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Production of Courseware

**e-Content for Post Graduate Courses**



Paper : **ADVANCED JURISPRUDENCE**

Module : **AMERICAN AND SCANDINAVIAN LEGAL REALISM**



ज्ञान-विज्ञान विमुक्तये



## Component – I (A)

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Component – I (B)

Description of Module	
Subject Name	Law
Paper Name	Advanced Jurisprudence
Module Name/Title	American and Scandinavian Legal Realism
Module Id	Module
Pre-requisites	Background of legal positivism and legal formalism will give the necessary orientation to read this module.
Objectives	<p>The objectives of this module are as follows:</p> <ol style="list-style-type: none"><li>1. To place the context in which legal realism was started as a movement.</li><li>2. To discuss the meaning and scope of legal realism.</li><li>3. To discuss American Legal Realism and Scandinavian Legal Realism.</li><li>4. To introduce the criticism against legal realism.</li><li>5. To discuss Legal Realism from Indian perspective.</li><li>6. To trace the contributions of legal realism to the development of legal theory and the study and research of legal theory.</li></ol>
Keywords	Law, Positivism, Formalism, Legal Realism, American Legal Realism, Scandinavian Legal Realism, Rule Scepticism and Facts scepticism



## Component – II : (e-Module: Four quadrant)

### e-Text (Quadrant I)

#### AMERICAN AND SCANDINAVIAN LEGAL REALISM

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## AMERICAN AND SCANDINAVIAN LEGAL REALISM

*“The life of the law has not been logic; it has been experience”.*<sup>1</sup>

### INTRODUCTION TO LEGAL REALISM

Legal realism, also known as ‘Analytical Positivism’<sup>2</sup> is a response to the then prevalent notions of law presented by the legal formalists which focussed on what may be termed as the untrue claims of formalists. Legal realism is a theory of adjudication and of law. It is primarily concerned with judicial process by which law is interpreted, declared, expanded, overruled and at times enacted by judges. ‘Formalists’ were of the view that law is nothing but logic and legal reasoning is a science where the inherent logic will be identified by those who are trained in law and relevant techniques.<sup>3</sup> Formalism would want us to believe that law is independent and above politics and personal choices of individuals who deal in it. Positivist scholars argued that a given set of facts will lead to specific results irrespective of who decides it. For the conclusion is based on reasoning and logic which is same for everyone and therefore the results can not differ. According to formalists, the role of a judge is merely to interpret law as it is. In interpreting the law, the inherent logic guides the judges. Thus a judge deciding a case need not bother about the outcome. Nor he shall concern with the effect of the law, morality or otherwise of the judgement etc. He should not think of any scope for developing law further by laying down any proposition or a new legal principle. Nor he should give any preference or otherwise because of personal liking, disliking, favours etc.

Positivist approach will focus on the single result any judge is expected to reach as there is no scope for there being something different. Suppose that in a legal system capital punishment shall be imposed if any one takes the life of other person. Further suppose that someone’s act or omission resulted in death of another person who stands convicted for the act or omission. The judge has no option but to impose the capital punishment and ensure that the life of the convict is brought to an end. As long as the law is clear, the judge has to simply pronounce the judgement without considering any other factors. But the realists focus on what the judge(s) actually do in such cases and also why the judges do so. Such actions of judges, according to the realists, have great bearing on the question of what the law is. The realists, while differentiating law ‘as it is’ from law ‘ought to be’, point out the fallacies present in the explanation and views of the formalists. Yet realists like

<sup>1</sup> Oliver Wendell Holmes, Jr., *The Common Law* 5 (M.D. Howe, ed., 1963) as quoted in, *infra* n. 14 at 190.

<sup>2</sup> John D Finch, *Introduction to Legal Theory* 13 (2<sup>nd</sup> Indian Reprint, 2009).

<sup>3</sup> J E Penner and E. Mellisaris, *McCoubrey & White’s Textbook on Jurisprudence* 123 (4<sup>th</sup> ed., 2008).





positivists conclude that the link between law and morality is merely incidental. However, realists differ as to what the law is and more particularly question the determinate nature of law which the positivists would defend with all might. So realism developed as a criticism to positivist approach. Yet realism is, in so far as it answers what the law 'is', also a positivist school of law. According to realism the law is what the judges decide. Legal realism comprises primarily of two branches, namely, American Legal Realism and Scandinavian Legal Realism. Both Scandinavian and American realist traditions disagree with the descriptions of law as given by positivists. But the focus of Scandinavian realists differed from their American counterparts in few respects. While the American realists focus on the way law is made the Scandinavian realists are concerned about how the law changes its subjects and their dealings with each other and also with law as an institution. In respect of the shortcomings of the positivist approach of law both the traditions significantly differ from each other.

In order to understand the context in which the Legal Realism rose to significance in the USA, it is important to know the then prevailing dominant legal theories.

#### **LEGAL FORMALISM – A PRECURSOR TO LEGAL REALISM**

Legal formalism considers law to be a set of rules to be applied logically and without any need to factor in the moral or policy issues prevalent at any given point of time. Some scholars have argued that “we can see formalism as an expression, in legal reasoning, of Kelsen’s aspirations to set out a pure science of law.”<sup>4</sup> According to formalists, policy and other issues are considered only at the time of legislating by the Parliament or State Legislative Assemblies. But policy issues have no relevance once the law is made and especially for judging policies are of no use and judges are not supposed to consider the same. Because the law enacted is capable of clear conclusions.<sup>5</sup> All that is required for such clear conclusion is the application of logic and reasoning. Use of such methods will give a clear answer as to what the law is with respect of a given set of facts. For most part a classical positivist will argue that the law is given by sovereign, be it King or Queen or Parliament and that the codified law is to be found in statute books etc. This method of research is being emphasised by most of the modern authors who write on the legal research. We often look at the statute books first to teach in the class or if one happens to be a practising advocate to advise the clients. But Realists try to expound that there is more to law than what has been understood by the above mechanism of merely referring to statutes and law books. Because, the legal language is supposed to be open texture but not without reasons. For the nature of words and phrases are such

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<sup>4</sup> Scott Veitch *et al.*, *Jurisprudence Themes and Concepts* 118 (2<sup>nd</sup> ed., 2012, 1<sup>st</sup> Indian Reprint 2014)

<sup>5</sup> See, Ronald Dworkin, *Taking Rights Seriously* (1997)



that they cannot be any certain than the people who use it mean them to be.

A given word may be understood by different people differently. Also as time passes by the word may acquire new dimensions. Also law makers cannot foresee all questions the law requires to answer. Even if we assume the law makers could be very efficient and address all the questions through the law being made, it is impossible to guess any new question that may arise in future. Such challenge is very much real s the world around us where the law operates changes continuously and at times very swiftly. Hence, the open texture nature of law is in fact essential for the law as an institution to function effectively.

#### **HISTORY OF COMMON LAW IN USA**

History of common law in the USA is said to have began with the settlement of North American colonies in 17<sup>th</sup> century.<sup>6</sup> During the early period of 17<sup>th</sup> century the American legal system was quite complex due to various historical conditions and it has to deal with all kinds of laws prevalent at that time. Some authors have listed as many as 15 sources of common law:

- “1. The law of the Crown (*lex coronae*).
2. Parliamentary law and custom (*lex et consuetudo Parliamenti*).
3. The law of nature (*lex naturae*).
4. The common law of England (*Communis lex Angliae*).
5. Statute law (laws established by authority of Parliament).
6. Customary law (*consuetudines*).
7. Law of arms, war and chivalry (*jus belli*).
8. Ecclesiastical or canon law.
9. Civil law in certain cases-not only in ecclesiastical courts but in the Courts of the constable and marshall, and of admiralty.
10. Forest law (*lex forestae*).
11. The law of marquee and reprisal.
12. Merchant law (*lex mercatoria*).
13. Laws and customs of the Channel Islands.
14. The law and privileges of the Stannaries (mines).
15. The laws of the East, West and middle Marches.”<sup>7</sup>

In addition to the multiple sources of law listed above, it is also a fact that the US is a federal polity and has Constitution and statutes of various states and thus there being a possibility of differential codification and the consequent result of differential interpretation. It may also be noted that the codification movement added a number of new statutes to the books every year. So the judges were

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<sup>6</sup> Sir Edward Coke, The First Part of the Institutes of the Laws of England lib. I, cap. 1, §3 (1628) cited in Morris L. Cohen, The Common Law in the American Legal System: The Challenge of Conceptual Research, 81 LAW LIBR. J. 13 (1989)

<sup>7</sup> *Id* at 19.



increasingly required to interpret a range of statutes.

#### **SURGE IN CASES IN USA**

Through the history of Americas, there has been as much increase in total number of litigants and litigations as the statutes. The surge in number of cases filed resulted in the increase in strength of the judges to ensure that the cases filed are disposed. However the ever increasing litigants became a huge challenge for the judiciary. It resulted in the multitude of laws being applied in varied ways across the length and breadth of the country. This led to explosion of judgements and publication of various reports.

#### **DOCTRINE OF PRECEDENT**

The complexity further gets aggravated due to the fact that in common law system the judicial decisions are binding and precedents are a source of law. This is based on the assertion that the law should be based on values such as consistency, continuity and certainty. But it must be borne in mind that only *ratio decidendi* is binding while the *obiter dictum* is not. However, it is very difficult to ascertain in a given case what the *ratio* is and what the *obiter* is. Every judge has a liberty in disregarding what the predecessor has said in earlier cases, for instance, when the facts are not similar. In US, neither the *stare decisis* model nor the declaratory theory of judicial function is a full description of judicial process.<sup>8</sup>

#### **APPOINTMENT OF JUDGES IN USA AND THEIR ROLE IN DECIDING THE CASES**

In US the judges to the federal Supreme Court and Court of Appeals are elected. As such they have different political ideologies and the nomination of names for being elected to the court is proposed by the executive. Once appointed the judges continue to hold the post during good behaviour. It's seen as appointment for life. So a judge has the best job security and hence, is free to act. Therefore, a judge may well use the distinction between ratio and obiter in the doctrine of precedent to suit her approach. For it is observed by judges themselves that the distinction between *ratio* and *obiter* is one of convenience for a judge. When one is inclined to agree something may be termed as ratio while terming the same as obiter when there is no inclination of agreement.<sup>9</sup> Often it was pointed out that the judges reached decisions even before considering the authorities on record.<sup>10</sup> Many factors such as the social outlook of a judge, her political affinities, individual preferences, likes and dislikes etc played an important role in judging. But the formalists would tell us to believe none of this to be true. Thus the people started noticing the actual ground realities in the courts and the study of such realities was taken up by some teachers of law schools.

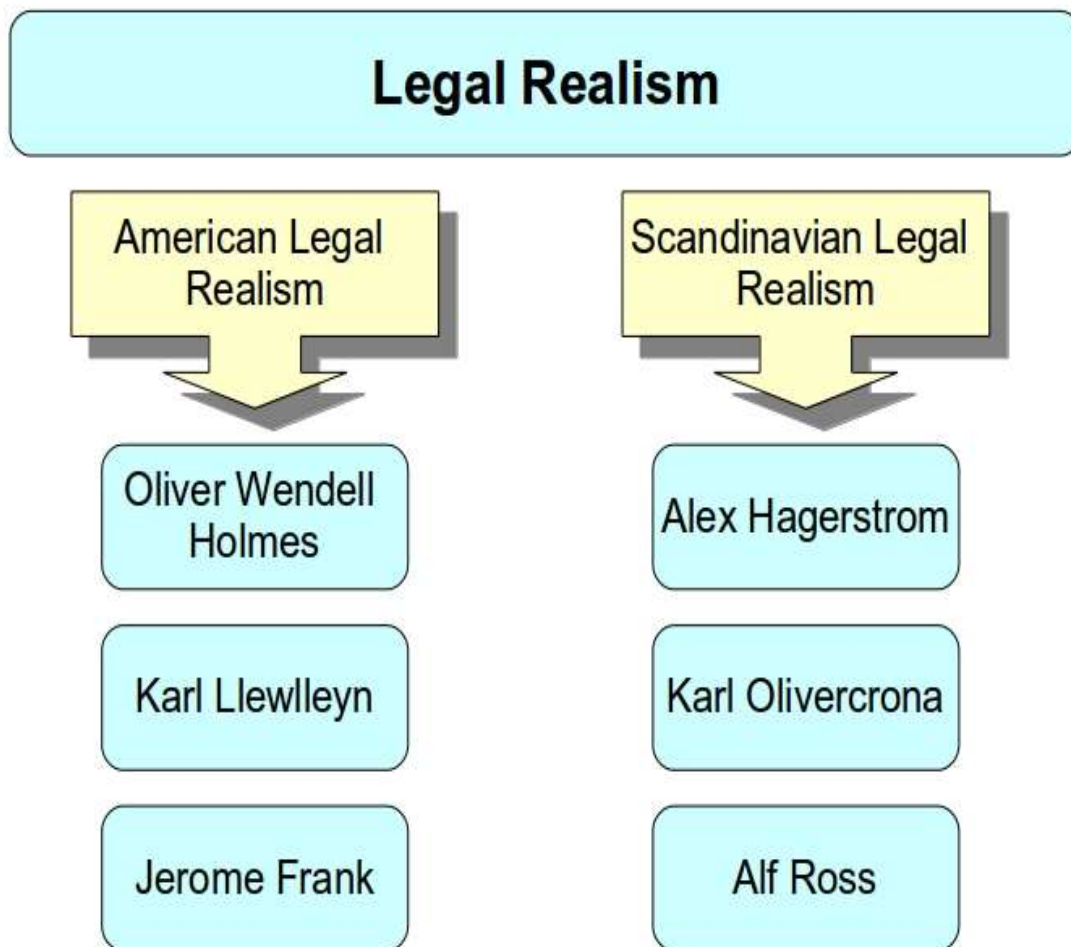
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<sup>8</sup> A Lakshminath, Precedent in Indian Law 3 (3<sup>rd</sup> ed., 2009)

<sup>9</sup> Dias and Hughes, Jurisprudence 81 (1964).

<sup>10</sup> Cross and Harris, Precedent in English Law 51 (4<sup>th</sup> South Asia ed., 1991; Reprint 2014)





### AMERICAN LEGAL REALISM

American legal realism has its origins in the US law schools and was a dominant discourse in 1920s and 1930s.<sup>11</sup> The rise of legal realism had coincided with the fact that in the beginning of the 20<sup>th</sup> century, there was explosion of sorts in filing of cases by common masses. This was encountered by the State with the increase in number of judges forming art of court system. This in turn led to far too many people deciding on varied sets of facts often having very less or no clue at all about what was done in other part of the country about a similar situation. Scholars including Felix Cohen, Herman Oliphant, Hessel Yntema, Jerome Frank, Karl Llewellyn, Max Radin, Oliver Wendell Holmes, Underhill Moore, and Walter Wheeler Cook, to name a few, have written extensively enriching the legal scholarship. Realists themselves argued that realism is merely an intellectual

<sup>11</sup> The early writings of American Legal Realism movement, although not acknowledged by the fellow realists in full, could be traced to the writings of Joseph Bingham. See "What is the Law?" Part I & II, 11 MICH. L. REV. 1 & 109 (1912).



movement and not a school of thought or set of theories of law.<sup>12</sup> But other scholars have argued it to be a set of theories having influence on the way the legal theory developed subsequently. Legal realism was said to be the most important indigenous jurisprudential movement in the United States during the twentieth century.<sup>13</sup> It had impact on the legal education, scholarship and law reforms in the US. Yet, perhaps the strength and weakness of the realism, in the words of Brian Bix, is that “[A]mong those writers who described themselves (or who were described by others) as “realists”, there was little by way of agreed views, values, subject-matter, or methodology”.<sup>14</sup> Notwithstanding the divergent views and positions taken, the realists “called into question three related ideals cherished by most Americans: the notion that, in the United States, the people select the rules by which they are governed; the conviction that the institution of judicial review reinforces rather than undermines representative democracy; and the faith that ours is a government of laws, not of men.”<sup>15</sup>

#### **ASPIRATIONS VS. REALITY**

For the American realists, the major focus was the way the cases were decided by the judges in real life as against what is propounded by the formalists. The determinacy of law is non-existent and is merely a construct of positivists which is completely misleading. For the language of law has not only inherent limitations but its meaning is imputed by the judges who decide cases. Therefore, the realists often were confronted by the fact that the judges have actually suppressed or gave a different colour to the established rules of law in deciding the cases. Law in the statutes were quite different from what was given by the judges in the courts. Because, the law simply cannot uniquely determine a result, the consequence being that the law leaves open to the judge or other decision maker a wide range of possible results to be based on nonlegal grounds.<sup>16</sup> There were many factors which influenced the judges in deciding a case in a way it was decided. This was understood to be 'law in action' as opposed to 'law in books'.<sup>17</sup>

#### **REALISM AS POSITIVISM**

The central tenets of positivism includes the question of what is law and that there is no link between law and morality. Realists also try to seek the meaning of law and believe that there is no link between law and morality. Like positivists realists are also concerned with what the law is rather than what the law ought to be. To this extent we can say that realism is a kind of positivism

<sup>12</sup> Suri Ratnapala, Jurisprudence 10 (2009) (Relying on observation of Karl Llewellyn)

<sup>13</sup> Brian Leiter, American Legal Realism in Golding and Edmundson, Blackwell Guide to the Philosophy of Law and Legal Theory 58 (2005).

<sup>14</sup> Brian Bix, Jurisprudence: Theory and Context 189 (2009).

<sup>15</sup> <http://cyber.law.harvard.edu/bridge/LegalRealism/essay1.htm> last accessed by 13.07.2015.

<sup>16</sup> Frederick Schauer's Forward to William Twining, Karl Llewellyn and the Realist Movement XI (2<sup>nd</sup> ed., 2012).

<sup>17</sup> McCoubrey, 123 See also, Roscoe Pound, “Law in Books and Law in Action”, 44 AMER. L REV. 12 (1910).



only.

But realists find fault with the positivists because the positivists “misrepresent the nature of law by their undue focus on its formal features”.<sup>18</sup>

#### **REALISM AS PREDICTIVE LEGAL THEORY**

Once the law in action was understood, the realists were concerned about the uncertainty it brings in the society for there was neither determinacy factor nor the law in action was predictable even using the other factors influencing the judicial decision making. However, a section of realists were of the view that the study and understanding of non legal factors influencing the judicial decision making would mean that the judges are sensitive to the societal needs and times as hiding behind syllogism often tends to lead to injustice. Because the realists were concerned about the predictability of meaning and scope of law, the realist movement was also known as “Predictive Theory”.

Predictive theory was concerned about the future development of law and the realists were of the opinion that finding the actual ‘law in action’ will help the future of law and by analogy the subjects as it will help the subjects to be certain about the relative outcome.

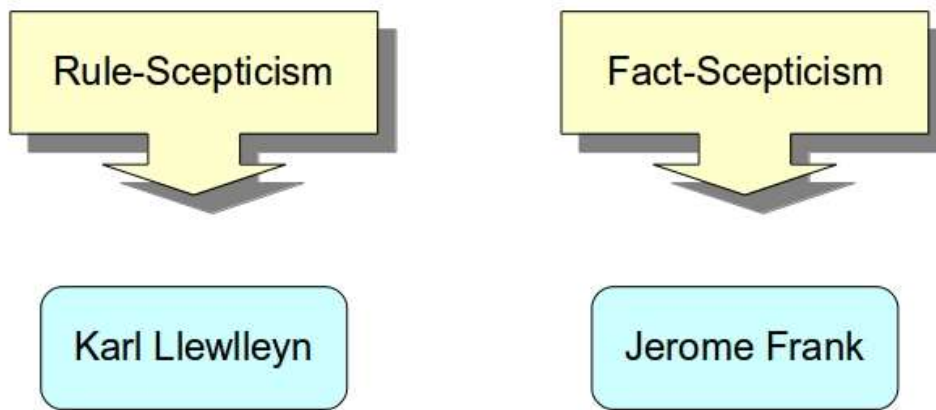
The early realists, for instance, Karl Llewellyn, advocated the use of empirical data to study the judicial outcomes.<sup>19</sup>

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<sup>18</sup> *Supra* n. 12 at 109

<sup>19</sup> William Twining, Karl Llewellyn and the Realist Movement 188 (2<sup>nd</sup> ed., 2012).

## American Legal Realism



American legal realism is further classified into 1) Rule Scepticism and 2) Facts Scepticism.<sup>20</sup>

### **RULE SCEPTICISM**

Rule scepticism refers to the fact that the rules are uncertain. A rule is capable of having more than one meaning. A common man is left confused to decipher as to what the rule really is. The rule sceptics, prominent among them were Karl Llewellyn, point out that the legal rules does not guarantee a particular decision of the court as the courts are deciding what will be just given the overall impression of the case a judge or bench of judges get out of a set of facts. The rule sceptics focus more on the appellate courts and their decisions on the rules and what they decide to be the contours of the rules in question. In other words, the legal rules do not necessarily determine the outcome of a given case as much as the will of the judges does. It is observed that the judges first decide the case in one way or other and then suitably use deductive or inductive method of reasoning to make the decision appear to be a logical and decided on principles.

### **FACTS SCEPTICISM**

Facts scepticism on the other hand focuses on the lower courts (i.e. trial and subordinate courts) and on they found that appellate courts do not or engage very little with the facts of a case. They don't

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<sup>20</sup> Jerome Frank, *Law and Modern Mind* vii (English ed., 1949), reproduced in Michael Freeman, *Lloyd's Introduction to Jurisprudence* 841 (9<sup>th</sup> ed., 2014).



bother if what were decided to be facts of the case by a subordinate court to be real facts of the case. As we know the persons associated at the subordinate or trial court level have lot of limitations, often prejudices, and bias of various kinds including personal bias, gender bias, caste bias to name a few.

For instance, if we go to any police station, police personnel associated with crime investigation are often over worked, ill trained, have got inertia, or they are simply inefficient or corrupt to the core. More often than not, we hear refusal on the part of the police to register the First Information Report. When it is registered, a copy of the same is not provided to the complainant. We do come across that in many of the criminal trials, the courts finally conclude that the accused persons are acquitted for want of proper and adequate evidence. It necessarily means that the prosecution has not been able to present correct facts of the case. Because the occurrence of an offence, be it theft, robbery, rape or murder, is real but the accused is getting acquitted. Let's assume for a moment that the accused was really innocent. It really means that the real offender has gone scot-free and roams freely intermixing with the society. It also means that the police and other law enforcing agencies together could not track and track the real culprit and book her for the 'real' offence that was committed.

The above condition, which is not far from reality, especially in a country like ours – vast and heterogeneous – illustrates the facts scepticism amply. For once if the facts on which the rules operate are wrong the rules alone cannot provide any justice, even in its limited sense. The whole judgement will be a mockery of the entire judicial process. The facts sceptics are really concerned with this situation only. Jerome Frank had pointed out that the facts are elusive in nature and hence the certainty of decisions “is, for most part, futile” and “its pursuit, indeed, may well work injustice.”<sup>21</sup>

### **SCANDINAVIAN LEGAL REALISM**

Unlike the American counterparts, the Scandinavian realists focused on the substantive philosophical doctrines from semantics and epistemology.<sup>22</sup> Scandinavian realism refers to the legal philosophical writings of scholars from Nordic countries which were not influenced much by the common law system. The law is largely uncoded in the Nordic region. Hence, the judges have a major role in deciding the cases. Scandinavian realists believed that the “law can be explained only in terms of observable facts, and the study of such facts, which is the science of law, is, therefore a

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<sup>21</sup> Michael Freeman, Lloyd's Introduction to Jurisprudence 842 (9<sup>th</sup> ed., 2014).

<sup>22</sup> *Supra* n. 13





true science like any other concerned with facts and events in the realm of casualty.”<sup>23</sup>

The interface between law and psychology was one of the major focus of the Scandinavian realists. In the process they articulated the fact that law influences the human behaviour in certain ways. Scandinavian realists consider the physical facts and the psychological effects of law.

### **CRITICISMS OF LEGAL REALISM**

Although it has been observed that the realist movement has contributed in important ways in the development of jurisprudence in USA and elsewhere, it has not been able to avoid criticisms. One of the primary criticisms is the fact that the realists themselves had taken contradictory positions and expressed views which could be reconciled only to a minimum level.

Secondly, the realists did not have the structure and in-depth analysis required for a theory of law to be developed out of their contribution. Thirdly, their indeterminacy was debunked by H L A Hart by explaining that the law remained open textured only at the edges and the 'core' law had a determined meaning guiding the judges. In fact it is scary to imagine a world without codified laws, however indeterminate they could be. For the world to be without law just because it has flexibility is very bad and will lead to more chaos. So it is important that we do not negate the codified law, rather build on the codified law after considering, amongst other, the views of the realists.

### **LEGAL REALISM IN INDIA**

As argued by the legal realists, the Indian judiciary has articulated policy issues openly and the judges have gone, in some cases, much beyond the text of the codified law. In fact the Apex Court has even appointed the committees to supervise the investigation and asked the committee to report to the court. Also, the court has even taken up enforcement of law under its direct supervision. It had even appointed specific persons to investigate a matter.

### **JUDICIAL ACTIVISM**

In India the remarks of realists can be found in what is called as judicial activism. Through judicial activism the Indian courts have actually illustrated that the judges considering non legal factors like policy issues etc. and developing the law in a wholesome manner is not only a possibility but also desirable as long as the judiciary restrains at an appropriate point and knows when activism crosses the fine line and becomes judicial overreach.

### **LIMITS OF JUDICIAL ACTIVISM**

The arguments of realists that the courts make law openly rather than under the cloth of logic has not materialised. Perhaps rightly so. Because, when courts will be free to legislate, the legislature

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<sup>23</sup> *Supra* n. 21 at 872.



will become irrelevant and the checks and balance between the two branches of the state which is so intricate in the constitutional scheme will be disturbed. For such checks and balance serve a very import purpose of preventing concentration of power. Moreover, the requirement of clothing the non legal factors with logic would require the judges to be very cautious in their approach and they will only fill the gaps in the existing legislation. And when required the legislature would be free to legislate on what was the gap filled by the courts. This would go a long way in ensuring development of law and the maintenance of fine balance between the authority of legislative and judicial branches of the State. Hence, the argument of realists that the courts should openly consider the non legal factors while declaring law is not acceptable. But should the courts take their hands off when the law is absent or has limited scope? The legal positivists may support such view. But justice demands otherwise.

#### **COMPLETE JUSTICE AND ARTICLE 141 OF THE CONSTITUTION**

One of the arguments of realists that the judges should make law has been acknowledged in the Constitution itself. Under Article 141 the Supreme Court is required to render complete justice and the court is duty bound to decide a matter and render justice. There have been a number of instances where the court has issues guidelines in the nature of binding law.<sup>24</sup> However, it may be noted that this power as well as the constitutional duty of the court is not instead of but in absence of law made by legislature.

#### **POST RETIREMENT APPOINTMENTS**

While the realists have pointed out the influence of many extra-legal factors in decision making of judges, in India we have an institutionalised factor – in the form of post retirement appointments in Tribunals and Other Constitutional Positions - which could play a role when a judge decides a case. From the realists' point of view, this is not a factor that is difficult to handle. Because, unlike other factors which are difficult to observe and almost impossible to prove, this aspect can be easily observed and can be tackled by institutionalising the relevant rules which prohibits and puts limitations on taking up of post retirement positions.

#### **CONCLUSION**

Legal realism has brought a new life to the study of legal theories. It tried to open up new vistas in legal research. In the words of Frederic Schauer, “Legal Realism is contested terrain. Whether we label the perspective legal realism or Legal Realism, or American Legal realism, there have been for at least eighty years serious disputes about just what Legal Realism is and what it claims. Moreover, the terrain is contested not merely because there are disagreements around the edges – that is, with respect to the borderline cases of what is or is not Realist perspective.”<sup>25</sup>

Realists have been concerned with the indeterminacy, subjectivity and the discretion of judges –

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<sup>24</sup> See, for instance, *D K Basu v State of West Bengal*, AIR 1997 SCW 610 and *Vishaka v State of Rajasthan*, AIR 1997 SC 3011

<sup>25</sup> Forward by Frederick Schauer in William Twining, Karl Llewellyn and the Realist Movement ix (2<sup>nd</sup> ed., 2012).



which is often used in unpredictable ways – in deciding the cases. The emphasis of realists on subjectivity of judges meant that they completely ignored normative nature of the law. If the judges are to make laws without their being a need to see what the legislature has to say on a subject, the judiciary will be setting new norms on regular basis. This in turn will lead to more chaos for want of benchmark to test if there was minimal or maximum deviation by the judiciary. Such testing is possible when and only when the law making power is exclusively with the legislature. In absence of such separation of powers between legislative and judicial branch of state, the realists themselves could not have had an occasion to analyse the laws and the judicial behaviour as they have done now.

But undoubtedly the realists have made important contributions to the development of legal theory. Let us see their contributions in some detail.

### **CONTRIBUTIONS OF REALISM TO LEGAL THEORY**

#### **STANDARDS OF JUDICIAL BEHAVIOUR – NEW INSIGHTS**

While the inherent nature of judging requires the judges to adhere to ideals, in recent past the standard of judicial behaviour has got the attention of the scholars. To ensure proper judicial behaviour, the standards of judicial behaviour has been openly debated and the standards are being consistently revised. Many common law jurisdictions now have codified the rules on judicial conduct which is expected to place appropriate standards of judicial behaviour. It is humbly submitted that the open debate on judicial behaviour which is quite contrary to the long held view of no or less discussions may be attributed partly to the legal realism.<sup>26</sup>

#### **INFLUENCE OF REALISM ON POSITIVISM**

Due to the criticism and analysis of realists the limits of positivism became clear. And the arguments of realists had influenced the positivists in important ways. In fact due to realists' influence H L A Hart restated his position – perhaps quite a toned down version of otherwise staunch positivist theory of law – in the following words:

The open texture of the law means that there are, indeed, areas of conduct where much must be left to be developed by courts or by officials who are striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance of both officials and private individuals by determinate rules which, unlike the application of variable standards, do not require from them a fresh judgement from case to case. This salient fact of social life remains true, even if the uncertainties may break out as to the applicability of any rule (whether written or communicated by precedent) to a concrete case. Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule producing function which administrative bodies perform centrally in the elaboration of variable standards.<sup>27</sup>

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<sup>26</sup> For a detailed account of judicial standards of conduct, please see, Shimon Shetreet and Shopie Turenne, Judges on Trial The Independence and Accountability of the English Judiciary 179 (2<sup>nd</sup> ed., 2013)

<sup>27</sup> *Supra* n. 12 at 97



This is markedly different from the original position of Hart where the role of judiciary was perceived by him to be very limited.

#### **LEGAL REALISM AND CONTEMPORARY LEGAL STUDIES MOVEMENTS**

All the present critical legal theories are having their origin in or the result of realist movement. Although we have seen that in early period the realists themselves were of the opinion that the realist approach is only an intellectual movement, “the realists’ more specific theoretical concerns and ideas crop up again in the 1970s, partly on account of the rise of neopragmatism in philosophy, with movements such as critical legal studies, feminist legal theory, and the economic analysis of law, all of which connected with or invoked legal realism – however much in different ways, and by placing different emphases – and even declared themselves its legitimate heirs.”<sup>28</sup> Surely this had led to the study of legal theory and its development form different dimensions.

#### **LEGAL REALISM AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS**

As litigants and common public understood the limitations of judicial process, the alternative dispute resolution mechanisms – negotiation, conciliation, mediation and arbitration – were adopted<sup>29</sup> and perhaps became much more acceptable for resolving private law matters. It gave a new beginning for it ensured that the relationships continued in future unlike what happens in case of litigation where one party wins while the other loses.

#### **EMPIRICAL LEGAL STUDIES**

Empiricism – rather the lack of it – which was just an observation of the early Realists, has now gained much ground in legal research. Empirical Legal Studies has now come to be acknowledged as an important methodology of legal research. Using empirical methods a lot new legal research experiments are being conducted.

#### **NEW LEGAL REALISM - THE ROAD AHEAD**

New legal realism refers to the “effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.”<sup>30</sup> “The distinguishing feature of the New Legal Realism is the close examination of reported cases in order to understand how judicial “personality,” understood in testable ways, influences legal outcomes, and how legal institutions constrain or unleash these influences. These inquiries represent an effort to test certain intuitive ideas about the indeterminacy of law, and to implement the (old-style) realist call for empirical study of how different judges decide cases by responding to the “stimulus” of each case.”<sup>31</sup>

<sup>28</sup> Gary Minda, Postmodern Legal Movements 59 (1995).

<sup>29</sup> Michal Alberstein, ADR and Transitional Justice as Reconstructing the Rule of Law, 2011 J. Disp. Resol. 127, 135 (2011).

<sup>30</sup> Thomas J. Miles and Cass R. Sunstein, The New Legal Realism, 75 Uni. Chicago L. Rev. 831 (2008).

<sup>31</sup> *Id.* at 834.



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