A CRITIQUE OF THE CRITICAL LEGAL STUDIES' CLAIM OF LEGAL INDETERMINACY

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BIOGRAPHICAL SKETCH

Ian Carlo Dapalla Benitez is a graduate of Bachelor of Arts in Philosophy at the University of the Philippines – Los Baños in Laguna. Born in Valenzuela City, Metro Manila, November 2, 1994, he currently lives in Canlubang, Calamba City, Laguna.

He graduated as the class salutatorian in Asian Computer College, Mayapa, Calamba City, his secondary school. Consequently, he is now the representative of his batch for the Asian Computer College – Alumni Association.

He has been a member of the UPLB Sophia Circle, a premiere academic organization for philosophy students and enthusiasts. He became the Head of the Publications Committee of the said organization on March 2013 to 2014. Throughout his college years, he worked as a student assistant at the UPLB Gender Center, a government office that addresses gender concerns, instruction, research, extension, and services avert incidence of sexual harassments.

His research in legal philosophy was inspired by his desire for the legal realm. He plans to take further steps to be an internal part of law as he enters law school.

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ABSTRACT

This paper challenges the Critical Legal Studies (CLS) claims of legal indeterminacy. It shall use a legal formalist logic and language as its main assertion, further maintaining that the CLS claims is only grounded in ambiguity and confusion.

CLS is a legal theory that challenges and overturns accepted norms and standards in legal theory and practice. They maintained that law in the historical and contemporary society has an alleged impartiality, and it is used as a tool of privilege and power – law is politics. Consequently, CLS maintained that these results to indeterminacy of law. Legal indeterminacy can be summed up as contrary to the common understanding that legal materials, statutes and case law, do not really answer legal disputes. Legal principles and doctrines, as CLS scholars claim, are said to be indeterminate, for it is riddle with gaps, conflicts, and anomalies that are widely present even in simple cases. Legal indeterminacy also rises because of the underlying political power – law is politics – that implicates law as merely a tool for oppression.

This thesis shows that CLS assertions with legal indeterminacy is only grounded on ambiguity. On one hand, using the main concept of legal formalist logic and language grounded with sub-arguments: inherent generality of legal language, reasoned elaboration, and neutral principles, it refutes the CLS claims of legal indeterminacy. On the other, the paper maintains that their main reason of legal indeterminacy, 'law is politics', is merely a statement of fact that currently happens in society is sentimental and weak through counterexamples.

Keywords: law, jurisprudence, philosophy, CLS, critical legal studies, indeterminacy

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CHAPTER 1

INTRODUCTION

This paper challenges the Critical Legal Studies (CLS) claims of legal indeterminacy. It shall use a legal formalist logic and language as its main assertion, further maintaining that the CLS claims is only grounded in ambiguity and confusion. The paper will also refute CLS main ground for claiming legal indeterminacy, the concept of 'law is politics', by offering counterexamples.

CLS is a legal theory that challenges and overturns accepted norms and standards in legal theory and practice. They maintained that law in the historical and contemporary society has an alleged impartiality, and it is used as a tool of privilege and power.

CLS is a kind of postmodern theory of law, the philosophical study of law within the scopes of postmodern theoretical outline: poststructuralist, neo-pragmatist, or post-Freudian psychoanalysis. Together with CLS, postmodern theories of law also includes 'work within law and society theory, law and literature studies, sociological jurisprudence, semiotic legal theory, feminist jurisprudence, and critical race theory'[1]. Furthermore, these theories view modernist theories of law 'as incoherent, descriptively inadequate, or normatively problematic, and incapable of securing freedom, equality, and justice'[2]. In

[1] David A. Reidy, "Postmodern Philosophy of Law, *The Philosophy of Law: An Encyclopaedia*, Vol. II, ed. by Christopher Barry Gray (New York: Garland Publishing Co., 1999) 674.
[2] Ibid. 674

addition, they also tend to be 'non-comprehensive, culturally and historically specific, interdisciplinary, rhetorically ambitious, and overtly political'[3].

Living in a pluralistic society, maintained by postmodern theory, means differences of the collective from wealth, gender, ethnicity, etc. In many instances, these differences often lead to conflicts. According to Chambliss and Seidman, the myth is that the state does not take sides, that it is neutral. The legal order is a self-serving system to maintain power and privilege[4]. This position is very different from Natural Law and Legal Positivism. In contrast to postmodern theories of law, there is a universal acceptance and agreement on what laws should be. However, the myth claims that powerful groups impose their will upon the collective by controlling the law inside a certain society.

Legal Realists assert that judges hold the key to the influence of law. They further claimed that judges are guided by their interpretation of the law; however, being human means being influenced by other factors such as feelings, moods, alliances, and preferences. They highlight the fundamental importance of personality in the outcome of dispute. The CLS scholars used the ideas and legacy of Legal Realism that sought to challenge the existing convention in the legal system.[5]

Legal Realism is a school of legal philosophy that is generally connected with the attack on the orthodox and conventional claims of late 19th century classical legal thought in the United States[6]. Its most important legacy, the challenge to the classical legal claim

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[3] Ibid.
[4] William J. Chambliss and Robert B. Seidman. *Law, Order, and Power.* (Boston: Addison-Wesley Publishing Co., 1971)
[5] Brian Leiter, "American Legal Realism", *The Blackwell Guide to Philosophy of Law and Legal Theory,* eds. W. Edmindon & M. Golding (Oxford: Blackwell, 2003)
[6] Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 2012) p. 595

that legal reasoning was separated and autonomous from moral and political discourse, was then used further and improved by the Critical Legal Studies.

CLS began in the mid-1970s with its early proponents from Harvard Law School faculty. In the beginning, many proponents of the American CLS scholars are into the legal education. By that time, they were influenced by their experiences from different movements: civil rights movements, women's rights movements, and the anti-war movements of the 1960s and 1970s. From these different protests against the domestic politics, CLS started off and eventually translated into a critical stance towards the dominant legal ideology of the modern Western society. Both the British and American version started roughly at the same time.[7] They both wanted to explain what is wrong in the legal thought and practice.

The movement operated around a number of conferences held annually, particularly the Critical Legal Conference and the National Critical Lawyers Group. Since then CLS has steadily grown in influence and permanently changed the landscape of legal theory. Among the noted CLS theorists are Roberto Mangabeira Unger, Robert W. Gordon, Morton J. Horwitz, Duncan Kennedy, and Katharine A. MacKinnon.[8]

Like most schools and movements, CLS has not produced a single, monumental body of thought. Although there are several common themes and subjects that can be traced on different adherents' works. The first theme is that legal materials, such as statutes and case law, do not totally determine the result of legal disputes. Second is the idea that 'law

[7] Legal Information Institute, Cornell University. "Critical Legal Studies: An Overview". Wex Legal Dictionary and Encyclopedia. Cornell Law School, Cornell University. http://www.law.cornell.edu/wex/critical_legal_theory
[8] Ibid.

is politics'. The arguments take aim at the positivist conception of law being separated from politics and morality. Third is the traditional claim is that far more often than is usually suspected, the law tends to serve the interests of the wealthy and powerful by protecting them against the demands of the poor and the subaltern, women, ethnic minorities, working class, indigenous people, disabled, homosexuals, etc., for greater 'justice'. Fourth are the claims that legal materials are inherently contradictory. Finally, they question the central assumption of law that an individual, a judge or a lawyer, is an autonomous individual. That they are able to make unbiased decisions based on reason detached from political, social, or economic constraints. CLS scholars hold that individuals are intrinsically tied to their epoch, socio-economic class, gender, race, and other conditions of life, temporary or permanently. Therefore, they question the idea of 'free' and partial decision-making.

However, as stated earlier, CLS, as a legal theory, shows different weaknesses as a critique of the legal system. One of their main claims states that due to the politics of law, its contradictory character, and other external factors, law becomes indeterminate. Nevertheless, this claim is grounded on the ambiguity of conflations, ideas, and concepts.

This thesis will use a legal formalist logic and language critique of CLS claims of legal indeterminacy. It maintains that laws are inherently objective, stable, and therefore determinate. It states that the CLS claims of legal indeterminacy is excessive, using a legal formalist logic and language as the main counter-argument, backed by grounds as follows: inherent generality and neutrality of legal codes, reasoned elaboration, centrality and institutionalized process. In addition, this thesis will also refute the main premise of CLS claims of legal indeterminacy, which is the assertion that 'law is politics'. It will be done

through offering counterexamples that will uphold law as an entity that is not purely politics.

The idea of 'formalist' throughout the thesis does not exclusively implies to the school of legal formalism, for it means a 'strict adherence' or 'observance of'. Although it will not dwell on CLS concerning its postmodern approach and view, it will discuss the weaknesses of postmodernism applied to legal jurisprudence, to serve as a supplementary critique to its flaws. Again, the critique's focus is on CLS main assertions on legal indeterminacy, concentrating on the legal theory they proposed.

Correspondingly, the aim of this paper is to use CLS theory's potential. Their approach or way of looking into the nature of law can be used to develop a viable alternative theorization that is capable of providing a new direction for legal scholarship and legal institutions as a whole. Moreover, in showing the weaknesses and strengths of CLS, the paper will offer a resolution that will further answer the problem with the legal system as whole.

This thesis also offers examples of statutes, laws, and legal cases in the Philippine context. These examples will further help the reader in contextualizing the theories posited by the paper.

For further elucidation, an overview of each chapter follows:

After the introduction on the first chapter, the second chapter exemplifies the current CLS movement's knowledge, substantive arguments, as well as theoretical and methodological contributions. In addition, it also shows the concepts, views, subjects, and themes that the CLS movement has, by tracing them from the existing adherent works. It starts with the

impression of postmodernism using a chapter on postmodern legal theories from Emmanuel Fernando's *A Course on Legal Theory.* A brief analysis of the most prominent forerunners of Legal Realist thought, Oliver Wendell Holmes Jr., and one of his main works, *The Common Law* follows. This is succeeded by a brief examination of Roberto Unger's major works, as one of the most valued proponent of the movement, *The Universal History of Legal Thought, Law in Modern Society: Towards a Criticism of Social Theory, The Critical Legal Studies Movement,* and *What Should Legal Analysis Become?* Then, the discussion narrows down to the CLS main assertions, its grounds, claims, and warrant, concerning their statement of law as indeterminate and purely political.

The third chapter states the paper's main arguments against the CLS movement's claim of legal indeterminacy. This paper will show that CLS assertions are based on ambiguity. On one hand, their claim of legal indeterminacy is founded only in a confusion between generality and contradictory. The paper uses arguments that moves around with the idea of legal formalism, logic, and language. It is then backed up by sub-arguments that will further support the main assertion of legal formalist logic and language, which includes inherent generality and neutrality of legal language, institutionalized and centralized process, and reasoned elaboration. On this chapter, the paper also refutes the CLS main grounds for legal indeterminacy, the idea of 'law is politics', through counterexamples. Further claiming that the idea is merely a statement of fact that currently happens in society and further using it as a ground for legal indeterminacy is sentimental and weak.

The last part offers the conclusion that CLS failed in demonstrating the indeterminacy of law. This is done by refuting their claim of contradictions in law through legal formalism. Then, with the use of legal formalist logic and language, together with the

sub-arguments: ‘reasoned elaboration’, inherent generality and neutrality of legal language, centralized and institutionalized process and settlement, this thesis refutes the claim of personal, partial, and subjective legal decisions. Nevertheless, it still considers CLS as a legitimate legal theory, and that it can be used as a viable theory for the advancement and benefit of the jurisprudence.

CHAPTER 2

CRITICAL LEGAL STUDIES

Critical Legal Studies (CLS) began with the concept and ideas of postmodernism. The postmodern legal theory sought to dismantle the meta-narratives of modernity, which in this case is the legal institution as a whole. They want to 'disrupt the foundations of the now conventional, comforting certainties.'[9] In this situation the 'comforting certainties' are the theories that includes legal positivism and natural law theory which offers a certain definition and nature of law.

This paper will focus on the CLS' claims of legal indeterminacy and legal impartiality as the main point of the critique. Postmodernism with its externality and anti-foundationalist character can also be used in analysing the CLS' claims against legal institutions.

Positive and Negative Jurisprudence

An overview of the postmodernism legal theory will help, for this is the style and character of CLS. Emmanuel Fernando examined the general orientation of postmodern legal theory as a collective movement in legal studies. He contrasted the postmodern approach to legal theory with the approach taken in Anglo-American legal theory. Fernando claimed that the postmodern approach is excessively external and anti-foundationalist. He added that the

[9] Emmanuel Fernando, *A Course on Legal Theory* (Manila:Rex Book Store, 2011) p. 923

modern approach also ends the nagging problem of infinite regress, which haunts all efforts to establish a political or legal platform[10].

Fernando maintained that one critique of postmodernism is its 'destructive character', and it offers nothing or hardly anything constructive.[11] However, this kind of approach against the CLS seems futile, since CLS is a postmodern legal theory. It means that this kind of legal theory does not really offer any structural framework of what is, it only criticizes the existing conventions, and it will be up to the individuals to formulate their solution about the criticized aspect of the subject.

Fernando coined the positive and negative jurisprudence in assessing postmodern legal theory. On one hand, positive jurisprudence 'refers to any legal theory which provides a basis for judicial action in a particular case or situation and/or recommends the basic structures for a just state'[12]. It specifically demands justice in particular legal controversies such as abortion, affirmative action, privacy, and the proper extent of taxation. In addition, it also suggests the nature of laws as a social phenomenon, and how decisions should be made in particular cases. Their work is positive in the sense that they offer a 'normative framework for future action by legislators and judges'.[13]

On the other hand, negative jurisprudence operates critical insights about the law, but it does not offer a positive plan for action. CLS stands on this realm of jurisprudence, for it only criticizes the existing notion of law, but it does not offer any plan of action. This is also where the critique of externality is founded.

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[10] Ibid. p. 942
[11] Ibid. p. 983
[12] Ibid.
[13] Ibid. p. 984

The issue then is which is better between the two approaches: positive or negative jurisprudence. CLS scholars claim that it is better to replace normative appeals with 'description and criticism' together with a more critical approach to law.[14] However, as claimed by Fernando, normativity may be partially correct at some point, but positive jurisprudence is more essential. He added that CLS scholars who analyse the normative conceptions tend to also use the concepts they ridicule i.e. justice, fairness etc. Therefore, due to the lack of foundation, they lean towards a foundation unintentionally, which then results to a sort of contradiction. In addition, another reason stated by Fernando in support of positive jurisprudence is that legal decisions are made internally, and not by revolutionary sociologist. He further maintained that a purely external critique without a normative component of what should be done is useless, for it cannot be really applied to legal practice. [15] He added that to change the law, it requires positive jurisprudence.

The solution then is for CLS to seek and not disregard a foundation that is strong enough and supported with normative claims. Deconstructing the foundational thinking in law seems to be a failed attempt because in each case there is a retreat to foundations of anew but unworkable sort.

External and Internal viewpoint

Externality of law is the view that tends to take a third-person (observer's) view of the legal system. This is in contrast with the internal view, which includes legal practitioners: lawyers, judges, legislators. [16] The external view of law looks at the big picture; it answers

[14] Ibid. p. 985
[15] Ibid. p. 986
[16] Ibid. p. 931

the larger question of ideology. It may be argued that this kind of approach is as essential as the internal viewpoint; however, it is also seen as rather irrelevant. According to Dworkin, "theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished." [17] Generally, an excessively external viewpoint in law is irrelevant, and it does not categorically affect legal institution. Conversely, according to Alan Hunt, a CLS scholar:

> The dominant tradition of contemporary legal theory is epitomized by H.L.A Hart and Ronal Dworkin that insists upon the adoption of an internalist perspective. It exhibits predisposition to adopt the self-descriptions of judges or lawyers as primary empirical material. There is thus a naïve acceptance of legal ideology as legal reality. Internal theory is simply too close to its subject matter.[18]

Hunt's point revolves around the warrant that legal practitioners, as a rational individual part of a certain society, have their own biases. It includes all external factors that influence the judging process like gender and class. This is one of the main assertions purported by the CLS scholars as their grounds on their claim of 'law as politics', which will be further discussed on the next chapter.

Legal Realism

Many theories claim that CLS was rooted from the Legal Realism's legacy because of their almost similar doctrines. There is a general claim or a popular belief that CLS is a maturation of legal realism.[19] The challenge to the classical legal claim that legal reasoning

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[17] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) p. 14
[18] Alan Hunt, "The Critique of Law: "What is 'Critical' about Critical Legal Theory?", *Journal of Law and Society* Vol. 14 No. 1. New Jersey: John Wiley & Sons, Inc, 1987. p. 14
[19] Guyora Binder, "Critical Legal Studies", *A Companion to Philosophy of Law and Legal Theory*. D. Patterson, ed., 2010; Buffalo Legal Studies Research Paper No. 2012-023. Available at SSRN: http://ssrn.com/abstract=1932927

was separated and autonomous from moral and political discourse, was then used further and improved by the Critical Legal Studies. As part of the main influences of CLS, a review on the most prominent forerunners of American Legal Realist thought, Oliver Wendell Holmes Jr.'s *The Common Law* will help. This is the book where the legal realists found its battle cry where it commenced the most famous aphorism: "The life of the law has not been logic; it has been experience."[20] This aphorism, together with whole book itself, created various discussions and debates whether it is a denunciation of all efforts to exemplify law as science, or an attack to the orthodox conception of law as a coherent system of fixed axioms from which particular rules and decisions could be deduced.

The main goal for legal realism and CLS seems similar, but the problem comes from their historical background. Jeffrey Standen claimed that CLS is actually not of a legal realist decent, but of an anti-positivist influence. In "Critical Legal Studies as an Anti-Positivist Phenomenon", Standen notes that the CLS approach to law traces its lineage back to the natural law tradition of ancient Greece and Rome. He further contends that in both its philosophy and its methodology, CLS stands not as an extension of legal realism but as its antithesis.[21] This creates the difference between the two schools. Legal Realism has based its critique on a positivist belief that law and morals are separate; whereas CLS is based on Natural Law. This also creates another weakness on the part of CLS because of the weak historical foundation from Classical Natural Law, which will be dealt with in the third chapter.

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[20] Oliver Wendell Holmes Jr., *The Common Law* ed. Mark DeWolfe Howe (Boston: Little, Brown, 1963) p. 5

[21] Jeffrey A. Standen, "Critical Legal Studies as an Anti-Positivist Phenomenon", *Virginia Law Review*. Vol. 72, No. 5. Aug., 1986. p. 983

By the early 1990s, the CLS conference had dissolved, yet the CLS movement continued its influence on the work of numerous legal scholars in different fields: legal and constitutional theory, legal history, labor and employment law, international law, local government law, and administrative law.[22]

Critical Legal Studies Scholars 'crits'

Consequently, adherents of CLS sought to destabilize traditional conceptions of law, and to unravel and challenge existing legal institutions. Over the following two decades after the sixties, from the civil rights and feminist movements and even in art, architecture, literature, and language, CLS did not leave legal theory untouched. The trend for proponents of CLS is mainly of a postmodern attack, meaning CLS attempts to disrupt the all-embracing theory of origins and structure of law.

The Brazilian philosopher, social theorist, and politician, Roberto Unger, leads the Critical Legal Studies Movement. They seek to rebuild legal institutions for human equality permanently, and not just a temporary truce in a brutal struggle against the legal injustices[23]. They sought to change the traditional views of law and legal doctrine, revealing the hidden interests and class dominations in the existing and prevailing legal frameworks. As one of the founding members of the movement, most of his works reflect the ideology CLS demonstrates.

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[22] Guyora Binder, "Critical Legal Studies", *A Companion to Philosophy of Law and Legal Theory*. D. Patterson, ed., 2010; Buffalo Legal Studies Research Paper No. 2012-023. Available at SSRN: http://ssrn.com/abstract=1932927

[23] Roberto Unger, *Passion: An Essay on Personality* (New York: Free Press, 1984) p. 47

Unger starts with *The Universal History of Legal Thought.* He relates law as the doctrinal quest for normative order, law as the will of the sovereign, and law as the unexplained and unjustified structure of society.[24]

Unger's second book is the *Law in Modern Society: Towards a Criticism of Social Theory.* It is used to examine how his legal theory develops as it is now. It is a study of the place of law in societies, and the criticism of social theory. It answers different inquiries about law and society, the conditions of different kinds of law, the bases of the rule of law, the significance of studying law, social hierarchy and moral vision, the struggles of the rule of law, and the lastly, the changes in the legality and legal thought. These are the questions that Unger dealt with through a broad range of historical settings.[25] Generally, it claims the resolution of its internal dilemmas; however, he did not offer a legitimate solution, but more of a metaphysical one.

In *The Critical Legal Studies Movement*, Unger shows the incongruity of formalism and objectivism. He discussed how laws and legal discourse hide the social inequalities and political biases that so interest philosophy and revolutionary politics. He first maintained the main objection to the approach or view of the critical legal studies movement, that "there is a formidable gap that suggests between the reach of their intellectual and political commitments, together with the constraints upon their situation." [26]

[24] Robert Unger, *The Universal History of Legal Thought.*
[25] Roberto Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (New York: The Free Press, 1976)
[26] Roberto Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983)

In *What Should Legal Analysis Become?* Unger argues for the reconstruction of legal analysis as a discipline of institutional imagination. He added that changing the practice of legal analysis has an effect in re-imagining and reshaping the dominant institutions of representative democracy, market economy, and free civil society. The search for basic social alternatives, largely abandoned by philosophy and politics, can find in such a practice a new point of departure. He then criticized the dominant, rationalizing style of legal doctrine, with its obsessional focus upon negotiation and its urge to suppress or contain conflict or contradiction in law. Further, he shows how we can turn legal analysis into a way of talking about the alternative institutional futures of a democratic society. To sum up, the major concern of the book is to search how professional subjects such as legal thought can inform the public or the collective down to the masses.[27]

Equally important, a compilation of interviews with the legal intellectuals and scholars edited James R. Hackney Jr., *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory*, showed the fundamental theoretical questions in legal academe. For the Critical Legal Studies part, Hackney interviewed Duncan Kennedy, a Carter Professor of General Jurisprudence at Harvard Law School, and one of the founders of CLS. In the interview, Kennedy stated the difference between realist and crits. He claimed that 'realists had been so committed to policy science and policy analysis, which they would preserve the law and politics distinction', and further claiming that 'they were never able to take their own critique seriously.'[28] He shortly mentioned the difference between the legal realist and crits. That they are doing a critique

[27] Roberto Unger, *What Should Legal Analysis Become?* (London; New York: Verso, 1996)
[28] James R. Hackney Jr., *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York: New York University Press, 2012) p. 27

against the legal realist stand with regards to analysing policy. The main difference that he added is that legal realists are not getting rid of the formalism. He added that CLS have something that is hard to substitute, which is 'rational policy thinking'.[29] However, on this claim, there is no clear definition or explanation of the so-called rational policy thinking.

Brian Tamanaha, has another approach with CLS. In his article *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, he mentioned an economic problem that might explain one of the CLS movement's major themes – the legal system is largely built by elites. Tamanaha introduced the pricing structure of legal education that shows an intense class implication, for the tuition is too high for the middle and working class. [30] Consequently, this creates an economic barrier, therefore placing the elites in higher legal positions.

Duncan Kennedy also maintained Tamanaha's claim of economic inequality in the legal education. Kennedy further stated that one of the major goal of CLS was to transform legal education. *Legal Education and the Reproduction of Hierarchy,* self-published as a pamphlet in 1982, is Kennedy's critique of the American legal education. In it, he argues that American legal education reinforces class, race, and gender inequality. He argued that everything about law school: curriculum, course material, teaching styles, grading system, class ranking, treatment of secretaries, how people dress and talk, on-campus hiring system, etc. "train students to accept and participate in the hierarchical structure of life in law."[31] Kennedy further argued that because of these, the educators must take 'personal

[29] Ibid.
[30] Brian Z. Tamahana, *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, Washington University in St. Louis, School of Law. p. 315
[31] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy.* p.591

responsibility' for the legal hierarchy for the legal education per se is a crucial part of perpetuating the system.[32]

CLS Major Themes and thoughts

As introduced earlier, the CLS scholars as a whole do not offer a monolithic body of thought, but several common themes can be traced in its members' works. First, there is the idea that all 'law is politics'. This means that legal decisions are not legal at all, for they are political. It takes aim at the positivist idea that law and politics is separated. Given their claim of the politics in law, there is a usual strand for CLS scholars that law tends to serve the interests of the wealthy and the powerful by protecting them against the demands of the poor and subaltern: women, ethnic minorities, working class, disabled, and homosexuals. Generally, they all argue that law is used as tool for the elite's protection.

Critical theorists argue that actual judges and legislatures produce predictable results. These results, mostly, are tilted towards the benefit of the elite. As Morton Horwitz argued, since 19th century courts changed legal rules to spur economic competition and assists the elite merchants for power and wealth.[33] Also as early as 19th century to 20th century, courts remade and repealed property rules to permit owners to exclude people from access to commercial and other enterprise business mainly for racial reasons.[34] As stated by Alan Freeman, law reforms implemented are at the perspective of the perpetrators themselves rather than the perspective of the victim. It is given the idea that the ones who

[32] Ibid. p. 608
[33] Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977) p.56
[34] Joseph W. Singer, "The Player and the Cards: Nihilism and Legal Theory". *The Yale Law Journal* Vol. 94, No. 1 (Nov., 1984). http://www.jstor.org/stable/796315

are placed, appointed, and are able to be on the legal realm are the elite, again using law as their tool for protection.

Most CLS scholars seek to demonstrate historical, socioeconomic, and psychological analyses to identify how these particular groups and institutions benefit from legal decisions.[35] They also want to expose how the legal analysis and legal culture mystify outsiders; moreover, making it work to make legal results seem legitimate.[36]

In addition, CLS also claims that individuals' decisions are based on reason that is attached to political, social, or economic constraints. Therefore, law practitioners do not really create a decision solely based on the law, but it is influenced by their political, social, and economical factors down to even their current state while deciding. For instance, external factors like weather, his or her breakfast, socio-economic class, gender, race, and all other conditions of life, affect the judge's decision in a certain case. Duncan Kennedy, one of the most noted proponents, acknowledges that these stated psychological and social dimensions of judicial roles exists as a constraint for the legal adjudication.

[35] Chayes Abram et al., "Critical Legal Studies Movement", *The Bridge*, Harvard Law School, Harvard University. https://cyber.law.harvard.edu/bridge/CriticalTheory/critical2.htm
[36] Ibid.

CHAPTER 3

LEGAL INDETERMINACY AND POLITICS

The objective of this chapter is to analyze the Critical Legal Studies (CLS) main assertion of legal indeterminacy. Here we shall state that it is only grounded on ambiguity and confusion about the legal process and decision. Particularly, it is also founded on the confusion of inherent generality of laws as contradictory, incoherent, and vague. Furthermore, this chapter also refutes the CLS claim of 'law is politics' as their grounds for positing legal indeterminacy.

Contrary to the critical scholars' claim of laws being indeterminate, this paper offers an account and proof for law's determinacy through an overarching principle of a legal formalist logic and language. This paper comprises the sub-arguments that will support the main assertion of legal formalism that includes inherent generality of legal language, reasoned elaboration, and neutral principle.

The focus of this paper revolves around the idea of legal indeterminacy, which states that contrary to the common understanding, legal materials, statutes and case law, do not really answer legal disputes.

Legal principles and doctrines, CLS scholars claim, are said to be indeterminate in two ways. First, the legal rules in force contain substantial gaps, conflicts, and ambiguities. They maintained that these existing gaps, conflicts, and ambiguities are not anomalies or exceptions, but are widely present even in simple cases. Second, legal indeterminacy also

rises because of the underlying norms that include stability and predictability, and also fairness and utility. [37]

Furthermore, CLS theorists do not claim that legal indeterminacy branched out because of the absence of structure. Alternatively, they argue that legal indeterminacy results from specific kinds of structure that run throughout law.

To demonstrate the indeterminacy of legal doctrines, some critical scholars used the methods of semiotics. They used it to deconstruct theories, and further unearth a deep structure of categories and tensions about the legal system as a whole. For instance, Duncan Kennedy maintained that various legal doctrines revolve around a structure of binary pairs of opposing concepts: self and other, private and public, subjective and objective, freedom and control.[38] [39] For Kennedy, such pairs limit the legal doctrines to two sides only. Further, he maintained that this is a manifestation of the indeterminacy of legal doctrines as it developed through history.

Kennedy also argued that instead of replicating existing social power relations, classrooms could be an arena for political analysis and struggle. He claimed further that law schools should expose the indeterminacy of legal doctrine. They need to teach law students to unbundle and reframe legal arguments on behalf of those with less power. [40]

According to some critical scholars, most existing legal theories are too committed to the law being determinate, objective, and neutral. The problem, according to them, is that neither of these ideals can be obtain in legal practice. ‘Law is neither, objective, nor

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[37] Ibid.
[38] Duncan Kennedy, “The Rise and Fall of Classical Legal Thought”
[39] Duncan Kennedy, “The Structure of Blackstone’s Commentaries”
[40] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy.* p.591

neutral.'[41] Critical scholars have been especially critical of law's claim to objectivity. Looking into most works of critical scholars, they developed extensive arguments concluding that law is radically indeterminate, incoherent, and contradictory. Critical scholars maintain that the areas of law embody conflicting principles that cannot be balanced.[42] The principles and counter-principles are manifestation of larger social visions or "prescriptive conceptions of society" which are themselves inconsistent.[43] Some critical scholars claim that unresolvable conflicts arise in nearly every case.[44] In addition, according to CLS, law is indeterminate to the extent that legal questions lack single right answers.

Furthermore, the concept of 'law is politics' is one of their main grounds to their claim of legal indeterminacy. Since the 1920s, Legal Realism started to develop the indeterminacy argument. It was then revised and updated in the 1980s by the proponents of the CLS movement to serve as their spearhead. Then, they employed this argument to claim that the rule of law was a myth designed to maintain the illegitimate domination of society by the economically and politically powerful or the elites.[45]

Legal formalism

This thesis uses the main principles of a legal formalist logic and language as its main assertion. Legal formalism is a theory that legal rules stand separate from other social and political institutions.[46] According to this theory, once lawmakers produce rules, judges

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[41] Joseph W. Singer, "The Player and the Cards: Nihilism and Legal Theory", *The Yale Law Journal* Vol. 94, No. 1 (Nov., 1984), pp. 1-70
[42] Unger Roberto, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983) p. 578
[43] Ibid.
[44] David Kairys, *The Politics of Law* 3rd ed. Basic Books, 1998. p. 11-14
[45] Roberto Unger, *The Critical Legal Studies Movement*. Cambridge: Harvard University Press, 1983.
[46] Legal Information Institute, "Legal Formalism", *Wex Legal Dictionary and Encyclopedia*. Cornell Law School, Cornell University. https://www.law.cornell.edu/wex/legal_formalism

apply them to the facts of a case without regard to social interests and public policy. [47] Lawrence Solum describes it as commitment to a set of ideas that more or less includes: [48]

(1) The law consists of rules.
(2) Legal rules can be meaningful.
(3) Legal rules can be applied to particular facts.
(4) Some actions accord with meaningful legal rules; other actions do not.
(5) The standard for what constitutes following a rule *vel non* can be publicly knowable.

Legal formalism started around the late nineteenth and early twentieth centuries.[49] It was the era of the "classical legal consciousness"[50] where they view judicial decision-making as "a scientific, deductive process by which preexisting legal materials subsume particular legal cases under their domain, thus allowing judges to infer the antecedently existing right answer to the case at bar."[51] Therefore, it is implied, using this formalistic approach, that judges decide cases objectively and impersonally by logically deducing the correct resolution from a definite and consistent body of legal rules. Thus, the judge did not make the law; rather, he or she merely applied the law that had been created by the legislature.

The possibility of using a deductive process of resolving a legal case has been clearly described as follows:

> Predominant legal theory claimed that reasoning proceeded syllogistically from rules and precedents that had been clearly defined historically and logically, through the particular facts of a case, to a clear decision. The function of a judge was to discover analytically the proper rules and precedents involved and to apply

[47] Ibid.
[48] Lawrence Solum, "Formalism and Instrumentalism", *Legal Theory Lexicon*, May 22, 2005, retrieved May 20, 2015. http://legaltheorylexicon.blogspot.com/2005/05/legal-theory-lexicon-043-formalism-and.html
[49] Gary Minda, "The Jurisprudential Movements of 1980's", *Ohiot St. L.J*. 599 (1989) p.633-634
[50] Elizabeth Mensch, "The History of Mainstream Legal Thought", *The Politics of Law*, David Kairys ed. rev. ed., 1990 p. 13
[51] Raymond A. Belliotti, *Justifying Law: The Debate Over Foundations, Goals, and Methods* (Philadelphia: Temple University Press, 1994) p.4

> them to the case as first premise. Once he or she had done that, the judge could decide the case with certainty and uniformity. [52]

Further, another illustration of how the act of legal reasoning can be shown in structure to pure deduction:

> Every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts and the application of the rule is a logical necessity. The old syllogism, "All men are mortal, Socrates is a man, and therefore he is mortal", states the exact form of a judicial judgment. The existing rule of law is: Every man who with malice aforethought kills another in the peace of the people is guilty of murder. The defendant with malice aforethought killed A.B. in the peace of the people; therefore, the defendant is guilty of murder.[53]

Therefore, it may be established that the language of judicial decision is mainly the language of logic. Then, given the logical method and form, it may also be concluded that it is founded also of certainty. Consequently, this possibility denies the claim of critical theorist judges cannot produce a certain answer or decision. In addition, this kind of legal reasoning also provides certainty, stability, and predictability to the law.

Inherent generality of laws

Another concern for the critical theorist is the vagueness of language used in legal rules e.g. 'reasonable', 'due process', 'fair value' etc. However, their claim of legal indeterminacy as founded on the vagueness of language is simply a confusion with the inherent generality of legal language. Laws are inherently general. It is to allow the legal practitioners in reading it as broadly or as narrowly as necessary to achieve a desired result.

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[52] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown and Company, 1960) pp.24-25

[53] John M. Zane,"German Legal Philosophy", *Michigan Law Review* 287,338 (1918). p.16

In addition, it will be irrational to claim that all laws are supposed to be specific to be applied on each legal cases, for it will never and cannot reflect the exact reality of events that happen in a certain society in which it is applied. That is to say, with the complexities of events, crimes, definitions, individuals, etc. laws exist to be general and overlapping for it to match the complexities to which it is to be applied. According to Hart, laws are supposed to be general for better application.[54] Codes and rules are composed of general provisions from enforcement, application, and penalties. He further claimed that the law is coherent, clear, and discoverable in most cases.[55] He specifically argues that the legal rules are necessarily worded in generalities so that they will apply to a broad variety of cases. This leaves an 'open texture' quality of rules for an element of judicial discretion in cases where law is unclear.[56]

In *The Concept of Law*, Hart maintains that there are some cases in which the rules of the legal system do not clearly specify the correct legal outcome.[57] Hart claims, "Penumbra of uncertainty" is derived from the vagueness and open texture of the legal language.[58] The judges apply existing rules created by the legislature. Take note that judges apply rules for adjudication, not just a single rule. Given the existence of pluralistic events, the penumbra of uncertainty and the open texture of the legal rules or legal language as whole is crucial. For Hart, the indeterminacy of law is a peripheral or an outlying phenomenon in a system of rules, which provide specific outcomes to cases.[59]

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[54] Emmanuel Fernando, *A Course on Legal Theory* p. 936
[55] Ibid.
[56] Ibid.
[57] Andrew Altman, "Legal Realism, Critical Legal Studies and Dworkin" *Philosophy and Public Affairs*
[58] "Positivism and the Separation of Law and Morals". Harvard Law Review, Vol. 71, No. 4 (Feb. 1958) pp. 606-607
[59] Altman "Legal Realism, Critical Legal Studies and Dworkin"

For instance, a quick analysis of the Revised Penal Code of the Philippines or the Act No. 3815[60] will help in illustrating legal codes' generality. In its first book, it is initially stated that it will use general provisions with its date of enforcement and application, together with its offenses, liabilities, and penalties. Laws are made specific only on the note of its articles and sub-articles. The problem, perhaps, rises from the vague terms on its defining article. In the example, the key term that needs to be defined is 'deceit'. According to Article 3 – Definitions, 'felonies' are committed not only be means of deceit (dolo) but also by means of fault (culpa). Further, it defined deceit as when the act is performed with deliberate intent and there is fault when the wrongful act results from imprudence, negligence, lack of foresight, or lack of skill. This act shows that in general, it corresponds to all acts of felonies by deceit and fault, and at the same it also corresponds to a more specific case through the extension stated through its sections. The existence of vague terms does not necessarily suggest the indistinctness of law, but it shows the inherent generality of the legal language. These kinds of gaps are for judges to fill in; however, it may be debatable that judges may tend to fill in these gaps in accordance to his or her bias therefore making the law not neutral at all.

Moreover, another concern is the idea of 'precedence'. The term precedence in the situation of legal institution may mean different things. First, it can be about the possibility of a new law created with a certain section contradicting or matching an old law. For instance, the R.A. 9710 or the Magna Carta of Women (MCW)[61] and the R.A. 10354 or the

[60] *Revised Penal Code of the Philippines Act No. 3815, s. 1930.* Retrieved from http://www.gov.ph/1930/12/08/act-no-3815-s-1930/
[61] *The Magna Carta of Women.* Republic Act no. 9710 s. 2008. S. No. 2396, H. No. 4273.

Reproductive Health Law (RH Law)[62] is relatively new. The MCW was approved on year 2007, while the RH Law on 2012. The former , as it recognize the realities that affect the former, as it recognize the realities that affect the women's condition, promotes comprehensive plans, policies, programs, measures, and mechanisms to address discrimination and inequality in all aspects of life of women. The latter, which mainly focuses on reproductive health, still stated and allotted a section against discrimination that already exists on the precedent laws passed. The problem with these is the legitimacy of what law is to be cited: the new or the precedent. The response is the newer law is more updated, therefore it is more valid. However, this does not remove the legitimacy of the precedent or the older law, for given in the example, some certain sections of the RH Law point towards the MCW for a more comprehensive focus on gender discrimination. Moreover, this kind of example shows that precedence always drive on the new and updated act, but this does not claim illegitimacy on the previous act. These kinds of complications were answered by the court postulation that the legislature was implicitly or explicitly implicating that it repeals the older law. Again, the said complications on the old and new laws do not entail law as indeterminate.

Second, since the Philippines has a hybrid of common and civil law legal system, a precedent is a principle or rule established in a previous legal case that is either binding for a court or any other tribunal when deciding a certain case with similar issues or facts. It is established by following earlier judicial decisions or a system of judicial decisions like the Supreme Court Annotated (SCRA) volumes here in the Philippines. SCRAs are the

[62] *The Responsible Parenthood and Reproductive Health Act of 2012.* Republic Act no. 10354 s. 2012. S. No. 2865, H. No. 4244.

decisions created by previous justices on their previous cases. A certain judge may seek a case written comparable to his or her case in need of adjudication; then by knowing the previous decision, the judge may come up with his or her own to be considered as a valid decision. However, according to the critical scholars, these acts create and generate indeterminacy on the part of statutes. Thus, the idea of reviewing SCRAs for judicial decisions is not for direct pronouncement, but merely a guide for consistencies.

Again, legal cases may be comparable, and these similarities can be used for consistencies on decisions for easier judicial process.

Consequently, laws do not really contradict, but they only overlap due to their generality. 'Overlap' does not necessarily suppose that it 'contradicts'. The CLS conception of contradictory of laws is based on ambiguity, for it may be claimed that their stance of contradictory is nothing but laws' inherent generality.

Reasoned Elaboration

Additional argument against the critical theorist's claim of indeterminate legal decisions is the rise of the Legal Process School that is widely associated with materials and thoughts developed by Henry Hart and Albert Sacks.[63]

This serves as an explanation against critical scholars' claim of judicial decisions being personal. Within this realm, the legal process theory maintained judges could decide cases through the process of 'reasoned elaboration'. Further, it will answer questions

[63] Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law.* (Foundation Press, 2006)

against the indeterminacy of laws through the elaboration of principles and policies contained within precedent and legislation.

As discussed earlier, legal codes and statutes often have general language, but that does not that officials should simply interpret this ambiguous language to reflect their own political values. Legal practitioners should apply a "general directive arrangement" must elaborate the arrangement in a way which is consistent with the other established applications of it, and "must do so in a way which best serves the principles and policies it expresses."[64]

It may be conceded that judges have their own bias in judicial decision-making, and that the adjudication is not merely a mechanical deduction from precedents and statutory texts. However, with the idea of reasoned elaboration, judges ideally reason from legal materials using principles that are neutral together with the defined set of facts. Using the legal process concept:

> The integrity of the judicial process may be compromised if the cases that are decided on extend further than the case at hand…only by insisting on a level of generality, some distance between the reasons and the facts of the case at hand, can one be certain that judges are actually reasoning from legal materials rather than indulging their own preference.[65]

Furthermore, according to Hart, the court should focus on applying and interpreting, and not on creating laws.[66] He added that it is part of the legal duties to develop a "reasoned application of basic principle" to a certain case.[67] He maintained that a court should base

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[64] Ibid. p. 2
[65] Ibid.
[66] L.L. Fuller, "American Legal Realism", *University of Pennsylvania Law Review* Vol. 82 No. 5 (March, 1934)
[67] William N. Eskridge Jr. and Philip P. Frickey, "The Making of the Legal Process", *Harvard Law Review* Vol. 107, No. 8 (June, 1994) p. 2031

its action, not on a free judgment of relative social advantage, but on the reasoned development of authoritative starting-points i.e. statutes, prior judicial decisions.[68] Besides, creating or modifying the existing statutes to come up with a decision will result to fading of written laws, since it will not be used appropriately.

Therefore, the problem of indeterminacy is not really plaguing the concept of law per se. Nevertheless, the problem seems to be derived on the way judges interpret laws. It may be conceded that, in reality, judges do in fact make decisions based on their political bias. However, laws can be neutral with its inherent generality. As maintained by Wechsler, courts can make such determinations based on the type of 'reasoned explanation' with intrinsic judicial action.[69] He added that if judges would decide cases strictly on the basis of such neutral principles rather than being result driven, judicial decision could be both extracted determinate and politically neutral.[70] Courts should respect legal procedures and materials, carefully consider the arguments of both parties, and justify the result with an honest and reasoned judicial opinion that provides a reasoned elaboration of the purposes behind the law being interpreted.[71]

In addition, Dworkin also added that by correctly identifying the 'best' interpretation of these materials, judges are and can be able to render determinate outcomes

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[68] Felix Frankfurter and Henry M. Hart Jr., "The Business of the Supreme Court at October Term", *Harvard Law Review* Vol. 49 (November 1935) p. 68
[69] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law", *Harvard Law Review* Vol. 73, No. 1 (Nov., 1959) p. 1
[70] Ibid.
[71] William N. Eskridge Jr. and Philip P. Frickey, "The Making of the Legal Process", *Harvard Law Review* 2031, 2043-45 (1994) p. 107

to legal controversies even in those cases in which appeal to the rules alone would provide ambiguous results.[72]

Institutionalized System

Every judicial and legislative institution has its own protocol. It is composed of system, framework, and protocols. For instance, in the Philippines, the court system is composed of Review Courts, Trial Courts, and Special Courts like Court of Appeals, Sandiganbayan, Sharia Courts.[73] These variety of courts are laddered with hierarchy. Each court has their own obligations and responsibilities depending on the type of the case. This is where the idea of judicial review rises. If an individual wants to make an appeal, his or her case will be transferred to a higher court for another review, assuming that it will be accepted for reopening of case.

These institutionalized systems creates a stronger foundation of the legal system; therefore, making law more determinate and stable.

'Law is politics'

One of the main premise for CLS claim of legal indeterminacy is their claim of 'law is politics'. The critical scholars' claim of 'law is politics' is founded on the idea that since laws are written, implemented, and decided by predominantly Christian, white, males – then laws are 'political'. They mainly criticized the law through this argument, further maintaining that this adds up to the reason why the law is indeterminate.

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[72] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) p. 105
[73] Arellano Law Foundation, "Philippine Court System", *The LawPhil Project: Philippine Laws and Jurisprudence Databank*, accessed June 3, 2015. http://www.lawphil.net/courts/courts.html

This thesis acknowledges the existence of political bias of legal practitioners from the creation, implementation, and judicial extension of laws. However, the claim that 'law is politics' is excessive. It may be true that there is politics in law, but law is not purely politics. 'Law is politics' is the same form as 'A is B'. Therefore, it proposes identity between the two different concepts. Furthermore, the claim overly reduces law as purely a political entity, which it is not.

Politics exists in every part of society. The law is part of society as a human artifact and it is also tainted with politics. Laws cannot stand on their own, for legal practitioners interpret them. Using the definition of 'politics' as power, the politics of law indeed exists. However, the taint of politics came from the legal practitioners, and not on the notion of law itself. It only serves as a tool, for the individuals, as the critical scholars claim, the elites. The existence of politics in law does not necessarily cause indeterminacy of laws.

Counterexamples will help refute the claim that 'law is politics', and it is the developments that happened in legal system. For instance, societies used laws to legitimate developments for social justice. The best example is the changes about slavery in different societies. Others may argue that slavery still exists, but the developments since the ancient times until now are pronounced. The elites prominently benefited with slavery, and laws were used to halt these discriminations.

Another example is the constitution. The constitution is committed to social and distributive justice. Using the 1987 Philippine Constitution[74], it has articles that directly address human rights through Article 3 Bill of Rights. In this article, from Section 1 to

[74] 1987 Constitution of the Republic of the Philippines, retrieved May 20, 2015 through http://www.gov.ph/constitutions/the-1987-constitution-of-the-republic-of-the-philippines/

Section 22, it addresses every right of an individual – life, liberty, property, privacy, freedom, equal protection of the laws, etc. The Article 13 was even dedicated to social justice and human rights. In addition, the government distributes wealth using taxation laws like the National Internal Revenue Code[75], Tariff and Customs Code[76], and Real Property Tax Code[77]. It may be claimed that deprived citizens still exists, but this taxation laws' primary goal was to redistribute wealth through government projects that everyone in society can use.

The problem with this criticism of law as a legal theory is that it merely states the current political state of law. It does not add any strong point to the indeterminacy of law, for the problem only lies on the collective and not on the notion of law itself.

CLS' Response

Given the stated arguments on this chapter, a contemporary critical scholar may offer the following response:

First, a critical scholar may respond to the critics of CLS through claiming that they are part of a certain society, therefore they are also blinded or in denial of being affected by politics and dominant ideology of their epoch. This is comparable to the idea false consciousness in Marxist ideology where the masses are not aware of the oppression. However, this response may be also used against the critical scholars since they are likewise part of that certain society affected by a dominant ideology.

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[75] National Internal Revenue Code of 1997, Republic Act No. 8424, retrieved through *Chan Robles Virtual Law Library.* http://www.chanrobles.com/legal6.htm
[76] Tariff and Customs Code of the Philippines, Republic Act. No. 1937, retrieved through *Chan Robles Virtual Law Library.* http://www.chanrobles.com/legal6.htm
[77] The Real Property Tax Code, Presidential Decree No. 464, retrieved through *Chan Robles Virtual Law Library.* http://www.chanrobles.com/legal6.htm

Fernando's idea on internal and external perspective of law may be used for this issue since it involves different characters with these two different approach or view towards law. Critical scholars may be guilty of being too external in looking into or analyzing the legal system. Likewise, critics of CLS and other legal philosophers from other schools of thought e.g. Legal Positivism, Classical Natural Law are also guilty of viewing the legal system with merely an internal perspective. Therefore, in creating a critique of the legal system, there should be a hybrid experience and approach – both external and internal perspective – in order to provide a comprehensive view of the legal system.

Second concern is with the issue regarding the degree of how politics affects law. If perhaps a certain critical scholar recreated or revamped their excessive and identical claims that law is politics into law merely affected by politics, then it will remove the excessiveness of their claim. However, using their idea of politics, it still does not really offer a sturdy support towards indeterminacy of law. Even if law is affected by politics, it does not entail that it is not determinate and legitimate.

Still, the notion of bias exists. Critical scholars may respond that given the existing bias, judicial decisions are tainted. They may argue that the existence of bias is inherent to every individual. Those individuals implicitly and unintentionally use their bias on every decision and choice they take, for it is essential innate for every individual. Therefore, judicial decisions are all politically tainted with bias. However, the problem with this kind of response is the excessive reduction of law to judicial decisions only. Law is a larger institution – a human artifact. It cannot be merely condensed to legal process and decisions. With regards the inherent existence of bias or prejudice, as stated earlier on this chapter,

the idea of reasoned elaboration, neutral principles, and institutionalized systems and protocols will help in decreasing, if not completely eliminate, prejudice. Through mechanical deduction, judicial decisions can be impartial and balanced as possible.

Legitimacy of laws

The CLS claims of legal indeterminacy do not necessarily result to illegitimacy. Legitimacy may not be the only factor why legal determinacy is important, but it is the most significant feature of law. If CLS could show that the legal system is indeterminate and therefore illegitimate, then it is powerful. To further demonstrate, a logical structure of the assumptions and claims of CLS to the existing liberal legal theory follows:[78]

1) Citizens have consented to rules duly enacted by legislature and are therefore obligated to obey them.
2) When judges apply legislative rules, citizens are obligated to obey those decisions in consequence of
3) All judicial decisions are applications of duly enacted statutes.
4) Therefore, citizens are obligated to obey judicial decisions
5) Thus, making laws legitimate.

Again, regardless of laws being legally indeterminate as the critical theorists' claim, legitimacy plays a more vital role to law. The determinacy or indeterminacy of law does not necessarily dictate if a law will be legitimate or not. Even if the CLS will be successful in the future in proving that laws are essentially indeterminate, it does not completely bombard the law's core, which is its legitimacy.

[78] Ken Kress, "Legal Indeterminacy", *California Law Review* Vol. 77 No. 283, 1989. p.288

CONCLUSION

Critical Legal Studies' (CLS) main assertion of legal indeterminacy is only based on ambiguity and confusion about the legal process and decision. Their claim of legal indeterminacy is founded on the confusion of inherent generality of laws as contradictory, incoherent, and ambiguous.

Since CLS is a postmodern legal theory, the weaknesses of the postmodern approach may also be considered. First is the postmodernist external approach that creates a gap in interpreting laws. They are merely criticizing the legal system without a systematized framework of how to start and overturn the ideas they want to overturn. Second is its antifoundationalist character wherein critical scholars tend to use the concepts they ridicule. They disregard normative principles, and use another foundation of an unworkable sort.

The critical scholars' claim of legal indeterminacy has been refuted by this paper's claim of inherent generality of the legal language for better application and interpretation – further showing that their claim of contradictory laws are not contradictions, but inherent generality.

Then, with the use of legal formalism and logic as the legal language, it refutes the claim of personal, partial, and subjective legal decisions. Together with 'reasoned elaboration' and neutral principles, and institutionalized systems and protocols, it shows that laws are capable and indeed clear, objective, neutral, and determinate.

Concerning the main reason for the CLS claim of legal indeterminacy – law is politics – this thesis showed the claim is excessive, for law is not purely politics. It offered counterexamples further maintaining that laws can be used for the good of the many through legal statues and codes for the development of society. It may be true that there is political bias from the creation, implementation, and judicial extension, but the law per se is inherently objective, impartial, and determinate. The claim – law is politics – is merely a statement of a problem in a certain society. It is not a decent ground for claiming legal indeterminacy; therefore, they failed to maintain a strong stand about the indeterminacy of law.

Legal legitimacy is the most important factor for a law to be a law. Consequently, the CLS claim of legal indeterminacy does not potently result to illegitimacy of law. CLS, as a legal theory, failed to show that their claim of indeterminacy would essentially cause the law to be meaningless artifact of society.

Further, their goal of overturning the hierarchical structures of domination in the modern society's legal institution is also problematic, for they are offering an indirect and difficult solution through eradicating the capitalist and elitist society. But then again, with an internal translation of their works partnered with a strong foundation, it will be possible.

Given the radical and postmodern approach, the CLS critique of the legal system is essentially a critical legal theory that entails the betterment of the society. It may be hard to analyze CLS because of its lack of a systematic framework, but their method and approach may serve as an example for the members of society and the good of the legal system. It further encourages an individual to come up with his or her own way of looking

into the legal institution. As a member of society, there is a need to work out ways in which the collective can live amicably and harmoniously with the existence of a legitimate law.

Overall, CLS may have failed in showing the indeterminacy of law, but they can be successful in showing the behind flaws of law. Given the possible weaknesses, CLS, as a legal theory, can still be used as viable alternative theory to the advancement and benefit of the jurisprudential future.

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