POSITIVISM WITH

REFERENCE

TO

AMERICAN REALISM

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1.1 INTRODUCTION

It is difficult to give a universal and uniform definition of jurisprudence. Every jurist has his own notion of the subject matter and the proper limits of Jurisprudence depend upon his ideology and the nature of society. Moreover, the growth and development of law in different countries has been under different social and political conditions The words used for law in different countries convey different meanings. The words of one language do not have synonyms in other languages conveying the same meaning. The-word "jurisprudence" is not generally used in other languages in the English sense. In French, it refers to something like ‘‘case law’’. The evolution of society is of a dynamic nature and hence the difficulty in accepting a definition by all. New problems and new issues demand new solutions and new interpretations under changed circumstances. However, scientific inventions have brought the people of the world closer to each other which help the universalisation of ideas and thoughts and the development of a common terminology.

The study of jurisprudence started with the Romans. The Latin equivalent of "jurisprudence” is *jurisprudentia* which means either "knowledge of law" or "skill in law". *Paulus*,[1] another Roman jurist, maintained that "the law is not to be deduced from the rule, but the rule from the law".

In England, the word jurisprudence was in use throughout the early formative period of the common law, but as meaning little more than the study of or skill in law. It was not until the time of Bentham and his disciple Austin in the early part of the 19th century that the word

1 Cited in V. D. Mahajan , Jurisprudence and Legal Theory, Eastern Book Company, Fifth edition, pg no. 1

began to acquire a technical significance among English lawyers. Bentham distinguished between examinations of the law as it is and as it ought to be.

Julius Stone[2] describes jurisprudence as "the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law"

The view of *Austin* is that the science of jurisprudence is concerned with positive law, with "laws strictly so-called". It has nothing to do with the goodness or badness of law. Austin divided the subject into *general and particular jurisprudence.* General Jurisprudence includes such subjects or ends of law as are common to all systems while particular jurisprudence is confined only to the study of any actual system of law or any portion of it.

Positivism is a philosophy of science based on the view that information derived from logical and mathematical treatments and reports of sensory experience is the exclusive source of all authoritative knowledge, and that there is valid knowledge (truth) only in scientific knowledge. Verified data received from the senses are known as empirical evidence. This view holds that society, like the physical world, operates according to general laws. Introspective and intuitive knowledge is rejected. Although the positivist approach has been a recurrent theme in the history of Western thought, the modern sense of the approach was developed by the philosopher and founding sociologist Auguste Comte in the early 19th century. Comte argued that, much as the physical world operates according to gravity and other absolute laws, so also does society.

2 Cited in V. D. Mahajan , Jurisprudence and Legal Theory, Eastern Book Company, Fifth edition, pg no. 2

The realism is the anti-thesis of idealism. Some jurists refuse to accept the realist school as a separate school of jurisprudence. American realism is a combination of the analytical positivism and sociological approaches. It is positivist in that it first considers the law as it is. On the other hand, the law as it stands is the product of many factors. In as much as the realists are interested in sociological and other factors that influence the law. Their concern, however, law rather than society. Realists don't give any importance to laws enacted by legislature. And they uphold only judge-made law as genuine law. A great role of judges' understanding about law, society and also their psychology affect any judgment given by them. At the same time, in a same case applying same law two different judges give the different judgments.

Realism denounces traditional legal rules and concepts and concentrates more on what the courts actually do in reaching the final decision in the case. In strict sense, realists define law as generalized prediction of what the courts will do. Realists believe that certainty of law is a myth and its predictability depends upon the set of facts which are before the court for decision. It presupposes that law is intimately connected with the society and since the society changes faster than law so there can never be certainty about law. They do not support formal, logical and conceptual approach to law. The realist school evaluates any part of law in terms of its effect. Jerome Frank has stated, "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 Court so

decides by its judicial pronouncement.[3] The judges' decisions are the outcome of his entire life history."

1.2 BACKGROUND

At various times and places, Jurists have made their approaches to the study of law from different angles. They have defined law, determined its sources and nature and discussed its purpose and ends. For the sake of clarity and convenience in understanding their points of view, the jurists are divided into different schools on the basis of their approaches to law. It is not denied that any such division may not be comprehensive or exact. There may be Jurists who may not fall within the strict bounds of any one school. Some of the schools may be merely a synthesis of two approaches. However, in spite of all this, the division is helpful in understanding the evolution of legal philosophy.

Great attention was given to the study of law by men belonging to the profession of law, whether as teachers of law or as practicing lawyers. They were merely concerned with positive law which had little to do with vague and abstract notions of natural law. They started demarcating the proper bounds of law and analyzing and systematizing it. They advocated the reform of law in the light of changed social needs and conditions and not on extraneous considerations. They laid more and more emphasis on the analysis of positive law and they came to be called "positivists" or "analysts". Though John Austin is considered

3 Frank Jerome: Law and the Modern Mind (1930) p. 46 cited on http://books.google.co.in/books?id=6nf4hZ0FjdUC&pg=PA21&lpg=PA21&dq=positivism+with+reference+to+american+realism&source=bl&ots=qFVtIdQewF&sig=xShXP1VBwWnuzYTyC0HAPHGM780&hl=en&sa=X&ei=d0qMUvraE8mJrQeV4oDgDQ&ved=0CGQQ6AEwCQ#v=onepage&q=positivism%20with%20reference%20to%20american%20realism&f=false

to be the father of the new approach, he owed much to Bentham and on many points his propositions were no more than a "paraphrasing of Bentham's theory.

Legal realism is a school of legal philosophy that is generally associated with the culmination of the early-twentieth century attack on the orthodox claims of late-nineteenth-century classical legal thought in the United States of America. American Legal Realism is often remembered for its challenge to the Classical legal claim that orthodox legal institutions provided an autonomous and self-executing system of legal discourse untainted by politics.

The realist school has been divided into two parts:

1. Scandinavian Realism
2. American Realism

Both are hostile to formalism that treats law as a lifeless phenomenon. Both adopt radical empirical methods that seek to explain law in terms of observable behavior (examining cause and effect) and both are antagonistic towards metaphysics and values. Scandinavian Realism is existed in Europe, Sweden, Norway, England and Scandinavian countries. This school of realism was supported by Axel Hagerstrom, A.V. Lundstedt and Karl Olivecrona.

Realist thinking was introduced to American jurisprudence by *Oliver Wendell Holmes*.[4]

Oliver Holmes has been described as the intellectual inspiration and even the spiritual father of the American realist movement. Holmes was skeptical of the ability of general rules to provide the solution to particular cases and readily gave credence to the role of extra-legal factors in judicial decision-making. Holmes gave the first and classic exposition of the court-

4. Holmes was confirmed as Justice of the Supreme Court on 1902 and served for some thirty years until his resignation in 1932.

focused approach in 1897, sowing the seeds for realism, in a paper called *The Path of the Law*.

1.4 AMERICAN REALIST MOVEMENT:

Realism was not consolidated into a definite, coherent theoretical system; it can at best be described as a 'movement' or 'historical phenomenon' rather than a 'school of thought'. The realist movement began in the 19th century in America and gained force during the administration of President Franklin D. Roosevelt. The realist movement in United States represents the latest branch of sociological jurisprudence which concentrates on the decisions of law courts. Sometime it is called the 'left wing of the functional school.' This movement named as realist because this approach studies law, as it is in actual working and its effects. Realism was a movement without a clearly articulated theoretical foundation of its own. Some jurists refuse to accept realism as a separate school of jurisprudence. According to Llewellyn, "there is no realist school as such, it is only a movement in thought and work about law." Realism is the anti-thesis of idealism. American realism is a combination of the analytical positivism and sociological approaches. *Julius Stone* calls the realist movement a 'gloss' on the sociological approach.

2.1 POSITIVISM IN LAW

In the words of Prof. Dias[5], the positivist movement started at the beginning of the 19th century. It represented a reaction against the *a priori* methods of thinking which turned away from the realities of actual law in order to discover in nature or reason the principles of universal validity. Actual laws were explained or condemned according to those principles.

Prof. Hart points out that the term ″ positivism" has many meanings. One meaning is that laws are commands. This meaning is associated with Bentham and Austin who were the founders of British positivism. The second meaning is that the analysis of legal concept is worth pursuing, distinct from sociological and historical inquiries and critical evaluation. The third meaning is that decisions can be deduced logically from pre-determined rules without recourse to social aims, policy or morality. The fourth meaning is that moral judgments cannot be established or defended by rational argument, evidence or proof. The fifth meaning is that the law as it is actually laid down has to be kept separate from the law that ought to be. It is the fifth which seems to be currently associated with positivism. It may spring from a love of order which aims at the clarification of legal concepts and their orderly presentation. Precision maybe difficult but it is commendable and profitable. Positivism flourishes best in stable social conditions. It is the intellectual reaction against naturalism and a love of order and precision.

5 Cited in V. D. Mahajan , Jurisprudence and Legal Theory, Eastern Book Company, Fifth edition, pg no. 503

Positivists do not deny that judges make law. As a matter of fact, a majority of them admit it. They also acknowledge the influence of ethical considerations on judges and legislators as a judge or legislator adopts a proposition when it is considered to be moral and just. What they maintain is that it is only incorporation in precedent, statute or custom that imparts equality of law to a precept. Even if an unjust proposition is embodied in precedent or statute, it will be law. Every proposition which passes through one or other of the accepted media is law irrespective of all other considerations. The positivists distinguish between formal analysis and historical and functional analysis. They do not deny the value of historical and functional analysis but maintain that they should be kept apart from formal analysis. There is one inherent difficulty as it is seldom possible to study institutions as they are except in the light of their history and function. Many can be understood only in the light of their origins and past influences.

A total separation of the law as it is and the law as it ought to be cannot be maintained. However, there must be some degree of separation for practical purposes. Such a separation is desirable in the interest of society. A separation between the "is" and the "ought" is useful in providing a standard by which positive law can be evaluated and criticized. The importance of being able to tell as clearly and simply as possible whether this is, or is not, a law at any given point of time is obvious. The introduction of morality will create difficulties. Morality is a diffuse idea and no one, not even a naturalist, maintains that everything which is moral is law. As the area of law is bound to be narrower than that of morality, its boundary should be made as clear as possible.

2.2 Analytical School

The analytical school is known by different names. It is called the Positive School because the exponents of this school are concerned neither with the past nor with the future of law but with law as it exists, i.e., with law "as it is". The school was dominant in England and is popularly known as the English School. Its founder was John Austin and hence it is also called the Austinian school. This school takes for granted the developed legal system and proceeds logically to analyze its basic concepts and to classify them in order to bring out their relation to one another. This concentration on the systematic analysis of legal concepts has given this school the name of Analytical Jurisprudence. The first concern of the jurists is to understand the structural nature of a legal system and for this purpose; discussions of Justice are not only irrelevant but also dangerously confusing. Such an approach to law is commonly termed analytical and such writers are often styled Analytical Positivists. The term positivism was invented by Auguste Comte, a French thinker.

The purpose of analytical jurisprudence is to analyze, without reference either to their historical origin or development or their ethical significance or validity, the first principles of law. According to Salmond, a book of analytical jurisprudence will deal with such subjects as an analysis of the concept of law, an examination of the relation between civil law and other forms of law, an analysis of the various constituent ideas of which the complex idea of law is made up such as the State, sovereignty and administration of justice, an account of the legal sources from which law proceeds, together with an investigation of the theory of legislation, judicial precedents and customary law, an inquiry into the scientific arrangement of law into distinct departments along with an analysis of distinctions on which the division is based, an

analysis of the concept of legal rights along with the general theory of the creation and transfer of rights, an investigation of the theory of legal liability in civil and criminal cases and an examination of other relevant legal concepts.

The main task of the Analytical School is the lucid and systematic exposition of the legal ideas pertinent to ampler and maturer system of law. It starts from the actual facts of law as it sees them today. It endeavors to define those terms, to explain their connotation and show their relations to one another. One purpose of the Analytical School is to gain an accurate and intimate understanding of the fundamental working concepts of all legal reasoning.

2.3 MAIN JURISTS OF POSITIVISM

Austin

The work of the English jurist John Austin (1790-1859) remains the most comprehensive and important attempt to formulate a system of analytical legal positivism in the context of the modern state. Austin's most important contribution to legal theory was his substitution of the command of the sovereign (i.e., the state) for any ideal of justice in the definition of law. Austin defines a law

"as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him".[6]

Law is thus strictly divorced from justice and, instead of being based on ideas of good and bad, is based on the power of a superior. This links Austin with Hobbes and other theorists of

6 Lectures on Jurisprudence {4th ed., Campbell), Vol. 1, p. 86. Cited in W. Friedman, Legal Theory, Fifth edition pg no. 211

sovereignty; but it was left to Austin to follow up this conception into the ramifications of a modern legal system.

The first division of law is that into laws set by God to men (law of God), and laws set by men to men (human laws). The former class of laws is of no real juristic significance in Austin's system, compared, for example, with the scholastic teaching which establishes an organic relation between divine and human law. In Austin's positivist system, which refuses to relate law to goodness or badness, the law of God seems to fulfill no other function than that of serving as a receptacle for Austin's utilitarian beliefs. The principle of utility is the law of God. This proclamation of Benthamite faith has no influence whatsoever on the main principles of Austin's doctrine.

Human laws are divisible into laws properly so called (positive law) and laws improperly so called. The former are either law set by political superiors (either " supreme" or "subordinate") to political subordinates (such as statutes and by-laws, or laws set by subjects, as private persons, in pursuance of legal rights granted to them. As an example, Austin gives the rights of a guardian over his ward. But since the legal nature of such rights derives from the indirect command of the superior who confers such right on the guardian, it is obvious that every enforceable private right must fall within this category. Laws improperly so called are those which are not set directly or indirectly by a political superior. In this category are divers' types of rules: rules of clubs, laws of fashion, laws of natural science, and the rules of so called international law. To all these Austin gives the name of "Positive Morality," thus describing both their closeness to and their difference from positive law.

Bentham

Like Austin's theory, Bentham advocated an imperative theory of law in which the key concepts are those of sovereignty and command. Bentham "expounds these ideas with far greater subtlety and flexibility than Austin and illuminates aspect: of law largely neglected by him" Austin's sovereign is postulated as an illimitable, indivisible entity but Bentham': Sovereign is neither. There may be sound practical reasons for having one all-powerful sovereign, but Bentham saw the distinction between social desirability and logical necessity, which Austin did not. From a conceptual standpoint, there is no necessity for a sovereign to be undivided and unlimited. As a matter of fact, in the complex societies which have now developed, quite the reverse is true. Bentham accepts divided and partial sovereignty. He discussed the legal restrictions that may be imposed upon the sovereign power To quote him: "The business of the ordinary sort of law is to prescribe to the people what they shall do : the business of this transcendent class of laws is to prescribe to the sovereign what he shall do." Bentham believes a sovereign may bind his successors. "If by accident a sovereign should in fact come to the throne with a determination not to adopt the covenants of his predecessors, he would be told that he had adopted them notwithstanding:"

Sanctions generally play a less prominent part in the theory of Bentham than they do in that of Austin. Bentham thought that a sovereign's command would be law even if supported only by religious or moral sanctions. What chiefly differentiates Bentham from Austin and makes him an interesting philosopher of law is that he was a conscious innovator of new forms of enquiry into the structure of law. He made explicit his method and general logic of enquiry in a way in which no other writer on those topics does. When Austin's definition of law is compared with that of Bentham, the contrast becomes clear. On the surface they are similar.

Both are framed in terms of Superiority and inferiority, in terms of conduct to be adopted by those in the habit of obedience to a sovereign. The similarity ends here.

Every law may be considered in eight different respects viz., source, subjects, objects, extent, aspects, force, remedial appendages and expression. The source of law is the will of the sovereign who may conceive laws which he personally issues or adopt laws previously issued by former sovereigns or subordinate authorities or he may adopt laws to be issued in future by subordinate authorities.

Bentham's sovereign is “any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience and that in preference to the will of any other person". The attributes of sovereignty are interesting. Such power is indefinite unless limited by express convention or by religious or political motivations. The sovereign may consist of more than one body, each of which is obeyed in different respects. Habitual obedience may be divided and partial.

H. L. A. Hart

Prof. Hart is regarded as the leading contemporary representative of British positivism. His influential book, *The Concept of Law*, was published in 1961 and that shows that he is a linguistic, philosopher, barrister and a jurist.

Prof. Hart approaches his concept of law in this way. According to him: "Where there is law, there human conduct is made in some sense non-optional or obligatory.” Thus the idea of obligation is at the core of a rule. He commences in his book by criticizing Austin’s view of law as a command. The idea of command explains a coercive order addressed to another in special circumstances but not why a statute applies generally and also to its framers.

Moreover, there are other varieties of laws, notably powers. The continuance of pre-existing laws cannot be explained on the basis of command. Hart demolished the myth of "tacit command". Austin's "habit of obedience" fails to explain succession to sovereignty because it fails to take account of the important differences between "habit" and "rule". Habits only require common behavior which is not enough for a rule. A rule has an "internal aspect" which people use as a standard by which to judge and condemn deviations. Habits do not function in this way. Succession to sovereignty occurs by virtue of the acceptance of a rule entitling the successor to succeed and not because of a habit of obedience.

The view of Prof. Hart is that the significance of rules has been neglected. He uses "rule" to distinguish between "being obliged" and "having an obligation. A gunman orders B to hand over his money and threatens to shoot him if he does not do so. In this case, B is obliged to hand over the money but he has no obligation to do so. B believed that some harm or other unpleasant consequences would befall him if he did not hand over the money to the gunman and he handed over the money to avoid those consequences. The statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done. However, the statement that someone had an obligation to do something is of a very different type. In the case of the gunman there was no obligation as such. The statement that someone was obliged to do something normally carries the implication that he actually did it. One has an obligation only by virtue of a rule.

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin. There may be no centrally organized system of punishments for the breach of those rules.

3.1 AMERICAN REALISM

The realist movement is a part of the sociological approach and it is sometimes called the "left wing of the functional school". It differs from the sociological school as it is little concerned with the ends of law. It concentrates on a scientific observation of law in its making and working. The movement is called "realist" as it studies law in its actual working and rejects the traditional definition of law that it is a body of rules and principles which are enforced by the courts. The advocates of the realist movement concentrate on the decisions given by law courts. They not only study the judgments given by the judges but also the human factor in the judges and lawyers. They study the forces which influence judges in reaching their decisions.

The American realist movement is a combination of the analytical positivist and sociological approaches. It is positivist in the sense that it regards law as it is and not as it ought to be. The ultimate aim is to reform the law, but that cannot be done without understanding it. Law is the product of many factors and therefore the realists are interested in those sociological factors which influence law. They share with the sociologists an interest in the effects of social conditions of law as well as the effect of law on society. They put too much emphasis on judges. To them law is what judges decide. That is partly due to the fact that judges have played a very important part in the growth of the American Constitution and law. The approach of the realists is essentially empirical. Their view is that the decisions of the judges are brought about by ascertainable facts. Some of them are the personalities of the individual judges, their social environments, the economic conditions in which they have been brought up, business interests, trends and movements of thought, emotions, psychology etc. The

importance of the personal element is not new, but the contribution of the realists lies in the fact that they have put too much emphasis on it.

While calling American realism a revolt against formalism, Lord Lloyd points out that in the nineteenth century and at the beginning of the twentieth century, *laissez faire* was the dominant creed in America. That creed was associated with a certain attachment to what has been called "formalism, in philosophy and the social sciences. That was marked by a reverence for the role of logic and mathematics and a priori reasoning as applied to philosophy, economics and jurisprudence, with but little urge to link them empirically to the facts of life. However, empirical science and technology were increasingly dominating American society and with that development arose an intellectual movement in favour of treating philosophy and the social sciences as empirical studies not rooted in abstract formalism.

Dr. Friedmann[7] also points out that no country could offer richer material for the study of law as it worked in fact than the United States, with a Federal and forty-eight State jurisdictions, together producing innumerable precedents, with the function which the Supreme Court exercised in the political and social life of the country; with the contrast between the theoretical and practical aspect of constitutional principles; with the development of powerful corporations protected by the same individual rights as the pioneer farmer in the Wild West; with the manifold political machinations within the judicial system.

7 Cited in V. D. Mahajan , Jurisprudence and Legal Theory, Eastern Book Company, Fifth edition, pg no. 653

3.2 BASIC FEATURES OF REALISM:

Realism denounces traditional legal rules and concepts and concentrates more on what the courts actually do in reaching the final decision in the case. In strict sense, realists define law as generalized prediction of what the courts will do.

There are certain principal features of realistic jurisprudence as outlined by ***Karl Llewellyn and Prof. Goodhart***[8]:

1. There has to be a conception of law in flux and of the judicial creation of law.
2. Law is a means to social ends; and every part of it has constantly to be examined for its purpose and effects, and to be judged in the light of both and their relation to each other.
3. Society changes faster than law and so there is a constant need to examine how law meets contemporary social problems.
4. Realists believe that there can be no certainty about law and its predictability depends upon the set of facts which are before the court for decision.
5. They do not support formal, logical and conceptual approach to law because the Court while deciding a case reaches its decisions on 'emotive' rather than 'logical' ground.
6. 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 judges.
7. Realists are opposed to the value of legal terminology, for they consider it as tacit method of suppressing uncertainty of law.
8. The realists introduced studies of case law from the point of view which distinguished between rationalization by a judge in conventional legal terminology of a decision already reached and the motivations behind the decisions itself.

8 Cited in Dr. N. V. Paranjape, Studies in Jurisprudence and Legal Theory, 6th edition 2011, pg no. 82

9. The realists also study the different results reached by courts within the framework of the same rule or concept in relation to variations in the facts of the cases, and the extent to which courts are influenced in their application of rules by the procedural machinery which exists for the administration of the law.

HOW AMERICAN REALISM IS DIFFERENT FROM OTHER SCHOOLS OF JURISPRUDENCE:

AMERICAN REALISM AND LEGAL POSITIVISM: Despite their serious differences, American realism and legal positivism share one important belief. It is that their views are similar on the point of difference between 'the law as it is' and 'the law as it ought to be'. The positivist, according to Hart, look to the established primary rules and to secondary rules of recognition that designate law making bodies. American realists are skeptical about the degree to which rules represent the law. They seek to investigate how courts actually reach their decisions. Karl Llewellyn observed that the realists' separation of 'is' and 'ought', is a temporary divorce. The divorce lasts while the scholars are discovering what courts actually do.

AMERICAN REALISM AND SOCIOLOGICAL APPROACH: Realist school differs from sociological school as unlike the sociological approach, realists are not much concerned about the ends of law but their main attention is on a scientific observation of law and its actual functioning. It is for the reason that some authorities have called realist school as the 'left wing of the functional school.' Some quarters feel that realist movement in the United

States should not be treated as a new independent school of jurisprudence but only a new methodology to be adopted by the sociological school.

AMERICAN REALISM AND NATURAL LAW PHILOSOPHY: Realist school differs from Natural law school as according to natural law philosophy laws are made by the Nature or God itself but Realist school believes that laws are made by the judges or juristic persons. Natural Law is "discovered" by humans through the use of reason and choosing between good and evil. In Natural law school laws are based on the morality and the ethics.

3.3 MAIN JURISTS OF AMERICAN REALISM:

I. JUSTICE HOLMES:

The seeds of realism were sown by *Justice Holmes*. He said that Law is not like mathematics. Law is nothing but a prediction. According to him, the life of law is logic as well as experience. The real nature of the law cannot be explained by formal deductive logic. Judges make their decisions based on their own sense of what is right. In order to see what the law is in reality, he adopted the standpoint of a hypothetical 'Bad man' facing trial. Therefore his theory is known as *Bad Man Theory*. This theory says that a bad man successfully predicts the actual law than other people. Holmes said that law should be looked from bad man's perspective. On the basis of this prediction Holmes defined the law as, "Prophecies (ability to predict) of what the court will do in fact and nothing more pretentious."[9]

9 OW Holmes '*The Path of the Law*' (1897) 10 Harvard LR 457

II. JUSTICE GRAY:

John Chipman Gray only exhibited limited factors in common with the realists. His approach was certainly as court-oriented as the realists. For Gray the law was simply what the court decided. Everything else, including statutes, were simply sources of law. He said, "The law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.

III. KARL N. LLEWELLYN:

Karl Llewellyn was a professor of law at the Columbia University. He confessed that there is nothing like realist school instead it is a particular approach of a group of thinkers belonging to the sociological jurisprudence. According to Llewellyn realism means a movement in thought and work about law. Karl Llewellyn outlined the principle features of the realist approach. Which are as follows:-

1. There has to be a conception of law in flux and of the judicial creation of law.
2. Society changes faster than law, so there is a constant need to improve the law.
3. There has to be a temporary separation between is and ought for the purpose of study.

Karl Llewellyn[10] described the basic functions of law as 'law jobs'. Law is an 'institution' which is necessary in society and which is comprised not only of rules but also contains an 'ideology and a body of pervasive and powerful ideals which are largely unspoken, largely implicit, and which pass unmentioned in the books'. Law has jobs to do within a society. These are:

10 Dr. N. V. Paranjape, Studies in Jurisprudence and Legal Theory, central Law Agency, 6th edition 2011, pg no.82

i. The disposition of the trouble case: a wrong. A grievance, a dispute. This is the garage-repair work or the going concern of society with its continuous effect upon the remarking of the order of society.

ii. The preventive channeling of conduct and expectation so as to avoid trouble, and together with it, the effective reorientation of conduct and expectations in similar fashion.

iii. The allocation of authority and the arrangement of procedures which mark action as being authoritative; which includes all of any constitution and much more.

iv. The positive side of law's work is the net organization of society as a whole so as to provide integration, direction and incentive.

v. 'Juristic method' to use a single slogan to sum up the task of handling the legal materials and tools and people developed for the other jobs to the end that those materials and tools and people are kept doing their law-jobs, and doing them better, until they become a source of revelation of new possibility and achievement.

IV. JEROME FRANK:

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. He was also a visiting professor of law in Yale Law School. His classic work, "Law and the modern mind" presents a very close examination of judicial process and is full of practical illustrations. His thesis is that law is uncertain or certainty of law is a legal myth. He exploded the myth that law is continuous, uniform, certain and invariable and asserted that the judges do not make the law, instead they discover it. Frank observes that a judge's

decisions are the outcome of his entire life history. His friends, his family, vocations, schools, religion, all these factors are influential.

In this regard Jerome Frank has given the *Fathers' Symbol Theory.* The child puts his trust in the power and wisdom of his father to provide an atmosphere of security. In the adult the counterpart of this feeling is the trust reposed in the stability and immutability of human institutions. Frank suggested that the quest for certainty in law is in effect a search for a 'father-symbol' to provide an aura of security, and although he attributed great prominence to this factor. He offered it only as a 'partial explanation' of what he called the 'basic myth', and listed fourteen other explanations as well.

Frank emphasized that law is not merely a collection of abstract rules and that legal uncertainty is inherent in it. Therefore mere technical legal analysis is not enough for understanding as to how law works. Frank accordingly divided realists into two camps, described as 'rule skeptics' and 'fact skeptics.' The 'rule skeptics' rejected legal rules as providing uniformity in law and tried instead to find uniformity in rules evolved out of psychology, anthropology, sociology, economics, politics etc. The 'rule skeptics' avoided that criticism by saying that they were not deriving purposive 'ought' but only predictions of judicial behavior analogous to the laws of science. Frank called this brand of realism the left-wing adherents of a right-wing tradition, namely, the tradition of trying to find uniformity in rules. The fact 'fact skeptics' rejected even this aspiration towards uniformity. He abandoned all attempts to seek rule-certainty and pointed to the uncertainty of establishing even the facts

in trial courts. It is impossible to predict with any degree of certainly how fallible a particular witness is likely to be, or how persuasively he will lie.

Frank divided realists into two camps, described as ‘rule-skeptics’ and ‘fact-skeptics’. The ‘rule-skeptics’ rejected legal rules as providing uniformity in law, and tried instead to find uniformity in rules evolved out of psychology, anthropology, sociology, economics, politics etc. Kelson, it will be remembered, maintained that it is not possible to derive an ‘ought’ from an ‘is’. The ‘rule-skeptics’ avoided that criticism by saying that they were not deriving purposive ‘ought’, but only predictions of judicial behavior analogous to the laws or science.

CONTRIBUTION OF THE AMERICAN REALISM TO JURISPRUDENCE:

The main contribution of realists to jurisprudence lies in the fact that they have approached law in a positive spirit and demonstrated the futility of theoretical concepts of justice and natural law. Opposing positivist’s view, the realists hold that law is uncertain and indeterminable in nature therefore, certainty of law is a myth. According to Friedman, realist movement is an attempt to rationalize and modernize the law- both administration of law and the material for legislative change, by utilizing scientific method and taking into account the factual realities of social life. According to Julius Stone, “realist movement is a gloss on the sociological approach to jurisprudence. He considers realism as a combination of the positivist and the sociological approach. It is positivist in the sense that it undertakes the study of law as it is and sociological, because it expects that law should function to meet the ends of society. Thus in his view, realist school is merely a branch of sociological jurisprudence and a method of scientific and rational approach to law.

CRITICISM OF AMERICAN REALISM:

1. The realist approach to jurisprudence has evoked criticism from many quarters. 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 can't 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.
2. Another criticism so often advanced against realists is that they seem to have totally neglected that part of 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 legislature never comes before the court.
3. The supporters of realist theory undermine the authority of the precedent and argue that case law is often made 'in haste', without regard to wider implications. The courts generally give decisions on the spot and only rarely take time for consideration. They have to rely on the evidence and arguments presented to them in court, and do not have access to wider evidence such as statistical data, economic forecasts, public opinion, survey etc.
4. Realist school has exaggerated the role of human factor in judicial decisions. It is not correct to say that judicial pronouncements are the outcome of personality and behavior of the

judges. There are a variety of other factors as well which has to take into consideration while reaching his decisions.

5. The realist theory is confined to local judicial setting of United States and has no universal application in other parts of the world like other schools of jurisprudence.

3.4 REALISM IN THE INDIAN CONTEXT:

The legal philosophy of the realist school has not been accepted in the sub-continent for the obvious reason that the texture of Indian social life is different from that of the American life-style. The recent trends in the public interest litigation widened the scope of judicial activism to a great extent but the judges have to formulate their decisions when the limits of constitutional frame of the law by using their interpretative skill. In other words the judges in India cannot ignore the existing legislative statutes and enactments. They have to confine their judicial activism within the limits of the statutory law. They are free to overrule the previous decisions on the ground of inconsistency, incompatibility, vagueness, change of conditions etc. Thus the Indian legal system, though endows the judges with extensive judicial discretion, does not make them omnipotent in the matter of formulation of law. The legislative statutes and enactments, precedents and the rules of equity, justice and good conscience are indispensable part of the judicial system in India. The constitution of India itself provides ample scope for the judges to take into consideration the hard realities of socio-economic and cultural life of the Indian people while dispensing social and economic justice to them.

In short, it may be reiterated that though Indian jurisprudence does not formally subscribe to the realist's legal philosophy, it does lay great stress on the functional aspect of the law and relates law to the realities of social life. Again, it refuses to accept the realist's view that Judge-made law is the only real 'law' and other laws are worthless, but at the same time it does not completely ignore the role of Judges and the lawyers in shaping the law. Thus it would be correct to say that the Indian legal system has developed on the pattern of sociological jurisprudence as evinced by the post-independence socio-economic legislation but it considers doctrine of realism alien to Indian society which has a different life-style and social milieu. Undoubtedly, the Indian judges do have the liberty of interpreting law in its contextual and social setting keeping in view the social, economic, political, cultural, historical and geographical variations of the Indian society. The power of review and doctrine of overruling its earlier decisions has enabled the Supreme Court to effectuate the socio-economic contents of the constitutional mandate[11] through the process of judicial interpretation and use of its inherent powers. Thus the Apex Court in ***Bengal Immunity Case***[12] overruled its earlier decision in ***Dwarkadas v. Sholapur Spinning Co.***[13] and observed that "the Court is bound to obey the Constitution rather than any decision of the Court, if the decision is shown to have been mistaken". Justifying its stand, the Court further observed that where a constitutional decision affects the lives and property of the public and where the Court finds that its earlier decision is manifestly wrong and injurious to the public interest, it should not hesitate to overrule the same.

11 Part III & IV of The Constitution of India cited in Dr. N. V. Paranjape, Studies in Jurisprudence and Legal Theory, central Law Agency, 6th edition 2011, pg no.88
12 Bengal Immunity Ltd. v. State of Bihar (AIR 1955 SC 661)
13 AIR 1954 SC 119 (137)

Adopting the same approach Justice B.B. Gajendragadkar in ***Keshav Mills v. Income Tax Commissioner,***[14] observed that Supreme Court has inherent jurisdiction to reconsider and revise its earlier decision if it does not serve the interest of the public good.

There are a number of cases where the rules or laws are made by the judiciary. Some of the following cases where Supreme Court played the role of law-maker are given as below:

In ***Hussainara Khatoon v. State of Bihar***,[15] the Supreme Court has held that speedy trial is an essential and integral part of the fundamental right to life and liberty enshrined in Article 21. In Bihar a number of under trial prisoners were kept in various jails for several years without trial. The court ordered that all such prisoners whose names were submitted to the court should be released forthwith. Since speedy trial is being held to be a fundamental right guaranteed under Article 21 of the Constitution of India. The Supreme Court considered its constitutional duty to enforce this right of the accused person.

In ***Shri Ram Food and Fertilizer case***,[16] the Supreme Court directed the company, manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighborhood, to take all necessary safety measures before reopening the plant.

In ***Ganga Water Pollution*** **case**,[17] the petitioner sought the direction from the Supreme Court restraining the respondents from letting out trade effluents into the river Ganga till such time

14 AIR 1965 SC 1616
15 AIR 1979 SC 1819
16 AIR 1987 SC 1965
17 M.C. Mehta v. Union Of India (AIR 1988 SC 1115)

they put up necessary treatment plants for treating the trade effluents in order to arrest the pollution of water in the said river.

In ***Parmanand Katara v. Union of India***,[18] the Supreme Court has held that it is a paramount obligation of every medical (private or government) to give medical aid to every injured citizen brought for treatment immediately without waiting for procedural formalities to be completed in order to avoid negligent death.

In ***M.C. Mehta v. State of Tamil Nadu***,[19] it has been held that the children cannot be employed in match factories which are directly connected with the manufacturing process as it is a hazardous employment within the meaning of Employment of Children Act 1938. There can, however, be employment packing process but it should be done in are away from the place of manufacture to avoid exposure to accident. Every children must be insured for a sum of Rs. 15,000/- and premium to be paid by employer as a condition of service.

Dealing with a case pertaining to water pollution in case of ***Vellore Citizens Welfare Forum v. Union of India***,[20] the Supreme Court directed 162 tanneries in Tamil Nadu to be closed because these were polluting the air and the water around the area where they were operating and the water had been unworthy for drinking.

18 AIR 1989 SC 2039
19 AIR 1991 SC 417
20 AIR 1996 SC 2715

M.C. Mehta v. Union of India,[21] with a view to preserve environment and control pollution within the vicinity of tourist resorts of Badkhal and Surajkund the court directed the stoppage of mining activities within two kilometer radius of these two tourist resorts.

In a significant judgment in ***Vishakha v. State of Rajasthan***,[22] the Supreme Court has laid down exhaustive guidelines for preventive sexual harassment of working women in place of their work until any legislation is enacted for this purpose.

21 (1996) 8 SCC 462
22 AIR 1997 SC 3011

POSITIVISM V/S AMERICAN REALISM: A COMPARITIVE STUDY

Every human society has some form of social order, some way of marking and encouraging approved behavior, deterring disapproved behavior, and resolving disputes. What then is distinctive of societies with legal systems and, within those societies, of their law? Before exploring some positivist answers, it bears emphasizing that these are not the only questions worth asking. While an understanding of the nature of law requires an account of what makes law distinctive, it also requires an understanding of what it has *in common* with other forms of social control. Some Marxists are positivists about the nature of law while insisting that its distinguishing characteristics matter less than its role in replicating and facilitating other forms of domination. They think that the specific nature of law casts little light on their primary concerns. But one can hardly know that in advance; it depends on what the nature of law actually is.

According to Bentham and Austin, law is a phenomenon of large societies with a *sovereign*: a determinate person or groups who have supreme and absolute *de facto* power they are obeyed by all or most others but do not themselves similarly obey anyone else. The laws in that society are a subset of the sovereign's *commands*: general orders that apply to classes of actions and people and that are backed up by threat of force or "sanction." This imperatival theory is positivist, for it identifies the existence of legal systems with patterns of command and obedience that can be ascertained without considering whether the sovereign has a moral right to rule or whether his commands are meritorious. It has two other distinctive features.

The theory is *monistic*: it represents all laws as having a single form, imposing obligations on their subjects, though not on the sovereign himself. The imperativalist acknowledges that ultimate legislative power may be self-limiting, or limited externally by what public opinion will tolerate, and also that legal systems contain provisions that are not imperatives (for example, permissions, definitions, and so on). But they regard these as part of the non-legal material that is necessary for, and part of, every legal system. The theory is also *reductivist*, for it maintains that the normative language used in describing and stating the law talk of authority, rights, obligations, and so on can all be analyzed without remainder in non-normative terms, ultimately as concatenations of statements about power and obedience.

Imperatival theories are now without influence in legal philosophy. What survives of their outlook is the idea that legal theory must ultimately be rooted in some account of the political system, an insight that came to be shared by all major positivists save Kelsen. Their particular conception of a society under a sovereign commander, however, is friendless. It is clear that in complex societies there may be no one who has all the attributes of sovereignty, for ultimate authority may be divided among organs and may itself be limited by law. Moreover, even when "sovereignty" is not being used in its legal sense it is nonetheless a normative concept. A legislator is one who has *authority* to make laws, and not merely someone with great social power, and it is doubtful that "habits of obedience" is a candidate reduction for explaining authority. Obedience is a normative concept. To distinguish it from coincidental compliance we need something like the idea of subjects being oriented to, or guided by, the commands. Explicating this will carry us far from the power-based notions with which classical positivism hoped to work. The imperativalists' account of obligation is also subject to decisive objections. Treating all laws as commands conceals important

differences in their social functions; in the ways they operate in practical reasoning, and in the sort of justifications to which they are liable. For instance, laws conferring the power to marry command nothing; they do not obligate people to marry, or even to marry according to the prescribed formalities. Nor is reductivism any more plausible here: we speak of legal obligations when there is no probability of sanctions being applied and when there is no provision for sanctions. Moreover, we take the existence of legal obligations to be a *reason for* imposing sanctions, not merely a consequence of it.

Hans Kelsen retains the imperativalists' monism but abandons their reductivism. On his view, law is characterized by a *basic form* and *basic norm*. The form of every law is that of a conditional order, directed at the courts, to apply sanctions if a certain behavior (the "delict") is performed. On this view, law is an indirect system of guidance: it does not tell subjects what to do; it tells *officials* what to do to its subjects under certain conditions. Thus, what we ordinarily regard as the legal duty not to steal is for Kelsen merely a logical correlate of the primary norm which stipulates a sanction for stealing. The objections to imperatival monism apply also to this more sophisticated version: the reduction misses important facts, such as the point of having a prohibition on theft. But in one respect the conditional sanction theory is in worse shape than is imperativalism, for it has no principled way to fix on the delict as the duty-defining condition of the sanction that is but one of a large number of relevant antecedent conditions, including the legal capacity of the offender, the jurisdiction of the judge, the constitutionality of the offense, and so forth.

Kelsen's most important contribution lies in his attack on reductivism and his doctrine of the "basic norm." He maintains that law is normative and must understood as such. Might does

not make right not even legal right so the philosophy of law must explain the fact that law is taken to impose obligations on its subjects. Moreover, law is a normative *system*: "Law is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system". For the imperativalists, the unity of a legal system consists in the fact that all its laws are commanded by one sovereign. For Kelsen, it consists in the fact that they are all links in one chain of authority. For example, a by-law is legally valid because it is created by a corporation lawfully exercising the powers conferred on it by the legislature, which confers those powers in a manner provided by the constitution, which was itself created in a way provided by an earlier constitution. Its authority, says Kelsen, is "presupposed." The condition for interpreting any legal norm as binding is that the first constitution is validated by the following "basic norm:" "*the original constitution is to be obeyed*." Now, the basic norm cannot be a legal norm we cannot fully explain the bindingness of law by reference to more law. Nor can it be a social fact, for Kelsen maintains that the reason for the validity of a norm must always be another norm no ought from is. It follows, then, that a legal system must consist of norms all the way down. It bottoms in a hypothetical, transcendental norm that is the condition of the intelligibility of any other norms as binding. To "presuppose" this basic norm is not to endorse it as good or just resupposition is a cognitive stance only but it is, Kelsen thinks, the necessary precondition for a non-reductivist account of law as a normative system.

There are many difficulties with this, not least of which is the fact that if we are willing to tolerate the basic norm as a solution it is not clear why we thought there was a problem in the first place. One cannot say both that the basic norm is the norm presupposing which validates all inferior norms and also that an inferior norm is part of the legal system only if it is

connected by a chain of validity to the basic norm. We need a way into the circle. Moreover, it draws the boundaries of legal systems incorrectly. The Canadian Constitution of 1982 was lawfully created by an Act of the U.K. Parliament, and on that basis Canadian law and English law should be parts of a single legal system, rooted in one basic norm: 'The (first) U.K. constitution is to be obeyed.' Yet no English law is binding in Canada, and a purported repeal of the Constitution Act by the U.K. would be without legal effect in Canada.

If law cannot ultimately be grounded in force, or in law, or in a presupposed norm, on what does its authority rest? The most influential solution is now H.L.A. Hart's. His solution resembles Kelsen's in its emphasis on the normative foundations of legal systems, but Hart rejects Kelsen's transcendentalist, Kantian view of authority in favour of an empirical, Weberian one. For Hart, the authority of law is social. The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually *practiced*. Law ultimately rests on customs about who shall have the authority to decide disputes, what they shall treat as binding reasons for decision, i.e. as sources of law, and how customs may be changed. Of these three "secondary rules," as Hart calls them, the source-determining *rule of recognition* is most important, for it specifies the ultimate criteria of validity in the legal system. It exists only because it is practiced by officials, and it is not only the recognition rule that best explains their practice, it is rule to which they actually appeal in arguments about what standards they are bound to apply. Hart's account is therefore conventionalist ultimate legal rules are social norms, although they are neither the product of express agreement nor even conventions in the Schelling-Lewis sense. Thus for Hart too the legal system is norms all the way down, but at its root is a social norm that has the kind of normative force that customs have. It is a regularity of behavior towards

which officials take “the internal point of view:” they use it as a standard for guiding and evaluating their own and others' behavior, and this use is displayed in their conduct and speech, including the resort to various forms of social pressure to support the rule and the ready application of normative terms such as “duty” and “obligation” when invoking it.

It is an important feature of Hart's account that the rule of recognition is an *official* custom, and not a standard necessarily shared by the broader community. If the imperativalists' picture of the political system was pyramidal power, Hart's is more like Weber's rational bureaucracy. Law is normally a technical enterprise, characterized by a division of labour. Ordinary subjects' contribution to the existence of law may therefore amount to no more than passive compliance. Thus, Hart's necessary and sufficient conditions for the existence of a legal system are that “those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials”. And this division of labour is not a normatively neutral fact about law; it is politically charged, for it sets up the possibility of law becoming remote from the life of a society, a hazard to which Hart is acutely alert.

Although Hart introduces the rule of recognition through a speculative anthropology of how it might emerge in response to certain deficiencies in a customary social order, he is not committed to the view that law is a cultural achievement. To the contrary, the idea that legal order is always a good thing, and that societies without it are deficient, is a familiar element of many *anti*-positivist views, beginning with Henry Maine's criticism of Austin on the

ground that his theory would not apply to certain Indian villages. The objection embraces the error it seeks to avoid. It imperialistically assumes that it is always a bad thing to lack law, and then makes a dazzling inference from ought to is: if it is good to have law, then each society must have it, and the concept of law must be adjusted to show that it does. If one thinks that law is a many splendored thing, one will be tempted by a very wide concept of law, for it would seem improper to charge others with missing out. Positivism simply releases the harness. Law is a distinctive form of political order, not a moral achievement, and whether it is necessary or even useful depends entirely on its content and context. Societies without law may be perfectly adapted to their environments, missing nothing.

A positivist account of the existence and content of law, along any of the above lines, offers a theory of the *validity* of law in one of the two main senses of that term. Kelsen says that validity is the specific mode of existence of a norm. An invalid marriage is not a special kind of marriage having the property of invalidity; it is not a marriage at all. In this sense a valid law is one that is *systemically valid* in the jurisdiction it is part of the legal system. This is the question that positivists answer by reference to social sources. It is distinct from the idea of validity as moral propriety, i.e. a sound justification for respecting the norm. For the positivist, this depends on its merits. One indication that these senses differ is that one may know that a society has a legal system, and know what its laws are, without having any idea whether they are morally justified. For example, one may know that the law of ancient Athens included the punishment of ostracism without knowing whether it was justified, because one does not know enough about its effects, about the social context, and so forth.

No legal positivist argues that the *systemic validity* of law establishes its *moral validity*, i.e. that it should be obeyed by subjects or applied by judges. Even Hobbes, to whom this view is sometimes ascribed, required that law actually be able to keep the peace, failing which we owe it nothing. Bentham and Austin, as utilitarians, hold that such questions always turn on the consequences and both acknowledge that disobedience is therefore sometimes fully justified. Kelsen insists that "The science of law does not prescribe that one ought to obey the commands of the creator of the constitution". Hart thinks that there is only a *prima facie* duty to obey, grounded in and thus limited by fairness -- so there is no obligation to unfair or pointless laws. Raz goes further still, arguing that there isn't even a *prima facie* duty to obey the law, not even in a just state. The peculiar accusation that positivists believe the law is always to be obeyed is without foundation. Hart's own view is that an overweening deference to law consorts more easily with theories that imbue it with moral ideals, permitting "an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: 'Ought this law to be obeyed?".

Analytical jurisprudence **is** the dominant theme of the legal theory of Professor H. L. A. Hart. But other jurisprudential approaches are discernible in his thought. One of the more important of these other approaches is that of American Legal Realism. While Hart adopts some Realist tenets, he is severely critical of others. His criticism of Realism may be designed chiefly for effect. That is to say, Hart may have caricatured American Legal Realism primarily to make more vivid certain points in his own theory. Be that as it may, Hart's distortion of Realism is so great as to require response. The writer is of the opinion

that Hart and the Realists are not as incompatible in thinking as Hart in his The Concept of Law seems to suggest.

Recognition of one point is essential to a meaningful comparison of Hart and the Realists: Hart's attempt, in the tradition of analytical jurisprudence, is to describe a universal legal system, while the Realists seek a method of critical examination rather than a philosophy of law. As Karl Llewellyn, the greatest Realist, explained:

"There is no school of realists. There is no likelihood that there will be such a school. There is, however, a movement in thought and work about law. The movement, the method of attack, is wider than the number of its adherents. It includes some or much work of many men who would scorn ascription to its banner."[23]

Because there is no attempt by the Realists to formulate a complete theory of law, point by point comparison of Hart and the Realists is not possible. What is possible is a comparison of the respective focuses of attention with a consequent illumination of differences in the degree of importance attached by each to various phases of law and legal methodology.

While there is no simple system of American Legal Realism, adherents of the method do, however, share several " common points of departure." Three of these, adopted from Mr. Justice Holmes' The Path of the Law, are: (1) separation of law and morality, which is common to both the Realists and Hart; (2) the fallacy of the logical form as the source for answers to legal questions, which also is recognized by Hart but is said by him to have been

23 K. Llewellyn, "Some Realism about Realism," (1931) 44 Harv.L.Rev. 1222, 1233-1234.cited in V. D. Mahajan, Jurisprudence and Legal Theory, fifth edition, pg no. 662

extremely exaggerated by the Realists; and (3) the prediction theory of law, which is expressly and categorically rejected by Hart as generating a distorted picture of law.

SEPARATION OF LAW AND MORALITY

While the approaches of both Hart and the Realists generally separate law and morality to facilitate clearer analysis, the two differ substantially in focus and tone. Only on the fringes, as may be necessary in an analytical theory of law, does Hart's theory provide room for moral considerations in the administration of law. For the most part, the rules of law are Hart's objective is. And the ought most relevant to Hart's legal theory is the correct application of rules which provide relatively clear answers in most cases. In the unusual fringe-area or ''penumbral'' case, Hart's legal ought does acquire immediate moral relevance:

"Here we touch upon a point of necessary intersection between law and morals which demonstrates the falsity or, at any rate, the misleading character of the Utilitarian's emphatic insistence on the separation of law as it is and ought to be. Surely, Bentham and Austin could only have written as they did because they misunderstood or neglected this aspect of the judicial process, because they ignored the problems of the penumbra."[24]

While Hart and the Realists concur that moral considerations are of vital importance in areas of legal uncertainty they disagree rather sharply on the scope of law's penumbral frontiers. Hart's theory of rule ambiguity and vagueness is, for at least the most part, quite mechanistic. He suggests that while the meanings of most words contain large cores of

24 H.L.A. Hart, Positivism and the Separation of Law and Morals" (1958) cited in Jurisprudence: Theory and Context by Brian H. Bix, fifth edition pg no. 40

certainty, the meanings do tend to become fuzzy at some outer point. For example, a prohibition against use of a vehicle in a park would clearly encompass the use of automobiles, buses and motorcycles, but the clarity of applicability breaks down when the question becomes use of an electrically propelled toy automobile. This same approach is taken by Hart in his examination of legal standards-concepts such as '(fair rate," "safe system," ''reasonable care," and ''due process.') He describes such concepts as having certainty in the more extreme possible cases and losing that certainty as the factual situation becomes less extreme.

Such a view of legal uncertainty sacrifices accuracy and completeness for the sake of symmetry and simplicity. Missed are some patent areas of uncertainty and some that are not so obvious. One of the most important omissions is that of the competing legal premises an area that provides choice by categorization and thus allows injection of moral considerations into the decisional process. A vivid example of the possibilities of decision making through categorization can be found in the famous case of **Hynes v. New York Cent. R.R.**[25] There a sixteen-year-old lad, after swimming across a river, saw a board extending out over the river, away from the bank. The lad climbed out of the river, onto the bank, which was part of the defendant's railroad yard. He walked out onto the board, was hit by a falling wire and fell to his death in the river below. The lower court held that the lad was a trespasser thus not due the ordinary standard of care. The Court of Appeals reversed, holding that the river was a "public way." Thus the lad, while standing on the board over the river was not a trespasser. Therefore the defendant should have been held to the higher degree of care. In his opinion for

25. 231 N.Y. 229, 131 N.E. 898 (1921)

the court Cardozo J. clearly declared that the court had been faced with two valid competing premises. The court selected the one consistent with their view of justice in the case.

In numerous other settings, result oriented categorization is often unavoidable. One such instance is where non-substantial activity in furtherance of performance has occurred prior to revocation of an offer to enter into a unilateral contract. If the activity is categorized as "beginning of performance," the offeror is precluded from revocation; if categorized as ''preparation for performance" the revocation is effective. The same latitude of choice is present in many cases of mistake in contract formation. Mistakes categorized as mutual have been viewed by the common law as fatal to contract formation, but not so if categorized as unilateral. Thus in the landmark decision in **Shewood v. Walker**[26] the court viewed the buyer and seller of a pregnant cow to have bargained thinking only that the cow was sterile. Thus mutual mistake prevented contract formation. On the other hand, if the court had described the buyer's state of mind as one of conscious ignorance of the fecundity of his purchase, or as having consciously been hoping for a good bargain, the mistake would have been categorized as unilateral and would not have prevented contract formation.

Among the other more significant areas of judicial choice which Hart overlooks are those in which two lines of precedent exist, each deciding the same point differently. Another is the technique of avoiding an undesirable precedent by confining applicability to its peculiar facts. Also missed is the technique very important to the growth of law of extending older precedents to varying new fact situation. The Realist is ought dichotomy is more complex than that of Hart. Realism's approach offers more latitude for injecting considerations of morality into the administration of law. Realism has taken the view of its founding father,

26. 66 Mich. 5G8. 33 K.W. 919 (1887)

Holmes, on the potential role of moral considerations in legal decision making. The Holmesian reason for urging an analytical separation of law and morality, curiously often ignored by his critics, was clearly stated in *The Path of the Law:*

"When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that I ask you for the moment to imagine yourselves indifferent to other and greater things."

Responsible Realists continue the basic Holmesian theme urging a separation of law and morality in order to define the proper role for moral considerations in the operation of law. Llewellyn predicted great potential for the method in the appellate process:

"The field of free play for ought in appellate courts is vastly wider than traditional Ought-bound thinking ever had made clear. This, within the confines of precedent as we have it, within the limits and on the basis of our present order."

Professor Jones, leader among contemporary Realist thinkers, has depicted a more complete horizon of potential for the method:

"The choice between alternatives, the selection of the path to be pursued, cannot but be influenced by the decision-maker's ought to be . . . when we enter the realm of the judge's ' serious business,' the prosecutor's discretion, the practicing lawyer's choices, we need a moral theory fully as demanding as the older natural law tradition but more directly addressed to the points of strain at which moral insights are most needed. In realist

perspective, choice, decision, and responsibility for decision are central elements for a philosophy of law."

While the approaches of Hart and the Realists develop from the same starting point, they differ radically in emphasis. Hart's theory allows morality a direct role in legal administration only at the outer edges; the Realists provide an orderly method of injecting moral considerations into the mainstream of a lawyer’s everyday “serious business." Actually what Hart is saying is that uncertainty exists only on law's outer limits and that in this area moral considerations can properly be used in the administration of law. The Realist is saying that the lawyer who attains a high level of understanding of that with which he works can readily dispose of the many routine, easily answered questions and focus his attentions on law's broad lee-way areas. Thus if a lawyer knows his business, there is significant room for the injection of moral considerations into the bulk of what will be his day to day endeavors.

CONCLUSION

The legal positivism has been a misunderstood and under-appreciated perspective throughout most of Twentieth-Century American legal thought. The positivism is a theory of law that limits the theories of adjudication available to judges who accept it, and it uses the history of American legal theory to illustrate this claim. Positivism's constraints are broader than many of its critics have claimed, in that modern legal positivism and judges can incorporate moral concepts into legal reasoning without collapsing into some form of natural law.

Despite their serious differences, American realism and legal positivism share one important belief. It is that their views are similar on the point of difference between 'the law as it is' and 'the law as it ought to be'. The positivist, according to Hart, look to the established primary rules and to secondary rules of recognition that designate law making bodies. American realists are skeptical about the degree to which rules represent the law. They seek to investigate how courts actually reach their decisions. Karl Llewellyn observed that the realists' separation of 'is' and 'ought', is a temporary divorce. The divorce lasts while the scholars are discovering what courts actually do. But in new generation of international legal scholarship in which the distinctions between realism and positivism has become unimportant.

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