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## **Introduction**

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

## **Preface**

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

## **Description**

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

## **PART III OF THE CONSTITUTION- A JURISPRUDENTIAL MONTAGE**

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### **ABSTRACT**

The Indian Constitution is a living constitutional charter that embodies centuries of political philosophy, moral reasoning, social experience, and jurisprudential thought. Instead of representing a single ideological or philosophical framework it represents a jurisprudential montage that selectively draws inspiration from various schools of jurisprudence.

This article explores in detail the core & foundational principles of the schools of Jurisprudence such as Historical, Sociological and Realist School; while simultaneously examining the imprints of each school in Part III of the constitution. The article goes on to analyse the judicial decisions that further operationalized the elements of each school.

The article concludes with some additional provisions of the constitution beyond Part III, that have taken inspiration from the various schools of jurisprudence. These provisions demonstrate conscious effort by the makers to ensure jurisprudential pluralism.

### **CONSTITUTIONAL REFLECTION OF SCHOOL OF JURISPRUDENCE**

The Constitution of India is a comprehensive legal document, and one of the largest written constitutions in the world. The constitution assembly debates, the Objective resolution, the Government of India Act, 1935 and the constitution of other countries are some of the most commonly recognised sources of the Indian constitution. But apart from these commonly recognized sources what often gets overlooked are the deeper jurisprudential foundations drawn from various schools of jurisprudence, such as the Historical School, Sociological School and Realist School of Jurisprudence.

At the heart of the Indian Constitution lies Part III which guarantees several fundamental rights, ranging from rights as important as Equality before law and equal protection of law and as basic as Right to life. Part III of the Constitution represents a jurisprudential montage, combining elements from various schools of jurisprudence, such as dignity and autonomy of individual; recognition of customs and traditions; substantive equality and social justice; and judicial creativity and pragmatism. This ensures that constitutional provisions and its interpretations remain rooted in social realities and tradition.

## HISTORICAL SCHOOL OF JURISPRUDENCE

### Core Principles

The Historical School is premised on the belief that law is organic in nature and emerges from the traditions, customs, experiences and collective consciousness of the society. It does not see law as a product of abstract reasoning or sovereign command but an evolutionary phenomenon. The central thesis of Historical school is that law derives its authority from *Volksgeist*- the shared beliefs, values and practices of a community<sup>1</sup>.

It views law as a product of gradual evolution through practices, traditions and judicial decisions rather than a result of an abrupt legal reforms or codifications.

### Imprints on the Articles

The most significant and direct manifestation of this approach is present in Article 13(3)(a) that defines law and includes “custom or usage having in the territory of India the force of law”. It explicitly recognizes customs and usages as law within the territory of India. Thus, giving force to one of the most essential elements of Historical school that believes law to be the values and practices of the community emerging from collective consciousness of the people rather than solely on legislative enactment<sup>2</sup>.

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<sup>1</sup> F.C. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward trans., Littlewood & Co. 1831).

<sup>2</sup> Bimal N. Patel & B.K. Matilal, *Custom, Law and the Indian Constitution*, 15 *J. Indian L. Inst.* 1 (1973).

Article 25 which guarantees the freedom of conscience and right to practice, profess and propagate one's religion further preserves the historical and cultural roots. It provides people the right to follow their long-standing cultural practices and traditions as a part of their fundamental rights, subject only to public order, morality and health. The provision reflects the belief that we must protect historically evolved institutions rather than seek to uproot them through rigid uniformity. The attempt to preserve the cultural and linguistic identity under Article 29 and 30 further underscores the historical orientation of Part III of the constitution. These articles are aimed at providing enhanced protection to the cultural and educational interests of the minorities; to ensure that they aren't neglected or subjugated by the majority community. By safeguarding the minority, the constitution ensures that legal uniformity does not come at the cost of neglecting the historically evolved identities.

The constitution does not completely negate the traditions and customs but subjects it to the scrutiny of part III, ensuring that only the customs that are fair, just, reasonable and consistent with the fundamental rights are treated as law. The constitution thus creates a balance between blanket protection and outright repudiation, with special protection to minority community's interests; subject to public order, morality and health. This approach resonates with historical school's beliefs that law must recognize society's practices while adapting to the contemporary notion of constitutional morality.

### **Judicial Illustrations**

1. *Zoroastrian Co-operative Housing Society v. District Registrar, 2005*<sup>3</sup> - Issue: Whether the bye-laws of the society restricting membership to Parsi community is violative of Article 14 and 15.

*Judgement:* The court upheld the validity of the bye-laws of the society as a legitimate exercise of their associational autonomy under Article 19(1)(c) and the classification created was reasonable, recognizing the society's objective to preserve the cultural identity of the minority Parsi community.

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<sup>3</sup> *Zoroastrian Coop. Hous. Soc'y Ltd. v. Dist. Registrar, Coop. Soc'ys (Urban)*, (2005) 5 SCC 632 (India).

*Link:* The court instead of applying the traditional and negative idea of equality, allowed the community restrictive bye-laws recognizing the positive concept of equality. It recognized the society's objective to preserve the customs and traditions of the minority community within the co-operative society; creating a balance between constitutional equality and custom-based social arrangements necessary to preserve cultural identity.

2. ***Madhu Kiswar v. State of Bihar, 1996<sup>4</sup>*** - *Issue:* Whether the customary laws of the tribal community, relating to succession and discriminating against women, violative of Article 14, 15 and 21.

*Judgement:* The court refused to interfere with the tribal customary laws and outright strike it down for being violative of women's rights. It did not support discrimination but sought to reinterpret customs to ensure its not against women's rights.

*Link:* The court recognized the tribal customs are naturally evolved systems, that reflect their cultural identity, landholding patterns and social cohesion. Customary laws are respected as a product of historical evolution and collective consciousness; any reform must be through a gradual process by way of social change and legislation and not by outright judicial invalidation.

## **SOCIOLOGICAL SCHOOL OF JURISPRUDENCE**

### **Core Principles**

The main proponents of Sociological School of jurisprudence are Roscoe Pound and Eugen Ehrlich, who envisaged law as a social institution whose primary function is to regulate human conduct and ensure social welfare. Roscoe Pound conceptualized law as an instrument to balance conflicting interests of people and achieve maximum social satisfaction, with minimum friction<sup>5</sup>. The law must take into consideration the individual, public and varied social interest, creating a balance between individual needs and collective welfare. Sociological school leaves room for judicial creativity, encouraging judges to interpret the law to ensure social justice, equity and fairness, even if it means expanding traditional legal boundaries and is against static interpretations of law.

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<sup>4</sup> *Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125 (India).*

<sup>5</sup> *Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harv. L. Rev. 591 (1911).*

### Imprints on the Articles

Part III embodies the sociological understanding that law must respond to the changing social conditions and function as an instrument of justice, rather than existing merely as a formal set of rules.

A central understanding of sociological school is visible in the concept of equality envisaged under Article 14, 15 and 16 of the constitution. The Articles does not postulate negative equality where everyone is treated as equal before law disregarding the diverse socio-economic conditions; but rather substantive equality focusing on real world scenario instead of theoretical understanding of equality<sup>6</sup>. Articles 15(3), 15(4) and 16(4) explicitly permits affirmative actions for women, socially and educationally backward classes and schedule castes and schedule tribes. Such affirmative action show acknowledgement of the varied economic conditions of the people and the history of oppression, ensuring that they are given adequate opportunities to uplift themselves.

Article 17 which abolishes untouchability, one of the most prevailing social practices entrenched in caste hierarchy, represents clearest sociological reflections in Part III. By providing a distinct article specifically dedicated to structural discrimination and to bring about social reformation; it reflects the sociological believe that the law must actively work to dismantle oppressive social institutions.

Article 21 which guarantee one the Right to life and personal liberty has been actively interpreted by courts to include the right to shelter, education, livelihood, health and clean environment<sup>7</sup>. Such an expansive judicial interpretation ensures that the right to life under Article 21 is not narrowly applied to only include mere animal existence but also other factors that indirectly supports life, aligning with sociological understanding that law must ensure overall human well-being.

Article 23 and 24 which prohibits human trafficking, child labour and forced labour is meant to regulate immoral human conduct and reinforcing sociological understanding of law as a social

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<sup>6</sup> Upendra Baxi, *Equality and Social Justice in the Indian Constitution*, 14 *J. Indian L. Inst.* 1 (1972).

<sup>7</sup> P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 *Colum. J. Transnat'l L.* 561 (1985).

institution designed to respond to real conditions of inequality, exploitation, and power imbalance. Instead of adopting the mechanical understanding of freedom, consent and non-interference into private matters, such an article takes into consideration the social and economic scenario under which the consent was obtained and whether apparent freedom is meaningful in situation of deprivation.

### **Judicial Illustrations**

1. *State of Karnataka v. Appa Balu Ingale, 1995*<sup>8</sup> - Issue: Whether denying Dalit access to public wells violative of Article 17 of the Constitution.

*Judgement:* The court held that denying access to public wells amounts to untouchability and is violative of Article 17. It unequivocally rejected the defence of custom for denial of access. Untouchability does not only mean physical segregation or violence but also includes social practices, customs and psychological exclusion.

*Link:* The court not only acknowledged caste as a legal classification but a deeply embedded social system sustained through fear and dominance. The court rejected the argument that absence of physical force negates untouchability and instead adopted contextual-sensitive analysis, interpreting provisions on the basis of ground realities.

2. *Indra Sawhney v. Union of India, 1992*<sup>9</sup> - Issue: Whether the reservations for the Other Backward Classes are violative of Article 14-16.

*Judgement:* The court upheld the validity of the reservation as affirmative actions necessary to ensure social justice and laid down certain limits, such as the creamy layer doctrine, within which the reservations must be carried out.

*Link:* Instead of outright rejecting its existence the judgement acknowledges caste as a living social structure that has deep influence on education, livelihood and dignity. It upheld the validity of reservations as a means to redistribute opportunities and correct the historical injustice the community was subjected to. Laying down certain limitation reflects sociological pragmatism, ensuring that reform targets real disadvantaged and does not further create inequities.

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<sup>8</sup> *State of Karnataka v. Appa Balu Ingale, (1995) 2 SCC 273 (India).*

<sup>9</sup> *Indra Sawhney v. Union of India, 1992 Supp. (3) SCC 217 (India).*

## REALIST SCHOOL OF JURISPRUDENCE

### Core Principles

The key thinkers of Realist School of Jurisprudence are Oliver Wendell Holmes Jr. and Karl Llewellyn. The realist school challenges the assumption that law is a coherent system of rules that is solely based on abstract legal reasoning. It believes that laws are what the judges interpret through time by practical application of the established set of rules, that are shaped by human, social, economic and psychological factors<sup>10</sup>.

The legal rules and norms framed are often vague and leaves room for varied interpretations. This were the judges' step in and ensure fair and reasonable interpretation of the legal rules on the basis of practical realities, exercising their discretion. Realist school emphasizes on pragmatism, realism and flexibility, focusing on how the law functions in reality rather than how it is theoretically structured.

### Imprints on the Articles

The most direct imprint of realism in Part III is Article 32, along with Article 226 though not within Part III, as it gives birth to the concept of judicial review. Article 32 and 226 acts as protection to the fundamental rights and other legal and constitutional rights by providing remedies for its enforcement in courts. The evolution of concepts such as public interest litigation and continuing mandamus shows that such provisions aren't applied in a mechanical and restrictive way but operate through judicial creativity, aligning with the realist jurisprudence.

While the articles under Part III does not show an explicit incorporation of realist understanding of law, it is replete with open-textured and indeterminate expressions such as “procedure established by law”, “reasonable restrictions” and “public order”, “decency” or “morality”. Such expressions are not defined under the constitution, nor is there any specific rules or scenarios laid down under which such grounds can be invoked. This calls for judge's discretion and interpretation of the constitution to the distinct facts and circumstances of each case, employing flexible standards rather than precise rules.<sup>11</sup>

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<sup>10</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

<sup>11</sup> H.L.A. Hart, *The Concept of Law* 124–36 (2d ed. 1994).

Articles such as 14, 19 and 21 has been consistently interpreted by the courts and given an expansive meaning, encompassing new dimensions such as privacy, autonomy, sexual orientation etc., as per the needs of the society. This aligns with the realist school which views law as an evolutionary process obtained by way of practical application and experience and not static or stagnant legal rules applied mechanically.

### **Judicial Illustrations**

1. ***Maneka Gandhi v. Union of India, 1978***<sup>12</sup> - *Issue:* Whether “procedure established by law” under Article 21 means any procedure laid down in law, however arbitrary.

*Judgement:* The court held that any procedure laid down by a legislation encroaching upon one’s personal liberty must be just, fair and reasonable. Any law that takes away one’s life or personal liberty enshrined under Article 21, if arbitrary or unreasonable is unconstitutional to that extent.

*Link:* The judgement moved from textual-realism to law-in-action. It took a wide interpretation of “procedure established by law” to mean “due process of law” ensuring that statutes aren’t mechanically applied abridging once right under Article 21 and that interpretation is guided by practical consequences and not formal legality.

2. ***Kesavananda Bharati v. Union of India, 1976***<sup>13</sup> - *Issue:* Whether the Parliament has unlimited amendment powers under the constitution.

*Judgement:* The court held that the Parliament does not have unfettered powers in amending the constitution. It framed the “Basic Structure Doctrine” according to which the Parliament while exercising its amending powers have to make sure that they are not destroying the basic structure or the foundational values of the constitution.

*Link:* The “Basic Structure Doctrine” is a judicially created doctrine and not textually explicit, meant to protect the core constitutional principles and values. The court played a pro-active role responding to the political realities of excessive amending powers to the Parliament. When constitutional values were at stake, the judges interpreted the constitution framing laws to preserve the constitutional functionality and balance, one of the most essential elements of Realist jurisprudence.

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<sup>12</sup> *Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).*

<sup>13</sup> *Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (India).*

## THE OPERATION OF JURISPRUDENCIAL SCHOOLS OUTSIDE THE REALM OF FUNDAMENTAL RIGHTS

The jurisprudential imprints are not limited to Part III of the constitution. Provisions such as Directive Principles of State Policies, Seventh Schedule of the constitution and judicial developments such as constitutional morality and basic structure doctrine are some of the other reflections of jurisprudential understandings.

Article 372 provides that pre-constitutional laws shall be in force within the territory of India unless repealed or altered by a competent authority, subject to other provisions of the constitution. Article 372 balances historical school's principles with constitutional morality by giving recognition to British-era laws as natural product of the historical evolution, customs, social practices and collective consciousness of the people; while simultaneously ensuring that they are not mechanically applied to perpetuate injustice.

Part IV of the constitution that provides for the directive principles of state policy, views state not as a passive law enforcement body but an active instrument of social transformation. It creates positive obligations on the state such as preserve social order, equal distribution of resources and environmental protection in order to ensure substantive justice. This closely aligns with the sociological school of jurisprudence which views law as a social institution which must respond to social realities and reshape unjust power relations.

The Realist school's reflection is evident in Articles 136 and 142 which provides the Supreme Court unfettered powers to grant or refuse leave, as opposed to formal legal standards. Such discretionary powers are vested to ensure complete justice which might not always be achieved by fixed legal rule and need assessment of real-world facts and consequences.<sup>14</sup>

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<sup>14</sup> Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis 212–20* (Hart Publ'g 2017).

## CONCLUSION

Part III of the constitution stands as a vivid illustration of constitutional pluralism, along with various other articles that take inspiration from Natural, Historical, Sociological and Realist School of jurisprudence, embodying a jurisprudential montage rather than showing allegiance to any one school of thought. The framers consciously adopted principles from each school of jurisprudence to ensure preservation of long-standing social customs and practices, implementation of law taking into consideration social realities of the time and areas of discretion and deviance from set rules and standards as per the need<sup>15</sup>. Together these schools operate in constant dialogue- tradition moderated by justice, social reform guided by pragmatism and discretion anchored in constitutional values.



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<sup>15</sup> 7 Constituent Assembly Debates 781–83 (Dec. 6, 1948).