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The Continuing Relevance of American Realism

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The research study is based on the Continuing Relevance of American Realism. American realism originating in the early 20th century challenged conventional legal methodologies and focused on societal, political, and economic influences on the adjudication process. Later it became a revolutionary theory of law under jurisprudence. Several core tenets of American realism had defined their approach to jurisprudence, which influenced subsequent critical legal studies. This study explores its continued relevance through a comprehensive review of historical and contemporary perspectives. The applicability of American realism to the complexities of modern legal systems is also discussed. It also elaborated the discourse of American realism theories that has equipped modern scholars and jurists to acknowledge the judge-made law with a sociological approach and how priority on empirical research is still pertinent. This article concludes with the significant contributions of American realism and analyzes the complexities of justice in a constantly evolving socio-legal landscape.

Keywords: *realism, judge, sociological approach.*

INTRODUCTION

In the early 20th century, a modern approach, known as American Legal Realism gained momentum in the form of the jurisprudential movement that defied the formalistic and

doctrinal approach of law. ¹This intellectual revolution emerged primarily between the 1920s and 1930s and focused on the judicial interpretation of law concerning the recent social context. It addressed the failure of traditional terminology and dictations of law and adhered to the sociological implications of legal disputes, it is popular as Analytical Positivism.² Some jurists such as Llewellyn did not consider this as a separate school of law and referred to this as a branch of the Sociological School. It studies the uncertainty of law as the psychology of judges and is often called the 'left wing of functional school'. Here, the law is studied as 'what it is', not as 'what it ought to be'. When formal legal reasoning couldn't address the complexity of real-world disputes, this approach responds based on the logic of social interest and public policy derived by judicious minds trained in law and practice. The shortfall of strict rules of law is its predictability so much so that advocates predict the outcome of trial and prepare accordingly. Therefore, the jurists of this school advised judges to include their subjective understanding instead of authoritarian statutes.³

REASON BEHIND EMERGENCE

In the 19th century, when conservative classes made orthodox, unrealistic arguments in the United States, many jurists and scholars countered such concepts, which led to the emergence of legal realism.⁴ Thus, American realism is the strong attack made on accustomed legal acknowledgments, which were not favored by politics.

The school of legal realism is divided into two parts:

- Scandinavian Realism
- American Realism

¹ 'American Realism in Jurisprudence' (*StudiosGuy*) <<https://studiousguy.com/american-realism-in-jurisprudence/>> accessed 17 October 2023

² *Ibid*

³ Vijay Awana, 'Jurisprudential Aspect of Legal Realism and Critical Analysis of the Realist Movement in America' (2020) 3(4) *International journal of Law and Management and Humanities* <<https://www.ijlmh.com/jurisprudential-aspect-of-legal-realism-and-critical-analysis-of-the-realist-movement-in-america/>> accessed 17 October 2023

⁴ American Realism in Jurisprudence (n 1)

Both Scandinavian Realism and American Realism pointed out the importance of the Courts and the relevance of 'HUMAN FACTOR' in Judges and advocates.

The most unique factor about American realism is that it is not a definite structure or set of theories; it is a historical revolution or phenomenon. It is never called a formal school of thought. This revolution gained attention when Franklin D. Roosevelt was the President of America. The elements of 'Realism' studies different aspects of law after its application and its influence on the target audience. Scholars like Felix Cohen, Herman Oliphant, Hessel Yntema, and Karl Llewellyn have contributed to this dominating discourse. This endeavor figured out that a Judge need not require sticking to the set norms of interpretation or system of decision-making, contrary to the perception that Judges adhere to the black letter law and use syllogistic reasoning to decide any case.⁵

One of the chief arguers of this theory, Oliver Wendell Holmes, Jr. explains: 'The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.'⁶

There are four main propounders of this theory. Out of them, two exponent jurists namely John Chipman Gray and Oliver Wendell Holmes Jr. vehemently contributed to its development and illustrated the human factor for interpreting the law. So, they are called the Father of American Realism.

The noted American Realists are as follows:

John Chipman Gray (1839-1915): John Gray focused absolutely on the judges. According to Gray, when judges formulate any law, decide on a case, or deliver a judgment, there are various factors influencing their decision. The factors are political views, economic theories, and

⁵ Ishika Sareen, 'American Realism & Its Future In India: A Study' (2022) 4(1) Indian Journal of law and legal Research <https://3fdef50c-add3-4615-a675-a91741bcb5c0.usrfiles.com/ugd/3fdef5_5081491ebc2249a19cf580e85ce41329.pdf> accessed 17 October 2023

⁶ *Ibid*

personal qualities. He considered the judiciary as the source of law instead of the legislature. As per Gray, 'Non-logical factors are more crucial for the elaboration of law. Since he laid the foundation of American realism, he is praised as one of the 'mental fathers of the realist movement'.⁷

Oliver Wendell Holmes Jr. (1841-1935): Oliver Wendell Holmes Jr. served as a Judge of the Supreme Court of the US. In his long service tenure, he delivered many remarkable judgments and he has a fundamental impact on American laws. Justice Holmes explains why people try to understand the law. According to him, people intend to understand the law to know what is right and what is wrong. He coined the term 'BAD MEN' which refers to the people coming in the purview of law. The people 'BAD MEN' have no interest in the statutes of law; their only query is what kind of punishment they are going to get from the court. They only want to know the analysis of judges and courts. From this criminal perspective, Justice Holmes Jr. deduces that Law is not logic only; it is the combination of experience and logic. Before deciding on any cases, the judges need to go through many factors such as what is their point of view, beliefs, etc. His practical approach was the fact-based analysis of statutes.⁸

Jerome Frank (1889-1957): Generally, Judges and lawyers apply the legal rules to the facts of the case and conclude with a legal decision. But if facts are wrong then legal decisions will become wrong. This is what Jerome Frank believed in. According to Frank, there is no such yardstick or guarantee that Judges shall understand the facts correctly and so they will reach an accurate legal decision. In his book 'Law & Modern Mind', he said that 'certainty of law is a legal myth'. It means if someone is doing something wrong, he cannot predict a certain outcome, because there are lots of variables such as how the rules are analyzed, and how the facts are perceived. Different interpretations shall have different outcomes. For example, if the rule of law is the same and the facts of the case are the same; still two different courts may still have different kinds of judgments.

⁷ Naresh Kumar, 'Realist School of law/ American Realism/Jurisprudence' (*LawNotes4U*, 07 November 2019) <<https://www.lawnotes4u.in/realist-school-of-law-american-realism-jurisprudence/>> accessed on 15 October 2023

⁸ Sareen (n 5)

Jerome Frank also stated that Judges and lawyers must decide every case based on its background and social condition without following the precedents blindly. According to him, 'Law is a constructive work at the hands of Lawyers and Judges' and so the lawyers and judges should construct the law independently.⁹

Carl N. Llewellyn (1893-1962): According to Llewellyn, Law is like an 'Institution', it is a 'Means to Social End'. So, the kind of changes the jurists want to bring into the society, they formulate appropriate laws for that. Since, society has been transforming with time; so, the 'law should be in flux with society. This means the law should be in sync with society in parallel. Moreover, Law should be used as an institution, so that different people can come together and interact with each other to reach a common solution.¹⁰

CLASSIFICATION

American legal realism can never be suitable to a single category, because of its variations and nuances stated by different jurists and scholars. It can be explained in the following ways:

Sociological Realism: American realists often believed that Judges' decisions are shaped by external forces like social and economic factors.

Instrumental Realism: Some scholars believe that law can be a tool to achieve policy goals.

Critical Legal Studies: In the late 20th century, critics started highlighting the issues of social justice and power imbalances.

Predictive Realism: Jurists expressed their concern that judicial decisions could be predicted by observing judges' personal or ideological inclinations.

Anti-Formalism: Realists advocate for flexible, context-based analysis over formal legal reasoning.

⁹ *Ibid*

¹⁰ *Ibid*

Despite the serious differences, American realism and Legal positivism share one similarity which is the point of separation between 'the law as it is' and 'the law as it ought to be'. Some jurists thought American realism was a new methodology adopted by the sociological school of jurisprudence. However American realism focuses on a scientific observation of law and its actual functioning while sociological approaches pay attention to the ends of law. Realists believe that laws are made by judges or scholars while natural law philosophy perceives law to be made by God and discovered by humans. This is how American realists' school is different from other schools of Jurisprudence.¹¹

American legal realism is not a monolithic theory, and in this regard, Jerome Frank has presented the *Fathers' Symbol Theory*. Just like a child trusts his father's power and wisdom, and feels a sense of social security; Law should be a quest for the aura of security so it can further be understood into 2 more subcategories:

Rule Scepticism: Rule skepticism emphasized on the upper judiciary i.e. appellate courts, their decisions on the rules and what they decide to be the contours of the precedents in question shed light on the fact that the set rules are unresolved. One single precedent can be interpreted in many ways and it can have many derivations. Karl Llewellyn points out that Judges first decide on the facts of the case and then suitably use their inferential ability to make the decision compatible with reasonable logic.¹²

Facts Scepticism: Facts skepticism focuses on the lower judiciary i.e. Trial and Subordinate Courts, and also noticed that Appellate Courts do not capture every little fact of any case. It is also observed that upper courts are not bothered by the facts stated by lower courts. This is so because lower courts have their limitations in terms of personal and professional perceptions. Sometimes, facts of a real offense are not well established because of preconceptions, gender bias, and caste bias which in consequence results in an unfair verdict by the court. Such instances

¹¹ American Realism in Jurisprudence (n 1)

¹² Sareen (n 5)

are a mockery of the entire procedure of judiciary by the hands of lawkeepers. It is a matter of concern that Fact skepticism can be found everywhere heterogeneously.¹³

CONTEMPORARY PERSPECTIVE

A similar framework of American Realism can be examined in contemporary times with the example of the Supreme Court of India. It can be seen that the Calcutta High Court and Kerala High Court can have different judgments for the same case. There are no set standards to follow for deciding on any case. The judges rely mostly on their interpreting skills with their discretion. That's why; the court's decisions and a judge's opinions are unpredictable at the end of the trial. For example, the court sentenced all three attorneys on contempt of court in the Vijay Kurle case with imprisonment of three months and a fine of Rs. 2000. But in Prashant Bhushan and another, the court charged only Rs.1 as a fine. This reflects that there is no set standard of interpretation and the Court has used its discretionary power.¹⁴

One of the fundamental insights of American Realism is the neutral nature of law. It means law replicates its past structural form. It turns arbitrary, being heavily influenced by social edifice, the judge's conscience, and professional ideologies. Some instances of gender bias can be noted in the case of *Km. Kranti v Uttarakhand Sahkari Chini Mills Sanghi Ltd*. Another instance is the custody cases where the judge's general perception is that the mother can take care of the child compared to the father if both parents have equivalent qualifications, job experiences, and incomes.¹⁵

Realist Karl Llewellyn elaborated that law on paper is different from what in reality it is perceived. Some rules are illegal on paper but still, it's considered legitimate in daily life. There are several cases where laws or rules are amended and new laws are proposed by the judiciary. In the Indian context, antics of the American lifestyle cannot be adopted, So Judges and Courts finalize their decisions within the purview of the Indian Constitution. In short, the Indian

¹³ *Ibid*

¹⁴ Diksha Mittal, 'American Legal Realism in Contemporary Times' (*Nicked and Dimed*, 21 July 2023) <<https://nickledanddimed.com/2023/07/21/american-legal-realism-in-contemporary-times/>> accessed 16 October 2023

¹⁵ *Ibid*

Judiciary cannot ignore existing legislative enactments and statutes. However, recent trend shows how the Public Interest Litigation has widened the scope of judicial activism, but that's also operating within the constitutional sphere. It can be observed from the verdict of numerous recent cases that American Realism also holds its roots in contemporary times. Though Judges are not lawmakers, they can add valuable insights corroborating recent societal developments.¹⁶

CONCLUSION

American Realists aptly pointed out the noteworthiness of human choices and the tendency to make mistakes or interpret them differently being influenced by socioeconomic factors. Critics also argued that realists have given undue priority to the judiciary, human behavior, and psychology undermining the value of law which is not presented before the courts. It can now be concluded that American Realism is a combination of analytical positivism and sociological inclinations. This theory challenged and rejected legal formalism and continued to focus on legal practice in contemporary times. It forced positivists to have second thoughts and consider derivations of legal language with judicial discretion. American Realism has established a legacy of a challenge for the Classical legal thoughts that legal institutions and reasoning are independent of moral, social, and political conflict. The contribution of American Realism to jurisprudence is revolutionary and focused on the life and property of the public, not merely on the orthodox statutes. Indian Jurisprudence rejects the functional character of American Realism that judge-made law is real, statutes are a myth. But it doesn't nullify the importance of courts' interpretation of statutes and includes correlating adjudication with social life realities. However, in the USA, jurists and scholars have adopted realism as part of their judicial philosophy. In sum, the discourse of American Realism has transformed the study of law under jurisprudence. With its emphasis on empirical analysis, the role of context in legal decision-making, and the indeterminacy of legal rules; it faced criticism for its limitations and continues to influence contemporary legal thoughts and practice.

¹⁶ *Ibid*