SCEPTICAL ABOUT THE RULE OF LAW

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The Formalist School

It is surprising that judges, who are expected to make complex and important decisions every day, have written so little about the process by which they arrive at the decision. Perhaps one important reason was the declaratory theory of judicial decision-making,[1] according to which, the role of the judges in construing the Constitution or a statute was simply that of a vector declaring the intention of the legislature that made that law.[2] Similarly, in common law, it was believed that the judge was doing no more than applying logical reasoning to previous judicial authority.[3] This belief was the cornerstone of the Formalist theory of the judicial decision-making process.[4] The Formalists contended that every judicial opinion was capable of being broken down into a three-part equation. The equation propounded by the Formalists consists of the rules of law (R), the facts of the case (F), and the decision of the judge (D). This would be represented by the formula R x F = D.[5] As indicated by the formula, the Formalists' equation relies exclusively on the existence of the law. The rule of law, as established by precedent or statutory authority, is the uniform portion of this equation, which guides the judge's decision. Once ascertained, the rule is then exactly applied to the case after the judge has examined and determined the relevant facts. Therefore, the Formalist theory placed great faith on the comprehensive coverage of both common and statutory law, as well as the ability of a judge to pinpoint the applicable rule of law in forming a conclusion.[6] The Formalist theory of decision-making is that the judicial decision is the conclusion reached at by the application of the above formula. A clear implication of the Formalist theory is that the judge's conclusion should also be reached by any other jurist using the same formula under similar circumstances. Thus, the Formalist approach views the judge as one who objectively and impersonally decides cases by a process of logical deduction from a definite and consistent body of rules. This approach appears ideal as the decision making process is objective and rules have a central role in the decision making process, restricting the discretion vested in the judges. Yet, the fundamental belief that the Formalist approach relies on, that the judicial decision is really a mere application of a simple formula, appears questionable. This can be best explained by the following examples.

Consider the sale of a painting by an auction house for a bid of Rs. 10,000. When the buyer has the painting appraised, it turns out to be a lost masterpiece worth millions. Upon learning this, the auction house sues to rescind the contract of sale. A rule of law exists that a contract may be rescinded when

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1 According to Blackstone, who was one of the most influential exponents of this theory, exercise of judicial power required the judge to determine the law arising upon the facts of the case. In determining the law, the judge is not expected to pronounce or make a new law, but is expected to expound and maintain the old law. This was acknowledged as the declaratory theory of decision-making. BLACKSTONE, COMMENTARIES 13 (1765).

2 Justice Michael Kirby, *Judging: Reflections on the moment of decision*, *at* http://www.csu.edu/conference/decision-making.html (last visited December 10, 2000).

3 *Id.*

4 DENNIS LLOYD, INTRODUCTION TO JURISPRUDENCE 655 (1985).

5 Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision-Making*, *at* http://www.ublawforum.com/judgesjudge.htm (last visited December 18, 2000).

6 *Id.*

there has been a mutual mistake concerning a material fact. If the contract was for the sale of an inexpensive painting, there was clearly a mutual mistake. However, if the contract was for the sale of a work of unknown value, there was not. The reason is that rules are often expressed in such vague language (*e.g.*, "reasonable", "due process", "fair value", etc.) as to allow them to be read as narrowly or as broadly as necessary to achieve any desired result.[7]

Consider for instance, a woman living in a rural setting who becomes ill and calls her family physician for help. He is the only local doctor but it is the doctor's day off and he does not respond because he has a golf date. The woman's condition worsens; no other physician can be procured in time; as a result, she dies. Her estate then sues the doctor for not coming to her aid. A rule of law exists that, in the absence of an actual contract for services, there can be no liability. However, another rule holds that, in the absence of an explicit contract, the law will apply a contractual relationship when that is necessary to avoid injustice. The reason is that the law is riddled with contradictory rules, so that a judge will always have a choice between competing rules leading to opposing outcomes.[8]

The Realist School

The existence of contradictory rules and rules that give wide scope for interpretation are the reasons for questioning the Formalist theory. The Realist school emphasizes on what courts may do, rather than on abstract logical deduction from rules.[9] Realism focuses attention on the empirical factors that underlie a judicial decision.[10] Karl Llewellyn, a rule sceptic[11], in his 1931 defence of Realism against Roscoe Pound, summarized the principal beliefs of the Realists, and, while doing so, explained the crux of the Realist viewpoint on rule scepticism as being the distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing; and the distrust of the idea that rules as expressed in the form of legal doctrine are the heavily operative factor in producing court decisions.[12] Realists believe that the heavily operative factor in judicial decision-making is not rules, but empirical factors like the philosophy, temperament, and opinion of the judge. The contradictory nature of rules and the vague language in which rules are expressed enable the judge to justify any decision in terms of rules and concepts. Thereby, Jerome Frank, a leading Realist scholar, maintains that the opinions written by the judiciary are an inaccurate description of actual thought processes that occur in a judge's mind. The judgment is perceived as being little more than the "*mere intellectualization or justification of the judge's*

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[7] John Hasnas, *Back to the Future: From Critical Legal Studies forward to Legal Realism, or how not to miss the point of the indeterminacy argument*, 45 DUKE L. J. 84, 85 (1995).

[8] *Id.* Through these examples, John Hasnas questions the belief that the judicial decision can be arrived at, in a simple and direct manner, by the application of the appropriate rule to the given fact situation. The problem, as can be seen by the examples, is that the appropriate rule cannot be determined as easily as the Formalists purported it to be.

[9] Lloyd, *supra* note 4, at 658. The general intellectual movement in favor of Realism as against Formalism perhaps reached its heyday by the end of the 1920s. Justice Oliver Wendell Holmes greatly influenced the Realist movement and much of the characteristics of the Realist school were seen as reflections of Holmes' views of law as being what the courts may decide.

[10] HOLMES, THE COMMON LAW 35 (1921).

[11] *See* JEROME FRANK, COURTS ON TRIAL. 26 (1949). There are two groups of realists: rule sceptics and fact sceptics. Rule sceptics believe that the legal uncertainty in decision-making is due to the contradictory nature of rules and the existence of rules that give wide scope for interpretation. Fact sceptics believe that the unpredictability of court decisions lies primarily in the elusiveness of facts.

[12] Karl Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1930-1931).

desires."[13] It may seem strange that the contention that rules have a central place in the structure of a legal system could ever be seriously doubted. H.L.A. Hart believed that the sceptic's conception of what it is for a rule to exist is an unattainable ideal. Consequently, when he discovers this, he expresses his disappointment by the denial that there are, or can be, any rules.[14] Thus, just as the rules which the judges claim bind them in deciding a case, have an open texture[15], or have exceptions that are not exhaustively specifiable in advance,[16] the rule sceptic believes that rules do not have a central place in the structure of a legal system. However, at no point do rule sceptics like Llewellyn deny that the elements of legal doctrine such as rules and concepts are important matters of analysis.[17] Llewellyn distinguished between "*real rules and rights*" and "*paper rules and rights*".[18] He conceived real rules in terms of behaviour and as the practices of the court. He stated that paper rules were what have been treated traditionally as rules of law. Thus, in Llewellyn's view, sensitivity to the courts' work, as well as the way judges rationalize their actions through legal rules and principles, ought to cause a cautious and critical view of legal doctrine.[19] A number of factors likely to influence judicial decisions are direct influences such as legal and political experiences, political affiliations, intellectual opinions, and temperamental traits; and indirect and remote influences such as legal and general education, family and personal associations.[20]

The Rule of Law

Rule scepticism appears to question the ideal of the rule of law. The ideal of the rule of law is often expressed by the phrase "*government by law and not by men*"[21]. F.A.Hayek defines the ideal of rule of law more precisely and clearly as:

> "*Stripped of all technicalities, rule of law means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive power in given circumstances, and to plan one's individual affairs on the basis of this knowledge.*"[22]

Rule of law requires rules to be fixed and announced beforehand, *i.e.*, law has to be prospective in nature.[23] The framers of the American Constitution, for instance, forbade the Congress to pass any *ex*

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[13] JEROME FRANK, LAW AND THE MODERN MIND 35 (1930). Frank stated that the judges' decisions are not based on a systematic analysis of fact and law, but rather on an intuitive flash which he termed "*judicial hunch*" According to Frank, "*Whatever produces the judge's hunch makes the law*". The "*judicial hunch*" is a reaction in response to an internal emotional impulse of the judge. The impulse is due to the biases and preconceptions of the judges.

[14] H.L.A.HART, THE CONCEPT OF LAW 133 (1961).

[15] *Id.* at 124. Whichever device, precedent, or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point, where their application is in question, prove indeterminate; they will have what has been termed an "*open texture*".

[16] As the exceptions to a rule are not exhaustively specified in advance, the judge may create an exception, and may also decide that the situation in the case before the court falls within the created exception.

[17] ROGER COTTERELL, THE POLITICS OF JURISPRUDENCE 191 (1989). In this context, Cotterell relies on a statement made by Karl Llewellyn. Llewellyn stated, "*I feel strongly the unwisdom, when turning the spotlight on behaviour, of throwing overboard the emphasis on rules, concepts, ideology, and ideological stereotypes or patterns... a jurisprudence which was practically workable could not have been built in terms of rules and concepts if they had not contained a goodly core of truth and sense.*"

[18] See Karl Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L REV. 431, 449 (1930).

[19] Llewellyn, *supra* note 12.

[20] Capurso, *supra* note 5.

[21] JOSEPH RAZ, THE AUTHORITY OF LAW 212 (1979).

[22] F. A HAYEK, THE ROAD TO SERFDOM 54 (1944).

[23] According to Joseph Raz, the rule of law has two aspects - that people should be ruled by the law and obey it, and that the law should be such that people will be able to be guided by it. Therefore, the law has to be prospective for if it is to guide people, they must know what it is. *Supra* note 21, at 215.

post facto law.[24] The cornerstone of rule scepticism is distrust that rules describe what the courts are doing. Although rules are fixed and announced beforehand, the way in which the court will apply the rules is not clear until the court actually applies the rules. Therefore, despite fixing the rules, the purpose of fixing and announcing the rules beforehand is defeated, as it amounts to retrospectivity. As Llewellyn had pointed out, real rules are the practices of the court, *i.e.*, the manner in which the courts apply the rules, and it is only when the court applies them that they are in truth fixed and announced.[25] Ronald Dworkin's criticism of the legal positivist theory of discretion is similar.[26] The judge, according to this theory,[27] has the discretion to decide the case when it cannot be brought under a clear rule of law.[28] However, according to Dworkin, in reality, he legislates new legal rights, and then applies them retrospectively to the case at hand. When the rules are, in truth, fixed only when the court applies them, one is not aware of the rules beforehand, and this leads to uncertainty.[29] Rule scepticism is concerned with the proposition that judicial decisions cannot be predicted from the paper rules *per se*, and the result is uncertainty. According to Dicey, no man can be lawfully made to suffer except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. [30] In this sense, every system of government based on the exercise of wide and arbitrary powers by persons in authority is contrary to the rule of law.[31] The focus of Dicey's definition of rule of law is that it is contrary to arbitrary power. Joseph Raz agrees and states that the rule of law is often rightly contrasted with arbitrary power.[32] The rule of law excludes all forms of arbitrary power in the law-applying function of the judiciary, where the courts are required to be subject only to the law, and to conform to the procedures.[33] Rule scepticism argues that this seems to be in direct conflict with the rule of law in this sense. Rule sceptics argue that the judges are not really subject to the law, as the nature of rules is such that they can be used to appear as if the judges have acted in accordance with binding rules, whereas in

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[24] K.C.Wheare, Modern Constitutions 8 (1951).

[25] *See generally* Llewellyn, *supra* note 18.

[26] Ronald Dworkin, Taking Rights Seriously 81 (1999).

[27] *See* Hart, *supra* note 14, at 133 and *id.* Hart, for instance, relied on rules and believed that indeterminacy exists only in the penumbra of cases, due to the open texture of rules. Therefore, in hard cases, the judge is said to have the discretion to decide the case either way. According to Dworkin, the judge is in reality legislating new legal rights which are then applied retrospectively to the case in question although the language used by the judge seems to assume that one or the other party had a pre-existing right. Dworkin states that the judge ought not to legislate retrospectively but should refer to the principles and policies which law comprises of, besides rules. In this context, Dworkin is referring solely to hard cases, *i.e.*, cases where the rule is said to be unclear, as is Hart. Positivists believe that the theory of discretion is applicable only in hard cases. In other cases, which, according to the positivists, are the majority of the cases, the rules are clear. However, the rule sceptics state that in every case, due to the contradictory nature of rules, the legal right is not clear, as the rule to be applied is not clear. Therefore, the judge, when he chooses to apply one rule over another rule, is legislating and applying the rules retrospectively, as, according to the rule sceptics, the real rules are formed only when the rules are applied by the courts

[28] *See generally* Raz, *supra* note 21.

[29] According to Joseph Raz, when people are unable to foresee the law, it leads to uncertainty, which is a violation of the rule of law. The rule of law in its broadest sense means that people should obey the law and be ruled by it. Uncertainty thereby affects the rule of law in its broadest sense, for if people are not certain as to what the law is, they cannot obey it. Raz, *supra* note 21

[30] A.V. Dicey, An Introduction To The Study Of The Law Of The Constitution 188 (1990).

[31] *Id.*

[32] Raz, *supra* note 21, at 219.

[33] *Id.*

truth, it is the "judicial hunch"[34] which led to the decision. The vast discretionary power of the judges provides a wide scope for the arbitrary use of power.

Rule Scepticism and the Doctrine of Separation of Powers

Rule scepticism questions the doctrine of separation of powers, which is based on the ideal of the rule of law. According to the doctrine of separation of powers, the legislature alone can formulate laws, whereas the judiciary is required to apply the law. However, rule sceptics state that judges do not merely apply the law laid down by the legislature.[35] In fact, the rule sceptics go so far as to say that the paper rules are the rules created by the legislature and the real rules are the rules, which the courts choose to apply.[36] They suggest that doctrine is less important than those who create it; that what judges do is more important than the reasoning with which they justify their decision. The full extent of judicial power to develop law through creative interpretation can be recognized as a practical matter. Indeed, judges and courts, viewed merely as decision-makers determining disputes, might not look very different in character from administrative regulators or legislative rule-makers.[37] The fact that appellate judges make law, and not merely interpret it, is now fully acknowledged although there are many, including the appellate judges, who still contest this proposition.[38]

In this context, the doctrine of judicial review has been the subject matter of emotionally surcharged debate, the extreme charge being that in the name of interpretation, the judges arrogate to themselves the role of legislator.[39] According to Justice D.A.Desai, this is an unavoidable outcome of the power of judicial review.[40] In the decision making process, when the judge tailors the law to suit the facts of the

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[34] FRANK, *supra* note 13.

[35] Llewellyn, *supra* note 12.

[36] Llewellyn, *supra* note 18.

[37] HAYEK, *supra* note 22, at 183,184.

[38] U. Baxi, *On the shame of not being an activist: Thoughts on Judicial Activism*, 11 IBR 259, 259 (1984). According to Baxi, judges naturally indulge themselves in the honest fiction that they are merely carrying out the intention of the legislators. He further states that the nature of law is such that it allows the judge to do so. Baxi terms this persistent attempt to convince people that judges do not make law as "*the Great Blackstonian Lie*". In keeping with the Lie, appellate judges continue to contest the acknowledged proposition that they sometimes make the law. In this context, Baxi points out several instances when the appellate judges clearly made law. One such instance is the amendment of the provisions of the Code of Criminal Procedure relating to maintenance wherein the Muslim spouses were excluded, not because the system of *mehr* was considered to be adequate maintenance, but because the ruling political coalition government was apprehensive of alienating the Muslim male-dominated constituencies. In this particular instance, Justice V.R. Krishna Iyer interpreted the relevant provisions so as to ensure that they would also be applicable to Muslim women. By doing so, Justice Krishna Iyer actually reversed the specifically desired legislative exclusion.
Another instance pointed out by Baxi is the manner in which Justice P.N. Bhagwati was instrumental in evolving a unique form of epistolary jurisdiction through which public citizens or groups could approach the Supreme Court for violation of the fundamental rights of the ethnic and other minorities in the Indian society. Any citizen could now approach the court, even by means of a letter, which could be treated as a writ petition; the traditional law relating to *locus standi* thus underwent a fundamental change.

[39] Justice D.A. Desai, *Justice according to law is a myth*, 11 IBR 237, 238 (1984).

[40] Justice Desai states two reasons for this unavoidable outcome: firstly, when a judge progressively interprets the law with a view to resolving the controversy before the court, the judge has to determine the object for which the law has been enacted. There will then be a grey area about the intention or object of the statute, which allows the judge to legislate interstitially; secondly, when a law is enacted, the social conditions of the period during which the law was enacted determine the object which the law seeks to achieve. When the social conditions change, but the law remains unchanged by corresponding amendments, the judge, who is influenced by the prevailing circumstances, acts in accordance with the altered circumstances.

case before him, he does legislate interstitially to some extent, and when he does so, he is unconsciously influenced by his own social philosophy.[41] In *State of Bihar* v. *Maharajadhiraja Kameshwar Singh*,[42] the constitutional validity of the Bihar Land Reforms Act, the Madhya Pradesh Abolition of Proprietary Rights Act, and the Uttar Pradesh Zamindari Abolition and Land Reforms Act was challenged. The aim of these enactments was to promote land reforms. However, Section 23 of the Bihar Land Reforms Act, which provided for the computation of net income of a proprietor or tenure holder, was held void on the ground that it had been fixed in an arbitrary manner.[43] According to Justice Desai, the five-judge Constitution Bench was influenced by their background and by their social philosophy that private property was sacrosanct.[44]

Judicial Activism

Judicial activism explicitly proves the point of the rule sceptics. In judicial activism, it is clear that the rule was formulated when the court applied it. At the end of his judicial career, in *Vellore Citizens Welfare Forum* v. *Union of India*, (1996) 5 SCC 647, Justice Kuldip Singh, held that the tannery industries were required to pay compensation on the basis of the "*polluter pays*" principle. In this context, he stated that as the principle was an accepted principle of customary international law, and as it was not contrary to the municipal law, it was to be incorporated into domestic law.[45] Justice Kuldip Singh, after referring to the principles evolved in various international conferences, and to the concept of sustainable development, stated that the precautionary principle, the "*polluter pays*" principle[46], and the special concept of onus of proof had now emerged in India as well, and that this was clear from Articles 47, 48-A, and 51-A(g) of the Constitution of India and that, in fact, in the various environmental statutes, such as the Water

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[41] For instance, Justice Kuldip Singh was known to be pro-environment, and was called the "green judge" by the media.

[42] AIR 1952 SC 252.

[43] According to P.P. Rao, the decision of the Patna High Court is said to have come as a rude shock to the framers of the Constitution whose mindset was different.
Speaking on the Draft Constitution, Jawaharlal Nehru had said in the Constituent Assembly on 10-9-1949:
"*The policy of the abolition of big estates is not a new policy but one that was laid down by the National Congress years ago. So far as we are concerned, we, who are connected with the Congress, shall, naturally, give effect to that pledge completely - one hundred per cent - and no legal subtlety, no change, is going to come in our way. That is quite clear. We will honour our pledges. Within limits, no Judge and no Supreme Court will be allowed to constitute themselves into a third chamber. No Supreme Court and no judiciary will sit in judgment over the sovereign will of Parliament which represents the will of the entire community. If we go wrong here and there, they can point it out; but in the ultimate analysis, where the future of the community is concerned, no judiciary must come in the way. Ultimately, the whole Constitution is a creature of Parliament.*"
P.P.Rao, *Basic Features of the Constitution*, (2000) 2 SCC (Jour) 1.

[44] Desai, *supra* note 39. Justice Desai also points out that the history of the expression "*compensation*" in Article 31, commencing from the decisions in *State of West Bengal* v. *Subodh Gopal Bose* (AIR 1954 SC 92), *State of West Bengal* v. *Bela Banerjee* (AIR 1954 SC 170), *K.K.Kochuni* v. *State of Madras* (AIR 1960 SC 80) upto *I.C.Golaknath* v. *State of Punjab* (AIR 1967 SC 1643), which necessitated the First, Fourth and Seventh Amendments of the Constitution, clearly shows that the property-oriented judges strove valiantly to protect private property and in order to do so, set at naught the Constitutional Amendments.

[45] In international law, a distinction is often made between hard and soft law. Hard international law generally refers to agreements or principles that are directly enforceable by a national or international body. Soft international law refers to agreements or principles that are meant to influence individual nations to respect certain norms or incorporate them into national law. Although these agreements sometimes oblige countries to adopt implementing legislation, they are not usually enforceable on their own in a court. Interestingly, the "*polluter pays*" principle and the precautionary principle are considered a part of soft international law.

[46] Interestingly, Justice Kuldip Singh, referred to his own judgement in *The Bichhri Case* (*Indian Council for Enviro-Legal Action vs. Union of India*, 1996 (3) SCC 212) and stated that the "*polluter pays*" principle had been held to be a sound principle by the Supreme Court.

(Prevention and Control of Pollution) Act, 1974, and other statutes, including the Environment (Protection) Act, 1986, these concepts were already implied. Thus, judges do decide, not on the basis of the existing rule, but on the basis of extraneous factors such as their favoured philosophy. Even Hart, who was critical of the rule sceptics and believed that they wished to create a "*heaven of concepts*" states that rule scepticism has a serious claim on our attention as a theory of the function of rules in judicial decision.[47]

Judges may even experience feelings of compulsion when they decide as they do, and these feelings may also be predictable; but beyond that, there is nothing that can be characterized as a rule that they observe.[48] Consider once again the situation of the woman living in a rural setting, who becomes ill on the doctor's day off.[49] As contradictory rules govern the situation, a judge will have a choice between competing rules leading to opposing outcomes. Yet, the judge may even experience feelings of compulsion and will act with sufficient predictable regularity. The feelings of compulsion are induced not by the binding nature of the rules, but are more likely to be induced by the prevalent social philosophy of the judges of that period. If the prevalent belief is that medicine is a noble profession, and that doctors who are lifesavers cannot be considered at fault for natural human weaknesses, the case will be decided in favour of the doctor. However, if the prevalent belief is that doctors are service providers who ought to know that any deficiency is a matter of life and death, the case will be decided against the doctor. It is not that the law and the prevalent belief are two different notions. The law is enacted in accordance with the prevalent belief. However, it may happen that the circumstances may change, but that the law may not be amended correspondingly.[50] The judge would then tend to decide in accordance with the prevalent beliefs of the current period and not the prevalent beliefs of the period in which the law was enacted. For instance, in the United States, in the *Dred Scott Case*, slavery was upheld by the Supreme Court of the United States.[51] Nearly a century later, in sharp contrast to the decision in that case, the Court unanimously held in *Brown* v. *Board of Education*[52] that segregated education was inherently unequal. The same Constitution that permitted the judges to approve slavery in the *Dred Scott Case*, permitted an interpretation, a century later, which condemned the segregated education between blacks and whites, as inherently unequal, and, therefore, wholly unjust.

Illustrations given by Chipman Gray, considered one of the fathers of the Realist movement, from English and American legal history, show how political sympathy, economic theories and other personal qualities of particular judges have settled matters of grave importance.[53] The idea of Realism, a "*movement in thought and work about the law*"[54], was to place the judge in the centre of the law. This was because the decision-making process is such that when the judge applies the law to the facts in controversy before him, he does legislate to some extent. It is indeed the legislature that legislates and creates the rules to be applied. However, when the judge chooses between conflicting rules, it is the judge who has decided and in effect created the rule that is to be applied. Thus, the judge does legislate

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[47] HART, *supra* note 14, at 135.
[48] *Id.*
[49] Hasnas, *supra* note 8.
[50] Desai, *supra* note 39.
[51] *Dred Scott* v. *Sandford*, 60 U.S. 393 (1857).
[52] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).
[53] W. FRIEDMAN, LEGAL THEORY 293 (1944).
[54] Llewellyn, *supra* note 12, at 1223.

to some extent when he exercises the power of selection between conflicting rules and precedents. Hart attributed this to the open texture of the law.[55] While Hart accepted that there were grey areas where the judges legislated, Dworkin goes further to say that even where there is a hard case where no settled rule dictated a decision either way, the decision should be generated by either policy or principle, and that the judge should not legislate legal rights retrospectively.[56] Hart viewed law as consisting solely of rules, and realizing that there are cases where the rule to be applied is not clear, stated that in such cases, the judge had the discretion to decide. However, according to Dworkin, law consists of principles and policies as well, and when there is no settled rule binding the judge to decide either way, the judge ought to refer to the principles and policies of law and decide accordingly. If the judge does not do so, Dworkin considers the judge to be legislating new legal rights that he ought not to do. Llewellyn also believed that if a particular legal rule proved to be indeterminate in a particular case, the decision of the court did not have to be only the judge's legally uncontrolled choice.[57] The illusion that the judge is forced to legislate in the absence of a determinate legal rule is due to the failure to realize that legal decision-making is against a background of well-established rules, principles, standards, and values. Although the Realists may be sceptical about the binding and determinate nature of rules, they do not argue that the judge is forced to legislate.[58] Hart said, in conclusion, that there are two extremes, the Nightmare (the view that the judges never find and always make the law) and the Noble Dream (the opposing view that they never make it). The truth, perhaps unexciting, is that sometimes judges do one and sometimes the other. It is not, of course, a matter of indifference but of great importance, which of these they do, and when, and how they do it.[59] The Realists were sceptics but not non-believers. They stressed the legislative opportunities of the courts and attempted to dissipate the conventional belief that the judge mechanically applied the rules to the given fact situation. It cannot be denied that some Realists were considered extreme in their insistence that rules were what the courts did.[60] Yet, the underlying belief of the Realists was that one should be sceptical, although not always dismissive, of the claim that binding rules and precedents alone determined the decision of the court. Thus, the Realists served to fundamentally alter the conceptions of legal reasoning that had so far been accepted.

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[55] HART, *supra* note 14, at 132.

[56] DWORKIN, *supra* note 26, at 80-83.

[57] KARL LLEWELLYN, JURISPRUDENCE AND REALISM IN THEORY AND PRACTICE 114 (1962).

[58] *Id.*

[59] H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 144 (1983).

[60] *Id.* at 128. According to Hart, in Jerome Frank's *Law and the Modern Mind*, hailed as a classic in the 1930s, the belief that there could be legal rules binding on judges and applied by them, not made by them, in concrete cases, is "*stigmatized as an immature form of fetishism or father fixation calling for psycho-analytical therapy*".