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Relevance of American and Scandinavian Legal Realism in Indian Judiciary

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ABSTRACT

"We are all Realists now," as the saying goes. Viewed not simply as jurisprudential movements, but as parts of their broader political cultures, American Legal Realism and Scandinavian Legal Realism sought to assert independence from the existing legal systems of the past. With their democratic claims and claims of scientific and empirical aspects of law, these movements significantly influenced subsequent critical legal studies. The impact of these movements was particularly traceable across the atlantic. Although the influence of these movements have now reduced, the claims and ideas of the two movements are still relevant to the Indian context to some extent.

This article endeavors to explore the relevance of ALR and SLR within the framework of the contemporary Indian judiciary. The article commences with an examination of the shared characteristics and distinctions between these two jurisprudential movements. Subsequently, it scrutinizes the assertions of these movements within the specific context of India. By dissecting their relevance in the Indian legal landscape, the article aims to provide insights into how these theoretical frameworks intersect with the complexities of the Indian legal system.

Keywords: *American Legal Realism, Scandinavian Legal Realism, Indian Judiciary, Realism, Positivism, Formalism, Jurisprudence.*

I. INTRODUCTION

American Legal Realism (*hereinafter* "ALR") as a major jurisprudential movement arose in the early decades of the 20th century as a response to legal orthodoxy and legal formalism.² ALR examined the law 'as it is' and not 'as it should be'.³ Deriving from this thus, Consequently, the primary focus of ALR was on judicial decision-making. The movement aimed to assert that judges are not obliged, nor should they be confined, to strictly interpret statutes, as *Roscoe Pound* phrases it as the contrast between "law in books" and "law in

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² Subhra Priyadarsini Baral, 'The Continuing Relevance of American Realism' (2023) 4.2 JCLJ 732.

³ Urvi Shrivastavaa, Sunishtha Mogheb, 'The American Realism and its Mirroring in Indian Judicial System' (2019) 9 Online International Interdisciplinary Research Journal 105.

action”.⁴ They need not adhere to the black letter law and rules of syllogism for decision making.

The process of legal decision-making is affected by biases, both personal and political, which can consciously or unconsciously influence judges' interpretations and applications of the law.⁵ As per American legal realists, the judges were more responsive to the facts of a case and how they were presented. *Karl Llewellyn* distinguished between paper rules and real rules, noting that black-letter rules contribute to unpredictability. He advocated for aligning legal rules more closely with the social norms accepted by the subjects. Consequently, understanding why judges make decisions and how people behave requires insights from social science. *Oliver Wendall Holmes*, the chief arguer of this movement, also puts this in saying, “The life of law has not been logic: it has been experience...they have a good deal more to do than syllogism”.⁶

While on one hand ALR was concerned with the way law is made in practice and how it ought to be made, the central concern of Scandinavian Legal Realism (*hereinafter* “SLR”) was how the law changes behavior of the people. It sought to explain scientifically the force of law, free of metaphysical elements embedded in traditional explanations.⁷ As per SLR, the force of law among the citizens is produced by psychological effects caused by ritualistic modes of law making.⁸

Axel Hagerstrom and *Karl Olivecrona*, the two Scandinavian legal realists, offer distinct views on law's nature and its impact on society. Hagerstrom emphasizes law's psychological force, stemming from ritualistic lawmaking, and questions the existence of abstract legal concepts like rights and duties. He argues that law's power lies in its psychological effects rather than adherence to natural laws. In contrast, Olivecrona grounds law in the natural world, attributing its force to the monopoly of coercion. He rejects the command theory of law, instead proposing an "independent imperative" model, where law shapes morality and societal behavior.

Alf Ross further explores legal norms, defining them as directives corresponding to social facts, with binding force either through coercion or internal obligation. He distinguishes legal norms from other social practices, highlighting their effectiveness through non-coercive sanctions and officials' voluntary compliance.

Despite their divergence, they shared a common rejection of the concept of law as a rigid set

⁴ Roscoe Pound, ‘*Law in Books and Law in Action*’ (1910) 44 ALR 12.

⁵ Spiers Duncan, ‘*Jurisprudence Essentials*’ (2011) Edinburgh University Press 75.

⁶ *supra* note 2

⁷ D.J. Sherbaniuk, ‘*Scandinavian Realism*’ (1962) 2 Alta L Rev 58.

⁸ Suri Ratnapala, ‘*Jurisprudence*’ (2009) 36.

of principles and regulations. They argued that the true essence of law is revealed through its practical application, distinct from the theoretical constructs found in textbooks. While pursuing different agendas, both movements aimed to expand democratic governance.⁹ The Scandinavian Realists aimed to enhance democratic politics by rendering jurisprudence more scientific, stripping law of remnants of the old order, particularly aristocracy and religion. In contrast, the American Realists aimed to highlight the inherently political nature of law. Despite their rivalry, both claimed to advance the scientific understanding of law.¹⁰ This period thus saw a trans-Atlantic critical legal movement between the late nineteenth and early twentieth centuries, with the central goal of removing legal barriers to democratic reform.

II. AMERICAN LEGAL REALISM IN INDIAN JUDICIARY

Though the Indian Jurisprudence does not formally adopt the realist legal theory, it does lay great emphasis on the functional aspect of the law and relates to the social life realities.¹¹ The ALR has in its core a reaction to the ‘black letter’ approach or formalistic approach. The realists like *Karl Llewelyn* argue that when it comes to the courts, this approach is rarely practiced.¹² The resulting gap is to be bridged by the judiciary in interpreting the written law and developing it so as to suit the benefit of Indian society. The Supreme Court has time and again preferred to adopt a purposive approach rather than strictly interpreting the rules word-by-word.¹³

In *Indira Sawhney v UOI*, it was observed “The Constitution of India being essentially a political document has to be interpreted to meet the felt necessities of time”. In *M.C. Mehta v Kamal Nath*, the Supreme Court expanded Article 21 Right to Life and Personal Liberty to include the right to a clean and healthy environment within the ambit of fundamental right.

In addition to this, the courts in India have been also regarded as playing a creative role in the law making process in India. Article 13(2) of the Constitution empowers the Supreme Court to invalidate any legislation passed by the legislative bodies if it contradicts the provisions of the Indian Constitution. Additionally, various other constitutional provisions such as Article 32, Article 131-136, Article 143, Article 146, and Article 226 provide avenues for challenging and declaring state actions as unconstitutional and nullified, based on different circumstances and grounds.

⁹ Gregory S. Alexander, ‘Comparing the Two Legal Realisms- American and Scandinavian’ (2002) 50 The American Journal of Comparative Law 132.

¹⁰ *ibid.*

¹¹ Ishika Sareen, ‘American Realism & Its Future in India: A Study’ (2022) 4 Indian JL & Legal Rsch 9.

¹² Hakim Yasir Abbas, ‘India’s Too Much Constructivism Syndrome: A Critical Analysis of Indian Constitutional Regime in the Light of American Legal Realism’ (2014) 1 Indian JL & Pub Pol’y 1

¹³ *M.Nagaraj & Others vs Union Of India* [2006]8 SCC 212.

The ALR aims to bring the role of judges and the judiciary central to the process of lawmaking. In India, as a common law jurisdiction, precedents hold a binding authority akin to statutes enacted by legislators. However, within the Indian context, there are diverse perspectives on this matter. Some scholars contend that the Indian judiciary's role is confined to scrutinizing laws, distinct from assuming a proactive creative function. It is widely recognized that when interpreting challenged laws or provisions, the judiciary initially presumes constitutionality, employs the doctrine of severability, and favors a rationale that aligns with legislative intent, thereby giving primacy to legislative enactments without overreaching into legislative domains. Some scholars also argue that the logical consequence of the interpretation is that something new is created.¹⁴ It is important to note that in several instances, the Indian judiciary has directly assumed a creative role in the absence of legislative guidance. For example, in the *Vishakha v. State of Rajasthan* case, the Court established the Vishakha Guidelines for states to address and remedy issues pertaining to sexual harassment in the absence of specific legislation.

According to *Holmes*, understanding law boils down to predicting how judges will rule in a case. He exemplified this belief with the "Bad Man" theory, suggesting that a person's self-interested interpretation of the law offers the most accurate insight, as they calculate precisely to avoid punishment for breaking it.

However, there are significant departures from the ALR in the Indian context as well. As per *Holmes*, judges can go beyond the written law, bring their own personal experience in deciding hard cases.¹⁵ However, by the doctrine of separation of powers, the legislature has been primarily entrusted with the law making job. Unlike the American Constitution, India's is highly detailed, delineating powers and duties of each governmental organ to minimize ambiguity and conflicts. Legislative authority is explicitly vested in Parliament and State Legislatures, with detailed procedures outlined. Constitutional provisions, including fundamental rights and directive principles, define legislative powers. Thus, it's unequivocally established that legislation is the primary source of law in India.¹⁶

Even when interpreting statutes or creating guidelines, the Indian judiciary ensures that it does so by remaining within the framework of the Constitution. There is a fundamental difference in declaring law enacted by the legislature just by applying the principles of statutory interpretation and creating a new law without any reference to the legislative acts by

¹⁴ *supra* note 12

¹⁵ *supra* note 5.

¹⁶ Dr. Pankaj Kakde, 'Judicial Activism: The Indian Version of American Realism' S. P. Law Review 8.

interpreting Constitutional provisions in the light of newer conditions.¹⁷ Consequently, in India, the constitution occupies the highest position, not the judiciary. This stands in stark contrast to the United States, where the constitution is concise and grants substantial authority to the judiciary. In contrast, the Indian Constitution outlines procedures and constraints on state functionaries, thereby serving as a check on the powers of the judiciary as well.

A close examination of the Constitutional provision in this regard suggests that the power of the higher judiciary to declare laws void on the Constitutional parameters is a declaratory power and not the creative one. The Indian Constitution with its fundamentals as discussed above can hardly admit a creative role of the judiciary explicitly. There cannot be two parallel authorities performing the same functions in the Constitutional setup in India,¹⁸ it may be noted that making binding guidelines power as well as the constitutional duty of the court is not instead of but in absence of law made by legislature.¹⁹

III. SCANDINAVIAN LEGAL REALISM IN INDIAN JUDICIARY

While the Scandinavian School of Jurisprudence may not have directly influenced Indian legal thought, its principles of empirical research, sociological analysis, and psychological approach to understanding the law have had some resonance in Indian jurisprudence.

According to *Axel Hagerstrom*, law's force on people cannot be explained by the physical laws of nature, but only by its psychological effects.²⁰ The symbolic nature of execution of procedure and association with group identities to effect expressive goals explains how people use the law and the legal systems.²¹ Further, this psychological coercion results from the monopoly of the force that an authority enjoys, as per *Karl Olivecrona*.²² The Constitution prescribes the powers and limitations of multiple functionaries of the State in extensive detail. As a result, it can be viewed as holding exclusive authority, with legislations and precedents adhering to its provisions exerting a psychological influence on citizens. This psychological coercion is also exhibited by prescribing the just forms of coercion in case of breaches- with court and statute-imposed punishments aligning with the constitutional ideals.

According to *Alf Ross*, the effectiveness of a legal norm depends on (a) allegiance of officials to constitutions and institutions under it and (b) non-violent sanctions of disapproval and

¹⁷ *ibid.*

¹⁸ *supra* note 16

¹⁹ *ibid.*

²⁰ *supra* note 8 at 110.

²¹ Kenworthy Bilz and Janice Nadler, 'Law, Psychology and Morality' (Northwestern Law) <https://www.law.northwestern.edu/faculty/fulltime/nadler/bilz_nadler_law.pdf> accessed May 04, 2024.

²² Spaak Torben, 'Law, Force, and Social Morality'. (2014) 157.

criticism that are implied in this attitude.²³ The Constitution, as was envisaged by the framers, has been placed at the highest pedestal in our country. All the institutions of the State owe allegiance to the Constitution. As long as the laws submit to this allegiance, they are effective. In 2018, the Supreme Court of India in the landmark case *Joseph Shine v. Union of India* decriminalized adultery, striking it off the Indian Penal Code (IPC). The Court held that adultery to be civil wrong and a valid reason for divorce, but not a crime. The five-judge bench unanimously held that Section 497 of the IPC violated Articles 14, 15, and 21 of the Constitution, and was archaic, arbitrary, and paternalistic and therefore the law could not seek an internal obligation and therefore was regarded as ineffective in that sense.

Karl Olivecrona argued that law shapes morality.²⁴ Rather than working directly to change behaviors and attitudes, the law is able to work via more subtle social psychological processes, to shape perceptions of morality.²⁵ Between 1990 and 2014, the share of Indians who believed "homosexuality is never justifiable" fell from 89% to 24%.²⁶ From the first pro gay rights protest in the 1990s towards greater recognition of LGBTQ+ rights and the *Naz Foundation*, *NALSA* and *Navtej Singh Johar* have all influenced Indian morality.

IV. CONCLUSION

In summary, the American Legal Realism (ALR) and Scandinavian Legal Realism (SLR) movements have significantly influenced jurisprudence, particularly in understanding the law's practical application and its impact on society. In India, while not formally adopting these realist theories, there are evident parallels in judicial practices. The article attempted to assess these parallels by relevant case law and socio-political developments in India. The contribution of American and Scandinavian legal realism is revolutionary and focused on life and property, not merely on philosophical or moral codes or orthodox statutes. With their emphasis on empirical analysis, the role of authority in decision making and the indeterminacy and psychological aspect of legal rules towards democratisation of states, they continue to influence contemporary Indian legal thoughts and practice.

²³ *supra* note 8 at 115.

²⁴ *ibid.*

²⁵ *supra* note 21.

²⁶ Rukmini S. , 'Homosexuality in India: What data shows' (LiveMint, Sept 14 2018) <<https://www.livemint.com/Politics/nLQipPl5UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html>> accessed May 04, 2024.