



FACULTY OF JURIDICAL SCIENCES

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Realist School of Jurisprudence

Unlike the sociological school, legal realism is mostly unconcerned with the ends of the law. The movement is known as the “realist” movement for it aims to study the actual workings of law and rejects the traditional definitions which regard enacted the law as the only true law.

One of the most important aftermaths of the Industrial Revolution was the increased tendency towards socialization amongst the people. It was recognized that to ensure justice, it is important to strike a balance between the overall welfare of the society and the protection of individual liberties. Thus, it was opined that the society is an important element in an individual’s life and vice-versa. This can be said to be the basis of the various sociological approaches towards the study of law. One such sociological approach is legal realism. The realists study the judgments given by the courts of law and even consider the human factor involved while delivering the said judgments.

It can be divided into two schools of thought- American Realism and the Scandinavian Realists.

American Realism

The ultimate aim of American realism is to reform the law. They recognize the fact that the same cannot be done without understanding it. They are interested in studying the law “as it is” and not “as it ought to be”. This is something that they have in common with the positivists. Furthermore, they seek to understand the law by taking into consideration the sociological factors. They adopt an empirical approach to the study of law. The American realists put too much emphasis upon the role of judges in law. According to them, the law is what the judges decide through their judgments. This particular tendency is due to the fact that judges have played an important role in the development of the American Constitution and subsequent laws. American realism studies the human factors involved in law. In fact, it strongly emphasizes the importance of studying such human factors. Some of the noted American Realists are as follows:

Gray (1839-1915)

John Chipman Gray is considered to be one of the “mental fathers of realist movement”. Although known to be an analytical jurist, Gray considered the judiciary, and not the legislature, to be the most important source of law. He admitted the crucial role played by “non-logical” factors, such as personality and prejudice of the judge while delivering the judgments. Gray is complimented for laying down a solid groundwork upon which many of the most important ideas of American Realism are currently resting.

Justice Holmes (1841-1935)

Oliver Wendell Holmes J. is famous for his “bad man’s theory” which looked at law from a criminal’s perspective. Law, according to him, is meant for the potential criminals or the “bad man”. He took note of the various definitions of law based on principals of ethics, morality and natural law and rejected all of them stating that the bad man only cares about what the courts will do if he commits certain acts. Such predictions or “prophecies” regarding the actions of the courts is known as the law. He believed in the complete separation of law and morals. He was interested in studying law “as it is”.

Legal history, according to him, should only be studied to analyze the relevance of certain historical laws in contemporary times. His definition of law as ‘prediction’ resulted in the increased importance of litigation and lawyers in the field of law. His approach towards law can be said to be empirical and pragmatic. Through his literary works and the writings as a judge of the Supreme Court of America, Holmes brought about a significant amount of change in the overall attitude towards the law.

Jerome Frank (1889-1957)

Frank insisted upon the existence of two groups of realists. While one group is sceptical about legal rules providing uniformity to law, the other group is sceptical about the establishment of facts before the trial court, in addition to the scepticism about legal rules. Frank identified himself as a member of the second group. According to him, law involves the application of certain rules of law to the facts of a case by the judge. He expresses his scepticism about the accuracy in the finding of a fact by a judge and remarks that, in most

judgments, it is difficult to distinguish between the facts found by the judge, the rule of law applied to them and the subsequent combination of both, the facts as well as the rules.

Frank emphasizes the uncertainty of the law. Precedents and codified law, according to him, are made under the false belief that law should be certain. He was of the opinion that judges and lawyers should accept the fact that law is uncertain and should not strictly adhere to the precedents and codified laws. Such strict adherence to precedents and codifications in order to ascertain the law only provides a false sense of security to them and is actually quite harmful and dangerous.

Carl N. Llewellyn (1893-1962)

Llewellyn recognized law as an institution. According to him, law is an extremely complex institution in society. It owes its complexity to the use of a number of precedents and ideologies in the formulation of legal principles. He further establishes the concept of “law-jobs” wherein law has two basic functions in society:

- to facilitate group survival;
- to engage in a quest for justice, efficiency and richer life.

He further expounded upon the achievement of such “law-job ends” using “legal tools”. He established the concept of “craft” as a minor institution. “Craft”, according to him, refers to the skill and “knowhow” among a group of specialists who perform certain jobs within an institution. Such group or body of specialists continuously develops its skills from time to time and then passes them over to the next generation through education and practical example. He described the legal profession as a profession involved in the practice of such crafts with the juristic method being the most important one amongst them.

Scandinavian Realists

Professor Dias is of the view that there is no “school” of Scandinavian Realism since the people belonging to such a group have certain differences amongst themselves. The approach of the Scandinavian realists towards law is more abstract and philosophical, unlike that of American Realism. It strongly criticizes the metaphysical ideas of law. Scandinavian realists have played an important role in rejecting the ideas of the school of natural law. Some of the noted Scandinavian Realists are as follows:

Hagerstorm (1868-1939)

Axel Hagerstorm is regarded as the spiritual father of the Scandinavian Realists. He was a philosopher who strongly criticized the metaphysical foundations of law. Much of his work is a critique of the errors in juristic thought and writing. His analysis is conceptual, historical and psychological and not empirical, like that of American realists. He reviews the attempts made by various jurists to find empirical foundations of rights and rejects all of them. He stressed upon the psychological significance of right.

According to him, “One fights better if one believes that one has right on one’s side.” He extensively studied the Greek and Roman law in his quest for the historical basis of rights. He believed that just like classical law, modern law is also ritualistic in nature. According to him, the relation between law and ritual is just like that between liquor and its container (bottle). One cannot drink the container, but, it is necessary in order to be able to drink the liquor. Hagerstorm rejected the ideas of good and bad. He denied the existence of such objective values.

Olivercrona (1897- 1980)

Law, according to Prof. Olivercrona, does not require any specific definition. He sought to investigate the law and not the nature of law since such an examination of the nature of law would require an assumption to be made with regards to what it is. He insisted on examining facts rather than making assumptions. According to him, the law has a “binding force” so long as it is valid. The moment it loses its validity, it loses its binding force.

He rejected the ideas of “binding force behind the law” and “the” binding force of law. He further stated that such binding force is not vested in the “will of the State” or the unpleasant consequences if the law is broken. The binding force is present in its validity and the moment it is declared as invalid, it loses its binding force. He further believed that the term “right” is a hollow word and legal problems can be solved without using the concept of rights.

Ross (1899- 1979)

Alf Ross was a Danish jurist who deliberated upon the normative character of law. He distinguished between normative laws and descriptive laws which are found in the books. He did not believe in interpreting the law in

the light of social facts and expressed concerns regarding the validity of the law. Like all legal realists, his ideas too are concerned with legal orders and the position of the courts.

A.V. Lundstedt

Lundstedt rejects the idea of justice and all the normative aspects of the law. The idea of justice, according to him, is purely metaphysical and regarded it as pure fantasy. He believed that only physical facts should be considered in the study of law. Thus, he dismissed the concepts of rights, duties, legal rules, etc. as unrealistic. The idea of laws being made to achieve justice was rejected by him and he regarded such laws made on the idea of natural justice as 'material law'.

Critics have argued that the overall approach of the realists, in general, undermines the importance of statutory principles and rules. They further argued that the realists have given undue amount of importance to litigation and the human factor in law and have been ignorant of that part of the law which does not even come before the courts for adjudication purposes. All in all, legal realism has greatly contributed to the evolution of jurisprudence. Julius Stone describes it as a gloss on the sociological approach and Allen goes on to describe it as an "avatar on the sociological jurisprudence."

SELF-TEST QUESTIONS

Who is known as is called Darwinian before Darwin	Savigny	Edmund Burke	Aust
Theory of Volksgeist (Spirit of the People)	Savigny	Edmund Burke	Aust
Who known as Social Darwinist.	Sir Henry Maine	Edmund Burke	Aust
Theory of Status to contract , contract to status	Sir Henry Maine	Edmund Burke	Aust
Who known as Father of British Historical Schoool	Sir Henry Maine	Sir Henry Maine	Edm Burk
Theory of Social Utilitarianism	Rudolph Von Ihering	Sir Henry Maine	Edm Burk
Interest Theory	Rudolph Von Ihering	Sir Henry Maine	Edm Burk
Theory of Norms of Organization or Living Law	Eugen Ehrlich	Sir Henry Maine	Edm Burk
Theory of Social Solidarity	Leon Duguit	Sir Henry Maine	Edm Burk
Theory of No right, Only duty	Leon Duguit	Leon Duguit	Sir H Main