Page 1976 - 1988

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 4

2020

Jurisprudential Aspect of Legal Realism and Critical Analysis of the Realist Movement in America

VIJAY AWANA[1]

ABSTRACT

Law is not just about reading and applies the written word as it is. Understanding law requires the interpretation and application of legal rules and doctrines as well. Hence, there arises a need to introduce a sane approach to problems of and about law. The sane approach would be purpose of the facts and circumstances of each case and not mechanical application of law. Looking at appliance of law from this perspective can be called a 'realist' interpretation of law. Thus comes up the question that what part of judicial decision making is based on legal reasoning, which can also be put as the facts earn points in a case or are the black written word is the binding force. Being realistic is the approach to solve any problem one says. The theory of realism can be said to be born out of this simple thought.

It was around 1920s that some American Jurists notably Holmes, Cardozo and Gray raised their voice against legal conceptualism and stressed on the study of law as it actually operates and functions. They emphasize on functional and realistic study of law not as limited in the statute but as interpreted by the Courts in their judicial pronouncement. They were called Realists and their legal approach has been called Realist School of jurisprudence. Though it also is pertinent to mention here that some jurists refuse to accept realism as a separate school of jurisprudence and hold that at best it may be called as a branch of sociological jurisprudence. The reason for this emanate from the inability of the realists to present their views in a coherent fashion as there are different degrees of realism and various fronts and opinions.

I. INTRODUCTION

Law is not just about reading and applies the written word as it is. Understanding law requires the interpretation and application of legal rules and doctrines as well.[2] Hence, there arises a need to introduce a sane approach to problems of and about law. The sane approach would be purpose of the facts and circumstances of each case and not mechanical application of law. Looking at appliance of law from this perspective can be called a 'realist' interpretation of

[1] Author is a Research Scholar at Indian Institute of Foreign Trade Management, University, Moradabad., Delhi
[2] Frederick Schauer, Easy Cases 58 S. Cal. L. Rev. 399 (1985).

 [ISSN 2581-5369]

law.[3] Thus comes up the question that what part of judicial decision making is based on legal reasoning, which can also be put as the facts earn points in a case or are the black written word is the binding force. Being realistic is the approach to solve any problem one says. The theory of realism can be said to be born out of this simple thought.

It was around 1920s that some American Jurists notably Holmes, Cardozo and Gray raised their voice against legal conceptualism and stressed on the study of law as it actually operates and functions. They emphasize on functional and realistic study of law not as limited in the statute but as interpreted by the Courts in their judicial pronouncement. They were called Realists and their legal approach has been called Realist School of jurisprudence.[4] Though it also is pertinent to mention here that some jurists refuse to accept realism as a separate school of jurisprudence and hold that at best it may be called as a branch of sociological jurisprudence. The reason for this emanate from the inability of the realists to present their views in a coherent fashion as there are different degrees of realism and various fronts and opinions.[5]

According to Llewellyn, there is no realist school per se, but it is only a movement in thought and work about law. It presuppose that law is intimately connected with the society and since the society changes faster than law, there cannot be certainty about law. Further, there is no certainty in law and therefore, law as it 'is' must be completely dissociated from law as it 'ought' to be.[6]

Roscoe Pound defined realism as, "fidelity to nature, accurate recording 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".[7]

Legal Realism is usually understood, in part to question legal doctrine's determinacy, casual effect on decisions, and consequential accuracy in explaining and predicting legal outcomes.[8] The theory of realism emphasized on the need to enlarge knowledge empirically and to relate it to the present day practical problems of the society.[9] Realists advocate the judge made law. Realists believe that assurance of law is a myth. Jerome Frank has stated, "law is what Court has decided in respect of any particular set of fact, prior to such a decision, the opinion of

[3] Dias, *Jurisprudence* 470 (2nd Edition).
[4] Francis J. Mootz III (ed.) *On Philosophy in American Law* (Cambridge University Press, New York, 2009), available at: www.cambridge.org/9780521883689.
[5] Dias, *Jurisprudence* 470 (2nd Edition).
[6] Llewellyn, "Some realism about Realism" *(1931) 44 Har. L. Rev. 1222.*
[7] Roscoe Pound, "The Call for a Realist Jurisprudence" *Harvard Law Review, Vol. 44, No. 5. (Mar., 1931), pp. 697-711*, available at: http://www.jstor.org/stable/1331791.
[8] Frederick Schauer, "Legal Realism Untamed" (May 22, 2012*), Virginia Public Law and Legal Theory Research Paper No. 2012-38, available at*: http://ssrn.com/abstract=2064837 or http://dx.doi.org/10.2139/ssrn.2064837.
[9] Michael Freeman, *Lloyd's Introduction to Jurisprudence* 656 (Sweet & Maxwell, London, 2001).

lawyers is only a guess as to what the Court will decide and this cannot be treated as law unless the Court so decided by its judicial pronouncement".[10]

The geneses of critical legal studies are to be found in the American legal realist movement of the 1920s.[11] Legal Realism, a movement that arose in 1920s and 1930s in the US, challenged the prevailing view that judges are rational decision-makers, who apply only legal rules found in law books to the facts of the case.[12] The underlying contradictions of American democracy were revealed by the worst economic crisis in American history. The reactionary jurisprudence of the U.S. Supreme Court led President Roosevelt to attempt to pack the Court. U.S. Supreme Court justices enjoy life tenure and cannot be removed from office.[13] However, the U.S. Constitution is silent as to the number of justices that make up the panel. Since Roosevelt could not remove the justices whose constitutional interpretations were undermining the relief policies of the New Deal[14], he attempted to appoint many new justices. While the President's attempts to "pack" the Court failed, his message did not. After the court-packing incident, the interpretations of the Court became markedly less hostile to the exercise of federal power, power first exercised in the name of ending the depression and then later in the name of fighting and winning the Second World War. At the same time these judicial maneuvers were going on and in part because of them, a new school of thought known as Legal Realism arose in the United States.[15] Legal Realism was the intellectual forbearer of Critical Legal Studies.

II. EXPONENTS OF REALIST SCHOOL AND BEGINNING OF THE REALIST MOVEMENT IN AMERICA

In the 19th century laissez- faire was the governing creed in America which was connected with an attachment to what is called 'formalism'[16] in philosophy and the social sciences. The formalism can be said to be marked by logic, mathematics and reasoning with little urge to relate them to the facts of the life or the practical problems of the society.[17] The legal realism

[10] Frank Jerome, *Law and the Modern Mind* 46 (1930).
[11] Joseph William Singer, "Legal Realism at Yale", *76 CAL. L. REV. 465, 468-469 (1988).*
[12] Vitalius Tumonis, "Legal Realism and Judicial Decision Making", Mykolas Romeris University, *2012, 19(4), p. 1361–138.*
[13] U.S. Constitution, Art. III, § 1.
[14] The New Deal was a series of domestic economic programs enacted in the United States between 1933 and 1936. They involved presidential executive orders or laws passed by Congress during the first term of President Franklin D. Roosevelt. The programs were in response to the Great Depression, and focused on what historians call the "3 Rs": Relief, Recovery, and Reform. That is Relief for the unemployed and poor; Recovery of the economy to normal levels; and Reform of the financial system to prevent a repeat depression.
[15] Theodore M. Benditt, *Law as rule and principle: Problems of legal philosophy* 2 (Stanford University Press 1978).
[16] 2 This famous expression made its way into the title of Morton Gabriel White's Social Thought in America: The Revolt against Formalism, New York: Viking Press, 1949.
[17] Michael Freeman, *Lloyd's Introduction to Jurisprudence* 656 (Sweet & Maxwell, London, 2001).

grew against the formalism of the traditional theory of law.[18] In law, the revolt against formalism came from sociological jurisprudence (Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo) and from legal realism implicit in its strict sense. The expression legal realism is used in reference to the United States in a broad sense as well as in a narrow sense, on the one hand to designate all the anti-formalistic currents of the late 19th and early 20th centuries, thereby grouping under the same banner sociological jurisprudence and the movement led by Llewellyn and Frank, and on the other hand to designate only this latter movement. This is what is meant by "legal realism understood in its strict sense."[19]

As it is mentioned above, that realism has different degrees and realists will have more conflicts within them than they have with the formalists. Realism is a diverse school of thought and any attempts to homogenize it will distort more than simplify.

But as one could put down, the features of the realists are, firstly, the American Realist Movement can be said to be combination of analytical positivism and sociological approaches.[20] It is positivist as it first considers the law as it is, as the reform of the law first demands its thorough understanding as well. Further, it is sociological as it considers that the law as it stands today is the product of many factors. Realists are interested in sociological and other factors that influence the laws well. But it also worthwhile to note that realists concern is with the law and not the society. They share with sociologists only the interest in the effects of law on society. But they emphasize the need for the actual behavior of lawyers.[21] Professor Stone calls the Realist Movement a "gloss" on the sociological approach.[22]

Secondly, Realism is centered on the judge. Law is what the judges decide. Realists only uphold the judge made law as genuine law giving less importance to the laws enacted by the legislature. They believe that 'certainty of law is a myth'. As Jerome Frank has states regarding this, "law is what the court has decided in respect of any particular set of facts, prior to such a decision, the opinion of lawyers is only a guess as to what the Court will decide and this cannot be treated as law unless the Courts so decide by its judicial pronouncements".[23]

Many factors contribute to grant of such honour of the judiciary in the Realist Movement. One factor is the check imposed upon the legislature by the American Constitution and the judges

[18] Carla Faralli, "The Legacy of American Legal Realism", available at: http://www.scandinavianlaw.se/pdf/48-6.pdf.
[19] Carla Faralli, "The Legacy of American Legal Realism", available at: http://www.scandinavianlaw.se/pdf/48-6.pdf.
[20] Leiter, B. Positivism, Formalism, Realism. Columbia Law Review. 1999, 99: 1145−46.
[21] Dias, *Jurisprudence* 471 (2nd Edition).
[22] The Province and the Function of Law, p.414, cited in: Dias, *Jurisprudence* 471 (2nd Edition).
[23] Frank Jerome, *Law and the Modern Mind* 46 (1930).

 [ISSN 2581-5369]

interpret the Constitution and have the power to quash the legislation id conflict with it. Another is that the American Legal Institutions are young compared with those in the Great Britain. The days when judges were consciously building up the law are still fresh in the minds of American jurists. It is therefore, less easy for them than for jurists in England to conceive of mechanistic judges, who only apply an existing set of rules. Further, the divergent and separate common law systems that obtained in the different states are evidence of the creative functions of the judges. These systems could not have been developed if not for the active faculties of the judges.[24] Thirdly, the realists consider dispense the 'oughts' of the law and considers what it is. They focus on the reality of the clear simple fact.[25]

Fourthly, their approach is therefore pragmatic. The decision of judges, in the product of ascertainable facts and included among them are the personalities of the judges, their social environment, the economic conditions in which they have been brought up, business interests, trends and movements of thoughts, emotions, psychology and so forth.[26]

Similarly, the five brief points on the Realist Thought as stated by Goodhart are[27]:

i. Realists believe that there can be no certainty about law as its predictability depends upon the set of facts which are before the Courts for decision.

ii. They do not support formal, logical and conceptual approach to law because a Court while deciding a case reaches its decision on 'emotive' rather than logical grounds.

iii. They lay greater stress on psychological approach to the proper understanding of law as it is concerned with human behavior and convictions of the lawyers and the judges.

iv. Realists are opposed to the value of legal terminology, for they consider it as tacit method of suppressing uncertainty of law.

v. The Realist school prefers to evaluate any part of law in terms of its effects.

The seeds of the Realist Movement were sown by Mr. Justice Holmes in 1897. In his words, if one desires to know what law is, one should view it all the way through the eyes of a bad man, who is only concerned with what will happen to him if he does not certain things.[28] Justice Oliver Windell Holmes discussed law from the point of view of the 'bad man', which means the person who is before the Court as an accused or a wrongdoer. He pointed out that the accused or the offender, as the case may be, had no interest in axioms or deductions, but simply

[24] Goodhart, "Some American Interpretations of Law", *Modern Theories of Law 1*.
[25] Dias, *Jurisprudence* 472 (2nd Edition).
[26] Gray, *The Nature and Sources of Law* 226.
[27] Freidmann, *Legal theory* 200 (5th Ed.).
[28] Michael Freeman, *Lloyd's Introduction to Jurisprudence* 656 (Sweet & Maxwell, London, 2001).

 [ISSN 2581-5369]

wanted a prediction of what the Court would decide in his particular case. In most cases, the court is virtually certain to decide in a particular way. Thus, what matters to the person who is standing trial before the Court is whether he will win or lose, and what are the likely effects of winning or losing the case on him. The concern of the judge is to do justice in the case before him and if that required a creative interpretation of the accessible rules, he should certainly resort to it. The duty of the judge is to apply the law as he finds it and not to seek to rectify perceived inadequacies by the use of creative interpretation. Holmes asserted that where there is a gap in the law, the judges are required to take account of precedent, but where this is unclear, he must decide the best way to proceed and the result may be a decision which is in some way innovative, but the fundamental principles are always part of the law.

Justice Holmes played a important role in bringing about change in attitude to law. His emphasis on the fact that the life of the law was experience as well as logic, and his view of law as predictions of what courts will decide, stressed the empirical and pragmatic aspect of law. He also stressed that law must be strictly notable from morals, for the lawyer is concerned with what the law is, not what it ought to be. Holmes felt that the development of law could be justified scientifically, for the "true science of law… consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition".[29] In this respect Holmes apparently relied more on practical than on pure science, the lawyer trained in economics and statistics, though he nowhere clearly indicated on how an objectively sound policy was to be attained.[30] Holmes' view of law as "prediction" placed both litigation and the professional lawyers in the centre of the legal stage. His emphasis on what courts may do, rather than on abstract logical deduction from general rules, and on the inarticulate ideological premises which may underlie the decisions of Courts, focused attention of the empirical factors which underlie a legal system.[31]

It is also seen that Mr. Justice Holmes was not purporting to give any final definition of law. The statement that law is only for Courts do is iconoclastic, and suggests that ethics, ideals and even rules should be put on one side. Holmes himself had no such intention, for he also insists on the need to restrict the area of uncertainty and on the need for more theory. In his words: "We have too little theory in the law, rather than too much."[32]

Another pioneer of this movement was Llewellyn. Karl Llewellyn was a Professor of Law at

[29] M. Howe, *Holmes: The Shaping Years* 257 (1957).
[30] Michael Freeman, *Lloyd's Introduction to Jurisprudence* 657 (Sweet & Maxwell, London, 2001).
[31] Michael Freeman, *Lloyd's Introduction to Jurisprudence* 658 (Sweet & Maxwell, London, 2001).
[32] "The Path of the Law", *Collected Legal Papers 17,* cited in: Dias, *Jurisprudence* 473 (2nd Edition).

 [ISSN 2581-5369]

the Columbia University. Running through legal realist jurisprudence was a distinction between the "law in books" and the "law in action," with the idea that law is not found primarily in statutes and judicial opinions, but rather in the behavior of judges and other legal officials.[33] On this Karl Llewellyn wrote, a realist study of law must capture "the area of contact between judicial (or official) behavior and the behavior of laymen."[34] The idea that law is what lawyers do was taken up as his theme by Llewellyn.

> *"This doing of something about disputes, this doing of it reasonably, is the business of law. And the people, who have the doing in charge, whether they are judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself."*[35]

Llewellyn developed the principal features of his approach as follows:

i. There has to be a conception of law in flux and of the judicial creation of law.

ii. Law is a means to social ends; and any part of it has to be constantly examined for its purpose and effect, and to be judged in the light of both and their relation to each other.

iii. Society changes faster than law, and so there is a constant need to examine, how law meets contemporary social problems.

iv. There has to be temporary divorce of 'is' and 'ought' for purposes of study.

v. The realists distrust the sufficiency of legal rules and concepts. This is the cardinal point of their approach of law.

vi. Coupled with this is a distrust of the traditional theory that rules of law decide cases. The realists have drawn attention to many other influences which, in their view, play a decisive part. To define law in terms of legal rules is therefore absurd.

vii. The realists believe in studying the law in narrower categories than has been the practice in the past. They feel that part of the distortion produced viewing the law in terms of legal rules is that rules would cover hosts of dissimilar situations, where in practice utterly different considerations apply.

viii. They also insist on the "evaluation of any part of the law in terms of its effects" and on "the wothwhileness of trying to find these effects".

---

[33] Roscoe Pound, "Law in Books and Law in Action", *44 Am. L. rev. 12, 15 (1910)*.

[34] Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum. L. rev. 431, 455–56 (1930), cited in: Katherine r. Kruse, "Getting real about Legal realism, New Legal realism and Clinical Legal education" *Volume 56 | 2011/12.*

[35] The Bramble Bush 3 (2nd Edition).

ix. Finally, there must be a sustained and programmatic attack on the problems of the law along the lines indicated above.

Llewellyn acknowledged the fact that there is large measure of predictability in case law attributable to the general "craft" of decision making. He placed reliance on insight and wisdom of the judiciary which enables Judges to achieve objective criteria so as to arrive at the appropriate legal solutions. This brings about consistency in the treatment of cases and thereby promotes the cause of Justice. Llewellyn described law as "what officials do about disputes" and insisted that law should be evaluated in terms of its effects.

A part of realist movement, Jerome Frank was initially a practicing lawyer. He served in the Law Department of the Government for about a decade. In 1941, he was appointed as a Judge in the United States Circuit Court. Frank explained his views about realistic approach to jurisprudence in his classic work titled Law and the Modern Mind. He exploded the myth that law is continuous, uniform, certain and invariable and asserted that the Judges do not make law, instead, they discover it. According to him, the individual decision of the Judge is law par excellent. He reiterated that law consists of decisions and the personal convictions, likes and dislikes and emotions. The temperament of the judge has an important bearing on the mechanism of the law. Thus, Frank made fact finding by the Court as the central theme of his realism in which the personality of the judge and his past experience play a dominant role in moulding the law and giving it a concrete shape.

Frank emphasized that law is not merely a collection of abstract rules and that legal uncertainty inherent in it. Therefore, mere technical legal analysis is not enough for understanding as to how law works. For example, facts in a legal case have to be established by witnesses who may or may not be telling the truth and it is for the judge to discover and ascertain what the actual facts are in the case before him.

Also Thurman Wesley Arnold, who served in the Department of Justice for a long time and was then appointed as an Associate Justice of the US Court of Appeals for the District of Columbia treated politics, economics, law and other disciplines relating to social sciences as indispensable social institutions based on common values such as habits, attitudes, traditions, creed, etc. He stated that the rule of law is best preserved by coordinating the various conflicting ideologies.

Another pioneer of realism was Gray, who drew a basic distinction between law and sources of law. The former is what the judges decide. Everything else, including statute, are only

 [ISSN 2581-5369]

sources of law until interpreted by Court.[36]

The earlier Realist, including Holmes, were much concerned to promote a new and more experimental and constructive attitude to social life and thought, but avoided making any specific proposals to be realized. The later legal realists have been true to this attitude by concentrating on developing actual techniques for helping the practitioner to understand and anticipate the trends of judicial decisions, as doling out theories which have no interaction to the social practices and activities with courts, lawyers and other concerned to develop and apply legal rules is of no help. The early realists employed the social sciences as an addition, using them to no insightful effect.[37] The modern inheritors of the realist tradition have laid down sophisticated techniques of the political scientists and sociologist.[38]

In spite of various contributions by the Realism Movement, one finds it difficult to avoid the feeling that nothing new has immerged from all these detailed studies, beyond what a reasonably progressive and socially minded lawyer might already have accepted as self-evident.

As putout by Llewellyn's own conclusion "almost nothing the newer jurisprudence has yet found and little that is seems likely to find within a few decades, will prove in any manner new, to the best lawyers."[39]

Yet, it is not wrong to say that the realists have done good work in emphasizing both the essentially flexible attitude of the judiciary towards developing precedent, even within the four corners of a rigid doctrine of precedent and the operation of concealed factors in judicial law making and if they had exaggerated the intrinsic unpredictability of law from rules alone, they have also shown that courts will always retain some freedom of movement which cannot be reduced to a merely mechanical application of past decision to a new set of laws.[40]

The American Realist Movement has been by and large successful at one thing, which is provoking a storm of controversy and criticism from all quarters. In an authoritative recent history of American Realism Laura Kalman concludes that it failed.[41]

"*We are all Realists now- It is a Truism to refer to it as a Truism*"[42]

As put by Laura Kalman, the realists who call themselves realists (by which she meant those

[36] Gray, *The Nature and Sources of Law* 226.
[37] LL Hampstead, *Introduction to Jurisprudence* 458 (Stevens & Sons, London, 1979).
[38] Haward, "A Psycologist's contribution to legal procedure" *(1964) 27 M. L. R 656.*
[39] LL Hampstead, *Introduction to Jurisprudence* 458 (Stevens & Sons, London, 1979).
[40] D. Pole, The later Philosophy of Wittgenstern 33 *(1958).*
[41] *Legal Realism at Yale*, 1927-1960 (1986).
[42] J. Singer, "Legal Realism Now" *(1988) 76 California L. Rev. 465, 503*.

 [ISSN 2581-5369]

of the 1920s and 1930s) did little to integrate the law with social science or organise casebooks along factual lines. By the 1960s according to her, realists did make a positive contribution to legal education but the appellate opinion still lay at the core of legal education. As very strongly put by her, legal realism seemed revolutionary, but there was no revolution. The same has been worded by Gilmore as "the revolution may have been merely a palace revolution, not much more than a changing of the guard."[43] To Kalman, realism was not intellectually significant and "pedagogically, it had not fulfilled its promise."[44] Realists, concludes Kalman, pointed to "the role of idiosyncrasy in law" at the same time retaining a belief in the rule of law. They attempted to make it more efficient and more certain.

A good deal of criticism is not founded on what the relists have actually said but on what they were supposed to have said. On the other hand, the realists themselves have undoubtedly been guilty of overemphasis in certain directions.

III. CRITICISM OF REALIST SCHOOL

The critics allege that the exponents of Realist School have completely overlooked the importance of rules and legal principles and treated law as an assemblage of unconnected court decisions. Their perception of law rests upon the subjective fantasies and life-experience of the Judge who is deciding the case or dispute. Therefore, there cannot be certainty and definiteness about the law. This is indeed overestimating the role of Judges in formulation of the laws. Undoubtedly, Judges do contribute to law-making to a certain extent but it cannot be forgotten that their main function is to interpret the law.

Attention should, in the first place, be directed to the question how far the Realists do in truth reject the existence of rules. Indeed, it is clear that they do not all do so. The importance of rules maybe questioned, but that is a matter of degree. To arrest that a judge's "hunch" determines the way in which he manipulates and applies rule is unexceptionable. But to say that rules are completely illusory and that the "hunch" reigns supreme is, in one sense, too strong a statement. In many cases judges are bound by rules and have little or no choice, whatever their sympathies; and even when they circumvent rules, they do so in a manner which conceals the fact that they are doing so. In other words, the "hunch" and operate only within the framework of rules. In the "hunch" is supreme goes scarcely far enough, for the "hunch" is itself the product of standards, patterns of behavior, concepts and rules. It can also be explained that the "hunch" is supreme goes scarcely far enough, for the "hunch" is itself the product of

[43] *The Ages of American Law* 87 (1977).
[44] *The Ages of American Law* 87 (1977).

 [ISSN 2581-5369]

standards, patterns of behavior, concepts and rules.

The relists have properly drawn attention to the many factors that influence the minds of the judges, but among them should also include rules of law. It is fallacious to assert that what judges say can never be a guide to what they do. They sometimes say that they are bound by rules because their decisions have in fact been so governed. The point is that the reasons which particular judges give for doing certain things are very much a part of what they do. So, to be realist in full sense of the word would require that allowance be made for the way in which non-realists behave, and this includes their adherence to rules.

The gravest of the charges against the realists would seem to be that in rejecting the part played by rules they are being more unrealistic than most of the victims of their attacks. Much of the trouble seems to stem from misleading impressions created by the way in which the realists expressed themselves, especially in their earlier works. Another criticism so often advanced against realists is that they seem to have totally neglected that part of the law which never comes before the court. Therefore, it is erroneous to think that law evolves and develops only through court decisions. In fact a great part of the law enacted by the legislature never comes before the court, never the less, it does remain a law enforceable and applicable in appropriate cases and situations. To which the realists argue, that here too, much of what is stated to be law has been the subject of previous judicial decisions. But, for eg. Immediately after the Law Reform (Enforcement of Contracts) Act, 1954 came into force, and before it ever came before the courts, it would have been possible for a lawyer to have advice his client that a new rule of law has superseded the old rule, which required that certain types of contracts need to evidenced by a note in writing. To argue that such a statement would have been a statement as to "probable law" is quite unrealistic. The realists are far too obsessed with what occurs in the courts. A great many daily transactions go forward and are governed by what everyone takes to be "law".

Thirdly, the existence of rules as "law" in themselves has to be admitted. Statutes are followed because they are "law" already. According to the realists, the stamp of "law" is only to be applied after the judge has already decided. This is most certainly not the accepted usage. A decision is no "real" in providing the damages, property or whatever else is being sought, than a rule, also, in a situation where the insufficiency of evidence, the court is certain to acquit, for example, a thief, and in fact does acquit him. If it is said that a court might have convicted had there been sufficient evidence that immediately implies the presence of some rule, independent of the decision, on the basis of which a conviction might have been obtained.

Fourthly, to say that the actual decision alone becomes "law" necessarily means that it

 [ISSN 2581-5369]

forthwith ceases to be "law" for the future, since it will in its turn be subjected to interpretation and be embodied in another decision. "Law" then, in the words of one critic, "never is, but is always about to be."[45]

Further, it can be felt that realists are keen to pin the word "law" to something definite and fixed, namely, actual decisions. A denial that certainty in law can be achieved through rules is no reason why they may not be called "law". Frank's statement, quoted earlier, that until a court has pronounced on a matter there is only "probable law", suggests that even a statutory rule is not actual law" until it has been the subject of a judicial decision.

Finally, the realist conception of law is too vividly coloured by one point of view. They look at law with their attention fixed on the judges. The Realist point of view is helpful in a system of law which gives power and discretion to the judiciary. In a system in which judges are strictly controlled and in which their power and discretion is strictly reduced, the focus of attention will inevitably shift away from the judges to those who do wield the power and discretion. This, as has been pointed out, is what makes the Realist point of view inappropriate to a concept of Soviet law for example.

If Realism is considered in the Indian context, the realist school has not been accepted in the Indian sub-continent. To state the obvious, that the texture of Indian social life is different from that of the American. However, the recent trend of 'social action litigation' has widened the scope of judicial activism to a great extent but the Judges have to formulate their decisions within the limits of constitutional frame of law by using their interpretative skill. In India, the judges cannot ignore the legislature made law. They have to confine their judicial activism within the limits of the statutory law. Also, the doctrine of precedent which has no place in the realist philosophy plays a significant role in the Indian judicial system. Indian legal system, though endows the Judges with extensive judicial discretion, does not make them omnipotent in the matter of formulation of law.

The major part of realism showed signs of having past its peak by the early 1930s, though in the sphere of jurisprudence its message not only continued but ushered in a distinctive movement which is by no means extinguished. In law, just like in other disciplines, it is felt that empiricism and positivism are not enough, some ground of 'realism' must be there to underpin the ethos of man and human society.

It should be borne in mind that the realists do not reject technical legal analysis, but merely emphasis that it not in itself is enough, if we wish to understand how the law works, or how it

[45] Cardozo, *The Nature of the Judicial Process* 126.

 [ISSN 2581-5369]

may best be developed or improved. Realists have played their part in bringing about changed outlook and attitude towards the legal system and the function of the law and the legal profession in society, which has made itself felt.

Certain sympathetic assessments have been made by Singer and Horwitz[46]. To Singer, "legal realism has fundamentally altered are conceptions of legal reasoning and of the relationship between law and society."[47] The realists were, he believes, "remarkably successful both in changing the terms of legal discourse and in undermining the idea of a self-regulating market system." He sees all major current schools of jurisprudential thought as "products" of legal realism.

Horwitz see "the most important legacy of Realism" as its "challenge to the orthodox claim that legal thought was separate and autonomous from moral and political discourse." Their attack on deductive legal reasoning constituted, he argues, the realists' most "original and lasting contributors to legal thought." Legal Realism is seen as "the culmination of early-twentieth-century assaults on legal fundamentalism and, in particular, on late-nineteenth-century categorical thinking."

Thus, the way to determine whether a legal classification was good or not depended on the purposes for which the category was created, not on some measure of whether it fit or reflected a pre-existing natural category.

IV. CONCLUSION

The Realists were each outstanding in their own way, as educators, practicing lawyers, philosophers, and politicians, and every one had what could at a minimum be described as illustrious careers. In the writings detailing their lives and accomplishments the adjective most frequently used to describe their minds was "brilliant," their memories "encyclopedic", and their politics "radical" or "progressive." I have no doubt that every one of them was a genius. As a group, they envisioned changes they thought wise for society.

Whatever may have been the past or future of the legal realism a movement, it remains true that its impact has been such that things can never seem to be quite the same again.

*****

[46] *The Transformation of American Law 1870-1960* (1992), Chapter 7.
[47] J. Singer, "Legal Realism Now" (1988) 76 California L. Rev. 456, 503.