THE PREDICAMENT OF MODERN CRITICAL LEGAL THEORY

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By

PROFESSOR A. O. OBI LADE
Professor of Law

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LEGAL theory has joined the market of ideas extolling newness or radicalism in order to attract attention. We now hear of radical legal theory, new pragmatism, feminist legal theory; constructive legal theory, new Public Law Scholarship and new critical legal thought. Whatever is new is a challenge to the old.¹

In legal theory, there have been circular movements from the old or classical theory to the new or modern and back to the old in a "new" form. Law, the subject of legal theory, has been defined descriptively and prescriptively; it has been derided and deified; it has been a nightmare and a noble dream. It has been presented as a monster, an ass, a mere reason for action, a language of human interaction, an enterprise of subjecting human conduct to the governance of rules and a non-existent entity.²

There is something new in modern critical legal theory. It is a commitment to radical criticism of dominant legal thought in a manner hitherto unknown, combining social theory, political and economic theory, legal and moral philosophy as well as psychiatry with a view to establishing a social world devoid of mystification and securing the emancipation of the human being through law.³ This lecture examines problems relating to this commitment in the light of social realities.

PRAGMATIST LEGAL THEORY

Pragmatism is a doctrine of philosophy that evaluates assertions solely by their practical consequences in relation to human interests.⁴ Its history dates back to Charles Sanders
Peirce, William James, John Dewey and George Mead. Legal pragmatism as a version of modern critical legal theory is a prescriptive and instrumentalist theory. It enquires into the problems of society, seeks a solution by an experimentalist mode of thinking and continually reviews the solution in the light of the expectations of society or the classes of society concerned. It has been described as freedom from theory-guilt. To the pragmatist, the inadequacy of a theory is not an impediment to a social practice. It does not attempt to find a final objective conception of truth or meaning. It seeks truth in the consensus of members of the community as some people are trying to do in this country in this transition period. Thus, what constitutes truth may readily change. It emphasises inquiry, experimentation and "fallibilism" (fallibility). Of particular importance to modern pragmatism in its problem-solving effort is how to listen to the disadvantaged members of society—the oppressed.

Among the early pragmatists were Oliver Wendell Holmes, John Dewey, Lon Fuller and Karl Llewellyn. Legal realism was influenced by pragmatism. After the disappearance of pragmatism, legal realism too disappeared. As the influence of legal positivism diminished in the 1960s, pragmatism reappeared.

In 1977, the Critical Legal Studies Movement emerged and carried on the work which legal realists had abandoned. In the 1980s neopragmatists including Martha Minow, Thomas Grey, Daniel Faber, Philip Frickey, Richard A. Posner, Ronald Dworkin and Roberto Unger emerged. Pragmatists reject such divisions as fact/value, subject/object, mind/body, perception/reality and form/substance. To them such dualities constitute a mere figment of imagination. They assert that knowledge of facts presupposes knowledge of values, knowledge of values presupposes knowledge of facts, knowledge of facts presupposes knowledge of Laws and knowledge of Laws presupposes knowledge of facts.

A major problem of pragmatism is its attitude to rules. Rules are made or designed by human beings for the purpose of solving problems of society. As soon as the rules constitute obstacles they must be altered. If rules are to be changed or amended, should the alteration or amendment take effect retroactively? If so what is the place of the rule of law ideal? Where lies justice? Pragmatists as judges try to distinguish a case whenever an established principle does not favour the results which they expect. On this matter, Joseph William Singer said, "In freeing us from 'theory-guilt' pragmatists remind us that concepts and rules are human inventions designed to solve human problems. If the concepts get in the way of solving those problems, they can and must be altered so that they can work better. By permitting us to concentrate on the human dimension of Law, pragmatism frees us from self-created obstacles to human progress and directs our attention to what really matters: doing away with social practices that create unnecessary human misery and promoting practices that nurture human flourishing". Pragmatists tend to offer justice a human face.

Thus, pragmatists think of the possible results of applying a principle of rule before applying it. As judges they may reformulate the principle or rule in the light of their own notion of society's expectations with respect to the principle or rule. The relevance of society's expectations is found in the recent race riot in Los Angeles, California, where the people believe that the white policemen charged with assaulting a black motorist were wrongfully acquitted by the court in spite of clear video tapes showing how the motorist was beaten up. An all-white jury returned a verdict of "not guilty."

To pragmatists, this practice of determining society's expectations does not negate the idea of justice. What matters most to the pragmatist is solving human problems in a way conducive to human progress without any obstacle. Logic is not of paramount importance to the pragmatist. As Cardozo said, The final cause of Law is the welfare of society. The rule that misses its aim cannot permanently justify its existence... Logic and history and custom have their place. We will shape the Law to conform to them when we may; but only within bounds. The end which the Law serves will dominate them all. I do not mean, of course, that judges are commissioned to set aside existing
rules at pleasure in favour of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.

The tenet of pragmatism has featured prominently in court decisions in Nigeria. For example in *Alegbe v. Oloyo*, Eso, JSC, said, The Constitution of the Federal Republic of Nigeria 1979 is not intended to be a merely academic constitution. It is a pragmatic Constitution made for Nigerians by Nigerians and by a process of constitution making which is expected to have benefited from the experience of this country under the previous Constitution and provide as much as possible a panacea for the ills of the past.

It reminds us of the purposive approach to interpretation of Statutes — an approach that seeks the underlying purpose of legislation. That approach was used in the election petition case, *Oyegun v. Igbinedion* where Nasir P.C.A. (delivering the leading judgment) said: “I am of opinion that in an election petition whether at the trial or on appeal the court must do its utmost to understand exactly what happened in order to be able to decipher whether the electorate did agree with the rule of the game or whether certain circumstances happened which will make even the ordinary man say that the contest by the candidate was against the rules.”

Similarly, in *Olaniyan v. University of Lagos*, Aniagolu, JSC said:

To remove a public servant in flagrant contravention of the Rules governing him, whether under contract or under provisions of a statute or Regulations made thereunder, is to act capriciously and to destabilise the security of tenure of the public servant, frustrate his hopes and aspirations, and thereby act in a manner inimical to order, good government and the well-being of society.\(^\text{16}\)

There is hardly anything new that pragmatism is contributing to Legal theory today. Critical Legal scholars of diverse interests have espoused the cause of Legal instrumentalism.

With the purpose of Law in mind they have constructed theories aimed at improving the plight of human beings. Lon Fuller’s idea of Law as a means of facilitating human interaction, John Finnis’ identification of basic forms of human good (life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion) and Deryck Beyleveld and Roger Brownword’s idea of the human social condition illustrate legal thinkers’ efforts in this direction. Mention may also be made of Jeremy Bentham’s principle of utility, Richard Posner’s economic analysis of Law, John Rawls’ idea of justice and Ronald Dworkin’s idea of right to equal respect and concern.

It does not appear that pragmatism is interested in truth. It seeks what is believed to be truth in the light of social need. We are constantly reminded of Thomas Kuhn’s observation in his book, *The Structure of Scientific Revolutions* that the acceptance or a major discovery in science depends on the world-view held by scientists of the relevant generation.

Legal pragmatism is against formalism, that is, the idea that legal questions can be answered by analysis of concepts with little reference to social facts. As stated by Richard Posner:

The tendency of formalism is to force the practices of business and lay persons into the mold of existing legal concepts, viewed as immutable, such as ‘contract.’ The pragmatist thinks that concepts should be subservient to human need and therefore wants Law to adjust its categories to fit...
the practices of the nonlegal community. Formalism rests on a priori reasoning and logic rather than empirical research.

The task of pragmatism is arduous, particularly in a developing society. Let us assume that the disadvantaged members of society, for example, the poor, the unemployed, the handicapped, the homeless, the sick, women and children realise that their legitimate expectations are not met by society in spite of Laws prescribing the formal equality of all people with respect to their expectations. It is uncertain whether the situation will improve. How will the problem be solved?

The recent race riot in Los Angeles illustrates the point. The remote cause of the riot was the increasingly declining standard of living of the black community since the race riots of the 1960s. According to official statistics, 33.8 percent of black people in large cities lived below the poverty line in 1990 as against 31.2 percent in 1967.26 One may ask in passing how many of us in this country in this period of the Structural Adjustment Programme live below the poverty line. Many people live on O - 1 - 1 (that is, just two meals a day) A greater number live on O - 1 - O.

Ruth Anna Putnam says of this type of situation.27. Once we ask what is to be done to improve the life prospects of the disadvantaged in our midst, we have formulated a problem. But we may have arrived at that formulation of the problem by two distinct routes. We may have appealed to a standard of justice to which the situation fails to conform, or we may have responed to what James called ‘the cries of the wounded.28

We may have approached the indeterminate situation in a ‘structured’ or in a ‘contextual’ manner. I am inclined to think that if the dis-

But we see them everyday in Lagos – under the bridges and at Kano Street, Ebute-Metta, for example.

Pragmatism invites us to enquire into the problems of society and seek solutions to them. It encourages us to think constructively about such problems. Its use of Ordinary language philosophy, a branch of analytical philosophy,29 enables us all – the oppressor and the oppressed, the rich and the poor, the strong and the weak – to understand one another. It enables us to realise that an oppressor in one context may be an oppressed in another. Although it encourages joint action, it does not advocate violence. Pragmatism seeks justice. Its continual search for better solution to society’s problems would benefit from John Rawls’ imagined “original position” of individuals covered with a “veil of ignorance” which prevents them from knowing their sex, status, social position, class, colour, religion, level of intelligence or strength, their conception of the good, where they are or where they live.

They are to enter into a social contract30 on the basis of fairness to choose principles of justice which will govern their relationship. As rational human beings, they will, acting in their self interest choose two principles. The first is that each person is to have maximum liberty subject to con-

straints necessary for protecting the liberty of others. The second is that there are to be no social or economic inequalities except in so far as they are to give the greatest benefit to the least advantaged members of society and in so far as there is equality of opportunity.31
The basic assumption of John Rawls' analysis of distributive justice — the existence of a natural right of justice as fairness — has been described by Ronald Dworkin as the "most basic assumption" of a "right to equal respect and concern in the design of political institution." A pragmatic approach to the problem of formal equality enables us to understand that offering the greatest benefit to the least advantaged members of society is a means of attaining substantive equality, a means of treating a fellow human being as an equal, loving one's neighbour as oneself. Thus, problems relating to discrimination against women or against the physically handicapped may be solved through Law by adopting the pragmatic approach — applying the concept of equality to concrete cases, treating others as we would like to be treated.

At this juncture, it should be noted that the concept of equality in Mathematics or the natural sciences is different from the concept of equality in legal or moral discourse. In Mathematics and the natural sciences, it is descriptive, for example,

$$\sin^2 \theta + \cos^2 \theta = 1, \quad 4 + 5 = 9; \quad 2H_2 + O_2 = 2H_2O$$

But in legal and moral discourse, it is prescriptive, for example, section 39 (1) (a) of the constitution of the Federal Republic of Nigeria 1979 provides that all citizens of Nigeria are to be treated as if they are equals in spite of differences with respect to "ethnic group, place of origin, circumstance of birth, sex, religion or political opinion" for the purpose of the application of any law in force in Nigeria. Thus, it prescribes equality before the law in spite of inequalities with respect to particular factors.

The concept of equality may be applied to concrete cases, treating others as we would like to be treated. For example, in the case of discrimination against women in tax laws, a married man who has a wife living with him is entitled to an allowance. A married woman who has a husband living with him and who is fact maintains the husband has no such allowance. They are, thus, not being treated as equals.

A similar argument may be adduced with respect to discrimination against pregnant women under contracts of employment in certain countries in violation of International Labour Organisation Standards. On the issue of discrimination against women based on the payment of bride-price, it is clear that any rule of customary Law which equates a bride with a chattel purchased by the bridegroom is repugnant to natural justice, equity and good conscience and is, therefore, not enforceable. Accordingly, failure on the part of a divorced woman to refund the bride-price would not deny her new husband the custody of the children of the new couple. With respect to rape, feminist legal theorists welcome the tendency to extend the offence to cover a husband living together with his wife. Another offence should be created to deal with such selfish and wicked men whose conduct is a negation of love, in cases where the wife's refusal is reasonable, having regard to all the circumstances. The rule should be that the wife's consent is implied as a general principle. But the consent is withdrawn as soon as the wife so indicates expressly or impliedly. But in the case of abortion, the feminist legal theorists' argument based on interference with women's freedom or right to privacy is untenable. No person has absolute freedom to do anything whatsoever to himself or herself. Abortion laws do not, by themselves, constitute discriminatory laws. Men cannot biologically be in the same position as women in this case. Moreover, on moral and religious grounds, total liberalisation of abortion ignores the oppressed in the womb. The foetus has life which must not, normally, be unduly terminated although the law of crime does not regard it as a human being until it has completely protruded from its mother's womb. In this case, morality should remain the principal basis of the law. But there are related problems which government should solve. They are the problems of pre-natal care, post-natal care and child abuse — if the law is to be effective. A related case is the case of patients in a vegetative state in hospitals living only by means of life-support machines. What should be the
attitude of the law towards switching off the machines? If we are to treat them as we like to be treated what shall we do? Here, again, morality should remain the principal basis of the law. Feminist legal theory, a branch of Feminist theory - a theory espousing the case of females in society – is an instrumentalist theory and it may be regarded as part of legal pragmatism. Similarly, critical race theory, dealing with the problem of racial discrimination, may be regarded as part of pragmatism.

Legal pragmatism as critical legal theory has a vision of a social world in which justice and harmony prevail. Its notion of truth raises a problem. To it, truth is invented. It is provisional. But it enables us to solve problems of society through law by constructive thought.

THE CRITICAL LEGAL STUDIES MOVEMENT

Modern critical legal thought has been developing fast since the emergence of the Critical Legal Studies Movement. Roberto Magabeira Unger has said that “[t] he Critical Legal Studies Movement has undermined the central ideas of modern legal thought and put another conception of Law in their place.” It has been influenced by the critical approach of the Frankfurt School. The Frankfurt School “aimed to expose the irrationality and contingency of conventional thought, and thus to free people to conceive of new possibilities for social liberation.” The movement’s tenets are stated by David Kairys in the Introduction to The Politics of Law.

They are the rejection of formalism in the Legal process, the rejection of the notion of the Law as a value-free phenomenon as well as the Vulgar Marxist idea of Law as a mere superstructure built upon an economic base, the assertion that in order to understand Law we must consider the role played by legitimation and the call for participatory democracy - “popular participation in the decisions that shape our society and affect our lives.” The programme of the movement is a continuation of the work abandoned by Legal realists.

It is an attempt to avoid the “crippling choice between liberal theory and mechanical determinist forms of Marxism - Leninism.”

Roberto Unger has identified the tenets of the movement as follows:

(a) The movement rejects formalism. His own idea of formalism is not just the belief that disputes can be solved by the mechanical application of a gapless value-neutral system of rules. It is wider. It is the idea that legal discourse “can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.”

(b) It rejects objectivism which to Unger is “the belief that the authoritative legal materials - the system of statutes, cases and accepted legal ideas - embody and sustain a defensible scheme of human association.”

(c) A constructive critical programme requires a recognition of legal discourse as a discourse concerning the basic terms of social life which does not result in a dogmatic defence of the existing social order or “the inconclusive contest of political visions.”

(d) It adopts a “deviationist” approach, “the willingness to recognise and develop the disharmonies of the law; the conflicts between principles and counterprinciples that can be found in any body of law.”

(c) The movement aims at the emancipation of the human being. It is believed “that the weakening of
social divisions and hierarchies would reveal deeper individual and collective identities and liberate productive and creative powers.”

(f) A new conception of Law and constitution emerges. Law and constitution feature “the denial rather than the reaffirmation of the plan of social division and hierarchy. The ideal aim of the system of rights ... is to serve as a counter programme to the maintenance or re-emergence of any scheme of division and hierarchy that can become effectively insulated against the ordinarily available forms of challenge.”

(g) The constitution would embody “empowered democracy.”

(h) The constitution should make “each crucial feature of the social order effectively visible and vulnerable to controversy, conflict, and revision.”

(i) The constitution should contain immunity rights, market rights, solidarity rights and destabilisation rights. Destabilisation rights are very important. They are “claims to the disruption of established institutions and forms of social practice that have achieved the very sort of insulation and have contributed to the very kind of crystallised plan of social hierarchy and division that the entire constitution wants to avoid.”

(j) It is envisaged that, super-liberalism would emerge. It “pushes the liberal premises about state and society, about freedom from dependence and governance of social relations by the will, to the point at which they merge into a larger ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in place.”

(k) The movement “must wage perpetual war against the tendency to take the workings of a particular social world as if they defined the limits of the real and the possible in social life.”

(l) The movement rejects the “false dilemma of conservative reform or textbook revolution.”

(m) It seeks “ways to override the contrast between the politics of personal relations and the politics of the large-scale institutional structure. It must take advantage of the highly segmented character of social life ... in order to experiment with forms of social life capable of overcoming the very oppositions ... that this segmentation helps strengthen. [The] movement exemplifies very incipiently and imperfectly, one mode of activity, with the distinguishing opportunities and constraints that come from working through the medium of legal thought and practice.”

To the Critical Legal Studies Movement legal autonomy is impossible for “there can be no plausible legal theory without a social theory.” Law is simply one part of the social order. There are other orders including the moral order, the religious order, the ethnic group order and the economic order that form part of the social order. Max Weber’s characterisation of Western law as a comprehensive set of gapless rules is thus rejected. The Movement seems anti-positivist. It favours the introduction of ideological factors into Law. It rejects liberalism both as a general philosophy and as a specific legal concept. As a general philosophy, liberalism
is simply a general view of social life as "founded on [the] self-directing power of the personality." Thus liberalism does not recognize the notion of an "inherent human nature" and it asserts that an individual's values, desires, and ambitions are inescapably relative. The individual has maximum freedom to pursue his self-interest. As a specific legal concept, liberalism is sometimes referred to as "liberal constitutionalism." The Critical Legal Studies Movement rejects liberalism in both senses. To CLSM, liberalism offers a false evidence of "human sociability." It "imagines society as a collection of rights-bearing citizens, as if rights had an independent existence "out there". Liberalism sees the world as dualities as freedom/necessity, subjectivity/objectivity and individualism/altruism. This facilitates the rationalisation of any result desired. CLSM argues that liberal constitutionalism relies on the false idea of a "neutral adjudicator" and that the separation of Law and Politics. It asserts that legal interpretation is "contextual" and, therefore, value-laden and that liberalism resists only such social change as would change the structure of the hierarchy.

CLSM argues that Law lacks "rationality." It rejects the existence of a rational foundation for Law. According to Gary Peller, Rationality purportedly distinguishes legal discourse from other ways of thinking. The rule of Law is identified with reason, whether a priori or instrumentalist, and is contrasted with passion or will, which in turn is associated with arbitrariness or discretion. "Rational" argument is supposed to have cognitive content accessible to all thinking people, "passion" is subjective and ungroundable. Indeed, it is a common rejoinder to critical attacks on legal thought that, whatever the imperfections of legal analysis, a commitment to the rule of Law is preferable to rule by will or passion...

The purported rationality of legal discourse distinguishes it from these "irrational" kinds of social force. CLSM follows the example of legal realists in demystifying the Law. Demystification or delegitimation exposes the true nature of the Law. It affects the removal of the veil of mystery cast over Law and thus facilitates criticism and reform Freeman has said of delegitimation:

"The point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realise a substantive notion of justice instead of the abstract, rights, traditional, bourgeois notions of justice that generate so much of the contradictory scholarship. One must start by knowing what is going on, by freeing oneself from mystified delusions embedded in our consciousness by the liberal legal worldview. I am not defending a form of scholarship that simply offers another affirmative presentation; rather, I am advocating negative, critical activity as the only path that might lead to a liberated future..."

"The task of a scholar is to liberate people from their abstractions, to reduce abstractions to concrete historical settings, and, by so doing, to expose as ideology what appears to be positive fact or ethical norm."

An illustration of demystification appears in Osoba v. Foreign Finance Corporation where Olatawura, J.S.C. said Obiter:

"Those who think that might is right and that the Government can do no wrong should better have a second thought. We have long passed that stage."

Furthermore, in an attempt to confirm the removal of the myth of the power of the Military Governor over land under the Land Use Act, the learned Justice of the Supreme Court of Nigeria said, Obiter:
“It is not out of place to sound another note of warning to Public Servants generally on the execution of their duties. Many a time some of them go out of their way to resorting to methods that will embarrass the government or their employers in carrying out simple duties. No government anywhere should condone the violation of its own law... The time has come that a copy of judgement wherein erring officials who set out to serve their personal interests should now be sent to the government so that those who mislead the government should be surcharged for damages incurred by the government as a result of ill-advised action. Over-zealous Public Servants must be made to pay for their actions”.

What a bold judge!

This idea is new in view of the protection which the law gives to public officers with respect to the execution of their official duties. Obviously, government acts only through human beings. In appropriate cases the veil should be removed in order to disclose the identity of the real actor just as the veil of incorporation is lifted in Company Law. Related to demystification or delegitimation is deconstructionism, a principle of Literature and interpretation. According to deconstructionism a text has no objective meaning.

A similar theory is the hermeneutic theory which deals with principles of interpretation. The use of the theory, like the use of deconstructionism enables us to realise that interpretation is linked to the interpreter’s thought process and social context. It reveals the political and oppressive function of Law.

CLSM Scholars have kindled Legal thought tremendously. They have reminded us of much of our plight as individuals and groups. Their commitment to the goal of a new social world is a challenge to traditional legal scholars extolling doctrinal analysis, analogy and precedent. Transfor-
THE HUMAN BEING AND THE COMMON GOOD IN MODERN LEGAL THOUGHT

The human being and the idea of the common good have occupied a prominent place in the "enterprise of subjecting human conduct to the governance of rules."88 Modern critical legal thought emphasizes the promotion of human good and the common good. In normative legal philosophy approaches used by theorists fall into two classes, namely, goal-based approaches and right-based approaches.90 Goal based theories are instrumentalist theories, for example, utilitarianism, which requires Law to be based on the principle of utility, the idea of securing the greatest happiness of the greatest number of the people.90 Right-based theories are theories founded on some notion of individual rights.91 The interest of the community as a whole is central to goal based theories. On the other hand, it is the interest of the individual that is central to right-based theories. As Ruth Gavison has observed.92

The language of rights has become central to legal and political philosophy. Some have seen this as an indication that positivism is on the decline since the affirmation of rights has always been part of natural Law traditions.

The reason for the present trend is the existence of oppressive regimes in many areas of the world rather than the superiority of right-based theories.93 Among contemporary critical legal thinkers who have espoused the cause of the human being and the common good are Ronald Dworkin,94 John Finnis,95 Charles Fried96 John Rawls,97 Deryck Beyleveld and Roger Brownsword,98 Robert Nozick,99 Lawrence Tribe,100 Bruce A. Ackerman,101 Richard Epstein,102 Anthony Kronman,103 and John Feinberg104.

John Finnis has stated that Law is intended to coordinate activities for the common good. In his view the basic purpose of Law is known by identifying the benefits that can be obtained only through human Law (Positive Law and the practical requirements which can be satisfied only by Legal institutions:106 By distinguishing between sound and unsound practical thinking, he identifies basic forms of human good as life, knowledge, play, aesthetic experience, friendship, practicable reasonableness and religion.106 He then identifies basic requirements of practical reasonableness — his conception of natural Law. Natural Law is, to him, "the set of principles of practical reasonableness in ordering human life and human Community."107

In his opinion, through practical reason (the giving of reasons for action), we can know the factors which are the basic requirements of human life. In Finnis' view, the pursuit of the basic values of life by individuals as dictated by practical reason does not negate the idea of the common good for, in the community, there is "some shared conception of the point of continuing cooperation."106 Notwithstanding conflicts arise among members of the community for all of them cannot have the same set of values.109 Conflicts which arise from the legitimate pursuit of their interests by individuals do not negate the idea of the common good, according to John Finnis. He argues, "For a legislator or judge, considering the problems of social order generically, the pure conflict situation cannot be conceded to exist as between the members of a community: A and B may be in a pure conflict situation here and now, but A might have been in B's position and vice versa; so, in advance or generically (i.e. for the purposes of selecting rules and conventions), people of A's and B's sorts have a convergent interest in containing, modulating and conditioning the possible loss..."110 In Finnis' opinion, therefore, the fact that the common good exists does not necessarily mean that the whole of the interests pursued in the short run by individuals in the community coincide. But it shows that there is need for the coordination...
of the activities of the whole community in the long run. Coordination is, therefore, a means of realising the common good.

Classical utilitarian conception of the common good is different. Law is to promote the greatest happiness of the great number. This utility principle is the principle by reference to which governmental action is to be justified. To Jeremy Bentham, law ought to promote the maximum happiness of all members of the community. The “public good ought to be the object of the legislator; general utility ought to be the foundation of his reasoning.” Government should balance individual interest and the interest of the community with a view to achieving the common good. It has been argued that this device of attaining the common good ignores the separateness of individuals. In the absence of any specific distributive principles, the happiness of an individual may be sacrificed in order to attain the greater happiness of others. In a society dominated by the laissez-faire doctrine, entrepreneurs may prefer engaging in industries offering luxury to the millionaires, thereby contributing to an increase in the gross national product, to establishing industries that cater for the basic needs of most members of the community. Utilitarianism permits gross inequality in the treatment of individuals in order to procure a maximisation of aggregate or average welfare. Ronald Dworkin has said that this violates the moral right of equal concern and respect. He gives as an illustration of the violation the use of the majority vote to determine restriction to liberty.

The economic theory of law is a modern version of utilitarianism. It seeks to maximise economic efficiency and equate it with justice in society or the common good. Judge Posner states the central theme of the theory as follows:

Although the traditional subject of economics is indeed the behaviour of individuals and organisations in markets, a moment’s reflection on the economist’s basic analytical tool for studying markets will suggest the possibility of using economics more broadly. That tool is the assumption that people are rational maximisers of their satisfactions. The principles of economics are deductions from this assumption — for example the principle that a change in price will affect the quantity of a good by affecting the attractiveness of substitute goods or that resources will gravitate to their most remunerative uses, or that the individual will allocate his budget among available goods and services so that the marginal (last) dollar spent on each good or service yields the same satisfaction to him; if it did not, he could increase his aggregate utility or welfare by a re-allocation.

The economic theory assumes that human beings are capable of choosing what is in their best interest. Obviously, human beings would, normally, pursue their self-interest and therefore strive to maximise their satisfaction. But this trait should not be the basis of law for it is not necessarily just and it is not conducive to the common good.

Utilitarianism — classical or modern — without a principle of equitable distribution negates the idea of the common good.

The utilitarian conception of the common good may now be compared with Finnis’ conception of the common good. Finnis’ conception of the common good does not ignore the separateness of the individual. The common good, according to Finnis, “is fundamentally the good of individuals, an aspect of whose good is friendship in community.” It is not, unlike the utilitarian common good, the aggregate happiness within the community.

Leslie Green has criticised Finnis’ theory of the common good on the ground that it does not account for the distinctiveness of law and the role of sanctions. Of course, law is not the only instrument of social control, nor is it the only factor that induces coordination or cooperation.
among members of the community. Many activities of individuals involving cooperation or the common good are engaged in without reference to law. An example is offering alms to the poor. Finnis says that there “are human goods that can be secured only through the institutions of human law, and requirements of practical reason that only those institutions can satisfy.” He contends that there are “only two ways of making a choice between alternative ways of coordinating action to the common purpose or common good of any group.” The two ways are unanimity and authority. Unanimity is impracticable in any community for practical reasoning dictates in different ways the behaviour of individuals. In the case of authority, we need it for the coordination of our activities for the public or common good. As Finnis has said, “If the particular individuals and groups have as their prior concern (as they should) their particular interests, such overall coordination can hardly be achieved save by some person or body of persons whose prior concern and responsibility it is to care for the overall common good. This discussion of authority in relation to the common good, thus, indicates that Finnis’ theory takes account of the distinctiveness of law.

With respect to the view that Finnis’ theory of the common goods does not explain adequately the role of sanctions in a legal system, it should be noted that Finnis has explained sanctions is terms of a reaction to failure to abide by “authoritative stipulations for coordination of action for the common good.” According to Finnis, sanctions serve as:–

(a) a signal indicating the “common path for pursuing the common good”

(b) “a palpable incentive to abide by the law when appeals to the reasonableness of sustaining the common good fail to move”

(c) an assurance to those who abide by the law that their attitude to law is proper,

(d) a measure for effecting a “fair balance of benefits and burdens” in society; and

(e) a means of restoring “reasonable personality in the offender”, thus bringing him to the path of the common good.

But sanctions do not constitute an essential element of Finnis’ ideal-type law. Leslie Green contends that the explanation of sanctions in terms of refusal or failure to comply with authoritative stipulations is inadequate if the existence of coordination for the common good is to be maintained. He argues that if a legal system is characterised as an existing coordination equilibrium, a situation in which no member of the community has any reason to be of deviant behaviour, it is wrong to explain sanctions in terms of refusal to comply with authoritative stipulations. Thus, he agrees to some extent with Edna Ullman-Margalit who says: “It seems as if there is a prima facie case for analysing the legal system — any legal system — in terms of a solution to producing co-ordination equilibria.”

Edna Ullman-Margalit’s statement is a criticism of Gans’ explanation of sanctions in a legal system characterised as a coordination equilibrium. Ullman-Margalit further says:

Apprehension of sanctions contributes to the effectiveness of coordination norms no doubt. However, and this is the essential point, at least primarily the motive to conform to coordination norms has to do with the intrinsic reward concomitant to the achievement of coordination the fear of sanctions being only a secondary and subsidiary element in this motive.

Similarly, in explaining the role of sanctions in a legal system, Professor H. L. A. Hart has said:
‘Sanctions’ are therefore required not as the normal motive for obedience but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this would be to risk going to the wall. Given this standing danger, what reason demands is voluntary cooperation in a coercive system.

Green argues that sanctions do not play any rôle in a legal system characterised as a coordination equilibrium. Indeed, in such a legal system, there is no need for any motivating factor with respect to conformity to norms. But, as Professor Hart noted:

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[N] either understanding of long term interest, nor the strength or goodness of will, upon which the efficacy of these different motives towards obedience depends, are (sic) shared by all men alike. All are tempted at times to prefer their own immediate interests and, in the absence of a special organisation for their detection and punishment, many would succumb to the temptation.

The existence of a coordination equilibrium does not mean that there is no temptation to be of deviant behaviour — to deviate from the part of the common good.

Although the idea of the common good is desirable, it is not an essential part of the concept of law. T. G. Green has said that an interest in the common good is the ground of political society in the sense that without it no body of people would recognise any authority as having a claim on their obedience.139 But it is not every legal system that contains rules conducive, on the whole, to the common good. A number of legal systems ostensibly reflect the common good although in fact they are against the common good. It is desirable to coordinate human activities for the purpose of attaining the common good. But it should be noted that law is not the only means of fulfilling the objective.

CONCLUSION

Modern critical legal thought is advancing at a rapid pace. Legal scholars continue to grapple with the problem of engaging in experimentalist and speculative thought for the purpose of fostering the emergence of a social world which would witness the emancipation of the human being.

Modern critical legal scholars have kindled thought on law and human purpose. They think of us all as people sharing the same broad goals. They have built on the ideas of great thinkers including Aristotle, Plato, Socrates, Hegel, Karl Marx and Max Weber in their attempt to establish a new social world in which there would be no oppressor and no oppressed. They do accept human fallibility. They subject their thoughts to constant review in view of social realities. One of them, Roberto Unger, rides like a giant in the intellectual field. Even when we do not agree with him, we appreciate his intellectual development.

In his critique of pre-existing social theory, he has contended that for several centuries, the greatest thinkers and social movements have based their thought on the notion of “inevitability,” “naturalism” or “necessitarianism” — the idea of conceiving of science, human nature as well as social, economic and political relations as having certain immutable characteristics as if they have to conform to a pre-determined natural order. This trend perpetuates, in his opinion, “conditions of hierarchy, . . . dependence and domination.” 140

It is an obstacle to the emancipation of the human being. Modern social theory has replaced naturalism with constructivist social theory, plasticity replaces inevitability, empowerment takes the place of disempowerment, “contingent” replaces “permanent”, “openness” replaces “closure” “political” replaces “apolitical” and “infinite” takes the place of “finite” — all in the scheme of indicating that the central assumptions of pre-existing social theory were false.

In view of the heavy task before modern critical legal theory, it is significant that Roberto Unger ended his first
book, Knowledge and Politics published in 1975 with the words “Speak God.”

In the market-place of ideas the critical legal scholar philosophises about law, drawing from the experience of great thinkers in various departments of learning as he seeks, through constructive thought, to establish a new social world where true justice would reign. He is not Plato’s philosopher-king, nor is he Ronald Dworkin’s Hercules for he is human. But he is a scholar interested in the human condition.

Modern critical legal thought has much more to do, particularly with respect to the conception of human good. It should have a concrete vision of the nature of the human being. It should understand human personality. In particular, in our own social world known as the Third World even though it should be referred to as the First World in View of the ancient civilization of Egypt we need basic necessities of life. We are still waging war against ignorance, disease and hunger. We need good drinking water. We need regular supply of electricity. We need good balanced diet even if it is a daily meal. We need sound education. We need to be de-colonized in thought by abandoning the idea that whatever exists in a developed country is good for us. But we should be willing to accept suitable ideas from any part of the world. We ought to appreciate whatever is suitable to our environment in any foreign culture and conserve that part of our cherished culture that is not inconsistent with the demands of modernity. We need to understand the essence of human dignity. We need to know what it is to be a human being. Without understanding what it is to be really human, any speculative thought about a new social world is built on sand. This is the predicament of modern critical legal theory.

But without divine intervention, the dream of the new social world cannot be a reality having regard to the limits of human understanding and human capabilities.

God bless you all.
There is equal treatment when goods are distributed equally among people. There is treatment as an equal when they are distributed according to need. The right to equal treatment is "the right to an equal distribution of some opportunity or burden". The right to treatment as an equal is the right to be treated "with the same respect and concern as any one else".

There is equal treatment when goods are distributed equally among people. There is treatment as an equal when they are distributed according to need. In the case of distribution of doses of medicine among the ill, for instance, the chronically ill may be given the only doses available and the slightly ill may be ignored instead of sharing the dose equally and therefore refusing to prevent the death of the chronically ill.
49. Ibid., p. 565
50. Ibid., p. 577
51. Ibid., p. 578
52. Ibid., p. 584
53. Ibid., p. 598
54. Ibid., p. 592.

This involves freedom "to deal with one another as individuals rather than as placeholders, in the System of Class, communal role or gender con-trasts" See Roberto Unger, False Necessity: Anti-Necessitarian Social theory in the Service of Social Democracy (1987) p. 361. It also involves grassroots participation in state and societal affairs.

55. Ibid., p. 673
56. In other words there should be a right to remove from the legal order fundamental structures that constitute a stumbling block to the realisation of the goals of the new social order.

57. Ibid., p. 602
58. Ibid., p. 665
59. Ibid., p. 672
60. Ibid.

63. L. Hobhouse, Liberalism 123 (1913)
67. Hereinafter referred to as CLSM
70. See Roberto Unger, Knowledge and Politics (Free Press 1975), 38 - 55.

71. See Hutchinson and Monaham, 'The 'Rights' Stuff: Roberto Unger and Beyond' supra note 60 at 1494.
81. See Boyle, "The Politics of Reason; Critical Legal Theory and Local Social Thought", supra note 66.
84. Galileo was the first person to use the telescope to study the skies. Through the use of the telescope he obtained evidence showing that the earth revolves around the Sun and that it is not the centre of the Universe, contrary to earlier belief. That thought was revolutionary for it appears to contradict the scriptures. Therefore he was tried by the Inquisition in Rome for blasphemy, ordered to renounce the thought and placed under house arrest. Long after that the revolutionary thought was accepted. See Encyclopaedia Britannica, Vol. 9 (1984) pp. 1089 – 1090; E. F. Bozman (ed.), Everyman's Encyclopaedia, Vol. 5. (5th ed. 1967) N. Dent & Sons Ltd., London.
86. See Karl Marx, Capital I, 80.
11. See John Finnis, Natural Law and Natural Rights (Oxford 1980), p. 3
12. Ibid. p. 23
13. Ibid. p. 280
15. Ibid. p. 156
16. Ibid. p. 255
19. Ibid., Chapter 1, para. 7
20. Ibid., Chapter 1, para. 4 and 5
24. Ibid.
28. See John Finnis, Natural Law and Natural Rights (Oxford), p. 3.
29. Ibid. p. 232
30. Ibid. at p. 233.
33. Ibid., at p. 262.
34. Ibid.
35. Ibid.
130. Ibid., at p. 263
131 Ibid., at p. 264
133. Leslie Green, ‘‘Law, Coordination and the Common Good’’, supra note 125 at p. 317.
134. Ibid.
138. Ibid.
140. Roberto Unger, Social Theory; Its Situation and its Task (1987), p. 1
141. See Plato, The Republic
142. See Ronald Dworkin, Taking Rights Seriously 105 – 106 (1977). Hercules is an imaginary ‘‘lawyer of superhuman skill, learning, patience and acumen .... a judge.....’’ See also Ronald Dworkin, Law’s Empire 231 (1980) where Hercules appears as ‘‘an imaginary judge of superhuman intellectual power and patience who accepts law as integrity.’’