REVISITING THE INDETERMINACY THESIS OF CRITICAL LEGAL STUDIES

Muhammad Mahbubur Rahman*

Vagueness is an ineradicable feature of our everyday language, and its pervasiveness in the law is the most commonly invoked reason for thinking that the law is indeterminate. Though we seem to have a firm intuitive grasp of what it means to describe, for example, compensation as "fair" or a form of behavior as "harassment," we are hard-pressed to decide in borderline cases whether a certain amount is truly fair or a particular act genuinely constitutes harassment.1

ABSTRACT

While the mainstream liberal legal scholarship maintains a formalistic approach that view the judge as one who objectively and impersonally decides cases by logically deducing the correct resolution from a definite and consistent body of legal rules, critical legal studies (CLS) characterizes this formalist image of the judge as a myth and proclaims that law is radically indeterminate to such an extent that authoritative legal norms permit multiple outcomes in adjudication. In CLS understanding, the texts of law therefore have no definite meaning apart from the contexts and one single interpretation of the texts is as good as any other. The present paper critically appraises this indeterminacy thesis of CLS to argue that this thesis can be used as a powerful denial of rhetorical claims made by mainstream legal literature since judicial decisions are not necessarily a mechanical and neutral act, sometimes they are also the result of moral/political choice of the judge concerned. The paper also argues that once we quantitatively test indeterminacy thesis in a given jurisdiction, it helps us understand how the legal system or any particular area of law within that system works there. Any picture of radical indeterminacy, once discovered therein, can even belittle the very foundation of the system.

I. INTRODUCTION

Although it is said to be a direct descendant of American legal realism,2 the critical legal studies (CLS) movement,3 beginning its journey in 1977, went far

---

* Muhammad Mahbubur Rahman, Ph.D. (School of Oriental and African Studies (SOAS), University of London, UK), Post-Graduate Diploma on International Humanitarian Laws (NALSAR University of Law, India), LL.M and LL.B (Hons.) (University of Dhaka), is an Associate Professor, Department of Law, University of Dhaka.


members of this movement, the CLS school of thought, even in its early years, posed a threat for the orthodox liberal legal scholarship.

The CLS movement arguably “enjoyed a period of organizational momentum” until 1994. But this movement, once characterized as “the most influential progressive movement in legal studies”, is now said to have already lost its ways. It is therefore generally shared by many scholars that CLS movement has gone into deep decline. This however does not necessarily mean that all the ideas associated with CLS deserve to be archived now. The present paper therefore apprises one of the central tenets of CLS - law is radically indeterminate to such an extent that authoritative legal norms permit multiple outcomes in adjudication.

II. CLS VIEWS ON LEGAL INDETERMINACY

Liberalism offers itself as “a government of laws, and not of men” and believes that “the courts are the means by which the values of liberty, autonomy, and rights-based equality can be preserved when impinged by the political system”. The crits however attack “these ideas as apologias for the status quo and argued that these ideas were complicit in masking the deep

---

9 According to Blalock, “schools of thought and theoretical movements that once appeared vibrant no longer do”. See supra note 5, at p. 82
13 supra note 5, at 74.