Chapter 3

THEORIES OF JUSTICE: AN OVERVIEW

3.1 Jurisprudence in general

Jurisprudence is the branch of study of the philosophy of law. The modern jurisprudence began in the 18th century. One of the tasks of Jurisprudence is to construct and elucidate organizing concepts serving to render the complexities of law more manageable and more rational; and in this way theory can help to improve practice.¹

The four primary schools of thought in general jurisprudence are: Natural Law Theory, Legal Positivism, Legal Realism and Critical Legal Studies.

3.2 Natural Law Theory

Natural law theory asserts that enacted law should correspond to the laws that are eminent in nature. The view of the Natural law theory can be summarised by the maxim *lex iniusta non est lex* which means an unjust law is not a true law. As per natural law theory, the foundations of law are accessible through human reason and it is from these laws of nature that the man made laws gain force. The central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature.²

² ibid, p.15.
The original aspects of the natural law approach can be found in Plato (C.429-347 BC), Aristotle (384-322 BC), and Cicero (106-43 BC). It was St.Thomas Aquinas (1225-1274) who gave a systematic form to it.

The development of Platonic thoughts must have helped Aristotle to give the main problems of legal theory their classical formulation. The connecting link between them is concept of virtue, the all-embracing idea of which justice is a necessary part and aspect. Even though balance and harmony evolve as the test of a just State and a just individual as per the concept of both Plato and Aristotle, their concept of harmony differs from each other. Harmony for Plato is a state of inner balance of mind not capable of rational analysis. To Aristotle, it is the mean between extremes, deduced by quasi-mathematical principles from a blend of extremes in government and human relations.

Aristotle is said to be the father of Natural Law Theory. His association with Natural Law is largely due to the way in which he was interpreted by St.Thomas Acquinas. St.Thomas considers the right to the acquisition of property as one of the matters left by natural law to the State as a proper agency for the regulation of social life. Thus, there is no foundation whatsoever, in St. Thomas’s teaching, for the elevation of the right of private property into a principle of natural law. Even some three and a half centuries later, Suarez, one of the most influential of Spanish – Catholic natural law philosophers, substantially agreed with St. Thomas.

Aristotle’s theory of justice occurs in Nicomachean Ethics. According to him, justice refers to two different but related ideas, i.e., general justice and

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9 *ibid*, p.7 & 8.
10 *ibid*, p.110 & 111
particular justice. When a person’s actions are completely virtuous in all matters relating to others, it is ‘justice’ in the sense of general justice. This idea of justice is more or less coextensive with virtue. Particular justice is a part of general justice or individual virtue which is concerned with treating others equitably. The natural law is classically contrasted with the positive law of political community, society or State and thus serves as a standard to criticise the said positive law. Even though the natural law is distinct from common law, Natural Law theorists exercised material influence on the development of English Common Law.

According to Thomas Acquinas, positive law has its purpose, which is the common good of the community. Any positive law which conflicts or is inconsistent with the natural law is not really law at all. Hence, according to him, there is neither legal nor moral obligation to obey the same. Augustin and Martin Luther King are also the supporters of this view.

Thomas Hobbes expresses the view of Natural Law as a precept found out by reason by which a man is forbidden to do that which is destructive of his life. According to him, the people of a society is prepared to give up some rights in order to have a social order. In this, he believed that the law gained peoples’ tacit consent.

Natural law has, at different times, been used to support almost any ideology; but the most important and lasting theories of natural law have undoubtedly been inspired by the two ideas, of a universal order governing all men, and of the inalienable rights of the individual. When used in the service of either of these ideas, natural law has formed an organic and essential part in a hierarchy of legal values.

According to Lon Luvois Fuller, there is some overlapping between morality and justice; it is impossible to have a legal system without fidelity to the rule of law and formal justice. His debate with H.L.A. Hart which was

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11 Thomas Hobbes was an English philosopher best known for his work on political philosophy.
12 supra note 8, p.96
13 Lon Luvois Fuller was a legal philosopher and was professor of Law at Harvard University.
14 Herbert Lionel Adolphus Hart was a professor of Jurisprudence in the Oxford University.
published in the Harvard Law Review\textsuperscript{15} was of prime importance for shaping the modern conflict between legal positivism and the natural law. In the opinion of Friedman, in any society there is a close connection between social morality and the legal order. There cannot be – and there never has been – a complete separation of law and morality.\textsuperscript{16}

3.2.1 Eight principles of Internal Morality of Law

The morality of the law may vary, but is real. The basic goodness of all human beings is a spiritual axiom, a fall-out of the advaita of cosmic creation and the spring of correctional thought in criminology.\textsuperscript{17} Lon Fuller contends that the purpose of law is to “subject human conduct to the governance of rules”. In his book, “The Morality of Law”, Fuller describes eight rules of failure of any legal system.\textsuperscript{18} He narrates the story of an imaginary king named Rex who attempts to rule but finds he is unable to do so in any meaningful way when any of these conditions are not met. They are:

(i) The lack of rules or law, which leads to ad-hoc and inconsistent adjudication.

(ii) Failure to publicize or make known the rules of law.

(iii) Unclear or obscure legislation that is impossible to understand.

(iv) Retroactive legislation.

(v) Contradictions in the law.

(vi) Demands that are beyond the power of the subjects and the ruled.

(vii) Unstable legislation (ex. daily revisions of laws).

(viii) Divergence between adjudication/administration and legislation.


\textsuperscript{16} \textit{supra note 8}, p.43


According to Lon Fuller, these principles represent the internal morality of law and compliance with them leads to substantively just laws and away from evil ones. If any of these principles is not present in a system of governance, the system will not be a legal one.

It remains to be proved that, while the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.\(^{19}\)

Criticising the argument of H.L.A. Hart, Fuller says that on the one hand he rejects emphatically any confusion of “what is” with “what ought to be.” He will tolerate no “merger” of law and conceptions of what law ought to be, but at the most an antiseptic “intersection.” Intelligible communication on any subject, he seems to imply, becomes impossible if we leave it uncertain whether we are talking about “what is” or “what ought to be.”\(^{20}\)

The history of natural law is a tale of the search of mankind for absolute justice and of its failure. Again and again, in the course of the last 2,500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval.\(^{21}\) Natural law has fulfilled many functions. It has been the principal instrument in the transformation of the old civil law of the Romans into a broad and cosmopolitan system; it has been a weapon used by both sides in the fight between the medieval Church and the German emperors; in its name the validity of international law has been asserted, and the appeal for freedom of the individual against absolutism launched.\(^{22}\)

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\(^{19}\) Oliver Wendell Holmes, Jr., *The Common Law*, Macmillan And Co., 1911, p.38  
\(^{21}\) *supra note* 8,p.95  
\(^{22}\) *ibid*, p.95
3.2.2 **Draw backs of Natural Law Theory**

The main drawback of natural law theory is that people have interpreted nature differently. Therefore, there is ambiguity in deciding the moral law of nature by human reason. The principle that behaviour in accordance with human nature is morally right and behaviour not in accordance with human nature is morally wrong cannot be correct in all cases.

Natural law terminology tends to obscure the possibility of criticizing law on other than purely moral grounds. But, the fact is that law must be evaluated by reference to its efficacy, general convenience, simplicity and many other factors, as well as by reference to the demands of justice and morality. If two people disputing about the morality of euthanasia were to agree to accept the verdict of a third party, any finality so obtained would be illusory. For even after judgment was given either party could still question the moral correctness of the “judge’s” verdict. Moral disputes, unlike legal disputes, remain permanently open.

According to the critics of Natural Law Theory, it is doubtful that the inherent nature of human behaviour establishes loss of behaviour in the same way as it may establish loss of behaviour for animals. The two supporters of Natural Law Theory namely Thomas Acquinas and Aristotle differ in their views about the role of God in the nature. Human behaviour may be subject to the environment to which a person is exposed to which includes social situations, the background in which he was grown up, his education, his family background etc. This has not been explained by the Natural Law Theory. Further, the difficulty is that the inference of a moral proposition form a factual statement is not apparently one of strict logical necessity.

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23 supra note 1, p.24 & 25.
24 ibid, p.23.
25 ibid, p.18.
3.3 Legal Positivism

Legal positivism is a school of thought mainly developed by 19th century legal thinkers such as Jeremi Bentham\(^\text{26}\) and John Austin. This theory distinguishes the question whether a rule is a legal rule from the question whether it is a just rule, and seeks to define law, not by reference to its content but according to the formal criteria which differentiate legal rules from other rules such as those of morals, etiquette, and so on.\(^\text{27}\)

According to this theory, there is no necessary connection between law and morality and force of law comes from some basic social facts. As per this theory, law is something which is ‘posited’ and it is made in accordance with socially accepted rules.

Natural law was the subject of many biting Benthamite comments.\(^\text{28}\) He first redefined good and evil in hedonist terms, laying down that “Evil is pain, or the cause of pain, good is pleasure, or the cause of pleasure.” On this basis, he defined utility as “the property or tendency of a thing to prevent some evil or to procure some good.”\(^\text{29}\) According to him, he who adopts the principle of utility, esteems virtue to be a good only on account of the pleasures which result from it; he regards vice as an evil only because of the pains which it produces.\(^\text{30}\) He suggested a procedure for assessing the moral status of any action which he named as hedonistic felicific calculus. In his book, ‘Principles of morals and legislation’, he has classified 12 pains and 14 pleasures by using which we can test the happiness factor of any action. Bentham was the first person to move for codification of all the common law into a set of statutes. He worked hard for the formation of the Codification Commission in both England and U.S.

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\(^{26}\) Jeremi Benthan was a British Philosopher, jurist and social reformer.

\(^{27}\) supra note 1, p.25.

\(^{28}\) Julius Stone, Human Law and Human Justice, Universal Law Publishing Co., First Indian Reprint 2000, p.110

\(^{29}\) ibid, p.122

Bentham’s views about law and jurists were popularised by John Austin who was one of his students. Austin’s utilitarian answer to what is law was three fold namely,

(I) Laws are commands issued by the sovereign.
(II) Such commands are enforced by sanctions.
(III) A sovereign is one who is obeyed by the majority.

According to Austin, the law is a command from the sovereign which is enforced by the threat of sanction. In his view, positive law has three characteristic features. It is a type of command, it is laid down by a political sovereign and it is enforceable by a sanction.31 The sovereign can be a single person or collective body such as Parliament.

Hans Kelsen’s32 ‘Pure theory of law’, published in the year 1934 which was expanded in 1960, describes law as binding norms while at the same time refusing itself to evaluate those norms. According to him, legal science is separate from legal politics. The central concept of Pure Theory of Law is the notion of a ‘basic norm’ which he called the ‘Grundnorm’ - a hypothetical norm, presupposed by the jurist, from which in a hierarchy all ‘lower norms’ in a legal system are understood to derive their authority or ‘bindingness’. The Grundnorm is the initial hypothesis upon which the whole system rests.33 In this way, Kelsen contends, the bindingness of legal norms can be understood without tracing it ultimately to some suprahuman source such as God, Nature or a personified State or Nation. He attempted to reconstruct legal science as a science of norms. According to him, this type of legal science would be pure in two senses. Firstly, it would set out a priory for a pure part of legal science consisting of a framework of fundamental concepts. Secondly, it would also be pure in being solely descriptive, excluding from the science any element of evaluation. According to him, positive norms are valid only on one assumption: that there is a basic norm which establishes the

31 supra note 1, p.25 & 26.
32 Hans Kelsen was a jurist and legal philosopher who was regarded as the one of the most important scholars of 20th Century.
33 Dr.V.D.Mahajan, Jurisprudence and Legal Theory, Eastern Book Company, Lucknow, 1987, p.545
supreme law-creating authority. The validity of this basic norm is unproved and must remain so within the sphere of positive law itself.$^{34}$

Despite fluctuations in his views on many other points, Kelsen maintained for half a century the theory that law is pure norm. One of his leading themes was the demonstration that legal rules are abstract entities identifiable neither with the events which give rise to them (their legislative history), nor with the events which constitute their application (judicial or administrative enforcement).$^{35}$

### 3.3.1 Concept of Legal System

Regarding the concept of a legal system, Graham Hughes suggests that “for many purposes it will be useful to reserve the description ‘legal system’ for those types of social order characterized by a high degree of institutionalization in the creation of general prescriptions, in the apparatus for adjudicating disputes, and in ordering the disposition of force.”$^{36}$ The concept of Herbert Lionel Adolphus Hart regarding the difference between a primitive and advanced legal system is similar to that of Graham Hughes. According to Hart, the law should be understood as a system of social rules. He disagreed with the view of Hans Kelsen that sanctions were essentials to law. Hart’s “primary rules of obligation” correspond very closely to what are usually described as “customary” rules. Hart’s “secondary rules of recognition” are in effect a shorthand description of the major aspects of a modern institutionalized legal system, which develops machinery for the formulation of legal rules, for orderly change, and for adjudication.

### 3.3.2 Primary and Secondary rules of Hart

Unlike legal realists, positivists believe that the law is normative and provides determinate guidance to its subjects and the judges. The work of H.L.A.Hart caused a fundamental rethinking of the doctrine of positivism and its

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35 J.W.Harris, *Law and Legal Science: An Inquiry into the Concepts Legal Rule and Legal System*, Oxford University Press, Walton Street, Oxford, 1979, p.34

relationship with other theories of law. His views were expressed in his book ‘The Concept of law’, wherein he made a distinction between primary and secondary rules.

He specifically enumerates three secondary rules as follows:-

1. The Rule of Recognition:- The rule by which any member of society may discover what the primary rules of the society are. In a simple society, Hart states, the recognition rule might only be what is written in a sacred book or what is said by a ruler. Hart claimed the concept of rule of recognition as an evolution from Hans Kelsen's ‘Grundnorm’, or ‘basic norm.’

2. The Rule of Change:- The rule by which existing primary rules might be created, altered or deleted.

3. The Rule of Adjudication:- The rule by which the society might determine when a rule has been violated and prescribe a remedy.

According to Hart, law may also be regarded as a hierarchy of rules. The pedigree of each rule, primary or secondary, may be traced back to the ‘rule of recognition’, the Hartian equivalent of Salmond’s ultimate principles. Unlike Kelsen’s basic norm, the rule of recognition is not a mere postulate of theory. It is a social rule whose existence can be empirically recorded.

In his article, ‘Positivism and Separation of Law and Morals’, Hart argued that morality and law were separate. But he shares with equal vigour the important proposition that justice and morality are clearly relevant to the issue as to what law should be. According to him, we cannot usually in social life pursue a single value or a single moral aim, untroubled by the need to compromise with others. Joseph Ralph, another notable positivist, was a student of H.L.A. Hart who developed Hart’s arguments of legal positivism. He edited the 2nd edition of

37 Rupert Cross & J.W.Harris, Precedent in English Law, Oxford University Press, Walton Street, Oxford, 1991, p.212
38 Ibid, p.213
42 Joseph Ralph was the professor of philosophy of law and a fellow of Balliol College, Oxford.
Hart’s ‘Concept of law’ including the additional section dealing with Hart’s response to the criticism of other philosophers of his work.

### 3.3.3 Draw backs of Positivism

Legal positivism has been criticized by the naturalists as sterile and inadequate because it fails to take moral considerations into account.\(^{43}\) Secondly, there is the objection that the theory conflicts with ordinary usage by denying the name ‘law’ to rules which are generally classified as legal, e.g., rules of customary law, international law and much of constitutional law. None of these rules originate from a sovereign command: customary law springs from habitual behaviour rather than from precept, international law is a system of customary rules originating from state practice, and constitutional law consists in part of conventions which have evolved without legislation or judicial decision.\(^{44}\)

Another often heard criticism is that sanction is not an essential component of law. International lawyers, however, contend that while sanctions render a legal system stronger, they are not logically necessary and that the idea of a legal system without sanctions is not self-contradictory.\(^{45}\) Completely effective law without sanctions may not exist, but the notion that there could exist such a system of law is not logically inconceivable.\(^{46}\)

### 3.3.4 Legal formalism

Legal formalism is a legal positivist view. While legal positivism can be seen as appertaining to the legislature, legal formalism appertains to the judge. Unlike positivists, formalists do not suggest that substantive justice of law is irrelevant but, according to them, that is a question for the legislature to address and not the judge.

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\(^{43}\) supra note 1, p. 25  
\(^{44}\) ibid, p. 28  
\(^{45}\) ibid, p.34  
\(^{46}\) ibid, p.35.
The specific characteristic of legal formalism purported separation of legal reasoning from normative or policy considerations. The formalists argue that the process that produced the legal norms has exhausted normative and policy considerations. So, the law can be seen only as a more or less closed normative system. According to formalists, the judges should be constrained in their interpretation of legal tests suggesting that providing the judiciary with the power to say what the law should be, rather than confining them to decide what the law does say, violate the separation of powers. The formalists argue for a ‘government of laws and not of men’.

Legal formalism differs from legal realism. According to legal realists, interpretation of legal tests is justified in order to assure that the law serves good public policy and social interest. But, the legal formalists oppose this argument stating that giving authority to the judges to change the law to serve their own ideas regarding policy undermines the rule of law.

3.3.5 New Textualism

Justice Antonin Scalia is noted for his formalist views. He advances the theory of New Textualism.

The term “new textualism”, which is a method of rigorous text-based statutory interpretation, emerged in 1980s. The critics have mentioned it as ‘radical theory’. The term new textualism was coined by Professor William N. Eskridge Jr. Justice Antonin Scalia and Judges Frank Easterbrook, James Buckley, Kenneth Starr, and Alex Kozinski advanced this theory. Anyhow, there is difference between new textualism and traditional textualism or plain meaning approach of statutory interpretation.

In the traditional textualism or plain meaning approach, the legislative intent is the touchstone of interpretation. But it holds that the text is the best evidence of the intent. According to this approach, where the meaning of the text is plain, legislative intent is the exclusive evidence. Under this approach, the judges will look into external sources such as legislative history and the outcome
resulting from a given interpretation for the purpose of confirming plain meaning and to discern the meaning when there is ambiguity in the text. In this model, deviation from the text is permitted when the judge finds that the plain language of the text would lead to ‘patently absurd consequences’.

Where the plain language of the statute would lead to ‘patently absurd consequences that the legislature could not possibly have intended, the court need not apply the language in such a fashion.47 So the traditional textualism or the plain meaning approach can be said to be a refinement of the purposive model of Hart and Sacks.

New textualism adheres more to the text of the statute and it can be said to be a harder version of the plain meaning approach and unconcerned with the legislative intent or purpose. The new textualists try to find what the legislature said from the text of the statute. The new textualism do not rely on legislative history because of its unreliability and lack of legal authority. The new textualists, in addition to the text of the statute, also considers its place in the statutory scheme and also the statute as a whole and other similar and related usages in the statute.

The difference between the new textualism and the traditional textualism (which can be said to be a refinementary purposivism) can be better illustrated from the words of Judge Posner in his dissenting judgment in United States v. Marshall.48 In that case, the Seventh Circuit considered whether the phrase “mixture or substance containing a detectable amount,” as used in a federal narcotics statute, was limited to “pure” LSD or also included the paper blotter, sugar cube, or other medium in which the LSD was sold.49 According to Posner, the difference between new textualist approach and the purposivist approach is that the former (new textualism approach) “buys political neutrality and a type of objectivity at the price of substantive injustice,” while the latter [purposive

48 908 F.2d 1312 (7th Cir. 1990) (en banc)
49 ibid, p.1315.
method] “buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial wilfulness.”

In the view of Justice Scalia, the examination of legislative intent, when it is sufficiently divorced from the text of the statute, is a subterfuge for judicial law making. According to him, this is repugnant to the democratic separation of powers. The crest of the criticism is that judicial law making increases the unpredictability and arbitrariness of the law, as it undermines rule of law, because nobody can know with certainty how the judges will remodel the law to suit their personal preferences. Justice Scalia was against the use of legal history for determining the legislature’s intent. According to him, it is time to call an end to such an experiment.

If textualism’s description of interpretation had much in common with legal realism, its aspirations for the judiciary had much in common with legal formalism. A comparison of the purposivism of Judge Learned Hand and the New Textualism of Justice Scalia reveals the difference in the approach of realists and formalists. The criticism against Scalia’s theory of textualism is that it is formalistic.

Scalia meets this argument stating as follows: “Of all the criticisms levelled against textualism, the most mindless is that it is “formalistic.” 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 a government a government of laws and not of men.”

50 ibid, p.1335.
Of course, it is true that textualism is different from strict constructionism. According to Scalia, strict constructionism is a degraded form of textualism which creates disreputation to textualism. But, the attitude of Scalia itself indicates the ingredients of something more than formalism in the textualist approach. In narrating the difference between textualism and strict constructionism, Scalia describes his experience as a judge in the decision of a case:

“The difference between textualism and strict constructionism can be seen in a case my Court decided four terms ago. The statute at issue provided for an increased jail term if, “during and in relation to ….. (a) drug trafficking crime”, the defendant “uses …….. a firearm.” The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held, I regret to say, that the defendant was subject to the increased penalty, because he had “used a firearm during and in relation to a drug trafficking crime. The vote was not even close (6-3). I dissented. Now I cannot say whether my colleagues in the majority voted the way they did because they are strict-construction textualists, or because they are not textualists at all. But a proper textualist, which is to say my kind of textualist, would surely have voted to acquit. The phrase “uses a gun” fairly connoted use of a gun for what guns are normally used for, that is, as a weapon. As I put the point in my dissent, when you ask someone, “Do you use a cane?” you are not inquiring whether he has hung his grandfather’s antique cane as a decoration in the hallway.”

So, when viewed in this angle, the textualist approach of Scalia was not merely of form, but it was of substance. Thus, the formalism of Scalia is not that of a strict constructionist. On the other hand, it is evident that he was looking for the purpose for which the gun was used. So, traces of contextual purposivism can be seen there. But, it is true that it is not as that of the purposivism advanced by Judge Learned Hand. At the same time, the approach of Textualists cannot be branded as one looking only at the form. In the words of Frederick Schauer legal
decisions and theories are condemned as “formalistic with accelerating frequency.”

3.3.6 Strict Constructionism

Strict Constructionism requires a judge to apply the text only as it is spoken. Once the court has the clear meaning of the text, no further investigation is required. According to Justice Hugo Black, the injunction of the first meaning of the American Constitution that Congress shall make no law against certain civil rights should be construed strictly as no law and it does not accept any exceptions. Strict Constructionism is often mistakenly used instead of textualism and originalism. In the 2000 Election campaign of U.S. President, George W. Bush promised to appoint strict constructionist in the mould of Justice S. Rehnquist, Scalia and Thomas. But, Thomas considers himself as a originalist and Scalia rejected Strict Constructionism calling it a degraded form of textualism.

3.3.7 British rules of interpretation

The three British rules of interpretation are:- 1. Plain meaning rule which is also known as the literal rule, 2. Golden rule or British rule, and 3. Mischief rule. As per the plain meaning rule, the statutes are to be interpreted using the ordinary meaning of the language of the statute unless the statute explicitly defines some of the terms otherwise. The court should not read the law word by word and should not divert from its ordinary meaning. The plain meaning rule is a mode of interpretation which supports the textualism and to a certain extent originalism.

The golden rule or British rule allows a judge to depart from a word's normal meaning in order to avoid an absurd result. As per this rule, like the plain-meaning rule the words of a statute are to be given the plain or ordinary meaning; but when this may lead to an irrational result which is unlikely to be the legislature's intention, the golden rule dictates that a judge can depart from this meaning.

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The mischief rule aims to determine the mischief which the Parliament was seeking to remedy when it passed the law. It gives more discretion to the judge than the literal and the golden rule as it permits him to effectively decide on the Parliament’s intent. It is open to the criticism that it undermines the supremacy of the legislature as it takes the law making decision away from the legislature.

The illustration of more sensible outcome of mischief rule than literal rule is the decision in Smith v. Hughes. In that case, as per the Street Offences Act 1959, it was a crime for prostitutes to ‘loiter or solicit in the street for the purpose of prostitution’. The defendants were calling men who were in the street from the balconies and tapping of windows. They claimed that they were not guilty as they were not in the ‘street’. The judge applied the mischief rule to come to the conclusion that they were guilty as the intention of the act was to cover the mischief of harassment from prostitutes.

3.3.8 **Doctrine of Absurdity**

This doctrine is also against textualism. As per this doctrine, if strictly literal interpretation of doctrine can lead to absurdities, common sense interpretations should be used. This doctrine is also known as Scrivner’s error in which the American courts interpreted statutes contrary to their plain meaning in order to avoid absurd legal conclusions.

3.3.9 **Draw backs of Formalism**

According to Richard A. Posner formalism buys certainty at the cost of substantial injustice. But, formalism which is a product of positivism cannot be ignored in toto. The object of various forms of positivism and formalism such as textualism, new textualism etc. is to guard against the uncertainty in applying the provisions of law. But, it is not advisable to accept certainty at the cost of justice. So, the element of formalism is to be used for achieving certainty; but with justice.

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54 (1960) 2 All E.R.859
3.4 Legal Realism

Legal realism is a school of legal thought which challenges the classical legal claim that legal institutions provided autonomous self-executing system of legal discounts untainted by politics. Theories of legal realism too, like positivism, look on law as the expression of the will of the state, but see this as made through the medium of the courts. Like Austin, the realist looks on law as the command of the sovereign, but his sovereign is not Parliament but the judges; for the realist the sovereign is the court. Legislation is concerned with general classes of persons, objects and actions and must therefore employ words of general application. Such words, however, are usually far from precise. Consequently the categories to which such words apply are never finally determined. Because of this feature, which has been described as the “open-texture” of ordinary language, the use of such general terms always leaves open the possibility of a borderline case.

Legal realists attempted to expose the uncertainty of the law. According to them, for any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts, no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Accordingly, the realist concludes that a statement of law is nothing more than a prediction of what the courts will decide. Such opinion is not actually law but only a guess as to what a court will decide. Since law in practice must differ from the law stated in statutes or textbooks, American jurisprudence developed considerable scepticism about legal rules. Where courts must choose between

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56 supra note 1, p. 35.  
57 ibid, p. 39.  
58 ibid, p. 39.  
59 Jerome Frank, Law and the Modern Mind, London Stevens & Sons Ltd., 1949, p.46  
60 supra note 1, p. 40.  
61 supra note 59, p.46
alternatives, much will depend on the temperament, upbringing and so on of the members of the Bench. 62

The most important forerunner of American realism was Oliver Wendell Homes Jr. 63 Justice Homes laid the foundation of healthy and constructive skepticism in law. According to Hughes, Justice Homes is a profit to the Law. 64 In the year 1881, Homes published his famous book ‘The Common Law’ which influenced American legal realist thought. He writes “The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” 65

It is sometimes asserted that to deny that law consists of rules is to deny the existence of legal rules. That is spacious reasoning. To deny that a cow consists of grass is not to deny the reality of grass or that the cow eats it. So while rules are not the only factor in the making of law, i.e. decisions, that is not to say there are no rules. Water is not hydrogen; an ear of corn is not a plow; a song recital does not consist of vocal cords; a journey is not a railroad train. Yet hydrogen is an ingredient of water, a plow aids in the development of corn, vocal cords are necessary to a song recital, a railroad train may be a means of taking a journey, and hydrogen, plows, vocal cords and railroad trains are real. No less are legal rules. 66

According to Dean Roscoe Pound, Judges should knowingly use wide discretion, should recognize unique circumstances, should employ flexible standards as opposed to fixed rules, and should be encouraged to a “free judicial

62 supra note 1, p. 40.
63 Oliver Wendell Homes Jr. was an American jurists and Associate Justice of SC of United States.
65 Oliver Wendell Holmes, Jr., The Common Law, Macmillan And Co., 1911, p.1
66 supra note 59, p.132
finding of the grounds of decision”; that “certainty attained by mechanical application of fixed rules to human conduct has always been illusory”. Roscoe Pound regards law as social engineering, not as legal imperatives to be obeyed by subjects for fear of coercive sanctions.

Holmes perceived the arrogance or the ignorance of many of his predecessors who had asserted their faith and their prejudices under the guise of objectivity. Against this, Holmes did not assert another dogmatic faith, but a philosophy of responsible and humble scepticism, based on a careful study of the problem involved and the scrupulous weighing of the conflicting values and interests at stake. The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

The other influential work of Holmes was ‘A path of Law’ which was written originally as a speech in the year 1897. This is the theory that all law is in reality judge-made. Holmes begins by considering the situation, not of the judge or lawyer, but of what he calls the “bad man”, the man who is anxious to secure his own selfish interests. What such a person will want to know is not what the statute book or textbooks say but what courts are likely to do in fact. “I am much of his mind”, said Holmes; “the prophecies of what the courts will do, in fact, and nothing more pretentious are what I mean by the law”. But what the courts will do in fact cannot necessarily be deduced from the rules of law in textbooks or even from the words of statutes themselves, since it is for the courts to say what those words mean.
Karl Llewellyn put more emphasis on the facts of a specific case than on general rules. According to him, what the judges do about disputes is the law itself. The approach of Karl Llewellyn has been criticized by H.L.A. Hart in his book ‘The Concept of Law’.

Jerome Frank, in his book ‘Law and modern mind’ emphasizes the psychological source at work in legal matters. According to him, only a limited degree of legal certainty can be attained. The current demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary. If it be true that greater legal certainty is sought than is practically required or attainable, then the demand for excessive legal stability does not arise from practical needs. It must have its roots not in reality but in a yearning for something unreal which is to say that the widespread notion that law either is or can be made approximately stationary and certain is irrational and should be classed as an illusion or a myth.

In his classical work, ‘Courts on trial’, Jerome Frank stressed the uncertainties and the unpredictabilities of judicial process. According to him, the trial judge begins with the decision he considers desirable, and then, working backwards, figure out and publish an $F$ (fact) and an $R$ (rule) which will make his decision appear to be logically sound, if only there is some oral testimony which is in accord with his reported $F$, and if he applied the proper $R$ to that reported $F$. If so, it does not matter whether actually he believed that testimony, i.e., whether the facts he reports are the facts as he believes them to be. In other words, he can, without fear of challenge, “fudge” the facts he finds, and thus “force the balance”. No one will ever be able to learn whether, in the interest of what he thought just, or for any other cause, he did thus mis-state his belief. The books of Jerome

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74 supra note 59, p.11 & 12
Frank especially ‘Law and Modern Mind’ and ‘Courts on Trial’ will probably continue to be read widely by students of law.\textsuperscript{76}

Benjamin N. Cardozo was one of the towering figures of American Law in the 20\textsuperscript{th} century.\textsuperscript{77} Cardozo is noted for his jurisprudential work especially ‘The Nature of the Judicial Process’ based on the lectures he delivered in the Yale University. He took the judge made law as one of the existing realities of life. Cardozo is known as the Spokesman on sociological jurisprudence and the relationship between law and social change.

\textbf{3.4.1 Purposivism}

The purposivist approach of Judge Learned Hand has elements of realistic thought. He believed that he could interpret a statutory provision so as to effectuate the common will of the government by discerning the underlying general purpose expressed by the legislature in enacting a particular statute.\textsuperscript{78} Even though he acknowledged potential problems with this method, this is the most reliable way to give effect to the legislature’s aims. This is evident from the observation in \textit{Borden Co.} case\textsuperscript{79}

“[w]e can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more unreliable.” \textsuperscript{80}

\textsuperscript{77} Richard D Friedman – Cardozo The Smaller Realist, 98 Mich. L. Rev. p.1738
\textsuperscript{79} \textit{Borella v. Borden Co.} 145 F.2d 63 (2d Cir.) 1944
\textsuperscript{80} \textit{ibid}, p.64 & 65
According to Judge Learned Hand, a Judge, during the process of statutory construction, is “pulled by two opposite forces.”\textsuperscript{81} He drew a distinction between two “extreme” schools – the thinking that “a judge ought to look to his conscience and follow its dictates; he ought not to be bound by what they call technical rules, having no relation to natural right and wrong”\textsuperscript{82} and those who stick on to a “dictionary school”.\textsuperscript{83} Criticising the approach of the dictionary school that one must read the words in the usual meaning, “no matter what the result is and stop where they stop”, Judge Hand suggested that “[n]o judges have ever carried on literally in that spirit, and they would not be long tolerated if they did.”\textsuperscript{84} Even though Judge Hand rejected strict literalism, he placed initial emphasis on the text, observing that the most important factor in ascertaining the intent of a statute is its words. Anyhow, he was aware of the danger of sticking on the words of a statute literally. This can be seen from his beautiful expression, “[t]here is no surer way to misread any document than to read it literally.”\textsuperscript{85} In other words, according to him, the meaning of a sentence may be more than that of the separate words. This is the view which he expressed in *Helvering v. Gregory*.\textsuperscript{86}

“It is quite true, as the Board has very well said, that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.”\textsuperscript{87}

The approach of Judge Hand was that of a purposivist and the glimpse of this approach can be seen in the legal process theory of Henry Hart and Albert Sacks. Traces of this approach can be seen in the Imaginative reconstruction model of Judge Richard A. Posner also. According to Posner, the judge should try to put himself in the shoes of the enacting legislators and figure out how they

\begin{footnotesize}
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\item \textsuperscript{81} supra note 78, p.109
\item \textsuperscript{82} supra note 78, p.103
\item \textsuperscript{83} ibid, p.107
\item \textsuperscript{84} ibid, p.107.
\item \textsuperscript{85} Giuseppi v. Walling, 144 F.2d 608, 624, 2d Cir. 1944, Hand, J., concurring
\item \textsuperscript{86} Helvering v. Gregory, 69 F.2d 809, 2d Cir. 1934
\item \textsuperscript{87} ibid, p.810–11
\end{itemize}
\end{footnotesize}
would have wanted the statute applied to the case before him. If it fails, as occasionally it will, either because the necessary information is lacking or because the legislators had failed to agree on essential premises, then the judge must decide what attribution of meaning to the statute will yield the most reasonable result in the case at hand—always bearing in mind that what seems reasonable to the judge may not have seemed reasonable to the legislators, and that it is their conception of reasonableness, to the extent known, rather than the judge’s, that should guide decision.  

3.4.2 Drawbacks of Realism

The realists forget that the decisions creating new law represent, in fact, only a fraction of the total of actual law suits. The majority of court cases involve no point of law and a greater number still never reach the courts at all; in such cases, the law is clear and established and can be fairly automatically applied. Such is the case with the rules relating to commerce and property, which are in general clear enough to render even legal advice unnecessary in most situations.

The realists overstress the uncertainty of language. The fact that a word may be unclear in its marginal applications does not allow as to draw a line regarding its application. We cannot always draw a line and we must not imagine there are not some cases well to each side of any line that could be drawn. However blurred the edges of words may be, they have a hard central core of meaning without which language and communication would be at an end. As has been said, doubt about dusk is not doubt about noon.

The majority of human situations governed by law produce no litigation, partly because the law in question is sufficiently clear, and consequently most of the layman’s activities in private, commercial or industrial life are undertaken

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89 supra note 1, p. 41.
90 ibid, p. 42.
without legal advice. People act in accordance with the law as they understand it.\textsuperscript{91}

However, the importance of the views expressed by realists cannot be ignored. The various forms of realism such as purposivism, imaginative reconstructions etc. are intended to achieve absolute justice. But, there is a lot of uncertainty in achieving this justice.

The theories of Naturalism, Formalism and Realism so far discussed are all at one in viewing law as consisting of rules. Such rules are regarded by natural law as dictates of reason, by positivism as decrees of the sovereign and by realism as the practice of the courts. None of the theories, however, provides any adequate analysis either of the term “rule” or of the notion of a system of rules.\textsuperscript{92} All these theories attempt to achieve justice. But what is required is not mere justice; but justice with certainty. So, one cannot be found fault with thinking in terms of application of a combination of these approaches i.e., application of the elements of realism together with naturalism and formalism in order to achieve justice with certainty.

### 3.5 Critical Legal Studies

Critical Legal Studies is a recent theory of jurisprudence which was developed in 1970s. The proponents of this movement sought to destabilize the traditional conceptions of law and to unravel and challenge the existing legal institutions. Roberto Mangabeira Unger\textsuperscript{93} is one of the main proponents of this theory. The main approaches of the critical legal studies are as follows:

1. The legal materials such as statutes and case law, even though imposes significant constraints on the adjudicators, they could not completely determine the outcome of legal dispute.
2. Unlike the claim of the positivist that law and politics are entirely separated from each other, critical legal studies propose the idea that law is

\textsuperscript{91} ibid, p. 42.
\textsuperscript{92} ibid, p. 43.
\textsuperscript{93} Roberto Mangabeira Unger is a philosopher and social theorist.
politics. Judicial and legislative acts are based around the construction and maintenance of a form of social space.

3. The law tends to serve the interest of the higher class by protecting them against the demands of the poor and marginalised sector. Even though the laws claim to have an object of protecting the marginalised sector, it is not actually doing what it says it does.

4. Legal materials are inherently contradictory and legal order is based on a series of binary oppositions such as preference for strict rules and preference for broad standards.

5. The individuals are tied to their communities, socio economic background, gender, race etc. And they are not autonomous individuals of the Kantian notion.

The critical legal studies is a broad group with clusters of theories from many Universities of American and British but its interference and prominence has diminished in the recent period in the American Legal Academy. However, its branches namely, Critical Race Theory and Feminist Legal Theory continue to grow in popularity.

3.5.1 Critical Race Theory

Critical Race Theory is an academic discipline focused on the application of critical examination of society and culture to the intersection of race, law and power. As per this theory, white supremacy and racial power are maintained overtime and the law may play a role in the process. Critical Race Theory emerged as a reply to a response by 1985 scholars of colour in the Critical Legal Studies movement when they were frustrated to see that even in the midst of a counter-hegemonic movement their interest and the whole question of race were pushed to the periphery. Their response was to create a new movement called Critical Race Theory. Derrick Bell,⁹⁴ was one of the proponents of this theory.

⁹⁴ Derrick Albert Bell Jr. was the first tenured African – American Professor of Law at Harvard Law School.
This new movement used some of the tenets of Critical Legal Studies but insisted on making race a central feature of their scholarly enquiry.95

3.5.2 Feminist Legal Theory

Feminist legal theory describes that the law has been instrumental in women’s historical subordination. The feminist legal theory is two fold. Firstly, it explains the ways in which law played a role in women’s former subordinate status and secondly it is aimed at changing women’s status through reworking of law and its approach to gender.

Feminist legal theory has mainly four approaches:

(i) Liberal equality model
(ii) Sexual difference model
(iii) Sexual dominance model
(iv) Post modern and anti-essentialist model

3.5.3 Liberal Equality Model

This model prescribes that the women are to be afforded genuine equality as opposed to nominal equality. It seeks to achieve this goal by a more thorough application of liberal values to women’s experiences or the revision of liberal categories to take gender into account. Susan Moller Okin proposed this type of approach. This model resembles the sameness model which proposes that there are no real, significant or important difference between females and males.96

3.5.4 Sexual Difference Model

This model emphasizes the significance of gender differences and holds that it should be taken into account by the law. As per this model, only by taking

into account these differences the law can provide adequate remedy for women’s situation which is distinct from men’s. This approach recognises the reality of certain habits of ways of being – natural or culturally ingrained – that tends to distinguish men and women.97 This model is against the sameness account which emphasizes women’s sameness with men. According to sameness feminist, employing women’s difference for achieving greater heights is ineffectual to that end. They emphasize on the very characteristics of women that have historically precluded them from achieving equality with men. The effect of protective laws in the US is an example.

3.5.5 Dominance Model

This model rejects liberal feminism and views the legal system as a mechanism for perpetual male dominance. This model agrees with one approach of critical legal theory which considers the potential for law to act as an instrument for domination. Catherine MacKinnon98 proposed this type of approach. According to her, sexuality is central to dominance. She argues that women’s sexuality is socially constructed by male dominance and that the sexual dominance of women by men is the primary source of social subordination of women. The dominance approach, in that it sees the inequalities of the social world from the standpoint of the subordination of women to men is feminist.99 “It is not foreign to us” writes Catherine MacKinnon that social conditions shape thought as well as life.100 The theme of dominance in feminist jurisprudence reflects what early radical feminists called “construction of gender” (or sexuality) as male domination and female subordination.101

97 ibid, p.93 & 94.
98 Catherine A.MacKinnon is an American feminist, scholar, lawyer, teacher and activist.
100 ibid, 1994, p.54
3.5.6 Post modern and Anti-essentialist Model

Post Modern Feminist Theory emerged in the mid-1980s as a vibrant new academic school of thought that would prove influential to many disciplines key to the study of women and gender.\textsuperscript{102} According to this model, every perspective is socially situated. Anti-essentialist and intersectionist critic objected to the idea that there can be universal women’s voice. They criticized feminists like black feminism, for basing their work on the experiences of white middle class and heterosexual women. This model exploits the ways in which race, class, sexual orientation and other acts of subordination interplay with gender to determine female destiny. Post modern feminist theorists attempt to intervene strategically in the field of power by exploiting and exposing contradictions in gendered discourse.\textsuperscript{103}

3.6 New Options

As neither of the theories stated above could give an absolute answer to the exact nature of the judicial process, especially the nature of the decision making mind, jurists worked up new options mainly by mixing up the theories noted above. Some of such theories were the combination of Natural law theory & Positivism and some others were combination of Formalism & Realism.

3.6.1 Mid – path between Natural & Positive theories

According to John Michael Finnis, the modern living theorist, in spite of their distinction, there is resemblance between natural law theories and positive theories. John Finnis is renowned for his anti homosexual views. In his opinion, homo sexuality is morally depraved and contributes to the degradation of the society. In his 1997 paper, ‘law, morality and sexual orientation’, after criticising ‘homo sexuality’, ‘gay marriage’ or ‘same sex marriage’, he writes, “Marriage, on


\textsuperscript{103} ibid, p.23.
the other hand, is the category of relationships, activities, satisfactions, and responsibilities which can be intelligently and reasonably chosen by a man and a woman, and adopted as their integral commitment, because the components of the category respond and correspond coherently to a complex of interlocking, complementary good reasons: the good of marriage. True and valid sexual morality is nothing more, and nothing less, than an unfolding of what is involved in understanding, promoting, and respecting that basic human good, and of the conditions for instantiating it in a real, non illusory way—in the marital act.104

According to Finnis, it is not possible to talk about what the law is without discussing the unique value and purpose that the law serves. Thus, modern theorists like John Finnis who select a mid path between natural law theory and positivism still argues that the law is basically a moral creature.

In the view of Ronald Dworkin, Hart’s account is incomplete. Dworkin makes room for the presupposition that knowledge of the law involves more than grasping the meaning of words.105 A complete account of judicial reasoning will include something other than rules which he calls principles. The principle, according to him, is “a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.”106

To illustrate the distinction between rules and principles, Dworkin refers to the decision of the New York Court of Appeals in Riggs v. Palmer.107 Elmer Palmer knew that his grandfather was leaving him a large sum of money in his will, but he began to fear that his grandfather would change the will and leave him nothing. Before that could happen, Palmer killed his grandfather, by poisoning him. Even though there were criminal laws governing the killing, but there were

107 15 N.Y. 506, 1889
no laws preventing Palmer from keeping the inheritance. Two of Palmer’s aunts sued in civil court to prevent Palmer from getting the inheritance.

The majority opinion, written by Judge Robert Earl, held that Palmer should be denied his inheritance. Earl relied on the idea that ”No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to fount any claim upon his own iniquity, or to acquire property by his own crime.” This is a principle in Dworkin’s narrow sense i.e., a standard that a judge observes because it is a requirement of justice (rather than of positive law).

According to Dworkin, law is whatever follows from a constructive interpretation of the institutional history of a legal system. According to him, in every situation where people have legal rights which are controversial; the best interpretation involves the right answer thesis. In such difficult cases, according to Dworkin, the judges have no discretion. In his famous book, ‘A matter of principle’ Dworkin writes about right answer thesis.

“Suppose the legislature has passed a statute stipulating that “sacrilegious contracts shall henceforth be invalid.” The community is divided as to whether a contract signed on Sunday is, for that reason alone, sacrilegious. It is known that very few of the legislators had that question in mind when they voted, and that they are now equally divided on the question of whether it should be so interpreted. Tom and Tim have signed a contract on Sunday, and Tom now sues Tim to enforce the terms of the contract, whose validity Tim contests. Shall we say that the judge must look for the right answer to the question of whether Tom's contract is valid, even though the community is deeply divided about what the right answer is? Or is it more realistic to say that there simply is no right answer to the question.”

108 supra note 106, p.23.
If it is true that an exchange of promises either does or does not constitute a valid contract, and that someone sued in tort either is or is not liable in damages, and that someone accused of a crime either is or is not guilty, then at least every case in which these issues are dispositive has right answer. It may be uncertain and controversial what that right answer is, of course, just as it is uncertain and controversial whether Richard III murdered the princes. It would not follow from that uncertainty that there is no right answer to the legal question, any more than it seems to follow from the uncertainty about Richard that there is no right answer to the question whether he murdered the princes. But is it true that an exchange of promises always either does or does not constitute a valid contract, or that someone always is either liable or not liable in tort, or guilty or not guilty of a crime?110

Law, in the opinion of Dworkin, is an interpretive concept. Judges normally recognise a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice. When they disagree in what I called the theoretical way, their disagreements are interpretive. They disagree in large measure of in fine detail, about the soundest interpretation of some pertinent aspect of judicial practice.111

According to Dworkin, law as properly interpreted will give an answer. This is not to say that everyone will have the same answer or if it had, the answer would not be justified exactly in the same way for every person. But, there will be a necessary answer for each individual if he applies himself correctly to the legal question. The correct method is that encapsulated by the metaphor of Judge Hercules, the idle judge. According to Dworkin, Judge Hercules would always come to one right answer. The actual, present law, for Hercules, consists in the principles that provide the best justification available for the doctrines and devices of law as a whole.112

110 ibid, p.120.
112 ibid, p.400
Dworkinian interpretation demands more from the interpreter than merely perceptual and intellectual engagement. Dworkin's metaphor of judge Hercules bears some resemblance to Rawls’ veil of ignorance.

3.6.2 Rawls’ Two principles of justice

According to John Rawls, the right conditions for choosing principles of justice can be created by envisaging what he calls an ‘original position’. The main feature of the original position is the idea of the veil of ignorance. In this case, we imagine that the people who are to choose the principle of justice do not know anything about themselves or their situation other than that which is absolutely necessary to enable them to distinguish and to make a choice between the alternative sets of principles. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances since all are similarly situated and no one is able to design principles to favour his particular condition. The veil of ignorance makes it possible to have a consensus amongst people who may otherwise disagree with each other in the choice of principles purely for reasons of self-interest or selfishness.

Rawls proposes two principles of justice which he believes that people in the original position would choose and agree on. He argues that these principles accord with our most basic institutions about justice and he contends that they should form the basis of any well-ordered society. Rawls says that these principles should be lexically ordered, and that the first principle should be lexically prior to the society, i.e., requirements of the first principle should always be met to the fullest extent possible before attempt is made to fulfil the requirements of the second principle.

113 supra note 105, p.359
3.6.3 Rawl's First Principle of Justice (The principle of greatest equal liberty)

Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.

The liberties whose distribution is governed by the first principle include:

1. Political liberty- i.e. the right to vote and to be eligible for public office;
2. Freedom of speech and assembly;
3. Liberty of conscience and freedom of thought;
4. Freedom of the person along with the right to hold (personal) property;
5. Freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.

The liberties should be enjoyed equally by all the citizens of a just society, since justice require them to have the same basic rights.

3.6.4 Rawl’s Second Principle of Justice

Social and economic inequalities are to be arranged so that they are both:

1. To the greatest advantage of the least advantaged- (i.e. the representative worst of person)- the difference principle;
2. Attached to offices and positions open to all under conditions of fair equality of opportunity-the principle of fair equality of opportunity.

Rawls’ lexical priority rule means that people in a just society must always be assured to their liberties before consideration is made to the distribution of material and other primary goods. Ultimately, this is to ensure that the element of choice, which enables people to define their own goals, to make up their own plans of life and to pursue such plans utilizing the resources available to them without undue interference from society, is guaranteed. The priority of the First Principle to the Second Principle requires that the basic liberty of citizens must not be restricted for the sake of greater material benefits for all, or even for the benefit of those least advantaged. There can be no trade-offs between liberty and
material goods. This is what is referred to as the priority of liberty. For Rawls, liberty may only be restricted, the effect of such restriction must be to create a more extensive system of liberty for everyone.

3.6.5 Intuitive Override Model of Judging

This model of decision making has been suggested by Chris Guthre, Jeffrey J.Rachlinski and Andrew J.Wistrich. According to them, judging, as it is being done, is neither applying law to facts in a mechanical and deliberate way as the formalists suggests nor is by hunching as the realists suggests. They suggest that judges rely on intuition thereby disproving the purely formalist model of judging; but, at the same time they are applying rules to the facts similarly, disproving a purely realists model of judging.

As per this model, neither the formalists nor the realists accurately describe the way judges make decisions. It suggests a blend of the realist and formalist methods known as intuitive override model of judging. It posits that judges make intuitive decisions, but sometimes override their intuition with deliberation.

The proponents of this model claim that it is less idealistic than formalist model and less cynical than realist model which they describe as realistic formalism. It is realist in the sense that it acknowledges the important role of judicial hunch in the decision making whereas it is formalist in the sense that it recognises the importance of deliberation in controlling the inevitable but, often undesirable influence of intuition.

This model is based on a study conducted on the trial judges. According to the authors, elimination of intuition from judicial decision making is both

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115 Chris Guthre associated in for Academic affairs and professor of law at Vanderbilt Law School.
116 Jeffrey J. Rachlinski, Professor of law at Coronel Law School
117 Andrew J. Wistrich, Magistrate Judge of the United States District Court for the central District of California.
119 ibid, p.103.
120 ibid,p.103.
impossible and undesirable because it is an essential part of how the human brain functions. Intuition, according to them, is dangerous not because the people rely on it, but, because they rely on it when it is inappropriate to do so.\(^\text{121}\) This model proposes a dual process of judging namely intuitive process and deliberative process.

Intuitive process is called system one process which is automatic, heuristic based, effortless and fast. Emotional influences also arise through system one process. On the other hand, deliberative process is called system two process which is mental operation and it requires effort, motivation, concentration and execution of learned rules. They are deliberative and rule governed, effortful and slow. System one quickly proposes intuitive answers to judgment problem as they arise and system two monitors the quality of these proposals which it may endorse, correct, or override. Judgments eventually expressed are called intuitive if they retain the hypothesized initial proposals without much modification. This model views the judges neither as a purely deductive decision makers envisioned by the formalists nor as the intuitive rationalizers envisioned by the realists. Rather, it views judges as ordinary people who tend to make intuitive system one decisions, but who can override their intuitive reactions with complex, deliberative thought.\(^\text{122}\)

After conducting a Cognitive Reflection Test (CRT), the proponents of this model found that the judges make intuitive decisions when they are affected by ‘anchoring’.\(^\text{123}\) They found that the ‘anchors’ trigger intuitive judicial decision making.\(^\text{124}\) Same is the case when judges are affected with representativeness heuristics where they tend to undervalue statistical evaluation.\(^\text{125}\) In cases where

\(^{121}\) ibid, p.105.

\(^{122}\) ibid, p.108 & 109.

\(^{123}\) When making numeric estimates, people commonly rely on the initial value available to them. This initial value provides a starting point that anchors the subsequent estimation process. People generally adjust away from the anchor, but typically fail to adjust sufficiently, thereby giving the anchor greater influence on the final estimate than it should have. In short, the number that starts the generation of a judgment exerts a stronger impact on the final estimation more than subsequent pieces of numeric information.

\(^{124}\) supra note, 118, p.119.

\(^{125}\) ibid, p.121.
judges were affected with hind sight bias (hind sight bias is the tendency to overestimate the predictability of past events) also, there is intuitive decision making.\textsuperscript{126} This model suggests that if judges need to use deliberation to override intuition, the justice system should encourage that process.\textsuperscript{127}

### 3.6.6 Coherence based reasoning

This model is proposed by Dan Simon. According to rationalists, legal decisions emanate from prescribed forms of logical inference whereas critical view of the realists is that the life of law is not based on logic, but rather the felt instincts of the time and that intuitions and judicial prejudices have more to do with legal decisions rather than formal axioms of logical inference.\textsuperscript{128} This is a cognitive psychological theory which posits that the mind shuns cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions.\textsuperscript{129} This model also proposes a theory of cognition containing elements of both rationalistic and critical approaches.

In a nut shell, coherence-based reasoning suggests that decisions are made effectively and comfortably when based on coherent mental models. Loosely defined, mental models capture the decision-maker’s perception of the task at hand—that is, the way the considerations of the decision are represented in his or her mind. A mental model of a decision task is deemed “coherent” when the decision-maker perceives the chosen alternative to be supported by strong considerations while the considerations that support the rejected alternative are weak. Such is the case, for example, when the prosecution’s eyewitness is reliable, the forensic evidence is compelling, and the defendant has a strong motive and a weak alibi. A mental model is considered “incoherent” when the decision-maker

\textsuperscript{126} ibid, p.123.
\textsuperscript{127} ibid, p.132.
\textsuperscript{129} ibid, p.513.
perceives the considerations as providing equivocal support for both alternatives.130

Complex decisions are solved rather by nuanced cognitive processes that progress bidirectionally between premises and facts on the one hand, and conclusions on the other. Ultimately, people make decisions through what appears to be a rational-like choice in which a strong alternative is straight forwardly preferred to its rival. However, this dominance is the product of an unconscious cognitive process that reconstructs and transforms difficult and complex decisions into easy ones by amplifying one alternative and deflating the other. This transformation of the mental model of the decision lies at the heart of the decision-making process.131

3.6.7 Balanced Realism

This model is proposed by Brain Z. Tamanaha132. As per this model, jurists held realistic views of judging during the so called formalist age. It holds that it is a mistake to view the realists today as sceptics of judging. In fact, they believed in the law. The leading legal formalists hold very realistic views of law and the legal realists accept the core elements of a formalistic view of law. According to this model, difference between the formalism and realism is comprised in tone and emphasis, but, framing debate about judging in these terms is counterproductive and encourages attacks on false targets.133

In the view of Tamanaha, legal academies are busily developing new legal formalism or new legal realism. The entire legal culture has been indoctrinated in the formalist – realist divide.134

Although it seems much older, writes Tamanaha, the formalist age first burst in the legal scene in 1970s. Neither Holmes nor Pound, nor Frank attached

130 ibid, p.516.
131 ibid, p.583 & 584.
132 Brain Z. Tamanaha, Professor of Law at Washington University School of Law
134 ibid p.1245.
the legal ‘formalists’ or ‘formalism’ to a prevailing theory of style of judging.\textsuperscript{135} The term ‘formalist’ style was used by Karl Llewellyn in 1942 in his essay.\textsuperscript{136} It was in mid 1970s that cluster of articles on legal formalism by prominent legal historians and theorists came.\textsuperscript{137} Tamanaha’s balanced realism has two conjoined aspects viz. sceptical aspect and rule bound aspect. It refers to an awareness of the flow, limitations and openness of law and awareness that judges sometimes make choices, that they can manipulate legal rules and precedents and they are sometimes influenced by their political views and personal bias.

In the opinion of Tamanaha, Benchamin Cardozo’s and Karl Llewellyn’s attitude amounted to balanced realism. According to Tamanaha, even though a number of prominent judges and legal realists including judge Antonin Scalia, Easter Brooke, Prof. John Manning, Prof. Lowrence Solum are tagged as modern day formalists, they accept basic insights identified with realism.\textsuperscript{138} In the view of Tamanaha, the difference between the modern day legal realists namely Richard A.Posner and his opponents relates to small subset of legally uncertain cases. This small subset can never be eliminated because the law is unavoidably open and uncertain at the margins.\textsuperscript{139} Tamanaha concludes that most jurists today and for more than a century adhered to balanced realism which can equally be called as balanced formalism.

3.6.8 Value based decision making [Normative judging]

Judging is 'ius' + 'desire'. 'ius' means right value and 'desire' means decide. Judging is a process of supplying or upholding the right value to human conduct. In Indian context, the right value i.e. the 'ius' is the 'ius' of the Constitution. So mainly, the work which the courts in India do is nothing but applying the constitutional 'ius' to past human conduct whereas what the legislature does is applying the constitutional 'ius' to the future human conduct. It is true that there

\textsuperscript{135} ibid p.1254.
\textsuperscript{136} Karl Llewellyn, On The Good, The True, the beautiful in law, 9U, Chi.L.Rev., 1942, p.224.
\textsuperscript{137} supra note 133, p.1254.
\textsuperscript{138} ibid, p.1260.
\textsuperscript{139} ibid, p.1268.
are good judgments and bad judgments. How the judgments are categorized as
good and bad? The good judgments are those judgments which uphold the
constitutional values consciously. A person can come to the court only for
deciding the existence, non-existence, nature or extent of his right liability or
disability. In the normative method of judging the following steps are involved:

1. Identify the right, liability or disability that is asserted or denied. In the
pleadings, it is not just a fact presented by the lawyer. He may be
manipulating the cognitive independence of the judge by presenting a factual
pattern in order to suit his case. Therefore, the judge, independently of the
presentation of the facts by the lawyer, has to identify the right liability or
disability which is asserted or denied.

2. The next step is to identify the law under which the right is asserted or
denied and the purpose of the law. The judge has to identify the ingredients
of the law that is to identify the model facts prescribed in the law. So, the
legal consequences will follow if the facts of the case match the model facts.

3. The next is to find out the facts in issue i.e., the facts either by themselves
or in connection with other facts from which the existence, non-existence,
nature or extent of the right liability or disability necessarily follows.

4. The next step is to set up a legal standard on the basis of the proved facts
of the case. The attempt of the court should be to identify the correct legal
standard irrespective of the factual pattern of the case. For example, the
court, in an appropriate case, can ascertain the purpose for which the law
was enacted, which is the purposivist approach. Likewise the required legal
standard is to be fixed. This is one of the most important steps of normative
method of judging.

5. The final stage is rendering the decision. It must uphold the object of
securing justice i.e. upholding human conduct consistent with constitutional
values.

In short, the normative method of judging involves identification of the
rights, liabilities, or disabilities, the law which creates the same, setting up legal
standard and making the decision i.e., to uphold the right values on which the society stands. Normative judging is nothing but a process of structured thinking. When the judge gives over emphasis to the facts, there is every possibility for the judge to be carried away from the required legal standard; whereas in normative judging, the judge will be more capable of identifying the constitutional 'ius' which the society wants to uphold. The judge following the latter method will not be carried away by the factual matrix of the case. In other words, the judges of this category will be more sensitive to the manipulation of cognitive independence than the former category.

If the judges follow the normative method of judging, the possibility of manipulation of cognitive independence is comparatively less since the decision is based on certain norms and not merely on the facts. It is true that the work of the judge involves interpretation of human behaviour. So, certainly the judges have to broaden the horizon of interpreting the human behaviour. It is not that there will be no errors in the normative judging. But the percentage will be very less compared to the traditional methodology. By adjudging individual cases, the judge does not merely decide the case but he is upholding the right values on which the society stands. The judge has to give effect not to his own scale of values, but to the scale of values revealed to him in his readings of the social mind. In order to achieve the vision, the judge has to think in terms of the norms which our constitution upholds. Identifying the law and its purpose and to apply the law for achieving the constitutional value is the vision. Normative method of judging goes a long way in achieving this.

3.6.9 Normative judging - Examples

The normative method of judging is not one that has not been applied in India. Examples can be seen here also especially in many decisions rendered by Justice V.R. Krishna Iyer. One among many is the Ratlam Municipality’s case.

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which is a “path-finder in the field of people's involvement in the justicing process.” The judge directly enters into the crux of the case by the opening sentence of the judgment itself which reads as follows: - “It is procedural rules”, as this appeal proves, ‘which infuse life into substantive rights, which activate them to make them effective’.

Another recent example is the decision of the Delhi High Court in Ram Lakhan v. State. It was a case where the Metropolitan Magistrate found that the petitioner, a beggar, was guilty of “begging” and ordered his detention in a Certified Institution for a period of one year under Sec.5(5) of the Bombay Prevention of Begging Act, 1959. The finding was upheld by the learned Additional Sessions Judge. However, the duration of the detention was reduced to 6 months. The Hon’ble High Court analyzed the matter entering into the norm which the society wants to uphold. The court observed as follows:-

“Why does a person beg? There are various reasons for a human being to solicit alms. Firstly, it may be that he is down-right lazy and doesn't want to work. Secondly, he may be an alcoholic or a drug-addict in the hunt for financing his next drink or dose. Thirdly, he may be at the exploitative mercy of a ring leader of a beggary “gang”. And, fourthly, there is also the probability that he may be starving, homeless and helpless. Although, apparently, the said Act does not distinguish between the four different kinds of “beggars” mentioned above, in my view, there is enough scope in the provisions of the said Act to treat them differently as, indeed, they should be. Professional beggars who find it easier to beg than to work may be appropriately dealt with by passing orders under Section 5(5) of the said Act for their detention in Certified Institutions. But, what about the beggar who falls in the second category? His is not really a problem of “begging” but a problem of addiction. The solution lies in attempting to de-addict him and help in ridding himself of the malady. Then there is the third category of “beggars” who are exploited and forced into begging by other ring leaders. A different approach is required here. The person found “begging” need not and

142 137 (2007) DLT 173
ought not to be detained in a Certified Institution. Because, his act of solicitation was not voluntary but, under duress, the result of exploitation at the hands of others. The ring leaders need to be rounded up and penalised under Section 115 of the said Act and these “beggars” need to be released from their exploitative clutches. Lastly, I come to the fourth category of “beggars” mentioned above. They are persons who are driven to beg for alms and food as they are starving or their families are in hunger. They beg to survive; to remain alive. For any civilized society to have persons belonging to this category is a disgrace and a failure of the State. To subject them to further ignominy and deprivation by ordering their detention in a Certified Institution is nothing short of de-humanising them. It is here that courts must step in and recognise the defence of necessity. Judicial notice must be taken of the fact that as the accused are poor they will not have access to quality legal assistance, if at all. The duty is therefore cast upon the courts to satisfy themselves that the accused did not have a defence of necessity. Prevention of begging is the object of the said Act. But, one must realise that embedded in this object are the twin goals—Nobody should beg and nobody should have to beg. 143

Ultimately after beautiful illustration of the doctrine of defence of duress and doctrine of defence of necessity, the court found that the case was one of defence of necessity and did not amount to begging. This case is an example of the normative method of judging.

Adjudication occurs in the mind of the judge. It is often said that adjudication is nothing but the contest for the conquest of the judge's mind. The parties approaching the courts will be having a tendency to present the facts in a particular pattern to suit their case. Here is the need to be sensitive to the manipulation of the cognitive independence. This can be achieved only through the structured thinking by which the mind of the judge will not be deviated from the right norms which the society wants to uphold. This, to a certain extent, occurs in the normative method of judging. It is not that the normative method of judging

143 Ram Lakhan v. State, 137, 2007, DLT 173
is the real solution to this. It is true that there can be disagreement even within a single theory over correct interpretations.\textsuperscript{144} But, it is high time that the judges should at least make an assessment of the methodology of judging being adopted to find out whether it serves the real purpose in the post colonial period.

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