

An overview of critical legal studies



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The given quotation in question is by Robert Gordon, in *Law & Ideology* as featured in Lloyd's *Introduction to Jurisprudence* by MDA Freeman where he has touched upon critical legal studies. For our purposes, my answer will provide a short explanation of what the critical legal studies is about, then it will feature how law maintains inequality according to critical legal scholars, and what techniques are adopted in response to the inequalities and finally how effective these techniques are.

Critical legal studies (hereinafter referred to as the CLS) grew out of a dissatisfaction with current legal scholarship.[2] As Raymond Wacks[3] put it the most important feature of CLS is its rejection of what is taken to be the natural order of things, be it free market or 'meta-narratives', or the conception of 'race'.

Law based on reason is what attract the scholars of CLS the most. For the scholars of CLS it is to doubt the prospect of uncovering a universal foundation of law based on reason. The myth of determinacy is a significant element of the critical assault on law.[4] To the scholars of CLS, law is far from being a determinate, coherent body of rules and doctrine, the law is portrayed as uncertain, ambiguous and unstable.[5]

If American legal realism was 'jazz jurisprudence', Critical Legal Studies may be its 'rock' successor.[6] Ronald Dworkin found the CLS resembling the older movement of American realism, and for him it was too early to decide whether the CLS is more than an anachronistic attempt to make the then dated movement reflower.[7] Professor Hilaire McCoubey and Dr. Nigel D. White[8] finds the ultimate target for scholars of CLS is to destroy the notion

that there is one single 'truth', and that by disclosing the all-pervasive power structures and hierarchies in the law and legal system, a multitude of other possibilities will be revealed which are all equally valid.

LAW, ITS INEQUALITY AND OTHER ISSUES SURROUNDING LAW

The scholars of CLS find it very disturbing how the law maintain inequalities in society.

According to the scholars of CLS, legal doctrine is limited and imperfect. Legal doctrines can only offer a narrow view of the world. Robert Gordon finds the legal doctrine to comprise of abstract and impoverished categories. These crude, artificial categories e. g., found in criminal law, laws of contract and family, which will illustrated below, are based on complex human relationships although they in no way reflect or naturally represent with what is occurring.

With regard to criminal law, M Kelmen[9]uses the example of a wife who, having been battered by her husband, kills the husband. Then she pleads the defence of provocation. Question arises whether the judge is to adopt a narrow 'time frame'[10]or that of a broad one[11]. No one can say it for sure which law is to be applied here for certain. There may be circumstance where the alleged offender is considered in a narrow time frame basis and another in a broad one. This line of approach is making individuals fall into the contradiction in law faced in criminal law.

The law of contract where the principle enshrined in the maxim caveat emptor – a maxim devised to protect capitalist interest against the interests

of the powerless consumer – stands against the principle that it is the function of the state to intervene to protect the weaker party against exploitation is a clear reflection of inequality in law.[12] This kind of contradiction in law has always put the judges in confusion as to which principle a judge needs to follow in a given case. It is argued by the scholars of CLS that law is fundamentally political. For D. Kennedy[13] there is no line between private and public law. It is a myth.[14] There is nothing natural or neutral about contract law as much as administrative law, property law as much as environmental law.[15]

The law of co-habitation opens range of options to a judge which makes it hardly possible to come to a decision which ultimately causes conflicting outcomes from the courts of law. Where a woman who seeks to enforce a co-habitation agreement against a male partner the question that comes before the court is to choose between (1) common law principle that such agreements are not legally enforceable because of the presumption that such agreements lack the necessary element of an intention to create legal relations and (2) the principle, arising from public policy that it is the duty of the courts to give effect to the intention of the parties. This has always put judges in a difficult position as said earlier.

For Peter Gabel,[16] one is never, or almost never, a person; instead, one is successively a husband, a bus passenger, a small businessman, a consumer and so on, in contemporary capitalist society. To Mark Kelman,[17] liberalism in the eyes of Critics is a system of thought that is simultaneously beset by internal contradiction and by systematic repression of the presence of these contradictions. Liberalism focuses upon individualism and self-interest at the

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cost of others. The scholars of CLS are against such notion. Such preference is evinced in the law's creation and maintenance of division between the public and private matters. Mill's liberty is the perfect example. Mill's liberty is the principle that an individual can be compelled where his actions harm others, but must be free where his actions affect himself. The courts always find it difficult to prevent oppression in the private realm because of the legal division between public matters, in which the state or its laws can intervene, and private matters, in which they cannot. The Critics of CLS termed this division as false and a mere illusion.

Robert Gordon very clearly mentions that for the Critics, law is inherently neither a ruling-class game plan nor a repository of noble with perverted principles. To Gordon, it is a plastic medium of discourse that subtly conditions how we experience social life.[18]

Robert Gordon refers to some basic points that the Critics want to make about legal discourse. He refers to discourses of power. Law cannot be a toy for the powerful to play with. However, in reality to avail legal services or matters in conjunction to it one has to be able to wield legal discourses with facility and authority or to pay others, such as lawyers, legislators, lobbyists, etc., to wield them on your behalf is what matters and that is what it takes to possess power in society. For this reason legal discourses tend to reflect the interests and the perspectives of the powerful people who make most use of them.[19] This may be regarded as another example of how law maintains inequality in the eyes of the scholars of CLS. However, whether actually being used by the powerful or the powerless, legal discourses are saturated with other non-legal discourses that for the most part rationalise

and justify in subtle ways the existing social order as natural necessary and just.[20]

It is a common phenomenon to make laws to spur economic competitions and thus assisting the elite class in their search for power and wealth. Duncan Kennedy[21]mentions that the primary targets in Legal Education are the unhealthy hierarchies at various levels like those existing between lecturers and the students they teach; those between the faculty members and the administrative support and he terms them all as false and unnecessary hierarchy which gets into the mind of law students and thus creates a continual chain of hierarchies.

TECHNIQUES APPLIED TO LEGAL DISCOURSES

Trashing or Debunking

As McCoubey and White put it trashing is mainly aimed at revealing the illegitimate hierarchies that exist within the law and society in general.

[22]The scholars of CLS are essentially engaged in revealing those hierarchies and undermine them. In Marxism the hierarchy of power exist in terms of classes but here we have seen the hierarchy to exist even in universities where there is a power relationship between lecturer and student.[23]It is much more complex than the marxists' view.[24]Trashing involves seeking to question and challenge the mainstream liberal legal regime. Mark Kelman's scepticism towards mainstream or orthodox views of law led to defend trashing against mainstream academic critics and stated that the discrediting of accepted legal argument is good. The following extract from Kelman explains the purpose of trashing or debunking:[25]

' We are also engaged in an active, transformative anarcho-syndicalist political project ... At the workplace level, debunking is one part of an explicit effort to level, to reintegrate the communities we live in along explicitly egalitarian lines rather than along the rationalised hierarchical lines that currently integrate them. We are saying: Here's what your teacher did (at you, to you) in contracts or torts. Here's what it was really about. Stripped of the mumbo-jumbo, here's a set of problems we all face, as equals in dealing with work, with politics, and with the world.'[26]

The above quotation reveals the tension of exposing hierarchies at work place, specifically it goes on to mention within the law school and expressly between the teachers and students as discussed earlier. Kelman further mentions that one main objective of trashing is to de-stabilising view of the theoretical world that is trapped in liberal legalism. Trashing helps us to see the underlying complacencies and assumed premises in liberal legalism as imperfect and opposes the belief that the world is running smoothly. Robert Gordon, in his Law & Ideology, states that trashing techniques are used sometimes simply to attack the discourses on their own terms – to show their premises to be contradictory or incoherent and their conclusions to be arbitrary or based on dubious assumptions or hidden rhetorical tricks.[27]He claims that this would reveal the hidden truth of obscure realities.

Dereification

Dereification is aimed at exposing what the scholars of CLS see as one of the most important functions of law in a liberal society.[28]Mostly everyone is in a trapped situation that is to say an implicit hierarchy is established in society. The term 'employee' is attached to people who agree to work for

another in return for payment and the term 'employer' is used to refer to the person or body who hires them. The use of 'employer' and/or 'employee' is attached with a range of consequences and expectations for both parties. For this reason the parties are led to behave in a particular way that is to say on the basis of their formalised relation under the heads of 'employer' and 'employee'. In this sense reification has occurred. Peter Gabel has characterised law by reification, which involves a gradual process whereby abstractions, originally tied to concrete situations, are then themselves used and operated instead of the concrete. Dereification involves the scholars of CLS to see it the other way round. Dereification is basically the recognition and exposure of such fallacies to reveal the law as it really is.

Delegitimation

To delegitimize law the scholars of the CLS attempt to strip away the veneer of legitimacy to reveal the ideological underpinnings of the legal system. [29]McCoubey and White states that delegitimation is aimed at exposing what the scholars see as one of the most important functions of law in a liberal society, namely the legitimation of the socio-economic system of that society. This brings the important insights into the law.

Genealogy

Robert Gordon considers genealogy as another technique to highlight the awareness of the transitory, problematic and manipulable ways legal discourses divide the world which is by writing their history.[30]

CONCLUSION

CLS is considered as radical by many jurists today. It is submitted that CLS and its technique is to filter the process of thinking of mankind. Most of the general public finds anything more acceptable which brings in more explanation for things going around us in our day to day life. CLS and its technique reveal an attempt to bring equality and more thinking into law. Trashing, genealogy, dereification etc. are all well convincing methods of looking into things surrounding our day to day life to find the right reason and hence bring equality in to law. However, it needs to be mentioned as well that too much critical thinking in to anything may not bring the right or convincing result. Therefore, a balance between critical thinking and a liberal approach is a must for a better philosophy.

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