
LEGAL REALISM: THE ROLE OF JUDGES IN SHAPING THE LAW

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ABSTRACT

There are two distinct groups of theories of adjudication, or views on how judges should or do resolve cases, in the field of jurisprudence. Legal formalism and legal realism are two theories that are believed to have a lengthy history in the field of legal theory. Formalism theory asserts that all that goes into judicial decision-making is mechanical deduction.

The Theory of Realism asserts that judges base their decisions more on the case's underlying facts than on the relevant legal principles and justifications when it comes to adjudication, which embraces the descriptive thesis. The reason it is called realist is that the major premises of legal reasoning may be changed by judges in response to shifting views of public policy. The necessity to maintain a fair level of legal stability has an impact on the rate of change, particularly the rate of change in adjudication. This study also discusses how the Indian Court System has embraced or rejected the doctrines of realism and formalism.

A jurisprudential method known as legal realism examines how judges shape the law, highlighting their discretionary power and social significance. This abstract examines the crucial role that judges play in determining the course of legal proceedings, going beyond simple interpretation to actively shape legal evolution. Legal realists assert that judges have a substantial influence on the development of the law because of their personal convictions, the social environment, and policy considerations.

The idea of entirely objective legal interpretation is called into question when case decisions are examined through a realist lens, which highlights the subjective aspect of judicial thinking. Understanding the dynamic interaction between judges and the law is crucial for understanding the complex structure of legal systems as legal realism gains traction. The essence of legal realism is captured in this abstract, which explains the complex and varied ways in which judges impact the ongoing evolution of the legal system.

INTRODUCTION

It is common to believe that law is solely the product of the legislative and that the court serves it by rendering judgements. By revealing the "realist" element of how the law is when applied, the study of jurisprudence completes our comprehension of the law.

The Realist School of Jurisprudence holds that judges have the power to influence how laws are created and how they are applied. American realism had been attempting to penetrate the core of the Indian court, notwithstanding the primacy of the Indian Constitution.

The Realist School of Jurisprudence considers judges to be the primary source of law among all schools of law. Legal realism is only a subset of the sociological perspective, according to academics: hence, it shouldn't be formalised into its school of law.

The left arm of the functional school is sometimes referred to as the Realist School of Jurisprudence. Since it is less interested in the purposes of the law, the realistic school differs from the sociological school. American and Scandinavian legal realism are the two primary trends within the realist school of law Critical Legal Studies in America It may be claimed that American realism was the root cause of the trend, which first appeared in the 1970s.

Instead of Nordic realism, the researcher will concentrate on American realism. Also, he won't be giving the American Critical Law Studies Movement any attention. Friedmann claims that Oliver Wendell Holmes, Grey, Cardozo, Karl Llewellyn, and Jerome Frank were the intellectual forefathers of the realist movement in America. They emphasised the practical and realistic study of law, not as it is written in statutes or enactments but as it is interpreted and established by the courts in their rulings. The realists are interested in studying law as it operates, which entails looking at the social elements that, on the one hand, create laws and, on the other hand, determine how those laws will affect society.¹

Justice Oliver Wendell Holmes, Jr. frequently clashed with academics who viewed the law as a system of logic, a conclusion drawn from moral precepts, or an accepted set of principles. He was a pioneer of the Realist School of Jurisprudence and described the law as a "good reason for a bad man" because, in his view, a bad guy isn't interested in axioms or deductions.

Instead, he wants to know what the courts are likely to do in practise. Justice Holmes believed

¹ FRIEDMANN, LEGAL THEORY 293(5th ed.1967).

that the law is nothing more grandiose than predictions of what the courts would do, as a result, the law is unclear until the court makes a judgement. According to Justice Holmes, the practice of law has not been founded on logic but rather on experiences.

LEGAL REALISM IN INDIAN CONTEXT

According to positivism, the legislature serves as a vehicle for the state's will to be expressed through the legislation. Like positivist theories, theories of legal realism view the law as a manifestation of the state's intent, but they do it via the courts. Like Austin, realists view the law as the dictate of the sovereign, but unlike Austin, realists view the court as the sovereign rather than Parliament.²

The law in India during British colonial authority was oppressive and detrimental to the socio-economic requirements of the Indian populace. Sanctions were inflicted on Indians in the strictest Austinian meaning on the pretext that "justice is according to law." The laws in force at the time granted several exemptions and unique rights to the British citizens of India. Therefore, there existed two laws: one for the king and one for the subject.

The tide of nationalism and intellectual awakening led to repeated calls for civil liberty and fundamental human rights, but these demands went unanswered. Under British Colonial Power, the people's repression, persecution, and exploitation persisted unabatedly. Lawyers and judges mechanically implemented the law without taking into account the perceived requirements or necessities of the populace. The precedent theory was strictly followed. With the end of British rule in India, the Constituent Assembly's constitution, drafted under the leadership of Dr Ambedkar marked the beginning of the period of Indian constitutionalism. Dr Ambedkar constantly cautioned the Constituent Assembly during arguments that because British authority had ended in India; we could no longer use foreign control as an excuse for future mistakes.³

A distinct chapter on fundamental rights, which includes individual freedoms and rights, and a chapter on directive principles for state policy, which includes social rights, was inserted into the Indian Constitution, which went into effect on January 26, 1950. During the early years of post-Independent India, the Constitution of India has been seen as Grundnorm in the Kelsonite

² P.J. FITZGERALD (ED.), SALMOND ON JURISPRUDENCE (12th ed. 1966).

³ THE INDIAN LAW: DYNAMIC DIMENSIONS OF THE ABSTRACT 5.

means that all legislation and enactments derive their legitimacy from it, and the Constitution's legitimacy rests on the Indian society as a whole, regardless of circumstances.⁴

It is important to keep in mind that post-independent Indian positivism varies from Austinian positivism in that the former aims to create a harmonious link between is and ought. This may be observed in the unified approach used by the Supreme Court in situations where basic rights and guiding principles of state policy conflict, where we see a synthesis of justice and morality.⁵ The SC has occasionally taken a strict positivistic stance. The Apex Court ruled in the *Re, Kerala Education Bill* case refused to look past the language of the constitution and did not see it necessary to take sociological imperatives into account that prompted the legislature to establish this statute.⁶

Corresponding to this, the court determined in *Tilkayat Shri Govindlalji Maharaja v. State of Rajasthan* holds that a ruler's will is the law by which all of his subjects are legally bound. The Influence of Austinian Positivism can be seen in the *Habeas Corpus Case*, in which the state suspended fundamental rights during an emergency, and the Apex Court upheld State's arbitrary powers during the emergency while ignoring the demands of social justice in the Preamble, the Fundamental Rights, and the Directive Principles of State Policy. Nonetheless, Austinian positivism's dominance is now steadily waning, and the law is increasingly viewed in India as a tool for bringing about social change for the benefit of society.⁷

In recent years, India has seen an increase in judicial activism and public interest lawsuits. New avenues for interpreting the law in social contexts have been made possible by the emerging trends in and regarding public interest litigation. A new social order with a focus on social justice has been established using law as a vehicle of social transformation. According to Judge P.B. Sawant in *Indira Sawhney v. UOI*, the Indian constitution is fundamentally a political constitution that must be construed to fit the perceived needs of the time.⁸

Several welfare laws were passed after India gained independence, and the Supreme Court has occasionally claimed that the facts of a given case determine the law when it comes to social welfare laws. Being on the left side of the functional school, the realism school of law has so well established itself in India since independence. While the judiciary is thought to be the least

⁴ *Keshavanand Bharti v. State of Kerala*, AIR 1973 SC 1461.

⁵ *Minerva Mills v. UOI*, AIR 1980 SC 1789.

⁶ *Re: The Kerala Education Bill, ... vs Unknown*, AIR 1958 SC 956.

⁷ *A.D.M. Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

⁸ *Indira Sawhney v. Union of India*, AIR 1993 SC 447 (634)

powerful branch of government, the Supreme Court is regarded as the guardian of the Indian Constitution. Judges must maintain their innocence like Caesar's wife for democracy to flourish, and for the rule of law continues to be upheld, as it was noted in the case of Krishna Swamy v. UOI, the judge serves as a living oracle, articulating the perceived needs of the moment while operating in the harsh light of realities. Hence, robust judicial accountability is very necessary. Also, situations have been reported where the line between judicial activism from judicial overreach or judicial adventurism is blurring, which is not a very positive indicator.

INDIAN JUDICIAL SYSTEM AND LEGAL REALISM

In a statement that would shock Indian jurists, R.W.M. Dias writes in a nation like Britain, which has maintained relative stability, it has been simple to uphold the analytical positivist ideology, which separates the study of law from social, moral, and other value issues. But, jurists, much alone judges, are forced to make deliberate judgements about which direction to steer if a shipwreck to be averted when tensions start to roil the very surface of national life.⁹

The theory of separation of powers assures that no authority has absolute and unrestricted power, which is a crucial prerequisite for democracy to exist. Because of this, various entities charged with carrying out various responsibilities related to the government are given varying degrees of authority in democracies. The legislative, executive, and judicial branches of government are the three most crucial. Despotism is always a possibility when all three powers are vested in one body.

The State's legislative branch is in charge of passing laws, while the executive implements them, and the court upholds them. For these organs to work properly, it is crucial to prevent interference between them. Although there is no explicit mention of the theory of separation of powers in the Indian Constitution, it may be concluded from its provisions that it exists. However, the Indian Constitution establishes the Supreme Court of India as a watchtower over all the significant buildings of the other branches of the State, serving as a sentinel to monitor whether those branches are carrying out their duties by the law and the Constitution, the latter of which is the supreme.¹⁰

⁹ Supra note 3.

¹⁰ INDIA CONST. art. 129.

With a written constitution, India is a democratic nation. For it to be true that democracy is a government of, by, and for the people, it must also be true that in a democracy with a written constitution, the written constitution, not the Parliament, is paramount. In the case of India, the Constitution of India embodies the will of the nation's citizens, as it was, they who declared the Constitution of India to be the supreme law of the land.

One could debate whether the will of the people forming the government in a democracy with a written constitution is supreme because the Parliament is made up of the elected representatives of the nation and can amend the written constitution of that nation, or whether the will of the people enshrined in the written constitution of a democratic state is supreme. With all due explanation, the latter is paramount in India since our written constitution includes the fundamental structure theory, which limits the Parliament's ability to alter the Constitution and states that the ability to amend does not confer the ability to destroy.

It is a myth that the court is not the voice of the people since it is not elected. The Constitution is the supreme law of the nation, and it established the judiciary and gives it the authority to declare legislative and executive actions to be unconstitutional if they violate the citizens' protected rights. The courts function on behalf of and in the name of the people as the protectors of the Constitution.

The Indian judiciary should be highly commended for the judicial activism it has demonstrated over time as and when the need for it has arisen. The advocates of judicial activism believe that a strong court is fundamentally required to defend the rights, interests, and entitlements of weaker groups in society against those who could be driven by foolishness or injustice.

Legal Realism may be regarded from an Indian perspective via the lens of the Constitution's grant of judicial review authority to the Indian Supreme Court. Yet it's important to draw a line between judicial activism—the actual use of the judicial review power—and judicial over-activism, often known as judicial adventurism or overreach.¹¹ The judiciary's job is to protect the utmost perfection of the Indian Constitution, which necessitates the use of judicial restraint or balancing when needed to maintain the proper balance between the three branches of the government—the legislative, the executive, and the judiciary. The judiciary, which is charged with upholding the Constitution, is not supposed to interfere with the authority granted to the

¹¹ State of U.P. v. Jeet S. Bisht, (2007) 6 SCC 586

legislative and executive branches of government, unless such activities are inconsistent with the structure of the Constitution, since doing so might undermine the *Suprema Lex*.¹²

Hence, judicial activism is not an anomaly but rather a crucial component of a Constitutional Court. Courts must distinguish between judicial activism, judicial populism, and judicial excessivism in the spirit of realism. To avoid becoming counterproductive and damaging the Court's efficacy, respectability, and credibility, judicial activism and PIL jurisdiction must only be used within institutional bounds and while keeping in mind practical considerations and reasonable constraints. It is true that in a society like India, where there is great diversity, a gap between the rich and the poor, caste divisions, and a history of feudalism, the court should use a liberal interpretation when addressing issues of social and economic justice and human rights, avoiding what has been referred to as the austerity of tabulated legalism¹³, keeping in mind that the letter kills, but the spirit gives life.¹⁴

LEGAL REALISM AND THE STATE'S JUDICIAL FAILURES

The pragmatic philosophy, which has its roots in America, is reflected in the realist approach. It was said that pragmatism was a new label for certain antiquated methods of thinking. The philosophers rejected the idea that law was an abstract idea and instead attempted to build it on facts and deeds.¹⁵

The Supreme Court serves as the protector of the Indian Constitution, but only within the parameters established by the Constitution of India. This is true in the realist sense of the term. As a result, legal realism in India is only partially realised since the courts lack absolute discretion. The Constitution of India is the supreme law and must be upheld at all times since it represents the people's will, which is the foundation of the democratic system of government. Since legal progressivism depends on knowledge and clarity of thinking, as well as the conviction of the top echelons of the judiciary, courts in India are allowed to operate as realists as long as they uphold the Constitution's spirit. Therefore, it is believed that courts must act with enthusiasm.

When it comes to protecting the Constitution and advancing constitutional thought, the judiciary in India is viewed as a pseudo-realist institution. However, what if the judicial branch

¹² S.R. Bommai v. UOI, (1994) 3 SCC 1.

¹³ Minister of Home Affairs v. Fisher, (1980) AC 319.

¹⁴ People (D.P.P) v. O'Shea, (1982) IR 384.

¹⁵ Riggs v. Palmer, (1889) 115 N.Y. 506.

of the state has flaws of its own. For example, what if the public witnesses that the legislative and executive branches of the government are disobeying the Constitution by engaging in favouritism, nepotism, and corruption.¹⁶

The foundation and servant of democracy is the judiciary. The entire democratic system would come to an end if people lost trust in the justice delivered by a court of law. Progressive judicial activism was observed in India as opposed to regressive judicial passivism. Its crowning achievement came when, in the post-emergency era, the Court acted to increase access to justice, creating more innovative affirmative processes and dynamic remedies that would enable the marginalised, excluded, and disabled masses to approach the court directly or through an NGO proxy, thereby requesting relief for a large group of impacted people who felt aggrieved, not as individuals who had been injured but as persons with concern.¹⁷

Courts are for realists, and Parliament is for Positivists. For a nation like India, where it is clear that the other two branches of the government have been acting against the interests of society as a whole by abusing their various public posts for personal gain, instances of corruption in the court are very degrading. The courts in India use realism to uphold the supremacy of the Indian Constitution to advance constitutional ideas, not to create their supremacy.¹⁸

According to the Indian Constitution's constitutional design, the legislative branch, the executive branch and the judicial branch are the three pillars of the state and should assist one another in the event of any moral or fundamental crisis. Who will evaluate the judges, one wonders?

Judge V.R. Krishna Iyer urged the lawmakers to bring glasnost and perestroika to the legal system. There cannot be judicial absolutism and tyranny in the name of independence. The so-called Collegiums were created by the judiciary, and the personality cult syndrome's lack of accountability would corrupt even the most upright people. This is a democracy, not a robed dictatorship with the SC granted papal-like infallibility for just administrative duties. Judges who are corrupt anti-socialist "brethren" pose a threat because they lack accountability.

¹⁶ UOI v. Sheth, (1977) 4 SCC 193.

¹⁷ Haridas Das v. Usha Rani Banik, (2007) 14 SCC 1.

¹⁸ Vishwanath v. E.S. Venkataramiah, (1990) Cri LJ 2179 Bom.

REVIEWING THE REALIST SCHOOL OF JURISPRUDENCE'S ARGUMENTS IN LIGHT OF INDIA: (CRITICISM)

It is hardly accepted that American realism had a significant influence on legal positivism. Legal positivism was shaken out of its complacency by American realism, which challenged accepted notions about the nature of norms. It should be kept in mind that Holmes revealed the flaws in the command theory of law much earlier than Hart. Legal positivists like Hart and Raz were obliged to separate themselves from "formalism" and reevaluate the nature of legal language and judicial discretion as a result of realism, which caused them to reevaluate legal positivism as a treatise. It may even be true to claim that Holmes made Hart conceivable.¹⁹

The realism school of law, however, has not been without criticism throughout the years. Some of these criticisms include:

- Legislation is deemed to be in force as soon as it is passed; it is not necessary to wait for it to be upheld by the courts. Legislation is recognised as the law by courts; it is not the law only because of judicial recognition.
- The judge is only asked to interpret a small portion of the law. One cannot claim that a law is not a law if interpretation is never permitted.
- The law promulgated by realists cannot exist in a totalitarian society because courts are not free to interpret the laws set out by the ruler.
- There is confusion between what is stated in the law in black and white and how the law is to be construed as such by a court of law leads to the notion of "legal realism." When legislation or statutory provision is subject to more than one interpretation; the role of Judges is strictly confined to providing guidance. Judges must choose an interpretation that accurately reflects the legislative meaning.

Insofar as India is particularly bothered, Indian jurisprudence does not follow the realist philosophy in the proper sense since it emphasises the practical application of the law and links it to the reality of Indians' daily social existence. This is so that courts can consider people's social and cultural backgrounds while deciding cases, which is permitted under the Indian Constitution.

Although judges in India enjoy a great deal of judicial discretion, they do not have absolute

¹⁹ SURI RATNAPALA, JURISPRUDENCE 108 (ed. 2009).

power over the creation of laws. The rules of justice, equity, and good conscience, as well as legislation and precedents, are essential components of the Indian judicial system. Although Indian law rejects the idea that only laws produced by judges are legitimate, it does acknowledge the crucial role that judges and attorneys play in the creation of laws. The Supreme Court has been able to carry out the socioeconomic provisions of the Constitution's mission thanks to the authority of judicial review and the doctrine of overruling. The notion of precedent, which is not acceptable to the realist school, also plays a significant part in Indian justice.

In India, judicial institutions serve a sacred role in mediating intra-party conflicts as well as serving as a check against the competing forces and pulls at play in society. The Constitution gave rise to courts of law, which serve as tools for realising the principles of government established in it. Their role is to administer justice following the law, and in doing so, they must take into account the hopes and aspirations of the populace because, in no uncertain terms, this nation's citizens have vowed to secure social, economic, and political justice in addition to equality and dignity for all.

In India, it is becoming increasingly clear that judges must use their discretion when using their innovative powers to preserve the delicate balance between the laws passed by the state and Federal legislatures, and the spirit of constitutional superiority. This is because the great Generalities of the Constitution have different meanings for different ages. Turning India become a nation with a stable government, one with a long history of justice, and one where freedom gradually spreads from precedent to precedent is another task.

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CONCLUSION

When we talk about democracy, we don't just refer to a "free marketplace of ideas"; we also make claims about the fact that no freedoms are absolute and that all freedoms must be subject

to a range of reasonable restrictions, including those related to constitutional principles, public order, morality, and national security.

The Indian Constitution is kept safe by the Indian judicial system. The judicial mindset changed in the latter part of the 1970s and into the 1980s. A new constitutional jurisprudence is being developed in light of shifting social, economic, and political factors thanks to the *Keshvananda Bharti Case* [AIR 1973 SC 1461], which definitively affirmed judicial primacy in constitutional interpretation issues. The *Maneka Gandhi Case* [AIR 1978 SC 597] later altered the whole legal framework of Article 21 of the Indian Constitution. Public Interest Litigation (PIL) was a significant breakthrough in the early 1980s that loosened the restrictions imposed by the theory of locus standi. The Supreme Court weakened the locus standi theory and departed from traditional ideas of standing in judgements like *S.P. Gupta* (1982) and *Bandhu Mukti Morcha* (1984).

The Indian court system has gradually realised that achieving justice involves more than just rules; it also requires a fair procedure. This calls for three things: competent and independent legal profession; an impartial, independent judicial system; and procedural fairness, a key component of a just legal system. This calls for the assurance of a fair trial as well as access to legal counsel, support, and representation. Given that the Indian Constitution is a living instrument, and India has experienced a change in judicial attitude throughout time, from a positivist to a realist perspective.

As a result, Indian law cannot be confined to the rigid confines of Legal Positivism or Legal Realism. Today's system is faced with a single ongoing challenge rather than a theoretical conundrum: how to implement the never-changing principles of the rule of law within the bounds of the hallowed constitutional architecture.