

# The critical legal studies (cls) movement



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The Critical Legal Studies (CLS) Movement originated in 1960 following the founding members participation in social activism surrounding the Civil Rights movement and the Vietnam War.

Several CLS scholars entered law school during that period applying the ideas, theories, and philosophies of post modernity (intellectual movements of the last half of the twentieth century) to the study of law taking guidance from such diverse fields as social theory, political philosophy, economics, and literary theory<sup>1</sup>. This theory aims to defy and eradicate established norms and principles within legal theory and practice. The concept of this theory is that the reason and construction accredited to the law is dependent upon power relationships of society, advancing the idea of The law being in place to further the interests of the class that composed it and has disintegrated into a complication of viewpoints and discriminations that allow the injustices of society to operate legally thus the wealthy and the powerful exercise the law as a means of oppression to sustain their position in hierarchy. The central idea of CLS is that law and politics is one and the same making it neither impartial or value free<sup>2</sup>, due to this many CLS Theorists support the concept of the law being a reflection of political power and there is a great deal of evidence to support this primarily the way in which certain groups benefit from the law in more ways than others, further their themes such as the impossibility of liberal rule of law, the indeterminacy and contradictory nature of the legal system support this, however there is divided opinion upon this amongst theorists as there are has been an advancement of a new view that rejects the reduction of law as politics and asserts that the two disciplines are mutually interspersed, meaning that there is no pure law or

politics but rather the two form work together as a unity as means of the legal system operating effectively and so the debate on whether the law can be said to be anything more than a reflection of political power requires further consideration. Foremost a central theme running through the work of CLS theorists is the concept of the law and politics being deeply intertwined so much that the two rather than being two independent entities have become an unnatural system where political power undermines the legal system. The main point of this notion is law has become politics, meaning that it impossible to differentiate one from the other.

CLS theorists assert that liberalism has conventionally considered the law to be a neutral and coherent system of specific decision making, whilst viewing politics conversely to be an area full of indistinct and irrational opinions infiltrated by opposing interests. CLS Theorists consequently believe the law is not separate from the political arena and its quarrels, resultantly legal reasoning instead of existing as a powerful mechanism of impartial rationality has fragmented by incongruous and illogical classification that is continuously redefined and revised. From this notion the law is simply convoluted political principles so that just like other political principles is in place to maintain the interests of the party or class that devised it. Vitally from the CLS viewpoint the legal system preserves the status quo perpetuating the reputed power relations of society; accordingly the law is not reasoned or structured but instead is resultant of power relationships amongst society. Primarily CLS considers the law to be a compilation of beliefs and prejudices allowing injustices of society to be carried out under

the veiled protection of legality<sup>3</sup>, this is supported by Mark Kelman stating that “.

? a mainstream tax lawyer would tell a client that it is illegitimate to exclude from income the value of accommodation under S119 if he would be paid market price for those accommodations, quite to the contrary, tax lawyers in fact drew up plans for Zero-Based Reimbursement account”<sup>4</sup> this demonstrates the way in the legal system is used to achieve unfair results to progress the interests of power groups and like earlier mentioned that the law is continuously illogically redefined in pursuance of political power interests. Resultantly the law is exercised as a means of repression for the use of elite and the influential in order to retain their hierarchical positions. Literature amongst critical legal studies in their study of legal doctrines found that common areas studied in law schools such as contracts, constitutional and corporate are in themselves politically motivated in their own ways . This is evidenced by Duncan Kennedy who stated “ The doctrines are political in the sense that they are the ground rules for struggle between groups , struggles that have a strong ideological dimension”<sup>5</sup>, applying the example of landlord/tenant law he evidenced this by showing that those who have studied landlord law would recognise that the rules as a locale of limitation for disputes among landlords and tenants as groups in addition with methods to cordially resolve such disputes. Further this is supported by Unger who concluded that the law “ has become the keystone of traditional liberal ideology, whilst the ‘ myth’ of individual rights, because it denies individuality and difference, disguises widespread social, political and economic exploitation and disadvantage”<sup>6</sup>. Further this exercise of political

power within the legal system can be seen within the judiciary, as whilst they are not appointed by society they are able to decide upon social issues and disputes and often people view some decisions to be motivated by their own political power interests.

Duncan Kennedy in support of this asserted “ the political power judges exercise through all these different doctrinal areas has been legitimated, explained, rationalized by saying its true judges aren’t elected but they don’t need to be elected because the legal process imposed a kind of discipline on them that forbids them from being ideological actors in the system... even if you acknowledged that the judges were in fact influencing distributive outcomes, and influencing conflict between groups, they weren’t really doing it on their own hook, they were doing it as agents of the political process constrained to follow the law in some way” 7 . Overall these views about law and politics being one and the same indicate that the law cannot be said to be anything more than a reflection of political power this is valid as the law has on several occasions seemed to favour certain groups over others this can be seen for example by the methods used to scrutinize parliament as often they are ineffective in actually monitoring the actions of parliament, further the use of hierarchy which is also proposed by Duncan Kennedy being present in so many aspects of the legal system particularly the legal doctrine in the form of teaching in law schools, the hierarchy of the courts and even the hierarchy of the judiciary highly implies that the law is vastly politically power motivated as if this was not the case then surely so much hierarchy which furthers those at the top interests more than those at the bottom would not operate so significantly within the legal system.

However on the hand it could be argued that the law is not just a reflection of political power as the power given to the judiciary is limited given that they are able to decide the majority of cases based on existing case law, and it is only in limited cases that they are given greater authority, equally the presence of hierarchy could be contended not to mean that a certain groups interests are being favoured over another's but simply a system necessary to ensure the effective operation of the legal system and could be said to be based on skills and ability rather than political power such as those who are members of the house of lords as opposed to a district judge is most likely due to the skills and attributes that they had more than other candidates. Moreover the majority of CLS theorists assert that the rule of law is nothing more than a theory and is instead a falsity created as a means of the law reflecting political power by advancing the interests of certain power groups over the less advantaged. Primarily a great deal of the literature on critical legal studies proposes that liberal legal and political theory are " incoherent" 8, " internally inconsistent," 9 and " self contradictory" 10 . Prominently it is contended that it is impractical for the state to comply with the need of responding to both the necessities of the rule of law and the requests of liberal political morality There are three primary principles of this argument within CLS literature for why it is impossible for a liberal rule of law to exist; one there cannot be an unbiased system for the enacting of ' legal rules in the context of moral, religious and political pluralism" 11, and given that it is a requirement of the liberal rule of law for such a system to operate thus proving the impossibility of the rule of law support for this contention is provided by Roberto Unger, secondly there can be no neutrally conducted procedure to allow legal rules to be analyzed in the context of moral,

religious and political pluralism, this argument has two branches the radical one contending that legal rules are intrinsically absent of meaning and can be composed of content only through a process that is not neutral, this view is outlined in the work of Gary Peller and James Boyle<sup>12</sup>, the second branch does not believe that legal rules can be said to be devoid of meaning however they counter that their interpretation requires a process which cannot be considered neutral, this is supported by Roberto Unger in Knowledge and Politics<sup>13</sup>, the consensus amongst both branches though is that liberal rule of law is defeated due to the absence of a neutral process of legal interpretation which is its whole purpose of existence.

The third contention of CLS theorists is that the distinction between law and politics which is considered to be of vital importance to liberalism in their continued neutrality of the legal process is in itself a contravention of neutralism because it allows a bias against beliefs about the good and right , thus attempts to protect the neutrality of the law which is crucial to maintaining the rule of law ultimately becomes biased and contravenes the liberal principle of neutrality, this is supported by Mark Kelman. Returning to the first contention Unger in Knowledge and politics contended that the major deficiency which prevents the operation of liberal rule of law is the failure of liberalism to come to a logical understanding of the relationship between rules and values in social life , and this in turn provides the two contradictions to liberal political and legal theory which Unger contends, that firstly of the law failing to have a process satisfying the need of neutral interpretation and secondly the lack of neutral interpretation of legal rules<sup>15</sup>. Consequently many of the academic arguments within CLS literature that

support the theory that liberal rule of law is impossible is a result of Unger's contention that liberal legal and political theory does not allow a logical account of rules and values. Unger's contentions are plausible given that the law is largely criticised for not being able to legislate based on legal rules and morality and social values in an unbiased form, rather it is largely contended that morality and value is given no importance as what is largely adhered to it legal rules, this would indicate that the law cannot be said to be anything more than a reflection of political power as the lack of neutrality which is requirement of the rule of law destroys the whole concept of a liberal rule of law thus resulting in a system where the law is based on pursuing political interests rather than the interests of the larger society.

However it could be contended that the concept of impossibility of the rule of law does not mean that the law is a reflection of political power as it can be said that it would be impractical for the law to always neutralize the enactment and interpretation of legal rules in the context of moral, religious and political pluralism, as the law is designed to act in the interests of society as whole not to satisfy all interests of society as to do is impossible.

According to Peller " the pretension of legal practice to find determinate meaning in written texts is one aspect of legal ideology and has largely been surpassed at least in superficial respects by the dominant versions of legal thought since the 1950s" 16, Similarly James Boyle in favor of the contention of the law being devoid of any meaning and instead being full of content thorough an unnatural process states that " words do not have core meanings" 17. These contentions are valid considering that in applying legal rules difficulties arise in recognizing their true meanings and the result can



be to apply something which was not the intention of the law in creating the rule, this is evidenced for example by the difficulty judges face in statutory interpretation as often judges are unclear of the true meanings of statutes and have to resort to one the three means of statutory interpretation in doing so they do not necessarily follow the former intention of parliament in making the statute and can often depend on the facts of the case, arguably this can be considered an unnatural process given that there is no single set outcome, therefore this would suggest that the law is a reflection of political power as law can be said to be distinct of natural meaning and instead the content seems to be full of artificial aspects based on political thought since it is designed by parliament. Although arguably the law could be said not be a reflection of political power as despite the inconsistencies of interpretation, the law is decided upon legal rules as well as the circumstances on the case and thus the rules cannot be said to be solely politically motivated.