


Subject: **LAW**

Production of Courseware

 - Content for Post Graduate Courses



Paper : **Advanced Jurisprudence**

Module : **Critical Legal Studies**



ज्ञान-विज्ञान विमुक्तये



Principal Investigator	Prof. Ranbir Singh, Vice Chancellor, National Law University Delhi
Paper Coordinator	Prof. Sri Krishna Dev Rao (Vice Chancellor, National Law University, Odisha)
Content Writer	Dr. Sheela Rai Associate Professor National Law University Odisha
Content Reviewer	Prof. S.K. Bhatnagar (Professor of Law, Ambedkar University, Lucknow)



Critical Legal Studies Movement

Description of Module	
Subject Name	Law
Paper Name	Advanced Jurisprudence
Module Name/Title	Critical Legal Studies Movement
Module Id	Module 18
Pre-requisites	Background of Legal liberalism and Realist school would be helpful.
Objectives	<p>Purpose of this module is to:</p> <ul style="list-style-type: none">(a) To discuss the views of writers of critical legal studies movement(b) To understand the difference and relationship between CLS movement and Realist school and Marxist school of jurisprudence(c) To examine with the help of Indian cases interaction of law and politics in judicial decision making and political discourse
Keywords	Law, power, legal liberalism, political choice.

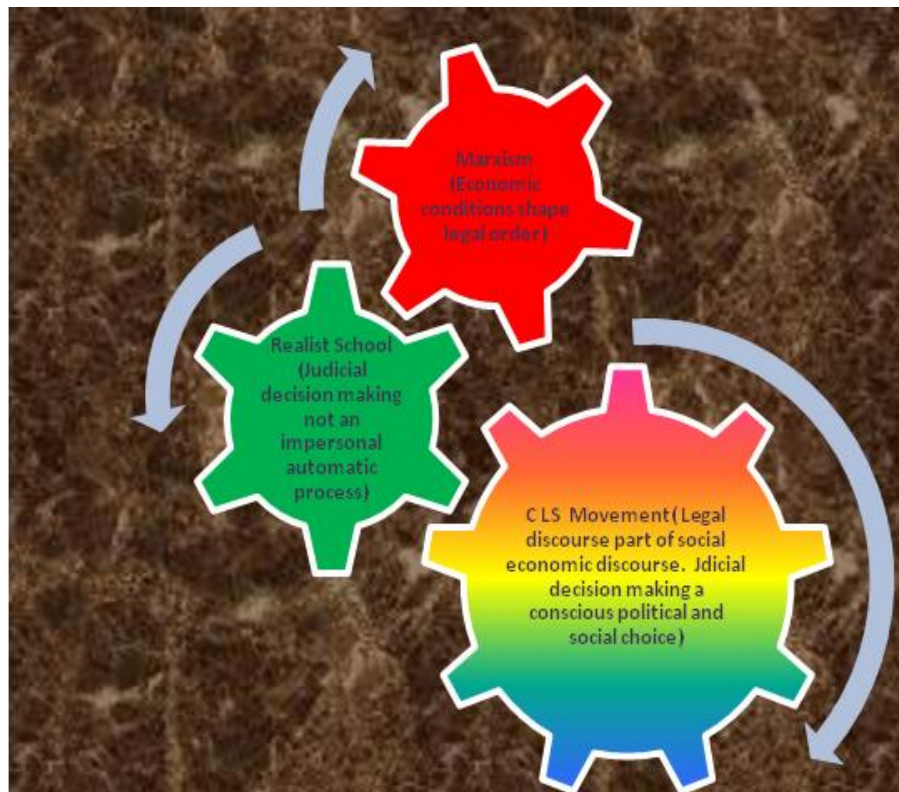
‘Tis written:” In the beginning was the *Word*.” Here I balked: who, now can help afford? The *Word*?- impossible so high to rate it; And otherwise must I translate it. If by the Spirit I am truly taught. Then thus: “In the Beginning was the *Thought*” This first line let me weigh completely, let my impatient pen proceed too fleetly. Is it the *Thought* which works, creates, indeed? “in the Beginning was the *Power*,” I read. Yet, as I write, a warning is suggested, That I the sense may not have fairly tested. The Spirit aids me: now I see the light! “In the Beginning was the *Act*,” I write. ¹

We can say that according to writers of the Critical Legal Studies (CLS) movement a legal system works in the reverse order given above. A judge presented with a case makes a choice exercising his power that is he acts by exercise of his power. This choice is legitimized according

¹Johann Wolfgang Von Goethe, Faust (Translated by Bayard Taylor, Echo Library) p. 39

to prevailing social legal and economic thinking and translated into words. The CLS movement rejects the claim of legal liberalism about the possibility of establishment of harmonious balance in society through a legal order based on immutable principles culled from social and political truth.

Critical legal studies movement is a development over the Realist School and has leftist leanings. However, it is different from both. American Realism drew our attention to the mistake of reliance on formalism and objectivity asserted by legal liberalism. They pointed out the necessity of study of judicial behavior and declared that predictability in decisions cannot be attained by study of statutory laws but by examination of the disposition of different courts. Realist school was still a part of legal liberalism and it only added one more variable for examination in attempt for establishment of a perfect legal system. It fell short of stating that legal discourse was part of social and political discourse and none of the three are perfect. This shortcoming was made good by the critical legal studies movement and was carried on by post modernism. CLS is different from Marxist school because for Marxists law was a super-structure based on the sub structure of economic conditions and economic relations within a society. For CLS writers, law and legal system was not parasitic upon the economic substructure but part of the economic dynamics and an important instrument in the creation and maintenance of the existing economic order.



The movement formally originated with a series of conference organized by Duncan Kennedy and Mark Tushnet. Purpose of these conferences was to bring on one platform writers who were critiquing the existing discourse of legal liberalism based on formalism and objectivity and examining the existing legal system from wider perspective; as part of social, economic and political discourse.

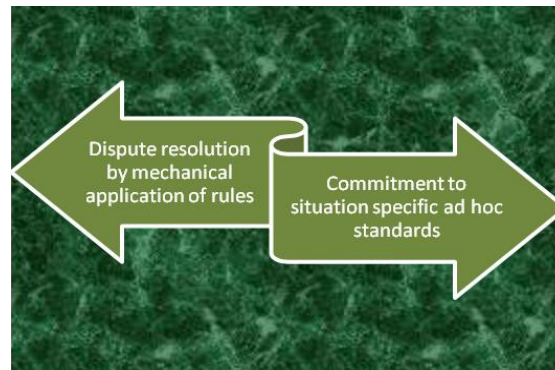
Two main aspects of the Critical Legal Studies movement which can be highlighted are as following:

- (a) Critique of legal liberalism
- (b) Legal process and legal decisions are a social and political choice

(a) Critique of Legal Liberalism:

CLS movement debunks claims of formalism and objectivity in decision making process made by legal liberalism. Mark Kelman highlights three internal contradictions of legal liberalism which it tries to suppress:²

- (i) Between “a commitment to mechanically applicable rules as the appropriate form of resolving disputes ---and a commitment to situation sensitive, ad-hoc standards,”³

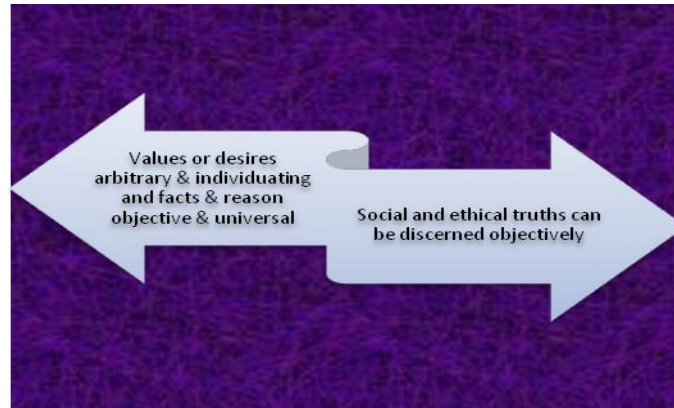


- (ii) “the contradiction between a commitment to the traditional liberal notion that values or desires are arbitrary, subjective, individual and individuating while facts or reason are objective and universal and a commitment to the ideal that we can know social and ethical truths objectively----or to the hope that one can transcend the usual distinction between subjective and objective in seeking moral truth”,⁴

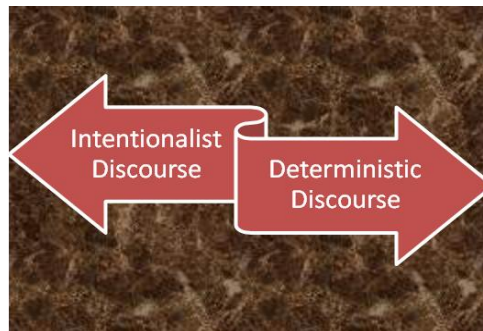
² See M.D.A. Freeman (ed.), *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed. 2008) p. 1210

³ Mark Kelman, *A Guide to Critical Legal Studies*, (Harvard University Press, 1987) P. 3

⁴ Id. Chap. Id.



(iii) “the contradiction between a commitment to an intentionalist discourse, in which all human action is seen as the product of a self-determining individual will, and determinist discourse, in which the activity of nominal subject merits neither respect nor condemnation because it is simply deemed to be expected outcome of existing structures.”⁵



Let us discuss the above contradictions in detail with examples. The first refers to contradiction between rules and standards and repression by legal liberalism of this contradiction. Under law of contract, an agreement becomes a contract if consent is free. This is a rule. However, this rule depends on standards because free consent gets vitiated if there is ‘undue influence’ which is a standard. There is no determined rule whereby existence of ‘undue influence’ can be decided. It depends on the facts of the case, on socio-economic circumstances and also on the views of the judges. Therefore if there is an ‘unconscionable’ contract between a pardanashin woman and a man, there would be presumption of ‘undue influence’. However, if a man of meager resources is badly in need of money and he takes debt at a very high rate than the existing market rate, courts would be likely to consider it only as commercial hardship and not undue influence. In this way the rule of free consent is dependent on standards like ‘undue influence’ and ‘unconscionable contract’ which do not have any fixed application and interpretation. Perhaps McCormick is right when he says that there cannot be rules without standards.

⁵ Id.



With regard to the second, examples of values and desires would be individual freedom, education, and empowerment, social and economic progress etc. Different persons would have different notions about each of these values. Social and economic facts are like poverty, unemployment, hunger, malnutrition etc. Liberal writers try to establish values and universal truths which they claim are based on facts. Important example of this is abolition of child labour. Child labour is result of poverty, unemployment etc. in society. Child education, empowerment etc. are values. Liberal writers around the world advocate abolition of child labour as a universal value as it according to them necessarily leads to child education and empowerment. But this may not be true in underdeveloped countries where many children work by declaring their wrong age just to get job. Child labour was earlier prevalent in western countries also when their level of economic development was lower. Elimination of child labour took place gradually in those countries with their economic development. But this socio-economic fact is advocated as a universal value to protect the interest of their corporate sector. Job becomes necessity for children in underdeveloped countries in order to sustain themselves and their families. After legal abolition of child labour, those who employ needy children do a favour to them by giving them job. In this scenario there are larger chances of exploitation of children. Better course would have been in these underdeveloped countries to recognize child labor and regulate it in order to prevent exploitation of children. Child labour would phase out with the development of society. But a social fact prevalent in currently developed countries is proclaimed as a universal value and universal truth.⁶

Third contradiction can best be understood with the help of criminal law. Criminal liability is seldom strict liability. Usually both elements of crime-mens rea and actus reus have to be present for criminal liability. However, there are some exceptions to criminal liability like grave and sudden provocation, forced intoxication, insanity, private defence etc. In these cases a person is exempted from criminal liability because of lack of mens rea or intention. In these cases a person does not 'will' or 'intend' an act but is compelled by circumstances to act in a particular manner. In other words actions of accused are determined by external circumstances outside control of the accused. However, in many of these cases availability of exception and determination of intention become a matter of speculation rather than decided by clear cut rules. In case of *K.M. Nanavati vs State of Maharashtra*⁷ the court held that provocation was not sudden because the accused had enough time to cool down and plan his actions. Therefore crime was intentional. However, in many cases of continuous domestic violence, foreign courts have allowed availability of exception even though greater time had lapsed between last act of violence and the crime. Therefore it becomes a matter of subjective assessment of court to decide whether action

⁶ Sheela Rai, "Linking Cyber to Soil" in Conference Proceedings of International Conference on Access to Legal Information & Research in Digital Age" (29th Fe. To 2nd March, 2012) p.369 (National Law University, Delhi Press)

⁷ AIR 1962 SC 605



of the accused was intentional or determined by external circumstances on the basis of time lapse between provocation and crime committed.

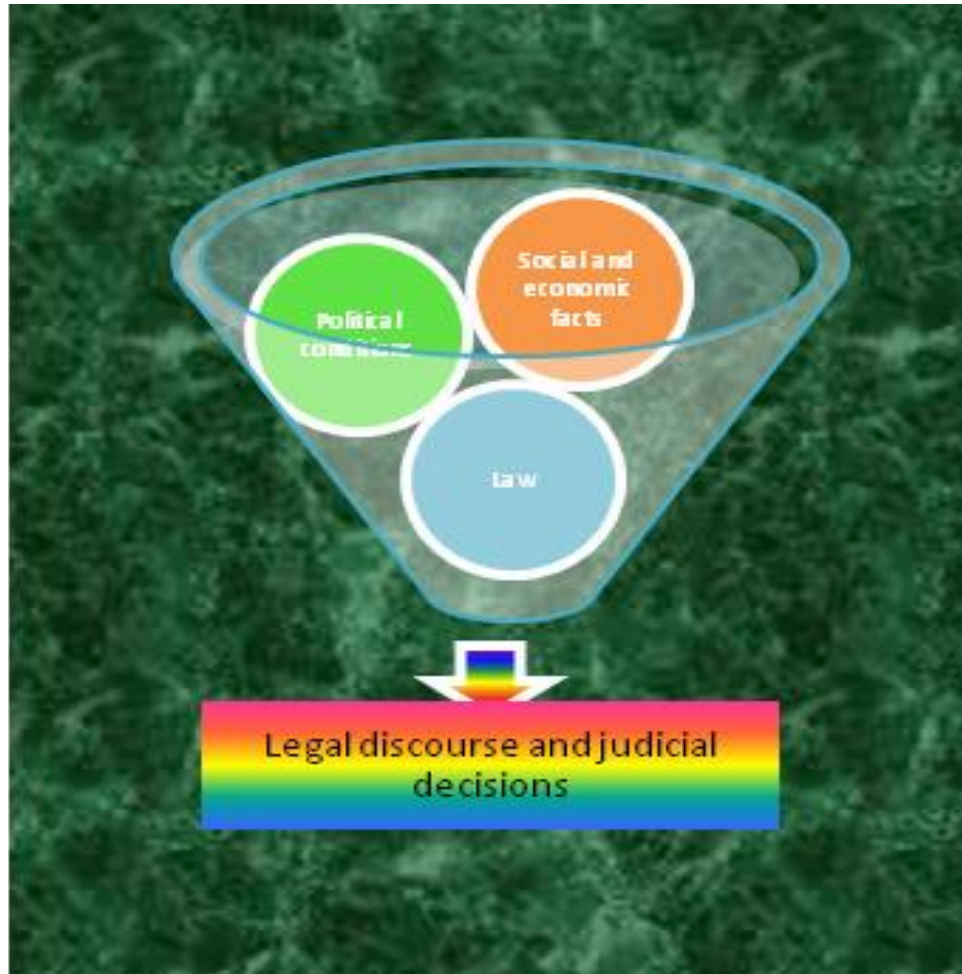
By highlighting these internal contradictions in the liberal legal regime, the CLS movement debunks all claims of formalism and objectivity of liberal legal regime. Liberal legal regime tries to suppress these contradictions by trying to establish its principles as universal truths based on social, economic and political reality. In reality they are only a choice of the dominant groups in the social, political and legal order which has been made rigid by claims of universalism and altruism.

(b) Political and Social Choices in Decision Making:

CLS movement takes forward the American realist movement by claiming that judges in giving decisions are influenced by social and political factors. The decision making process is not an impartial evaluation of facts by a blindfolded goddess of justice. Decisions are conscious political and social choices made by judges. Legal discourse is part of political and social discourse. Not only judges, other people in legal field are also influenced by and part of existing political and social discourse. This is due to very nature of legal profession. Lawyers discuss and debate existing laws in light of existing political conditions. Legal education itself is part of dominant political culture. Duncan Kennedy who wrote much about admission in law colleges and legal curriculum, debunked the claim of merit and objectivity in law school admission process. He argued that the pattern of admission test is determined according to dominant political culture and it wrongfully declares persons of other class as less meritorious. It is the same with law school curriculum which was also in need for reform. In short he was an advocate of diversity in the demography of the law schools and variety in their curriculum.⁸ Therefore according to CLS movement, legal regime and legal discourse is not autonomous as liberal legal regime tries to establish but imbedded in the existing political and social system and discourse.⁹ In this way judges do not arrive at a decision by any objective and formal process of evaluation of facts, they make conscious political choice.

⁸ See Duncan Kennedy, “A Cultural Pluralist Case for Affirmative Action in Legal Academia” 1990 *Duke Law Journal* pp. 705-757.

⁹ Sheela Rai, Twenty Five Years of National Law Universities *The Practical Lawyer* (2012) PL October 47



Let us examine these claims with reference to some Indian cases. For this purpose two cases on commercial law, two cases on criminal law and important cases of constitutional law are selected. Let us start with landmark cases on criminal law. A leading case in this area is *Vishakha vs. State of Rajasthan*.¹⁰ This case is landmark as it recognized the problem of harassment of women at workplace and incompetence of the Indian legal regime to deal with it due to absence of relevant laws. On the basis of India's commitment to CEDAW, the Supreme Court laid down certain guidelines for prevention of harassment of women at workplace till the government of India came out with a suitable law. We all are aware of factual background of the case. Smt. Bindeswari Devi was raped by some men of her village. She worked for women development project run by the government of Rajasthan. Prevention of child marriage was part of the project and Smt. Bindeswari Devi actively worked for it. In order to chastise her for her misadventure she was raped by some important persons of her village. It was a simple case of

¹⁰ (1997) 6 SCC 241.



crime punishable under the Indian Penal Code. However, due to influence of the accused in the criminal justice administration system, victim had to fight hard and long to get justice. She got national and international recognition for her determination and bravery. The issue was agitated by the women's organizations in India. She was invited by the United Nations for the fourth World Conference on Women: Action for Equality Development and Peace held in Beijing, China in 1995. She also got a national award. Decision of the Supreme Court was delivered in 1997. One wonders whether court was just influenced by the factual background of the case or also by the national and international momentum. The issue becomes worth pondering considering the alarming increase in such cases recently in important institutions and inadequate response of concerned authorities. In reality it is difficult to prove harassment unless there is violation of IPC. One wonders need for prevention of harassment laws if its only purpose is to re-emphasize existing criminal law.

Another example is the famous case of murder of Jessica Lal¹¹ which exposed extent of corruption in the criminal justice administration in India. However, it was not a unique case inflicted with this malady. But the case became famous due to media attention given to it and nation-wide sympathy it generated. High Court of Delhi directed reinvestigation and trial in the case and the accused was finally brought to justice and convicted with life imprisonment. In this case also one wonders whether family members of Jessica Lal would have got justice had so much media attention not been given to it.

Other two cases are famous commercial law cases. One is BALCO case and the other is Vodafone case. In BALCO case¹² 9 judge bench of the Supreme Court overruled earlier two decisions of the Supreme Court given in Bhatia International¹³ and Venture Trading¹⁴ and held that part 1 of the Indian Arbitration and Conciliation Act, 1996 does not apply in cases where seat of arbitration is outside India. One again wonders whether it was an objective application of the existing law. How can objective application of law be diametrically opposed in two cases? The fact is that BALCO decision was influenced by decision of international investment tribunal in White Industries case¹⁵ where India was made accountable for delay in its justice delivery

¹¹ See < http://en.wikipedia.org/wiki/Murder_of_Jessica_Lal>

¹² Bharat Aluminium Co. Ltd. vs. Kaiser Aluminium Technical Services Inc. (2012)9 SCC 552

¹³ Bhatia International vs. Bulk Trading S.A. & Anr. (2002) 4 SCC 105

¹⁴ Venture Global Engineering vs. Satyam Computer Services Ltd. & Anr. AIR 2008 sc 1061

¹⁵ White Industries Australia Ltd. vs. The Republic of India UNCITRAL Arbitration London, 30th November 2011 available at < <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>>



system and enforcement of foreign awards. Similarly in Vodafone case¹⁶, decision of the Bombay High Court was overruled by the Supreme Court. The two courts arrived at different interpretations of the Indian Income Tax Act. Government of India amended the law with retrospective effect and imposed tax liability on Vodafone. Vodafone has taken the matter to international investment tribunal. The legal discourse in India concerning the case is not so much about the legal issue and legal liability of Vodafone but the impact of the decision and action of the government on the foreign investment climate in India.

Most important cases which may help in highlighting political choice making by the Courts are constitutional law cases. Metamorphosis in the stand of the Supreme Court from *A.K. Gopalan vs. State of Madras*¹⁷ and *ADM Jabalpur vs. Shiv Kant Shukla*¹⁸ on the one hand to *Indira Nehru Gandhi vs. Raj Narian*¹⁹ and *Maneka Gandhi vs. Union of India*²⁰ on the other shows that decision making is actually a political choice. In *A.K. Gopalan* and *ADM Jabalpur* the Supreme Court adopted a strict positivist stand. Let us examine the decisions chronologically. During the time of *A.K. Gopalan* India was a newly flourishing democracy and people of India generally had immense faith in the political branch of the government as it was largely composed of freedom fighters. Therefore the court also paid deference to the laws of the Parliament and words of the constitution. By the time *Keshvanand Bharti v. State of Kerala*²¹ was decided, political climate had changed. The court seemed divided. Doctrine of basic structure was propounded but by a thin majority of one judge. By the time *Indira Nehru Gandhi vs. Raj Narian* was decided political climate of India had drastically changed and the court unanimously asserted the doctrine of basic structure. Although in *ADM Jabalpur* the majority again adopted a positivistic stand and Khanna, J. had to suffer for giving dissenting opinion, in *Maneka Gandhi vs. Union of India* court clearly favoured a natural law touch to the interpretation of the Indian Constitution which increased its powers of judicial review. One can see that changes in the stand of the court coincided with change in political climate of the country and the court had to determine its role and realize the place of the Indian Constitution in the changing political scenario.

¹⁶ Vodafone International Holdings B.V. vs. Union of India & Anr. Civil Appeal o. 733 of 2012 available at <<http://supremecourtfindia.nic.in/outtoday/sc2652910.pdf>>

¹⁷ AIR 1950 SC 27

¹⁸ (1976) 2 SCC 521.

¹⁹ 1975 Supp SCC 1

²⁰ (1978)1 SCC 248

²¹ (1973) 4 SCC 225.



Purpose of discussing above cases was to draw attention to various political and social factors which influence the course of decision making. There can be different views about the demand of justice and what would amount to justice in particular case and what is the duty of the court and what should be the norm which should be established by the court. When the court accepts one version of justice and norm, it makes a political choice. Recognition of this fact is the significant contribution of the critical legal studies movement.

While the main aim of critical legal studies movement has been to debunk the assertions of liberal legal regime, some writers have also attempted a reconstructive theory. Roberto Unger has outlined a reconstructive program which he calls super liberalism. In super liberalism people would have better substantive rights as they would have rights not only within the system but would also have right to destabilize the existing system. There would be greater decentralization and many mini constitutions with specific aims. Economy would be restructured in a way where individual initiative would be encouraged but there would be limit on profit making. State would aid entrepreneurship by providing loans. Thus by preventing concentration in economy and centralization of political power and recognition of individual's right to reshape the whole social and political system, Unger felt a real liberal society and polity would be formed which would not be based on universal values, ideologies and notions.

Concluding Remarks:

Critical legal studies movement was a development over the American Realist movement. It debunked the claims of legal liberalism that it is an autonomous system and favours objectivity and formalism in decision making process. CLS movement emphasized that legal discourse is embedded in the social and political discourse and legal principles of liberal legal regime are political choices of dominant class of the society. The argument has been developed by post modernist jurisprudence who highlighted the role of violence in the concept of law and possibility of achieving varied meanings of legal text by deconstructing the prevalent meanings. Accepting CLS claim that legal discourse is part of social and political discourse post modernism deconstructed the rigidity of identity of legal subject and universal notion of justice and acknowledged pluralism in legal perspective as rightful.