

The critical legal studies movement



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The Critical Legal Studies (CLS) movement came to the fore in the United States (US) in the 1970's. This movement is a body of like-minded thinkers who claim to attack the virtues that they say are proclaimed by the liberal legal system. It is a radical theoretical movement which rejects the distinction between law and politics and the notion that law can be neutral and value free. The movement proposes the integration of law and social theory. Since the Critical Legal Studies movement is relatively new, its value as a theory of law is still being assessed, but despite its continual development it has given much of interest to thinking about the law. Indeed, like other sceptical theories it may undermine the coherent world of law which legal academics and practitioners tend to portray. In Britain, the Critical Legal Conference was formed in 1984.[1]

Although CLS has been largely a US movement, it was influenced to a great extent by European philosophers, such as nineteenth-century German social theorists Karl Marx, Friedrich Engels and Max Weber; Max Horkheimer and Harberd Marcuse of the Frankfurt School German social philosophy; the Italian Marxist Antonio Gramsci; and poststructuralist French thinkers Michel Foucault and Jacques Derrida, representing respectively fields of history and literary theory. CLS has borrowed heavily from legal realism, the school of legal thought that flourished in the 1920's and 1930's. Like CLS scholars, legal realists rebelled against accepted legal theories of the day and urged more attention to the social context of the law. Among noted CLS scholars Roberto Mangabeira Unger, Robert W. Gordon, Mark Kelman, Peter Gabel, Morton J. Horwitz, Duncan Kennedy and Katherine A. Mackinnon.[2]

The founders of CLS found a yawning absence at the level of theory, fundamentally convinced that law and politics could not be separated. How could law be so tilted to favour the powerful, given the prevailing explanations of law as either democratically chosen or the result of impartial judicial reasoning from neutral principles? Yet how could law be a tool for social change, in the face of Marxist explanations of law as mere epiphenomenal outgrowths of the interests of the powerful? CLS scholars have influenced try to explain both why legal principles and doctrines do not yield determinate answers to specific disputes and how legal decisions reflect cultural and political values that shift over time. They focused from the start on the ways that law contributed to illegitimate social hierarchies, producing domination of women by men, nonwhites by whites, and the poor by the wealthy. They claim that apparently neutral language and institutions, operated through law, mask relationships of power and control. The emphasis on individualism within the law similarly hides patterns of power relationships while making it more difficult to summon up a sense of community and human interconnection. Joining in their assault on these dimensions of law, CLS scholars have differed considerably in their particular methods and views.[3]

One of the characteristic of CSL is that it has been rejected formalism. Formalism has tended to be the fall back position of liberal legal thinking when forced to confront the question: how can a legal system give the kinds of neutral decisions expected of it. Formalists, as CLS characterise them, [4]circumvent this problem by insisting that the judge is not imposing his or anyone else's values but merely interpreting the words of the law. By

separating core and penumbra Hart could be taken to admit the problem by his indulgence that the judge had to have recourse to discretion in interpreting the penumbra of legal rules.

CLS theorists also share the related view that the law is indeterminate. They have shown that using standard legal arguments, it is possible to reach sharply contrasting conclusions in individual cases. The conclusions reached in any case will have more to do with the social context in which they are argued and decided than with any overarching scheme of legal reasoning. Moreover, CLS scholars argue that the esoteric and convoluted nature of legal reasoning actually screens the law's indeterminacy. They have used the ideas of deconstruction to explore the ways in which legal texts are open to multiple interpretations.

The CLS thesis refutes the claim that traditional legal scholarship produces rules and principles of law which guide human behaviour. Both legal formalism and positivism, which look upon law as a system of rules which are rationally made, are repudiated. Traditional legal scholarship treats the law as objective and neutral. The CLS claims that law can not be objective because human and social realities always manifest themselves in the legal discourses.

Roberto Mangabeira Unger, who teaches at Harvard Law School and is widely regarded as the intellectual leader of the movement, now offers the public a short manifesto he describes as " more a proposal than a description." It is an ambitious and impressive undertaking. It also defies summation. It is a carefully crafted statement with ideas interlocked like a chain-link fence that

stretches as far as the eye can see. And the full purport of his message can only be appreciated by an attentive reading. Even so, five themes seem central to his argument.

There were two distinct stages in the role of law in western societies before the modern era. First it served to establish and defend social hierarchies and social class divisions. Toward the end of the 18th century, however, it was put to the revolutionary task of protecting rights of individuals irrespective of their social rank or class. In this country the founding fathers relied on democracy (created by our public law, the Constitution) and the market (fostered by private law, notably contract) to give form and limits to those rights.[5]

By the 20th century the context in which American law operated had drastically changed. Social arrangements sanctioned by law had come to include an array of hierarchies of economic power and pernicious social distinctions protected as rights by the very legal system created to establish individual freedom and equality. The politics of democracy and the blind forces of the market proved woefully inadequate to govern a society increasingly dominated by modern science and technology. Hence there is a compelling need to restructure our social order to make it compatible with freedom and equality.

The way to accomplish this reconstruction, according to Roberto M. Unger, is not through classical revolution of the kind Marx advocated, brought about by an alliance between disaffected elites and the downtrodden. Rather law must be reinvented to give it a revolutionary new purpose: to lead the

dismantling of the various hierarchies of power and privilege that through perversions of the legal process have come to threaten the higher values of our society.[6]Of property law, he says that it has its own inbuilt legal market which is a constitutional interest with its own legal structure in a democracy. According to him, the situation is fraught with ambiguity and indeterminacy, because of the abstract nature of the concept of rights. With respect to contract law, Unger explains that contract law allows freedom to contract, but that this is promptly contradicted by other principles which say that people can only bind themselves in contract for what the law allows. Unger presents an argument on formalism which states that every doctrine relies on some view of human associations which are right and realistic in social life. The lawyer needs a theory as his guiding vision, which prevents him from seeing legal reasoning as a game of analogies. To Unger, reliance on analogies leads to analogy-mongering, and this must stop. He claims that this received wisdom is challengeable as wrong, and to do this one should rely on a normative theory of a branch of law supplied by the CLS. This is Unger's 'deviation doctrine', which embellishes the CLS's nihilistic view of law.

Mark G. Kelman examines the importance to criminal law of the stage that precedes legal analysis. His argument is that legal argument has two phases: interpretive construction and rational rhetoricism, and that the former, a vital step which undercuts the authority of the latter, goes virtually unexamined.[7]For example, the result of a case may depend on whether the defendant's act is set in a broad or narrow time frame. This issue has come to a head with a series of cases where battered women have murdered

their husbands and the scope of the provocation defence has been tested.

[8]If a broad time frame as been used she may have defences of provocation, even self-defence; in a narrow time frame she has committed murder. There is no meta-theory to determine the appropriate time frame; the decision accordingly is unreasonable.

There are some techniques which the CLS have deployed in analyzing legal texts, namely “ Trashing, Deconstruction, Genealogy, etc.

Leading CLS scholar Mark G. Kelman defends trashing against mainstream academic critics, claiming that the discrediting of accepted legal argument is ‘ good’

According to him - “ the most frequently recurring theme in the attacks on our technique, the more-or-less hysterical counter-Revolution against Trashing. It is abundantly apparent that the vast preponderance of mainstream American legal academics were told (repeatedly) by their moms and dads, “ If you don’t have anything nice or constructive to say, say nothing at all.”[9]

Again he stated that law-and-economics studies of private law rules have not actually analyzed the concrete implications of rule choices on particular occasions, pretensions of policy relevance to the contrary. Instead, they have again and again simply derived apologies for existing arrangements from a highly general and theoretical economic vision.

There are two politically central insights of mainstream private law and economics scholarship: (1) In situations involving “ strangres” (where

markets cannot work because of transaction costs), “ proper” legal rules that establish implicit fees for harming others can be applied to concrete cases so that parties who interact to create a joint cost will take all cost-justified, damage-averting precautions; and (2) in situations involving those in contractual relationships, competitive markets function in such a way that buyers inevitably get whatever they desire at the lowest possible price — a [*308] price that is the sum of the production cost of the desired good and a “ normal” profit sufficient to prevent industry exit.

One goal, if not an inevitable effect, of trashing is to destabilize a variety of theoretical world views (and thus, one would hope, related [*328] commonsense world views) that imply the beneficence or inexorability of social life as we see it. Of course, asserting that there must be a causal connection between the high-level apologetics of the intelligentsia and the everyday mediating “ political” ideals that help us organize and make sense of daily interactions would be patently ridiculous. But one can discern at least a close family resemblance between elaborate, mandarin apologetics and the more ordinary, complacency-inducing, “ commonsensical” bits of wisdom without straining credulity.[10]

According to Robert Gordon Deconstruction is one of the CLS techniques best work is a familiar work kind of left-wing scholarship, unmasking the often unconscious ideological bias behind legal structures and procedures, which regularly makes it easy for business groups to organise collectively to pursue their economic and political interests but which makes it much more difficult for labour, poor people, civil rights groups to pursue theirs.[11]

CLS claims that mainstream legal thought acts to reify; it does this by translating social practices into things. For example, the relation between employer and employee brings about a range of consequences and expectations for both parties. The terms confirm or foster an implicit hierarchy; both employer and employee will expect the latter to follow instructions and generally defer to the former.

Another way to heighten awareness of the transitory, problematic, and manipulable ways legal discourses divide the world is to write their history under the Genealogy technique.

Some critics charge that CLS work hampers progressive political movements by challenging the idea of the subject and human agency. Others view CLS work as unimportant or failing because of inadequate development of specific policies, strategies, or constructive direction. CLS is faulted for implying that simply changing how people think about law will change power relationships or constraints on social change, although a fair reading indicates that “Crits” simply treat changes in thought as a necessary but insufficient step for social change. Feminists and Critical Race Theorists object that conventional critical legal studies employ a critique of rights that neglects the concrete role of rights talk in the mobilization of oppressed and disadvantaged people. Robert Gordon has responded with a warning that even such mobilization efforts must be done with an experimental air and full knowledge that there are no deeper logics of historical necessity that can guarantee that what we do now will be justified later.

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