

Article

An Analysis of Legal Realism's Influence on Modern Dispute Resolution Practices

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Abstract: Legal realism as a jurisprudence movement has substantially transformed the modern jurisprudence of dispute resolution by discrediting the formalistic foundations of law and advocating the practical and contextual solutions. This research explores the influence of legal realism on progress and application of ADR methods (negotiation, mediation and arbitration). Bypassing the rigidity of the traditional adjudication, legal realism has shifted towards interest-based negotiation as compared to the rights-based negotiation which is more cooperative and result-oriented. Realism has changed the mediator role as problem solving and empathetic as opposed to advocacy in an adversary process and systemic reforms that are increasingly promoting the use of mediation over formal litigation. Procedural flexibility in arbitration can consider legal requirements and fair considerations to balance. The study uses empirical research and comparative legal research and evaluates the success of the realist-inspired ADR practices that are quantifiable and their cross-cultural adaptability. Legal realism makes dispute resolution more efficient, fairer, and a more whole-person, multi-dimensional attitude to resolve conflicts. However, some challenges exist in regards to standardizing the practices in different jurisdictions with different traditions of law. Current study reiterates on the ever-present implications of legal realism on the modern day dispute resolution and highlight the aspects of potential future reforms.

Keywords: legal realism; alternative dispute resolution negotiation; mediation; arbitration; procedural flexibility; interest-based negotiation; cross-cultural adaptation

1. Introduction

Legal realism has substituted the classical perception of law which is a rigid system of abstract principles. It concentrates on law as a socially, politically and empirically constituted process. Legal realism began in the earlier 20th century and it has been far-reaching in both common law or civil legal systems (Akani 2019). Black letter law enacted in the statute books is not the only law but extra-legal factors such as judicial discretion, societal norms and policy implications determine the law (Akani 2019). Legal realism provides a critical view of the judicial decision-making and dispute resolution since it bridges the divide between the written laws and its practical application.

Criticism of formalism is one of the key postulates of legal realism. According to this theory, judges are the automatons who merely apply the ready-made rules of law. Contrarily, realists suppose that judges use facts of a case, ideological tendencies, and expediency (Eliot 2020). This perspective supports the idea that legal reasoning is not solely intertwined with policy arguments and socio-political context and consequently the pure deductive legal analysis is not sufficient (Balkin et al. 2006). Legal realism, thus, considers law as a dynamic process instead of a definite set of legal rules where the court interpretation of law can be adjusted to the requirements of society (Akani 2019). This dynamic interpretation and the empirical legal research encouraged the examination of behavior of the judiciary through content analysis and other methodologies that can be repeated (Hall et al. 2006).

Legal realism in the dispute resolution has impacted the current dispute resolution practice by altering the understanding of justice since it focuses on the practical results rather than commitment to the formalism of procedure. The progressive approach of the policy-based movement, has compelled the legal professionals to become practical problem-seekers since they recognize the indeterminacy of the legal rules and ideological character of judicial opinions (Rohde et al. 2023). There should be an agreement between the law written in the books and the law in action (Lipiec 2024). This elasticity of legal realism has made it a cornerstone of modern systems of alternative dispute

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resolution in which the situational fairness replaces the rigid legal formalism. Despite the far-reaching influence of legal realism, it has been criticized as possessing the potential to impact negatively the predictability of law. Massive discretion of the courts may lead to inconsistency in the judgments eroding confidence in the justice system. The realist approach cannot be eliminated when examining the practice of law particularly in complex and changing societies.

Legal realism and ADR are a less-researched topic in the literature. This study argues the impact of legal realism on contemporary dispute resolution, examines its theoretical and empirical applications and evaluates its impact on the delivery of justice. This study advocates the ways in which the tenets of realism remain alive in the legal practice to ensure that the dispute resolution mechanisms would be sensitive to the requirements of the society.

2. Legal Realism and Traditional Adjudication

The legal realism is a scathing criticism of the traditional adjudication that doubts its capacity to address the versatility and complexity of the human conflicts. The primary source of this criticism is the idea that the litigation process, its binary quality of the result and dependence on precedent can lead to rigid and fragile solutions that are inappropriate in the dynamics of the real-world wars (Menkel-Meadow 2020). This inflexibility has been termed as path dependence whereby the past legal systems are used in the present or future conflicts reducing the possibility of having context specific solutions. According to legal realists, such formalism fails to consider the underlying interests and relationship between the parties involved and that the doctrine is more significant than justice. The criticism of realism gained popularity when scholars and practitioners realized that litigation was not an effective mechanism for sustainable and mutually satisfying outcomes. This led to the development of ADR mechanisms which are aimed at solving problems through collaboration, rather than win-lose approach to adjudication, such as mediation, integrative negotiation, consensus-building, and ombudsmen (Menkel-Meadow 2020). These methods are founded on the pragmatic ethos of legal realism and produce better solutions to the needs of individuals and society. Due to the diversion of conflict out of the formal court procedure, the ADR mechanisms are transforming the assumption that adjudication is the best or default mode of conflict resolution which has existed.

Backward- and forward-looking dispute resolution differ philosophically in favor of such a transition. Traditional adjudication is backward-looking as it considers past acts in the light of already established law norms. Other proactive approaches, and their primary focus on restoring or restructuring relationships helps avoid conflict in the future (Morrill 2017). This shift is in line with the legal realism focus on realistic results and flexibilities in solutions, as opposed to strict following of precedents. Through relational continuity and creative problem solving, ADR illustrates the realist perspective that law should be a flexible means of social coordination rather than a set of rules. Another concern that the realist critique has brought about is that of trade-offs that might be in terms of flexibility and legal certainty. Although ADR mechanisms offer tailor-made solutions, these mechanisms may not be transparent and consistent as the formal adjudication. The reconciliation of these competing imperatives lead to conflict resolution that is fair, predictable and can be discussed in detail in future studies as to how the emerging practices in dispute resolution have managed to achieve the same.

3. Legal Realism and ADR

The impact of legal realism on ADR can be characterized as the informal yet influential process of evolution, which in its core changed the modern process of dispute resolutions globally. Being a derivative of the ideas of the American Legal Realism and pragmatism, many of the key tenets of the two approaches to law have been integrated into the theoretical and practical tenets of the modern ADR (Giabardo 2020). Although the connection between legal realism and ADR might not be explicitly acknowledged, the privatization of civil justice as ADR is a realist way of viewing law, conflict resolution, and justice, focusing on flexibility and functional outcomes rather than rigid formalism. Late 20th century ADR movement was a radical change in the conventional adversarial litigation due to the collaborative dispute resolution procedures that were predicated on realist thought. The proponents of ADR argue that the mediation, and negotiation, have their help rebuild relationships between the members of the dispute, dispel the reasons of the conflict, reduce costs, and provide individual decisions (Morrill 2017). This is consistent with a critique of formal court proceedings that was part of legal realism bypassing the complexities of human conflict. Realist scholars have long argued that legal rules cannot be sufficient to resolve conflicts without considering the contextual factors, a view which ADR operationalizes by focusing on flexibility and the freedom of the parties.

The philosophical foundation of ADR, is reminiscent of emphasis of the legal realism on the notion that the dispute resolution should be functional and not formally theoretical. The collaboration trend and the individualistic solutions approach makes ADR representative of the realist inclination towards practical solutions. This approach allows the system to be context-sensitive to the situation of every dispute and not constrained by the shortcomings of the traditional adjudication process that is inclined to give a binary solution to complicated disputes of winners and losers. ADR can, therefore, be seen as a successful expression of realist ideals, as more sensitive and fair representation of dispute resolution in the world of increasing interconnections and pluralism of the law.

3.1 Practical Application in ADR

The interest-based negotiation, and strategic appropriation of rights and power to promote integrative agreements, is relevant to the legal concerns of the practical result (Olekals et al. 2020). It is in line with the realist approach where legal rules are not rigid structures that interfere with problem-solving. This is backed by empirical studies that show that settlement tendency of a dispute can be predicted by the degree to which legal arguments are shelved in favor of practical discourse. This concept can be summarized in one cliché of the practitioners as *"when trying to settle a case, don't talk about the law unless you really have to"* (Olekals et al. 2020).

Such structured models as power-rights-interests framework proves the impact of legal realism on dispute resolution as it provides systematic information on the ways of conflicts resolution. The studies indicate that mediation, founded on the concepts of realism, resolves 75-100 percent of the grievances without the necessity to end up in arbitration (Olekals et al. 2020). This

resolution rate is high to an extent that it shows the effectiveness of mediation since the disputes are resolved through a collaborative method rather than litigation method. The results are supportive of the realistic perspective that legal conflict could be tackled by concentrating on the interests and practical compromises instead of legal claims.

3.2 Cross-Cultural Acceptance and Adaptation

The impact of legal realism on the non-Western legal systems has been replicated in other legal cultures. The new judicial laws in China have a negotiation and mediation style instead of formal arbitration, which can be explained by the adherence to the principles of realism based on the idea of flexibility and situational appropriateness (Song 2024). The selective nature of international dispute resolution mechanisms is a larger pattern of an international trend towards ADR which can work in local legal cultures. Unlike court hearings, where parties present their arguments in the presence of a judge, in the mediation, a direct dialogue takes place between the disputants, who are provoked to the realization of each other and the joint resolution of their issue (Dobrokhotova 2015). This transition in is the reflection of the realist vision of law as a process that is dynamic and socially dependent and not a set of rules.

4. Impact on Negotiation Strategies

The shift to practical and results-based solutions that legal realism adopted and the abandonment of strict formalism in the legal practice have significantly altered the negotiations landscape in the legal profession. This change could be traced in three key developments:

- (1) A higher regard of negotiation as a core competence of law.
- (2) Use of interest-based problem solving.
- (3) Openness to non-legal resolutions (Scott 2008).

The negotiators under the influence of the realist tradition will add the broader interests and wants of clients to the bargaining instead of relying on legal precedent as the sole determinant in the process (Scott 2008).

4.1 From Rights-Based to Interest-Based Negotiation

The rights-based approach has a tendency of impeding the resolution of disputes. Interests, rights and power model is adopted to demonstrate how the overly strong emphasis on the legal rights and the point-counterpoint game of power may be detrimental to the settlement negotiations. In fact, the realist ideas encourage negotiators to consider underlying interests and strategically appeal to the legal rights. This plan is supported empirically since the likelihood of integrative agreements decrease with time as a result of discussion of legal doctrine (Olekals et al. 2020).

4.2 Flexibility and Outcome-Driven Legal Practice

The legal realism has introduced a more accommodating and risk conscious negotiation process. The modern practitioner is increasingly agile in character, in which risk taking and uncertainty are perceived as strategic possibilities, rather than as the adherence to the rules. The tendency can be representative of the general trends in dispute resolution, where the legal systems have more interested in the transition to the principles-based approach, and taking informed risks, instead of attempting to avoid risks (Meerssche 2023). This malleability is useful to the realist argument that legal precedents must be measured in realistic terms as opposed to doctrinal purism.

4.3 A Multi-Dimensional Approach to Negotiation

Factual (substantive), psychological and procedural dimensions should be considered as a way of achieving a successful negotiation within a realist framework. The substantive dimension deals with incompatible interests and aims of the parties, and the psychological and procedural dimensions deal with interpersonal relations and structural constraints, which define negotiations (Jakubiak-Mironczuk 2018). This holistic approach ensures that the optimum results of a client are gauged in the context of legal solutions, personal goals and realities (Scott 2008).

5. Impact on Mediation Strategies

Legal realism has changed the mediation practices by redefining the role of a mediator and the expansion of dispute resolution to include other aspects that are not well established in law. Below author will examine the ways, in which legal realism can be used to introduce a more flexible, party-centered mediation process, influence the evolving status of a legal representative, and encourage the systemic changes in support of ADR.

The mediators is not bound to the formal legal doctrines either since they cut across the legal realism and are more pragmatic and humanistic in their practice. Realism mediators turn a little bit of good out of the mediation process by listening to the parties and consider their experience attentively. Their alternatives to the strict legal solutions are the soft explanations of the negotiation dynamics and the realities of law without taking away the freedom of choice in the parties (Ferguson 2020). With such a perception, mediators go beyond the boundaries of conventional legal solutions. Despite the clear framework provided by the statutes and case law, the actual purpose of the realist-informed mediation is to consider real business, professional, or emotional needs and requirements (Ferguson 2020). Consequently, mediation is less rigid and can come up with solutions that a formal litigation might overlook.

5.1 Adversarialism versus Collaborative Problem-Solving

Legal realism has converted the position of a lawyer in the mediation process to a novel form of advocacy (Scott 2008). A client in this system is never peripheral, and the lawyer does not make decisions as he used to be but is a facilitator of the process. This is contrary to the traditional adversarial models whereby the lawyers control the communication process while in realism, the direct communication is promoted and the lawyers monitor the process to make it successful (Scott 2008). The shift is in the context of a realist criticism of formalistic legal practice, one that emphasizes that dispute resolution should be practical. The new advocacy

model is consistent with the legal realism in its emphasis of the social role of the law rather than the abstract legal doctrines, by open communication and co-solving problems.

The effects of legal realism are evident in the individual level mediation sessions, and at the institutional level, which is ADR favorable. Reforms have promoted the permanent appeal system and the stronger mediation system have replaced litigation or arbitration with negotiation and mediation (Song 2024). It confirms the realist premise that mediation can be more satisfying and efficient than official legal procedures. Such institutional development is an indication of the modern relevance of legal realism to arguing. Mediation approaches that are based on legal realism remain challenging and transformative to traditional legal practice because they value flexibility, party autonomy, and practical results.

6. Legal Realism and Its Influence on Arbitration Strategies

6.1 Procedural Flexibility in Arbitration

Legal realism has played a major role in the arbitration by promoting flexibility and adaptability of the process in resolving disputes. Unlike the classic formalistic methods, which is rigid in terms of observing the established rules, the arbitrators with realist orientations are supposed to make the arbitration process flexible and adapted to the specifics of a specific case. Arbitrators involved in the realism can manipulate the rules of the process to the circumstances and can exercise discretion alleviating the costs (Ferguson 2020). This non-formalist approach finds superior solutions to particular cases, which are less formal and more reflective of the realities of disputes than legal doctrines. This flexibility of procedure points up the larger grievance of legal realism of mechanical jurisprudence which is disposed to put doctrinal consistency at its highest when fairness is the issue. Realism makes arbitration more sensitive to the needs of the parties since it enables arbitrators to modify the rules of procedure such as timelines, evidentiary standards or the informal negotiations. This approach reduces the delays and costs and increases the availability and equity of resolutions to disputes (Ferguson 2020).

6.2. Balancing Legal and Practical Considerations

The fact that the legal requirements ought to be matched with realities is one of the major contributions of the legal realism to arbitration. Although arbitrators are bound to acts as they deliver judgments that are consistent with operative law (in most instances) (Ferguson 2020), arbitrators deliver judgments that are well-reasoned, accessible, fair, and equitable. The following twofold liability is introduced by the consideration that the realists perceive that a fair settlement of controversies is a question of practical estimate of the interests of the litigants, the facts of the case and the net consequence of the award. This is especially seen when the question is related to complex business or international disputes, whereby legal formalism can't do justice to the business relationships or the culture. The arbitrators influenced by the realists use facts, consider the industry practices, and the principles of fairness to ensure that the award is defensible in the courts and it can be practically enforced. This approach averts the pitfalls of resolutions that are over-technical to the extent that, although legally correct, they are practically impractical or unfair (Ferguson 2020).

6.3. Varied Adoption Across Legal Systems

The legal realism in the arbitration strategies cannot be regarded as identical in the sense of jurisdiction due to the different attitude to the formal and informal forms of dispute settlement. Some legal systems have a taste of negotiation and local legal remedies over international arbitration as recent reforms are establishing a permanent appeal mechanism by concentrating on ADR such as mediation (Song 2024). This selective arbitration is in line with the realism as the methods of dispute settlement should be evaluated on the basis of actual working performance rather than on theoretical desirability. Jurisdictions with strong traditions of judicial control or community-based dispute resolution may not consider arbitration as a default process, but merely as one of the tools (Song 2024). This practical selectivity lends to the skepticism of realism in one-size-fits-all solutions and a pluralist approach where arbitration is co-existent with mediation, negotiation and adjudication, as a matter of situational suitability.

7. Conclusions

Legal realism has influenced the current dispute resolution by replacing the rigid formalism of the historical adjudication and advocating pragmatic solutions. Flexibility, fairness and efficiency of the ADR approaches criticized the strict procedures of existing mechanical jurisprudence. Legal realism has impacted the negotiation, mediation and arbitration, and facilitated the move away from rights based adversarialism to the interest-based problem-solving approach. Realism in negotiation has created a multi-dimensional process that does not regard legal rights as abstract concepts. Rather it focusses on workable outcomes where the parties reach agreeable solutions. The role of mediator has changed focusing the empathetic, fact-based solutions, so that mediators are now more active participants in steering the parties towards fair solutions. Arbitration has also changed under the influence of realism and arbitrators are now more inclined to find a balance between legal requirements and practicality in order to make enforceable yet contextual awards. Effectiveness of realist-inspired ADR practices, including increased settlement rates, lower litigation expenses and satisfaction among parties, is measurable, testifying that it works better in the majority of dispute resolution situations. But these do not transfer cross-culturally in a homogenous way since a difference in the legal traditions and institutional preferences exists. Some jurisdictions have fully embraced mediation and negotiation as the primary alternatives while others still hesitate to adopt it. Legacy of legal realism is its realization that the most effective manner of justice is to make the dispute resolving mechanism flexible in response to the needs of the real world rather than entrenched in the doctrines.

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