CRITICAL LEGAL STUDIES (CLS): AN ALTERNATIVE FOR CRITICAL LEGAL THINKING IN INDONESIA

MUCHAMAD ALI SAFAA'T
Faculty of Law, Brawijaya University, Malang, Indonesia
Email: safaat@ub.ac.id

MILDA ISTIQOMAH
Faculty of Law, Brawijaya University, Malang, Indonesia
Corresponding Author’s Email: milda.istiqomah@ub.ac.id

Abstract: This article discusses Critical Legal Studies (CLS) as the critical study of the law that opposes the doctrine of legal formalism. As a form of critical study, CLS not only accommodates Marxist legal ideas, but also liberalist-radical and postmodernist ones. This article has the objective to identify briefly the ideas contained within CLS from various legal experts, its advantages and disadvantages, as well as its context with the legal development in Indonesia. The utilized research method was the normative method for the investigation and analysis of the existence of legal doctrines. This article concludes with a critique of the law in Indonesia at present and how the ideas of CLS may be utilized as another radical alternative in solving legal problems in Indonesia.

Keywords: Critical Legal Studies, Doctrine of Legal Formalism, Radical Alternative.

Introduction

Critical Legal Studies (CLS) is a movement that emerged in the 1970s in the United States. This movement is the continuation of the legal school of thought of American realism that desires a different approach in understanding the law, not just as with the current understanding that is Socratic in nature. Several figures that became the initiators of CLS are Roberto Unger, Duncan Kennedy, Karl Klare, Peter Gabel, Mark Tushnet, Kelman, David Trubek, Horowitz, and others. Critical Legal Studies is translated by Ifdhal Kasim into the Indonesian language with the term “Gerakan Studi Hukum Kritis” (literally, “Critical Legal
The term that is utilized in this article hereinafter is Critical Legal Studies, or CLS for short.

The primary difference between CLS and other traditional ideas of law is that CLS rejects the separation of legal rationality and political debates. There is no differentiation of logical models of the law; law is politics under a different guise. Law is only present in an ideology. CLS regards the function of the court in understanding the law as the primary concern.

Although it rejects being called as a type of Marxist thinking that differentiates suprastructure and infrastructure as well as the law as a dominance tool for capitalists, CLS declares the role to take apart the hierarchical social structure. The social structure represents a form of injustice, domination, and oppression. The task of those in law circles is to bring about changes in ways of legal thinking and changes in society. These ideas were inspired by the critical philosophy doctrine of Jurgen Habermas, Emil Durkheim, Karl Mannheim, Herbert Marcuse, Antonio Gramsci and others. Jurgen Habermas, Karl Mannheim, Herbert Marcuse, and Antonio Gramsci are the primary figures of the critical doctrine. Critical philosophy is one of the schools of philosophy that developed through the usage of the critical approach toward social reality. This school of thought was inspired by the ideas of Hegel and Karl Marx. The school of thought developed from the Frankfurt Doctrine up to Post-Modernism.

Supporters of CLS understand and utilize legal ideas and social theories in a more intensive manner than realists do. They have destroyed much of everything that applies in law. However, many have also criticized that only a few CLS thinkers have offered constructive models.

This article has the objective to recognize in brief the ideas within CLS from various legal experts, its advantages and disadvantages, and its context with legal development in Indonesia. As the starting point, the first section involves the explanation of CLS ideas that are explained in the book *Modern Jurisprudence* written by Hari Chand, accompanied by several criticisms that are present in the book. It is described as a starting point, because this section also contains several supplementations, whether directly or in footnotes, regarding matters related to the discussion of CLS from other sources.

The second section involves the explanation of several other ideas from CLS that were not discussed in the *Modern Jurisprudence* book. The third section, after discovering the ideas of CLS, involves the analysis of the entirety of the ideas of CLS with the objective to discover the strengths and weaknesses of CLS in both its theory and execution. This section is combined with the application of CLS ideas for the analysis of the law in Indonesia.

9. Ibid.
The final section is the concluding part of this entire article, which more constitutes final remarks by which the ideas of CLS may be utilized as alternative ideas for the resolution of legal problems in Indonesia.

**Analysis and Discussion**

**CLS as a Movement of Critical Legal Studies in the United States**

As with previous practices of legal ideas, CLS continues the tradition of the empirical study of the law. However, the utilized approach is “leftist” social science paradigms such as the Marxism school of thought, the critical theories of the Frankfurt doctrine, neo-Marxism, Structuralism, and others. This does not mean that CLS does not inherit the views from these; instead, CLS utilizes them in an eclectic manner. Radically, CLS refutes theories, doctrines, or principles such as neutrality of law, autonomy of law, and separation of law and politics (law-politics distinction).\(^{10}\)

Up to 1850, the general opinion states that a judge rules on a case by utilizing considerations of prudence (the instrumental view). Starting from 1890, the view that was adopted then was that a judge rules on a case by the application of its own appropriate regulations. After 1937, the realist understanding of law takes the view that the search for objectivity and a system of legal thinking that is impartial is purely an illusion. The movement of the realists creates distrust toward the courts and adds to the power of state experts and apparatuses. According to realists, the law and morality are separated. Meanwhile, the contemporary view states that between law and morality, there is a tight relationship. Law is a moral science and judges make verdicts as moral apparatuses. Ronald Dworkin and Posner discovered morality that lies within traditional.\(^{11}\)

CLS states that a liberal society is filled with dominance and hierarchy. The upper class forms a structure that applies for others to make their lives proceed more smoothly.\(^{12}\) An ideal legal state is one that can mark contradictions and hierarchy in a liberal society. If it is said that the law does not serve to seek the truth, but to discover the existing complexity, legal theory will not be meaningful without social theory. The truth of statements about social living has actually been conditioned by all applicable social systems.\(^{13}\) The truth is relative according to certain societies or certain historical groups.

A person in the entirety of social structure is a product of history, not nature. History is filled with many disputes, and social rules are the separators that illustrate the position of each person. Power becomes a right, obedience becomes a task, and the division of social hierarchy temporarily becomes vague.

CLS attempts to affect social reality. The existing structure constitutes the usage of beliefs and assumptions that create a society in the reality of relationships between people. This belief structure or ideology has the potential to be concealed in its tendency to maintain its own dynamics to create a legal doctrine that blames conditions and nature.\(^{14}\) For CLS, legal conscience is a tool that is related to the thought to commit oppression. This constitutes a way to conceal or avoid the fundamental truth that everything is in a process of change and presence.\(^{15}\)

---

\(^{10}\) W. Friedmann, *Teori Dan Filsafat Hukum Susunan I (Legal Theory)* (Raja Grafindo Perkasa 1993).

\(^{11}\) Roberto M. Unger (n 1).


\(^{15}\) *Ibid.*
Legal experts are largely affected by external factors such as society, economy, politics, and psychology, but CLS thinkers emphasize more on social and political contexts. Interpretations are largely affected by historical conditions, and thus legal principles and rationality are not immune from social and political influences. They affirm that legal thinking affects legal changes and legitimizes the social order that already exists in ways that apply imperceptibly.

CLS takes the opinion that de-legitimization is necessary to bring up the possibilities that express realities. Something must free itself first from the mystical illusions that manifest in conscience with the path of a liberal legal world and critical activities that can free the future. However, this very much depends on whether a person adopts this philosophy or not. As a theory for political actions, CLS itself is important, as a person must possess a viewpoint toward own responsibilities.

Followers of CLS regard the state as the most effective executor of transformative actions. Actual freedom requires social living that possesses instruments for its own revision. Real freedom lies in activities of discovering the boundaries of differences between transcendental ability and structural limitation, wherein the life and struggle of every difference in intent of achievement and obfuscation of objectives are present.

CLS has the belief that a theory must be the result of experimentation and social investigation, and can thus be practical for theory development. This parallels the thinking of Karl Marx on the practical objective meaning that began from his critique toward philosophy up the historical materialism doctrine. As an example, the mechanism for conflict resolution prioritizes unity and participation. They see the effects of law toward values, self-perceptions, and ideas. The critical school of thought rebels against the traditions of an academic society just as they reject ideas, objectives, or suppositions from traditional education. The critical legal school of thought desires to achieve ambitious social transformation dreams under universities.

**Essential Themes of the CLS Movement**

**Uncertainty**

Positivism demands that the ruling of a case refers to establishment and certainty. However, CLS considers that a claim over a certainty is a fake one. Both legal regulations and teachings of legal principles as well as adages cannot be utilized to determine the final results of a case. Legal rationality is a kind of manipulation. This is because the same principles, doctrines, or adages may be utilized in the fields of different cases with different or opposite results. Various legal regulations and various words or phrases that are utilized in regulations are very much vulnerable toward various interpretations, depending on which interpretation that a judge would accept. In brief, this does not depend on legal substance, let alone the reason of legal rationality. What is rejected is that the entirety of the law possesses established regulations.

However, according to Hari Chand, positivism is indeed incorrect by demanding that the law rules on cases just as CLS is also incorrect because of regarding the law as an

---


uncertainty. The reality of legal certainty also exists, but it is incorrect if this reality is present in each and every law and regulation or legal system. In a heavy case, it is unlikely that there are legal regulations that may be considered as guidelines by a judge, and facts of indeterminacy are largely found in heavy cases. However, the thesis of indeterminacy cannot be justified in many other cases.

Conflict
That legal doctrines contain contradictions is another essential view of the critical legal school of thought. Unger gives the example of contract law, which is based on the principle of freedom to select from partners as well as the terms and conditions that the parties desire, and the counter-principle of not bringing ruin to the social aspects of shared living and not committing unfair transactions and bargaining. Yet, there is always a contest for the principle of domination in contract law. In reality, there is an element of domination in unity.

Prof. Finnis stated that Unger failed to see that a person can maintain a set of regulations and doctrines by realizing the principle of conflict without admitting this matter. Regarding this matter, Chand stated that the view of Unger regarding the thesis of contradiction does not show that the legal system is heading toward a collapse, but only indicates that the imperfect doctrine must be revised in order to be appropriate with the new situation.

Legitimacy and False Conscience
Professor Horwitz proposed a thesis in his book *The Transformation of American Law* that legal doctrines are constructed with the aid of the growth of industries, and thus they serve the economic interests of a part of wealthy society. Not all schools of thought of critical law accepts this viewpoint, which sounds similar to orthodox Marxism. Another thesis that is adhered to by most supporters of CLS is that the law serves those who rule through legitimacy. As an example, the emphasis on legal rights and regulations leads people to believe that the legal system is purely fair and reasonable, making it seemingly that there are no other alternatives for the people. Several figures of CLS applied the idea of Antonio Gramsci on ideology in the legal atmosphere. In the book *Prison Note*, Gramsci stated that the ruling class fosters their rule not just by force specifically but also by various kinds of moral and social beliefs that force the people to accept the system as being profitable, able to achieve justice, and well-designed. This is the same as the legal system propagandizing a set of ideas regarding prosperity, agreements, individual rights, and legal regulations that influence the minds of people that the system is fundamentally fair. For example, Klare describes the American Labor Law as a manifestation of a moral and political vision that contains a set of beliefs, values, and political assumptions that come together in ruling (as the worldview) and that serves as a legitimization of ideology.

According to Chand, the claim of CLS that the law moves one step ahead and legitimizes unfair regulations and an unfair legal system raises major questions. A person may say that the law had not gained the monopoly to form human conscience. It is likely that the mind of a person is sufficiently open to consider the consequences of human invention, including the law.

Advantages and Disadvantages of Critical Legal Studies
Critical Legal Studies is a critique of legal theory that demands that the doctrinal approach is flawed, with abstract principles such as independence, freedom of contract, and right

---

of possession being able to result in contradictions in various matters. They utilize sociological, anthropological, and ideological techniques in the legal structure. They attempt to illustrate the emphasis between normative ideas and the social structure. CLS indicates how the law provides contributions toward stability and preserves the existing social order. Duncan Kennedy in *The Structure of Blackstone’s Commentaries* is a good example of this method, which illustrates the in-depth analysis on how those comments legitimize existing social practices that had existed in England at that time. In doing so, Kennedy was able to show that the entirety of modern legal thinking provides contributions toward the stability of a social order.

Meanwhile, Unger sees the mainstream legal and economic school of thought as one of the primary schools of thought that serve political rights, trends of rights, and principles that serve centralism. The primary instrument of the legal and economic school of thought is the obscure usage of the market conception.

CLS is comprised of various kinds of ideas or thinking that are expressed by many legal experts. These ideas vary from ideas that are orthodox Marxist in character up to post-modern thinking. However, there are several agreements between those ideas, which are the disbelief of legal neutrality, a hierarchical social structure dominated by the ideologies of certain groups, and the desire to reorganize the social structure.

The criticality of CLS in understanding social reality and legal structure, and the commitment to develop legal theories based on the social praxis to rearrange the hierarchical social structure, is the primary advantage of CLS. This advantage is manifested in the form of critical analysis toward the legal structure, values, and reasons that are utilized by judges who have always been regarded as being neutral and objectively correct.

Another advantage of CLS is its enormous attention toward individuals as the primary absolute subject in the social order: This advantage seemingly resurrects Kantian existentialist views that recently have been eroded by waves of modernity and industry, which leads to the alienation of the subjective individual because of being drawn into the abstract flow of mass culture.

As with other forms of critical thinking, if not properly utilized with consideration of objectives and limits of usage, criticism can lead to nihilism. Alternatively, at the least, this could lead to being trapped in an endless circle of criticism at the discourse level, thus forgetting the practical task toward society.

Another disadvantage is the original nature of critical ideas that they always achieve deconstruction within themselves, and thus changes and upheavals always occur. Yet, the reality of society is that it always tends to maintain old values and orders, and only permits imperceptible changes. The consequence is that supporters of CLS will always be present on the edge of the social system, if not regarded as deviant creatures that must be cast aside. As a result, it becomes very difficult for CLS to become mainstream for legal development. The primary task of CLS is to state criticism for changes that are made by other people.

22 Franz Magnis Suseno (n 2).
Critical Analysis toward the Law in Indonesia and Critical Legal Studies as Alternative Thinking

The usage of CLS to analyze the law in Indonesia is easiest to be conducted toward legal development in the New Order era. In this period, the dominant economic and political interests that reside in ideas of legal structure can be seen clearly. Interests of economic growth force policies of ease in doing business with methods of providing credit that are accompanied by deregulation and de-bureaucratization. The interest of economic development requires political stability that is achieved by reducing the civil and political rights of the people.

As an example, what follows is the explanation of the interests of the dominant class in determining the substance of the Draft Law at the People’s Representative Council (DPR) for the execution of the 2004 elections. The 2004 elections had a strategic meaning. For rulers, this moment had significance to preserve their rule. Thus, from this point forward, many actions and policies were founded on considerations of the ruling interests in 2004. On the other hand, the period of political transition is the easiest period to implement change because of the absence of dominant powers. The eradication of corruption, collusion, and nepotism (KKN) must be conducted within the period of political transition.

If changes have not been successfully made by the time of political reconsolidation, then the process of change will reenter difficult times because of the further establishment of power. The meaning of the 2004 elections became even more important, as it was the time that a new bicameral\textsuperscript{24} representative system was initiated in Indonesia that is marked by the existence of the Regional Representatives Council (the Senate, DPD) and the shift in the position of the People’s Deliberative Council (MPR)\textsuperscript{25}, as well as the beginning of direct presidential elections. To be able to create representatives who are trustworthy and responsible as one of the agendas for eradicating KKN, they must be elected by and through an election system that is created to be able to fulfill these interests.

The 1999 elections that utilized a proportional system with a closed list\textsuperscript{26} had created a distance between representatives and their constituents.\textsuperscript{27} By voting for party emblems, political party campaigns emphasized more on primordial sentiments and the reputation of party figures, and thus the votes of their constituents were not based on rational considerations of their programs and the images of their candidates. As evidence, it may be disclosed that the differences in votes for the DPR, Provincial DPRD (Regional People’s Representative Council), and Regency/City DPRD only amounted to 0.04\%.\textsuperscript{28}

As a result, presently it is difficult to demand the responsibility of representatives.\textsuperscript{29} Negative judgements of people toward a representative will be easily wiped away by the figures from the parties. The system for the 1999 elections also led to the creation of the hegemonic rule of political parties. The rule of political parties is quite massive in determining candidates, as well as what representatives should do. The system for

\textsuperscript{24} Jimly Asshidiqie, ‘Menuju Struktur Parlemen Dua Kamar (Toward a Bicameral Parliament Structure)’ (2001).

\textsuperscript{25} Agus Haryadi, ‘Bikameral Setengah Hati (Half-Hearted Bicameralism):’ \textit{Kompas} (2002).

\textsuperscript{26} ACE Project, \textit{Sistem Pemilu (Election System)} (IDEA, United Nations, and IFES 2001).


\textsuperscript{28} ‘Anas Urbaningrum, Member of the General Elections Commission, in a Discussion Forum at the Center for Good Governance Studies, Jakarta, October 2002.’

\textsuperscript{29} Forum Keadilan, ‘Potret Suram Dari Senayan (Gloomy Portrait from Senayan), No. 34.’ (2002).
The 1999 elections had in fact affirmed an abstract, paternal, and irresponsible political culture.

The Draft Law for Elections that was discussed at the DPR in several areas attempted to cover up various disadvantages in the election system that was utilized in 1999. The usage of a proportional system with an open list is expected to be able to achieve the representation aspect of the proportional system and the accountability aspect of the district system.

This system certainly possesses positives and negatives. On the positive side, for the development of political parties, it firstly diverts the conflict in composing the list of candidate names in political parties. Previously, the conflict was unhealthy, because the decision depended on party leaders. In a proportional system with an open list, candidates are not arranged based on ranking. A definite candidate is a candidate that obtained a certain number of votes by ranking according to the number of available seats in the local region. Second, because the fate of a candidate is determined by the obtained votes, the candidate must primarily campaign in the region of the candidate.

Campaigns that present certain figures outside the region of election become less significant for the election of a candidate. The conducted campaign must be able to touch on the real needs of the people, and the people may challenge and correct the results in the following election. Third, this system will be able to eliminate the hegemony of political parties toward representatives and bring representatives closer to their constituents.

The positive side for the people is the development of a rational political culture. First, the people do not only vote for party emblems, but also vote for candidates that will fill the party seats. Thus, it becomes rather possible that the party choices of voters will differ among the Regent/City DPRD, Provincial DPRD, and DPR. The people will also learn the rational calculation of the images and programs of representatives. Second, regional interests or local issues will be able to obtain a place in Indonesian politics.

Meanwhile, the negative side is its execution, which is quite complicated and requires detailed and complete voter knowledge. With the condition of Indonesian people whose education level is low, the execution of this system is indeed quite difficult. Then, there are other technical issues, such as the form of the ballot, the time required for voting, and the time for counting the votes.

However, these obstacles are far from being unable to be resolved. The obstacle of voter conscience and knowledge can be resolved if there is a sufficient process of voter education in election stages. This process is not only conducted by the General Elections Commission (KPU) as the election organizer, but also by other elements of society. The obstacle of complexity in the processes of campaigning, election, and counting can also be resolved by the separation of election execution. Aside from the reason that the principal issues of the elections are different, this will also affirm the rational calculation of the people in each election.

Yet again, this effort for change faces the “wall” of power that presently resides in the structure of political parties. Six major parties have indicated rejection for the proportional system with an open list. Various reasons have been put forward, from ideological ones to technical ones.

This rejection may be understandable for a few reasons. First, this system will weaken the control of political parties toward representatives. Second, this system will bring about the critical conscience of voters. Conscious voters will no longer be bound by emotion, but by the image and programs of representative candidates. As a result, parties that do not possess sincere programs will be abandoned. Third, this system requires a campaign process that is long, needs much dialogue, and emphasizes political education; yet political parties currently prefer the process of mobilizing crowds.

This barrier “wall” is very strong, because it is present in the institutions of the DPR and the government. The two institutions are the ones that, in a juridical normative manner, hold the power to form laws. It appears that the hope of obtaining representatives who are more responsible is difficult to realize.

Conclusion
Legal thinking in Indonesia up to the present is still dominated by two major schools of thought, which are positivism and sociological jurisprudence. Positivism is primarily adopted by law enforcement apparatuses, scholars, and bureaucrats, and thus often becomes a barrier for the development of the law and stalls when faced with new cases.

Meanwhile, sociological jurisprudence is largely illustrated by the behaviors and activities of politicians, particularly in the law-creating institution (the legislative). This school of thought was initially applied in the New Order era to support the development programs at the time and preserve power by maintaining political stability. Currently, what remains to be seen is making the law a venue of legitimacy in order to obtain and preserve power.

CLS itself is very much new for legal circles in Indonesia. In its early development, CLS was utilized by NGO activists to understand the policies and structures of the law that oppress. This is in accordance with mainstream LSM thinking that tends to be critical with the utilization of Marxist ideas and critical doctrines.

Presently, Indonesia is in a transition period that is marked by the struggle of powers that attempt to dominate, whether from inside the country or from international capitalist forces. Thus, it also becomes the time for ideas of CLS to be utilized to understand, criticize, develop, and apply the law in Indonesia.

Bibliography
ACE Project, *Sistem Pemilu (Election System)* (IDEA, United Nations, and IFES 2001)
Anas Urbaningrum, Member of the General Elections Commission, in a Discussion Forum at the Center for Good Governance Studies, Jakarta, October 2002.
Antony Gidden, *The Third Way* (Gramedia Pustaka Utama 1999)
Armia MS, ‘Ultra Petita and the Threat to Constitutional Justice: The Indonesian Experience’
—–, ‘Public Caning: Should It Be Maintained or Eliminated? (A Reflection of Implementation Sharia Law in Indonesia)’ [2019] Qudos International Journal of Islamic Studies

Fanny Tasyfia Mahdy, ‘Filsafat Hukum Ibnu Sina Dan Perluasan Pemikiran Plato’ (2017) 2 Petita : Jurnal Kajian Ilmu Hukum dan Syariah

Forum Keadilan, ‘Potret Suram Dari Senayan (Gloomy Portrait from Senayan), No. 34.’ (2002)

Franz Magnis Suseno, Berfilsafat Dari Konteks (Gramedia Pustaka Utama 1999)

——, Pemikiran Karl Marx: Sosialis Utopis Ke Perselisihan Revisionis (The Thinking of Karl Marx: Utopian Socialism to Revisionist Dispute) (Gramedia Pustaka Utama 2001)

Hari Chand, Modern Jurisprudence (International Law Book Services 1994)


Jimly Asshidiqie, ‘Menuju Struktur Parlemen Dua Kamar (Toward a Bicameral Parliament Structure)’ (2001)

Jurgen Habermas, Knowledge and Human Interest (Polity Press 1968)

Margareth M. Poloma, Sosiologi Kontemporer (Contemporary Sociological Theory) (Rajawali Pers 1987)


Muammar, ‘Nurcholish Madjid Dan Harun Nasution Serta Pengaruh Pemikiran Filsafatnya’ (2017) 2 Petita : Jurnal Kajian Ilmu Hukum dan Syariah

Peter Beilharz, Teori-Teori Sosial (Social Theory: A Guide to Central Thinkers) (Pustaka Pelajar 2002)

Roberto M. Unger, Gerakan Hukum Kritis (Critical Legal Studies) (ELSAM 1999)

Roger Simon, Gagasan-Gagasan Politik Gramsci (Gramsci’s Political Thought) (Pustaka Pelajar 2000)

Sayyid Al-Islam Ayatullah Al-‘Uzma As-Sayyid Muhammad Baqir Ash-Shadr, Falsafatuna (Mizan 1998)


W. Friedmann, Teori Dan Filsafat Hukum Susunan I (Legal Theory) (Raja Grafindo Perkasa 1993)