PART IV — CRITICAL LEGAL STUDIES

JAANI RIORDAN*

4.1 Historical background

CLS was a movement instigated by critics of the Western legal system from within academic institutions during the late 1970s. Its proponents were mainly legal scholars.

CLS was begun by 6 junior lecturers from Yale who were expelled from the law school.

Duncan Kennedy and David Trubeck left Yale and went to Harvard to teach, forming a group to discuss their critical view about modern law.

4.2 Law is simply politics

Their major claim is that law is simply politics; they are inextricably linked.

In this sense, CLS is an offspring of legal realism. It also adopts modes of reasoning similar to the Marxist way of analysing law.

However, the movement ran out of steam when other jurists began to agree with them; the movement has since been (partially) assimilated into mainstream jurisprudence. Even so, its ideas are still relevant today; CLS formed the foundations of CRT and feminist critiques of law.

Davies: "Even if we were all 'amoral automata' able to apply the law in a vacuum, the ideal of rationality and coherence in law is in any case unattainable because the language in which rules are expressed can never be sufficiently precise."

4.3 Liberal theory is a smokescreen

Liberal theory operates as a smokescreen to cover up incoherence, injustice, and power hierarchies in law. Critical Legal Scholars sought to expose the inconsistency of Western liberal theory and demystify legal thinking – to "free it from its 'liberal' chains."

Law is not objective, not just, and not coherent.

To achieve real legal reform we must neutralise this legal view of the world which is so different to the way in which we actually act. Self-consciousness by the individual can lead to revolution in law.

Rather than taking law (and its claims of coherence, objectivity, and rationality) for granted, one has to destroy (or, at least, open to criticism) the liberal ideology in order to understand it better.

Legal reasoning is a technique used to rationalise political decisions. It cloaks and mystifies policy in legal language.

4.4 Law is indeterminate

* Undergraduate student, University of Melbourne, November 2003; http://www.jaani.net/

Laws or rules cannot determine absolutely the outcomes of every case. Any number of outcomes may be justified by stretching the relevant principles.

Knowledge is not comprised of facts "out there" waiting to be discovered; knowledge is conceived by a perceiver within the context of a specific epistemological and cultural paradigm.

4.5 Realism

This proposition is similar to that of the American realists. Oliver Wendall Holmes J proclaimed in 1902 that "the actual life of the law has not been logic, it has been experience." Realism postulated that whenever you want to examine law, look at it from the perspective of a criminal: law is simply what the courts will punish you with/for doing.

The real nature of the law cannot be described using only formal reasoning: it encompasses social ends, value judgments, and is contingent for its effect upon its specific application in a unique situation of facts. "Law is what officials use to resolve disputes."

Looking at cases historically, different cases employ different reasoning for different reasoning; this is reflective of its social component: it changes depending on the social conditions.

1. *Rules by their very nature cannot dictate the court's decision*
2. *The overriding function of law is to control disputes*

The law is not what the courts do/did, it is a system of abstract doctrines. For a realist, law is a social instrument which ought to be directed at achieving specific social ends.

Recognition of realism is today reflected by "policy" arguments, but rules and procedure continue to favour privileged, white, upper-class males.

4.6 The relationship between realism and CLS

Realists need to identify factors which influence the law, such as the social, historical, and empirical. In contrast, for Crits law is purely political.

CLS debunks/deconstructs the idea of rationality in law simply because of the indeterminacy and ambiguity of the language used to articulate rules. The way in which language is interpreted depends on individual life experience/worldview, so an objective view of law is impossible.

Davies: "one addition to realism made by CLS writers was their exposure of the political and ideological underpinnings of law. While realists observed that law could not generally be separated from politics, CLS writers analysed the relationship between law and *liberalism* (a specific form of political thought), and attempted to break the hold which liberal thought has on legal doctrine and judicial decision-making."

There are two primary strands of CLS (note overlap between them):

1. *A broad critique of liberal ideology*
    - A Law protects power
        - i Rich over poor
        - ii Property rights – cf Marxism
    - B Institutionalises power structures
    - C CLS challenges the belief that
        - i Law is fair to everyone
        - ii Law is objective/rational

2 *Nihilistic*
- D Points out the incoherency of legal doctrine
  - i The law is so indeterminate that it should be rejected or reconciled
- E Introduces a new mode of 'legal' reasoning: "trashing"
  - i Deconstruction and delegitimisation
  - ii Seeks to undermine the ideological and legal bases on which legitimacy is constructed
- F Western liberal theory alienates us
  - i Theories don't meet reality
  - ii Creates artificial distance between law and people
  - iii Theory is not what is needed: tap into the "political community"
- G Offers the tactic of moral terrorism
  - i Opposed to reform
  - ii Students should disrupt and revolutionise their legal education

Trashing

- Hunt: "what does it prove to demonstrate an incoherence or contradiction in an intellectual position?" Since CLS disputes the claims of rationalist epistemology (and its pursuit of internal consistency), what significance does finding inconsistency in liberalism have for the CLS movement?
  - Contradiction is said to be a symptom of larger incoherence in liberal thought
  - Demonstrating inconsistency challenges the construction that law is rational and coherent
    - This is a fundamental critique of the ideological basis of law
  - Frees legal thinking from liberal chains by demystifying the law, creating the potential to see it differently
  - Unger: "deviationist doctrine" – legal doctrine contains the potential for radical transformation, but is masked by legal ideology, accentuating the contradictions
- Davies: "[c]ritique is useful and necessary to all forms of theory, because it exposes the assumptions we make as being not natural or neutral, but rather associated with our particular position in the world
  - Freeman: negative, critical activity is the only path that might lead to a liberated future

Presenting alternate theories isn't as useful in eliminating political assumptions as is debunking existing theory; brings to light influences in the way in which we see the world, and explains the ideological foundations of liberalism.

On the vacuous nature of legal doctrine

Turning to the reality of a courtroom for a moment, one need only look to cases like *Mabo* to see how limited these institutions are in their ability to question tenets of the legal tradition in which they operate. The majority in *Mabo* were unable to question the doctrine of *terra nullius*, and proceeded along a different line. Similarly, *Dietrich* demonstrates how the separation of powers cannot be called into question; *Theophanous* how notions of 'intention' must necessarily influence constitutional interpretation; *Tasmanian Dams* how federalism is very much ingrained in our adjudicatory framework.

Many doctrines are simply beyond question. Indeed, far from attempting to justify (or even recognise) these assumptive foundations, courts use them as *cloaks* for less palatable normative choices. At a lower level, individual doctrines – legal fictions – operate to conceal the indeterminacies of legal adjudication.

Criticism of the overriding framework may have the effect of unhinging (or at least drawing attention to) deep-rooted legal assumptions, which do not *necessarily* (though they might, owing to their many years of application and refinement) lead to the most equitable outcomes. Cases like *Cubillo* thus illustrate the difficulty such a fixed conception of law encounters when confronted with the task of accommodating legal pluralism.

4.7 CLS and rights

One of the basic questions of modern liberalism is what degree of state intervention is permissible? John Stuart-Mill proposed the harm to others principle (the only purpose for which power may be rightfully exercised over an individual is to prevent harm to others). Individual liberty is thus determined by two things:

1. What is harm?
    a. Who defines rights?
    b. What are they?
        i. Rights formalise the limits of state intervention
        ii. They are necessary for the pursuit of individual goals
        iii. "Political needs" are equated with "rights".

2. Who defines it?
    a. Subject to criticism by the CLS movement
    b. What may be seen as social degeneration by one person may be considered a necessary social *development* by another
        i. eg, injecting rooms
    c. Therefore, the identify (and influences) of those defining rights is important

Criticism:

- Peter Gabel: rights are alienating, and don't necessary reflect the needs of people; too abstract
- Rights are unstable, and what is an acceptable level of rights at one point in time may later come to be regard as inadequate
- Rights "sell out" to liberalism – they are a 'cosy' alternative to real political action (eg, in America, the Civil Rights Bill 1968)
- The presence of 'rights' does not guarantee that they will be realised to an equal extent for all people
- Rights serve to reinforce existing social inequality by masking substantive differences under a veil of 'formal' equality of opportunity
- Rights discourse is problematic because not everybody wants the same thing; imposition of certain rights onto certain minorities is against their beliefs
- Feminists argue that women have formal rights, but are still not substantively equal
    - Does this mean they need more rights?
    - Or is rights discourse a trap into which unsuspecting liberals fall, stunting political advancement by lulling the legislators/the community into a false sense of equality?

<u>Equality and rights</u>

Liberal constructs are paraded as universal, to be applied equally to all. This implicitly supports the idea that all persons are of equal value. As a corollary, the legal system ought not to favour any particular individual or group, but rather afford an equal opportunity to everyone to exercise their rights and prevent others from encroaching upon their liberty. Liberal legal traditions have made significant advances towards formal equality in the way legal disputes are adjudicated and parties are protected by law – largely through the reformulation of archaic and overtly discriminatory doctrines and a focus upon positive rights – but it will be argued that substantive equality is ultimately impossible due to fundamental differences between individuals. Criticising rights discourse as masking real inequality seems misguided in light of its central role in securing many advances over the last century, though liberalism may be rightly accused of being largely deluded (and formally 'blind') to the continuing inequality that (necessarily) pervades society.

Prejudice is ingrained in the legal system itself (eg, marriage laws prohibiting gay marriage; but often less overt).

<u>On the tendency to deconstruct rights</u>

While postmodern and CLS scholars are only too happy to do away with overarching constructions of rights and liberties, they forget that not all members of the Western liberal state are in as privileged positions as they. Crits don't *need* rights (190), so of course they're happy to dismiss them as alienating, but to do so is to ignore the substantive advancements that rights discourse (problematic and conducive to complacency though it may be) has conferred.

Debunking liberalism is all very well – postmodern critics seem to take great delight in it – but if their goal is really to improve civil society, then completely delegitimating its determining structure is hardly the way to ensure meaningful social advances. Many of the most important achievements for civil liberty and equality in recent legal history took place within the confines of the liberal legal system (welfare and aid programs, recognition of native title, recognition of civil and political rights of women, children, minorities). Critique is useful only to the extent that it exposes culturally, politically, and racially biased assumptions in a dominant mode of reasoning which are paraded as neutral (183).

The CLS critiques of legal abstraction all assume that we would actually be better off if law did not have a pretence to objective, non-political legal reasoning. This ignores the fact that for many people law is *actually* empowering; it may oppress, but it also (at least partially) empowers minorities to assert their rights.

Before any reform can take place, an increased consciousness of the limitations of liberal theory is necessary.

Even so, rights may be needed to advance certain political causes.

4.8 CLS and Contract/Tort

Liberal theory assumes that "freedom to contract" entails "equal bargaining"; this doesn't represent the reality of society. Individuals are idealised as autonomous wealth-maximisers but this is not necessarily the case. The doctrine of contract continues to perpetuate this ideology by maintaining the power of certain privileged members of society who are able to set the terms of a contract at the expense of those not in a position to bargain.

Tort law forces us to commoditise the person by placing a monetary value on personal injuries (related to the growth of capitalism and industrialisation). People are commoditised, but tort rests upon the assumption of individual autonomy and equality of workers and consumers. However, cases like the Ford Pintos highlight how tort really only servers to strengthen *existing* wealth distributions.

4.9 Theory and practice

Students emerge passively from most US law schools, accepting existing practice. There is a strict separation between theory and practice.

However, Crits argue that one cannot study law in isolation from its "applicatory framework", socioeconomic influences, and other external features of its context.

Is this method of isolated education better than viewing it in its political context, or does it confuse and veil the real issues?

Criticism:

- CLS has been accused of intellectual elitism
- Is it just the view of a group of white men in an elite US law school, or does it represent a deeper truth in western legal jurisprudence?
- Either way, CLS manages to create a void and fails to fill it; this leads to a form of legal nihilism
- Some would argue that it is pointlessly deconstructive and contrary to legal aims (whatever they may be)

Duncan Kennedy: it is pointless to describe social and political relations in theoretical terms; the political energy of a community is needed: "intersubjective zap".

Davies: "Accepting the dichotomy between theory and practice or politics, and simply reversing it, so that practice becomes more important than theory, is not a very convincing way of challenging the established order." Some practices may be theoretical, and theories can be practical. Communication and description inherently involve abstractions from reality.

After all, as Crits claim, it is not only a change of practice (legal application) which is required, but also a "change of consciousness and ideology" (theory). This makes its lack of providing an alternative somewhat more forgivable, since it still arguably takes measures to raise awareness of basic jurisprudential issues (albeit in an elitist and culturally insular, intellectual fashion).

Gabel: liberal ideology alienates us from our true selves. The liberal emphasis on individuals and formal rights is "an illusion which deflects people from realising their true connectedness with others."

Davies: the CLS critique of ideology claimed that liberalism operates by "covering up the oppressive, alienating, and contradictory structures of society." This prevents us from seeing "the way in which oppression is entrenched in our social, political, and legal environments."

4.10 Other problems

- For all its analysis, CLS neglects the needs of oppressed people.
- Failed to come up with a viable alternative (with the exception of Unger)
- If we accept that individuals are inescapably influenced by their social environments, legal reform cannot free itself from contingency upon social norms
    - Davies: since an objective, unambiguous legal system is impossible, surely it is better to try and improve the current one *now*, even though the foundation does not stand up to scrutiny
- Darlton: delegitimation is a useful strategy, but needs to be balanced by an ongoing program of reform
    - "Despite the risk of replicating the tried and untrue path, we must create even as we re-envision."
    - "…negative critique and positive program are… symbiotic"
- Matsuda: "there are times to stand outside the courtroom to protest the system as a whole, and times to stand inside to defend one's rights"
- Davies: "moral terrorism can only be practiced by those with the relative power and security of the white male academic"