THE CONCEPT OF

SCANDINAVIAN REALISM

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JURISPRUDENCE
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INTRODUCTION

In the nineteenth and in the early years of the twentieth century, laissez-faire\(^1\) was the dominant creed in America. This creed was associated, in the intellectual sphere, with a certain attachment to what has been called “formalism” in philosophy and the social sciences. This was marked by the reverence for the role of logic and mathematics and ‘a priori’\(^2\) reasoning as applied to philosophy, economics and jurisprudence, with but little urge to link these empirically to the facts of life. Yet empirical science and technology were increasingly dominating American society and with this development arose an intellectual movement in favour of treating philosophy and the social sciences, and even logic itself, as empirical studies not rooted in abstract formalism. In America this movement was associated with such figures as William James and Dewey in philosophy and logic, Veblen in economics, Beard and Robinson in historical studies, and Mr. Justice Holmes in jurisprudence. It is important to note that this movement was especially hostile to the so-called British empirical school derived from Hume, and to which Bentham, Austin and Mill adhered. For while it is true that these thinkers were positivist and anti-metaphysical they were for the anti-formalists not empirical enough, since they were associated with a priori reasoning not based on actual study of the facts, such as Mill’s formal logic and his reliance on an abstract “economic man,” Bentham’s hedonic calculus of pleasure and pains, and the analytical approach to jurisprudence derived from Austin. They were particularly critical of the ahistorical approach of the English utilitarians. Nor, unlike the sociologists of Pounds persuasion, were they interested to borrow from Bentham such abstract analyses of society as his doctrine of

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\(^1\) See Black’s law dictionary, meaning governmental abstention from interfering in economic and commercial affairs. n. [French “Let (people) do (as they choose)”]

\(^2\) [Latin “From what is before”]. Deductively, from the general to the particular (as an analyst, he reasoned a priori- from seemingly self evident propositions to particular conclusions).
conflicting interests. What these writers in their various fields were concerned to emphasise was the need to enlarge knowledge empirically, and to relate it to the solution of the practical problems of man in society at the present day. Hence pragmatism attempted to link truth with practical success in solving problems, and in its more developed form of instrumentalism, Dewey further emphasized the empirical approach by treating knowledge as a kind of experience arising out of human activity creating a problem, and which is attained when the problem is solved. Again Veblen emphasized the importance of studying institutions empirically especially the connection between economic institutions and other aspects of culture. The new historians stressed the economic forces in social life and the need to study history as a pragmatic means of controlling man’s future. All of these currents of thought played a vital role in the gradual movement of the United States from a highly individualist to a form of collective society in the first half of the twentieth century.3

The realist movement in United States represents the latest branch of sociological jurisprudence which concentrates on decisions of law courts. The realists contend that law has emanated from judges; therefore law is what courts do and not what they say. For them, Judges are the law-makers. However, modern Realism differs from sociological school as unlike the latter, they 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 this reason that some authorities have called Realist approach as the ‘left wing of the functional school’. The contention of realists is that judicial decisions are not based on abstract formal law but the human aspect of the Judge and the lawyer also has an impact on court’s decisions. Some quarters feel that realist movement in the United States should not be treated as a new

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3 Freeman M.D.A; Lloyd’s Introduction to jurisprudence; seventh edition; p. 799-800.
independent school of jurisprudence but only a new methodology to be adopted by the sociological school.

According to Friedmann, the mental founders of the Realist movement in America were Oliver Windell Homes, Gray, Cardozo and Jerome Frank who emphasized on functional and realistic study of law not as contained in the statute or enactment but as interpreted and laid down by the courts in their judicial pronouncements.

**BASIC FEATURES OF REALIST SCHOOL**

Realism denounces traditional legal rules and concepts and concentrates more on what the courts actually do in reaching the final decision in the case before them. In strict sense of the term, realist define law as generalized prediction of what the courts will do. The main characteristic features of realist jurisprudence as stated by Goodhart are as follows:

1. Realists believe that there can be no certainty about law as its predictability depends upon the set of facts which are before the court for decision.
2. They do not support formal, logical and conceptual approach to law because the Court while deciding a case reaches its decision on ‘emotive’ rather than logical grounds.
3. 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.
4. Realists are opposed to the value of legal terminology, for they consider it as tacit method of suppressing uncertainty of law.
5. They prefer to evaluate any part of law in terms of its effects.
According to Llewellyn, there is no realist school as such, it is only a movement in thought and work about law. It presupposes that law is intimately connected with the society and since the society changes faster than law, there can never be certainty about law. There is no place for idealism in law and therefore, law as it 'is' must be completely with reference to a given set of facts to reach a decision, they lay greater emphasis on case law method of the study of law. Statutes are accepted as ‘law’ only when they have been approved as law by a court decision.  

THE SCANDINAVIAN REALISTS

Despite the unfortunate ignorance in the common law world both of the working of the legal systems in the Scandinavian countries, and of their legal literature, common lawyers have slowly become aware of a significant movement in legal thought in the Nordic countries. Understanding of this movement increased as works by Scandinavian jurists were published in English. As our knowledge of the methods and concepts of Scandinavian law increased, the writings of these jurists became more meaningful. The relative insularity of the Scandinavian countries, with early national formulations of law, meant that Roman law had little impact on their civilization. In their substantive law and, though less so, in their legal science, they remained outside the main legal families of the world. Their law is less codified than the rest of the Europe and, as a result, more judge oriented. This comes out particularly in the writings of Ross though, to a lesser extent, in those of Olivecrona. The Scandinavian penchant for social welfare is apparent in the

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4 Dr. Paranjpe N.V.; Studies in jurisprudence and legal theory; Sixth edition; Central law agency; p. 81-82
5 Supra: 3; p 855-85
writings of Lundstedt, though he himself would never had admitted that his philosophy was tarnished by ideology. Perhaps, above all, the jurists’ rejection of metaphysics comes out in the rather down-to-earth Scandinavian approach to crime and its treatment.

**PHILOSOPHICAL BACKGROUND**

Hägerström’s philosophical perspective is grounded in reason and concerned with the ontological and epistemological conditions that make empirical knowledge of the world possible which is expressed in his motto “Praeterea censeo metaphysicam esse delendam” (moreover I propose that metaphysics must be destroyed). His anti-metaphysical view rejects the existence of a meta-physical reality or supernatural world beyond the existence of the physical reality or natural world. However, he is committed to a metaphysical or ontological view that maintains the completely logical character of reality and this implies that reality is intelligible but not in terms of a spiritual reality of ideals and values but in terms of the physical reality of things and their necessary relations that exist apart from the human mind. Hägerström is committed to the realistic view that concepts are embedded in the facts of physical reality that make an impact upon the minds of human beings using their senses of sight and touch to arrive at knowledge of reality to be expressed in meaningful words in terms of concepts that can be used to express judgements since the truth of a judgement is the reality of the thing. The philosophical task is to use a conceptual analysis in order to determine whether words correspond to facts and thus express concepts or rather are words devoid of meaning. Hägerström calls his philosophy rational naturalism since it provides the secure foundation for the pursuit of scientific knowledge based upon the naturalistic approach that everything in nature is what it is. His model for knowledge is botany rather than
physics and this implies that the classification of the quality of things is more important than the quantity of things that is related to measurement and movement that is the concern of physics. It follows that the physical reality cannot be described and explained in mathematical concepts but only in naturalistic or empirical concepts referring to natural properties and their causal relations. Hägerström’s naturalistic approach is followed by Lundstedt, Olivecrona, and Ross, although he in his later writings shifts his allegiance to logical positivism, rejecting metaphysics by reference to the principle of verification and his model for knowledge is physics. But they share the commitment to use the method of conceptual analysis to instigate a revolt against the traditional ways of legal thinking that must be replaced by scientific thinking about morality and law.  

The movement looks to Hagerstrom as its spiritual father, but the protagonists best known in Britain are Olivecrona, Lundstedt and Ross. Their writings aroused considerable interest perhaps because they seem to be in line with the empirical traditions in English philosophy and jurisprudence, and also to have some affinities to the sociological approach which grew in influence in England during the last generation.

For better understanding of the concept of scandanavian realism a brief study of the writings of the key thinkers, who have contributed and played as the protagonists in this branch, is required.

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Axel Hagerstrom was born in Vireda, Jönköping County, Sweden. He was not a lawyer. He was a professor of Philosophy in Uppsala University, whose attention was directed to law and ethics as particularly fertile sources of metaphysics. He dedicated his life to exposing speculative ideas and myths by which man is exploited by man. He wanted to establish a real legal science which could be applied to the reorganisation of society in just the same way as the natural sciences had been used to transform the natural environment. To do this, legal science had to be emancipated from mythology, theology and metaphysics. Hagerstorm contented that it is the aim of philosophy to liberate the human minds from the phantoms of its own creation. Legal philosophy for Hagerstorm as, indeed, it became for his followers, is sociology of law without empirical investigation, but built instead upon conceptual, historical and psychological analysis. Much of his writing is, accordingly, a critic of the errors of juristic thought.
Hagerstorm appoints to the following method. He first reviews the attempts that have been made to discover the empirical basis of a right. He dismisses each such attempt as unsuccessful: “the factual basis which we are seeking cannot be found, either in protection guaranteed or command issued by an external authority.” He concludes that there are no such facts. The “idea” has nothing to do with reality: its content is some kind of supernatural power with regard to things and persons. Hagerstorm next sought a psychological explanation and found it in the felling of strength and power associated with the conviction possessing a right. “One fights better if one believes that one has right on one’s side.” It is clear from his writing that, though rights may not exist, they are useful tools of thought. He rejected the notions of right-duty relationship and the theory of legal obligations because they do not have any objective basis. For him these are merely psychological notions.

Hagerstorm also investigated the historical basis of the idea of a right. To achieve this he made comprehensive studies of Greek and more particularly Roman law and history. His studies were devised to demonstrate that the framework of the *jus civile* was a system of rules for the acquisition and exercise of supernatural powers. He was puzzled why, for example, the buyer claimed the *res mancipi* as his before the ceremony of *mancipatio* was over. Hagerstorm’s explanation was that the buyer’s statement was not true; that, in effect, he used the formal words to make the *res mancipi* his property:

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7 *Supra*: 3; p 856-857
8 *Supra*: 4; p 84; para 4
9 [http://www.britannica.com/EBchecked/topic/119271/civil-law#ref484699](http://www.britannica.com/EBchecked/topic/119271/civil-law#ref484699); DOA: 19/11/2013 The term *jus civile*, meaning “civil law,” for example, was used in ancient Rome to distinguish the law found exclusively in the city of Rome from the *jus gentium*, the law of all nations, found throughout the empire. The phrase has also been used to distinguish private law, governing the relations between individuals, from public law and criminal law. Finally, in the philosophy of law, civil law sometimes refers to the positive law of the state, as distinct from natural law.
words and gestures had a magical effect, the act was a ritual. He believed, and there is an element of truth in his belief that modern law is equally a ritualistic exercise.

Hagerstorm’s ideas were based on Greek and Roman sources, but modern research, in attacking the assumptions embedded in the anthropology of Tyler and Frezer’s Golden Boug, has cast doubt on Hagerstorm’s understanding of the role of magic in less complex societies. The influence of Hagerstorm’s thesis is nonetheless apparent in Olivecrona’s analysis of legal language, in his discussion of what he calls “performatives,” legal words which are used to produce certain desired results, usually a change in legal relationship. Thus, “I do” said, during a marriage ceremony, influences people to regard a man and a women in a different light from the light it treated them prior to the ceremony. In Olivecrona’s words: “it is the language of magic.”

KARL OLIVECRONA (1897-1980)
Karl Olivecrona (25 October 1897, Norrbarke– 1980) was a Swedish lawyer and legal philosopher: He studied law at Uppsala University from 1915 to 1920 and was a pupil of Axel Hagerstorm, the spiritual father of Scandinavian legal realism. One of the internationally best-known Swedish legal theorists, Olivecrona was a professor of procedural law and legal philosophy at Lund University. His writings emphasise the psychological significance of legal ideas. His most striking work on legal theory, the first edition of his book Law as Fact (of 1939, almost entirely different in content from the similarly titled 1971 work), stressed the importance of a monopoly of force as the fundamental basis of law.

Olivecrona's politics during World war II showed a related stress on a need for overwhelming coercive power to guarantee order in international relations. He became convinced that Europe required an unchallengeable controlling force to ensure its peace and unity, and that Germany alone could provide this. His pamphlet England eller Tyskland (England or Germany), published in the darkest days of the war, argued that England had lost its claim to exert leadership in Europe and that the future required an acceptance of German hegemony.

Indirectly, Scandinavian legal realism, with its emphasis on "law as fact", helped to create a climate conducive to the sociological study of law. One of Olivecrona's doctoral students, Per
Stjernquist, who as a left-leaning liberal entirely rejected his supervisor's politics, became a pioneer of sociology of law and was largely responsible for establishing it as a university subject in Sweden in the early 1960s.\footnote{http://en.wikipedia.org/wiki/Karl_Olivecrona; DOA:}

Professor Olivecrona’s views about Scandinavian realism have been appreciated for their practical implications. He emphasized the study of law as a social fact. According to him, law is nothing but a ‘set of social facts’. He rejected the view that laws are a command or an expression of the will of the State and argued that they are ‘independent imperatives’ issued by constitutional agencies of the State from time to time and they ‘operate in the minds of the judge’ while reaching a particular decision. For him, there is no such thing as the binding force of law; it is a myth. For instance, a person may break the law and go undetected yet no one would say that the law is not binding on him. In his opinion, the notion of binding force of law only exists in the mind of a person because of the psychological pressures which exert an influence on his conduct and motivates him for regularity of behavior which is an attribute of a legal system.

Adopting an acceptable moderate view about the form of skepticism, Karl Olivecrona refrained from defining law and preferred to analyse those facts which are covered under Rules of law. He agreed that law has a binding force and is valid so long as it has a binding force, and therefore, an invalid law is not binding. Divorcing morality from law, he observed that law is binding whether or not it is consistent with morality. He also disagrees with the view that binding force lies in the consent or ‘will’ of the State.
Olivecrona propagated the view that law is a set of ‘independent imperatives’ prescribed by law agencies, such as Courts, Parliament, etc. producing a set of social facts based on the application of organized force of the state.

Olivecrona, in his book LAW AS FACT, tried to explain the relation between moral standards and law. According to him when thoughts of unlawful acts enter the mind of a person it is soon counteracted by the involuntary moral impulse and calculations of the risks involved. He has called these as independent imperatives. These imperatives beat down the tendencies to unlawfulness. And the ideas or feelings which accompany them are to a very large extent- though not, of course, exclusively- a consequence of the “administration of justice” through regular infliction of punishment and extraction of punishment and extraction of damages.

He suggests that the moral ideas are the primary factor and the law is inspired by them. The principal rules of law are represented as being based on “justice.” According to him, either they are founded on an abstract norm, existing by itself in nubibus\(^\text{12}\), or that the law is founded on our ideas of justice. Both these ways of stating the case is incorrect.

He tried to resolve the questions as to, how the moral standards of every single individual are fashioned and what is the influence of the use of force according to the rules of law in this respect. He suggests that the character of a person is formed under the influence of his surroundings, especially in earlier years. Ideas of a person are also branded by the society where we live in. Law is one of the foremost forces working within the society. The law certainly cannot be a projection of some innate moral convictions in the child or adolescent, since it existed long before he was born. When he grows up and becomes acquainted with the

\(^{12}\) In abeyance; [http://en.wiktionary.org/wiki/in_nubibus](http://en.wiktionary.org/wiki/in_nubibus)
conditions of life he is subjected to its influence. The first indelible impressions in early youth concerning the relations to other people are directly or indirectly derived from the law. But the effect is not only to create a fear of the sanctions and cause the individual to adjust himself so as to be able to live without fear. The rules also have a positive moral effect in that they cause a deposit of moral ideas in the mind.

The rules of law are independent imperatives. In that form they are communicated to young and old. Now these imperatives are absorbed by the mind. We take them up and make them an integral part of our mental equipment. A firm psychological connection is established between the idea of certain actions and certain imperative expressions, forbidding the actions or ordering them to be done. We speak of a moral command when an independent imperative has been completely objectivated and therefore is regarded as binding without reference to an authority in the outer world. The chief imperatives of the law are generally transformed in that way. Only when this is the case is the law really firmly established.

A moral influence of the law is required for its effectivity only in respect of a limited number of fundamental rules, and only in these cases is such an influence possible. For the rest it is enough that the idea of a moral obligation to abide by the law as such is sustained and that it is not damaged by unreasonable laws or arbitrary jurisdiction.

Several things explain how the rules of law can thus be absorbed by the whole people. The suggestive effect of the imperatives is enormous when there is power behind them - here the majestic power of the state, working relentlessly according to the rules about sanctions. This power is surrounded by august ceremonies and met with a traditional and deep-rooted reverence. All this combines to make a profound impression on the mind, causing us to take the fundamental “commands” of the law to heart as objectively binding. We do it all the
more readily since we understand, at least instinctively, the necessity of these rules for the maintenance of peace and security.

The absorption of the imperatives cannot, of course, be effected under all circumstances. On the contrary, it is possible only under specific conditions, which ought to be thoroughly studied. Broadly speaking the first requirement is that the rules appear as reasonable to most people, i.e. as furthering ends which are generally recognised as desirable. Otherwise the rules will have no moral effect or may even arouse moral indignation. Also it is necessary that the application of sanctions is regular and fairly impartial.

It seems impossible not to admit that those are, in brief words, the relations between law and the moral standards of the individual. The law is the primary factor. The individual is caught in its grip from the earliest stage in life and his moral ideas are developed under its influence. The law- including the regular use of force according to the rules- is not, of course, an isolated factor. There is never a single cause for such a complicated thing as our moral ideas. The causes are necessarily manifold. Above all, the use of force must be associated with propaganda, preparing the minds for the reception of the imperatives, and there must be a direct inculcation of the imperatives through parents, teachers, superiors etc. What is suggested here is merely that the use of force is one of the chief factors in the moulding of our moral standards, and not the other way round.
Alf Niels Christian Ross (June 10, 1899 – August 17, 1979) was a Danish legal and moral philosopher and scholar of international law. He is best known as one of the leading exponents of Scandinavian Legal Realism.

Born in Copenhagen, Alf Ross graduated from high school in 1917. He studied law, graduating in 1922. He consequently worked in a barrister’s office. In 1923, he commenced a study tour, which would last for two and a half years, visiting France, England and Austria. He spent 1928–1929 in Uppsala, receiving a degree in philosophy in 1929 from the university. In 1935, he was appointed to teach at the University of Copenhagen in Constitutional Law. In 1953, Ross published Om Ret og Retfærdighed (which he would later publish in English, under the title On Law and Justice).

Like Olivecrona, he also asserts that law or legal notions must be interpreted as conceptions of social reality which is nothing but the actual behaviour of man in society. He follows the American line of approach and accepts the authority of the court to expound law. In his view, laws are the legal norms in the form of directives addressed to the courts. These norms of conduct, i.e., laws may be of two types, namely i) norms of conduct which deal with behavioural aspect of law; and ii) norms of competence or procedure which prescribe the mode of procedure to be followed for determining the norms of conduct. Ross pointed out that while deciding a case, the actual past behaviour of the judge as well as the set of ideals by which he motivated must be taken into account in order to determine the predictability of law in future.

According to Ross, validity of law lies in the predictability of decisions. Valid law implies “the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action. These norms are effectively followed because they are felt to be socially binding by the Courts and other legal authorities which apply the law.” Norms are therefore, observed as law because they are felt by the Judge to be socially binding and therefore, obeyed. A norm is valid if it is predictable that Court will apply it.¹⁴

¹⁴ *Infra 16; p. 85*
Anders Vilhelm Lundstedt (September 11th, 1882 – August 20th, 1955) was a Swedish jurist and legislator, particularly known as a proponent of Scandinavian Legal Realism, having been strongly influenced by his compatriot, the charismatic philosopher Axel Hägerström. He studied Law at Lund University and was a professor of law at the University of Uppsala from 1914 to 1947. Like Hägerström, Karl Olivecrona and Alf Ross, he resists the exposition of rights as metaphysical entities, arguing that realistic legal analysis should dispense with them. Lundstedt's main focus in his theoretical work became a sustained attack on what he called the method of justice. He considered that there was no objective way to define the requirements of justice and that, invocations of justice cloaked purely subjective preferences or unacceptable metaphysical claims. Instead, law and legislation should be guided by a method of social welfare centred on objective study of social conditions and of the practical effects and capabilities of law in improving society for all its members. Lundstedt was a member of the Swedish parliament for many years and promoted within it changes to the penal system and a range of other liberal reforms.¹⁵

Vilhelm Lundstedt rejected all English conceptual theories of law which are metaphysical in nature and have only theoretical significance. He emphatically stated that

law is not founded on the notion of justice but it is based on social pressure and needs of the society. The most striking feature of Lundstedt’s realism is assertion that law at any time, place and society is determined by ‘social welfare’ which is the guarding motive for legal activities. Therefore, Judges should think in terms of social welfare and in terms of rights and duties. The sense of security is the main force behind social welfare and therefore, Lundstedt was inspired to extend the principle of strict liability in matters relating to disputes concerning torts, contract and criminal law with a view to preventing disruption of the society.

Lundstedt regarded law simply as the fact of social existence in organized groups which makes the co-existence of people in society possible. He rejected the traditional concepts of right or duty and asserted that law simply consists of rules about the application of organized force. He observed that Judges should think in terms of social aims and objectives and not rights or duties. He preffered to use the term ‘social welfare’ and property, freedom of action and protection of spiritual interests. In his view, social welfare strives to attain a balance between all other competing interests without intrusion of set values.

These Scandinavian realists paralleled American Realist movement while presenting a more skeptical challenge to legal reasoning and discourse. Their approach was simple and they wanted to get rid of thinking about law of all the mystifying references to abstract concepts and metaphysical entities.\(^\text{16}\)

LAW AS FACT

\(^{16}\) Dr. Paranjpe N.V.; Studies in jurisprudence and legal theory; Sixth edition; Central law agency; p. 85-86
The Scandanavian Realist, resemble other modern schools in their positivist outlook in their desire to eliminate metaphysics. For them law can be explained only in terms of observable facts, and the study of such facts, which is the science of law, is, therefore, a true science like any other concerned with facts and events in the realm of causality. Thus, all such notions as the binding force or validity of law, the existence of legal rights and duties, the notion of property are dismissed as mere fantasies of the mind, with no actual existence other than in some imaginary metaphysical world. If then those notions are dismissed as mere metaphysical will-o’-wisps, what is left for the legal scientist?

Apparently nothing but predictions as to judicial behaviour, apart from various kinds of psychological pressures which, for various reasons not necessarily material, do in fact, human nature being what it is, exert an influence on human conduct, and given certain conditions promote that regularity of behaviour with which we associate a legal system. Does this mean that the normative element of legal rules is thus entirely eliminated? Not altogether, for Olivecrona propounds the view that rules of law are what he terms “independent imperatives,” that is propositions in imperative form (as opposed to statements of fact) but not issuing, like commands, from particular persons. It would seem, however, that Olivecrona attaches little importance to this analysis, since for him laws “exist” only in the sense that words exist only in the sense that words are to be found written on pieces of paper or intermittently stored or present in human minds or memories, and the real significance of these words is merely in the factual circumstance that these words are a link in the chain of physical causation, producing certain courses of behaviour on the part of human beings. Lundstedt, on the other hand, rejects everything normative which he apparently identifies with the metaphysical. Legal rules are no more than “labels” which,
torn from their context of legal machinery, are merely meaningless scraps of paper. In that context these “labels” may influence action, though causal connection is extremely complicated. It may be “quite practical” to speak of legal rules in common parlance (though there is really no need to do so) and there is no reason why ordinary practicing lawyers should not use this form of words. But legal writers concerned with actual and not imaginary connections should refrain from arguing that, because of a certain rule, a legal duty is imposed. For this is to support a metaphysical or normative link which no amount of observation can establish as a fact. He rejected legal duties (a duty is only a term for an effect upon man of maintaining diverse rules of law applicable to certain actions) and legal rights. Thus, “a so called right of property is only the legally risk-free possibilities to the owner of acting at will as to a certain thing”. This position which is advantageous to the owner is nothing but a consequence of the maintenance of certain rules of law. Lundstedt saw rights and duties as nothing more than conclusions from rules of law. A good illustration is his analysis of Rylands v. Fletcher. What the court actually did in this case, Lundstedt averse, was decide what the rule as to damages should be for cases in which something dangerous had escaped from land. The fact that it reasoned in terms of an obligation on the property-owner was illusory, superfluous and, because it mystifies, also harmful. Thus as Campbell has stated, while “Kelsen…offered an account of law stated purely in terms of Sollen, Lundstedt…tried to present an account purely in terms of Sein,” thereby throwing the baby out with the bath water.

Contribution of realist school 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 in uncertain and indeterminable in nature therefore; certainty of law is a myth. As Frank Jerome rightly pointed out, “realist school has sought to liberate the judges from the enslavement of unduly rigid legal concepts and exerted them to take into consideration the ground realities of social facts while deciding the cases”. According to Friedmann, 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. For 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. Expressing similar views, Dr. Allen thinks that realist school is an improvised form of the sociological jurisprudence.

**Criticism against realism**

The realist approach to jurisprudence has evoked criticism from many quarters. The critics allege that the exponents of Realist legal philosophy have completely overlooked the importance of rules and legal principles and treated law as an assemblage of unconnected court decisions. Their perception of law rests upon the subjective fantasies and life-experience of the Judge who is deciding the case or dispute. Therefore, there cannot be certainty and definiteness about the law. This is indeed overestimating the role of Judges (court) in formulation of the laws. Undoubtedly, judges do contribute to law-making to certain extent but it cannot be forgotten that their main function is to interpret the law.
Another criticism so often advanced against realist is that they seem to have totally neglected that part of the law which never comes before the court. Therefore, it is erroneous to think that law evolves and develops only through court decisions. In fact a great part of the law enacted by legislature never comes before the court; nevertheless, it does remain a law enforceable and applicable in appropriate cases and situations.

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.

Realists have exaggerated the role of human factor in judicial decisions. It is not correct to say that judicial pronouncements are the outcome of personality and behaviour of the judge. There are a variety of other factors as well which he has to take into consideration while reaching hid decision.

Last but not the least, the realist theory is confined to local judicial setting of United States and has no universal application in other parts of the world. The Scandinavian jurist Olivecrona has, however, accepted the universal validity of the nature of law.

**Realism in the Indian Context**

The legal philosophy of 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 which Professor Upendra Baxi prefers to call as ‘social action litigation’ have, however, widened the scope of judicial
activism to a great extent but the Judges have to formulate their decisions within limits of constitutional frame of the law by using their interpretative skill. This in other words, means that 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. Besides, the doctrine of precedent which has no place in the realist philosophy, plays a significant role in the Indian judicial activism within the limits of the statutory law. Besides, the doctrine of precedent which has no place in the realist philosophy, plays a significant role in the Indian judicial system inasmuch as precedents provide guidance to the presiding judge about the existing position of the law in question. They are; however, free to overrule the previous decision on the ground of inconsistency, incompatibility, vagueness, change of conditions, etc. assigning reasons for their deviation from the earlier ruling. 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 the doctrine of overruling its earlier decisions have enabled the Supreme Court to effectuate the socio-economic contents of the constitutional mandate through the process of judicial interpretation and use of its inherent powers. Thus the Apex Court in Bengal Immunity Case overruled its earlier decision in *Dwarkadas v. Sholapur spinning & weaving Co*\(^{17}\) 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.

Adopting a same line of approach, Justice P.B. Gajendragadkar, in *Keshav Mills v. Income Tax Commission*\(^{18}\) observed that Supreme Court has inherent jurisdiction to reconsider and revise its earlier decision if it does not serve the interest of public good.

In the case of *Golak nath v. State of Punjab*,\(^{19}\) the Supreme Court speaking through Subba Rao, CJ, (*as he then was*), observed:-

\(^{17}\) A.I.R. 1954 SC 119 (137).
\(^{18}\) A.I.R. 1965 SC 1616.
\(^{19}\) AIR 1971 SC 1643
“While ordinarily the Supreme Court will be reluctant to revise its previous decision, it is its duty on the constitutional field to correct itself as early as possible, for otherwise the further progress of the country and happiness of the people will be at a stake…”

The observations made by Justice K. Ramaswamy deserve a special mention in context of realism in interpretation of the Constitution and the law of the land. To quote his words, he observed:-

“The Judge is the living oracle working in dry light of realism pouring life or force into the dry bones of law to articulate the felt necessities of the time…”

The former Chief Justice of India Shri S.P. Bharucha expressing concern about fate of Indian Judiciary observed, “if a sizable number of corrupt Judges occupying seats in higher courts are allowed to enjoy immunity as a part of British legacy and expose themselves by resorting to such nefarious steps.” The people will regularly become victims of our unaccountable judiciary; therefore, it is high time when the Hon’ble members of higher judiciary should seriously think over the issue.20

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20 Dr. Paranjape N.V.; Studies in Jurisprudence and Legal Theory; 6th Edition; Central law agency; p.88-89
CONCLUSION

The realism school is not considered as a school by many jurists and many thinkers. Some criticize it saying that it is just a branch of sociological school. The so called school of realism was evolved in America. In regards of the Scandinavian Realism, even though the Scandinavian countries were different, and they had little scope for Roman law, still the scandanavian jurist had the empirical approach towards crime and its treatment.

These Scandinavian realists paralleled American Realist movement while presenting a more skeptical challenge to legal reasoning and discourse. Their approach was simple and they wanted to get rid of thinking about law of all the mystifying references to abstract concepts and metaphysical entities

Scandanavian realism is speculative in approach to legal problems, and it doesnot devote much attention to psychological behaviour of Judges as the American realist do. It has empirical approach to law and life alike American Realism and give more weight to the social effects of law with emphasis on judicial decisions.
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