

## ANALYSIS OF LEGAL REALISM THEORY

Umang Gupta, Amity Law School Noida, Amity University Uttar Pradesh

### ABSTRACT

Jurisprudence can be called as the foundation of law that helps in forming, analyzing and interpreting of laws. Jurisprudence as seen by laski: as the eye of law, it relating the functioning of eye that helps in seeing the environment similarly it helps in giving a new understanding to the laws. The Legal Realism Theory is one of the most important theory of jurisprudence which helps in giving the wings in understanding of decision of courts. The realists contend that law has emanated from judges, hence law can be said as what court do and not what they say. This realist theory is the branch of sociological jurisprudence. Researchers believe that legal realism to be a development which ought not be formalized into a different school of law, as it only part of the sociological approach. Legal Realism as movement in thought of law or an idea of law, dismisses the thought of natural law as it doesn't give the principles of justice. So, it not accepting the imperative model of law as for realist the meaning of legal term is not defined by law makers but it's the observation of law in action. Also, Prof. Sir John Chipman Gray's propositions "judges put life into the dead words of law" and "law is what judges declare".

The objective of this paper is to understand the literal meaning of Realism in its legal point of view and basic interpretation relating to it. Also, the research paper mentions the Legal Realism in the view point of Indian scenario. So, the paper acknowledges that Legal realism is the modern and latest school of the jurisprudence.

**Key words: Legal Realist, Realism, Sociological, Jurisprudence, Society**

## Introduction

Jurisprudence has first originated in the Roman Civilization by the Roman Jurist Ulpian described as “The observation of things human and divine, the knowledge of just and unjust”. And from this point, the interpretation of the jurisprudence took place and gained the position of new branch of law. The Jurisprudence was a Latin word which meant as ‘knowledge of law’ and we can also say that jurisprudence is providing the insight about the law. Basically, the further interpretation or the construed meaning of jurisprudence is somehow related three words i.e. philosophical, theoretical and ideologies. These are the three words which form the meaning of jurisprudence and backbone of the jurisprudence. The jurisprudence has different schools of law such as Philosophical school or Natural school of law, Analytical school of law, Historical school of law, Sociological School of law and Realist school of law.

The new branch of sociological jurisprudence which concerns the decision of law courts are represented by the realist movement in united states. The Sociological school of jurisprudence has originated as the result of synthesis of various juristic thoughts. The compact meaning of this school is the social phenomenon as they are concerned with the relationship of law to other contemporary social institutions. Basically, the construe of the sociological school is that the jurist should focus their attention on social purposes and interests served by law rather than on individuals and their own perceptions or rights. The sociological school deals with the society aspects and societal points of view through which they get the new sunshine in the law so as to remove the darkness behind the laws. The sociological school is deals with other science regulations and served it as the synthesis of psychology, philosophy, political science, sociology, etc. Law according to the sociological school was “an applies science employing functional methods of investigation and analysis for solving the social and individual problems.” As per another Jurist Eugen Ehrlich who was a professor of Roman Law in Austria suggested that “The Institutions of Marriage, Domestic life, inheritance, contract, etc. governs the general public through ‘living law’ which overwhelms the human life”. By ‘living law’ here the jurist meant with the extra-legal controls which regulates social relationship of the person.

Jurist Julius Stone has defined the sociological Jurisprudence as “a study which seeks to bring social science knowledge to legal problems, address themselves to the influence of social,

economic and psychological and other non-legal factors on the process in the concrete content of legal propositions”.<sup>1</sup>

The realist theory is the emerging part of the sociological school as they are not much concerned about the outcomes of the law but their main point of view is on a scientific observation of law and its actual functioning. That’s why this realist theory is determined as the ‘left wing of the functional school’. The main objective of this theory is not based on judicial decisions but the human aspect of the judge and the lawyer has an impact on the court’s decision. Thus, some American jurist believes that the realist school has no significance independently but as this is the new methodology which is adopted by the sociological school. Some jurist stressed their studies and come up with the new conceptualism that the realist theory is the combination of both analytical positivism and sociological ideologies in their legal approach to law and social institutions.

Roscoe Pound said that “realism as fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagines to be, or wished to be or as one feels they ought to be”.<sup>2</sup> The jurist wants to defined realism as the cause or belief, accuration of the things which can be compare with the visualization or feel to be or as it is. It can be termed as a method of scientific approach of law. The realists gave more emphasis on the judge making laws are the true laws then the laws made by the legislatures.

Jerome Frank has defined “law is what the court has decided in respect of any particular set of fact, prior to such a decision, the opinion of lawyers is only a guess as to what the court will decide and this cannot be treated as law unless the court so decides by its judicial pronouncement”.

The Realism criticizes the traditional legal rules and concepts. It concentrates more on what the courts actually do in reaching the final decision in the case before them. In strict sense of the term, realists define law as generalized prediction of what the courts will do. The Goodhart has stated the main characteristic features of realist jurisprudence: -

---

<sup>1</sup> N. V. Paranjape, *Studies in jurisprudence & legal theory* (Central Law Agency, Allahabad, 9<sup>th</sup> edn., 2019)

<sup>2</sup>Definition available at:

<https://shodhganga.inflibnet.ac.in/bitstream/10603/258225/1/ph.d.%20thesis%20rajib%20hassan%20department%20of%20law%202016.pdf> (last visited on September 09 ,2020)

1. Realists believe that there can be no certainty about law as its predictability depends upon the set of fact which are before the court for decision.
2. They don't uphold formal, intelligent and applied way to deal with law in light of the fact that the courts while deciding a case arrives at its decision on emotive as opposed to legitimate.
3. They give more stress on psychological approach to the proper understanding of law as it is concerned with human activities, behaviour and convictions of the lawyers and judges.
4. Realists are not giving importance to the legal terminology, for they consider it a tacit method of suppressing uncertainty of law.
5. They like to assess any part of law in regarding of its effects.

The Jurist Karl Llewellyn said that there is no realist school in existence, as it is manoeuvre in thought or work about law. As the realism is presupposes that law is the related to the society and changes in the society in such faster than the laws. The laws are not static or idealism so that 'laws as it is' is completely excluded from the 'law ought to be'. So, realism is more concentrated towards what the courts do with the reference to a given set of facts to give a decision as the courts has greater emphasis on case-law technique of the study of law. The realist-conviction is that realist way to deal with the investigation of law would assist the lawyers with foreseeing the judgements and set up their contentions in like manner.

What should be remembered is that American Realism is about court-scepticism where the realists contend that while giving judgements the judges don't confine themselves to exacting principles of interpretation however, joined within such judgment their abstract comprehension of the issue.

The Reasons for accepting this approach in Indian Scenario as the analysis of the Indian constitution or Legal setup through the "realist approach". There are two main reasons behind it are:

- To eradicate the myth about 'Judges interpret the laws and they are not law creator'.

- To point out the judges utilizing the extra-judicial tools and their philosophies in the judgements. As the judiciary in India has forgotten its customary function of ‘interpretation the law’ and has track another way of utilizing extra- tools to ‘construct new laws’.<sup>3</sup>

Basically, these reasons are the clear advantage of the comparative study of courts in a dynamic and vast range of courts. Such diversity helps the researchers by providing the opportunity to identify a wider range of conditions and experiences the functioning of the courts in order to develop the basics of understanding. Judges didn't hold fast to the built-up rules of interpretation and utilized extra-legal strategies and their very own personal way of thinking to decide the cases.

**KARL LLEWELLYN** admitted that there is nothing seems Realist school, rather it is a specific approach of a class of thinkers having a place with the sociological jurisprudence. As per Llewellyn, “the traditional outlook that the rules decide cases and therefore, they should be looked into the law books has become outdated and now the focal point of consideration should be the conduct and thinking of the deciding judges or the court”. He also explained the realism briefly as;

- That acknowledged the fact in large measure of predictability in cases for giving decision.
- That he described law ‘what officials do about disputes’ and stressed that law should be evaluated in its effects so that judicial plays an important role of law creator in it.
- That he argued the societal changes are very rapid and inconsistent than law so there is a need to have a knowledge that law meets the social problems or not.
- That he supports the divorcing ‘is’ from ‘ought’ for the study purpose in judicial process and more concentrate towards how law factually operates in the society.
- That he considered determining law as in legal rules and traditional legal theory senseless as there are many other effects which affects the decision of court.
- That he emphasized on sustained and programmatic evaluation and examination of law through which judicial process in terms of changing circumstances.

In the end, Karl Llewellyn’s philosophy of law favoring the development of jurisprudential intuition beyond the principles of law appropriate and thinks about the ideology and factual circumstances. The focal point of jurisprudential study should be shifted from the study of rules

---

<sup>3</sup> Reasons for Realist Approach available at: [http://docs.manupatra.in/newsline/articles/Upload/F3DBF1B8-CA4E-4A6B-AA2C-1AD1E36F7837.1-a\\_Constitution.pdf](http://docs.manupatra.in/newsline/articles/Upload/F3DBF1B8-CA4E-4A6B-AA2C-1AD1E36F7837.1-a_Constitution.pdf) (last visited on September 10,2020)

of law to the real activity of law applicable to a given case. Thus, judicial tradition on which court decisions are based should receive primary rather than the rules contained in law.

**JEROME N. FRANK** who was a practicing lawyer, he explained his views about realistic approach to jurisprudence in his classic work entitled '*law and the modern mind*'. He detonated the myth that law is persistent uniform, certain and perpetual and stated that the judges don't make law, rather they discover it. He insisted that law consists of decisions and the personal conviction, likes and dislikes, emotions. The judge's temperament has an important role in the mechanism of law. Thus, he said that court is the 'fact-finding' as the central theme of his realism in which the experience and personality of the judge plays as a backbone role in giving proper and concrete shape. Finally, he was more concentrated towards the study of law in action and court room rather than the library and he said that it should be working like in laboratory.

### **Criticism of the Realism Theory**

- As the law cannot be termed as definite and certain in its nature so this indeed overestimating the role of judge or court in formulation of the laws. Their contribution to law-making to a certain extent but it cannot be forgotten that their main function is to interpret the law.
- Another criticism is that the neglected part of the law which never comes before the court and it is erroneous to think that law evolves and develops only through court decisions.
- The supporters of the realist hypothesis subvert the authority of the precedent and argue case law is frequently made in scramble, regardless of more extensive implications.
- The role of human factor in judicial decisions are exaggerated by the realists. It is not correctly to say that the judicial decisions are the outcome of personality and behaviour of the judge. There are variety of factors which has to be taken into consideration for reaching towards the decision.
- As the realist theory is not universally applicable and some parts of the country accepted it and some are not accepting it.

### **Realism in Indian Context**

The lawful way of thinking of realistic school has not been acknowledged in subcontinent for evident explanation that the surface of Indian public activity is not the same as that of the American way of life. The recent patterns in the public interest litigation which professor Upendra Baxi wants to call as 'social action litigation' have be that as it may, augmented the extent of judicial activism generally however the judges need to plan their choice inside the restriction of constitutional frame of the law by utilizing their interpretative aptitudes. Thus, it implies that the judges in India can't disregard the current legislative statutes and enactments. They need to keep their legal activism to the furthest reaches of legal law. The doctrine of precedent which has no spot in the realist theory, assumes a huge function in Indian legal framework in as much as precedent give direction to the managing judge about the current situation of the law being referred to. They are, nonetheless, free overrule the past choice on the ground of irregularity, contradiction, vagueness, change of condition, and so on. Allotting purposes behind their deviation from prior decision. The legislative statutes and enactments, precedents and the rules of equity, justice and good conscience are indispensable part of the legal system of India. The constitution likewise gives the plentiful degree to the judges to think about the hard-real factors of socio-economic and cultural life of the Indian public while scattering social and economic equity to them.

In reality, it can be said that Indian jurisprudence has not formally accepted to the realist's legal philosophy, it does lay extraordinary weight on the utilitarian part of the law and relates law to the real factors of social life. Again, it will not acknowledge the realists view that judge – made law is the main genuine law and different laws are useless, and yet it doesn't completely ignore the function of judges and the lawyers in molding the law.

Accordingly, it is right to say that the Indian legal system has created on the example of sociological statute as displayed by the post-independence's socio-economic legislation but it considered as the doctrine of realism as outsider to Indian culture which has an alternate life style and social milieu. Undoubtedly, the Indian judges do have the freedom of interpreting law in its relevant and social setting keeping in view the social, economic, political, social culture, historical and geological variety of Indian society.<sup>4</sup>

---

<sup>4</sup> N. V. Paranjape, *Studies in jurisprudence & legal theory* (Central Law Agency, Allahabad, 9<sup>th</sup> edn., 2019)

## Conclusion

The Legal realist theory is the part of the sociological school of jurisprudence. This realist theory depends upon the creativity and thinking ability of judge who decides the case but not on the laws drafted by the legislature. As this theory is somehow dependent on the Natural law school which basically deals with the justice of what is right or wrong, equity and good conscience. And it describes that the realist theory is related with sociological school of law and it has some element of the positive law. So, we can say that legal realist theory is the mixture of positivist law, natural law, societal law and other laws also. Thus, this particular theory is not accepted in India directly but somehow it is recognized in an indirect way, as it is the most useful theory and practical aspects without which a judge cannot interpret the statutes and give the decision through the laws made by the law makers i.e. legislatures. It must be expressed that in the developing law of the current century, more prominent pressure ought to be on responsibility of the legal judiciary to the individuals of India as opposed to making it supreme in the process of formulation of law. This realist and moderate methodology evading boundaries is maybe generally arranged to the current Indian conditions. The law should not be a deterrent to societal change. In today's era, a judge is a person who shapes the law to conform closely to the desires and expectations of the people. Law ought to be molded by social needs and interests in this manner for transforming itself into prevailing public opinion through the decisions of the courts. Therefore, legal realist theory is a virtual part of our Judicial system rather than a reality. As this theory is applied every time when the pronouncement of any judgment but it has no proper shape and place in our constitution of India.