

## The American Realism and its Mirroring in Indian Judicial System

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### Abstract

Law is often understood to be only the legislature's piece of work and served by the judiciary in the form of decisions. Study of Jurisprudence completes the understanding of law by unraveling the 'realist' aspect of its implementation. The Realist School of Jurisprudence believes in the ability of judges to shape the development and outcome of the law. Given the supremacy of Indian Constitution, American realism had been trying to pave its way to go to the root of Indian Judiciary. This article analyzes the extent of welcoming approach conferred by Indian Judiciary upon an American Realism.

### INTRODUCTION

It is difficult to give a universal and uniform definition of jurisprudence. The Latin equivalent of "jurisprudence" is jurisprudential which means either "knowledge of law" or "skill in law".<sup>1</sup> Jurisprudence- as Laski observes jurisprudence is the eye of the law, it gives the law its insight into the environment of which it is the expression. It relates the law to the spirit of the time, and the richer the jurisprudence of a given system in a given area, the nearer will be the law of that system to the needs of its time.<sup>2</sup>

Amongst all the schools of jurisprudence, the Realist School of Jurisprudence regards law, primarily as emanating from the judges. Legal realism is a school of legal philosophy that is originated through the early-twentieth century attack on the orthodox claims of late-nineteenth-century classical legal thought in the United States of America.<sup>3</sup> The legal Realism examines the law 'as it is' and not 'as it should be' and thus it is very close to the positivistic philosophy of the law. The philosophy of Realism believes that the sociological factors influence development of the law to considerable extent and descends some of its principles from sociological approach.<sup>4</sup>

Generally, Realists don't give any importance to the legislature enacted laws and usually consider only judge-made law as genuine law. Realism deems that a judges' understanding about law, society and also their psychology affect any judgment given by them. Roscoe Pound has defined realism as: Fidelity to nature, accurate reordering

<sup>1</sup>Rigveda Dattatraya Amonkar, *Positivism With Reference To American Realism*, available at: <http://www.grkarelawlibrary.yolasite.com/resources/LLM-LT-1-Rigved.pdf> (last accessed: 04/04/2017 02:02 UTC).

<sup>2</sup>AVNI NAGARIA, *JUSTICE V.R. KRISHNA IYER: OUR HERITAGE 109* (2011 ed., Universal Law Publishing Co.).

<sup>3</sup>*Supra* note 1.

<sup>4</sup>Dr. Pankaj Kakde, *Judicial Activism: The Indian Version of American Realism*, S. P. LAW REVIEW, available at: [https://www.academia.edu/5635493/Judicial\\_Activism\\_The\\_Indian\\_Version\\_of\\_American\\_Realism?auto=download](https://www.academia.edu/5635493/Judicial_Activism_The_Indian_Version_of_American_Realism?auto=download) (last accessed: 04/05/2017 02:25 UTC).

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. The Realists avoid dogmatic formulations and concentrate on the decisions given by the courts.<sup>5</sup> The realist school has been divided into two parts namely, Scandinavian Realism and American Realism.

Realist thinking was introduced to American jurisprudence by Oliver Wendell Holmes. Oliver Holmes has been described as the intellectual inspiration and even the spiritual father of the American realist movement. Holmes gave the first and classic exposition of the court-focused approach in 1897, sowing the seeds for realism, in a paper called *The Path of the Law*.<sup>6</sup>

Parliament plays a crucial role in the law-making process. The contemporary legal thought is subjugated by the outlook that law making fundamentally is a function of the Legislative organs of the State. Although it is the fact that the legislature plays a dominating role in the process of framing laws for the nation, the judiciary has participated substantially in reforming the law. The Realistic philosophy that, the real law is to be traced into the judgments of the higher judiciary has always held its place in all these years of legislative dominance in law making. Indian Supreme Court has played potential role in the development of law and policy in India, which traditionally is presumed to be the role of Legislative organ of the State i.e. the Parliament. The separation of power, between the organs of the State demands non-interference from these organs into their respective functioning but the philosophy of the legal realism supports the creative role of the higher judiciary in development of law and legal system and advocates the Judiciary as a true source of law. To what extent the doctrine of realism prevails will be discussed in the upcoming part of this article.

## LEGAL REALISM IN INDIA

Theories of legal realism too, like positivism, look on law as the expression of the will of the State, but they see this through the medium of the courts. Like Austin, the realists look on law as the command of the sovereign, but there sovereign is not Parliament but the judges; for the realists the sovereign is the court.<sup>7</sup>

With the wave of nationalism and awakening of intellectuals, demand for civil liberty and basic human rights were persistently made but the same was given no recognition, suppression, oppression & exploitation of the people continued unabated under the British Colonial Rule. The lawyers and judges interpreted and applied law mechanically without considering the felt needs or necessities of the people. There was rigid adherence to the Doctrine of Precedent. With the Constitution of India coming into force on 26th January, 1950, a separate chapter on Fundamental rights

<sup>5</sup>ShivamGoel, *The Explorative Study Of The Realist School Of Jurisprudence In Indian Context*, available at: [https://www.researchgate.net/publication/272247887\\_The\\_Explorative\\_Study\\_of\\_the\\_Realist\\_School\\_of\\_Jurisprudence\\_in\\_Indian\\_Context](https://www.researchgate.net/publication/272247887_The_Explorative_Study_of_the_Realist_School_of_Jurisprudence_in_Indian_Context) (last accessed: 04/05/2017 02:29 UTC).

<sup>6</sup>*Supra* note 1.

<sup>7</sup>P.J. FITZGERALD (ED.), SALMOND ON JURISPRUDENCE 35 (12<sup>th</sup> ed., Universal Law Publishing Co. Pvt. Ltd.1966).

including individual rights and freedoms and a chapter on Directive Principles on State Policy comprising social rights was incorporated.<sup>8</sup>

In the post-independence era SC has adopted a rigid positivistic approach, for ex - In the case of **Re Kerala Education Bill**<sup>9</sup> the Apex Court declined to look beyond the letter of the fundamental rights and did not think it necessary to consider sociological imperatives which impelled the legislature to pass such a law, similarly In the **Habeas Corpus Case**<sup>10</sup>, in which fundamental rights during emergency were suspended by the State and the Apex Court upheld the arbitrary powers of the State during emergency and disregarded the imperatives of social justice in the Preamble.<sup>11</sup>

However this trend is now changing in India considering the welfare of the society, which can be observed in the form of judicial activism and public interest litigation. Law is now being used as a tool of social transformation for creating a new social order with primacy to social justice. In **Indira Sawhney v. UOI**<sup>12</sup>, Justice P.B. Sawant observed: The Constitution of India being essentially a political document has to be interpreted to meet the felt necessities of time.<sup>13</sup> Hence from our own constitutional experience we have popular cases<sup>14</sup> in which the motives were laudable but the exercise of power was imperfect and the verdict of the court went against the legislation or the orders.<sup>15</sup>

Considering the rise of judicial activism and PIL in India it is safe to say that For a democratic state wedded to the rule of law it is necessary that Judiciary as the third wing of the State should not only be independent but be activist and robust too. Rise of legal Realism in India in the form of Judicial Activism and Judicial Creativity is to be witnessed in the light of the fact that the Constitution of India is a living document and the Judiciary at all times must protect the Constitution of India, not only in matter but also in spirit.

It has being rightly acknowledged by S.H. Kapadia, J. in the case of **M.Nagaraj v. Union of India** that: “The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and

<sup>8</sup>*Supra* note 5.

<sup>9</sup> AIR 1958 SC 956

<sup>10</sup>A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

<sup>11</sup>*Supra* note 5 atpg. 8.

<sup>12</sup>Indira Sawhneyv. Union of India, AIR 1993 SC 447 (634).

<sup>13</sup>*Supra* note 5 at pg. 9.

<sup>14</sup>‘Newsprint Case’: Bennett Coleman and Co. Ltd. v. Union of India, A.I.R. 1973 S.C. 106; ‘Privy Purse Case’: Madhava Rao Scindia v. Union of India, A.I.R. 1971 S.C. 530; ‘Bank Nationalisation Case’: R.C. Cooper v. Union of India, 1970 AIR 564.

<sup>15</sup>U. N. Gupta, *Legal Realism And Indian Constitutional Interpretations*, The Indian Law Institute, available at:

[http://14.139.60.114:8080/jspui/bitstream/123456789/16446/1/009\\_Legal%20Realism%20and%20Indian%20constitution%20interpretations%20\(212-236\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/16446/1/009_Legal%20Realism%20and%20Indian%20constitution%20interpretations%20(212-236).pdf) (last accessed: 04/05/2017 02:40 UTC).

purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges”.<sup>16</sup>

Judicial Activism is often termed as an expansion of the doctrine of Judicial Review. Article 13(2) of the Constitution of India (as the primary source of judicial review in India) vests power in the Court to declare a law enacted by the legislative organs as void if it is against the provisions of the Indian Constitution. There are other constitutional provisions like Article 32, Article 131- 136, Article 143, Article 146 and Article 226 which on different grounds and in different situations can be used to declare actions of the State as un-constitutional and void.<sup>17</sup>

### CRITICAL ANALYSIS/CONCLUSION

Indian judiciary is the custodian of the Constitution of India. The late 1970's and the entire decade of 1980's witnessed a change in the judicial attitude. Cases like **Keshvananda Bharti Case**<sup>18</sup>, **Maneka Gandhi Case**<sup>19</sup> conclusively established judicial supremacy in the matters of constitutional interpretations, thus allowing it a decisive and creative role in evolving a new constitutional jurisprudence. With the advent of the public interest litigations in India, the SC assumed the epistolary jurisdiction.

Legal Realism from the Indian standpoint can be seen through the eye of the power of Judicial Review vested in the SC of India by the Constitution of India. But, it is necessary to carve out the distinction between judicial activism and judicial over-activism. In the case of **State of U.P. v. Jeet S. Bisht**<sup>20</sup> Markandey Katju, J. rightly held: The Supreme Court is subordinate to the law and not above the law. When it is said, 'Be you howsoever so high, the law is above you', this dictum applies even to the Supreme Court, since the law is above the Supreme Court and the Supreme Court is not above the law.

Thus, Judicial activism and PIL jurisdiction must be exercised only within the institutional limitations and keeping in mind the ground realities and manageable limits- lest it becomes counter-productive resulting into loss of effectiveness, respectability and credibility of the Court.

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<sup>16</sup>Supra note 5.

<sup>17</sup>Supra note 5.

<sup>18</sup>AIR 1973 SC 1461.

<sup>19</sup>AIR 1978 SC 597.

<sup>20</sup>(2007) 6 SCC 586, Para 30 and 31.