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A Jurisprudential Analysis of Legal Formalism and Legal Realism under Indian Legal System

KUMARI SWETA[1]

ABSTRACT

In Jurisprudence, there are two different families of theories of adjudication i.e., theories as to how judges do or should decide cases. These theories are of Legal formalism and Legal realism which are said to have a long history in legal thought. Theory of formalism claims that judicial decision-making involves nothing more than mechanical deduction. Whereas, Theory of Realism claims that descriptive thesis is embraced as regards to adjudication i.e., in deciding cases, judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons. It is called realist because the concepts which provide the major premises for legal reasoning could be altered by the judges in response to changing perceptions of public policy. The pace of change and especially the change in adjudication is affected by the need to preserve a reasonable degree of stability in law. The paper further highlights as to how far the theories of realism and formalism have been accepted or disregarded by the Indian Judicial System. What is the approach that Indian judicial set up adopts? Is it the Formalist approach which establishes that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; or it stands with the idea of Realism which resonates that there are norms embedded in the law for judges to discover, and that discovery is effected by looking to the underlying purpose of the law while, all the time, making the present decision consistent with those that preceded it? Or, has the Indian Legal system disregarded both the theories and taken a different path instead? All the relevant issues regarding Indian Judicial-Decision making process have been discussed at length in the paper.

I. INTRODUCTION

The terms "legal formalism" and "legal realism" have a long history in legal thought. Over the years they have accreted so many meanings and valences.[2] Legal Formalism is the *thesis* to

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[1] Author is a student at ILS Law College, Pune, India.

[2] Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*,

which legal realism is the *antithesis*. There have always been clashes regarding the jurisprudential approaches of Legal realism and Legal Formalism. Formalism is a theory of adjudication, a theory about how judges actually do decide cases and how they ought to decide them. Legal formalism reinforces the concept of predictability while the legal realism negates the element. Under the legal formalism framework, judges are expected to align their decisions with current laws without any alterations. It is known as the 'theory of judging". "Formalist" theories claim that the law is rationally determinate, i.e., the class of legitimate legal reasons available for a judge to offer in support of his decision, justifies one and only one outcome either in all cases or in some significant and contested range of cases; and adjudication is thus autonomous from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy. [3]

Legal realism is a naturalistic approach to law. Legal realists believe that the legal science should investigate law exclusively with the value-free methods of natural sciences, also called 'sciences of the real'. Realists are interested in methods of predicting judges with more accuracy. When it comes to judicial decision-making, realists had two general theses. First, judges have a preferred outcome of a case even before they turn to legal rules; that preferred outcome is usually based on some non-legal grounds such as conceptions of justice, attributes of litigating party's ideology, public policy preferences, judge's personality, etc. Second, judges usually will be able to find a justification in legal rules for their preferred outcome.[4] This theory of Realists may be substantiated because the legal system is complex and often contradictory.

Most accounts of how legal realism came to exist start with *Holmes, Cordazo* and other predecessors of the birth of the movement in 1920s and 1930s. Holmes also famously stated in his dissenting opinion that general propositions do not decide concrete cases.[5] Legal realism is also called 'American legal realism' as it is a distinctly American approach to philosophy of law. The movement is called "Realist" as it studies law in its actual working and rejects the traditional definition of law. A clear distinction should be drawn between what the law is and

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Volume 37 Issue 2, Case Western Reserve Law Review 179 (1986). Available at: https://scholarlycommons.law.case.edu/caselrev/vol37/iss2/3. Last accessed on February 28, 2021.

[3] Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue? Legal Theory,* 16(2), Cambridge University Press 111-133. doi:10.1017/S1352325210000121. (2010). Available at https://www.cambridge.org/core/journals/legal-theory/article/abs/legal-formalism-and-legal-realism-what-is-the-issue/6E27CE438E5C4DBD96478A5EC1D8202A. Last accessed on March 01, 2021.

[4] Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, 124 (Harvard University Press, 2009)

[5] Oliver Wendell Holmes Jr., G. Edward White *The Common Law,* xxiv, xxv (New York: Dover Publications, 2009)

what it should be. Law can only be viewed as an empirical science, as it ought to be, if moralistic notions are either excluded or are translated into empirically verifiable terms. It is a kind of classical legal thought.[6]

As far as the Indian Legal and Judicial System is concerned, it is no more based on the classical philosophies of Holmes, Pound and Cardozo. Legal Realism and Formalism has entered the life stream of Indian Constitutional System and is prevalent in the present judicial setting. Even the Judges have time and again made reference to the theories of Formalism and Realism in the process of judicial-decision making. The recent trends in the Public Interest Litigation have widened the scope of judicial activism to a great extent but the Judges have to formulate their decisions within limits of constitutional frame of the law by using their interpretative skill. Also, the doctrine of precedent which has no place in the realist philosophy, plays a significant role in the Indian judicial system in as much as precedents provide guidance to the presiding judge about the existing position of the law in question. In the case of *Navtej Singh Johar & Ors. vs. Union of India,*[7] the Hon'ble Supreme Court made a reference to Legal Formalism and held that "*The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism buries the life-giving forces of the Constitution under a mere mantra*." However, whether the legal philosophy of realism and formalism has been completely or partially accepted or rejected in Indian Legal System needs to be analysed, by taking into consideration the footing of Indian Judicial and Legal System on these theories. This introduction follows up with significance, research questions, scope and limitation of the present study; objectives of carrying out the study, review of literature relevant to this work, research methodology and scheme of chapterization.

(A) Significance of Study

The research study can provide information on the philosophies of Legal Formalism, Legal Realism, their origin, approach and jurisprudential essence. Further, this study would also review the extensive application of these legal philosophies. The research also highlights the reason as to why Legal realism and Formalism are arguably the most important and controversial theory of judging in the history and how their influence went far beyond as a theory of adjudication. Legal formalism reinforces the concept of predictability while the legal realism negates the element.

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[6] *Legal Realism and the Realist Critique, The Bridge,* Retrieved from https://cyber.harvard.edu/bridge/LegalRealism/essay2.htm. Last accessed on February 28, 2021.
[7] (2018) 10 SCC 1

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This study would be beneficial to the researchers in India as it also studies Legal Realism and Formalism in the Indian Scenario. It can enhance their knowledge regarding the possible issues related to the idea of realism and formalism in India and the footing of Indian Legal and Judicial System on the same. This study can provide information on acceptance/ rejection of these legal theories in the Indian sub-continent and. The Judicial Activism in India can be regarded as a substitute for American Legal Realism. So, to the future researchers, this study can provide baseline information on the recent Judicial Trends in the Indian Legal System regarding the idea of Formalism and Realism, and also the Jurisprudential approach regarding the same.

(B) Research Questions

1.What is the jurisprudential essence of the theories of Legal Formalism and Legal Realism?

2. Whether theories of Formalism and Realism subsist in the Indian Legal System and what is the Judicial response to it?

(C) Review of Literature

Here are some literature reviews that will illustrate that what is the approach in this research and what are the materials which have been searched for carrying on this research project work:

1. **Richard A. Posner,** in his article ***Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution,***[8] focuses on certain questions related to Judicial decision making. He raises several questions such as 'Are judges to look solely to the naked language of an enactment, then logically deduce its application in simple syllogistic fashion, as legal formalists had purported to do? Or may the inquiry into meaning be informed by perhaps unbridled and unaccountable judicial notions of public policy, using legal realism to best promote the general welfare?' Judge Posner considers the concepts of formalism and realism to be meaningful and useful in common law reasoning but in interpretation to be useless and, worse, forbidden. He analogizes unclear "orders" from a legislature to garbled battlefield communications, and argues that the duty of the recipient of those orders (the judge) is to advance as best he can the enterprise set on foot by the superiors.

2. **Brian Leiter,** in his article ***Legal Formalism and Legal Realism: What is the Issue?***[9]connotes several aspects of Legal Realism and Legal Formalism. The author contends

[8] Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, Volume 37 Issue 2, Case Western Reserve Law Review 179 (1986).
[9] Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue? Legal Theory,* 16(2), Cambridge University Press 111-133. doi:10.1017/S1352325210000121. (2010). Available at https://www.cambridge.org/core/journals/legal-theory/article/abs/legal-formalism-and-legal-realism-what-is-the-issue/6E27CE438E5C4DBD96478A5EC1D8202A. Last accessed on April 10, 2021.

that typically there are two different families of theories of adjudication, theories of how judges do or should decide cases which are Formalism and Realism. Formalist theories claim that law is "rationally" determinate, i.e., legal reasons available for a judge to offer in support of his decision justifies one and only one outcome either in all cases or in some significant and contested range of cases whereas Realism advances a descriptive theory of adjudication according to which legal reasoning is indeterminate i.e., it fails to justify a unique outcome in those cases that reach the stage of appellate review. However, the Author supports none of the theories and tries to establish the concept of "Balanced Realism."

3. Oliver Wendell Holmes Jr., G. Edward White's *The Common Law*,[10] is a brilliant work by Oliver Wendell Holmes, Jr., who is considered one of the greatest justices of the United States Supreme Court. Justice Holmes in the book observes that the paradox of form and substance exists in the common law because judges are not supposed to be deciding cases on the basis of their intuitions and prejudices about matters of public policy, even if those intuitions and prejudices are widely shared by other actors in the culture at the time. Judges, who are typically not as directly accountable to the public as elected officials, are supposed to be putting aside their idiosyncratic human reactions so as to decide cases impartially and neutrally. The perspective that Holmes adopted in "The Common Law" captures the interplay between the aspirations for judicial behavior in a culture committed to the rule of law, and the way the process of deciding cases actually plays out. The limitation of this Literature being that focus is more on Realism and less on Formalism. Further, it is restricted to American Legal system and has nothing related to other Jurisdictions.

4. *The Nature of The Judicial Process* by Benjamin N. Cardozo,[11] is the classic treatise where the Supreme Court Justice Cardozo describes in simple and understandable language the conscious and unconscious processes by which a judge decides a case. He discusses the sources of information to which he appeals for guidance and analyzes the contribution that considerations of precedent, logical consistency, custom, social welfare, and standards of justice and morals have in shaping his decisions. Justice Cardozo states that One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore, in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the

[10] Oliver Wendell Holmes Jr., G. Edward White, *The Common Law*, xxiv, xxv (New York: Dover Publications, 2009)
[11] Benjamin N. Cardozo, *The Nature of The Judicial Process* 180 (New Haven: Yale University Press. I92I).

chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs.

5. **Brian Z. Tamanaha,** in his work ***Balanced Realism on Judging***[12] argues that Legal academics are busily developing "new legal formalism" or "new legal realism." The entire legal culture has been indoctrinated in the formalist-realist divide which is fundamentally wrong. According to him, the story about the legal formalists is largely an invention. Legal realism is substantially misapprehended. However, he further states that legal realism cannot be totally discarded as Judges are regularly confronted with open areas in which the orthodox methods of analysis yield unsatisfactory and sometimes no conclusions, thereby allowing or even dictating that emotion, personality, policy intuitions, ideology, politics, background, and experience will determine a judge's decision.

6. **Radin Max's, *Legal Realism*,[13],** is a comprehensive article highlighting the Realists' theories of law and factors considered by judges at the time of decision making. Max Radin in his work argued that judges do not process facts or legal rules logically or rationally. They respond to a cluster of fact situations. Radin noted that how Judge's mind works depends on their training, their prejudices, their conscious or unconscious interest, their philosophy, their aesthetic learning and even by the chance circumstances. However, it is limited to American context and does not provide information regarding relevancy of these theories in other Legal Systems which limits the utility of this work.

7. **Brian Z. Tamanaha,** in his ground breaking book ***Beyond the Formalist-Realist Divide: The Role of Politics in Judging*,[14]** thoroughly debunks the formalist-realist divide. Drawing from extensive research into the writings of judges and scholars, Tamanaha shows how over the past century and a half, jurists have regularly expressed a balanced view of judging that acknowledges the limitations of law and of judges, yet recognizes that judges can and do render rule-bound decisions. He reveals how the story about the formalist age was an invention of politically motivated critics of the courts, and how it has led to significant misunderstandings about legal realism. Beyond the Formalist-Realist Divide traces how this false tale has distorted studies of judging by political scientists and debates among legal

[12] Brian Z. Tamanaha, *Balanced Realism on Judging*, Vol. 44 Valparaiso University Law Review 1243 (2010). Available at: https://scholar.valpo.edu/vulr/vol44/iss4/9. Last accessed on April 09, 2021.
[13] Radin Max, *Legal Realism*, Vol. 31, Issue 5, Columbia Law Review, 824-828 (1931). Available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/clr31&div=60&id=&page=. Last accessed on March 26, 2021.
[14] Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*, 159 (Princeton University Press, 2010).

theorists. Recovering a balanced realism about judging, this book fundamentally rewrites legal history and offers a fresh perspective for theorists, judges, and practitioners of law.

8. **Mohan Parasaran,**[15] Former Solicitor General of India, in his article ***Free and Equal Decision Making*** which is basically his address to the newly appointed Judges to High Courts organised by National Judicial Academy at Bhopal, says that Free and equal decision making is an imperative element in the justice-dispensation system, which essentially shapes and constrains the core conception of constitutional justice. In succinct, free and equal decision making is central in upholding the Rule of Law. This requires the Judge to continually police the boundary between what is and what is not within his/her power to decide and to decide all cases in a way that never disregards the subjective evaluations of both parties. He makes a concluding remark that Ultimately, the judicial decision making would be free and equal if Judges are more honest about their reasons.

9. **U. N. Gupta** in his article titled ***Legal Realism and Indian Constitutional Interpretations***[16] makes a study of the methods and extent of the American legal realism in the context of the role being played by Indian Supreme Court in interpreting the Constitution of India. This is done first by examining the jurisprudential base of legal realism, thereafter by investigating the constitutional *sine qua non* for its development, and lastly, by examining the pattern or direction in which legal realism is taking shape under the Constitution of India. He further reviews that Jurisprudential principles of legal realism Legal realism emphasises that law can be properly understood or defined in terms of judicial process only. The law on paper and the law in action are distinct from one another. After the law has been laid down by the legislature, it is nothing but 'a prophesy of what the courts will do in fact' and so long as the courts have not given their final pronouncement on it, the law remains uncertain, a child's world.

(D) Objectives

1. To trace the origin, essence and evolution of the Theory of Legal Formalism and Legal Realism under Jurisprudence.

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[15] Mohan Parasaran, *Free and Equal Decision*, 5 SCC, Address to the newly appointed Judges to High Courts organised by National Judicial Academy at Bhopal on 21-11-2015, J-9 (2016). Available at https://www.scconline.com/Members/NoteView.aspx?citation=SlRYVC0wMDAwMDA2MTYzJiYmJiY0MCYmJiYmU2VhcmNoJiYmJiZmdWxsc2NyZWVu, Last accessed on April 17, 2021.

[16] U.N.Gupta, *Legal Realism and Indian Constitutional Interpretations*, Vol. 17, No. 2 JILI, 212, Journal of the Indian Law Institute (1975). Available at https://www.scconline.com/Members/NoteView.aspx?enc=SlRYVC05MDAwNDEzMjQ0JiYmJiY0MCYmJiYmU2VhcmNoJiYmJiZmdWxsc2NyZWVuJiYmJiZ0cnVlJiYmJiZyZWFsaXNtIHUgbiBndXB0YSYmJiYmQWxsV29yZHMmJiYmJmdTZWFyY2gmJiYmJmZhbHNl. Last accessed on April 18, 2021.

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2. To analyse how Formalism and Realism are different in approaches.
3. To analyse the Judicial response on the theories of Formalism and realism in Indian Legal System.

(E) Scope and Limitation of Research

This research examines the origin, nature, relevancy and approach of the theory of Legal Formalism and Legal Realism. Realism in law may be a purely practical matter. It may be an ideal to which it is hoped the courts will conform, and to which as a matter of fact they often do conform. Legal realists like all judges to be realists as far as the limitation on their function permits it. It also includes how the idea of Formalism is totally different from this idea of Realism as under the legal formalism framework, judges are expected to align their decisions with current laws without any alterations. In general, as well, there were few intellectual developments related to Legal Realism and Formalism that were considered influential, controversial, and misunderstood. As far as the Indian Legal system is concerned, these theories have been gradually embedded and Judicial Activism reflects the same. The research examines the application/ no-application of Legal Formalism and Legal Realism in Indian Legal System and Judicial-Process. It highlights the issues prevalent as well as a way forward.

Although the research study tends to reach its aim by using fairly common approaches, this study does not provide a complete picture of the assessments. The study is basically limited to certain factors. It is only confined to the concept of Legal Realism and Legal Formalism through the lenses of Jurisprudence. Further, the theories are only dealt with in Indian Context and study does not provide for American, Russian or Scandinavian Context of the same. The time duration for the research is very less. The available data and information on the topic is not sufficient. Due to current situation, there is lack of resources and materials as well.

(F) Research Methodology

The research in this study is Doctrinal and Descriptive in nature with an analytical approach. The Doctrinal Research is suited to my research because it is of theoretical nature and can be substantiated through doctrinal method of tools and techniques. The secondary data is mainly collected through books, research papers, journals, law reviews and articles. Other sources of secondary data are different websites. This study is based on several research works and legal contents which have provided a good collection of data. Tools and techniques in research are the doctrinal methods of collection, analysis, interpretation, presentation, and organization of data.

II. Jurisprudential essence of the theories of legal formalism and legal realism

"The life of the law has not been logic; it has been experience."- Oliver Wendell Holmes Jr.

Perspectives on judging are dominated by theories propounded by formalists and the realists and find their origin in the legal system of the United States. According to the conventional account of the same, from the 1870s through the 1920s, the peak of legal formalism, lawyers and judges saw law as autonomous, comprehensive, logically ordered, and determinate, and believed that judges engaged in pure mechanical deduction from this body of law to produce a single correct answer in each case. In the 1920s and 1930s, building upon the insights of Oliver Wendell Holmes, Roscoe Pound, Jerome Frank and Benjamin Cardozo, the story reflects that the legal realists thoroughly discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for almost every legal rule or principle.[17] Legal principles and precedents can support opposite results. The realists argued that judges decide according to their personal preferences and then construct their legal analysis to justify the desired outcome. This is the standard chronicle, repeated numerous times by legal historians, political scientists and many others who study courts, legal theorists and the laws.

According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way. For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic." Legal realism, on the other hand, represents a sharp contrast. For the realists, the judge "decides by feeling, and not by judgment; by 'hunching' and not by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster.[18]

Justice Cardozo noted in his celebrated work *The Nature of the Judicial Process* that, virtually every legal precept under which we operate today is in contradiction of a prior rule. Judges bring imagination, good sense, courage, and compassion to their cases, so that the end result can be, and hopefully is shaped by an arc toward justice in the particular circumstances. In the excerpts from the book, Justice Cardozo observes:

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not,

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[17] Brian Z. Tamanaha, *Balanced Realism on Judging,* Vol. 44 Valparaiso University Law Review 1243 (2010). Available at: https://scholar.valpo.edu/vulr/vol44/iss4/9. Last accessed on April 09, 2021.

[18] Chris Guthriet, Jeffrey J. Rachlinskitt & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell Law Review 1- 2 (2007). Available at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1707&context=facpub. Last accessed on April 08, 2021.

which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them--inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall."[19]

Before we can determine the proportions of a blend, we must know the ingredients to be blended. Our first inquiry should therefore be: Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained; his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute.[20]

(A) Legal Formalism as Theory of Law

The Legal Formalist age precisely ran from the 1870s through the 1920s, and subsequently the Legal Realism age emerged in 1920s and 30s in America, which has certain influence till date. Legal Formalism is an old school of thought which at its most extreme views judges as meticulous by the book adjudication machine. Testimony Evidence and impartiality are fed in one direction, laws and precedent in another, and rulings are pronounced from this combination without any personal preferences from the judge.[21] Legal Theory of Formalism claims that:

(1) The law is rationally determinate, i.e., the class of legitimate legal reasons available for a judge to offer in support of his decision justifies one and only one outcome either in all cases or in some significant and contested range of cases, and

[19] Benjamin N. Cardozo, *The Nature of The Judicial Process* 180 (New Haven: Yale University Press. I92I).
[20] *Ibid.*
[21] Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, Volume 37 Issue 2, Case Western Reserve Law Review 179 (1986).

(2) Adjudication is thus "autonomous" from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy. Formalism is sometimes associated with the idea that judicial decision-making involves nothing more than mechanical deduction on the model of the syllogism.[22] Formalism has been called an 'autonomous discipline', in reference to the formalist belief that judges require only the facts and the law, all normative issues such as morality or politics being irrelevant. If judges are seen to be simply applying the rules in a mechanical and uncontroversial manner, this protects judges from criticism.

The late United States Supreme Court Justice Antonin Scalia was noted for his formalist views about a variety of topics, particularly his view that the United States Constitution should be interpreted in accord with its original meaning and his view that statutes should be read in accord with their plain meaning. In his celebrated work "*A Matter of Interpretation: Federal Courts and the Law*", Justice Scalia defended formalism by saying:

"Of all the criticisms levelled against textualism, the most mindless is that it is formalist. The answer to that is, of course it's formalistic! The rule of law is about form... A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbour with a video camera has filmed the crime and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism! It is what makes us a government of laws and not of men."[23]

However, the Legal Formalism has faced several setbacks as a theory of judicial Decision Making especially from the realists. It has been time and again criticised on the ground that it does not admit the fact that anything other than the law impacts judicial decision making, which is not fundamentally true. In a celebrated 1958 article, H.L.A. Hart, a giant of twentieth-century legal philosophy, expressed bafflement about the term "formalism": What precisely is it for a judge to commit this error, to be a "formalist," "automatic," a "slot machine"? Curiously enough the literature which is full of the denunciation of these vices never makes this clear in concrete terms. It is said that in the formalist error courts make an excessive use of logic, take

[22] Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue? Legal Theory,* 16(2), Cambridge University Press 111-133. doi:10.1017/S1352325210000121. (2010). Available at https://www.cambridge.org/core/journals/legal-theory/article/abs/legal-formalism-and-legal-realism-what-is-the-issue/6E27CE438E5C4DBD96478A5EC1D8202A. Last accessed on March 01, 2021.

[23] *Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law. 3-48, Princeton University Press, (2008). Available at https://press.princeton.edu/books/paperback/9780691174044/a-matter-of-interpretation. Last accessed on March 30, 2021.*

a thing to “a dryly logical extreme,” or make an excessive use of analytical method.[24]

(B) Legal Realism as Theory of Law

Legal Realism, a movement that arose in 1920s and 1930s in the United States, challenged the prevailing formalist view that judges are rational decision-makers, who apply only legal rules found in law books to the facts of the case. Legal realism is also called 'American legal realism’ as it is a distinctly American approach to philosophy of law. According to Realist theory of Law, judges consider not only abstract rules, but also social interests and public policy when deciding a case. In this respect, legal realism differs from legal formalism. The movement is called “Realist” as it studies law in its actual working and rejects the traditional definition of law. It states that all law is derived from prevailing social interests and public policy. Legal realism was arguably the most important and controversial theory of judging in the history. Its influence went far beyond as a theory of adjudication.

The U.S. legal realism movement began in 1881 when Oliver Wendell Holmes Jr. published “*The Common Law*”, an attack on the orthodox view of law. "The life of the law has not been logic; it has been experience" Holmes wrote. [25] Legal realism flourished during the 1920s and 1930s when Roscoe Pound, a professor from Harvard Law School, and Karl Llewellyn, a professor from Yale Law School, published a series of articles debating the nuances of the movement. Although the movement declined after World War II, it continues to influence how judges, lawyers, and laypersons think about the law. Legal realism is not a unified collection of thought. Many realists, like Pound and Llewellyn, were sharply critical of each other and presented irreconcilable theories. Yet, five strands of thought predominate in the movement. The strands focus on power and economics in society, the persuasion and characteristics of individual judges, society's welfare, a practical approach to a durable result, and a synthesis of legal philosophies. [26] ‘Law in action’ and ‘law in books’ are not one and the same. Legal Realism is not that which exists only in Statutes and Acts but in the Judges’ interpretations thus resulting in the politics of law.[27] The theory of Legal Realism casts light on the realities. It differs from the sociological school in respect of the fact that Realism is not much concerned with the ends of the law but focuses on the scientific observation of law and its actual

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[24] Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*, 159 (Princeton University Press, 2010).

[25] Oliver Wendell Holmes Jr., G. Edward White, *The Common Law*, xxiv, xxv (New York: Dover Publications, 2009)

[26] Karl Llewellyn, *My Philosophy of Law* (Mass: Bostan Law Co.,194)

[27] Divya Suwasini and Shreya Bose, *Arbitration in India not for the Faint-Hearted : Enforcing Foreign Arbitral Awards*, (2011) 6 NSLR 14, NALSAR Student Law Review 31 (2011). Available at https://www.scconline.com/Members/NoteView.aspx?citation=SlRYVC05MDAwNTY5MjA1JiYmJiY0MCYmJiYmU2VhcmNoJiYmJiZmdWxsc2NyZWVu. Last accessed on April 05, 2021.

functioning.

(C) Holmes & Cardozo and Other Predecessors of the Movement

1. *Oliver Wendell Holmes*

The birth of legal realism is largely credited to the jurist Oliver Wendell Holmes, Jr. Holmes famously wrote that "the life of law has not been logic; it has been experience." Holmes essentially argued that changes in law, at least judge-made law, were not due to logic or pre-existing law; instead, policy preferences or personal experiences of judges mattered more.[28] Holmes also famously stated in his dissenting opinion that "general propositions do not decide concrete cases". Many commentators consider this statement as his realist position that general rules of law will never decide actual cases. It seems, however, that this may have been an exaggeration as Holmes himself believed that specific legal propositions can determine how judges decide their cases.[29]

2. *Cardozo*

Like Holmes, Cardozo was not only an outspoken legal commentator but also a prominent judge. Thus, his position probably gave his views additional credibility. Compared to later realists, Cardozo was far from a revolutionary freethinker. His main treatise published in 1921 "The Nature of the Judicial Process" shows that most of his views rather moderate. He observed that in most cases, there are clear legal principles, which dictate the outcome. Yet, often a clear legal answer does not exist; in such cases, Cardozo thought, the judge should promote social ends; and here, Cardozo admitted, a judge may be tempted to substitute his view for that of the community."[30]

3. *Karl Llewellyn*

Karl Llewellyn was arguably the most influential realist. He also presented the version of legal realism that perhaps could lay claim for an established theory of law and judging. Like other realists, Llewellyn scoffed at the idea that judging is a rulebound activity, where a judge proceeds downward from legal rules to the outcome of the case. Llewellyn's one of the most famous contributions to the legal realism was to demonstrate the ambivalence of legal rules. In one of the most interesting and penetrating portions of his book "The Common Law Tradition: Deciding Appeals", Llewellyn takes up the question of legal certainty. Legal certainty is treated

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[28] Supra 24

[29] Oliver Wendell Holmes Jr., '*The Path of the Law*', 10 Harvard LR 457, 1 (1897). Available at http://emoglen.law.columbia.edu/LCS/palaw.pdf. Last accessed on April 15, 2021.

[30] *Supra* 18 at 136–37, 170.

as a genuine social value, and the inquiry whether case law produces it is considered as having an important bearing on the merits of the system as a whole. Llewellyn takes a needed distinction between predictability of judicial decision, and the ready availability of the materials upon which prediction is based. The first is a matter of legal certainty, the second a matter of legal system.

4. Jerome Frank

Like other realists, Frank doubted judges' ability to make decisions on the basis of general categories or general rules. Like many other eminent realists, Frank himself was an eminent federal judge. Frank thought that troubled psychological development is responsible for legal formalism. Frank emphasized that law is not merely a collection of abstract rules and that legal uncertainty is inherent in it. Therefore, mere technical legal analysis is not enough for understanding as to how law works. According to Frank, the judge's preferred outcome precedes the inquiry into legal rules. Frank was also one of few realists who was preoccupied not only with legal rules realism, but also with fact finding realism i.e., a judge will usually accept only that evidence which will support his or her preferred outcome.[31] Frank argued that judicial outcomes depend on many factors, most of which can be extra-legal: judge's personality, political preferences, mood, racial views, etc.

(D) Formalism and Realism: Two Different Paths of Judicial-Decision Making?

Formalism would want us to believe that law is independent and above politics and personal choices of individuals who deal in it. Positivist scholars argued that a law is a given set of facts and will lead to specific results irrespective of who decides it. The conclusion is based on reasoning and logic which is same for everyone and therefore the results cannot differ. According to formalists, the role of a judge is merely to interpret law as it is. In interpreting the law, the inherent logic guides the judges. Thus, a judge deciding a case need not bother about the outcome. Nor he/ she shall concern with the effect of the law, morality or otherwise of the judgement etc. He should not think of any scope for developing law further by laying down any proposition or a new legal principle. Nor he should give any preference or otherwise because of personal liking, disliking, favours, intuitions, emotions, biases etc.

Realists asserted that often judges make up their mind about the outcome even before they turn to legal rules; often they will use policy principles and make new law; some realists asserted

[31]Vitalius Tumonis, *Legal Realism & Judicial Decision-Making*, Jurisprudence, 19(4), 1370-1371, Mykolas Romeris University, Department of International and European Union Law, (2012). Available at https://core.ac.uk/download/pdf/144550402.pdf. Last accessed on April 08, 2021.

that judge's personality has more impact than legal rules. After making a decision, judges will justify it with formal legal rules.[32] For legal formalists, on the other hand, legal rules and logical reasoning are central to judicial decision-making. In more extreme versions of legal formalism, legal rules are the Alpha and Omega – the beginning and the ending of judicial decision-making.[33] Formalist critic rejected this contention on the basis of constitutional directions. They argued that excessive Formalism can sometimes result in an invalid legislative usurpation of duties left by the Constitution exclusively with the courts.

Opposed to formalist approach, Realists believed that there can be no certainty about law as its predictability depends upon the set of facts which are before the court for decision. Realists do not support formal, logical and conceptual approach to law because the Court while deciding a case reaches its decision on 'emotive' rather than logical grounds. They lay greater stress on psychological approach to the proper understanding of law as it is concerned with human behaviour and convictions of the lawyers and Judges. Realists are opposed to the value of legal terminology, for they consider it as tacit method of suppressing uncertainty of law. They prefer to evaluate any part of law in terms of its effects.

Whereas, "Formalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened.[34] Justice Scalia, for example, thinks that for judging to be genuinely mechanical (per the formalist's ideal), the interpretive principles that are part of the class of legal reasons must be austerely simple, lest discretion sneak into adjudication under the guise of "interpretation."[35] It is the school of legal philosophy that challenges the orthodox view of U.S. Legal realists and Formalists and maintain that common law adjudication is an inherently subjective system that produces inconsistent and sometimes incoherent results that are largely based on the political, social, and moral predilections of state and federal judges.

(E) Criticism against Legal Theories of Formalism and Realism

Both, the formalist as well as the realist approach to jurisprudence have evoked criticism from many quarters. Legal formalism considers law to be a set of rules to be applied logically and

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[32] Michael Steven Green, *Legal Realism as Theory of Law*, Volume 46 No. 6, 1915 William and Mary Law Review, (2005). https://scholarship.law.wm.edu/wmlr/vol46/iss6/2/. Last accessed on April 15, 2021.
[33] *Ibid.*
[34] William Eskridge, Jr., *The New Textualism*, 37 UCLA Law Rev. 621, 646 (1990). Available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4821&context=fss_papers. Last accessed on April 14, 2021.
[35] Brian Leiter, *Positivism, Formalism, Realism*, 99 Columbia Law Review [v], 1146, 1147 (1999) Available at: http://chicagounbound.uchicago.edu/journal_articles. Last accessed on April 17, 2021.

without any need to consider in the moral factors or policy issues. It was criticised on the ground that Law, as opposed to what was emphasised by Formalists, cannot always be autonomous, comprehensive, logically ordered, and determinate. On this account, legal formalism was brought to an end by the Realists, who propounded that the law is filled with gaps and contradictions. Law is indeterminate and there are exceptions for almost every legal rule or principle. Formalists propounded and believed that judges are engaged in pure mechanical deduction from the body of law to produce single correct outcomes whereas, realists criticised the same stating that legal principles and precedents can support different results. Judges, according to the realists, make decisions according to their personal preferences and not strictly on the basis of Legal rules. They later come up with legal rationales for the decisions so reached instead of solely adhering to the legal enactments. These views of Formalists regarding Decision making by a Judge were strongly criticised mainly by the propounders of Legal Realism.

As far as Realism is concerned, the critics allege that the exponents of Realist legal philosophy have completely overlooked the importance of rules and legal principles and treated law as an assemblage of unconnected court decisions. Their perception of law rests upon the subjective fantasies and life-experience of the Judge who is deciding the case or dispute. Therefore, there cannot be certainty and definiteness about the law. This is indeed overestimating the role of Judges in formulation of the laws. Undoubtedly, judges do contribute to law-making to certain extent but it cannot be forgotten that their main function is to interpret the law. Some critics also argue that a restrained use of legislative history and focus on text is necessary to prevent judicial usurpation of legislative power. In a representative democracy, the argument goes, major policy decisions should be made by the popularly elected branches of government. The judges' use of legislative history increases their discretion to make illegitimate policy choices.[36] Unelected judges should make as few policy choices as possible, especially when interpreting statutes.

Another criticism so often advanced against realists is that they seem to have totally neglected that part of the law which never comes before the court. Therefore, it is erroneous to think that law evolves and develops only through court decisions. In fact, a great part of the law enacted by legislature never comes before the court; nevertheless, it does remain a law enforceable and applicable in appropriate cases and situations. Realists have exaggerated the role of human factor in judicial decisions. It is not correct to say that judicial pronouncements are the outcome

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[36] Supra 33 at 648

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of personality and behaviour of the judge. There are a variety of other factors as well which he/she has to take into consideration while reaching his/ her decision. Last but not the least, the realist theory is confined to local judicial setting of United States and has no universal application in other parts of the world. Neither the formalists nor the realists accurately describe the way judges make decisions, but that key insights from each form the core of a more accurate model.

III. Legal formalism and legal realism in the Indian legal system: an overview

Free and equal decision making is an imperative element in the justice-dispensation system, which essentially shapes and constrains the core conception of constitutional justice. In succinct, free and equal decision making is central in upholding the Rule of Law. This requires the Judge to continually police the boundary between what is and what is not within his/her power to decide and to decide all cases in a way that never disregards the subjective evaluations of both parties.[37] *Justice Subba Rao* observes that

"It is the sacred duty of the courts to protect the rights of the people and fair decision making is an integral aspect of this process. A sensitised judiciary is a prerequisite for performing this sacred duty. A socially sensitised Judge is a crucial armour in the justice-delivery system than long clauses of penal provisions, containing complex exceptions and complicated provisos. The credibility and legitimacy of the judicial decisions depends not only on its merit and soundness in law, but equally on public perception of impartiality and objectivity of the Judge. Further, Judges should internalise sound procedural safeguards like conducting the proceedings in a fair, orderly and dignified manner to ensure that "justice is not only done but seen to be done".[38]

The legal theories of formalism and realism have not been completely accepted in the India for the obvious reason that the fabric of Indian society is different from that of the American setting. For Indian lawyers, jurists and political scientists the realist jurisprudence is no longer a study for personal enlightenment of the philosophy of law discussed by Holmes, Cardozo, Jerome Frank or Pound or the idea of Formalism for that matter. Legal realism has now vigorously entered into the life stream of Indian constitutional system. The judgments of the

[37] Mohan Parasaran, *Free and Equal Decision*, 5 SCC, Address to the newly appointed Judges to High Courts organised by National Judicial Academy at Bhopal on 21-11-2015, J-9 (2016). Available at https://www.scconline.com/Members/NoteView.aspx?citation=SlRYVC0wMDAwMDA2MTYzJiYmJiY0MCYmJiYmU2VhcmNoJiYmJiZmdWxsc2NyZWVu, Last accessed on April 17, 2021.
[38] Ibid.

Supreme Court on the power of Parliament to amend the Constitution as well as on the interpretation of Constitution to decide the validity of the exercise of power by different organs of government firmly establish the position of judiciary in India on the pattern of early twentieth century American legal realism.[39]

(A) Legal Realism from the Lenses of Judicial Activism in Indian Judicial Decision-Making Process

Legal Realism from the Indian perspective is reflected in the power of Judicial Review vested in the SC of India by the Constitution of India, which is also extensively called "Judicial Activism". The recent trends in the public interest litigation which Professor Upendra Baxi prefers to call as 'social action litigation' have, widened the scope of judicial activism to a great extent, but the Judges have to formulate their decisions within limits of constitutional framework of the law by using their interpretative skill.[40] Judges who are considered to be the protectors of the Constitution of India cannot ignore the existing legislative statutes and enactments. They must confine their judicial activism within the limits of the Constitutional principles and the statutory law.

1. *Articles 141 & 142 of the Indian Constitution-Should Judges Make Laws?*

One of the arguments of realists that the judges should make law has been acknowledged in the Constitution itself, under Articles 141[41] & 142.[42] Under Article 141, the Supreme Court is required to render complete justice and the court is duty bound to decide a matter and render justice. There have been a number of instances where the court has issues guidelines in the nature of binding law. However, it may be noted that this power as well as the constitutional duty of the court is not instead of but in absence of law made by legislature.

One of the most important constitutional provisions giving extraordinary power to the Supreme Court is Article 142 of the Indian Constitution. This provision empowers the Supreme Court to pass suitable decree or order for doing complete justice in any pending matter before it. Despite the fact that the law-making power in India lies primarily with the Parliament only, the Supreme Court is able to legislate under Article 142 of the Indian Constitution. This provision

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[39]U.N. Gupta, *Legal Realism and Indian Constitutional Interpretations*, Vol. 17, No. 2 JILI, 212, Journal of the Indian Law Institute (1975). Available at https://www.scconline.com/Members/NoteView.aspx?enc=SlRYVC05MDAwNDEzMjQ0JiYmJiY0MCYmJiYmU2VhcmNoJiYmJiZmdWxsc2NyZWVuJiYmJiZ0cnVlJiYmJiZyZWFsaXNtIHUgbiBndXB0YSYmJiYmQWxsV29yZHMmJiYmJmdTZWFyY2gmJiYmJmZhbHNl

[40]LawTeacher, *Do Judges Make Laws?* (November 2013). Available at: https://www.lawteacher.net/free-law-essays/constitutional-law/do-judges-make-laws-constitutional-law-essay.php?vref=1 Last accessed on April 17 2021].

[41]*Article 141*, The Constitution of India..

[42] *Article 142*, The Constitution of India.

is responsible for the judicial legislation in India. However, the judicial legislation is being done only when there is vacuum in law on the concerned subject matter.

The directions or rules issued by the Supreme Court under Article 142 would remain into force until the Parliament makes proper legislation on the subject matter. It means that the court understands the fact that appropriate law-making body is the Parliament only. For Parliament has more resources the Supreme Court to pass suitable legislation on the subject-matter. In the leading case of *Vineet Narain vs Union of India*, the Supreme Court observed that "Considering the importance of Article 32 read with Article 142, it becomes necessary for the judiciary that it should perform its constitutional obligation where there is no legislation on the certain field and implement the rule of law."[43] Again, the Supreme Court in *Kalyan Chandra Sarkar vs Rajesh Ranjan*,[44] acknowledged the importance of Article 142 of the Indian Constitution and said that the court has power under Article 142 to issue directions and guidelines for implementing and protecting the fundamental rights in the absence of any enactment. The court reiterated that any such direction, filling up the vacuum of legislation, is the law of the land.

Besides this, the doctrine of precedent which has no place in the realist philosophy plays a significant role in the Indian judicial activism within the limits of the statutory law. Precedents provide guidance to the presiding judge about the existing position of the law in question. Judges however, are free to overrule the previous decision on the ground of inconsistency, incompatibility, vagueness, change of conditions, etc. assigning reasons for their deviation from the earlier ruling. Thus, the Indian legal system, though endows the judges with extensive judicial discretion, does not make them omnipotent in the matter of formulation of law.[45] The legislative statutes and enactments, precedents and the rules of equity, justice and good conscience are indispensable part of the judicial system in India.

Justice Cardozo in his treatise 'Nature of the Judicial Process' also states that one of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore, in the main there shall be adherence to precedent. The constitution of India itself provides ample scope for the Judges to take into consideration the hard realities of socio-economic and cultural life of the Indian people while dispensing social and economic justice to them. In short, it may be reiterated that though Indian jurisprudence does not formally subscribe to the realist's legal philosophy, it does lay great stress on the functional aspect of the law and relates law to the

[43] A.I.R. 1998 S.C. 889.
[44] 11 A.I.R. 2005 S.C. 972
[45] Supra 39

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realities of social life.

(B) Judicial Response on Legal Formalism and Legal Realism in Indian Legal System

In India the remarks of realists can be found in idea of judicial activism. Through judicial activism the Indian courts have actually illustrated that the judges considering non legal factors like policy issues etc. and developing the law in a wholesome manner is not only a possibility but also desirable as long as the judiciary restrains at an appropriate point and knows when activism crosses the fine line and becomes judicial overreach. As far as Legal Formalism is concerned, in India the Judges have to formulate their decisions within limits of constitutional and legal framework by using their interpretative skill. Judges cannot ignore the existing legislative statutes and enactments. They must confine their judicial activism within the limits of the Constitutional principles and legislative enactments. Judicial activism should not result in 'excessive activism' or 'judicial-overreach'. Courts are free to act as realist in India, provided they respect the Constitutional spirit, for it is thought to be necessary for the courts to act with enthusiasm, because legal progressivism depends upon the wisdom and clarity of thought. This also reflects that the theories of Realism and Formalism have neither been completely negated nor been completely accepted in the Indian Legal System. Rather, a middle-path has been time and again adopted which is more balanced than the general approaches of Realism and Formalism. The Courts in India have time and again made reference to the concepts of Formalism and Realism. The references help in retrieving a clear picture of the subsistence of Theories of Legal Formalism and Legal Realism in India and the stand of Judiciary on the same.

In the recent case of *Navtej Singh Johar vs Union of India*,[46] the Supreme Court observed that "Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in Legal Formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal Formalism buries the life-giving forces of the constitution under a mere mantra."

Supreme Court is seen as the custodian of the Constitution of India, although Judiciary is considered as the weakest organ of the State. For democracy to prevail and to remain wedded

[46] (2018) 10 SCC 1

with the rule of law, it is necessary that Judges as wife of Caesar remain above suspicion;[47] for as it was observed in the case of *Krishna Swamy vs UOI* [48] that, "the Judge is the living oracle working in the dry light of realism pouring life or force into the dry bones of law to articulate the felt necessities of the time. Hence what is needed as of necessity is healthy judicial accountability." Also, in the wake of Judicial Activism in India, incidents have been witnessed whereby the line of difference as between judicial activism and judicial over-reach or judicial adventurism is blurring which is not a very healthy sign."

Rise of legal Realism in India in the form of Judicial Activism and Judicial Creativity is to be witnessed in the light of the fact that the Constitution of India is a living document and the Judiciary at all times must protect the Constitution of India, not only in matter but also in spirit.[49] The Apex Court in Bengal Immunity Case overruled its earlier decision in *Dwarkadas v. Sholapur spinning & weaving Co.*[50] observed that "the Court is bound to obey the Constitution rather than any decision of the Court, if the decision is shown to have been mistaken".

In *Golak Nath vs State of Punjab*[51], the Supreme Court speaking through Subba Rao, CJ, observed that "While ordinarily the Supreme Court will be reluctant to revise its previous decision, it is its duty on the constitutional field to correct itself as early as possible, for otherwise the further progress of the country and happiness of the people will be at a stake." The observations made by Justice K. Ramaswamy deserve a special mention in context of realism in interpretation of the Constitution and the law of the land. To quote his words, he observed that "The Judge is the living oracle working in dry light of realism pouring life or force into the dry bones of law to articulate the felt necessities of the time."

In the case of *Bhatia International vs Bulk Trading S.A.* [52], the Supreme Court observed that notwithstanding the conventional principle that the duty of judges is to expound and not to legislate. The Courts have taken the view that the judicial art of interpretation and appraisal is imbued with creativity and *realism,* and since interpretation always implied a degree of discretion and choice the Court would adopt particularly in areas such as constitutional adjudication dealing with social and other rights. Courts are therefore, held as "finishers,

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[47] Supra 46
[48]AIR 1993 SC 1407
[49] Shivam Goel, *The Explorative Study of the Realist School of Jurisprudence in Indian Context*, SSRN Electronic Journal, (2000). Available at https://www.academia.edu/13945107/The_Explorative_Study_of_the_Realist_School_of_Jurisprudence_in_Indian_Context. Last accessed on April 18, 2020.
[50] AIR 1954 SC 119 (137).
[51] AIR 1971 SC 1643
[52] (2002) 4 SCC 105.

refiners, and polishers of legislatures which gives them in a state requiring varying degrees of further processing."

In *Transport & Dock Workers Union vs Mumbai Port Trust*[53], the Supreme Court ruled that Judges must maintain judicial self-restraint while reviewing administrative or legislative decisions. Excessive interference is not proper. The machinery of the Government would not work if it were not allowed some free play in its joints. In view of the inherent complexities involved in modern society some free play must be given to the executive authorities. The judicial process is not a bucket of readymade answers, but a process, or technique, for easing an endless flux of changing social tensions, Making the law responsive to the changing world to be preferred to rigid formalism and to a jurisprudence founded upon immutable first principles.

The arguments of realists that the courts make law openly rather than under the cloth of logic has not materialised. Perhaps rightly so. Because, when courts will be free to legislate, the legislature will become irrelevant and the checks and balance between the two branches of the state which is so intricate in the constitutional scheme will be disturbed. For such checks and balance serve a very import purpose of preventing concentration of power. To uphold the values and idea of Democracy, the fundamental principle of Separation of Power must be meticulously observed by every organ whether it be Executive, Legislature or Judiciary. Moreover, the requirement of clothing the non-legal factors with logic would require the judges to be very cautious in their approach and they will only fill the gaps in the existing legislation. And when required the legislature would be free to legislate on what was the gap filled by the courts. This would go a long way in ensuring development of law and the maintenance of fine balance between the authority of legislative and judicial branches of the State. Hence, the argument of realists that the courts should openly consider the non-legal factors while declaring law is not acceptable.

Substantially, in *All India Judges Association vs Union of India*,[54] the SC made this significant observation that, "The conduct of every judicial officer should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamour, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to law, and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the

[53] (2011) 2 SCC 575, Para 37.
[54] Manu/SC/0039/1992, Para 71

purpose of advancing his personal ambitions or increasing his popularity."

In Indian Judicial process, neither the formalism nor the realism accurately describes the way judges make decisions. There is a blend of the two models of judging. The Indian Judicial-decision making process has adopted a middle-path to the concepts of Formalism and Realism. There is no strict adherence to either of them. Judges generally make intuitive decisions but sometimes override their intuition with deliberation and legal rules. This makes the Indian Judicial-Decision making process less idealistic than the formalist model and less cynical than the realist model. The model is "realist" in the sense that it recognizes the important role of the judicial arch and "formalist" in the sense that it recognizes the importance of deliberation in constraining the inevitable, but often undesirable, influence of intuition. So, Indian Judicial-Decision making process can be said to be based on a Balanced Formalistic-Realistic approach.

IV. Conclusion

The two grand theories of judging have their differences set around the importance of legal rules. For formalists, judging is a rule-bound activity. In its more extreme versions, a judge is seen as an operator of a giant deductive reasoning machine. Most formalists, however, don't subscribe to the more extreme views of judging as merely deductive active, but they nonetheless still regard formal legal rules as central to judicial decision making. The legal realists, however had a twofold claim. First, formal legal rules, do not determine outcomes of cases. Law is incurably indeterminate. Most realists agreed that legal rules play some role in judicial-decision making, but all realists argued that other rules and factors play much more important role. And a judge, influenced by other rules and other factors, will make a decision before consulting law books. Second, after deciding on other grounds than solely legal rules, judges will be able to justify the decision with formal rules because one can usually find competing legal grounds for almost any position.

The ultimate goal of legal realism was to increase certainty and stability of rule of law by uncovering actual factors behind judicial decisions. Although legal realism movement was short-lived, its impact and influence has been strong and long-lasting. Realism presupposes that law is intimately connected with the society and since the society changes faster than law, there can never be certainty about law. This is the reason for calling Law "indeterminate". Statutes are accepted as 'law' only when they have been approved as law by a court decision but not always. However, neither model has proved satisfactory. Judges surely rely on intuition, rendering a purely formalist model of judging clearly wrong, yet they also appear able to apply legal rules to facts, similarly disproving a purely realist model of judging. neither the formalists

nor the realists accurately describe the way judges make decisions, but that key insights from each form the core of a more accurate model. A model that balances the idea of Judicial-Decision making and is not radical in approach.

As far as the subsistence of the theories of Legal Formalism and Legal Realism in India is concerned, neither of the theories prevail in true sense. The Indian Judicial-Decision Making process accepts the Middle Path which values the legal enactments as well as considers other factors that are required for delivering a Judgment. Judiciary enjoys a very important and fundamental place in the legal framework, but for that reason it cannot be assigned a function of law making. Judiciary, on the contrary is responsible only for application of the law enacted by the legislature to the disputes coming before it. It emphasises on the principles of Justice, Equity and Good Conscience in the Judicial-process. The interest of individuals as well as the society can be protected only when while making the decisions, the Judges adopt an approach that is at par with the legal rules as well as the societal needs. Decisions can never be made in isolation of either the Formalism or the realism. The concluding remark for the research is being made from the Paper titled ***Free and Equal Decision Making*** authored by Mr. **Mohan Parasaran,**[55] Former Solicitor General of India, which is basically his address to the newly appointed Judges to High Courts organised by National Judicial Academy at Bhopal on November, 21, 2015. Former SG concludes his address as follows:

> "Ultimately, the judicial decision making would be free and equal if Judges are more honest about their reasons. It is widely been said that "… *the life of law has not been logic; it has been experience*".
>
> "It will be apt to conclude with the phrase which goes as follows:
>
> *For the first ten years, a Judge swears he will do nothing but justice*.
>
> *For the next ten years, he declares that what he does is justice*.
>
> *For the last ten years, he does not care what he does*."

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[55] Supra 36 at J-15

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