

INFLUENCE OF THE JURY ON LAW

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Abstract

Law does not only consists of the making of legal provisions; it also includes its interpretation and implementation – which can be a bit tricky, considering how the interpretation of such legal provisions can vary with each case. After all, with changing times, new challenges emerge in every new case.

In such situations, it is the duty of the Court to implement the legal provisions in such a way that it suits the unique situations of the case. However, one does not account for how the implementation heavily depends on the interpretation of the Judge; which also raises the question that what would happen if the Judge's personal morals and beliefs hinder the path of the judgement? Would it be a fair interpretation then, or would it simply become the Judge's perception instead?

In this article, we would explore more about these questions with the help of some recent case studies, especially focused on the Indian Judiciary, along with the schools of jurisprudence and study how a Judge's personal beliefs or influence can affect the law. In the end, we would also discuss the root cause of these issues and explore the possible solutions one can take to avoid such biases.

Keywords:

Legal Realism, jurisprudence, personal preferences, implementation of law, interpretation and legal provisions.

I. Introduction

It often happens that the judgement of some case comes out odd and unexpected to us – let it be due to the controversial nature of the case itself or the immoral sounding judgement given by the Judge hearing the case. However, when it is the latter scenario, more often than not the Judge who had given such judgement is brought under the critical eye of the public and media.

One may wonder, why is it so? Well, the answer is simple – the Judge is as human as we all are, and it is a well-known fact that the end judgement of any case solely lies on the discretion of the Judge. It may sound arbitrary, and it indeed is so; however, to counter any injustice that may happen due to these natural biases, the Indian judiciary consists of a hierarchy of Courts as its system. It enables the people to seek justice in Higher Courts if they are not satisfied with the judgement of the Lower Courts, which allows the case and its facts to be revisited and judged by different and more experienced Bench; thus, decreasing the chance of partiality.

This natural human partiality or preference is not often covered in the concept law – at least not directly, even though it clearly seems to affect the way a legal provision is implemented and interpreted by the Court. However, this concept is mostly seemed to be discussed and studied under the Realist school of Jurisprudence, which is one of the five main schools of jurisprudence.

A. What is Realist School of Jurisprudence?

Jurisprudence, in simpler terms, is the theory of law; that is, it deals with the theoretical aspect of the law, its origin and its nature while connecting it to the State. The main objective of Jurisprudence is to explain the nature and cause behind the law and to explore the workings of legal thinking and legal provisions. Meanwhile, legal realism or the Realist theory is one of the five 'schools' or theories of jurisprudence that advocates that the law, in reality, differs a lot from the law that is shown in the books or legal theories.

According to Legal Realism, the law cannot and should not be separated from its implementation – that is, the law is basically how the legal provisions made by the legislature are implemented and interpreted by the Court. In several instances, the interpretation of a legal provision can severely

differ from its previous implementation in earlier cases. This is mostly due to the fact that every case is unique on its own and with changing time, the interpretation and implementation of the law can highly vary.

With this in mind, the philosophers of this school argue that the interpretation of any legal provision or any judgement given by a Court is highly influenced by the cultural background and personal ideals of the Judge giving them. Furthermore, aspects like personal morals and political views of a Judge can also cause an indirect, if not direct, influence over the judgement given by the said Lordship.

This, in turn, makes the whole perspective of law more complicated; especially when we consider how most of the students of Law are taught how Judiciary should be impartial and neutral. Meanwhile, in real life, Judges are as human as we are, and we all know how no human can be completely impartial or neutral. Everyone's perspective differs and the Judge's perspective, no matter how objective it is, will always be a little bit, if not more, tinted with their own beliefs and morals.

However, the question that arises here is that is this really true? Can the same legal provision be applied in such a discretion that its implementation differs from case to case? Well, to answer that, we need to explore further what legal realism stands for and how it has evolved over the years.

II. Background of Legal Realism

The realist school of jurisprudence is relatively new; in fact, due to its new emergence and relatively similar philosophy as the Sociological school of jurisprudence, many philosophers like Llewellyn do not consider Legal realism as a school in itself but rather a part or branch of the Sociological school instead.¹

Primarily, as stated earlier, realists regard Judges as the source of law and judicial activism being one of the prime factors affecting law and how it is interpreted. In simpler terms, the law does not

¹ Llewellyn, 1931, "Some Realism about Realism: Responding to Dean Pound", Harvard Law Review, Volume 44, p.1222-1264

come from the legislators, but rather the observations made by the Judge when the law is in action. This includes the human factor of Judges and lawyers and how things like corruption, bribery and personal beliefs can influence any Judge while deciding for a judgement.

With this as the base philosophy, the Realist theory emerged from the American administration under US President Franklin Roosevelt and had gained huge popularity during the 1920s and 1930s. This theory highlighted the law under a new light – one from the view of social science and behavioural psychology rather than the legal science, as it had been done up until now. In simpler terms, this school evolved from the American Jurisprudence and advocated that law is more dynamic when viewed by the spectacles of experience rather than the ones of logic.

Famous jurists that advocated this school of jurisprudence include Karl Llewellyn, Walter W. Cook, Wesley Hohfeld, Morris Cohen, Felix Cohen, Warren Seavey, Oliver Wendell Holmes, etc.² Most of the mentioned legal philosophers had a key role in developing the theory of legal realism; however, with changing times, contemporary legal scholars had expanded the horizons of legal realism way further than it was and thus, coined a new term for the more contemporary side of this school – the new legal realism.

However, till the late 20th century, this theory was considered nothing more than a conceptual claim due to the British legal philosopher H.L.A. Hart, who had somehow misinterpreted the philosophy behind legal realism as one that studied and analysed the concept behind the law, instead of analysing the method by which a Judge implements and interprets a law.³ Moreover, since Legal realism was seen to emerge as a primary reaction to the theory of Legal formalism⁴, many legal formalists were sceptical of this school and so were the realists of Legal formalism. In a way, Legal realism came out as a criticism of Legal formalism more than anything.

² Horowitz and Morton J., 1982, "*History of the Public/Private Distinction*", University of Pennsylvania Law Review.

³ Hart, H.L.A., 1961, "*Chapter VII: Formalism and Rule Skepticism*", *The Concept of Law*, Oxford University Press, pp 124–154.

⁴ Legal formalism is a legal theory that highlights how judges should act and decide cases; focusing on the descriptive parts of the facts and applying objective as well as uncontroversial principles while making decisions for a judgement.

Regardless of that, in the present scenario, not only is Legal realism held as a school/theory of jurisprudence in itself but can also be still applicable to many Judicial practices; let it be the Judicial Review or its extension Judicial Activism. However, beyond those two blatant uses of Legal realism, the practice of this theory can be seen in many subtle Judicial practices which we will cover in the following section.

III. Relevancy in Current Scenario

Even though Legal realism may not be as popular as other concepts or theories of law, it still has influenced many Judicial as well as legal practices across the globe. Many such practices can also be seen in India, where Judicial review and Judicial activism can be held as the prime examples as both the judicial practices are highly influenced by how the Court interprets and views the legal provision. In the case of Judicial review, the Court interprets the constitution in parallel with the legal provision in question, to see if the legal provision goes against the Constitution of India. Based on the Judge's understanding as well as interpretation of the law, the Court may or may not declare the legal provision unconstitutional – which can seem like an arbitrary power in itself.

Judicial activism, on the other hand, is a philosophy of law that upholds the Judiciary as the guardian and protector of the people – believing that the Courts should go beyond their applicable believe to protect the rights of the people who are unable to access the Court due to their situation. The most recent example of Judicial activism can be held as when the High Court of Jammu and Kashmir ordered the internet service provider Bharat Sanchar Nigam Limited (BSNL) to discuss their course of action with some IT Officers and resolve all the connectivity issues faced by all the Courts in all the Union Territory of India during the pandemic.⁵ This order was given very recently, at the beginning of March 2021 when the Court was hearing a *suo moto* PIL registered during the pandemic.

Beyond these two practices, there are many more subtle legal as well as Judicial procedures that can be speculated to be influenced by the same philosophy as Legal realism. Such practices include

⁵ Court on Its Own Motion vs Govt Of Nct Of Delhi & Anr (2020)

only female Judges hearing rape or sexual assault cases or only female police officers search the female accused or suspects.⁶ Practices like these are based on the idea that female authority would not only have a greater understanding of the case but would also decrease the chances of further humiliation of the female victim/accused. It is also based on the principle that female judges would not only be more open-minded about such cases but would also see the facts of the cases in a view untainted by misogyny or any patriarchal influence.

Practices like these depict how some procedures are based to nullify the natural human biases and to bring in a more neutral as well as objective view while deciding for the judgements of some cases. However, these practices do not completely erase the human factor – there have still been many such cases that have been held as very controversial.

One such example is the recent judgement given by a bench led by a female judge in Bombay High Court, where it was held that groping without ‘skin-to-skin’ contact cannot be held as a sexual assault under the Protection of Children from Sexual Offences (POCSO) Act. The Court had further added that touching a minor's chest without removing or slipping under the child's garment would amount to sexual assault – which, as one may expect, received a lot of backlash from not only the media and public but also the Centre itself.⁷

Setting aside the blatantly controversial judgement as one can easily speculate how absurd it was in nature, we can easily observe how judgements like these can be made regardless of the gender of the Judge deciding them – after all, it is not only the gender of the judge but rather the personal beliefs and morals of the judge that affects their perspective and in turn, the way they interpret the law to implement it in cases.

Another example can be seen through the recent judgement given by the Supreme Court where the Chief Justice of India controversially asked the accused of a rape case if he would marry the

⁶ Section 51, CrPC 1975 and the observations in *Kamalabhai v. State of Maharashtra*, AIR 1962.

⁷ Hakim, Sharmeen, 2021, "Pressing Breasts Without Disrobing Not 'Sexual Assault' As Per POCSO Act But Offence Under Sec 354 IPC : Bombay High Court", LIVELAW, (March 1, 2021), <https://www.livelaw.in/top-stories/pressing-breasts-without-disrobing-not-sexual-assault-pocso-bombay-high-court-168845>.

victim.⁸ The backlash of that single question was huge and expected – the general population was outraged, and the media started doing its own trails.

The facts of the case included that the accused, who was now a government employee working under Maharashtra State Electric Production Company Ltd as a technician, had sexually assaulted a minor girl several times in 2014-15. By the time the Court hearing started, both the accused and the victim were legally adults and, in that context, the CJI asked the accused ‘Will you marry her?’⁹

‘You should have thought before seducing and raping the young girl. You knew you are a government servant... We are not forcing you to marry. Let us know if you will, otherwise you will say we are forcing you to marry her,’ the CJI had said to the accused, which caused a major uproar considering not only was this unethical, but also very questionable.¹⁰ A rapist being offered the choice of marrying his victim – without even giving the victim the chance of keeping her own viewpoint or consent for such marriage is not only inhumane but very absurd; especially considering where this was coming from.

However, from the perspective of legal realism, one can observe how this came to be – India is one of the only few countries that do not consider marital rape as rape; thus, enabling the notion that a woman owes her husband his sexual satisfaction regardless of her consent being there or not. Such a law takes its roots from the core cultural belief that marriage is a ‘holy’ and ‘sacred’ union between a man and a woman¹¹ and thus, to maintain its ‘sacrament’, marital rape is not considered a crime – of course, until and unless the wife is under 15 years of age, in which case the whole marriage shouldn’t be held legal in the first place.¹²

⁸ Mohit Subhash Chavan v. State of Maharashtra (2021)

⁹ “Will you marry her? Supreme Court asks government servant charged with repeatedly raping minor girl”, BARAND BENCH, (March 1, 2021), <https://www.barandbench.com/news/litigation/will-you-marry-her-supreme-court-asks-man-charged-rape-minor-girl>.

¹⁰ “‘Will you marry her?’ — CJI Bobde asks govt servant accused of repeatedly raping minor”, THE PRINT, (March 1, 2021), <https://theprint.in/judiciary/will-you-marry-her-cji-bobde-asks-govt-servant-accused-of-repeatedly-raping-minor/613775/>.

¹¹ According to the Hindu Marriage Act, 1955 that consummates marriage as a holy union between the wife and husband in several of its sections.

¹² Section 375 of the Indian Penal Code (IPC) considers the forced sex in marriages as a crime only when the wife is below age 15.

In fact, the UK Court's recent judgement on the case relating to extradition proceedings of Nirav Modi highlighted a few glaring facts about the corruption and biases of the Judges in the Indian Judiciary. As per the judgement, the former Supreme Court Judge, who had been called in as an expert witness, had said of the Nirav Modi extradition matter that 'because the BJP cannot solve India's economic problems, it was like Hitler and the Jews'; that is, 'Nirav Modi is the Jew that must be blamed for all the problems in India' during his cross-examination for the aforementioned case.¹³

Furthermore, the judgement also highlighted how the former Judge had made bold assertions about the corruption in the Indian Judiciary which not only included the judges but also the former Chief Justices of India as well. He argued that 'Indian judiciary has largely surrendered before the government and is no longer independent and impartial as it is expected to be,' which he also mentioned in an article published by him under TheWeek Magazine.¹⁴

However, the interesting thing to note here is that despite him being critical of the former Chief Justice's appointment to the Rajya Sabha soon after his retirement on a quid pro quo basis, former SC Judge himself secured the position of Chairman of the Press Council of India just after his retirement – which. Ironically speaking, was also appointed by the government. Shouldn't this suggest corruption, collusion and personal biases equally for his own situation?

All this further raises the question; is this really fair to the victims? In the aforementioned cases, due to hearing the Judge's personal bias and influence, the accused ones got an unfair favourability while the victims were left with not even a chance to stand with their viewpoint. With such legal repercussions, how may one trust the judiciary when it seems to be dominated by Judges with such skewed morals? Especially when it is not just the justice of the victims on the line but also the whole nation's faith.

¹³ Srivatsa Krishna, 2021, "Your Lordship, heal thyself!: UK court's judgment in Nirav Modi case shows Indian judiciary needs to introspect and reform", FINANCIAL EXPRESS, (March 5, 2021), <https://www.financialexpress.com/opinion/your-lordship-heal-thyself-uk-courts-judgment-in-nirav-modi-case-shows-indian-judiciary-needs-to-introspect-and-reform/2205842/>.

¹⁴ Markandey Katju, 2021, "Amid criticism, justice Katju defends claim Nirav won't get fair trial in India", THE WEEK, (March 1, 2021), <https://www.theweek.in/news/india/2021/02/27/amid-criticism-justice-katju-defends-claim-nirav-wont-get-fair-trial-in-india.html>.

IV. Effects of Personal Morals on Law

As discussed above, the personal morals and ideals of a Judge can easily affect their decision making while giving the judgement of a case – however, is it always as negative as the cases discussed above? Well, the answer is no.

There have been many cases where the Judges' discretion and personal belief have brought in a lot of positive changes – some of such cases included the decriminalisation of homosexuality and bringing in the concept of Absolute liability after several gas leak cases. Such changes as needed due to the changing times, and as legal realism in itself is a dynamic concept, it not only allows the space for such changes but also facilitates them.

With liberal Judges, the changing social norms and a proper mindset, many things in India have changed for the better through several landmark judgements that paved the road for future cases in not only India but also the whole globe. However, among all the shining judgements, there are several biased ones as mentioned above; though, it would be considered unfair to judge the whole Judiciary only through those bad examples.

But, if so, what should be the next step to avoid such blatantly biased judgements to happen in the future? Well, the answer to that is unfortunately not that simple. Since all the Judges are as human as the general population is, irradicating the human factor of subjectivity is quite impossible and inane as an option. However, appointing better judges with maybe a bit stricter evaluation would help in keeping the morality of the future judges in check – even that though may be quite subjective and unreliable.

The philosophy of legal realism is quite real in the practical field of law – so much so that ignoring it would be equivalent to disregarding a lot of variables. However, the human factor in the equation of law will always be that – a variable. One that cannot be solved through logic but rather experience and a better understanding of social norms and psychology behind the person making the decisions of the judgement of a case.

Indeed, the reason behind one's personal beliefs do not justify their actions, but they do help us to understand the root cause of the problem and give us an idea about where to start if we wanted to bring a change in our society. If we take the example of the aforementioned Supreme Court judgement, then the clear issue that can be observed is how marriage is indirectly being used to legalize rape and diminish the value of consent of a female once she is married. To tackle this issue, one can suggest bringing in legal provisions against marital rape, ensuring more rights to a married female; however, with the patriarchal mentality still running strong in the Indian society, the scope of this happening is pretty narrow. Especially when one considers the types of comment the Chief Justice of India himself made.

V. Conclusion

In the end, one cannot deny the theory of legal realism is still relevant in the current scenario – in fact, it may stay relevant as long as Judiciary is headed by humans. In this scenario, the human factor in the implementation of the law cannot and should not be ignored as it greatly affects law and the State itself.

It certainly may seem very arbitrary in nature and one cannot deny it being so either; so, to avoid it getting out of hand, the option of revisiting judgements and criticising the Courts has already been in practice. It is unfortunate that in the past few years, the scope of criticism has been roped into a narrow path by enforcing 'contempt of Court' if anything seems to be mocking or disapproving the Judiciary. However, it is undeniable that such personal influence can cause quite the harm in the enforcement of law, but it is an inseparable part of the legal field that keeps law dynamic and more in-tune with the societal changes. Just like almost everything in the world, such influence has its pros and cons.

The only thing one can do to facilitate the pros more than the cons in this situation is by acknowledging the variable of human factor and understanding that the enforcement of law can never be completely untainted by the personal preferences of the interpreters of the law. And as such, once we begin understanding the influence behind it, we can either accept it or change it; depending on if the personal influence is a positive or a negative one.