

# THE REALIST THEORY OF LAW

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## ABSTRACT

Legal realism is a natural theory of law which obtained its significance from societal norms and moral values. According to this theory, judges consider not only abstract rules, but also socio-economic interests and public policy when deciding a case.

The realists are of the opinion that law must only be analyzed using natural science methods which are commonly accepted in ways which are value free. Law is inseparable from its use and its scope is beyond understanding when applied in daily life.

It focuses more on the aspect as to how the law actually exists in practice, rather than how it exists on the books. Critics have claimed that the realists are the ones who have exaggerated the extent of law and law has been “riddled” or “made fun of” with contradictions.

This paper highlights the key features, significance of legal realism, the patterns of legal realism at with in India and the criticisms thereof.

**Keywords:** Law, Legal Sciences, Natural Sciences, Realism

## LEGAL REALISM

*“The waters of the law are unwontedly alive. New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas, philosophic inquiry is pursued without apology as it becomes clearer that decisions are functions of some juristic philosophy.”<sup>i</sup>*

Realism means a conceptual thesis on law in chunks and as a means of some social ends. It is applicable in a society which is acceptable to change. Legal realism is based on the theory that law is based on societal norms and adaptation to those societal norms is one of the basic fundamentals of law. According to this theory, judges consider not only abstract rules, but also socio-economic interests and public policy when deciding a case. In developing countries, Constitution and laws are expected to be dynamic and not rigid. It should change with the changing needs of the society so as to operate as an instrument of social engineering. Its function becomes highly significant particularly when there are conflicting groups or interests in the society.

Law has to pass through judicial scepticism. Different judges have different frame of mind. The behavioral pattern of the judges vary depending on the situations or cases presented before them. Karl Llewellyn states, *“Judges stand behind judgements; judges are men; they have human histories as men.”<sup>ii</sup>* Therefore, the law does not reside in an abstract domain with universal laws or values. To understand legal actors’ decisions and actions, legal realists often turn to the ideas of the social sciences to understand the human relationships and behaviour that culminates in a given legal outcome. The law in action has a vast difference from the law presented on paper. Legislature is a government body that makes the law. It is merely a *“prophecy of what the courts will do in fact and so long as the courts have not given their final pronouncement on it, the law remains uncertain, a child’s world.”<sup>iii</sup>*

At the same time, it should not be forgotten that there should be some element of certainty in law which is sought by the state and the subjects. It is conducive to justice. Realists believe that law is only on official action.

Roscoe Pound has defined Realist School as: *“Fidelity to nature, accurate reordering of things as they are, as contrasted with things as they are imagined to be, or wished to be or as one feels they ought to be.”<sup>iv</sup>*

## THE REALIST MOVEMENT

The legal realism movement was initiated by Oliver Wendell Holmes Junior in the year 1881 at the time when he published *The Common Law*. The publication was a revolt against the traditional practices and rationale of law. Realists were those individuals who were a part of the legal realism movement.

The Realist Movement started in the 18th century and gained momentum during the regime of U. S. President Franklin D. Roosevelt. Realists asserted, “*The life of the law has not been logic, it has been experience.*” Legitimate authenticity can likewise be depicted as a way to deal with law that is naturalistic. It is a practice of not adhering to the traditional principles but in turn challenging those principles. Realists believe that the courts apply legal principles in a rationale manner.

Jerome Frank, the man who is the pioneer of legal realism became a judge on the U.S. Court of Appeals for the Second Circuit. He laid down the guidelines of judicial making and added that the judge’s decisions can be influenced based on his/her mood depending on various factors which may or may not concern the case directly.

Realists believed that two things are true. First, they believed that law is not a scientific process in which deductive reasoning can be applied to come to conclusion so as to determine the case. Instead, most legal proceedings entails that judges must balance the interests of the parties and draw an arbitrary line on one side of the dispute. This line is typically drawn as per the political and psychological outlook of the judge.

For example, when a court is asked to decide whether a harmful business activity is a common-law nuisance, the judge must assess the activity reasonably. There is no hard and fast rule to determine the nature of the activity. Instead, the judge balances the competing economic and social interests of the parties, and rules in favor of the party with the most persuasive case. Realists are of the belief that judges are the ones who are focusing on economic advancements that will allow the continuation of a harmful activity, whereas judges who are socially concerned will never put environmental interests in jeopardy.

Judges decide cases based on their political affiliation and social change. For example, the realists of 19th century saw a dramatic rise in the disparity between the wealth and working conditions of rich and poor U.S. citizens post industrial revolution. To protect society's "have nots", many states began drafting Minimum Wages Act to protect the cause of exploited workers.<sup>v</sup> This legislation was part of the U.S. Reformist development, which reflected large numbers of the pragmatists' interests.

In the United States, the Supreme Court can overturn its past decisions. Even in India, the Constitution can be interpreted from time. This is not surprising for a legal realist if the Supreme Court overruled the Anwar Ali Sarkar case and the bank nationalization case. The Supreme Court may someday conveniently distinguish the Kesavananda Bharati case and hold that the Sajjan Singh case was rightly decided on the powers of the Parliament to amend the Constitution thereby shelving the concept of non-amendability of the basic features of the Constitution.<sup>vi</sup>

## **CHARACTERISTICS OF LEGAL REALISM**

1. Legal realism is a naturalist philosophy to law that urges jurisprudence to imitate the natural science methodologies.
2. There should be more dependence on empirical evidence. Legal factors of law must be separated from moral elements. The realists who are also known as legal positivists are those who believed that law must be dealt with scientifically.
3. Assumptions should be scrutinized.
4. Legal realists opine that legal science can analyze law exclusively through lens of natural sciences.
5. Judges may defer or reject to the previous precedent depending on the current realities and give their judgement.

6. Legal realists argue that human behaviour should be evaluated empirically, instead of by theoretical assumptions about the law<sup>vii</sup>
7. Realists define what law is, how it works in human cultures, accept that law is rarely sufficient to justify how courts adjudicate all proceedings before them, compensate for justice, adjudication within the limits of the statute.
8. The realists are convinced that the law principles that exist can be manipulated by the judiciary and they know that this can spark chaos and instability in the society if every judge were to follow their political beliefs.
9. The realists held that the judges should decide cases in a manner that would maximize the pleasure of the most fragile members of society. This school of thought enabled a change in the law that saw legislation put in place that protected the rights of vulnerable employees, especially women, protecting them from harsh working environments.
10. The judge identifies all the competing interests in the case. He or she then analyzes all the possible ways of handling the case. The judge weighs all the possible consequences of each of the possible ways of handling the case and their effect on the individuals involved.

## **SIGNIFICANCE OF LEGAL REALISM**

In India personal laws have a customary origin but at present they exist on the authority and binding force of judicial decisions. The common law as a basis of the major portion of the Constitution of England and of the law relating to mutual rights and obligations of the people in England in the United States India and other Commonwealth countries. For common law *“the doctrine of stare decisis is a philosophical necessity and in common law jurisprudence the law is a decision of the court itself. The dependence of customary law and common law on courts brings in legal realism in natural course.”*<sup>viii</sup>

Coming back to the question whether legal realism is indispensable it is observed that when the court is faced with a dispute in which the two parties give different interpretations to the Constitution the legal realism comes into play in the form of choice from different methods. It all depends on the personal likes dislikes or sense of justice aroused in the mind of the judge with reference to the facts of the case. The judge may refer to a particular text of law as provided in a general principle and will liberally apply the '*equity of the statute*'. The Supreme Court in a habeas corpus case<sup>ix</sup> recently held food adulteration activity to be an obstruction to the maintenance of supplies and service essential to the life of the society for which a person can be held in preventive detention under section 3 of the Maintenance of internal Security Act (MISA). This is interesting because normally penal statutes and detention laws are very strictly construed. In the present case, the judge took a liberal view by recognizing that food adulteration on an organized and large-scale was prevalent in the country. It was not only a social evil but was an obstacle to the socio-economic demands of the country as a large-scale adulteration carried on in a big way can throw out of gear the smooth functioning of life. The judge may not give a liberal interpretation to the laws. He may give a broad or limiting interpretation to the words in the Constitution to suit the ends of justice. In the very first case on fundamental rights, *Gopalan vs. State of Madras*, the limits of the rights and Article 21 and Article 19 were distinguished from one another on the principle of directness of consequence of law by Chief Justice Kania.<sup>x</sup> The doctrine of '*pith and substance*' is also an offshoot of this method of interpretation in modern times. This policy decision making by the judiciary is on demand that adds to the uncertainty of law because common standards for this purpose are impossible to be evolved the policy decision making gives it to the judicial activism a constructive role. It is advocated that the judge should study the social economic purpose for which the law is meant and interpret it accordingly.

## **CRITICISM ON REALIST THEORY**

Judges use legislations/laws to direct their rulings, and not as evidence to determine their final judgments. Many critics have argued that the realists overstated the extent to which statute is "*riddled*" with gaps, ambiguities, and so on. The fact that most legal issues have simple, clear-cut responses that no lawyer or judge would dispute is difficult to reconcile with the bold arguments of the realists of omnipresent legal "*indeterminacy*". Many critics have claimed that

the realists exaggerated the extent to which law is “*riddled*” with gaps, contradictions, and so forth.<sup>xi</sup> Other critics, such as Ronald Dworkin and Lon Fuller, have faulted legal realists for their attempt sharply to separate law and morality.<sup>xii</sup>

## CONCLUSION

While certain components of lawful authenticity are as yet seen as shortsighted or out of date, most lawful researchers will acknowledge that the pragmatists have been productive in their center aspiration of dismissing “*formalistic*” or “*mechanical*” lawful thoughts and legitimate rationale. Today it is commonly recognized that law is not and cannot be an accurate science and that it is an important factor to keep an observation on the actions of the judges while deciding the case and not just believing on what they say that will be doing in the case.

As current discussions on judicial independence and judicial discipline demonstrate, legal experts tend to argue on whether, judges could ever create law rather than just execute and apply the created laws of the legislature in cases. But none will argue with the central argument of the realists that judges (for better or for the worse) are influenced by political opinions, moral values, human behavioral patterns and other considerations.

It may be observed that legal realism is desirable so long as it does not involve any conflict with the political processes in the country. The judiciary should examine interpret and pronounce on any matter of law. If the government does not approve of it then with the support of the Parliament the interpretation of the law should be carried out. But now when judicial activism has chosen to participate in the amending process of the Constitution there is a claim by it for participation in the constant process which has always been a game of high politics.

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## ENDNOTES

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