will address the political content of law and show that law and politics are interrelated in that each one influences the other. Considerable attention will be given to the works of legal theorists Ronald Dworkin and Roberto Unger on the subject and in particular the notion of law is politics that was espoused by both of them. I will then go on to briefly discuss some aspects of critical legal theory.

While it is beyond the scope of this paper to indulge in an in-depth analysis of natural and positive law theories, it is useful to take as our point of departure a discussion of some of their basic elements.

Natural law writers argue that natural law is discoverable by reason in human nature.1 Aosara Lucania indicated that the basis for understanding law and social order is provided by the nature of the human soul.2 Natural law writers also agree that natural law is a higher law in that it is superior to any man-made law. Furthermore, natural law is claimed to be universal in that it applies generally to all people regardless of where in the world they are, and that it is unchangeable in that it stays the same regardless of historical changes or social attitudes and opinions.

Firstly, the name natural, in my view, is misleading because it suggests that it evolved by nature. What I mean by natural law is divine law; law that has been brought about by way of revelation by “Allah”. This natural law can be argued to be superior to man-made law because it gets its validity from God.3 Moreover, man-made law can be argued to be inferior because of the fact that it is incomplete or imperfect. This is because it is impossible for a set of rules constructed by a human being to apply to a variety of cases or situations in a neutral and objective manner to cover every conceivable situation that may arise. This is evident in the discovery of loopholes in legislation time and time again. Man-made law can also be argued to be inferior to divine law because it lacks universality. This is because, as has been emphasized above, it can not cover every conceivable case. Instead, it is designed to apply to a particular community or society.

Positive law, on the other hand, generally refers to law that is “posited” or laid down by a human agent, man-made law. Hence, the idea of “positivism” as a legal philosophy. Positivists argue that the law of legal systems is created by human acts, imposed on people, and that the proper role for legal philosophy is to come to an understanding of the nature of the legal systems rather than speculate about morality. Positivists argue that morality is not a necessary element of the concept of law, and that it can be excluded from the analytical study of law. H.L.A. Hart explained that morality is not considered as part of the definition or concept of law as positivists see it. This is because legal positivists claim to study what law is and not what it ought to be. This is one of the major conflicts between natural and positive law theories. On the one hand, the positivists’ definition of law is separated from questions of morality, politics and personal ideals. On the other hand, according to natural law, unjust or immoral statutes or court pronouncements are not really law.\* Positivist theory, in this respect, seems to beg the question because it relies on the law in order to explain the law.

The legal theories of Dworkin and Unger, however, address the political content of law in order to explain the law and therefor their theories can be described as political theories of law. Both Dworkin and Unger advocate the slogan “law is politics” which means that the judiciary makes policy decisions in deciding cases just as the legislature makes policy decisions when it enacts law. According to Unger, politics is the “conflict over the mastery and uses of governmental power” and “the conflict over the terms of our practical and passionate relations to one another and over all the resources and assumptions that may influence these terms”\*. Then, because law is a mechanism of social control and an exercise of governmental power, legal argument may be considered to consist primarily of political debate over what exactly forms the best social order. Unger recognizes that society is made up of various groups that advance different concepts of the human good and compete for control of government power \*. He argues that ” the class struggle ensues from the development of ‘group pluralism’ and subjectivity of values in liberal society” \*. Law is therefore not independent from politics, but is rather an extension of political debate, and forms an important of what Unger calls “society making activity” \*.

Dworkin’s definition of politics is almost identical to that forwarded by Unger. According to Dworkin, political theory is that which explains and justfies the legal order. In Dworkin’s view “law is the means by which a community interprets its own basic convictions about the most desirable ways of arranging and regulating its political life” \*. In order to solve legal problems, recourse to political theory is required because it these political theories that are the source of rights. In addition, because legal concepts can be interpreted in many different ways we should not rely on them to solve legal problems. Instead, we should look at the policies and intentions behind these “abstract concepts” that we have created. Dworkin sees law as fundamentally constituting an “ongoing narrative of the community’s political morality in the process of attaining justice” \*. He identifies legal argument as a species of political argument, and therefore locates the source of law in politics. Legal practice, he argues, is an exercise in interpretation and that law is “deeply and thouroughly political” \*. From what we have discussed above we can see that both Unger and Dworkin perceive law as a form of political activity and hence argue that “law is a function of politics and social theory, and it is not an autonomous branch of knowledge” \*.

“The starting point of critical theory is that legal reasoning does not provide concrete, real answers to particular legal or social problems. Legal reasoning is not a method or process that leads reasonable, competent, and fair- minded people to particular results in particular cases \*. The different in reasoning may explain the frustration of the layman with the law. This is because they cannot comprehend how, for instance, a court could come to a particular judgment in a particular case when according to their intelligent investigation of social facts and social policies they have arrived at a completely different conclusion.

Critical theory claims that legal reasoning does not provide the source for results to legal questions, rather the results come from those same political, moral, social and religious value judgments from which the law claims to be independent \*. Therefore, it is argued that decisions are not based on, or determined by, legal reasoning. “The ultimate basis for a decision is a social and political judgment incorporating a variety of factors, including the context of the case, the parties, and the substance of the issues” \*.

In conclusion, in light of our discussion above, we can say that far from being autonomous and separate from politics, law is actually very political. Judicial processes are just as political as legislative processes. The fact is that these ideas are rejected by many because they seem to question the legitimacy in which the liberal state depends. It is also rejected by those whose interests remains with the maintenance of the status quo.

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