Law as Politics:
Reflections on the Critical Legal Studies Movement

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Introduction

Critical Legal Studies (hereinafter CLS) movement of the U.S. marked the combination of a legal way of thought and a social network of left leaning legal scholars of 1970s. Though loosely constructed as a legal theory, CLS lacks the ingredients necessary for a full pledged legal theory. It is rather better described as anetwork of like-minded legal scholars at Harvard and a way of legal thought.[1] Prominent among the scholars were Roberto Unger,Duncan Kennedy, David Kennedy, Morton Horwitz, Jack Balkin, Mark Tushnet and Louis Michael Seidman. As is put by Roberto Unger, though CLS was meant to be "continued as an organizing force only until the late 1980s,…its founders never meant it to become an ongoing school of thought or genre of writing."[2] Yet the movement became a very powerful school of thought popularised throughout America and the rest of the world. CLS has been perceived both as a reaction to legal Formalism and Realism and a distinct theory of law.

CLS as a Reaction to Legal Formalism and Realism

CLS movement started at the behest of some scholars inspired by the civil rights movement (primarily black rights), feminist movements, opposition to Vietnam war and concerns over rapid wealth disparity between the rich and the poor. The movement questioned the traditional American understanding of law and legal system. More specifically, it questioned the dominant trends of legal formalism and legal realism.

Legal Formalism

Legal formalism was American middle ground in the naturalist and positivist jurisprudence. Naturalists claim the laws to be emanating from moral and natural sources. Positivists, on the other hand, claim the law to be deriving from amoral and worldly authorities like the sovereign, executive and legislature, etc.American formalist philosophy,in its turn, focused on a different actor – the judiciary. Inspired by the principle of judicial review established in ***Marbury v Madison*** **5 U.S. 137** (1803)the legal formalists claim that law is what the judges say.

Basic principles of legal formalism may be summed up as follows:

1) Legal rules reside above other social and political institutions. Once the lawmakers give us the rules, judges would apply them to the facts of a case. Now the question is about the pile of principles from which the rules would be found. Rules can be found from handful of general principles containing some abstract concepts – such as, contract without consideration is invalid, no guilt in absence

[1]Gerard J. Clark, 'A Conversation with Duncan Kennedy,' The Advocate: The Suffolk University Law School Journal 24, no. 2 (1994): 56.
[2]Roberto Mangabeira Unger, *The Critical Legal Studies Movement*,Harvard Law Review (1983), http://www.robertounger.com/en/wp-content/uploads/2017/01/the-critical-legal-studies-movement-another-time-a-greater-task.pdf (Accessed on November 5, 2017)

of guilty mind, etc. There will be a "mass of lower rules" deriving from these basic concepts. This tenet of legal formalism is known as *Conceptualism.*[3]

2) In applying the rule, the judges will not consider other social interests or public policies that may seem relevant for the case in hand. In this sense, the judge would simply apply the laws without considering whether the outcome of the application is just and moral.[4] This concept is known as *amorality of adjudication.*
3) What the judge need is simply the fact and a law. While there may be a huge lot of principles, the judges would look for the one which is clear and straight forward in the area and which is readily discoverable by the lawyers practicing in the area. This is called *restriction or denial of choice.*[5]In this sense, legal formalism aims at restricting the judge's discretion and hence it is also called the*mechanical jurisprudence.* One of the famous supporters of Legal Formalism was Justice Antonin Scalia of the U.S. Supreme Court. In one of his essay,*A Matter of Interpretation*, Scalia defended textualism and formalism by claiming:

> Of all the criticisms levelled against textualism, the most mindless is that it is formalist. The answer to that is, *of course it's formalistic!* The rule of law is *about* form . . . A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbour with a video camera has filmed the crime and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism! It is what makes us a government of laws and not of men.[6]

4) Since the judges decide cases on the basis ofdistinctly legal rules and reasons, the legal formalists claim that there is only one right answerfor every legal dispute. The judges will have to find that right answer by survey of available precedents and sources. This one-right-answer justifying one unique result is known as *rule determinacy.*[7]One of the famous critique of this *one-right-answer* doctrine is Professor Ronald Dworkin. Dworkin believes that law may give more than one right answer in a given case if the answer is attempted by different persons. Even if different judge may give the same right answer, their reasoning may vary. So more-than-one right answer is possible in every given case.[8]

Legal Realism

Dworkin's rejection of the formalist concept of *rule determinacy* brings us to the Legal Realism evolved during the 1930s. If Legal Formalism is a thesis, Legal Realism is an anti-thesis.Justice Oliver Wendel Holmes J. of the U.S. Supreme Court is given the honour of the Founder of American Legal Realism. In 1897, Justice Holmes delivered a famous speech "The Path of Law" before the Boston University School of

[3] Legality, Scott J Shapiro, Harvard University Press, 2011, pp.472 at p 241
[4]Leiter, B. (2010). Legal Formalism and Legal Realism: What Is the Issue? Legal Theory, 16(02), 111–133. http://doi.org/10.1017/S1352325210000121 9Accessed on November 4, 2017)
[5] Frederick Schauer, Formalism, 97 Yale Law Journal, 509, 548 (1988) at p 511
[6]Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law,* The University Center for Human Values Series (1997) at p 25
[7]Legality, Scott J Shapiro, Harvard University Press, 2011, at p 242
[8]Ronald Dworkin, "No Right Answer?" in *Law, Morality and Society*, 54-84 (Hacker and Raz, Eds), Oxford, Clarendon Press, 1977. For a general discussion see - Brian Bix,*Law, Language, and Legal Determinacy*Oxford, Clarendon Press (1995), Chapter 5 (Ronald Dworkin's Right Answer Thesis)

Law.Emphasising the law-in-action over the law-in-books, Justice Holmes told: "The life of the law has not been logic, it has been experience."[9] Holmes believed that law is not all about some determinate rules rather it is some *prediction* a legally interested person might need to do in planning his legal actions. Holmes explains through his famous "bad-man" example. Before deciding any course of action, a typical bad-man would calculate all possible consequences which may follow his action. At the end he would take only that route in which risks are the least and profits are more. Like a bad-man, a lawyer preparing his case for a client would calculate which judge would take which line of view. On that basis, the lawyer would decide which law to be relied, which arguments to be made before which judge. This is what is called Legal Realism- the law-in-action. Justice Homes says:

> But if we take the view of our friend - the bad man, we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[10]

Basic contours of legal realism may be summer up as follows:

1) As a theory, legal realism is different from both naturalism and positivism. Realists are not naturalists because, they don't accept the moral social values as something divine. They would rather see those as products of historical and sociological facts which need be addressed from a sociological and practical point of view. Reference to divinity is unnecessary. Realists are also different from positivists in the sense that they refuse to confine their investigations to state law and/or positive law only.
2) Realists are different from formalists in the sense that "what judges actually *do* in deciding cases, rather than on what they say they are doing."[11] Judges adjudicate more than they mechanically apply legal rules to some "uncontroversial fact-finding". We may never be sure that the facts and law identified in a judgment are the actual basis of the decision that comes out. Realists claim that the legal rules and principles elaborated in a judgment may hidesome controversial political and moral choices the judge may rear in his or her mind. In this sense, the rule determinacy theory proposed by the legal formalists is not right. Statutory and case laws are *indeterminate*, and decisions of the judges are not based entirely upon *rule of law*. This realist perception is widely known as ***rule scepticism***.[12]

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[9]See also Joan I. Schw, *Oliver Wendell Holmes's "The Path of the Law": Conflicting Views of the Legal World*, The American Journal of Legal History, Vol. 29, No. 3 (Jul., 1985), pp. 235-250 Oxford University Press, Stable url: http://www.jstor.org/stable/844757 (Accessed on November 2, 2017)

[10]Oliver Wendell Holmes, Jr., "The Path of the Law," 10 *Harvard Law Review* 457 (1897), Available online: http://www.constitution.org/lrev/owh/path_law.htm (Accessed on November 1, 2017)

[11]Robert A. Shiner, "Legal Realism," in Robert Audi, ed., *The Cambridge Dictionary of Philosophy*. New York: Cambridge University Press, 1995, p. 425

[12]Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?,*University of Chicago Public Law & Legal Theory Working Paper, No. 320 (2010) Available online: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1178&context=public_law_and_legal_theory(Accessed on October 31, 2017)

CLS as a Distinct Theory of Law

From a theoretical point of view, CLS questioned the precedent based common law norms and its traditional inability or inertia to address the power bias of law. Critical legal thinkers attempted to unveil the subtle partiality of the apparently impartial and rigid legal doctrines, hidden interests and class domination behind legal institutions and politics of laws.

Basic contours of CLS may be summed up as follows:[13]

1) The foremost assertion of CLS is, "Law is Politics". Legal reasoning is not different from political reasoning. Like political ones, legal disputes are solved through a hazy combination of coercion and reasoning. It is not pure reasoning at any rate.
2) All imaginable legal questions are indeterminate. Any well-developed legal system would permit the lawyers and judges to explore principles and rules both *within* and *across* the system. Within the system, a contract lawyer, for example, may rely on the dominant concept of agreement to establish a right, subordinate concept of mistake and fraud to destroy a right. If he seeks a bit different result, he may attack the concept of contract itself by resorting to some socio-political principle based arguments. The rules being indeterminate, the actors find themselves in a position of choice.
3) Legal system is titled in favour of the powerful persons and elites. The "haves" would dominate the institution building and agenda setting process of the state. They would internalise the "have-nots" in the process by regulating media, opinion process and fantasise the have-nots' perception about the so called liberal states.
4) The distinction between public and private domain is artificial. These are maintained only to offer justification for protection of private wealth. Otherwise, the distinction line between the private and public is always blurred. While haves' wealth is protected, state frequently enters intoindividual's private domain in the name of surveillance. In the same way, individual rights are more vehemently pressed to reinforce an individualism that would disrupt greater community solidarities and more substantial progressive change.

Therefore, instead of accepting the doctrine of rule-based decision making (legal formalism) or the situation based decision making (legal realism), critical legal thinkers of 1970s sought to establish a sort of "reasoned elaboration." The concept as explained Roberto Mangabeira Ugar, is that rules and situations could constitute "prescriptive system" at best. Relying on the prescriptions, the judges would uncover "justice" through reasoned analysis of policies and principles of law without questioning the "basic institutional arrangements of democracy and state.[14] By not questioning the "basic

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[13] The basic tenets of CLS in this part are summed up from one the pioneer of CLS at Harvard Law School Professor Mark V. Tushnet's chapter on "Critical Legal Theory"in Martin P. Golding & William A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Blackwell. Chapter 5 pp. 80--89 (2005) at 80 Available online: http://www.doi.org/10.1111/b.9780631228325.2004.00007.x (Accessed on October 28, 2017)

[14]Roberto MangabeiraUnger, *The Critical Legal Studies Movement*, New York: Verso (2015).

institutional arrangements" reasoned elaboration thesis would distance itself from the revolutionary zeal of radical Marxism. Reasoned elaboration would thereby permit the use of democratic legal system as a mechanism of social change. If not used in this way, laws would serve a stagnant society inherently biased towards wealth and power.

Continuing Relevance of CLS

The CLS movement substantially waned within a decade of its emergence. Yet the offshoots of CLS, like the critical race theory, critical feminist theory now play a major role in contemporary legal scholarship. An impressive stream of CLS-style scholarship has also emerged in the last two decades in the areas of international and comparative law. Most importantly, apart from the philosophic particularities of CLS, the networking and activist elements in the movement contributed towards a radical change in the U.S. Law School curricula and teaching-learning methodology. While the inherently Marxist-Socialist tendencies of the CLS movement have faded a bit, the"activist premise" of CLS remain viable.Encouraging the legal academiato question the institutions and norms from a sceptic's point of view is no less important today. Thinking and acting from a critical perspective could surely bring a positive change in the overall politico-legal scenario. Such a passionate upbringing and gathering of a folk of critical thinkers and activities would ultimately benefit the laws and legal institutions in the days to come. Seen in this line, CLS's is a very elementary and simple task – questioning the *status quo* and asking for a change.