

## THE DOCTRINE OF PRECEDENT: AN ANALYSIS FROM SOCIOLOGICAL SCHOOL OF JURISPRUDENCE & AMERICAN REALISM

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### Abstract

*“One precedent creates another and they soon accumulate and constitute law. What yesterday was a fact, today is a doctrine.”*

### Junius

*From time immemorial it has been observed that with the development of people, law has evolved to maintain peace and order in the society. It is where law is considered to be superlative, the anticipation and debate about the supremacy of the law formulating body is never ending. Thinkers and scholars from time to time have been promoting different ideologies to figure out the body which formulates law and the premise on which the law is operational. The overlapping between the thoughts of advocates of sociological school and American Legal Realism has been prominent as both the ideological grounds support the view that law finds its source in the society itself. The former argues that the addressing of the issues in the society is the key to formulate of law while the latter supports the view that law is formulated within the courtrooms by giving primary importance to the ‘judge made law’. The focus of study in this research paper will be upon the understanding of precedents and the interface between sociological school of law and the American legal realism and the impact of precedents in modern legal societies. The research also aims to find out the role of the precedents in formulation of principles, doctrines and how does it contribute to law making.*

**Keywords:** Doctrine of Precedent, Sociological School, American Realism, Socialism, Jurisprudence

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### Introduction

Relations of the human beings who are a part of society and the governing body or the controlling body have always been subject to change with changing times and modernization. In ancient times the only

source of governance for human beings and their groups was the usual practice, which later changed into usages and gradually the customs which if not followed would lead to imposition of sanction, this was followed by governance from the religious sources. With fading away of governance of behaviour through religious courses, the secular state came to power and held the dominating position. In the due course of evolution, the judges, thinkers, scholars, philosophers etc. in some way or the other contributed in becoming the part and parcel of the law-making and at times also involved themselves in governance.

With the changing scenario and development, there were socio-political and legal changes which highlighted the need for creating a balance between the individual and the society. It was quite later that the society's importance for individual and vice versa was brought to notice. So, this realization gave rise to the Sociological School of Law.

The Sociological School of Law was based on the main approach that law and society highly affect each other and law is a progressive mechanism which is needed by the society to grow and maintain its dynamic character. The pioneers of this school have argued that this school of law is an interface between positive law and the ideals of justice. This school of law advocates that the law is interdisciplinary with the social science.

There was 'the judge made law' which was getting acceptance as the popular source of law along with the sociological school of law in the early 19th Century (Llewellyn, 1930). The relevance of precedent was increasing with time in different legal systems. It is beyond any doubt, that the legal systems which are developed do have a structured hierarchy of courts. The learned judges while deciding the cases before the courts are likely to use constructive interpretation to meet the ends of justice. The decisions so given becomes the authority for the future cases which are conceptually similar.

The another school of law widely acknowledged in those days was the American Legal Realism which was a combination of rationalist and behaviourist approach to the social institutions (L.L. Fuller, 1934). The exponents of the American Legal Realism are advocates of the view that the decisions imparted in the courts of law are the basis of law. They generally stress on what is "Law in Action". Many scholars are of the opinion that the Realist School is not a separate school of Law, and understand realism as the branch of sociological jurisprudence only (Roscoe Pound, 1912). The exponents of this school of law consider the judge made law as true form of law and do not give much importance to the law enacted by the legislature.

In this research paper, the focus of study shall be upon the understanding of Precedents from both the Sociological School of Law and the American Legal Realism. The researchers opine that there is an interplay between these two schools of thoughts, that the majority of thinkers argue that American Legal Realism is a sub branch of the Sociological school of law itself. With the precedents at the centre of understanding of law for the exponents of the American Legal Realism, it needs to be understood that the Judges who impart decisions are also part of the society and are affected by the social factors, and thereby making the Sociological School of Law important facet in development of law.

### **1. Understanding of Precedent from American Legal Realism Perspective**

"The ultimate aim of American Realism is not only to change but reform the law. The followers of the theory emphasise more on studying the law "as it is" than "as it ought to be". This is the common aspect that both the positivist and the American Realist follow. In the same accord, they analyse the law by taking into consideration the societal aspects. A more of an experimental approach is what they adopt for the study of law. Role of judges in construction of legal framework is given primary importance by the American Realists. According to them, the law is what the judges decide through their judgments. This specific thought arises from the fact that judges have played a remarkable role in the evolution of the American Constitution and subsequent laws. American Realism focuses upon the importance of precedents in development of law.

"The American Legal Realism cannot be border lined in a comprehensible academic system which is purely theoretical in nature, moreover it cannot be called a school of thought (Smith, 1992). The American legal Realism is more of a movement which started developing in the nineteenth century and became more widely accepted during the president ship of President Franklin D. Roosevelt (Llewellyn and Karl, 1960). Some thinkers propound that the uplift of American Legal Realism was development of

latest branch of sociological jurisprudence. This movement was by and large concerned with decisions imparted by the courts of law. Sometimes the American Legal Realism is also referred to as “left wing of the functional school” because it is more concerned with the approach to recognize law and its actual working and above all its effects when it is interpreted and applied to in a certain way to certain set of facts which result in disputes (Clark, et al 1973).”

Understanding American Legal Realism as a separate school of law was very difficult for some thinkers because it could not define boundaries of a single theory. It was a blend of analytical positivism (L.L. Fuller, 1934) and sociological school of law and their joint understanding (Couclelis and Golledge, 1983). It can also be understood as the antithesis of Idealism (Bingham, J. W, 1938). As per the views of Llewellyn, it has been stated that, “there is no realist school as such, it is only a movement in thought and work about law” (Llewellyn and Karl, 1962). Julius Stone defines American Legal Realism as the “gloss on the sociological approach”.

## **2. John Chipman Gray (1839-1915)**

“John Chipman Gray is regarded as one of the “profounders of the movement of realism.” While recognized to be an empirical jurist, Gray viewed the judicial decisions to be the most significant source of law and not the law enacted by the legislature. He noted the central role played by “non-logical” variables, such as the judge’s personality and bias when delivering the decisions. Gray is complimented for setting down a firm framework on which all of American Realism’s significant concepts are actually sitting” (Princeton, N.J., 1950).

## **3. Justice Oliver Wendell Holmes (1841-1935)**

Oliver Wendell Holmes is renowned for his bad man’s theory, which looks at the rules from the viewpoint of a criminal. According to him, the law is intended for the possible criminals or the ‘bad man’. He acknowledged numerous concepts of law based on standards of ethics & morals and common law and dismissed both of them, arguing that if he commits such crimes, the ‘bad man’ only worries for whatever the judges will do (Frank and Jerome, 1931). These conclusions or “prophecies” concerning the acts of the courts are known as the ‘rules’. He was interested in studying ‘law as it is’. Judicial history, according to him, can only be analyzed in modern times to examine the validity of such historical rules. The increased importance of lawsuits and lawyers in the field of law stemmed from his description of law as ‘prediction’. It is safe to assume that his approach to the law is analytical and pragmatic. Holmes brought about a considerable shift in the general attitude towards the law through his literary works and writings as the judge of the Supreme Court of United States of America.”

## **4. Jerome Frank (1889-1957)**

Jerome Frank insisted that two classes of realists exist. Although one party is sceptical of laws offering legal clarity, the other group, in addition to the scepticism of legal rules, is also averse of the determination of facts before the trial court. In his opinion, the law requires the adaptation by the judge of certain principles of law to the details of a case. He shares his doubt about the consistency of a judge’s finding of a fact and states that it is impossible to differentiate in most decisions between the evidence discovered by the judge, the rule of law applied to them and the resulting mixture of the two, the facts as well as the rules. Frank stresses upon the law’s ambiguity. According to him, precedents were set and codified legislations were enacted under the false impression that the law should be certain. He was of the view that the codified law is ambiguous and does not necessarily adhere to precedents (Duxbury and Cormick, 1998). Hence codified laws should be recognized by judges and lawyers in order to remove the ambiguity. In order to verify the theory laid down by Frank, it is necessary that stringent adherence to precedents is provided to do away with the anomaly in the application of laws and their interpretation through practical applicability.”

## **5. Carl N. Llewellyn (1893-1962)**

Law was regarded as an institution by Llewellyn. As per his ideology, in society, law is an exceedingly complicated institution. It owes its difficulty in the application of legal concepts to the use of variety of precedents and philosophies. In addition, he introduces the idea of ‘law-jobs’ in which law has two central roles in society: to promote the existence of groups; to participate in a search for liberty, productivity and quality lifestyle. He also clarified the accomplishment of those ‘law-job ends’ with ‘legal instruments.’ As a minor organization, he founded the notion of ‘craft’. According to him,



'Craft' refers to the talent and 'know-how' within a community of professionals who perform such jobs within an organisation. Such abody of professionals actively improve their skills from time to time and eventually transfers them by education and realistic examples to the next generation. He defined the legal profession as practice of such crafts, the most relevant of which was the common legal system. (A Symposium on Realism, 1951)

The exponents of realism argue that the precise conclusion of law is mainly based on disputes which are in existence and can be resolved by the interpretation of statutes. To further explain this, it would be appropriate to quote Llewellyn who demonstrated that "courts had endorsed both the principle of statutory construction that a statute cannot go beyond its text, but also the principle that to effect its purpose a statute must be implemented beyond its text." (Karl N. Llewellyn, 1988)

"Llewellyn further stated that just like statutes the precedents may also be understood rigidly or flexibly. Rigid interpretation would be suitable in cases where facts are similar to the guiding principles which are already laid down through precedents. At the same time liberal interpretation is possible in the cases where there is no set precedent. In the landmark judgment in *Vishakha v. State of Rajasthan*, the Apex Court set out detailed rules for preventing sexual abuse of working women in the place of their employment despite the absence of any specific legal framework in this regard.

In the cases where the same precedent has different and distant outcomes then it may be understood that the interpretation which is applied to the subsequent case is correct and would not defeat the very purpose of the case being filed. The application of the value extracted from the precedent should be followed in suitable and correct manner which is "traditionally sound" and "dogmatically correct" (Edward A. Purcell, 1969). This value extraction from a particular precedent and its application has to be done very carefully because more than one value may be extracted from a same precedent."

There are some examples which are given by the scholars and exponents of the American legal realism, quoting the example from Oliphant, who in his prerogative uses the thoughts of Judge Joseph Hutcheson's statement, "the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause" (Joseph C. Hutcheson, 1929).

One understanding of the judge made law is also the presupposedness. Once the judge is convinced of a certain set of facts which are in favour of one party, mostly the judges tend to find the legal procedure and principles aiding the same presupposedness to be pronounced as the judgment. Llewellyn advised to the lawyers that they should try to convince the judge on facts and bring it to the court's notice."

The discussion makes it somewhat clear that this approach for law condemns the understandings which are traditional and are outmoded legal rules. It is more concerned with the manner in which courts act to reach to the final decisions in the particular cases. So, it can be said that law under this approach is defined as "generalized prediction of what courts will do" (Smith, 1992).

It can be said that there is no certain understanding of law through which the predictability can be guaranteed to be true. It is upon the courts to decide whether to use emotive or logical grounds to meet the ends of justice (Hunt, 1978).

The American realism emphasises on the psychological approach as the legal principles and suggests that the law is about the behaviour of human beings and mostly conviction of the lawyers and judges.

"The American Legal Realism understand the cases through the rationalization by a judge in traditional terms of law. The American Legal Realism is also the understanding of the decisions reached by the courts of law which operate on the concepts based on different set of facts presented before the courts. This approach is also affected by the level of influence of statutory principles which are made applicable by the courts and the procedure which is followed by the courts for imparting a decision for the effective administration of justice."

The less developed modern legal systems in today's time possess a system and hierarchy of the courts. These courts function to determine the rights and duties of the citizen and settle any conflict which arise to identify the confusion which comes up in the determination of rights and duties. It is noteworthy that the judges are guided by the customs and their own personal sense of understanding of the justice in deciding these cases.

Judges use their creative approach to fill any gap or cover up any lacuna present in the statute and while doing so they tend to adapt the law to the changed condition (Julius Paul, 1957). The decisions

so imparted become the guiding principle which is known as precedent for the subsequent cases which come up with similar facts.

American Legal Realism gives much importance to this “law in action” which is seen and observed in the courts and not mere restriction to the theory of law or law as it is stated in the books of statute. This understanding is about how law and the legal principles are related to the implementation and interpretation in true sense through the court to the resolution of disputes which is actually going to affect the lives of the people.

## 6. The Impact of Sociological School of Law on Precedents

Society is the primary object of study in sociology. The study of culture, human behaviour, and social changes in the society are known as sociology. The Sociological School of Jurisprudence claims that law and culture are interrelated and behavioural aspects of law deals with the operational aspects of the society. This school believes that, since it has a significant effect on culture, the legislation is a social phenomenon. The Sociological School of Law places more emphasis on the practical element of law than on its theoretical substance. They see law as a social structure that is fundamentally interconnected with other sciences and the direct effect of law on society, with its social need-based creation.

The sociological jurists were of the view that the main focus of development is not a particular statute or legislative development. It is not only the precedents which shapes the change in law but also the societal needs. Law is formulated for the society which also moulds itself with the changing dynamics of the society.

The research is restricted to the understanding of precedents from the point of view of exponents of Sociological School of jurisprudence.

Roscoe Pound was one of the leading scholars of the sociological jurisprudence in the twentieth century. He propounded the famous ‘Social Engineering theory’ and was of the view that the law must be linked to the society and should be adaptable for the societal needs to ensure the smooth governance of the society (Roscoe Pound, 2002).

Roscoe Pound opposed the “mechanical jurisprudence” through his sociological jurisprudence. He described mechanical jurisprudence as a general and extremely unpleasant practise wherein the judges without any consideration, make applicable the precedent to the facts of the case. The judges were not even considerate about the consequences which would arise in doing so as all the precedents are not appropriate for every set of facts and there has to be a reasonable application of mind. He also argued that the logic of previous precedent alone would not solve jurisprudential problems.

Roscoe Pound believed that the study of psychology of the judge while imparting a decision is necessary but only relying on it would be unacceptable as this approach takes away the focus from significant and essential factors and diverts attention to the unreasonable factors. As per the belief of Pound, “the legal system worked best when the law followed society. Any attempt to make society follow the law was futile.” (Roscoe Pound, 2021)

The contribution to the sociological school of law by Eugen Ehrlich was partly based on the theory of free-law, or sense-of-justice, formulated by Hermann Kantorowicz in Germany. He accepted two parallel sources of law: first, “legal tradition and jurisprudence” and second, “living law” as articulated in existing social norms. Ehrlich’s followers appeared to ignore the first because the second part was more novel, and some falsely thought that he had ignored judicial contribution to the formation of law all together. In his major work “Fundamental principles of the Sociology of Law” he opined that society plays a vital role in development of law compared to precedents and statutes.

It should be noted that Ehrlich has not entirely ignored the importance of precedent in development of a legal society, though not accepted it to be the only source of development of law. In his view the development taking place through precedents is slow paced. In one of his works Eugen Ehrlich had discussed how the changing norms may depict the dynamics of the society. According to him, the role of the judges is to work for the social change which must be progressive in nature (Smith, 1992).

The judiciary should take advantage of the techniques of sociological analysis that enable the real patterns of social justice to be recognized and contrasted with those present at the time of the implementation of the relevant applicable laws. This distinction, in terms of the principles secured by the legal order, points to a proper balance of competing interests. Will of the legislature gets





ascertained by the judge by taking into account the sociological events and evidences (Mikhail Antonov, 2021).

The French Philosopher Montesquieu is known for paving the way for the "sociological school of jurisprudence". He was of the opinion that the legal system is somehow compromised by socio-economic situation within the society.

Montesquieu criticized the modern English judicial system and the process defined by its theory of precedent for the impartial judicial analysis of law. The methodological error caused him to discern the English judicial feature and to marginalize it as merely an ad hoc decision of controversial evidence. Subsequently, Montesquieu disagreed with the constitutional existence of the English judicial exposition.

As per the views of Montesquieu, the precedents are only a way of applying a past decision without any pattern of reaching to the reasonable outcomes to attain justice. He did not appreciate and accept the law-making function of the judges and was of the view that they should only restrict themselves to the "Fact Finding Function of the Jury" and decision once imparted should not have an influence beyond that specific case. He advocated the doctrine of separation of powers and was of the view that the functions of the judges and executive officers should be clearly demarcated and should not be interfered by one another (Laurence Claus, 2005).

As per the views of Rudolf Von Ihering the purpose for which system of courts were established is to cater the needs of changing society. Law should be considered as means to an end, and not an end in itself. Moreover, the precedents are not sufficient for meeting the demands of the dynamism of the present-day society and the law should thus be coming from the society itself (Rudolf Von Ihering, 1913).

The same idea in the words of Ehrlich can be presented as "At the present as well as at any other time, the centre of gravity of legal development lies not in legislation, nor in the juristic decision, but in society itself."

Precedents in the eyes of exponents of Sociological School of Law are not given a major importance as they believe that judicial decisions or judge made laws are not at the centre rather it is the society and any legal development should pave its way from changes in the society only. It is the society which changes first and then changes the law. So, the precedents are not negated entirely but are not given a lot of emphasis and do not occupy the centre stage of the subject matter of the study.

## **7. Interplay between Sociological School of Law and American Legal Realism**

In this research paper the emphasis is laid upon interplay between Sociological School of Law and American Legal Realism. Many thinkers of Sociological School of Law hesitate to accept the American Legal Realism to be a separate theory altogether and consider it to be one of the aspects which already is covered under the Sociological School of Law. The advocates of Sociological School do not consider precedents exclusive of society.

The approach of both the ideologies is different yet related in one way or the other towards the relevance of precedents in law. The American Legal Realism focuses mainly on the "scientific observation of law". This approach makes one look into the way in which law actually functions. On one hand the Sociological school of law focuses mainly on the ends of the law and on the other societal aspect which is at the center of the study of the sociological perspective of the law. The focus of the American Legal Realism is on the 'functional aspect' of the law which is also termed as the "Left wing of the Functional School" (Suman Acharya, 2019).

The American Legal Realism observes law as a result of the societal impacts and circumstances along with the focus on the judicial pronouncements. The American Legal Realism not merely highlights the decision but also how it is reached at. The study of procedure of reaching to the decision by the judges also involves the societal aspects which had an impact on the judges and made them decide in a certain way. Thus, it can be stated that the American Legal Realism and the Sociological School of Law cannot be separated completely in the study and theory as some overlapping is bound to happen. The relation between the theories of both the approaches can be better understood by analyzing the views of scholars of both the approaches. The study of Sociological School of Law cannot go unmentioned without the study of the works and contributions of Roscoe Pound. The Contribution of Roscoe Pound is in furtherance of the contributions of Oliver Wendell Holmes.

Oliver Wendell Holmes stated, "Law is the thing that the courts do; it isn't simply what the courts state" (Craig C, 20224). Holmes stated that the substance of law at any given time nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past. (A Mendenhall 2015)

"Roscoe Pound strongly believed that the principles can be implemented by the learned judges of the common law system which would lead to the development in the society (B.N. MANI TRIPATHI, 2012). It must also be understood that the judges in the common law system have to shoulder this responsibility that the legal principles have to be interpreted in a certain way where the effects which are practical. The precedents set by the judges in cases should serve the purpose of the societal growth and in no way should it prove to be a hindrance in the same."

Roscoe Pound gave the principle of mechanical jurisprudence in 1908 which refers to judges rigidly enforcing law according to precedent and statute without considering its adverse implications on the functional aspect of law (Clark, C. E. et al, 1937)

The challenges posed due to the "mechanical jurisprudence" found the solution in Roscoe Pound's 'sociological jurisprudence'. The mere application of the values extracted out of certain decisions in no way would lead to resolution of the disputes and settling the legal position in the society. So, it can be said that both the approaches have the common ends to be reached that is to apply the legal principles and interpret them in such a way that they serve the purpose of imparting justice and also establish the developmental ideology through law in the society.

While his wish of seeing the legal system adjust to societal needs, Roscoe Pound claimed that common law system should evolve gradually which should result in the improvement within the society. Certainty in law has always been more advantageous than attempts at realistic modification, especially in areas such as commercial and property law. Through his mistrust in statutes, he showed a more pragmatic cast of minds, arguing that the slow implementation of judge-made legislation was superior to the dramatic reforms frequently brought on by statute.

His experiments led him to conclude that the law was a seamless network, like nature, and that changes in one component could yield completely unpredictable and undesirable results in a cohesive system.

"In the 1930s, Pound's sociological jurisprudence fell out of fervour after his theory was attacked by the LEGAL REALISM movement. The realists, especially JEROME N. FRANK, disagreed on the essence of judicial decision-making, while the legal realists and Pound shared more in common. Where Pound assumed that judges could objectively achieve the outcome in a particular case through the rational application of his concepts of sociological jurisprudence, Frank, in his book *Law and the Common Mind* (1933), thought differently. Frank argued that not rationality but the particular psychological makeup of judges was the most significant factor in the settlement of a case. After reviewing several court cases, the realists found out that sometimes a judge might accept a ruling on a given legal issue for either side. Therefore, on the basis of their own feelings of what was "fair" they argued, judges were required to decide cases and then refer to the relevant section of the case law to have legal fig leaves to cover what they had already done" (JEROME N. FRANK, 1933)

In a sequence of law reviews and articles published, Roscoe Pound aggressively responded to this report. He was of the opinion that the Laws, in particular the "Rules of Commercial Law and Property", could be decided with consistency and also maintain the rational cohesion of Euclid's proposals (White, G. E, 1972). Pound agreed that learning the philosophy of judging was necessary, but only to escape the distortions that the realists believed were normal. In their study of the judicial process, Roscoe Pound felt that the realists stressed on the peculiarities not so important, and not so core in considerations. He criticized the realists for disregarding the meaning of the common law and their ability to promote the application of the law for the change in society. For Pound, the legal system worked best when the law followed society. Any attempt to make the otherwise happen would not be appropriate as "law is for the society and society is not for the law".

This can clearly be stated that the two ideologies which have been discussed are focusing on the same end that is development of the lawful society. Though both have different approaches, one focuses mainly on the judicial decisions and the other is concerned with the socio-legal developments. Where

American Legal Realism is more inclined to the development through the interpretation and application of the judicial decisions, the sociological school targets the effects of the changing society in the shaping and moulding of the laws. It can thus be said that the two approaches came up at different times and took different roads to reach the same end without any contradiction. American Legal Realism focuses more on the functional operation of law whereas Sociological School emphasises more on the ends achieved through it.

#### **8. Judicial Decisions Leading to the Development of Law in Society**

The ideas of Sociological school of law has found its way in the Constitution of India since its inception. Provisions of the Part III of the Indian Constitution deals primarily with fundamental rights. These rights are conferred keeping in mind the individual's public and personal interest. Furthermore, the privileges given in these provisions have certain limitations and, thus, under certain circumstances those rights would not be available. In addition to this, these privileges were secured to fulfill the third requirement given by Pound (Roscoe Pound, 2021), as the Constitution of India provides that any legislation that does not stand on the vires with the Fundamental rights shall be declared unconstitutional and as a result shall be struck down."

In addition, there are a plethora of cases in which the principle of sociological jurisprudence has been stated and taken into consideration while pronouncing the decision. It was concluded in *Ashok Kr Gupta & Others vs State of Uttar Pradesh* that this court is not obliged to accept an understanding that slows development or hinders community cohesion. (*Ashok Kr Gupta & Others vs State of Uttar Pradesh*, 2011 SCC Online All 2770)

In the judgment given in *Union of India & Anr v Reghubir Singh*, the court stated that when deciding and defining the modern policies and legislations, the element of social behaviour and observations of the past has to be weighed. (*Union of India & Anr v Reghubir Singh*, AIR 1989 SC 1933)

"In the case of the *State of Madras v. Champakam Dorairajan*, the Court ruled that, being just a directive principle of state policy, Article 46 cannot circumvent the basic principle of the rights provided in part III of the Constitution of India." (*State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226)

"In the case of *N. Adithayan vs. Travancore Devaswom Board and Ors*, the disparity dependent on cast should not be permitted to infiltrate society at large and the social structure. (*Adithayan v. The Travancore Devaswom Board & Ors*, AIR 2002 SC 3538)

The Court while pronouncing the verdict, thus reiterated its stance that bigotry of any form would not have been permitted, which amounts to untouchability."

In the landmark judgment of *Bandhua Mukti Morcha vs. Union of India*, the Court ruled that the *Laissez Faire* method should be discarded by the Court in the legal system, especially in which it requires the protection of fundamental rights and the implementation of modern instruments, the creation of new approaches and the introduction of new techniques in order to make fundamental rights relevant for the masses." (*Bandhua Mukti Morcha vs Union of India & Others*, AIR 1984 SC 80)

"The court following the principle of sociological jurisprudence in the landmark judgment of *Sarla Mudgal v Union of India* declared that marriage solemnised under one personal law could not be dissolved through the implementation of any other law. This statement refers to Pound's principle in which he claimed that the interests of the same ground would be weighted together during case of disagreement between objectives." (*Sarla Mudgal, & others. v. Union of India*, AIR 1995 SC 1531)

"For the apparent explanation that the complexity of Indian modern society is distinct from those of the American way of life, the legal ideology of the realist school has not been embraced in the sub-continent very well."

The development in the public interest litigation has expanded the reach of "judicial activism" to a large degree, but courts must also be prepared to interpret the rulings by employing their abilities which can be interpreted through the usage of boundaries of the constitutional framework. The applicable laws in a given situation should not be ignored by judges in India. Within the boundaries of procedural law, they must confine their legal activism. In the grounds of confusion, incongruity, ambiguity, changing in conditions etc., they are entitled to invalidate and overrule the previous decisions. Thus, while the Indian legal system provides broad judicial discretion and independence to



the judges, it will not make them omnipotent in the matter which require their attention and intervention, especially where law making is necessary through the interpretation.

Provisions of the legislative enactments, precedents, principles of fairness, equity and good faith are an integral aspect of the Indian legal system. The Indian Constitution ensures equality and social justice to the people by providing abundant scope for courts to take into account the hard truths of the Indian people's conditions of socio-economic and cultural development.

In brief, while Indian jurisprudence does not formally adhere to the realist's legal theory, it does lay considerable emphasis on the substantive aspect of the law and applies law to the reality of social life. Under the Indian Jurisprudence it is an age old concept to follow customs, usages, commands of sovereign as the law and thus the view of the judge made law being the only appropriate law disregarding all other sources of law cannot be accepted to be a correct opinion. With the changing times and influence of English jurisprudence, the Indian Legal System has also given the weightage to the judge made law and has incorporated this approach into their legal system. This has been a welcome social and legal transformation in the modernising of jurisprudential approach of India.

It would not be incorrect to hold that, post-independence, the legal scenario of India is developing on the pattern of sociological school of jurisprudence and is also trying to incorporate the principles of realism in the legal system. This evidences the transforming socio-legal approach of development.

Through its situational and social environment, Indian courts get the right to interpret legislation, taking into account the political, social, economic, cultural, historical and geographical differences of Indian culture. The doctrine of prospective over-ruling has allowed the Apex Court to carry out the constitutional mandate through the constructive interpretation of laws. In *Bengal Immunity Case*, the Supreme Court overruled its earlier decision in *Dwarkadas v. Sholapur Spinning Co.* and stated that if the decision is erroneous, the Court is obliged to follow the Constitution rather than any previous decision of the Court. Furthermore, explaining its stance, the Court noted that if a statutory decision concerns the lives and property of the people and if the Court finds that its prior judgment is clearly detrimental to the interest of the public, it should not delay to overturn that decision. (*Bengal Immunity Company Ltd. v. State of Bihar*, AIR 1955 SC 661; *Dwarkadas v. Sholapur Spinning Co.*, 1954 SCR 587)

Embracing the very same strategy In *Keshav Mills v. Commissioner of Income Tax*, Justice B.B. Gajendragadkar noted that the Apex Court has absolute authority to review and amend its previous opinion when it does not benefit the public.” (*Keshav Mills v. Income Tax Commissioner*, AIR 1953 SC 187)

There are indeed a variety of instances in which the court sets the laws or regulations. Some of the following cases where Supreme Court played the role of law-maker are given as below: The Apex Court ruled, in *HussainaraKhatoon v. Home Secretary, State of Bihar*, that speedy trials are an important and intrinsic part of the universal "right to life and liberty" guaranteed by Article 21. In Bihar, many under trial prisoners were languishing in jail awaiting their trials. The court ruled that inmates whose names had been forwarded must be immediately released. This is because a speedy trial is deemed to be a fundamental right enshrined under Article 21 of the Indian Constitution. (*HussainaraKhatoon v. Home Secy., State of Bihar*, AIR 1979 SC 1369)

“In the landmark judgment of *Shri Ram Food and Fertilizer*, the Apex Court ordered the corporation manufacturing toxic and dangerous substances and chemicals, to take appropriate protective precautions before the plant was reopened which earlier posed a risk to the health and life of workers and people residing in its vicinity.” (*M.C. Mehta v. Union of India*, AIR 1987 SC 965)

“In another landmark judgment of *Ganga Water Pollution case*, the appellant sought the guidance of the Apex Court to bar the respondents from discharging commercial pollutants into the Ganga River before the requisite water systems for the ‘treatment of waste’ were set up to handle commercial pollutants in order to avoid the water pollution in that river.” (*M.C. Mehta v. Union of India*, AIR 1988 SC 1115)

“The Apex Court in the decision of *ParmanandKatara v. Union of India* ruled that it is the supreme duty of any medical institution, be it private or government, to grant emergency care to any individual requiring medical attention without asking for formal procedures to be fulfilled in order to prevent



irresponsible causation of the death of the individual in need of care. (ParmanandKatara v. Union of India, AIR 1989 SC 2039)

It has been held in the landmark judgment of MC. Mehta v. State of Tamil Nadu that children shall not be working in hazardous industries as it is a risky and therefore beyond the scope of the Employment of Children Act, 1938. "There should however be a method of work like packaging, but it should be performed in order to prevent damage to injuries away from the area of production. Each infant must be insured as a condition of care for a total of Rs. 15,000/- and a premium to be paid by the employer. (M.C. Mehta v. Union of India, AIR 1987 SC 965)

Trying to deal with a case relating to water contamination in the landmark case of Vellore Citizens Welfare Forum v Union of India, the Apex Court ordered the tanneries in Tamil Nadu to be shut as these were polluting the environment and the water in the nearby areas making the water unfit for consumption." (Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715; MC. Mehta v. Tamil Nadu, AIR 1991 SC 417)

In order to protect the atmosphere and monitor emissions within the proximity of the resort areas of Badkhal and Surajkund, in the case of M.C. Mehta v. Union of India, the court held that the mining operations should be stopped within a radius of two kilometres of these two tourist resorts. (MC.Mehta v. Union of India, (1996) 8 SCC 462; .C.Mehta v. Union of India, (1997) 3 SCC 715)

The Supreme Court bench while deciding for ShayaraBano v. Union of India, disagreed that triple talaq is an integral part of religious practice and stated, ".... merely because a practice is continued for long, that by itself cannot make it valid if it has expressly declared to be impermissible." (ShayaraBano v. Union of India, (2017) 9 SCC 1)

In Navtej Singh Johar v. Union of India, the bench held, "..... the following of doctrine of progressive realization of rights invariably reminded everybody about the living and dynamic nature of the constitution of India and following the natural corollary gave birth to the doctrine of non-retrogression. As per this doctrine there must be no regression for a progressive and every improving society. Following this principle, the supreme court of India recognised the LGBT rights." (emphasis supplied) (Navtej Singh Johar v. Union of India (2018) 1 SCC 791)

The five judge bench of the Supreme Court in the case of Indian Young Lawyers Association and Others V. State of Kerala stated, "the paternalistic approach is contrary to the constitutional guarantee of equality and dignity to women interpreting the constitution in accordance to the values that infuse it requires the dignity of women cannot be disassociated from the exercise of religious freedom." (Indian Young Lawyers Association and Others v. State of Kerala (2019) 11 SCC 1)

The above mentioned cases are the evidence enough that the approaches of law making are also transforming in order to keep pace with the changing dynamics of the society. If there is no transformation and adaptability, it will lead to stagnation of the age old laws and legal principles which shall be obsolete with time and the legal system would fail in its entirety if it would not be able to have its positive impact on the society. Thus, both the approaches should be applied in a complementary manner wherever required, so that law can serve its purpose in the society to achieve the ideals of justice.

### Conclusion

The precedent in its general sense means, to apply a set pattern for guiding the conduct of the future. Under the Doctrine of Precedent, the cases which are previously decided are used as a guiding force for the subsequent cases. In the different legal systems, the precedents are treated differently. The most successful usage of this doctrine has been done by the countries which follow the principles of common law. The most effective utilisation of the doctrine of precedent has been seen under the English legal system.

In spite of being a successful source of law, precedent is treated differently by the exponents of different ideologies. The American Legal Realism considers the precedent at the centre of its justice delivery system, whereas Sociological school is not ready to grant the same stature to the functional aspect of judge made law.

While enquiring into the application of these ideologies to the precedent, it is reflected that both these approaches are distinct yet not diverse as they have common end, it is just that their means are not the same. They overlap when both of them pay heed to the societal needs, but their approach in

solving the problems of the society differ in procedure. While American Legal Realism lays stress on the judge made law as problem solving technique, Sociological School sees the solution in bringing advancement in law by addressing social needs.


It can also be stated that the American Legal Realism is not a separate theory or a different school of law, rather some scholars correctly state that the American Legal Realism is a fresh branch of the sociological jurisprudence as social effect and impact on judicial decisions is the subject matter of study in the said approach which can also draw a relation to the Sociological School of Jurisprudence. These approaches can very easily be applied in a harmonious manner and are not in contradiction to each other.

In Indian Legal system, with the changing times and introduction of new challenges with each passing day the sociological jurisprudence has been adopted in the Constitution of India, so that the social justice which is guaranteed in the constitution can be delivered to every individual in the country. As far as the American Legal Realism is concerned it must be noted that for a country like India where, the importance of law and law-making is associated with the divine origin, commands of monarchs, customs and usages, giving complete importance only to the judge made law and ignoring the other sources of law would not have been possible. The framers of the Constitution intended to limit the law making function only to the legislature. Under the influence of the English legal system and with the passage of time, the importance of the precedents could not be ignored completely. The application of Doctrine of Precedent or stare decisis is now an established practice in the Indian Legal System.

It can be aptly concluded that the concept of sociological jurisprudence has been accepted in an exceptionally well manner and the presence of this approach is sensed in the Constitution of India, different statutes and legal principles along with the decisions of the Apex Court. As far as American Legal realism is concerned, it must be noted that, though the acceptance of American Legal Realism as a source of law has been slow, it gradually is carving its niche in the Indian legal system. With changing times, the Indian society has shown a phenomenal change, the reason of which lies in the acceptance of precedents as well as statutes in bringing about this socio-legal, economic and cultural transformation.

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