PROCESS OF JUDICIAL PRACTICAL REASONING

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CHAPTER 1

AN ANALYSIS OF PRACTICAL SKILLS AND LEGAL THEORY

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ABSTRACT:
In the realm of legal education, the traditional dichotomy between practical skills and theoretical knowledge has long persisted. This paper explores the imperative of bridging this gap by advocating for a holistic approach that seamlessly integrates practical skills within the framework of legal theory education. The current legal landscape demands graduates equipped not only with a profound understanding of legal principles but also with the ability to apply them effectively in real-world scenarios. The paper delves into the challenges posed by the existing divide, emphasizing the necessity of cultivating practical skills alongside theoretical knowledge to produce adept and well-rounded legal professionals. Drawing upon examples from various legal disciplines, we examine innovative methodologies and pedagogical strategies that can be employed to integrate practical skills seamlessly into legal theory curricula. Furthermore, the paper addresses the symbiotic relationship between practical skills and legal theory, emphasizing that each enhances and reinforces the other. It argues that a comprehensive legal education should equip students with the ability to navigate both the theoretical complexities of the law and the practical intricacies of legal practice. By embracing a more integrated approach, legal education can better prepare students for the multifaceted challenges they will encounter in their professional journeys.

KEYWORDS:

Constitutional Law, Jurisprudence, Legal Ethics, Legal Positivism, Natural Law.

INTRODUCTION

Judges bring a lot of useful skills to their job. Lawyers in law firms and barristers at the bar are encouraged to develop practical skills to help their clients. Those who become judges are expected to turn these skills into an art form when making final decisions. The final decision must be made in disagreements where the evidence is often conflicting, the issue or issues are hard to understand, and the law to apply is uncertain or not clear. The judge uses their skills to sort out the facts of the case, decide on the main issue, and explain why they made that decision. But just having useful skills is not sufficient. Those abilities must be based on an understanding of the judge's job. Legal theory is very important to that idea. A judge needs to understand their job well, or they'll be like a sailor without a working compass. People practice practical skills without thinking about why they are doing it, or they just do it without thinking because they think the reason is obvious and they don't need to understand it. Judges may be accused of not doing their job properly [1], [2].

I'm not saying judges should be philosophers, or that philosophers should be judges. I'm just saying that judges need to understand legal theory to do their job well. Plumbers can work for many years without ever really thinking about what their job is all about. However, following the law to serve justice is very different from fixing pipes. A judge can't just do their job like a plumber does theirs. Judges need to understand the theory behind their decisions in order to do their job and make sure they're doing it well. However, many judges are skeptical or don't trust legal theory. Andrew Halpin has figured out why some professionals are doubtful about theory. These strands are found frequently in legal work. Doubt is first seen in the idea that the law

doesn't need any theory. The law is so complex that theory is not needed. Some people don't think we need theory for practicing things. Although theory can help in certain practical areas, practical skills are still more important. In simple terms, theory can help with long-term planning, but it shouldn't stop people from getting better at their practical skills. The third type of doubt is that the theory has gone too far. It doesn't show what really happens and can sound unfamiliar. Also, you can include everything we just talked about [3], [4].

Many people find legal theory difficult to understand and feel it's not important. But thinking this way is wrong and can be harmful. A gut feeling and beliefs that are not questioned take the place of a person's own idea of how the law works or what the role of a judge should be. If the judge has their own thoughts, they might not fully understand them, or they might be wrong, or they might just have a general feeling about the law. Judges like this don't want to let go of the old ideas about how the court system works because they don't have anything better to replace them. Usually, they stick to a basic form of thinking that doesn't show any improvements from the newer way of thinking. They follow a strict rule-based approach and still believe in an outdated theory of law. They also ignore the many factors and societal needs that are not included in the formal expression of the law.

Knowing some legal theory can help you to see the legal process more clearly and correct any misunderstandings. It helps the judge understand and talk about how they make decisions in court. More importantly, it helps the judge understand how they should do their job, and this understanding will affect the decisions the judge makes. The judge's idea of the judicial role affects how they perform their job, especially when looking at the wide range of tasks they have to do. In simple cases, theory might not be very important for the judges' job. However, judges have more duties than just the usual work. Judges often have to make decisions that create laws and set rules for how things should be done. Legal theory is needed to make sure that the actions of judges are fair and justified [5], [6].

DISCUSSION

The idea that judges only make new rules or policies when they are being adventurous or not following the proper way of interpreting laws needs to be rejected. This idea is not true. Nobody except people who don't know about common law doubts that judges make law. The idea that judges don't create laws is very old-fashioned and no longer true. In 1972, Lord Reid said that we don't believe in fairy-tales anymore. Judges create laws not only by making them broader or applying them to new situations, but also by making them narrower or limiting their application. When the court has to decide on a new or unusual question, it is just as important in making the law as when the judge's decision is traditional or negative. This happens a lot when cases are brought to the appeals court. The belief that new laws are only created when someone makes a new and good decision assumes that there is already a law to break [7], [8].

Donoghue v Stevenson is a good example. Lord Bingham said that everyone could see that the decision made by the majority of three to two had become the law. Many people believe that it created good rules. Lord Bingham says that the decision would have still been the law even if most people had decided the opposite. He thinks that this decision may not have been a good one in the long run. However, the important thing is that, unless changed, it would have stopped a person from being able to sue and win in a similar situation. If the decision had been negative, it would not have been as creative as the actual decision. It would have made it very difficult for the plaintiff, and Lord Bingham believes it would have set a new legal precedent.

This idea comes from the fact that there is no clear rule to follow. Since there isn't a specific law for this situation and the law isn't clear, the decision in this case will create a new rule, which could be more or less strict. Judicial Policy Making and the Modern State is a great book

by Malcolm M. It talks about how judges make decisions and the government. Feeley and Edward L. will now be able to spend more time together as a couple. Rubin says that when the law is not clear, judges may be making new laws when they make decisions. Some decisions may be more imaginative than others, but even less imaginative decisions can still make new laws. Courts who disagree with this idea are showing that they still believe in the declaratory theory of law [9], [10].

Understanding that all judges, not just the more forward-thinking ones, have the power to make laws highlights the importance of all judges following a clear and open judicial philosophy. Judges are not elected and they cannot make laws that do not follow the legal theory. The main theory is what makes judicial law-making legitimate. It's also true that judges often make laws while they are working on cases. Legal experts who criticize making laws as a mistake from the true role of interpreting laws also overlook this fact. Judges have always had some influence on making rules. They have considered how their decisions will affect society. Judges make decisions based on whether they think it will have good or bad effects on society. They want to follow the rules of society and use government decisions to help them make choices, whether they know it or not. Sometimes, policy considerations may not be obvious. Those thoughts might have to be made to fit the formal rules. Judges will try to prove that the new policy comes from the current laws, rather than justifying it based on the good things it will do for society. Words like 'experience,' 'reason,' 'self-evident,' and similar terms often hide - or show - how important policy decisions are.

Many judges agree that policy is something to think about when making decisions. Who else is likely to lead in doing this, besides Lord Denning? In the case of Dutton v Bognor Regis UDC, Lord Denning said that even though it may not have been asked directly, the question of what is the best policy for the law has always been there. He said that the real issue has been hidden behind questions like: Did the defendant owe anything to the plaintiff. Were they close enough to have a relationship? Did the injury happen directly or indirectly? Could it have been predicted? Was it too far away? Nowadays, we focus on policy considerations. Many judges today, and definitely more than in the past, would not feel embarrassed to agree with what Lord Denning said. In 2003, the House of Lords openly mentioned policy reasons in a case where it was hard to prove which employer caused a disease from inhaling asbestos dust. The person had died from this disease.

Any remaining doubts about whether judges make policies in a special, confusing, or avoidable way through better legal reasoning have been cleared by the study I have already talked about as very good. Professors Feeley and Rubin did a thorough study of how Federal Judges in many U. States changed rules and traditions to improve the prison system, working separately from each other. After explaining this legal system, the authors do an amazing analysis of how decisions are made, and I agree with their findings. Their main point is that judges don't just settle disputes, they also make decisions that shape policies.

They are saying that judges use the law to determine their authority, and then make decisions that they think will have the best social impact. Judges will make new rules when they feel strongly about what is right in the community. However, the authors make sure to emphasize that policy-making has limitations and is not free from restrictions. They believe that the limitations in the process of making judicial policies result in decisions that are just as fair and lawful as decisions that claim to interpret the laws. We can't ignore Feeley and Rubin's conclusions just because they're specific to the US or to places with a written constitution. They explained the legal process in a way that is similar to what I have experienced in a place where there is no highest law, so I can't agree with their way out. Feeley and Rubin looked at how judges make decisions, how they change old rules, how they create new policies, and what

limits them when they're following the law. They studied a way of thinking that is typical in all common law countries. From a legal perspective, the judicial process is very inclusive [11], [12].

The interpretative approach is not good enough

Feeley and Rubin show that policy-making plays a big part in how judges make decisions. They go against the idea that interpreting the constitution or laws is the only thing that matters in the legal process. This criticism of the interpretivist theory is good because the theory is not much better than the discredited declaratory theory of law. This means that when the law is not clear, an interpretation is needed to make a decision. Timothy Endicott has said that he thinks this view is empty. When there is a rule, you don't have to figure out what it means. When a new rule is needed, it means there is no rule to follow or a current rule is changed or not followed.

Many legal theorists still really like interpretivist theory. I think this love for the topic comes from North American theorists paying a lot of attention to the decisions made by the Supreme Court of the United States about their Constitution. However, in general, the interpretivist theory doesn't work because of several real world factors. The first truth is that the law is not always clear. Something that is not clear cannot be understood, at least not in a logical way. What is there could be made bigger or smaller, but that doesn't mean it's being explained. In both situations, it's about being creative. Feeley and Rubin said that sometimes the law is so unclear and the judge's decision is so detailed that it doesn't really feel like they are interpreting the law anymore.

Furthermore, the interpretivist theory does not match up with the actual freedom judges have to make decisions on their own. I will argue more about this, but judges have a lot of choices when making decisions. Certainly, interpreting something gives you the ability to make a choice. Different judges may understand and apply a legal rule or principle in different ways. However, the problem with this narrow understanding is that it suggests there was a law for the judges to interpret in different ways. Most of the time, the judges have created laws or policies because there were no existing laws to follow. Basically, the interpretivist theory says that creativity doesn't play a role in how judges make decisions, and that judges don't have as much freedom as they should.

Judges and the theory of law

It is important for judges to understand legal theory because when they make decisions, they go beyond just interpreting the law and also make policies. So, having knowledge of legal theory helps they understand their role as judges better. A view of judges' role that doesn't recognize how much they make laws or policies cannot lead to good judicial decision-making. There's no good reason to think that making policies without understanding the role of the court will be anything other than confused, random, or unimportant. Without knowing the basics of how laws work, judges won't be able to have a meaningful discussion about making policies for the courts. Legal experts and scholars will continue to have discussions without the firsthand knowledge that judges can provide. Defining the correct limits and boundaries of judgment becomes harder.

Furthermore, the purpose of law is to help society. Society needs judges to use legal theory to make fair laws and policies for the people. Without it, society's needs won't be met. The judge's ideas about their job will not only affect how they make decisions in court, but also what those decisions are about. It's contradictory to say that law can help society and then have judges who don't understand the law's basic principles making decisions. Good ideas usually lead to

good plans, while bad ideas usually lead to bad plans. As I mentioned before, having a basic understanding of legal theory can help you avoid making wrong assumptions about it. It can clear up any misunderstandings you might have and help you see things more clearly. Knowing legal theory will help judges to stop believing in outdated ideas about the law, prevent them from only following a particular theory, and make sure they don't stick too closely to old-fashioned or newer ideas about the law. At the same time, the wrong beliefs and ideas that these quick, uninformed, and careless judicial attitudes create will be forgotten. They cannot exist together with a more practical and complete theory of the judicial function. Certainly, it would not be realistic to expect that a judge's preconceived ideas will completely go away because of this new understanding. The judge's old or wrong ideas about the law and legal process will be changed. In summary, making decisions without thinking would be stopped, following the rules strictly would be ignored, and using simple logic would be rejected.

Certainly, judges who learn about legal theory may have different ideas about the law and how the court should work. They may also have different views on their role as a judge. That's right, and it's a good thing. Certainly, it would weaken the strength of the law if this did not happen. Any theory about the role of judges is likely better than just blindly believing that they just declare the law, following strict rules, or being too focused on formalities. No matter what theory they follow, judges will explain their reasoning based on their idea of what their job is, and they will try to make their decision fit with that idea. The way judges think and make decisions would be more honest and easy to understand. Furthermore, because judges know more about legal theory, they can discuss and debate what they believe the role of a judge should be. This means that differences in judgments are often based on the judges' basic beliefs about the role of a judge and why they believe their idea should determine the outcome. Judges are expected to be more honest about their true reasons for making decisions and less likely to make excuses when writing judgments.

Legal experts and the actual application of laws.

If judges want to use their skills in a way that follows the right way to be a judge, they should be able to easily understand legal theory. Unfortunately, that is not always true. Many people who study the law write articles for each other. As a result, the study of law has become weighed down with too many theories and sub-theories. Many different ideas about a subject can cause people to argue and disagree. Some of these ideas may twist and misunderstand the original theory, which then leads to more criticism and discussion. Although it may not be very important, I have to say that there have been a lot of contributions to legal theory. There are so many that it has become its own industry, focused on looking at itself and thinking deeply about its own ideas. In this field, words that have to do with the law are given specific meanings and then changed, which can lead to ideas that seem to come from those meanings. Also, ideas about the law are put into groups and then changed, sometimes until the conversation seems to be more about the groups than the ideas. And proposals are made and then made again, until they don't make sense anymore because of the way they were first talked about. Jurisprudence now has a lot of different types, like a big supermarket. No wonder the person is confused about what to take from the shelf.

This mixture of ideas also includes the idea of naming things. After the theorist explains something, they will say, Will add the brand's name. It's nice to have your name linked with a popular idea from other thinkers. But if your own theory isn't strong, making up a new term for it won't help. I also got tempted and made a mistake when I created the word 'substantial's' to mean the opposite of formalism. Today, that word doesn't really fit to explain the work of judges who like to focus on fairness and modern ideas in the law, and who care more about the important things than following rules exactly.

Legal experts should not write in complicated language that people can't understand. It is frustrating to have to read a sentence or paragraph multiple times to understand it, and even more frustrating when you still can't understand what the author is saying. Judges and lawyers are smart people who can understand and judge ideas and concepts well. They know the law and legal process before they come to work. If they do not understand what the legal theorist is saying, it's the theorist's fault, not theirs. This is for theorists who want their work to be used in the legal system. They should write in a way that is easy for smart people to understand.

This criticism doesn't mean that legal philosophy doesn't have a place in the law. Legal thinkers can provide valuable knowledge just like other philosophers can help us understand the world, our lives, and human behavior. Seeking knowledge for the sake of knowledge is not bad, but it is better if the knowledge is explained clearly and can be understood easily. Philosophers try to speak to everyone and convince them to agree with their ideas. Legal thinkers may need to talk in a way that's hard to understand for lawyers in order to come up with valuable ideas, which can then be explained in a simpler way. Ultimately, legal philosophy is focused on a specific human activity and cannot be well developed without considering that activity. If it's not related to what really happened, then it's not about the law or legal system. If legal philosophical exercises want to be useful outside of just talking between philosophers, they need to be based on how the law is actually practiced. Their validity and relevance to the real world or their value independent of how they are said can only be determined at that time. Legal theory should be on this planet, not on another planet. More important than these rules, perhaps, are the frequent and more serious problems with legal theory. These problems might seem distant to judges who have a lot of experience with the legal process. One problem is that legal experts keep trying to find a law that exists before people or isn't based on personal feelings, but they haven't been successful. A second is when a judge doesn't realize how important it is for them to have the freedom to make decisions in the legal system. This is necessary because judges have to make a lot of choices when reaching a decision. The distance between theory and the basic need for the law to serve society seems like a third. It can never be the final goal on its own. Legal ideas that ignore or hide this fundamental truth are not helpful to the law and legal system. But we'll talk more about these points later.

CONCLUSION

It's really important for legal education to connect practical skills and legal theory because the way law is taught is always changing. The separation that has always been present in the field can't continue in a world where legal experts need to understand both the theory and the practical side of the law. Our study has shown that practical skills and legal theory go hand in hand in legal education. They work together and complement each other. It is important for graduates to understand legal principles and know how to use them in real life. This will help them succeed. As lawyers deal with harder problems, it's important for schools to use new ways of teaching that help students learn practical skills as well as understand legal ideas. By doing this, we can help new lawyers be prepared for the changing legal world.

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CHAPTER 2

EXPLORING THE DECLARATORY THEORY OF LAW

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ABSTRACT:
The Declaratory Theory of Law is a legal philosophy that posits the nature of law as a set of declarative statements rather than prescriptive commands. Developed in response to the legal positivism of figures such as H.L.A. Hart, this theory asserts that law merely declares and identifies existing legal rules without prescribing moral obligations. In this framework, legal validity is contingent upon the observance of social facts and the adherence to established norms rather than moral considerations. The Declaratory Theory emphasizes the predictive function of law, focusing on its ability to clarify and articulate existing norms within a legal system. This theory promotes the separation of law from morality, asserting that the law's essence lies in its declarative nature rather than its inherent normative content. As a significant strand within legal philosophy, the Declaratory Theory contributes to ongoing debates surrounding the foundations and characteristics of legal systems.

KEYWORDS:

Legal Validity, Law, Normative Systems, Predictive Function, Primary Rules, Secondary Rules.

INTRODUCTION

For now, let's just say that judges need to have a basic understanding of legal theory, even though there are some things they might not be good at. Any good writing and chosen works will help achieve that goal. All major schools of law have a lot to give. From Bentham to Hart, Kelsen to Llewellyn and Dworkin to Unger, the top thinkers give us helpful ideas about the tricky question: how the legal system works, and how legal reasoning works. Jurisprudence is not just one question and no one theory can claim to be the whole truth. Judges are very good at choosing things that make sense to them and saying no to things that don't make sense. I don't agree with Stanley Fish's idea that theory can be made to go away by focusing on practice. Theory gives us a better understanding of how to do things. As I have said before, studying law is the only way for judges to have a good understanding of their job, and this understanding is essential for their decision making. Theories make judicial practice better and also inspire judges to make wise decisions. Fish believes that theory cannot be strong enough to support its claim that it is a special kind of activity that guides and transforms practice. However, Fish fails to acknowledge that judicial practice is dependent on a conception of the judicial role, which is largely influenced by theory. As a result, practice can change because of a better understanding of legal theory [1], [2].

Definitely, some theories may be forgotten, but legal theory itself is still important and shouldn't be seen as just a side attraction in academics or speeches. I want to make some changes in the following pages, and I think judges should be allowed and encouraged to see their job in a new way. In order to change things, the judge needs to know what ideas to say no to as well as what ideas to say yes to. Both are equally important. This knowledge will help judges get rid of the old-fashioned rules that still cause problems in the practice of the law. Based on what I said, I mostly don't think there should be any conflict between how judges work and what the law says. The judge who works in the court and the academic theorist should

not be separated. The gap between judges and legal theorists can only be closed if judges learn enough theory to understand their role and legal theorists base their ideas on the reality of what judges do in simple language. Studying legal theory to understand the role of judges will help them think more about their job and what it entails. They will want to keep a closer eye on how well they do their job in the court. I want judges to think more about their decisions, but I don't want them to feel overwhelmed by it. Judges don't have to be afraid of that happening. It would be silly to compare the calm walk of a judge to the fast and chaotic movements of a centipede. Teaching yourself doesn't change the way you think. Judges will not get confused by learning about legal theory and thinking carefully about what their job [3], [4].

DISCUSSION

We need to look more closely at how the courts currently work. How are judges making decisions right now? I will review this in my next exam called "Muddling Along". The title might seem strict, even though judges have a lot of useful skills. This means that without a good understanding of the law, judges may not have a solid foundation for their decisions. The idea that laws represent higher principles has been shown to be wrong. Many people think that natural laws come from another world. The idea that laws come from actual experiences and the legal system doesn't really go together well. And the belief that laws should be followed strictly is still going on despite people saying it's not good. No new ideas have come up to replace these old theories [5], [6].

In the empty space left, judges rely on their gut feelings without having them checked. The important thing to understand is that even though people know the idea that the law is based on declarations is not true, many judges still act like it is. People still think that rules tell them what to do, and past decisions strongly influence them. The result is a legal practice that keeps all the characteristics of being very strict and formal. Even though people may not like it, formal rules still affect how courts make decisions. The main idea of this work keeps coming up in most, if not all, of the following sections. Sometimes it's just assumed, other times its stated clearly, and sometimes it's the most important goal of the law and legal process. The main idea is that the law is not just a rule on its own, but it is meant to help and satisfy the people in a society. So, its reason is determined by how much the law meets people's needs and expectations. At the heart of this mission are fairness and being up to date. Society's needs and hopes won't be fulfilled unless the law is fair and the courts give fair decisions, and the law changes as society's needs change. This work is focused on fairness and importance.

Study the results of keeping old rules and the ideas it creates. I think that formalism or its lasting impact makes it hard to see what really happens in the judicial process. It makes it difficult to understand how much judges can decide for themselves. This leads to a strict and rule-bound way of doing things and giving too much respect to the forceful part in following past decisions. In this situation, we look at the idea that the law makes sense and is rational, and find that it doesn't hold up. Also, the idea that the law is the same as legal analysis does not work well either. I believe that formalism prevents judges from understanding their job well. Before we finish, we look at the qualities of today's judges and criticize them, or they criticize themselves by just being mentioned. The ruling in the Sevcon Ltd v Lucas CAB Ltd case by the House of Lords shows an example of very narrow and rigid thinking.

To understand the way judges think, we need to get rid of some old ideas. The law often tries to make sure that things are clear and definite when making decisions. The other is the tendency to be too strict about following past decisions. The courts are dealing with excessive certainty in their decisions. The community wants the legal process to be predictable and certain. We recognize this and are looking into how to make it more predictable. I think some people make

the law sound more uncertain than it really is. But, I still believe that the law is uncertain because no law is perfect and they can always be questioned. The way to deal with the unclear law is not to just follow the rules without thinking about them. Instead, it's important to understand that being sure about something is important, but it's not the most important thing when judges make decisions. In a specific situation, we should consider how the decision will affect the community's ability to organize itself. But before certainty can have an effect on a disagreement, it needs to be directly related to the situation at hand. In general, we would follow what is fair and update the law to fit with current times. This means we would carefully review and question past decisions and legal principles. Not many court cases need to look at past decisions as examples. Contrary to what most people think, a 'binding' precedent is rarely directly involved.

Instead, the issue with the doctrine of precedent is that it makes judges think in a way that stops them from applying and developing the law properly. Judges stick closely to the existing rules so that their choices and decisions are based on a smaller set of options. I believe that it is important to follow past decisions in the legal system, but I think we should not always have to follow past decisions made in higher courts, and we should be more flexible with how we use past case law. When deciding whether to use a previous decision as a guide, the court should think about if it's still fair and relevant to today's society. If it is, then it can be used. Lewis, but for the Judges who had a hard time following the rules set by previous cases. The story tells a sad tale; the justice system didn't work because they were too set on following past decisions. However, most people in the Lewis case are taking a positive approach, which gives some hope for the situation. We need to add a 'post-script' to this because the majority's approach in Lewis was changed by a bigger Board in three appeals about whether the mandatory death penalty is constitutional. Five judges take a strict legal approach, while the minority takes a more lenient approach [7], [8].

What do we mean by 'the law' if there is no law that applies to everyone equally. We will answer that question. I believe that 'the law' is whatever the judges said it was in the past and what they will say it is in the future. It's important to mention that if the judges in the past didn't say anything important, the law will be whatever the judges in the present or future decide to make. Laws are always changing, they predict what will happen in the future instead of just staying the same. I believe that 'the law' should be seen as a process or ongoing system, not just based on the written laws. Seeing the law as a process helps judges and theorists who believe in following formal rules. It recognizes that the law is not always clear. It also shows that judges don't always follow the exact rules when making decisions. It says that the real limits on judges come from following a good method, not just following the exact words of the law. And it shows that the law we have now is connected to the law we think we should have.

I think that being creative in making and interpreting laws is really important. But I also think that this doesn't mean the law has no structure or rules. Instead of a law that doesn't exist, there is a way judges make decisions that follows specific rules and limits their freedom to decide. Rules and traditions from the past still matter. They help judges make decisions and change the law to be fair and keep up with the current times. The law needs to be adjusted to fit with reality, and this is discussed along with the terms of the judicial oath before the session ends. By not following strict rules, the courts have more freedom to make decisions. But there are still limits to prevent mistakes and personal biases. This job is being done. The limitations are explained in detail and, as I demonstrate, are genuine and successful. This makes me think that judges' actions are limited by how the law is interpreted and applied, rather than by what the law actually says. The rule of law is followed by the limits and rules in that system [9], [10].

First, we talk about the rules that judges have to follow, like working within a system that has higher courts to appeal to. Self-imposed or self-generated limitations are looked at and found to be just as real and powerful. I believe there would be more limits if we use a structured framework to answer important questions in making legal decisions. These questions are looked at one by one: should certainty be important in a case, should a previous decision be looked at again and given importance or not, should a change in the law be decided by Parliament or the courts, should the court look at a case in a simple way or make broader principles, and should the courts make rules to control how a general discretion is used. The limitations are much bigger and deeply ingrained than most people realize. They work together to support each other and create a system of control over judges so that they are unlikely to make mistakes or act strangely. I explained the good things about the idea of the role of judges that I like. The basic idea is that the law is a tool for making society better. The law is meant to help society, so every decision should support that goal. This is about making sure the law is fair for each person and also meets the needs of the community. The most important things in this are fairness and how much it matters. The text talks about how important it is to have fairness in making decisions. It also discusses the difficulty of interpreting and using fairness in the community. Sometimes, it is successful, and other times, it is not.

The law needs to change with the times, and this is important. We make sure the law changes to fit the needs of society in a timely manner. The law has to work for businesses, or it won't do its job. It's not realistic to expect that businesses will always follow the strict rules set by judges. Pragmatism is used in both theory and practice. The legal pragmatism being promoted keeps the important features of philosophical pragmatism: it is practical and realistic, avoids abstract theories and rigid approaches, considers the practical effects of the law, and makes decisions based on practical goals to meet the needs of society. The text discusses how this type of legal thinking will show up in real life and affect how judges make decisions [11], [12].

This focus on reality and practical thinking leads me to look at how we know things in a practical way. The current practical reasoning theory is helpful because it shows that judges sometimes change or add to the existing laws when they are not happy with the outcome. They do this while keeping the existing laws in mind. However, the current theory has some problems. I look at these things and think that the reasons for feeling unhappy should be considered as part of the decision-making process. I believe the current rules should not automatically be used. Laws and rules can help judges make decisions, but they can also be changed if needed. I believe people might be unhappy at first just because the law is not clear. I then explain how practical reasoning affects the choices judges make when deciding cases. A group of ideas comes up, and each idea tries to be the most important in the decision-making process. The most important things to think about are the laws and how they are used in court decisions. The rest of the text talks about what principles are and how they are used by judges. While principles are more important than strict rules and past decisions, the principles in my idea can be more flexible than usual. However, I believe that principles are very important in the legal process, even though there is some flexibility. Principles help the law stay organized and consistent. They help bring together many different and sometimes conflicting ideas into one clear and understandable idea.

Titled 'Taking Law Seriously', the article looks at how judges knowing more about legal theory and understanding their role better could make a difference in real life. I explain how this change would make it clear what the judiciary is secretly doing. Even more changes can be expected to happen, beyond just being more transparent. I can't consider all the possible changes in the law, so I will only focus on the changes that might happen in the way judges do their work. Finally, please stop comparing the law to a game, like many legal theorists and

practitioners do. The law has a big effect on people's lives, so judges need to take it seriously. I believe that if judges use the ideas in this, they will do their job better. A careful watcher will see that the work uses theory in three different ways as it goes on. First, theory is used to get rid of the false beliefs and obstacles that make it difficult to run and improve the common law. Old ideas that don't make sense are being argued against and proved wrong. Theory is used to create a place where people can talk about different ideas about how judges should do their job. Finally, the last part of the book explains a theory about how judges should do their job, with a deeper understanding of their role.

Practical muddling along

Judges usually make decisions little by little, based on their instincts. The title of this article is not too mean when talking about this. This text is from an article by Charles Lindlom called "The Science of Muddling Through. " Whether it's tough or not, it's suitable. To make decisions in court that create new laws and policies based on a judge's personal beliefs about their role, without fully accepting that judges have independence, and to continue using old and discredited ideas, is to struggle. There is a move towards improving the legal system, but it's not finished yet. In the early 1900s, a simple type of legal thinking called positivism was most common. The law was seen as a separate and self-contained system of rules. Judges were expected to apply these rules without using their own judgement. This strict way of thinking supported the idea that the law could be clearly decided, like a math problem, and followed a strict set of rules. Worshipping certainty and predictability in the law took over the focus on fairness and importance. Justice means following the rules and doing things as they are supposed to be done. Strictly following the rules of past court decisions was more important than the basic principles judges used to focus on. This made the technical and language rules of the time even stronger.

At least, the judges who followed this stricter type of legal thinking understood, or believed they understood, what they were doing. The confusion came from the simple and rigid theory. Today, the confusion comes from not having a clear idea of what the courts are supposed to do. Openly, most people don't support the strict beliefs of the past. Many judges firmly disagree with these theories as being valid explanations for the law or how judges make decisions. Some people criticize these beliefs as outdated and immature ideas that the judiciary has moved past and rejected as it tries to make better decisions. However, the practical and realistic approach that should come with rejecting these beliefs is not happening yet.

The reason these beliefs still affect decisions in court today isn't just because there's no other theory to replace them. They still believe that they are important or have some good qualities. Judges are used to think about and compare different ideas and arguments because they believe there is probably something good in each one. Opinions or points discussed in the courtroom might not always be strong, but they usually have some value. As a result, judges tend to think that there must be something important in these untrustworthy theories. They want to take advantage of that value. But the assumption is one-sided without a theory to challenge these beliefs. Also, when considering the traditional need for the judiciary to hold back and the pressures to follow established norms, it can be said that the judiciary is still too restricted by these outdated ideas. As a result, it's important to intentionally get rid of these wrong theories. The idea that judges only interpret the law doesn't make sense if they also create new laws. In simple terms, judges cannot make new laws and at the same time say they are just following existing laws. The two ideas don't go together.

The pressure from the legal system makes judges stick to the old declaratory theory. It's easy to see this. It helps judges avoid taking personal responsibility for their decisions.

Responsibility can be given to the vague entity called "the law," which they are just explaining. It also goes against the criticism that the judges think they are better than the law. Judges can avoid being seen as making unfair decisions when they claim to be explaining a law that already exists. Lastly, the theory also denies the accusation that judicial decisions are looking back at the past and not democratic.

Professor Dias has noticed that the problem comes from only thinking about the present and not considering the future or past. Judges might think there is a rule out there that just needs some adjusting to be found. Judges add their own rules or changes to existing laws as if it is a part of that law. It has been said. The reason this thinking takes over is because people don't see the law as a process, and don't understand that a decision is not just based on the past but also affects the future. The law is always changing because immediate influences affect decisions right away. It just won't stay still long enough to be declared.

Also, when we use the declaratory view or any less extreme version of that view, it seems like the result of a case doesn't depend on the specific judge. The decision is not based on the judge's personal feelings or the law being randomly chosen. Although we have to acknowledge that the judge creates the law, the judge can also say that the existing law influenced their decision. Basically, his or her growth was a natural part of the existing law and, as a result, could be interpreted in a broader way. This idea should never be considered. Alan Paterson noticed that Lord Radcliffe's appearance did not fix the issue of whether the law is legitimate or not. It was simply declared illegal by a judge and ignored. By not talking about how judges make laws, it left the rules for making and using laws unclear. Furthermore, it is a fundamentally deceitful tool because it tries to keep a fake process going by pretending, which won't hold up under public examination. While many judges today may not openly express the same feelings as Lord Radcliffe, they still have a strong desire to avoid taking personal responsibility for their decisions or being criticized for acting as if they are above the law. However, they are not able to reach this far; they are in charge of making the law. Simply put, judges must also follow the laws that they create.

Judges should agree that the declaratory theory of law is no longer credible and should completely reject it. They make a lot of decisions to get a result, and as they decide, they create the rules. They don't say or discover the law at that time. They say it is a law made by judges, and they need to explain it that way. Positivism is a way of thinking that believes in using evidence and scientific methods to understand the world.

The Mastersingers of Nuremberg

Richard Wagner makes his famous opera, The Mastersingers, take place in Nuremberg in the 1500s. The city is where the most important guild, called the Mastersingers, is located. They are a proud and stuck-up group. They have lots of training and experience, and they really want to protect the rules of music writing. Their music is very predictable and rigid, using basic scales and chords and avoiding any fancy embellishments. There has to be the right amount of verses, with each verse split into two parts. Each part must have a certain number of lines and be followed by an after song, which also has a set number of lines and a different melody. And this pattern repeats for each verse. The Mastersingers loved positive music. A rich and educated goldsmith named Pogner wants to give a more special prize than usual to the winner of the yearly singing contest. The prize is that Eva's father will give his daughter's hand in marriage and all his money and possessions. We can guess that Eva is pretty because she gets a lot more attention than Pogner's wealth.

The town clerk, Beckmesser, is in love with Eva. He is a master singer and believes he can win the competition. Eva doesn't like the man and she tries to convince Hans Sachs to join the

competition to save her from Beckmesser. Hans Sachs was a real person who was a shoemaker. He was also a famous poet, composer, and a good singer. Hans Sachs is the best singer and would definitely win the contest if he decided to participate. However, he is old enough to be Eva's father or maybe even her grandfather, and because he is kind-hearted, he doesn't want to compete. He is starting to become less reluctant. But then a handsome young knight named Walther von Stolzing arrives in town. He meets Eva, and they instantly fall in love. As expected, Walther wants to join the competition and win Eva's love. He is working to become a part of the Mastersingers. Walther has a really good voice, but he hasn't had any official lessons. He learned how to write poems by reading old books and listening to the birds sing in the forest. He uses the lessons to create his own songs.

Walther agrees to sing a practice song for the Mastersingers. But it's too new for them. They are shocked and disgusted. His song breaks all the rules. Beckmesser has to mark every mistake Walther makes on a chalkboard, but he runs out of chalk and slate. While people laughed at him, Walther is turned down by the Mastersingers. People think his song is just a bunch of mistakes from start to finish and goes against traditional music. However, Hans Sachs, who is more understanding, doesn't agree with the Mastersingers' disapproval of Walther's new song, even though they broke the rules. He tells them to forget their old rules and try to understand the freedom and flexibility in Walther's improvisation. The Mastersingers are traditional and stubborn, sticking to their rules and refusing to accept any liberal ideas. They are hesitant to accept new ideas and creativity in music because it might lead to chaos.

Wagner's opera is slow, but finally the song competition starts. The Mastersingers and a big group of people gather together. Beckmesser is the first one to go. The sneaky Town Clerk stole Walther's song, but he doesn't know how to use it because he's used to following strict rules. He did very badly and the audience laughed and booed loudly. Beckmesser leaves the stage angrily from the left side. Sachs asks the person who made the song to come forward, and then Walther comes forward. It is not a competition. The person in charge of checking how well Walther played the music was so amazed by how beautiful it sounded that he forgot to note any mistakes. The Mastersingers are happy and excited because they say, "Your song has won the Masters' prize. It would be great if positivity's strict rules could be defeated in such a glorious way.

CONCLUSION

The Declaratory Theory of Law is a way to look at how legal systems work. It has a different point of view on what laws are for and how they work. This theory suggests that laws just reflect existing rules and don't tell people what is right or wrong. It goes against traditional ideas of legal positivism. The theory focuses on clear statements and finding legal rules based on social facts. This shows that the theory is dedicated to understanding the law without any bias. The Declaratory Theory provides important information about how legal systems work, but it also causes arguments about how law and morality are connected. Legal scholars are still studying and improving the basic ideas of the Declaratory Theory. This theory helps us understand more about how laws work and how they guide society.

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CHAPTER 3

ASPIRATIONAL POSITIVISM: BRIDGING IDEALISM AND LEGAL REALISM IN JURISPRUDENTIAL

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ABSTRACT:
Aspirational Positivism emerges as a novel and nuanced perspective within jurisprudential discussions, seeking to reconcile the seemingly disparate realms of legal positivism and moral idealism. This paper delves into the conceptual framework of Aspirational Positivism, exploring its roots in legal theory and its implications for understanding the interplay between law, morality, and societal aspirations. Drawing from the rich tapestry of legal philosophy, this paper navigates the historical evolution of legal positivism and its critique from moral idealists, highlighting the inherent tension between legal rules and moral values. Aspirational Positivism, as a response to this tension, proposes a jurisprudential stance that acknowledges the positivist foundations of law while recognizing the aspirational nature of legal systems in fostering justice and societal well-being. The paper analyzes key tenets of Aspirational Positivism, examining how legal norms can serve as instruments for moral progress and societal betterment. By embracing the aspirational dimension of law, this perspective seeks to provide a more comprehensive understanding of the law's role in shaping ethical norms and fostering a just and equitable society.

KEYWORDS:

Legal Realism, Moral Aspirations, Social Facts, Social Practices, Value Neutrality.

INTRODUCTION

Today, positivism is seen as a type of ideology. Its followers refuse to give up on it. Instead, they keep making it better and better until it hardly looks like the original law. This idea stays in the minds of people and judges in a basic form. Strict rules and being sure are both the goal and how you get there. Many judges are really attracted to following rules in their work. These judges like rules because they make things clear and easy to understand. They can use the rules to sort the facts into categories easily. Thinking uses less energy. Positivism needs to be broken down and rebuilt. Primarily, positivism explains that the law has the power to rule and it sees the law as a collection of rules. Contemporary positivists who agree with H. Please rewrite the text in simple words so I can assist you better. Are you able to rephrase this text in simpler terms? Hart believes that legal authority happens when people agree to follow certain rules and behave in a certain way. This creates a sense of obligation to follow those rules. For Hart, this coming together is his well-known 'rule of recognition'. This means that decisions can be made based on set rules, without considering basic goals, plans or morality. Morality doesn't have to do with what is legal. In positivism, principles are not seen as important, but judges can still think about them when deciding on unclear or conflicting rules [1], [2].

One thing to remember is that many positivist thinkers disagree with the idea that something can be called a law if it is very unfair, which is a response to the natural law theorists. The goal of positivists' investigation determines where it goes. When they use the theory in legal reasoning, it gets confused. Certainly, if the law only includes things that make people do something or give them authority, then it will usually be seen as a set of rules. But that belief is just a matter of how something is described. The rules of the law will be made very strict

and other things that can affect a decision, like where the rules come from and different factors that influence the outcome, will be less important. The group of singers and dancers will not be performing in the show. The positivists' analysis is not very deep. The rule in a decision is made up of many factors that helped make that decision. It is not accurate to say that the rule itself is the only thing that makes the decision legal, because all the factors that went into making the rule are also important. In simpler terms, what makes a rule have power is not how much it's recognized, but the important value it represents to the community. The rule's power comes from its reason, so it can't be changed or made stronger without a good reason. This is what decides if the rule will be a law and stop the judge from deciding [3], [4].

Positivists do not deny that judges create laws. Many people agree that this is true. It is well known that judges are influenced by what they think is right and fair. They are more likely to agree with something if they believe it is just. No outside rules can become official unless they are included in a law, previous decision, or tradition that is accepted as the standard. However, the recognition that judges create laws is unwilling and not very enthusiastic. Hart believes that the law mainly helps officials and people know what to do with specific rules, instead of having to make new decisions each time. Hart changed the idea of 'mechanical law' by saying that rules are not always clear, and in difficult cases, judges need to be creative in making new laws. The definition of rules as 'open textured' doesn't fully capture the uncertainty and vagueness of the law. Since the law can change, rules based on past cases are not complete and must be recognized as such. Each time a rule gets longer or shorter, it shows that the old rule was not complete. However, if the rules are not complete, they will also be unclear. As a judge who knows a lot has said, having the power to tell the difference and make final decisions means that there is always room for more discussion. But this is not exactly what Hart meant when he said that rules can be flexible. The respected judge did not mean to go against his belief in following the law strictly. The vagueness in the law weakens the positivist approach. Certainly, there are rules that guide both officials and private individuals, as Hart describes. Certainly, there are many rules that are pretty clear and well-established. They are considered "determinate" because they have not been or are not likely to be questioned in court. Officials and regular people have to follow rules, but those rules might not always be the law in the next situation where they are important. Any certainty is not guaranteed. The current rules give power to the law and can be enforced, but they are not permanent enough to justify the limited view of creativity in making court decisions [5], [6].

Judges can be creative in all types of cases, not just the difficult ones. In legal books, people often pay more attention to difficult cases as if they are a special kind of case. The thought is that it is a difficult case because there is no previous decision that can be used to make a clear rule for that case. Because it is a new and unusual case, it is hard to make a decision. Things are not as easy as they seem. Despite the many different situations that come up, most cases come to court with a lot of supposed authority and doctrine. Usually, it's the stuff we already know that makes things hard, not the new information or questions. Also, it is not correct to think that a case without a clear precedent is harder to decide. Certainly, it's more likely to be the opposite. Without being restricted by supposed strict rules, the judge can ignore a lot of unproductive arguing and go back to basic principles. Without the legal argument about the authority's scope and applicability, the decision might not be difficult at all. The difficulty in making a decision in these cases comes from figuring out what is the right thing to do, not from following a specific rule.

The positivist's way of thinking has another big disadvantage as well. If the rules are not already decided and a judge has to use them, then they do not create strict obligations or have strong influence. This is why following previous decisions is really important in positive thinking.

However, it is very hard to predict if a rule will be followed in a specific case when using precedent. In simple words, if the rules are not clear, then the obligations they create are also unclear. This is not a good basis for deciding what is or is not the law. The idea can be explained differently if we go back to Hart's basic rule of recognition. Rules don't have value just because they exist. They are important because they provide a basis for organizing the community and guiding how people should behave. However, in the real world, rules are sometimes uncertain, so they may not be a reliable guide for how people should behave. What has been acknowledged about Hart's test? If a test only applies to specific rules that will be used in a real case, it's not a recognition rule at all. The recognition is always being put off until the next situation [7], [8].

Positivists can't dismiss the wide range of choices judges have to make. They also can't ignore the creativity involved in making decisions, except in very simple cases. As we have seen, the judge's decision can either make a new law or change an existing one. Basically, positivism is a theory that tries to explain why we should follow the law. However, positivism cannot fully explain how judges make decisions. In reality, judges often don't follow Hart's rule or any new version of the positivist theory. Contemporary legal theorists who support positivism criticize judges for not following a law that is unclear as if it were clear and must be followed. Positivism still has a bad influence on how judges think. Judges often mix up the positivists' theory about why "the law" is authoritative with how they make their decisions because they only have a basic or intuitive understanding of the theory. They are made to think or behave as if there is a rule that needs to be announced. They think the key is to understand what the law is. So, the focus is on figuring out how strong that understanding is, rather than deciding if the law is good or not.

Some judges who tend to use this approach become focused on following rules and look up to past decisions too much. They really like following strict rules and see the law as a logical system. Also, positivists believe that law should be kept separate from morality, which leads judges to have a limited understanding of the law and their role as judges. The idea that the law needs something outside of itself to guide it, besides just being recognized, gets ignored. The law is not just rules, but also includes legal principles, standards, and social considerations that can influence decisions made in court. Judges need to understand the problems with positivist theory and how it's different from the actual work they do. The people who believe in staying positive may be left behind, next to a sign on the road that shows the way to understanding the legal process.

DISCUSSION

Interestingly, positive thinking now includes some idealistic ideas. Normative positivism is when rules and ethics are considered important. I also call it 'positive thinking to reach your goals'. The positivists are saying that they need to change the idea of legal positivism so that it can still exist in the real world. They want to say that separating law and morality is a good thing and important for society. Ethical positivism is a belief about how political power should be used. In simple words, it is a 'hopeful idea of how laws should work' based on the assumption that governments are legitimate. Governments need to work with clear rules that everyone can follow without bringing in personal or group beliefs or politics. Ethical positivism is always an 'ideal'. Campbell's theory also helps him create a 'theory of democratic positivism'. The theory would limit judges from making many of their own decisions unless the law is unclear or unfair and waiting for lawmakers to change it would cause problems. Waldron does not accept the word 'ethical'. He thinks it's about how we should behave as individuals, not about how we should judge organizations. Waldron says that normative positivism is not just about having a set of rules. Legal positivism is firmly stated as a belief about what is right. In this statement,

he agrees with Campbell. Waldron says that in today's legal system, not only Tom Campbell, but also Gerald Postema, Neil MacCormick, Stephen Perry and maybe Joseph Raz support his claim. The normative positivists believe that making decisions without considering morals is only possible if the law is set up to determine what is right without needing moral or political judgement.

Legal thinkers or philosophers can say that a certain way of looking at the law is good and should be followed by judges, lawmakers, and people. However, many people find it hard to believe the argument made by normative or ethical positivists [9], [10]. First, normative positivism isn't a theory on its own. It doesn't take the place of legal positivism, it assumes it. So, all the problems with positivism that I mentioned before also apply to normative positivism. There is no realistic hope, and it's really painful to feel like nothing will change. Positivists don't understand that the law is uncertain, judges have a lot of freedom to make decisions, and judges have a lot of freedom to make decisions. This affects positivists' idea of what is possible. Everyone agrees that the law should be clear, but it's not right to base a theory on something unrealistic. Legal positivism doesn't work, so normative positivism also won't work.

Secondly, normative positivism doesn't seem to live up to its own claims. Normative positivists bring back moral ideas into the law in order to support legal positivism. Making a decision is okay when there's a rule that applies to the situation. It doesn't matter if the rule is unfair or doesn't fit with the current needs. Now, it's seen as a moral duty to apply the rule. I think that Campbell and Waldron are trying to get rid of a difficult moral and political decision, but now we have an even more difficult moral decision instead. Judges who refuse to use or change the law in a specific case to make it fair or up-to-date because there is already a rule in place are choosing one moral feeling over another. Thirdly, turning rules into something real is a very old idea. Having lots of rules doesn't always make things more certain or take away the moral and political part of the law. Later, we will argue that we should use a practical and realistic approach instead of sticking strictly to rules. Practical reasoning should be more important than following formal rules, and principles should be more important than rules in making legal decisions. We should not want to honor a strict or rigid approach, but instead try to get rid of it.

Positive thinking about romance

A good example of how a scholar's ideas can support positivism is found in Jeremy Waldron's book Law and Disagreement. Waldron praises making laws and criticizes the court system. He writes about the legislative process with strength and clearness. But he has a very romantic view of it. And he has a very negative view of the judicial process. But Waldron's support has gained a strong following among some scholars and lawyers, especially those who believe in legal positivism. So let's quickly talk about what Waldron is saying in his thesis. The first part of Law and Disagreement talks a lot about making laws better. One-third of the remaining money is used to get rid of judicial review. For now, we need to focus on the first part.

Waldron came up with the phrase "the circumstances of politics" to explain the need to find agreement in a community where there are a lot of disagreements about policies, ethics, and fundamental questions about political systems and individual rights. The best place to resolve these disagreements is in the government. Only the government can solve arguments in a way that keeps the pride and self-respect of those who don't win in the political fight. People want a fair political system that values their different opinions, instead of just looking for agreement. The majority rules in this government. Waldron believes that only laws created in line with democratic, diverse, and fair values will be valid. No other way of solving arguments can have that power because they don't treat every opinion and vote the same. Making decisions by

choosing the option that most people want is the principle we use to give everyone's opinion equal importance. This means that we try to give each person's opinion the most importance possible, while still making sure that everyone's opinion is equally important. It gives the most power to everyone, as long as everyone is treated the same. Waldron believes that the problems with majority rule don't support the idea of courts making decisions, since the courts also use majority votes to decide disagreements. Waldron says the legislative process is not a selfish race to win for oneself. Instead, he thinks it is a loud debate where passionate people argue about our rights, justice, and the common good. They argue not for their own benefit, but because they want to make the right decisions. Richard Posner strongly believes that Waldron is too idealistic about how the legislative process works. Waldron believes that when people with different views work together, they can make better decisions than if they worked alone. However, this idea ignores the fact that when people with different views talk, they may end up disagreeing even more instead of finding a solution [11], [12].

Though I agree that kindness and high morals can inspire lawmakers, we shouldn't exaggerate their impact. I think Waldron does it. He criticizes the idea that people only act in their own interest in politics too much. Lawrence Sager strongly believes that Waldron's view is risky and oversimplified. He thinks that politicians are more likely to respond to the influence of money and votes rather than the rights of individuals or groups. Sager admits that when politicians compete for support, they may have to make room for those who have less power. He also believes that small and isolated groups can become politically strong if they work together and stay determined. But this depends on what is convenient in changing political situations. It happens more because of gaining power than thinking about what is fair. No one can expect their voice to be heard in politics unless they can prove that they are important to the political process. Sager believes that in politics, power is more important than truth. Additionally, Waldron's description of majority voting as a way to show respect for everyone's opinions is very theoretical when it comes to actually making laws. Different opinions might seem equally important in theory, but that doesn't mean they are equally important in real life politics. Tell someone from a different race, or someone who is gay or disabled and on a fixed income, that their vote is just as important as everyone else's. Even people who don't care about voting have the same power as people who care a lot. Also, some people may vote without really thinking about it or doing research. Overall, the system allows voters to vote based on what is best for themselves.

Waldron's criticism of the legal process is not any more realistic than his positive view of the law-making process. For example, the way he shows how the legal system is controlled by the majority. When many judges don't agree, the decision is usually made by the majority of them. But the way the majority is reached can vary a lot. Most of the time, when a decision is disputed, it is reached through a fair and careful process. The judges must follow strict rules and be independent and unbiased. Cases are not decided based on someone's own interests. Judges are not tied to any specific group in the community. They are not connected to the interests of people who are part of the political community. They are not able to focus on their own interests and projects because of their role in making decisions, and they are not accountable to the people they represent.

Waldron prefers the idea that the legislature represents us, while the judiciary represents them. This preference makes people see the court as someone who interferes in their business and they don't understand the important role of the court in the constitution and democracy. I have tried to prove that the judiciary is allowed by the constitution and supports democracy in another place. Here we can see how the judiciary works together with Posner's ideas. Realism means understanding that judges are not influenced by political pressures like elected

lawmakers are. This helps them make fair decisions based on their knowledge and experience. This makes the judiciary an important part of the law-making process. Individuals and minority groups can seek justice and fairness, even if people make fun of them, because the adjudication process offers a unique and important form of equality, especially when it comes to disputed rights.

I would like an approach that sees both the legislative and judicial processes in a fair and honest way. Waldron's view of the legislative and judicial processes is not accurate and this affects his overall argument. These are different ways of resolving different types of arguments in a democracy. Although there will be some disagreement about where the boundary should be, the key is to make sure that agreements and arguments are divided between the two processes based on their strengths. In a representative democracy, most disagreements are resolved by the government's law-making branch. But disputes that need a fair, thoughtful process led by a neutral, unbiased group will usually go to the courts.

However, I don't think the debate represented by Waldron encompasses everything. Society is made of many people with different views. Certainly, there are many people who believe in a society where everyone's rights are valued and respected, and this belief will likely continue in the future. They want these values to be a natural part of the community, without anyone feeling forced or pressured to act a certain way. A legislature that many people like might not always make progress on their goals. They use the legal process to share and fight for their strong beliefs. Without that forum, they cannot express themselves effectively or may feel like their voice is not being heard. Debating whether the legislative or judicial processes are better, and if the courts are allowed to settle disagreements like the ones Waldron talks about, can wait for now. Instead, we are talking about something that affects the health of society, maybe even the most important part of a civilized society. We are dealing with a question about society, not about the law or philosophy. Can we keep the best human dreams and goals bottled up in compromises that don't lead to clear decisions? People who care about these dreams can turn to a place where even though there are some preferences and biases, it is less influenced by them compared to other places because of its strict and disciplined ways of doing things. It might be necessary for a fair and peaceful society to have the ability to go to court to solve problems between people's best and worst behaviors. This could help society to function well and be healthy.

CONCLUSION

Studying Aspirational Positivism helps us understand how laws can bridge the gap between legal rules and moral values, and also shows us the important role of laws in society. The Aspirational Positivism framework recognizes that law has both positive origins and goals. It sees the law as a powerful force for making society better and improving people's morals. As we figure out complicated modern legal ideas, Aspirational Positivism helps us see legal rules as tools for achieving justice and societal goals. This perspective focuses on the conflict between rules and what is right, and suggests that people who work with the law should think about how it affects society overall. Aspirational Positivism is useful for understanding and applying laws in court and in developing legal systems. This approach helps make sure that laws are in line with what society wants, so that the legal system supports justice, fairness, and people's well-being.

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CHAPTER 4

NATURAL LAW AND HUMAN RIGHTS JURISPRUDENCE

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ABSTRACT:
The intricate relationship between natural law and human rights jurisprudence, illuminating the foundational principles that underpin the convergence of these two essential legal frameworks. We delve into the historical evolution of natural law and its evolution into contemporary human rights discourse, examining the philosophical underpinnings that unite these conceptual domains. The investigation traces the roots of natural law, acknowledging its historical significance as a moral and ethical foundation for legal systems. Simultaneously, the paper scrutinizes the modern evolution of human rights jurisprudence, detailing the global efforts to codify and protect fundamental rights and freedoms. Through this historical lens, the paper elucidates the symbiotic relationship between natural law principles and the development of international human rights norms. Moreover, the paper explores the implications of this interplay in legal theory, jurisprudential interpretation, and the adjudication of human rights cases. It analyzes how natural law principles continue to influence the recognition and protection of human rights, offering a conceptual framework that transcends cultural and legal diversity.

KEYWORDS:

Human Rights, International Law, Justice, Legal Positivism, Normative Ethics, Positive Law.

INTRODUCTION

Positivism was a reaction to natural law theory. Let's briefly talk about natural law and how it affects the legal process. In natural law theory, authority is based on moral authority. Morality is a natural part of the law. Above the laws made by humans, there is a more important law that is based on moral principles and ideals that are timeless and unchanging. This law exists separately from human-made laws and is more important than them. So, laws made by people need to follow these principles and ideas to be considered valid and have authority. Throughout history, people have said that "natural law" comes from human nature, the way things naturally are, and the order of the universe, God's eternal laws, or the right way to behave in politics. People usually say that the way we find out about it is by using our thinking and understanding. Natural law doesn't describe the legal system, but it helps to decide what the law should be and helps us see if human-made laws are good or not. I agree with Oliver Wendell Holmes that I have doubts about natural law. I think Jeremy Bentham was mostly right when he said that natural law and natural rights are nonsense. According to Bentham, natural law is not real and reasoning based on natural law is confusing and based on opinions about human nature that can't be proven. I understand that when I criticize natural law sometimes, it's not as strong as what Bentham said – but maybe that's because we live in different times [1], [2].

Regardless of its long history, it's hard to study natural law theory without seeing it as a mix of superstition and guessing. It is now impossible to understand the basic rules of natural law using reason. The law is not something special or magical. It is a tool used by the people who make the rules in a political system, including the courts. Laws need to change and they do change to fit the needs of a society that is always changing. This happens without much respect for the old ideas of natural law. Strong criticism of natural law theory may be uncomfortable

because there are times when I am interested in it. Maybe it is a problem that someone who disagrees with the positivists' idea about the law might face. Ronald Dworkin thinks that the law is based on moral and political ideas, not just the rules that are actually used in court. But I still hesitate to believe that morality is the most important factor in deciding what is or isn't considered law. The law can be judged based on something outside of itself, even though that thing is not a natural part of the law. Moral beliefs can impact the law because they often impact judges, and the law can be looked at from a moral point of view. But that doesn't mean that the most important part of the law is based on morals. The main idea is that, like positivism, natural law theory is focused on explaining why laws have authority and are valid. It looks at the power of the law and how much it can be used compared to the moral power from a belief in human nature or God. It is aimed at the person or organization that has the power to make the law. When a judge decides a case, they are using their power, not figuring out where that power comes from. A judge cannot make a decision based on their personal beliefs about human nature, order, or God [3], [4].

The new versions of natural law theory do not change this view. Lon Fuller, a legal thinker, believes that law and morality should not be completely separate. He talked about the idea of sticking to the law. For the legal system to work, it needs to meet people's need to work together and have mutual responsibilities. The rules will bring clarity, sense, and structure. Being loyal to the system means following the law's inner moral code, according to Fuller. The morality inside the law means that there are eight things a set of rules must have before it can be considered a real legal system or the rules can be called laws. These needs don't have to be listed. Basically, these rules are about how things are done, and they are important for all lawyers to follow. But if a person has to follow the rules of a certain system if they have the necessary qualifications [5], [6].

John Finnis explains the most current and important ideas about natural law theory. He thinks that the legal system gets its power from helping the community. He believes that natural law is based on intuition and what is obvious, not just on reason. He also says that we can only know what is obvious if we have enough experience and are willing to think about it. This is called practical reason or practical reasonableness. If judges followed natural law theory, their decisions would involve both the law and morality more than they currently do. Right now, most moral thoughts are usually kept secret. In reality, positivism's belief in keeping law and morality separate has taken over natural law reasoning in courts. In simple terms, judges often try to make decisions based only on the law itself, without considering moral beliefs or any outside influences. Signs of natural law theory that match with a positive or more formal way of thinking can be found in how judges think. Bentham believed that natural law theory caused people to mix up legal and moral authority. This means that people thought that the law had authority not only as a law but also as a moral standard. Satisfaction that the law was followed correctly. People didn't like how Blackstone combined legal and moral authority in his Commentaries and suggested that English law was better than all others. Most judges don't believe there is a definite answer to legal problems nowadays. However, many judges seem too comfortable with the law as it is. Even though they don't believe their decisions have to be perfect, they are not very harsh when it comes to judging the past decisions they have to use as examples. Many people still believe that the common law is based on the wisdom of past judges. Following this wisdom without questioning it gives the existing law a strong sense of natural law.

However, judges' present attitudes, including their complacency and unquestioning satisfaction with existing laws, are mainly due to the success of positivism and its formalistic approach, rather than respect for old wisdom and confidence in reason to discover the law.

DISCUSSION

However, it is important to consider the judiciary's strong focus on human rights laws in the past twenty years. Human rights are very important and are a part of natural laws. Natural law includes natural rights, and these rights are connected to human rights. The importance of human rights is confirmed by the creation of constitutions and bills of rights that officially recognize and protect those rights. Almost always, the rights will be declared as if they are obvious, everlasting, and unchanging truths. The language will be wide-ranging and strong. It is clear that rights are important and are expected to be more important than regular laws [7], [8].

Judges strongly believe that human rights are more important than the current laws when making decisions. Many judgments in this area seem to have a strong desire to promote a particular belief or cause, especially when they are first made. This can be a little unsettling. The judges are good at protecting the rights of people who are different or who are being treated unfairly. In a democracy, people want everyone's rights to be respected, but sometimes the majority doesn't show enough respect. In those cases, the judiciary sees itself as the protectors of the community's important beliefs. This means that if we talk about it, we can see that human rights law is a good place for natural law theory to develop. Where do judges get their ideas about individual rights from when the laws are written broadly? And how do they decide what the community values. When they think about these things, they use big ideas like human dignity and the values of a civilized society to interpret the law. It's not surprising that judges, when they are in the middle of a tough legal battle, sometimes look up to the sky for inspiration. Where else can the judge find the inspiration they really need?

The court has to be creative when dealing with human rights cases. The rights mentioned in the law require creativity. In addition, judges can also choose to throw out or change previous decisions made in similar cases. In most cases, it would go against what the people who wrote the constitution or laws wanted to limit the rights and protections in them with court decisions that they didn't think were enough to protect those rights. As judges make more decisions, their freedom to decide human rights cases is limited. However, when faced with a new claim, judges must still try to find a practical way to apply the broad rights and concepts that are part of human rights law.

Do judges think that human rights come from natural law? If they do, they might not say it out loud. Many people are happy to just follow the rules in the constitution or laws that list their rights. But this just brings up the same question again. The judges can consider how wide the right is, the values in the constitution or bill of rights, the values of the community, and the big ideas behind human rights. However, those references alone do not define the extent of the specific right, the presence or characteristics of the lasting values, or the foundation of the broad concepts claimed to underlie the right or value. The exact meaning of the right will not be known until a judge decides what it is.

There has not been much legal theory about how judges interpret the bill of rights in the constitution or laws. Is it a natural law? No, it's not. Judges and theorists may look for it, but they won't find a special category in the heavens for human rights. Human rights are just as important as the rights that are supposedly given by nature's laws [9], [10].

Another way to look at it is that human rights law gets its power from the fact that human rights are recognized and valid for everyone. However, this idea is not fully developed yet. International support can be seen as a confirming power. However, this idea is not entirely true. While it may help understand why these rights are so widespread and strong, it doesn't explain the specific rights in different situations, the values behind the rights, or the overall concepts

associated with them. In general, the courts are not declaring something as a right or value that everyone agrees on or even knows about. The courts are doing something that has never been done before. For instance, look at the Canadian laws on this topic. The Supreme Court of Canada made a lot of decisions about equality in the constitution. These decisions were not already known or established before the Court made them. The judges created new rules and laws. So, it is believed that the laws about human rights that have been developed from general words in the constitution and laws over the last 20 years were created by judges. In the end, if there are no laws that say otherwise, the courts decide their own authority and how much power they have within their area [11], [12].

The judges have said that human rights should be protected a lot and with a lot of freedom. They did it for many different reasons, some of them may have been unclear, but all of them were practical and realistic. The first thing has to be the usual choice. By using general language, the people who create constitutions and laws have left it up to judges to decide what those rights mean in different situations. They have clearly stated that these rights are very important and have used strong language to tell people to follow them. But they didn't give all the information. If the courts don't do it, the information will be lost. Therefore, the people who create laws and rights have given the job to the judges, and the judges accept that they must do their best to carry it out. People may have different opinions about how the judges do their job, and some may not like all the new laws they have made. But the important thing is that the judges couldn't just ignore their duty.

Another reason why the courts have been involved in this area is because they believe it is their job to protect people and minorities from being mistreated in a system where the majority makes the decisions. Once again, the practical idea of default comes into play. If the courts don't protect people or small groups from the power of the majority, who will. Judges feel like they have a duty to actively protect individuals and minorities because of the constitutions and laws that have been passed. Basically, the people who wrote the constitution and made the laws are thought to have given a job, not just made a paper to understand.

Courts are designed to protect people from being hurt by those in power. The person or people who are the main focus of the courts' daily work. The person or people can be the one bringing a legal case, the one defending against it, the one bringing criminal charges, the one being accused of a crime, the one appealing a decision, or the one responding to an appeal. The courts pay a lot of attention to them and care a lot about them. A constitution or bill of rights gives judges new tools to show how much they care. As a result, we should reject the idea that the rapid growth of human rights law shows a return to natural law.

"Natural law and parliamentary supremacy" means that the rules and laws of nature are more important than the rules made by the government. Another way that natural law thinking is seen in the law is in the idea of parliamentary supremacy in democracies like Westminster. A new way of thinking about the constitution is developing. It suggests that the legislature should not have complete and unlimited power. This challenge is seen as part of the ongoing creation of a constitution that has not been written down yet. A written constitution can change and adapt to fit the times, and so can an unwritten constitution. It needs to be flexible so it can be updated to meet the needs of each new generation.

The idea that Parliament is the highest authority has been questioned by Sir John Laws and Sir Stephen Sedley in the UK. Sir John Laws starts by talking about how the courts are starting to provide clear and organized protection for our constitutional rights through a process called judicial review. Understanding that there are long-standing rules in the constitution, Laws believes that not having a single main text means that the way power is distributed among the

government branches is decided over time through agreements between them and is accepted by the people. The way people live in a place can change over time, even without a big revolution. This has been seen in the past three hundred years. Laws says that for a democracy to do well, the people in power need to have rules about what they can and can't do. They can't go beyond those rules. He says if this is correct, then it is because of the power of democracy itself that it should not be total.

Refusing to accept the idea that Parliament has all the power, Laws argues that there is a higher law that protects basic rights from being taken away by the government. If it were different, it would mean that the right is not guaranteed, but only exists because the government allows it to exist. If there is no way to control or limit such absolute power, then basic rights are just special benefits, and even though Parliament is elected, it can still act like a tyrant. Laws believes this idea also applies to democracy. He says that in order to keep democracy working, the power of the government or Parliament should not be unlimited.

The most important power is not held by the people in charge of the government, but by the rules that let them have that power. The constitution is the most important power, not the Parliament.

Sir Stephen Sedley, a current judge, thinks that it is important for judges to have more control over the government. He believes this was a big accomplishment for the law in the 1970s and 1980s. He sees it as a way to fix the problems in how democratic politics work. A major change in the legal system has happened with most people supporting it, so there's not much disagreement from politicians. He believes that a new way of running the country is starting to develop. It's not like before when Parliament had all the power and the rule of law had to follow whatever Parliament said. Now, it's more about both Parliament and the courts having power, and the government being responsible to both of them in different ways. Based on the importance of democracy, Sedley explains the problem like this: How can we make sure that our society follows laws that respect basic human rights? The judge says that in our society, the courts have a duty to explain and support the basic rules of how people should behave towards each other, called human rights. These rights may only apply for a certain time and in a certain place, but they are still important.

Laws believes that no government with the most power can take away basic rights because there is a higher law that says so. Likewise, Sedley said that the rule of law can be seen as a very important principle, just like democracy, and is given top priority by the general agreement within society. Sedley explained what he meant in his first great Hamlyn Lecture. In the end, the smart author suggested that we have to agree as a society on what is allowed and what is not allowed. He thought that this is not a strong law because it doesn't come from a powerful source and there's no way to make people follow it. Sedley decided that what we all agree is acceptable is the most we can tolerate. I have said before that in this case, we should also not accept a higher-level rule. Both Laws and Sedley believe that the courts should have the power to protect basic rights over what Parliament wants. I think it's better to not decide if Parliament is completely in charge. We should wait to give an answer until the courts have to deal with a law that seriously threatens representative government, the rule of law, or our fundamental rights and freedoms. A lot will depend on the situation then. Until that time, the answer does not have to be known. It can be left undecided for now.

The uncertainty or lack of clear answers is important for the constitution. A constitution is a set of rules that decides how political power is shared. If different groups in power don't agree, they can choose not to follow the rules, which could cause problems. This uncertainty about whether the courts will stop unfair laws can make lawmakers think twice about their power,

and can stop the courts from taking too much power for themselves. A balance of power between these two parts of government can be better achieved by keeping the question unresolved than by deciding it in favor of either Parliament or the judiciary. The lack of a clear answer makes people careful and hesitant.

In the story, it may be hard to tell what is true and what is made up. There is no doubt that the truth can be replaced by false stories. Timur, also called Tamerlane, was a really mean and fierce conqueror in history, especially before the twentieth and present centuries. He became famous in a tribe and went on to build a huge empire from Turkey to India in the 1300s. He fought many wars and was very cruel, killing many people and destroying everything in his path. Timur lied about being related to Genghis Khan and acted like him. Timur was even more cruel than usual in his actions. Timur surrounded the City of Sivas, which used to be called Sebasteia in ancient times. For a while, the people fought back. The soldiers decided to give up to Timur if he promised not to hurt anyone. Timur said yes fast. The soldiers gave up and Timur didn't hurt them. He just put them in the ground while they were still alive.

It was a rare situation where the dangers of going to court were not as important as other very unusual risks. But those dangers didn't actually happen. Timur won his case in the most important court in the country. His promise was clearly understood and he had not broken it. A few years later, another person wanted support for their war. They promised that no children would be hurt during the takeover of the troubled country. No child was hurt or injured at all. People who were not killed by gas were just left to die of hunger. Understanding the matter, the highest civil court decided that it had to follow the previous ruling in Timur's case. The attempts to figure out what happened in that situation were not successful. The soldiers being buried alive did not affect the decision in that case. The children being gassed or starved also did not change the main idea in this case. So, things that are similar should be treated in the same way. The argument that the killing without bloodshed made the promise worthless and that the promise essentially meant that the conqueror would not kill the children were not accepted. At last, the argument to show that things had changed and needed a kinder approach was ignored and rejected by the court. They thought it was just an attempt to make the court act in a biased way. Formalism was the most important thing. Timur has done many bad things and needs to take responsibility for them. Even today, some court decisions that don't make sense or seem ridiculous are still considered legal.

The long-lasting impact of formalism

The old legal ideas I talked about show up as formalism, which is the leftover effect of those discredited ideas. I have already said that blindly following a belief in the law is a big mistake. Formalism is a way of thinking about the role of judges that doesn't consider fairness or relevance. It can get in the way of making fair and relevant decisions in the law. Basically, using a formalistic approach hides the many options that a judge has when making a decision. Judicial reasoning is turned into a process that isn't very natural where the real choices are ignored or denied. It doesn't explain why a choice is rejected in favor of a specific rule to others. The special thing about rules is that they can be formal. They make sure to not consider things that have already been decided to not be important in the specific situation. Court decisions are limited in their scope and ability to provide fair judgments that are relevant to both parties and meet the current needs.

The purpose of this is to get rid of the lasting influence of this legal belief. Predicting what will happen in the future, when formalism ends, it doesn't mean the law will become chaotic and shapeless, controlled by every whim and fancy of the individual judge as its supporters are afraid of. Instead of formalism, a new way of making decisions in court will be used to stop

judges from behaving badly and to keep the law fair. This new way might even work better than formalism. Judges will no longer try to be more disciplined and controlled by the law itself, but will instead focus on the way they do their jobs as part of the judicial process.

CONCLUSION

Natural laws and human rights laws work together shows a strong and lasting connection that goes beyond time and culture. The history of natural law as a moral and ethical idea connects with the modern discussion of human rights. This creates a common philosophical basis for acknowledging and safeguarding basic rights. This paper looks at how natural laws and human rights are connected, both in the past and today. The basic ideas that link these laws give a strong base for understanding and explaining the inherent value and rights of each person. The paper talks about how natural law and human rights can be used in real life, and the problems that come up when they come together. Although it sees the chance to improve legal ideas and how they are interpreted, it also knows that we need to be careful and think about different legal systems and cultures.

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CHAPTER 5

TENETS AND TENSIONS OF FORMALISM IN LEGAL ADJUDICATION

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ABSTRACT:
The intricate dynamics of formalism in legal adjudication, shedding light on its foundational tenets and inherent tensions within the judicial process. Focusing on the observations made by Professor Weinrib in 1988, the paper traces the historical resilience of formalism, even as it has faced repeated challenges to its existence. It delves into the contemporary landscape of legal scholarship, revealing the persistent quest for methodological refuge after the deconstruction of formalism's traditional home. The central characteristics of a formalist judge are meticulously examined, highlighting tendencies such as a preference for fitting facts into existing rules, a prioritization of form over substance, and a proclivity for proclaiming absolute rules. The paper scrutinizes the formalist judge's inclination towards certainty, a strict adherence to precedent, and a reluctance to invoke the concept of fairness in judicial reasoning. Critically, the paper addresses the tensions inherent in formalism, pointing out its potential to sacrifice a thorough examination of facts for the sake of fitting them into pre-existing rules. The reluctance to reassess rules in light of changing societal needs is also scrutinized, raising questions about the conservativeness of rule-based adjudication and its impact on justice.

KEYWORDS:

Legal Realism, Normative Constraints, Precedent, Skepticism, Strict Constructionism.

INTRODUCTION

In 1988, Professor Weinrib tried to bring back legal formalism. He noticed that formalism has been declared dead many times in the past 200 years, but it keeps coming back to life. Today, most legal experts believe that its death cannot be changed. Edward Rubin noticed that after legal scholars stopped using formal methods, they have been moving around trying to find a new way to do their research. The fact is, even though it doesn't have a good philosophical or legal basis anymore, it's still seen as part of the law by judges. So, often it is done automatically as a reaction to the choices a judge has in a case. Formalism doesn't mean the same thing to everyone. However, the word may be used in different ways, but the idea that it means making decisions based on rules is commonly understood. In this context, 'rule' means the way a rule is written - its exact wording is more important. As a result, the judge can't consider as many factors as before. Deductive reasoning is always the best choice. This short explanation may show how it works, but its main focus is the belief that law makes sense and is rational. Formalists believe that the law's meaning comes from within itself, not from outside sources. It has a clear and logical structure, which is important for understanding legal relationships. This basic belief that the law is valid on its own supports the idea that sticking to strict interpretation of the law will make sure things are clear and can be predicted. It comes before and supports the unquestioning use of rules for specific situations [1], [2].

In response to people who criticize them, supporters of formalism argue that their beliefs are respectable because they focus on rational legal analysis instead of the irrationality of political contests. "But just saying things make sense or claiming to understand something fake is not a solution. Understanding laws does not ignore ways they affect decisions and politics is not

always illogical. Formalism cannot be justified by trying to be seen as the same as legal method and analysis. All judges, whether they focus on rules or not, have to follow the rules of the court. However, it is important to understand that the adjudicative discipline is just a structure for judicial reasoning, and not something that can replace it. Legal method and analysis don't always require following a rule or precedent without thinking about whether it's fair or useful. What is needed is for the judge to carefully review the case and explain their decision clearly. The process of making decisions must be fair and based on good reasons. This limits the power of judges because they have to make decisions that are better than the ones made before. Rules that limit what a judge can do are not always clear-cut. These rules control the judge's actions without completely stopping them from making their own decisions. They also make sure the judge stays within the boundaries of legal rules and analysis. Cardozo said that people sometimes use their personal sense of justice instead of following the law. But he also said that this sense of justice can be used to help understand and make the law better [3], [4].

Some legal experts today still support formalism, even though many people don't believe in it. They present it as a stricter form of positive theory. They are suggesting that the law doesn't always provide clear and predictable outcomes because judges don't always enforce the rules. Judges are not following the law, or even their ethical duties, that they promised to uphold. This idea is like believing in a very strange theory. However, the way it is said shows how judges feel pressured to follow the law, even if the law is unclear. All judges would be happy to follow the law if it was clear and there was no doubt about whether it was the right law for the situation. My colleagues and I on the Court of Appeal in New Zealand hear about 150 civil appeals each year.

The question was not about following the law or not, but about which specific law we should follow when there are different options to choose from.

Formalism is connected to positivism. Positivism makes judges think they can solve any case by just finding and following the rules. The main idea of formalism is that decisions are made based on following the specific rules, either exactly as written or by judges sticking closely to existing rules. The idea of 'presumptive positivism' in a formal way. I disagree with Frederick Schauer's theory called 'presumptive positivism'. Schauer believes his theory is the best way to understand how rules function in modern legal systems. Many judges and lawyers might agree with him, but I think his theory is not accurate or good, so it's important to discuss it separately.

Schauer says that rules must be followed, unless they create a really unfair, not just a not-so-good, outcome when looked at from a broader view. Laws that are clearly and officially recognized as legal according to accepted standards, or similar testing of their origin, are considered to be valid. If following a rule would have bad consequences, we don't have to follow it. Presumptive positivism means that a rule can be ignored if there are very good reasons to do so, even though the rule is usually followed. This can happen if the decision-maker thinks there are strong reasons to ignore the rule, not just because the result would be better in that specific situation. Schauer explains this idea using different words, just like judges use different words to explain an important idea. Richard Fallon listed some important points in a footnote. He talked about when a rule can be ignored if there are really good reasons. He also said that a rule shouldn't be followed if there are really good reasons not to follow it [5], [6].

DISCUSSION

At first glance, it seems like Schauer's thinking follows what judges actually do when making a decision. Basically, a rule will be accepted by a judge unless there are important reasons to reject it. Sometimes, a judge might find it easier to follow a rule if they are not sure about their

decision, especially if the rule is based on past experiences and wisdom in similar situations. This description is about how a judge who follows strict rules and formalities makes decisions. Judges who like the rule may find it very powerful.

Schauer's idea of positivism is not supported by the way judges make decisions and the role they play in the legal system, as I explain in my work. First, my experience as a judge has made me reject Schauer's support for a presumption. I have seen many cases where assumptions have made the judges accept them as true even though they may not be. For instance, when interpreting laws, assumptions can sometimes be used to go against what the lawmakers intended, which is unfortunate. Legal presumptions are becoming less common or should become less common. Lord Mustill has concerns about relying on general assumptions in a legal context because they can limit the court's perspective and treat all laws and situations as if they are identical. "He says this is not fair. Rules should be based on fairness. Using common sense is better than following strict formulas, which may not fit every situation [7], [8].

Additionally, it is wrong to think that Schauer's presumptive positivism would get rid of or greatly decrease judges' ability to make their own decisions. Judges can't make their own decisions or they have to make decisions within certain rules. Therefore, the judge's freedom to make decisions may be reduced if they only follow rules without thinking about them. But the rules they follow were made by a judge's decisions in the past. If the judge doesn't just follow a strict rule, they have to use their judgment to decide if there's a rule, make a rule, and decide if there are very good reasons to change the rule. Judges must choose which criteria and considerations to use when using Schauer's formulae. Overall, it is unclear whether a judge has less discretion when they make a rule have a strong influence, compared to when they decide if a rule is useful for bringing justice or keeping the law up to date.

These observations show another complaint. The rules for deciding when a rule should be changed or removed are not clear. What things should be thought about, and are they written in the law or are they not part of the law. A judge who follows rules strictly might be confused by this and choose the rule because they aren't sure how to handle other important things or how to compare them to the rule. This criticism is weakened because the situations where a judge needs to decide if the rule should be changed are probably the same situations where positivists want to limit the judge's choice. Decisions about society, politics, and what is right or wrong come into play when it's not clear which rule should be followed. Schauer's claim may not always be true. In many cases, the rule's result may not be the same as if we directly use the rule's reason. He says that the rule will usually match its reason. Schauer is suggesting something that many judges will likely believe and add to the rule. The rule will be seen as strong, and the idea that it is fair will also be considered strong [9], [10].

These criticisms show that we need to think again about any rule that is said to apply to a specific situation without any help or burden of a preconceived idea. The rule is where the judge begins thinking, but it needs to be checked to make sure it's fair and still important. In most cases, the answer to the question will be clear right away and we won't need to spend a lot of time looking for it. However, it is important to ask the question at the beginning. An unfair or unimportant rule in the beginning will make the outcome also unfair or unimportant, or it will make the judge's decision-making process unfair when trying to make a fair and important decision from an unfair or outdated starting point. But everything that is happening now is necessary for what will happen in the future.

A brief description of the serious judge

This means that a judge who believes in formalism will show certain characteristics to some degree. It's okay to stop and make a list of the most important features. Readers can easily see

which judges have these qualities if they use this list as a guide. First, the judge will try to apply the known information to the rules and believe that they will be fair. Carefully looking at the facts is very important for making decisions, but sometimes people might ignore the facts to make them fit the law instead of making the law fit the facts. Secondly, the formalist judge prefers to focus on the rules and structure, which may result in ignoring the actual facts of the case and not delivering justice in the specific situation [11], [12].

Third, the judge won't hesitate to make strict rules. Despite the lesson of over two hundred years, some people think that the common law can be limited. The judge doesn't trust the flexibility of making decisions and wants to limit it with strict rules or principles. Laws allowing the court to do what they think is best will be limited by previous decisions. Fourthly, the formalist judge probably wants to be sure about the decisions they make, even though they might not have proof that making certain decisions will improve the law. Difficult cases, which may involve real unfairness, need to be embraced with the belief that this difficulty will lead to a clear decision. Valuing certainty as much as the Incas valued their idols is an important part of how judges think.

The fifth characteristic is when the formalist judge follows a strict rule of using previous court decisions as a guide. Lord Steyn said that formalism teaches people to have a strong respect for following previous decisions, no matter what new experiences or better reasoning might suggest. If the law makes sense, judges won't feel the need to explain why they follow it. Believing in the rules of the law, their thinking might seem rigid and too literal. To prove a specific idea, like finding a pattern in a law, we might carefully look at the exact words in different parts of the law. But it's strange to think that the people who make the laws did the same thing, or even thought about it at all. Sixth, a formalist judge will tend to make unnecessary differences between things.

The idea that we can be sure of something is proven wrong when confusion happens instead. The attention given to the difference Lord Hoffmann talked about in the MacNiven v Westmorland Investments Ltd case is concerning. It shows how people focus too much on technical details. The Ramsay principle has been harmed by this unhelpful division, causing confusion or disappointment among lawyers and judges in later cases.

Seventh, if a formalist judge has to change the law, they will likely want Parliament to make the change. Even if people don't like the law and the courts could easily change it, the judge will want to let the government decide. These judges can sometimes say that Parliament needs to deal with the problem and even suggest a specific change, but they are not allowed to do more than that. Usually, people don't give a reason for showing respect to Parliament and the political process. They just think it's not the job of the courts to directly change the law. This retiring attitude is partly because the formalist strictly follows past decisions. This means once a law is decided, they believe it can't be changed by the courts.

In eighth place, a formalist judge will only decide what is really needed to answer the question in the court case. This way of thinking will still be present even though explaining the main ideas in court would help people understand the law better. This could make the law more certain and easier to predict. Once again, it becomes something people believe in. A judge will proudly say that they believe in making minimal decisions and will stick to that even if making clear decisions could help solve future problems without going to court. Additionally, formalism can make judges less likely to consider and understand the knowledge from other areas because it focuses on looking within oneself. Studying subjects like sociology, political science, psychiatry, psychology, economics, and behavioral sciences is different from focusing on rules and traditions from the past, which is what formalism does. So, the formalist judge

does not like to review existing rules and past decisions when new information from other areas can help. They don't consider the different perspectives from other areas when making decisions about social issues in the courts.

In the tenth place, because people think the law makes sense and is consistent, they believe it's best to apply the law without considering the new and changing needs of society. People are more likely to follow a rule without questioning it, rather than thinking about why the rule exists. They think the rule is enough on its own, or even more important than the reason behind it. The formalist doesn't want to reconsider the reason for the rule, so they are not able to adapt to change. In the end, making decisions based on rules tends to be cautious. It shows that most people think things are good the way they are and that making big changes will make things worse, not better. This means that a formalist judge doesn't care much about whether the law makes sense or not, and they don't want to change the rules. I will quote Lord Steyn once more, The formal judge is expected to say that it's not the court's job to explain the law of England.

There are many examples that could be chosen to show the points made in this. I suggest looking at the decision made by the House of Lords in the Sevcon Ltd v Lucas CAB Ltd case. This case shows how formalism works, even though it's about interpreting a law. The question in that case was whether sealing a patent is a necessary part of the claim for infringement that happens after the patent is published, but before it's sealed. Section 13 of the Patents Act 1949 says that after a complete specification is published, the applicant has the same rights as if the patent had already been sealed. However, the applicant can't take legal action for infringement until the patent is sealed.

Two possible explanations were competing for the support of the judges. The reason is that when a person applies for a patent, they get the same rights and privileges as if the patent was approved. So, the problem happens when someone violates those rights. The condition only delayed the applicant's right to take action until the patent had been approved. The other side said that the right to start a case for breaking the rules depended on the patent being given to the person who applied for it. So, until the patent was officially approved, the person couldn't claim an important part of the reason to start the case. This means that the ingredient is what makes the patent claims still valid in the complete specification. The old explanation won. All the judges agreed that the reason to sue started when the copyright infringement happened, and the rule was just a technical reason for not starting the case. Everyone agreed that Sevcon Ltd had a strong case and deserved to win. The full details were released in June 1971. Lucas CAB Ltd spent ten years fighting against the Patent Act before the patent was finally approved in 1982. Using the time limit in the Limitation Act 1980, Lucas argued that Sevcon couldn't get compensation for things that happened between 1974 and 1977 because it had been too long and the law said it was too late to do anything about it. If a person who created a new invention tells everyone about it like they are supposed to, they won't be able to sue for money if someone copies their invention before they are ready to take them to court. The unfairness may seem worse because it was caused by Lucas's long opposition to the situation. After getting a patent, the person who got it was not allowed to use it. Besides choosing between these big arguments, the judges had to make other decisions too. They had to decide if taking the words of the law literally would solve the problem. They also had to figure out how a certain part of the law should be understood in relation to the rest of it. They had to think about whether the purpose of the law mattered, and if the overall plan of the law should affect their decision. They also had to think about whether they should take into account policy questions, other parts of the law, and past court decisions. They chose a strict and narrow way to do things.

The formalistic approach is clear when the words ‘the applicant shall have the same privileges and rights as if a patent for the invention had been sealed’ are given more importance than the

condition. By giving more importance to the sub-section, it was believed that the rule preventing the applicant from starting any legal action for breaking the patent until it had been officially approved could be seen as just a rule to delay starting the legal action. In other words, the reason to sue had happened, but the applicant couldn't start a lawsuit. The way the subsection was organized determined what it meant. However, many critics have pointed out that there is no reason why the clause should not be seen as taking away rights instead of just affecting how they are used.

An interpretation that gives the condition real meaning and limits the rights given to the applicant seems reasonable and possible. Certainly, a judge in the Court of Appeal had suggested that it might be a good idea to wait until a patent is approved before taking legal action for infringement. But the House of Lords did not agree with that idea, even though they could have chosen to do so. They did not choose the option that would have been fair in that situation and others like it. Why was a reasonable and fair argument rejected, even though it could have been accepted without causing any problems? The reason can only be that the formal way of doing things was so established that it was more important than trying to be fair.

In following this formal approach, the judges didn't pay much attention to the logic of the situation. They made two big mistakes in their thinking. First, we need to figure out if sealing the patent is a necessary part of the applicant or patent holder's case. We can't just look at the words in section 13 to figure this out. The meaning of that part is clear: the applicant gets the same rights as if the patent was approved, except for the right to start a lawsuit for copying until the patent is approved. So, the simple meaning of the words doesn't really give a clear answer to the question of whether the exception takes away the rights of the person applying, or if it's just a rule that makes it harder to enforce those rights. Secondly, to prove the plaintiff's case, it's necessary to mention the patent being granted. This confirms that the patent exists and that the claims the infringer is accused of breaking are still valid when the lawsuit starts. Basically, the person suing needs to prove that they have the legal right to the patent in order to show that the part of the patent that was supposedly copied still exists. That particular request is very important for the legal case.

They were also influenced by an earlier decision made by the House of Lords. In the case of General Tire & Rubber Co v Firestone Tyre and Rubber Co Ltd, the court decided that interest could be given on damages for breaking a patent, even before the patent was officially sealed. This is based on a law from 1934 that says interest can be awarded from the date when the problem started to the date of the final decision. They thought that according to section 13, the patent did not have to be sealed before the cause of action under section 3 could start. In the Sevcon case, the condition was in a different law than the Limitation Act, so it wasn't strict, but it still affected the Law Lords' thinking. They did not challenge the reasoning in the case or try to reconsider it based on fairness or relevance. Surprisingly, the choice in the General Tire case may have been fair, but using the same thinking in Sevcon was unfair. One might think that the law was created based on whatever case came first. In the General Tire case, even though the House of Lords made a decision, it did not provide clear and certain results. Sevcon was upset because they thought Lucas was slowing down the process of getting the patent approved. They also believed they couldn't take legal action against Lucas until the patent was approved. Despite this, Sevcon continued to argue their case to the House of Lords. Clearly, it or its advisors thought that their argument was strong enough to win, even though the House of Lords didn't have to follow the decision.

They also said that the argument based on another part of the Patents Act was strong. Section 59 says that if the person who is accused of copying a patent can prove that they didn't know about the patent when they copied it, they don't have to pay damages. Their Lordships'

willingness to believe the section shows they are taking a formal approach. Actually, it would be unrealistic to say that the lawmaker meant to create a way for a person to sue under section 13 because of the wording of section 59. In reality, the provisions were not planned out, they just happened. A clear connection between the rules would happen by chance because neither Parliament nor the person who wrote the law meant for it to happen. The argument is just saying that the law may have a gap, and it doesn't make sense because the gap exists regardless of when the legal action happens.

Their Lordships don't seem to be upset about the result. The General Tire case does not seem to have any problems with how the decision was made, and there doesn't seem to be any complaints about the unfairness of the outcome. They chose to use a formal way and accept the result as the outcome of the law, not of reason or logic. A judge who doesn't always follow strict rules would have looked at the problem in this case in a different way. He or she would consider the main idea of the section. Because the law made the applicant share the details of their invention, a new rule was made to protect their invention until they got the patent. Anyone who tries to copy or use the invention is taking a risk because the person who applied for the patent can ask for payment if the patent is approved. This thing fails if the person applying for the patent can't get money because there was a long delay in getting the patent. Also, when we look at the reason for this part of the section, it shows that it wasn't written to restrict the applicant's right to get money for any infringement. Parliament and the person writing the law didn't think about whether the subsection would give the applicant or patent holder the right to sue, or when it would. The subsection of the Patents Act is there to protect the applicant until they receive the patent. Realizing that taking the words in their exact meaning doesn't give us the answer we need about when a legal case starts, a judge who doesn't stick strictly to rules would look at the whole section and give the exception real meaning. It should not be limited to a procedural right only about enforcing rules.

CONCLUSION

Studying how formalism is used in legal decisions shows that there are many important rules and difficulties involved in the court process. In the paper, it is clear that formalism still exists in legal thinking, despite many people saying it's gone. This is based on Professor Weinrib's ideas from 1988. The things that make a formalist judge are a preference for following the rules, caring more about the way things are done than the actual outcome, and wanting to be sure about their decisions. These things show how formalist judges tend to follow the rules very strictly. However, the paper looks closely at the problems within formalism, showing that it can overlook important facts, resist changing rules as society changes, and prevent fair thinking in court decisions. People are unsure about changing rules to fit with the way society is changing. This makes us wonder if sticking to strict rules might not be fair for everyone. As laws change, the paper says it's important to find a balance between following rules and understanding their limits.

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CHAPTER 6

A REVIEW OF CHALLENGES POSED BY LEGAL FUNDAMENTALISM

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ABSTRACT:
The concept of legal fundamentalism, an ideology within jurisprudence that emphasizes strict adherence to legal principles and doctrines, often in an unwavering and dogmatic manner. Exploring the roots and manifestations of legal fundamentalism, the paper investigates the implications of this approach on legal systems, jurisprudential thinking, and the broader social context. The examination begins with an exploration of the historical evolution of legal fundamentalism, tracing its emergence and manifestations across different legal traditions. The paper scrutinizes the ideological foundations that underpin legal fundamentalism, emphasizing its insistence on the absolute authority of legal rules and doctrines, often at the expense of contextual considerations. Furthermore, the paper dissects the challenges posed by legal fundamentalism, both within the legal sphere and in its interaction with societal norms and values. It addresses the potential rigidity, lack of adaptability, and resistance to change that may characterize legal systems dominated by a fundamentalist approach. The impact of legal fundamentalism on judicial decision-making, legal interpretation, and the pursuit of justice is critically examined.

KEYWORDS:

Conservatism, Dogmatism, Judicial Activism, Legal Formalism, Legal Interpretation.

INTRODUCTION

The plan of the law would also be significant. Basically, the Act gives the person with the patent all the rights and control over it. These rights apply to things that happened in the past. Believing that the lawsuit doesn't start until the patent is approved fits with the plan overall. In addition, it's important to consider section 30, which says that once a patent is approved, the owner can sue for any past instances of infringement. The main reason for Letters Patent is fully acknowledged. After this is finished, it is clear that the applicant has the right to take action under section 13. Once a patent is approved, the person who applied for it can take legal action against anyone who has used it without permission in the past. They may want to do this if they have sold the rights to someone else. The judge who doesn't only focus on rules would agree that having the exclusive rights to a patent is really valuable. They would also think that section 13 of the law has a big impact for people who give away their rights before the patent is official, or for the people who receive those rights but don't become the official owners. Policy considerations need to be taken into account. It is not fair to start the time limit for taking legal action before the patent is officially approved. It goes against the principle that a person should not be forced to take legal action when they can't. It is also wrong to separate a person's right to take legal action from the actual action itself. The law about time limits for people with disabilities shows that the government wants to wait until the person is ready to take legal action. This also applies to other legal cases, where the time limit should not start until the person is ready to take action [1], [2].

A judge who doesn't follow strict rules wouldn't have been stopped from looking at the General Tire case again and deciding if it was still valid. The thinking would not be considered good

because of the same reasons as in the Sevcon case. If General Tire can't convince people, it can't force them to do anything [3], [4]. Once the way the court will make decisions is decided, it seems like a different result is going to happen for sure. The judge is happy with the result when they start following the formal rules. The judge's decision is not influenced by what is fair or right in the case, or by any other important factors. This means that the chance of feeling unhappy is not possible from the beginning. The judge who doesn't follow strict rules might feel unhappy at the beginning because it's not fair for the person suing and others in the same situation to wait too long to sue when the person causing the problem is purposely making it take longer. We will look at the sub-section as a whole without focusing on any specific part. We will consider the purpose of the provision and how it fits into the Act. We will also think about the principles and policies involved. We will also think about how certain we can be about the decision, and we will review relevant past cases. The main things to consider would be if the law is fair and if it is relevant. Overall, it is a clearly better way of doing things.

Every now and then, I have used the term "legal fundamentalists". They are very different from others. Despite trying really hard to remove it, the phrase has stayed in the text. Continuing to use it shows that judges have tried to update the law for modern times, and it may have been difficult for them. They have faced a type of legal populism that wants to stop judges from making their own decisions and makes them afraid to do what is right and change the law to fit the current needs. Legal fundamentalism wants to stop the common law from changing. This bad influence on how the law is managed and made is why we need to talk about it separately. Legal fundamentalism has no place in modern ways of deciding what is fair and just.

Legal fundamentalism means thinking about the law in a very simple and limited way. It can be compared to religious fundamentalism. It is very strict in following traditional and historical rules, and held with great passion. As an example, some people who are very strict about the law don't like anything new in the law. They stick to strict rules and always follow past decisions. They don't see that the law is uncertain, and they don't think judges should make new laws. They believe in keeping the powers of government separate, and they don't like the idea of judges being creative with the law. They believe that past decisions show the actual law. Many judges, lawyers, and legal scholars might think this way, but they are not legal extremists. Legal fundamentalists are very old-fashioned and don't seem to see both sides of the law or judicial process [5], [6].

DISCUSSION

Legal fundamentalism is a belief system where people think they have all the answers and that their beliefs are the only truth. They don't consider other points of view. The legal process must stick to its strict rules, even if they are simple and wrong. These rules support the beliefs of the legal system and punish those who don't believe in them. Completely sure that it's correct, it becomes a powerful force against change. The judge should be scolded for following Puritan beliefs that say because people are flawed, they should not be able to make their own decisions. It's okay to call these extremists fundamentalists, but it would be wrong to call them legal experts. They are not. = They aren't. Instead, some theorists who are grumpy may make it seem like legal fundamentalists are very serious, but actually, they usually come from the more conservative or far right parts of the legal profession and academia. They may feel better after reading some academic legal books, but a lot of it is misunderstood or not used correctly. Also, most of it is shortened and made easier to understand. The creed is often repeated strongly, but not everyone understands that it's a false belief. It still affects the law and courts more than it should. It keeps getting punished or payback, but it keeps getting delayed. However, judges need to carefully think about and turn down attractive offers if they want to make fair and important decisions in the legal system [7], [8]. We will only talk about three common beliefs

held by strict legal experts. The first issue is about people questioning if the judges are fair and following the rules. The second issue is about people using the term "judicial activism" in a wrong or unfair way. The third issue is about people thinking that judges should not be involved in politics.

The fairness and impartiality of the court system

Many people don't trust or like the power of the courts. Legal fundamentalists are openly hostile. This criticism is because the judges are not elected and are not held accountable for their actions. These judges, who were not chosen or held accountable, make decisions that are seen as political and go against the democratic way of governing. This idea is not fully thought out and is too simple. The idea that the judiciary is undemocratic is old and overused. It comes from the traditional view of the judiciary. Basically, it is based on not understanding how the government's power is divided and thinking that the majority can always solve problems between those in power and those who are not. This means that the government is divided into three parts: the lawmaking part, the part that carries out the laws, and the part that interprets the laws. The simple saying seems attractive, but it's really just a boring cliche.

Political experts have shown that the idea of the separation of powers isn't really as strict as it seems. In democracies like Westminster, the government's branches - legislature, executive, and judiciary - all have powers that overlap. This doesn't mean that each part of the government doesn't have an important job. The separation of powers doctrine can be simplified to a formula that recognizes its central purpose. Feeley and Rubin are saying that in the separation of powers, one part of the government can do things that belong to another part, as long as it doesn't stop that part from doing its most important jobs. Simply put, one branch should not prevent another branch from doing its job well. If this rule is broken, people won't get the benefits and help that the specific area would normally offer. When it comes to the courts, it's best to think of their independence as a very important constitutional rule, separate from the idea of separation of powers. The government's lawmakers and leaders shouldn't meddle with the courts. They need to respect their independence, not just their main job. Another way to explain this is that it's important for judges to be independent from outside influence in order to do their job well. No matter how it's said, the government needs to be very careful not to meddle in the work of the courts in order to protect their independence [9], [10].

There is no need to defend the principle of judicial independence in this case. In general, it is widely agreed that the courts have the power to make decisions that everyone has to follow, without interference from other parts of the government. Judges cannot be elected or represent any specific person or group because it would make them less independent. But the courts need to be free to make their own decisions. This is the cost that the government has to pay to follow the rules. The judges must be fair and unbiased. Being independent without being fair and unbiased is like a wild animal. Judicial independence is most valuable in a democratic society when it is used fairly and without bias or favor. The important thing is that judges can solve problems without being influenced by the people involved or their power. If judges are not fair, one side could have too much influence and control over the court and the legal system. This is a problem because it can make the justice system unfair. Legal process and judicial adjudication are important for certain cases because the strength of one party doesn't matter when deciding who is right or wrong in a dispute. The control of power and strength from outside is stopped and the possibility of that control is removed because of fair and independent judges. This idea is very different from the usual understanding of the separation of powers [11], [12].

To be clear about what makes the judiciary legitimate in a democracy, we should focus on its independence and impartiality. The judiciary does not take sides between the government and the people, or between individuals. It treats everyone equally, regardless of their power or advantages. The forum helps solve disagreements between the government and citizens, or between citizens. It involves thoughtful discussions and decision-making. Everyone is treated the same by the law. These qualities are not just decided by the judges, but are also influenced by the many rules the judiciary must follow. This rule needs to be followed using a fair and legal approach that supports and encourages those qualities.

The critics can't rely on the idea of majority rule without being questioned. Basically, they mix up having a majority in government with having a democratic government, and they think that winning elections means they have the support of the people. They would take away the basic rules of democracy. I admit that pointing out the problems with elected government doesn't fix the problems with the courts. But that's not important.

The main idea is that relying on majority rule in government hides some important issues, like the fact that he didn't reveal his connection to a charity when he was supposed to. The House of Lords cancelled the previous decision on January 15 and sent the matter to another committee for a new hearing. The judges canceled the unfair trial because they said that Lord Hoffmann was not allowed to hear the appeal. Based on the information in the court decisions, it's hard to understand why Lord Hoffmann decided to be a judge in the first trial, or why he didn't tell the lawyers about his connection to Amnesty International Charity. This goes against the rules for judges to remain fair and unbiased. These attacks are based on theories. However, there is no question that several factors can disrupt the idea that representative government truly represents the will of the people. The first thing I want to talk about is how some groups and special interests have too much control over the political process. Start with the results of the vote. Money is important. Having power or being in charge of the media is important. Special interest groups try to convince the government to make laws or take action that benefits them. Sometimes they are successful even if most people don't want it. Agreements are often made that may not hold up when people vote. Simply put, party discipline can mean that a few politicians, with the backing of powerful but unknown government officials, make policy decisions.

Secondly, the power of the leader and the problems with the systems meant to make sure the leader is accountable to the elected group are important to talk about. People have been wondering how well government ministers are held accountable for their actions. In modern Parliaments, other ways have been introduced to help with this, but they don't always ensure that the government is responsible for all the decisions they make. The way the public service is currently organized makes it harder for the government to do its job properly. Overall, high-ranking officials who are not elected have a lot of power in starting, creating and controlling government policies. Sometimes they can also stop policies from happening.

Thirdly, when we look at what the majority of people want, we also need to think about what smaller groups want. Unless a small political party has a lot of influence in the government, minorities usually don't have much political power. People's interests are not always well represented and sometimes it feels like their efforts are not effective. Simple appeals for fairness in politics do not fix the problems that minorities face. It's not fair to say the "will of the people" if it leaves out minority groups. These groups are often big and can use fairness to argue for their rights. The majority's decision is not always what everyone wants, and the people's will is not always considered fully unless everyone's opinions are included. This kind of decision can only be made after a lot of people talk about it, without being influenced by the media or other powerful forces. People also need to be willing to give up some of their own

wants in order to make a compromise. However, it's risky to talk about it and people may struggle to work together and find a solution because they are focused on their own interests. The legal fundamentalists are actually talking about what most people want.

I want to emphasize that the problems with representative government are not as bad as people make them out to be. We should accept that even though our government may not be perfect, it still answers to the people. Voters are in charge of picking who will be in charge of the government. Governments should work to explain and support their decisions and plans during election campaigns to avoid losing the election. It's not completely right to say that this broad responsibility is only looking back and judging. During a government's time in office, they need to make smart decisions and not make mistakes to stay in power. This acknowledgment does not take away from the fact that many government decisions are too small, unimportant, and affect too few people to interest voters. One main problem can lead to weak and unsupported policies. The desire to reject other parties running for government may be stronger than wanting to hold the government accountable for their policies. However, the most important thing is that a democratic government is responsible to the people who vote in the elections.

The problems when turning what the people want into laws and policies are important because they affect how legitimate the court system is. The problems with representative government make people not trust democracy. The people have chosen their leaders to make decisions for them, but they are worried that the leaders will use their power in the wrong way. This concern is easy to see because many democratic countries have chosen to have a written constitution. The people want their democracy to work with a set of rules that will prevent their representatives from abusing the power given to them by the majority. Countries like the United Kingdom and New Zealand don't have a complete written constitution, but they still follow certain rules and customs that act like a constitution. These rules help control the power of the government. Both countries have made laws to protect people's rights. A democratic government needs to be responsible and fair, follow the rules of the constitution, and protect people's rights. Once people qualify, it's important to have someone else to make sure that the democracy continues to be fair and inclusive.

The court system is just as important to democracy as the rules in the constitution. Right away, we can see that the courts are an important part of democracy. The judiciary is a group of people who make sure the laws are followed in a fair way in a country with democratic rules. It is a part of how the government works and is important in a democratic system. Along with other officials who were not elected, it is one of the important institutions in a democracy. In a democracy, disagreements are bound to happen, and the courts are there to help solve them fairly and without taking sides, no matter who has more power or advantage. Describing the role of the courts like this makes it seem like they have the support of the people and are definitely a part of democracy. I think what legal fundamentalists are really worried about is not whether the courts are fair, but whether they have too much freedom to make their own decisions within the rules. In simple terms, they don't like when judges make up new laws or get too involved in making decisions. Basically, they are upset that the courts are making decisions on issues that they think should be decided by the government. Therefore, the complaint is about how much or how severe something is. The problem is not that the courts or the judges are wrong, but that some judges make decisions that are too extreme. They will not stay within the limits of what the critic thinks is the proper role for judges. Different people have different views on what is considered too much or just right for judges to do. It would be silly to say that only the court decisions legal experts and critics agree with are right. They have different opinions on what is right and wrong in the law. Legitimacy would change and be

different for everyone. The question of what is acceptable or not depends on people's opinions, but this doesn't mean its right to challenge the fairness of the judiciary in a democracy. That phrase is borrowed to help make the argument for creative judging.

The judge's values

Connected to this very conservative idea of the role of judges is the legal fundamentalist's dislike of judges putting their own beliefs on the community? People keep asking: what makes a judge's values better than other people's values. Some people see judges as a special group of people, almost like kings or heroes, who think they are very important. Only judges who strongly believe in following strict rules are safe from the angry criticism of the fundamentalists. But even these judges have their own strong beliefs and values just like the more progressive judges do. Surprisingly, despite being friendly and outgoing in the past, I have never met a judge who thinks that their values are better than the values of other people when making decisions in court. Many people feel it is important to understand and think about the values of the community from the heart. But using the language of legal fundamentalists doesn't address the real problem. The main comparison is not between the values of judges and the values of others in the community. Instead, it is about the values that can be judged in court and the ones that cannot.

When people bring their problems to court, they are not giving up control to the personal beliefs of the judges. They are bringing their problem to be resolved. It's possible that judges' personal beliefs will influence how they make decisions. But it's important to remember that judges work within a specific process, and that process is really important. I've acknowledged before that the legal process isn't perfect, but it's still a thoughtful and reflective way of making decisions. These thinking and reflecting skills can be seen in many ways. The way the court system is set up makes it easier for people to have careful discussions. In the beginning, all the important details are made very clear. These details are used as the reason for an appeal, in which arguments are also looked at very carefully. As the case goes through higher courts, the problems are looked at in more detail, and everything about the issue is talked about and thought about in the courtroom. Lawyers work very hard to make sure they don't miss anything. The judges are still talking in their meeting room, and if they need to, they can get more help with research from their clerks.

Moreover, in general, the legal process is not stingy with time, especially compared to other processes. Court procedures are made to cover everything. Making sure that everyone gets a fair chance to be heard is very important in the system. It is even more important than being quick or efficient. The slow process allows for thinking, which is important when making decisions at the appellate level. Thinking and considering different ideas is really important when trying to find a balance between different opinions and values. Once again, judges know they are not perfect, but they have lots of training and experience before becoming a judge. They continue to learn and gain experience while they are judges. They are pretty smart as a group. Education, knowledge, and smartness help judges make fair decisions by weighing different factors and reaching logical conclusions. Judges may not always agree on the outcome, but they are still very skilled at their job. We also need to consider how judges make decisions and follow rules to control and guide them. The courts work in a system that is mostly not affected by the pressures and conflicts that affect the making of laws. Differences in power and advantage don't matter in court. They might affect the laws that are made, but they don't affect what happens in the courtroom. Even the most ordinary person can stand up to the biggest company and still have the same rights under the law. I talked about being fair and not taking sides. I will try to make sure the result is based on facts and not influenced by personal feelings. I want to say again that I'm not saying the legal process is perfect. Not at all. The process has

problems because it is controlled by people. However, there are reasons why my argument is valid. It is not right for strict believers in the law to argue against judges using their own values when making decisions, and then question the legitimacy of the court just because their values are not better than anyone else's. The argument doesn't make sense. People who are involved in a lawsuit don't rely on the judges' personal beliefs. They rely on a fair and neutral process, which may have some flaws, but is thoughtful and fair. This process is made specifically to reduce the impact of the decision-maker's personal beliefs.

CONCLUSION

Studying legal fundamentalism shows that it has a complex way of thinking. We need to look at it carefully in the field of law. The paper talked about how the law has changed over time, the beliefs it is based on, the problems it faces, and the effects it has. Legal fundamentalism can make the law seem clear and certain, but it can cause problems when society's beliefs and rules change. Rigidly sticking to the rules without considering the specific situations makes it hard for the legal system to adapt and respond. Legal fundamentalism could create problems because it might make laws too strict and not able to change when needed. It might also stop laws from evolving when necessary. This strict following of set rules may make it hard for the courts to deal with new legal problems and adjust to changing values in society. This could stop the fair treatment of people. Furthermore, legal fundamentalism has effects outside of the courtroom, such as on legal education, research, and the overall discussion about the rule of law. Balancing the need for clear laws with the need to adapt to changes in society is important when interpreting the law.

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CHAPTER 7

EXPLORES THE ORIGINS AND EVOLUTION OF CONSERVATIVE ACTIVISM

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ABSTRACT:
The phenomenon of conservative activism, examining its dynamics, impact, and broader societal implications. Conservative activism, characterized by efforts to uphold traditional values and resist social and political change, has become a prominent force in various spheres, including politics, law, and culture. The paper explores the origins and evolution of conservative activism, tracing its roots in different regions and its intersections with political ideologies. The examination encompasses the strategies and tactics employed by conservative activists to influence public opinion, shape policy agendas, and impact legal frameworks. It dissects the role of conservative activism in shaping political landscapes, particularly its influence on electoral politics and the formulation of public policies. The paper also investigates the engagement of conservative activists in legal battles, analyzing their impact on judicial appointments, legislative initiatives, and landmark legal decisions. Furthermore, the societal implications of conservative activism are scrutinized, considering its influence on issues such as reproductive rights, LGBTQ+ rights, immigration policies, and racial justice. The paper explores the tensions arising from the clash between conservative activism and progressive social movements, shedding light on the broader cultural and ideological divides within contemporary societies.

KEYWORDS:

Conservative, Constitutionalism, Interpretation, Judicial Philosophy, Legal Tradition, Originalism.

INTRODUCTION

Legal fundamentalists often see the legitimacy of the courts as very important, but they may not understand or ignore other important factors that also make the courts legitimate in a democratic society. First of all, these critics don't understand how the rules that control the judicial system can have a big impact. We don't need to repeat those arguments right now. But together and individually, they help to show how the judicial system does its job. Critics often don't realize how much judge's care about what the public thinks. Once again, I will talk about this topic. I will use the example from Feeley and Rubin to show how judges react to things. In a study by Feeley and Rubin, they found that prison administrators in the United States did not care about or try to represent the wishes of the people. Certainly, some people claimed their freedom. Prisons were run by officials appointed by someone chosen by the people. However, the thin thread didn't stop prisons, especially in the South, from being isolated and ignored by most people and their representatives. The prisons had some independence in making political decisions. Feeley and Rubin discovered that the courts used and depended on what most people think. They thought that if people saw what prison was really like, especially the "plantation model prisons", they would be disgusted and ask for changes. The writers think the judges were right to assume that once people paid attention to the prisons, the bad things like abusing prisoners, not giving them medical help, only feeding them bread and water, and using other prisoners as guards, couldn't continue. Feeley and Rubin did a thorough study that shows how the courts and the community work together. It shows how judges follow the values of the

community and make sure the law always matches these values. Also, people who criticize the democratic authority of the court don't consider enough the idea that Parliament is the highest authority in democracies like the one in Westminster. This doctrine says that Parliament has the power to change or reverse anything that the courts have decided.

The Parliament has the highest power in making laws. This is because of its history, the rules of the constitution, and the basic legal principles. This means that the Parliament has the final say in making decisions every day. In a Westminster-style democracy, if it seems like the judiciary is gaining more power than the legislature, Parliament might take action to change that. In addition, it's a real threat that Parliament might try to show its power in this way. Judges know they have to follow the rules in the Constitution. If they make a decision that goes against the rules, the legislature can change it. The chance of being responsible in making decisions is something to consider [1], [2].

Finally, people who strictly follow the law cannot understand that the courts also have a role in making political decisions. Politics is the responsibility of the government and maybe the leader. When the courts get involved in politics, some people say that they lose their authority. The court's job is a bit like politics, but it doesn't ruin its fairness. I will talk about this more later. But first, let's talk about what people call 'judicial activism'. Judicial activism means when judges make big decisions based on their own opinions instead of just following the law. A curious professor wanted to find out what an 'activist judge' is. Everyone around him used the term. He had used it many times, pretending to show disapproval with a turn of his lip. Where should I begin? He looked at Stephen, who is great. In his book about the law, Stephen said that if someone could save a person from drowning but doesn't do anything, it's not against the law. The curious student wanted to test this theory and try to discover more about the judge who is active in making decisions [3], [4].

However, it is important to note that a lot of this thinking comes from the United States and the ongoing discussion about how much power the Supreme Court has in interpreting and applying the Constitution of the United States. When the Supreme Court cancels a law that goes against the rights and freedoms in the Constitution, it means there are no more questions about that law. Unhappy people have to go through a hard process to change the constitution. In countries like the United Kingdom and New Zealand, the courts don't have as much power, so their decisions may not be the final decision.

The question asked to the courts and the government is usually different. Explaining that the first question is about laws and the second question is more general shows the main difference. But this difference is often ignored or misunderstood. Examples of when a law is said to be unfair show the idea clearly.

The courts will decide if the law is unfair to some people or groups. The legislature will probably talk about a lot of things, not just discrimination. Only people who strongly oppose judges making decisions based on their personal beliefs would argue that the question of whether a law is discriminatory should be decided by politicians.

Of course, the public discussion should be influenced by any decision made by the courts. And we would expect it to be. A good teamwork between the lawmakers and the judges, where each one focuses on the things they are best at, can happen. The courts can decide if a basic right is being violated, but this doesn't stop the government from making new laws. People who don't like "judicial activism" shouldn't be allowed to mix up or confuse the two questions as if they're the same for all places as they are in the United States. Logical thinking requires a careful analysis and a clear understanding of the phrase 'judicial activism' instead of just a gut feeling of disliking how much power the courts have. The phrase is often used to argue against what

courts do, which is creating laws and policies. We have noticed that these tasks are necessary and allowed by law. Callin judges "activists" for doing their job of making laws and policies is just silly. The supporters of this idea need [5], [6].

In simpler terms, the people who support this idea need to understand that they are talking about judges who they think are making too many laws or decisions instead of letting Parliament do it. Therefore, it depends on how much. In simple words, these critics want the judges to be more cautious and not make too many decisions. Repeatedly mentioning this discipline doesn't give us a clear idea of what judicial activism means. All judges agree to be careful in making decisions, but they have different ideas about how careful they should be. Once again, it depends on how much. Clichés about the importance of judges being careful don't help us figure out how careful they should be. Once we understand that judicial activism can vary in how much it is used, we can see that it is the user's opinion on how judges should do their job. Legal fundamentalists prefer a traditional and strict approach, while others prefer a more open-minded and flexible approach. This preference shows a liking for traditional and conservative values. So, when we look closely, the phrase "judicial activism" actually challenges those values. The judges or courts that the label has been given to are thought to have gone too far from the established rules or what most people think is right.

Supporters of the phrase are simply saying that a conservative approach to managing and improving the law should be accepted as legitimate. They want to call a more open-minded or creative way of doing things "judicial activism" so that it seems like it's not a normal or accepted way of judging cases. However, as already shown, judges who think liberally and creatively play an important role in the legal system and still respect the law. Trying to say that approach is illegitimate is not a good idea for legal experts to consider. This means that it's not fair to call conservative judges "judicial pessimists" just because they have different ideas. The phrase "judicial activism" lets people avoid talking about how they think judges are doing their job. Their beliefs may be hidden behind the label. They don't have to explain why they prefer the conservative approach over one that focuses more on justice and the needs of the community. The label shows their beliefs, and as already mentioned, their beliefs don't need a reasoned defense.

Lord Denning

Legal fundamentalists believe that Lord Denning is the perfect example of a judge who makes a lot of decisions based on his own beliefs rather than just following the law. He definitely wanted to make sure that the law was fair in this case and that it kept up with the times. Lord Denning believed that every unfair decision reflects badly on the law and the judge who made it. He confidently followed the principles of fairness and decency that represent justice for English-speaking people, as described by Justice Frankfurter.

Interestingly, people both admire and dislike Lord Denning. He is respected for his great contribution to the development of the law, but his ideas about the law are not valued. People think he is really important and has greatly improved the law in the last fifty years. However, many judges, lawyers, and academics do not openly use Lord Denning's approach. Judges who admit his important contribution refuse to follow the same path that led to it. Lawyers respect him, but they don't like his approach and keep talking about past cases to the tired judge. Teachers will praise his way of practicing law to their students, but then laugh quietly about his love for the good parts and 'fairness'. The lawyers seem to really like the man and his work, but at the same time, they are very stuck in their ways and think they are better than others. It seems like it's better to be part of the priesthood and follow its rituals than to fight for justice and modernity in the law.

The real legal fundamentalists don't have this problem. They just don't want to admit that Lord Denning's approach is acceptable. He liked to change the law and that's all there is to it. It doesn't matter that without Lord Denning's contributions, the law would not be as good and the community would be worse off because of it. Ideology does not allow for any compromise. Of course, there is no doubt that Lord Denning should be seen as a forward-thinking judge. However, although he would have liked to be called this, he didn't seem interested in being called an activist judge.

He did not care about the label. A judge knows that the law is always changing because society is always changing. So, the judge will make sure to update the law to keep up with these changes. This idea about how judges should do their job means they need to be creative and not just follow the rules like a robot. Lord Denning thinks if judges don't do this, they don't deserve to be paid.

Yes, Lord Denning not only cared about unfairness, but he also had the ability to come up with a solution that most people would agree with, even if not right away. Not being happy with the current law is one thing, but being able to come up with a new idea for what to do next is something else. This ability was what made Lord Denning really good. His real bravery was not in rejecting old ideas, but in coming up with new ones that people would follow and eventually become the law. If this means Lord Denning is a judge who is actively involved in making decisions, then that's okay [7], [8].

Despite his creative ideas and forward-thinking attitude, Lord Denning doesn't quite fit the idea of how a judge should act or think in this situation. Nonetheless, his strengths and contributions to the law shouldn't be overlooked. He didn't seem to have a clear idea about the law and how it relates to justice, and he didn't understand the role of judges. He also didn't follow the proper methods and rules for being a judge. A top judge who is very good at making new laws might talk about the reasons behind his beliefs. Definitely, Lord Denning briefly thought about the idea of 'a new fairness'. He once said that laws are built on important basic ideas and that judges should follow these ideas instead of just following past cases. But no one was able to prove the beliefs that he taught and followed so closely. Lord Denning was not as clever as Holmes or Cardozo.

To prove that agreeing with the theory of judging in this would not result in a lot of judges acting just like Lord Denning, we can look at how Cardozo approached judging. Certainly, the two had a lot in common. Both said that facts are important for deciding a case. They used a lot of literary and stylistic techniques to explain their reasons. Sometimes they used too many fancy words and even exaggerated. Then, Denning and Cardozo were open to changing their opinions based on previous decisions. They both knew that judges make laws and didn't believe that the law always has a clear answer. They didn't want to separate how the law currently is from how it should be. They agreed that the law should be fair and meet the needs of today.

In a lot of cases, these alike traits made it hard to see the very different ideas about how to make decisions. Brady Coleman says that Denning's Christian faith had a big impact on him. He thought that being a good person and following the right religion would lead to fairness and honesty, instead of arguments and discussions or studying and thinking. He believed that God would make things fair according to what the good people in the community think is right. In the end, Coleman found that Denning was a judge who focused on the present instead of looking to the future or the past. He did not think about social policies or legal goals in a practical or purposeful way. He didn't think about the rules and traditions that came before. Instead, he thought about things and made decisions based on what he thought was fair. His religious beliefs strongly shaped his idea of what was right and wrong. His faith also guided

how he saw the moral and cultural values of his society. Basically, Denning's approach was like that of a lawyer who believes in natural law. Often, he believed so strongly in what he thought was right that he didn't consider both sides of the situation in a practical way in order to come to a more controlled decision [9], [10].

Cardozo, however, was mainly a practical person. He thought that the legal ideas of common law are based on practicality. Its truth is not always true and can change depending on the situation. He knew a lot about pragmatism and often used quotes from William James's lectures on pragmatism to support his opinions about making judgments. Cardozo also believed in facing reality. He was affected by the American Realist Movement and also had a big impact on it. He disagreed with Denning on legal decisions based on Christian values and preferred to reject precedent if it conflicted with his personal beliefs.

DISCUSSION

In the first 50 years of the 1900s, the conservative Supreme Court canceled laws that were meant to help workers and make sure people had enough money to live on. During the Lochner era, the Court said laws that limited how long people could work were not allowed. They said these laws were against the rights of employers and workers to make agreements. The Court got involved because it thought the government was getting too involved in the economy. Liberals didn't like this interference and argued that judges should be fair and impartial, and not influenced by specific goals or politics. Conservatives and liberals both want the courts to be careful when they don't have power over them. They say they want to stop the courts from getting involved in what the people want.

The conservative Court kept making President Franklin D. unhappy Roosevelt tried to change things to help people. The President prevented a fight between the government and the courts by choosing new judges who have more liberal views when the older, more conservative judges stepped down. But the liberal view of the law became stronger and reached its highest point during Justice Earl Warren's time. After that Judge died, there were fewer judges and now the court is very conservative. This Court has not changed all the important decisions from before. Brown v Board of Education and Roe v Wade are important and long-lasting decisions that have stayed mostly the same even though there have been some small changes made to them. It is not said that the recent cutback doesn't match with what most people want. Another question is whether it still has the same important values as the law. However, regardless of these questions, the Rehnquist Court has made a lot of changes through judicial review. Some people think this makes it the most active court in the history of common law. The main idea is that if it's wrong for liberal judges to use their power to make decisions, it's also wrong for conservative judges to do the same. What is fair for one group should also be fair for the other group. Many judges still like to pretend that the judicial process is not influenced by politics. Some politicians think that only Parliament can make laws, and they also believe that the judiciary should not be involved in politics. They might even support the judge's make-believe. Legal fundamentalists forcefully assert their beliefs. However, it is clear that the job of judges sometimes includes a political aspect. It may not be like regular politics, but it still has to do with politics. When judges do their job and make decisions, they have to decide what they think is right. This affects not just the people involved in the case, but also the whole community. Yes, judges have always been seen as having a role in making laws because of their political influence. I already said they aren't like lawmakers, but they still have to be involved in politics because they are part of the government's third branch, the judiciary [11], [12].

The idea that the legal system is connected to politics is not new. In the middle of the last century, US realists showed the political side of how judges work. Political experts and society

researchers have also proven that the judiciary plays a role in politics. In the 1980s, when studying the justice system in the United States, political scientists started looking more at how people actually behaved instead of just following the rules. They began to see judges as important political figures. People who say that the judicial process isn't influenced by politics are wrong. This is shown by how people who know about it can guess the result of a case just by knowing who is on the court. John Braithwaite says that having a lot of rules causes judges to argue and disagree, which makes the law more predictable in some ways. If you know which judges will be deciding the case, you can be pretty sure about what the outcome will be. He talks about David Robertson's study of the House of Lords' decisions in favor. In a study of House of Lords decisions, it was found that over 90% of tax and criminal cases and more than 80% of public, constitutional, and civil cases could be predicted correctly by knowing just one fact about the case. The important thing was which judges would be in charge of the case.

I can tell how a court case will turn out based on how the judges are feeling. I know this from my own experience. For a long time, before the court case started, I would read the judgment and the lawyers' arguments. Then, I would meet with my judge's assistant in the morning and try to guess the outcome of the case that was going to be heard that day. I would predict if the decision would be agreed on by everyone or if most people would agree, and how many would agree. I remember, and my clerks also remember, that my predictions turned out to be very accurate.

Other than looking at what we can see, there are many things that show that the judiciary is always connected to politics. As I mentioned before, most judges believe that their decisions are based on their own beliefs and opinions about what is important. When a judge has to pick between different things that are important, they are doing a political job. The choice could impact government rules, showing that politics is involved. Of course, how much politics is involved will depend on the specific situation. An appeal about the meaning of a word or phrase in patent law might not need a judgment about what is right or wrong. But an appeal about discrimination, like about whether same-sex marriages are valid, will definitely need a judgment about what is right or wrong.

Another important way that the courts act in a 'political' way is by considering the effects of their decisions. The current willingness of the courts to consider the effects of a decision was partly stopped by being too strict and is still affected by that way of thinking. The law is meant to help society, so judges often consider how their decisions will affect the society as a whole, not just the specific case they are dealing with. It is unavoidable that they will adjust their thoughts accordingly. Generally, judges today focus on the future and sometimes make decisions based on their political beliefs rather than just the facts of the case. In modern times, courts have to make tough decisions about social, political, and economic issues. They have to think carefully, make laws, and consider the consequences of their choices. These are important parts of their job. Many laws, like those for welfare, are written in broad and unclear terms. This leaves it up to the court to decide how to make the laws work. Laws for business activities may leave it up to the courts to decide how to make the general rules in the law work in specific situations. The courts try to make laws work. If needed, they will fill in gaps in laws to help the government's goals. The passing of the law is clearly based on politics, and making that law work means that the judges who support it also have some political involvement, but not as much.

Next, the court plays a key role in checking that government and administrative actions are legal and making sure citizens follow the law. This role is always influenced by politics. The review of laws by the courts can affect how public policies are made and put into action, even if it is done carefully. The courts can stop the government or executive from doing something

if they think it's against the law, doesn't make sense, or is unfair. Judicial review means that the courts have a lot of power in politics. It is necessary to make sure that the government's actions are legal, fair, and sensible. It cannot be any other way.

One big reason that shows a connection between politics and the courts is the focus on human and civil rights because of laws or rules set by the government. A constitution or bill of rights makes courts get involved in politics. Sometimes the courts have to explain laws in a way that respects basic rights and freedoms. They might also decide that a law goes against those rights and freedoms, even if most people support it. The kind of question asked and the things we need to think about to make a decision have a strong connection to politics. Certainly, people can and sometimes do use the process for political reasons. Groups and people will start a process to support their cause. Their reason will be known to everyone and their goal or reason will mostly be about politics. "Legal actions that aim to protect basic rights and freedoms need the courts to be involved in a process that is connected to politics.

Furthermore, the fact that the judicial process is becoming more decentralized and inevitable has an impact on the political aspect of the judiciary. Fuller emphasized that court cases involve many different interests. These interests can be very complicated and go beyond just the immediate interests of the people involved in the case. These broader interests and the number of people interested in them might be hard to understand.

The court's decision will most likely be important for everyone involved, not just the people in the courtroom. Dealing with issues about the environment, competition law, and consumer rights are good examples of this complex process. Sometimes, people who are fighting for their cause can't get a fair decision through normal politics. Once again, it is clear that this lawsuit is all about politics.

The way politics influence the judicial process can be shown in many other ways. There's no use pretending otherwise. The judiciary being 'political' doesn't mean it's the same as the government's law-making branch, or that it doesn't have to follow the law. Judges act differently than politicians. They follow different rules and have different limitations. The rules and limits that prevent and control wrongful decisions in the court system also help to limit political influence on the legal process. Judges are still involved in politics and have a political job, but they are separate from the normal politicians and do their job in a different way.

CONCLUSION

Studying conservative activism shows that it has a big impact on politics, laws, and society. This paper looked at how conservative activism works and the effects it has. It acknowledges that conservative activism is based on keeping traditional values and stopping society from changing. Conservative activists use different strategies like getting regular people involved and using the law to try to change people's opinions and affect the decisions that are made. Conservative activism can change how elections are run, who gets chosen for the courts, and what laws are passed. This can have a big effect on how the government works and what rules are made. As conservatives get involved in different social issues, conflicts arise, especially in areas like abortion rights, LGBTQ+ rights, immigration laws, and racial equality. The fight between traditional activists and modern movements shows the differences in ideas and culture that still exist in today's societies.

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CHAPTER 8

ANALYZING THE IDOLATRY OF CERTAINTY: A REVIEW

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ABSTRACT:
The concept of the idolatry of certainty, a cognitive and ideological phenomenon characterized by an unwavering attachment to absolute certainty in belief systems. The examination explores the roots and manifestations of this phenomenon across various disciplines, including philosophy, religion, science, and societal discourse. The analysis begins by tracing the historical and philosophical foundations of the idolatry of certainty, acknowledging its presence in different cultural and intellectual contexts. The paper scrutinizes how the pursuit of absolute certainty can lead to intellectual rigidity, stifling the openness to alternative perspectives and hindering the advancement of knowledge. Furthermore, the examination encompasses the societal implications of the idolatry of certainty, particularly in the realms of politics, public discourse, and decision-making. The paper scrutinizes how the rejection of uncertainty may contribute to polarization, hinder constructive dialogue, and impede the development of adaptable and inclusive social frameworks.

KEYWORDS:

Ambiguity, Indeterminacy, Judicial Discretion, Legal Uncertainty, Normative Complexity.

INTRODUCTION

Philosophers, humanists, and sociologists all agree that the everyday world we live in is always uncertain. However, we want to be sure. We believe certainty keeps us safe from superstitious beliefs, unfair judgments, and not knowing things. Being sure means not having any problems. Our want to be sure makes us ignore the fact that our social life is always changing and unpredictable. When we make mistakes, we like to pretend that we are certain about things. We don't want to hear that we can't draw lines and refuse to move beyond them, as Rohinton Mistry says. It's no surprise that the law, as a part of society, shows this desire for sureness. In a world full of doubt, it gives us hope that there will be truth and stability, even if it's not the most important thing in society. The law is just as unpredictable as the society it comes from and still follows.

The law is uncertain because the world is uncertain. Laws have always been unclear and will always be unclear. This not knowing is what is really happening. Cardozo understood this fact 80 years ago. Stop and listen to the wise judge's description of how he felt when he first started working as a judge. He felt confused and lost, but eventually, he found his way. I wanted to be sure. I felt unhappy and disappointed when I realized that trying to achieve it was pointless. I wanted to find a place with clear and fair rules and justice. I realized that true happiness is always out of reach, beyond our grasp. Over the years, I have thought a lot about how the court system works. I have learned to accept that there will always be uncertainty and I see it as a part of the process. I have learned that the highest level of the process is not about finding something, but making something. Doubts and fears are part of the difficult process of changing our thoughts and ideas, where old ideas die and new ones are born. However, many people in the legal community still don't understand Cardozo's perceived truth. Many smart people still believe that the law is definite, even though it's a mystery how they can think that way. For more than 200 years, people have worked hard to make the law clearer, but instead, it has

become more confusing. Still, many believe this idea without questioning it. In the end, making sure things are clear and definite is seen as the most important thing in decision-making. It is the most important factor in making decisions for many courts. Many judges, lawyers, and academics still worship it with blind and superstitious admiration [1], [2].

Therefore, in the legal field, people always want clear rules and instructions. They constantly look for set ways of doing things that will limit the judge's freedom to make decisions and minimize the need for them to be creative. It is clearly strong. How can we convince smart people that once a rule is decided, it should be automatically applied to similar cases in the future without needing to explain why? This means the rule should continue without considering the social or moral reasons for it in the first place. Although some conservative judges have doubted the strict use of precedent, it still has strong support because it creates more certainty in the law [3], [4].

An investigation into where this need for certainty comes from will help us understand it better. A goal is only valid if it makes sense in a logical way. Also, if the belief that is proven to be valid is not supported by the doctrine of precedent, sticking to that doctrine cannot be explained. During the investigation, we will also consider whether focusing on principles could help us be more certain about the outcome. Certainly, individuals want to understand their current situation so they can plan for the future. Business people really want their lawyer to tell them what the law is, without any uncertainty or guesses. Good advice might make people feel better about paying the fee. Many people think that a good legal system should be predictable. This idea is supported by lawyers and commentators who have a simple view of the law and legal process.

People expect that there are clear and predictable laws that apply to different situations. This expectation comes from centuries of legal theories and the stubbornness of some people in the legal profession who still hold on to old ideas about the law. As a result, people in the community still think they can be certain and predict things, even though it's clearly impossible. I'm not saying that being able to predict things is not important, but it's not realistic to pretend that the law is definite or can be predicted accurately.

The law is not exact like a science, so we can never be completely sure about it. But we can make it more certain by considering different factors, one of which is how well established the law is.

It is clear that there is uncertainty when we try to simplify something complex. Simplifying things from the big picture to the small details requires the judge to use their judgment. Furthermore, the way people used to think about this process as applying a general idea to a specific situation is too simple and not exactly right. The main idea has become lost among many details, some of which do not agree with each other. Sometimes judges claim to be very certain about the law when they give their reasons for a decision. Usually, people don't talk about the consideration in practice. A judge will disagree with a reasonable idea because it's believed that agreeing with it could create confusion in the law. He or she has a strong feeling that it is better to follow the rules and examples as closely as possible rather than directly question whether the law is fair and relevant to today's conditions. This means that sometimes people assume a general rule or idea applies to a situation, even if it might not be fair or right for that specific case. Besides the chance of unfairness in this situation, what will happen if the judge does not make a decision? A specific choice just changes or adds conditions to the general rule. It becomes more specific, and each specific thing can cause arguments about whether the rule applies. Certainty is hard to find and it's even harder to predict what will happen. For the sake of this discussion, we can agree that if we treat all similar things the same way, we can

predict how they will behave. But when the category is defined so specifically that people argue about whether a particular case fits into it, it's hard to apply the rule to a new situation because it's not clear if it qualifies [5], [6].

Some famous legal experts believe that certainty is not real and is just a made-up idea. Jeremy Bentham thought that the law is similar to astrology. If someone wanted to know what the law says, he warned that it's just as accurate to ask an astrologer for a cheap price as it is to ask a lawyer for a lot of money. The advice might be more powerful now because of high inflation and increasing legal fees since the respected judge's time. Professor Unger, a top scholar in the Critical Legal Studies Movement, says that the law is very hard to figure out. Many modern scholars also agree and say that the law is often unclear, so it's not always clear what the law requires.

If Judge Learned Hand is right, the common law grows slowly over time, like a coral reef, getting bigger and bigger. In this view, every new case that explains or expands on a previous decision would make the law more clear and certain. But that's not the case. The law getting bigger doesn't always make it clearer. I have used a different comparison to explain certainty or uncertainty in the law before. Picture a round shape. The law that has been decided is inside the circle. Like the sun being blocked out, there are doubts and uncertainty around the edge. This happens when many things become one thing, or when one thing clashes with another. As more cases are resolved, the group gets bigger. The circle of settled law gets bigger. However, the boundary of unclear rules also changes.

While metaphors may be tempting to use, we know deep down that they are not completely true. Both the rules inside the reef and the ones within the circle can be questioned and changed. In some parts of law, the existing rules may get more complicated, but in other parts, the basic ideas are still uncertain. Contract is a type of agreement. Who can say for sure that thinking about a promise is needed before it can be enforced? Or who can say without doubt that a third party can't sue someone over a contract. Can anyone say for sure that the law in England, Australia, and New Zealand won't start to accept the idea of good faith, like a lot of other places do. Who can say with confidence that the traditional laws about contracts and wrongdoing are not starting to change to a broader idea of responsibility based on general obligations? Who can stop the possibility that new areas of the law, like fiduciary obligations, constructive trusts, or other fairness principles, won't change these long-standing parts of the law? Who can predict that the combination of law and fairness won't lead to a different way of fixing legal problems, and mess with what we already know. With so many traditional legal ideas out there, it's doubtful that there's a lot of certain law that can't be challenged [7], [8].

This is why I say that the law is unclear or not definite. It seems that no law is so certain that it can't be questioned. Rules can change depending on how they are understood in different situations. Life often presents situations that require us to review and update the law so that it is fair and applicable to current needs. The law is always uncertain because it can be challenged and sometimes those challenges are successful. Certainly, there may be some rules that are mostly agreed upon at a certain time. But, overall, the law is uncertain because it can be disputed in many different ways.

DISCUSSION

Some people think that the law would be clearer if judges followed the rules and past decisions more strictly. Legal fundamentalists call this alleged failure a lack of 'intellectual rigor'. The idea is not true. From what we have seen, it's easier to understand the good and fairness of a specific situation and guess what will happen, than it is to guess what the law will say. Professor Atiyah believes that it can be easier to predict decisions made by choice rather than decisions

based on rules. This means that it is often simpler to understand what is fair in a situation rather than what the law says. In simple terms, judges can make decisions based on their own sense of justice and what the community needs, without being too strict about following rules or past decisions. In reality, it's easier to predict how people feel and what they think.

However, some people believe that even though the law can be uncertain, the current system is more predictable than a system where rules and precedent are not strictly followed. I think the new judicial approach could be reached without losing predictability in the law. It might even make the law more certain than it is now.

The main reasons can be easily summarized here. First, disagreements and uncertainties about which of two competing options will be chosen must go away if it is known that the court will definitely use a general rule instead of the specific rules. Secondly, there is often an argument about whether a previous decision prevents a claim or defense. However, it's important to know that previous decisions do not always have to be followed. Third, Professor Atiyah said that it is often easier to guess how someone will use their judgment than to guess the answer to a legal question.

The strengths and fairness of the case will become more important. Fourth, although judges will still have their differences, focusing on limits and introducing structured constraints could help them find more common ground within stricter boundaries. In simple terms, the conflicts in the strict approach that cause uncertainty, like the ongoing conflicts between rules and the real situation, between past decisions and basic ideas, between being sure and being fair, and so on, will mostly go away. The current uncertainty, which is not helpful, would be greatly reduced [9], [10].

In the end, there's a lot more on the line than just finding a balance between being sure and being fair. The legal system should be practical and real. It is important that the law makes sense and can change to fit the needs of the community as they change. The results show that the best way to achieve these goals is by using practical thinking and following principles, rather than following past decisions. Many things make it uncertain even though the courts follow a strict rule from previous cases. The things that are known to cause uncertainty are mentioned first. The first thing is about the details of the case. Discovering the truth is a really difficult task. The legal process of finding the facts is full of uncertainty. It will be easier to talk about this more. In summary, it's not common for the facts of one case to be exactly like the facts of another case. Judges have many options to choose from. They can decide if the facts are similar enough to use a previous rule. They can also decide to use the rule even if the facts are a little different. They can also say the facts are too different to use the same rule. They can also ignore the differences and use the same rule. They can change the facts to make the rule apply more or less. They can also say they can't find the right facts to support the rule. They can also decide not to use the precedent for other reasons even if the facts are the same.

The fact that the parties disagree about the facts can make it hard to make a decision. But not everyone understands how much of a problem this can be. We don't know which law will be used until we find out all the facts. Even if the court hears the case again, the new opinion might just hide a different understanding of the situation or a secret change in the facts that were found. So, when deciding a disagreement, the facts are usually very important and the court's decision on the facts is often very important too. However, the judge does not always have all the facts readily available. They need to be checked, understood, found, and compared from a lot of evidence, sometimes not well organized. This question is also part of a process where the judge can choose which facts to use or not use. Despite trying to find the truth, we still have to make choices.

Defining the legal problem is not clear

A legal dispute may happen if the judge's decision does not solve the problem. One party or both will argue that their claims are backed by a rule or example from the past. They will use several sources to support their argument. The judge has to decide between the different legal arguments. The judge's decision will depend on their personal views about the role of the judge in making judgments, and whether they follow strict rules or prefer a more flexible approach. Once we figure out the problem, we still might not know the answer right away. Just because one court talks about a problem in one way doesn't mean another court will talk about it in the same way. The other court could be a higher court that reviews the same case on appeal, or it could be a different court that looks at the issue in a new case [11], [12].

The unknowingness of the ratio

Once all the information is clear and the legal problem is defined, the judge needs to figure out the main reason behind any previous decisions. This reason is important because the judge may have to follow it based on the rules of precedent and stare decisis. The exercise is very hard and uncertain again.

The comparison can be really hard to see. It's possible that the previous situation never really had a clear reason. There could be several ratios, possibly as many as the number of judges giving different judgments. Also, it is not guaranteed that the later judge will agree with the reasoning even if the ratio is clearly stated. He or she might choose to explain the main reason for the decision in the previous case in a slightly different way. The problem of figuring out which rule to use is made worse when there are many different rules to choose from and the court has to decide which one to follow. At last, a great rule that the court decided could be made less important if it's called an orbiter dictum. Overall, it must be recognized that the idea of ratio decidendi is very controversial.

Exceptions being unsure

Another reason for uncertainty comes from the law's habit of making rules very strict. Lord Devlin said we need basic rules for regular situations that can be changed if needed for special cases. 'Exceptional circumstances' happen when we need to make things fair for a specific case or change the rule to fit new situations. An exception is when the rule is changed for a special reason. Certainly, Lord Devlin was incorrect in seeing the situation as only applying to unusual situations. Usually, it's just the situation that comes after the current one. However, some rules have been challenged by exceptions, some are weakened by exceptions, and some end up becoming so common that the exception becomes the rule. We can't be sure if the judge will follow the rule, make an exception, or say that the exception is actually the rule. One thing we know for sure is that if someone has a good reason, they will argue that their situation is special and should be an exception to the rule. The confusion about what others are doing in different places.

Many other reasons make it hard to predict what the law will be. For instance, because there are many strong and diverse legal systems, it is certain that different trends in the law will emerge. The way judges think and feel about things will not be the same in every country. While it's good to look at decisions from other countries, it also makes things more uncertain. In the past, judges in countries like New Zealand used to always follow decisions made in the United Kingdom. But now, it's unclear if they will still do that, or if they will start to prefer decisions made in newer common law jurisdictions. The second thing may show a different way of doing things.

The uncertainty arising from an abundance of riches

One more thing to consider is that there is uncertainty in the law. With the understanding that no one country has all the answers when it comes to law, we are looking at many different countries to learn from their legal systems. In addition, people are rejecting the differences between common law and civil law more and more. As a result, the large number of both reported and unreported decisions that lawyers can use as examples makes it difficult to follow the rules of precedent and stare decisis. The beliefs may be too difficult to put into action. However, as the number of cases increases, uncertainty also increases because it is impossible to be sure that every relevant case has been found until the search is complete. Also, it's possible that a strong decision could be made weaker if careful lawyers find a different decision that wasn't mentioned in court. Important court cases will eventually be replaced or distinguished, but the total number of court cases is definitely increasing. The problem with the rapid increase in easily available case law is that important principles could be hidden and forgotten, and the overall understanding of the law could be lost in a large number of specific details. Some reasons why people are unsure or don't know what will happen next.

There are other reasons why the law can be uncertain. The first problem is that language is not always clear, and we may have trouble understanding it. Everything we know is shaped by words, but they are not always precise in expressing a specific idea. Professor Endicott says that language uncertainty is everywhere and difficult to change. That being said, I want to warn against pushing the uncertainty of language too much. We are not in a situation where languages are not controlled. Although language can be confusing at times, it usually conveys meaning accurately. We can acknowledge that language is often uncertain and vague in the law without saying it causes chaos.

The importance of reaching a final decision in court cases

Another reason for uncertainty in the law is that the courts feel forced to make a decision, which can be difficult. Disputes need to stop for the benefit of everyone in the community. Making a final decision in a court case is very important for the legal system, and it's something that is special to the legal system. The government can delay or make unclear a complicated problem. Administrators may ignore a problem and choose not to deal with it. Both may lie and delay making a decision. Judges cannot choose those very generous options. They have to make a decision in this case whether they like it or not. Dworkin believes that when a court gives a clear decision, it shows that the law is also clear and definite. It gives a reason to say no to uncertainty. He argues that if the law is unclear on an issue, we must consider what that means and how it will affect things. However, Endicott has said that the need to make a decision does not prove that the law's requirements are clear and definite. Having a responsibility to make a decision doesn't mean there's only one right decision. None of the people involved in the court case will automatically benefit just because the court has to make a decision.

Once again, I think we should be more practical in our evaluation. Dworkin thinks that the need for final decisions in court actually creates more uncertainty. The judge might not really feel sure about the decision, but feels like they have to say it in a clear way. Comments made during a meeting after a court hearing, saying that the decision could go either way, are usually not mentioned in the final decision of the case. I am not saying the need for final decisions should be ignored. Instead, I am saying that this rule makes a legal atmosphere where there is no room for appearing unsure. The judge must decide whether they believe something or not, they can't just say it's uncertain and leave it at that. Once the judge has decided, they must explain why they made that decision so that everyone agrees it's the right solution to the problem.

This method can be seen in two ways, both of which actually make things more uncertain. First, the judge will probably use deductive reasoning to explain their decision as a strong interpretation of the law. He or she will try to prove that the decision they make comes from a rule. However, as mentioned before, the decision will change or limit that rule. Secondly, the judge wants to make sure that the decision they make will be respected by everyone. So, they will look at similar past decisions to support their choice. As mentioned before, doing this creates doubt. Following the rules means that every part of a principle can be questioned, even if the specific case seems fair. The judge tries to make a decision that will be final, but this process creates more and more uncertainty as more cases have to be looked at again or interpreted in a different way.

CONCLUSION

Studying how people worship being sure about things shows it's a complicated idea that goes across different fields like philosophy, religion, science and how we talk to each other in society. This paper has looked at the history and effects of valuing being absolutely sure about things, and how it can affect how we think and act in society. Being too sure about everything may feel safe, but it can make you close-minded and stubborn. The paper has studied how this thing can stop people from being open to different perspectives, slow down the growth of knowledge, and make society more divided. The widespread belief that being sure about everything is really important has a big impact on society. It affects politics, public conversations, and how choices are made. Refusing to accept uncertainty can stop people from having helpful conversations and make it harder to create inclusive social systems that can change and grow. Recognizing these results, the conclusion suggests that we should change our attitudes towards being certain, and instead be more open-minded and thoughtful in how we think and talk about things in society.

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CHAPTER 9

EXAMINING THE STATUS OF JUSTICE: A REVIEW STUDY

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ABSTRACT:
The multifaceted and evolving concept of the status of justice, examining its dynamic nature across legal, societal, and philosophical dimensions. Through a comprehensive analysis, the paper explores the current state of justice, addressing its manifestations, challenges, and implications in contemporary contexts. The examination begins with an exploration of the legal status of justice, encompassing the effectiveness and accessibility of legal systems, the protection of individual rights, and the application of just laws. The paper scrutinizes global and regional perspectives, considering the disparities in legal frameworks and their impact on the realization of justice. Moving beyond the legal realm, the analysis extends to the societal status of justice, investigating its presence in social structures, institutional practices, and public discourse. This section explores issues of equity, inclusivity, and the challenges faced by marginalized communities in their pursuit of justice.

KEYWORDS:

Equality, Fairness, Impartiality, Judicial Independence, Legal System, Law.

INTRODUCTION

I believe the third reason for uncertainty is not being sure if the legal system will make fair decisions. Lawyers believe that similar cases should be treated in the same way. Fairness happens when that rule is used in each situation. A judge will deny a proposition that seems reasonable because they think it goes against an important rule. Judges feel that it's better to follow the rules and precedents closely rather than deal directly with whether the law is fair or relevant to today's situation. In other words, people may assume that a rule or principle doesn't apply to a specific situation if it seems to go against the usual way things are done, even if it's fair or just [1], [2].

Justice is supposed to be served in a larger system, not just in individual cases. It means following the rules of the system to be fair to everyone. Basically, people think that sometimes it's okay to ignore what's fair in one situation in order to follow a general idea of fairness. And then, they believe that following the general idea will make things fair in the specific situation. Treating things that are similar in the same way is a basic idea in this view. Justice depends on how the concept is carried out, not on the specific details of each case. Also important to this belief is a positive view of the idea that we can be sure about the law. Similar things cannot be treated the same if the current law is not clear enough to make the comparison.

This way of thinking about justice is very empty and doesn't help much. It is actually a way to be unfair. First, it is basically not possible. Naturally, if someone is in the same situation as someone else and they don't get the same good result, they will feel upset. Treating similar things in a similar way is a good thing to think about. As I mentioned before, the situations in each case are usually not the same. Life and business are very complicated, and cases can often be distinguished because they are different. The legal system deals with many different facts and situations. It's not okay to only compare the facts of cases to decide if they are similar. Other things like changes in the law can also affect the comparison. Also, it's really difficult to be absolutely certain that someone has been treated the same as someone else in the past

according to the law. There will always be debate about how the first 'like' was actually handled [3], [4]. The idea of systemic justice is flawed because it assumes that justice comes from the law itself, instead of from somewhere else. This is the second most important thing to remember. The decision made by a judge in the past is the decision they thought was fair at the time. It's not right to say that a decision is fair just because it was made in the past, even if it would be seen as unfair now. The idea is clearly silly when it is explained. A good idea of justice should show the values of the community, not just follow rules. It shouldn't be based on old traditions or a formal system. However, some judges will always prefer to consider the overall concept of justice, while others will focus on ensuring justice for a specific case. The second one will not be willing to give up fairness to make the law apply consistently. They will think the sacrifice is not real and just an excuse, hidden behind formal-sounding reasoning.

Seeking fairness in a way that is not specific or practical does not guarantee a clear result. No matter how many times we believe that the idea of fairness is more important than fairness in a particular situation, people will still go to court to fix a problem they feel is unfair. Someone who doesn't know much about the law and has a problem or feels upset, thinks the law should help them. Belief is based on the values of the community, which also shape the law. That person talks to a lawyer who will understand and support starting a lawsuit if it goes against the same beliefs. In these situations, the party hopes the law will help them, which is what the community expects too. The law is rich and diverse, so it is very likely that a strong argument to support the claim will be made soon. Certainly, a strong argument will be met with a strong counter-argument. The parties may have different opinions on the facts and the law related to the facts. At that time, even if the highest authority says the law doesn't give a solution, the law is still unclear.

Therefore, judges who believe in systemic justice have two specific problems in their approach. The first reason is that they believe trying to correct the specific problems people have faced with justice can be stopped by continuing to have a system of justice that is not focused on real issues. Many years of trying shows that this idea is not possible and not smart. Justice that serves a bigger purpose may be seen as unfair if it doesn't match what the community thinks is fair for a specific situation. The second problem is that judges who want to be fair to everyone may forget to focus on being fair in individual cases, even when it wouldn't affect fairness in general. In trying to do what they think is right, they stop caring about unfairness and suffering. Justice, which means giving every person what they deserve, is ignored in the courthouse [5], [6].

DISCUSSION

The uncertainty in the law because of the factors mentioned has a few bad results, the two most important of which we'll briefly talk about. The first point is that people are still fooled into thinking that they can be certain and predict the future, even though it's clearly impossible. This trick is harming the way the law works and its honesty. It's better for the community to know how uncertain the law can be, and for people to understand that the law is not always clear. This means they will know what to expect from the law and how it works in real life. The difference between what people expect from the law and what the law actually does will become smaller.

The second problem is that the formalist judge may use the goal of certainty as an excuse to avoid making difficult decisions using their judgment. As we already mentioned, the true freedom of making legal decisions is not allowed, and judges are forced to follow a strict and limited process that doesn't take into account all the different aspects of the law. Formalism loves having reasons like this. In this process, we cannot avoid making decisions in court. So,

the judge has to decide which previous cases to follow if there are more than one. In that situation, they need to pick the important facts. They might say a fact doesn't matter, even though the previous judge thought it was very important, or the other way around. They can either make a big problem seem small or make a small problem seem big in court. Then they have to pick the important facts in the current case and compare them to the facts of the previous case. This involves making choices again. They have to pick which ratio is correct and prove why they think so based on the previous decision. They need to decide how much and in what way the ratio they found applies to the case they are thinking about. Judges will understand the meaning of precedents by looking at them in later cases. It is hard to predict how they will use them [7], [8].

Mentioning how the past case facts are important brings up another way in which following past decisions can make things more certain. As I mentioned before, the details of cases that people argue about are hardly ever the same, and never exactly the same. The realistic school of thought was the first to say that no two cases are exactly the same. There will always be some variation in the many facts in the different cases. However, we won't know which rules will be relevant until we figure out the facts. Even if the case is reviewed by a higher court, the court's interpretation of the law might just make it harder to see that there is actually a different understanding of the facts, or a sneakily changed decision about the facts. In reality, if judges want to find a difference in the facts of the current case from the facts of the previous case, it is usually easy for them to do so. Carefully looking at the facts is not needed to achieve that simple goal. Certainly, the problem is that a judge who wants to separate a difficult previous decision will try very hard to find a difference in the details of two cases and may end up twisting the facts of one or both cases in the process. The doubt in a process that starts with looking at the facts is easy to see.

Thirdly, we need to deal with the uncertainty that comes from using past decisions as a guide, either because we feel forced to or because we're used to it. One person said that judges have a natural habit of using the law for political purposes. However, judges have also been honest and open. Lord Reid said that following precedent too strictly has caused confusion and made courts use weak reasons to differentiate decisions they don't like. Sir Anthony Mason agrees with this statement. Creating different categories in this way has made it hard to know if a court will stick to its past decisions in a specific situation. As expected, Lord Denning has shown extreme honesty. He says it may be difficult to change, but there are always ways to fix a decision that is wrong. It can be recognized by finding a small difference in the details or the law, which, even though small, will be useful. Another way is to criticize or challenge the reasoning in the previous case. For example, by saying it wasn't needed for the decision, it was stated too broadly, or the judges may not have considered cases like this. Or, Lord Denning says that one can change a past decision by saying that things have changed because equity and law are now combined [9], [10].

To some degree, all judges use these tricks, especially those who tend to follow strict rules. The judge might not realize they're being indulgent, because they're focused on their legal method. Or, they might intentionally be indulgent to try to convince others that their reasoning is valid. One frustrating technique is for a judge to 'explain' what another judge meant, especially when the explaining judge may be trying to change what the earlier judge said in order to pretend to follow it. In general, judicial reasoning can be flexible, which adds some uncertainty to the doctrine of precedent. This uncertainty becomes even stronger when the doctrine is stricter. No previous decision can avoid the fake parts of a system that forces judges to accept decisions they don't like and not question them too much.

The doctrine also makes it unclear because every part of a principle can be questioned, even if it's fair or needed in today's world. The person suing will ask for a solution, or the person being sued will argue they aren't responsible, based on past cases. But it seems like they should lose based on what's fair and makes sense. The person being accused may disagree with the person making the accusation and say it goes against a rule or previous cases that support their argument. He or she or their lawyers argue in court that the previous legal decisions should be followed, even if they don't agree with them. They believe the court has a duty to do this. A better understanding of how precedent works in real life would make that assumption very uncertain. If the defendant didn't have such high hopes for the precedent doctrine, the case might not have gone to court.

Fifth, we should not forget about the increasing uncertainty of past events in the computer age that I mentioned earlier. It's possible that the instability has been increasing even before the computer age, and the age has only made it worse. Cardozo noticed that there are a lot of court cases, which would surprise Malthus. He said: "There are many people in the group who are not able to do things well and need help. Many court decisions are being made, and it seems like using past decisions as examples is becoming less important, while looking for a guiding principle is becoming more important. This judge may have been talking about his own court or he might have just been hopeful. In the past few years, we have learned that he was too optimistic. However, if computers cause us to rely less on past experiences and more on new ideas, then technology will have given humanity a very good thing. Simply put, the belief that the law only changes when courts don't follow a previous decision, or find a way around it, is not realistic. Laws can change a lot if a new court has a different way of thinking about their job than the old court did, even without attacking previous decisions. The same idea is just used in a different way. Big changes like this happen when the judges in a court change and the new judges have different opinions. Compare the decisions made by the Court of Appeal in New Zealand about administrative law when Sir Robin Cooke was the President, with the decisions made when his successor, Sir Ivor Richardson, was the President. The 'Cooke Court' in New Zealand made a lot of rules about how the government can do things. Some people thought they were too involved in checking up on the government. A few years later, people were starting to question if the Richardson Court was still doing a good job at keeping its traditional role as a supervisor. The main rules or laws had not been openly changed. The Court had changed because different people were on it, so they started doing things differently. The rules or principles were being used in a more careful way. So, the uncertainty in the law is not just about if previous decisions will be followed. It can also be about how the court's new members will change the direction of decisions [11], [12].

Surety as an important factor

Once we stop thinking that certainty is the most important thing in making decisions, we can start to consider it as an important factor, but only in certain cases. I understand that it's not very important to call certainty a 'goal' of judging if it's seen in this more limited way. A label doesn't do anything. I like to call it a "consideration" instead, to compare how certainty should work with the way judges are being questioned. I believe that when making a decision, we should think about how it will affect the community and its ability to stay organized. This should be decided based on each situation, rather than making a general rule for all cases. Certainly, we must pay attention to the specific situation at hand.

People who try to make sure all the decisions in court are certain are not helping the law. Imagine if we were completely sure about everything, then fairness to each person would be lost. Also, the law would not be able to keep up with the needs and wants of the community. The law would ignore fairness and not be helpful to society. Sureness is not a perfect thing,

like fairness is a perfect thing. This is not a valid reason, because social benefit is a valid reason. Instead, it is an idea made to help with these goals. The reason for it is to make things fair and meet the community's needs. Therefore, it is a very important thing to think about when applying the law. However, it needs to be shown that it is important and can be used in the specific situation. Assigning this specific role certainty prevents it from becoming too important in the judicial process, but still allows the law to be useful when it can be shown to be helpful.

The court must decide if certainty is important in a specific case. It will stop being a silent saying. Judges must explain why they believe certainty is important in this case, or why the law needs a specific decision to be certain. The first thing to ask is whether the current law is clear and decided. If we are not sure about the law, we cannot make the law seem certain by pretending it is not in doubt. So, if important people like judges, lawyers, or scholars are really unhappy with a decision, then we shouldn't think of it as final. Being sure about the decision shouldn't be the most important thing.

Sometimes, it might not be enough for the law to be clear or mostly clear in a certain situation. The person suing needs to prove that they and others in the community have used and followed the law as they thought it was. If they haven't, then saying that the law should be applied because it will make things certain and predictable isn't as strong of an argument. In these cases, the court can pay more attention to making a fair decision and making sure it fits with what is needed now.

The type of law that everyone thinks is already decided will also be important to think about. If the law is about things you own and contracts, the court will be less likely to change it if it could hurt those things. It's important that the law doesn't change in a way that could take away people's rights, especially in business deals. In some situations, the law has been the same for a long time, so it is better to let Parliament make the change. This course will talk about and go into more detail about important things to think about.

There could be other things about the situation that are important to decide if being sure about something is the most important thing. It is important to understand that the issue would not be resolved even if it is decided that certainty is an important factor. We still need to do a balancing exercise to figure out if that factor is more important than other things, like whether the case is fair or if the law is relevant today. The main thing is that the problem will be openly talked about in the decision, and the discussion will likely show the real reason for the judges' decision. Please rephrase the following text into simpler language: Original text: "The new legislation aims to promote economic growth and development by providing tax incentives to small businesses. The new law helps small businesses by giving them tax breaks to help them grow and do better in the economy.

Sadly, there are some judges and lawyers who deserve to be criticized. They seem to really care about what has happened before. With strong belief, they use past cases to show the law. People think that the past can tell us what will happen in the future. Staying true to what came before is the right thing to do. Do judges and lawyers have small minds when they stick to past decisions, even when it's silly to do so? It's not right to value consistency over making a smart choice?

The judges, lawyers, and some academics who believe that the common law should be kept the same as it has always been are affecting the way the law is administered. People often use old ideas to solve modern problems. The law is held back by old ideas and can't keep up with the fast changes in the world. Certainly, understanding history is important, but we shouldn't make it out to be more than it is - just learning from the past. Roscoe Pound has really said that.

Please simplify this text for me. Laws can backfire when people think they have all the answers and make unchangeable rules. When judges only look at past cases and don't consider the values of the community, the law doesn't improve much. Even when the law changes, it may happen without many people noticing, because it appears to follow previous rules. The change might not be noticed or might be made to seem less important by the people who make decisions in the legal system. Certainty, stability, and continuity in the law are supposedly achieved because the formal presentation of changes in the law does not allow for any further changes or the amount of change. It is said that the result has been taken from previous examples. As a result, the legal record becomes hard to understand. As mentioned before, new ideas in the law are being ignored because people are too focused on following the rules exactly. At least, the need to be creative to make sure each person is treated fairly and to update the law to meet modern needs is wasted on trying to find reasons to reject arguments or justify decisions within the current rule-based system. When a judge who follows strict rules makes decisions, they usually follow the idea: "Don't do anything new. " If the rules don't apply to a situation, don't do anything. In this way, the past has a bad impact. It doesn't matter that the judges didn't think about this when they made the law for the first time. It also doesn't matter if the question hasn't been brought to the courts before by chance. There is no law that can be used. So, if we never try something new, it can be unfair in some cases and stop progress in general. When judges are set in their ways, it can spread and affect others.

The judge who only follows old rules without thinking about the overall law system, does not understand how the law works. The judge sees the law at a specific time, based on past decisions that were made. No previous decision can show the changing law as it is supposed to be or as it will be in the next case. The judge is limited by a narrow and unchanging view of the law.

CONCLUSION

In conclusion, we need to understand justice in a complete way, thinking about how it connects to different areas like the law, society, and philosophy. We need to keep talking and working together to solve problems, include everyone, and make the world fairer for everyone. In the paper, we talk about different ideas about fairness and how it is defined and used, and we also think about where these ideas come from. It talks about the conflict between following the strict rules of the law and the idea of fairness in sharing resources, making things right, and treating people equally in society. In addition, the paper looks at modern problems with fairness, like unfair treatment for some people, violations of people's rights, and how new technology affects our laws. It looks at how international groups, governments, and regular people affect justice worldwide.

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CHAPTER 10

STRIKING A BALANCE: RETHINKING THE DOCTRINE OF PRECEDENT IN LEGAL ADJUDICATION

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ABSTRACT:
The argument underscores the limitations imposed on judges with a precedent-oriented perspective, restricting their ability to ensure justice in individual cases and adapt the law to evolving societal needs. Conversely, the narrative champion's judges free from the constraints of precedent, emphasizing their capacity to embody community values and translate abstract notions of justice into practical applications. The exploration further dissects the English doctrine of precedent, notably with the coercive element of stare decisis, contrasting it with more flexible systems rooted in Roman law. The coercive nature of precedent is critiqued, advocating for a departure from its 'rulish' character, especially within the common law tradition. The text challenges traditional justifications for strict adherence to precedent, including stability, reliance, and legitimacy. Stability is interrogated as a rationale, questioning whether it leads to justice or merely perpetuates the status quo.

The reliance argument is probed, acknowledging its importance while emphasizing the need for certainty and genuine reliance. The legitimacy claim, tying precedent to parliamentary authority, is refuted, highlighting the evolving role of judges in shaping the law.

KEYWORDS:

Court, Decision, Judgment, Judicial, Justice, Legal Process, Litigation.

INTRODUCTION

Another way to make this point is to admit that following precedent too strictly limits judges' freedom to make their own decisions. Judges who always follow previous decisions don't have the independence to make sure that the current case is fair or that the law changes to meet society's needs. On the other hand, judges who are not strictly limited by past decisions can try to make sure that the community's sense of fairness and justice is reflected in their rulings. Judges try their hardest to turn the idea of fairness into their decision when they are deciding a specific case. By not sticking too closely to past decisions, they can do important work. This is important for making sure people trust and respect the law. A lot of people talk a lot about how great justice is. Individual justice is seen as an important idea in common law. It's wrong to use the law to prevent justice in a specific case. Judges can't help solve community problems if they always have to deal with old cases. The ideas of fairness and importance that are involved must be what people think about now. In simple words, the argument for following past decisions seems very strong. Precedent doesn't always work the same way and it is not used in the same way everywhere. Laws are different depending on where you are and who is in charge. Following previous decisions is important to make sure similar cases are treated the same. But there are times when it's ok to make exceptions. The English rule of precedent, along with its idea of following past decisions, fits with this same belief. It has a strong element that is unique to English law. Precedent has to be followed. Decided cases are considered as law and rules, and must be followed unless they are different or cannot be separated. I believe we need to get rid of the strict rules and regulations that come with the doctrine of precedent. On the other hand, in legal systems based on Roman law, precedent is a more flexible idea. In France, a

judge doesn't have to follow the decision of another court in the past. The judge will look at recent decisions about the issue. The idea is that the decisions made by courts only become a source of law when they are repeated and consistent on a particular issue [1], [2].

In common law, the idea of following precedent is based on the theory of stare decisis. This means that judges usually have to make decisions based on previous court rulings. Law Dictionary explains the saying follow past decisions and not change things that are already set. However, the accepted latitude for the reference to 'established' law has been denied. Parke B showed the classical idea of precedent in 1833, which emphasizes rejecting something. Our common law system involves using the rules and legal principles from past court decisions to decide new cases. We need to apply these rules to all cases, even if we don't think they are the best, in order to have consistency and certainty in the legal system. We can't just ignore these rules because we don't like them [3], [4].

It would be nice to say that this way of thinking is no longer popular. This claim is like a story Mark Twain told when people thought he was dead. He said, "The reports of my death are greatly exaggerated. There is a similar idea in an article by Justice Kenneth Hayne of the High Court of Australia.

The Judge believes that following previous court decisions is important in making fair judgments according to the law. A judge should not change the law based on their personal thoughts, especially in new cases. Yes, a judge cannot change the law however they want, but when there is a disagreement about the law, the judge has to interpret it as best as they can. Judges often have different opinions and use past decisions to support their views.

So, it would be an exaggeration to say that judges, lawyers, and academics are not still attracted to the classical idea of stare decisis. It keeps building a strong position of power in the field of law. Before I start looking at that, I want to say again that I don't oppose using previous decisions as a guide. As we have seen, all legal systems have a system of precedent. Looking at past cases is important and useful. Sometimes we have to follow the same decision or legal rule from before. It would be wrong not to do that in many situations. Old and respected ways that courts have made decisions can show how wise the court is as a lasting institution. Furthermore, the common law changes slowly and relies on past decisions to make new ones. I do not want to get rid of previous examples or decisions. Instead, I want to show the difference between what we think should happen and what actually happens, and suggest that we take it easy on forcing people to follow a certain belief, especially the way it makes us think. Many people have explained the different reasons why we should follow precedent. Lawyers know the importance of making sure that the law is stable and predictable, protecting people who rely on past legal decisions, keeping the law fair and making sure the courts work well [5], [6].

DISCUSSION

Stability is the main reason for the doctrine of precedent. By getting rid of differences in the legal system, people believe that it will make the law more certain and predictable. People will also think the law is stable and not likely to change. People can plan and use their money and things with assurance. You can trust the law to help solve problems without going to court. Making sure that business transactions are certain and can be predicted is very important. Saying that decisions are overruled a lot is like saying adjudications are only good for one specific day and train.

Without a doubt, many situations exist where people depend on previous court rulings. People decide to use their resources based on the belief that the current laws will stay the same. They believe that the courts will support their actions. People want things to stay the same, not just

in their own lives, but also in the government and society. However, the importance of staying steady cannot replace the need to be adaptable. Change is inevitable, and laws need to change too to make sure they are serving the community. The law cannot stay the same. As Dean Pound said: "Laws must change, but they cannot stay the same [7], [8].

It is clear that following previous decisions for the sake of stability is important because of the value of treating everyone equally. Treating people in similar situations the same way is the idea that like cases should be treated alike. The idea includes many good thoughts. Consistency and sameness are the basis of the idea. Fairness is important, so if someone is treated unfairly compared to others in a similar situation, they can complain about it. But using the idea of precedent to support the norm of equality has a big mistake. If two similar cases are not treated the same, then it's not clear which one is wrong according to the principle. It could be the beginning or the end. This rule goes even further and says that the latter case will be wrong. This idea is probably not appealing to most people, except those who are very committed to following established laws and precedents.

Again, as I mentioned before, the rule that similar cases should be treated similarly doesn't explain what makes cases 'similar'. Common thinking looks for how the facts are alike. But we can't just assume that the 'similarity' must only be based on the facts. Before we can say that the requirement to treat things equally has been broken, it's not enough for just the facts to be the same. The community's rules and expectations, as well as the changes in other laws and outside influences, all need to be consistent. If any of these things change, it's not wrong if the second case is handled differently than the first. Yes, it may not be fair to treat the two cases in the same way just because the facts are the same when the community's view of the facts and the importance of such facts have changed. These different ways of seeing things and different beliefs are just as important to one person in the case as the similar facts are to the other person. Jerome Frank, who is a judge and writer in the United States, wants us to think that a rule created by a judge represents a court's previous opinion on policy. He asks why a court's decision on a policy cannot be changed by that same court. Why should the policy stay the same? Why should the court's power to make a policy be used up by making a mistake? Frank thinks that sticking to a rule that is unfair is itself a policy of being unfair [9], [10].

Openness and honesty are needed before moving on to a different subject, and Frank is the best person to provide it. This top judge realist noticed that people generally follow old decisions because it's just what they're used to. He agreed that it's probably true that people and society often resist change in every part of life. He said that there is a strong physical and mental reason for not liking change. Using a comparison, Frank says that people don't always choose a new path, even if it's faster and better, instead of their usual one. If a familiar path isn't bad, people are afraid to try a new one because they don't know what might happen. He wants to know if it's best to be very careful when going past places where many people have already been. Frank thinks fear may be why people follow what others have done before. We can't say that giving in to human behavior helps to create stability or is a good basis for setting rules that are followed.

However, we still believe it's important for the law to stay the same as much as possible. So, it's important to consider stability when trying to find the right balance for each individual.

Another reason for following precedent is to keep society and political systems stable. According to this idea, it is believed that change will always happen over time, even for important principles and laws. Certainly, the idea of change, or the constant possibility of change, is what makes the doctrine of precedent valuable. The doctrine gives a community that is always changing a feeling of safety. Feeling safe is important for keeping society stable and

orderly. The conservative view says that even if the doctrine doesn't really make the law certain, what's more important is the belief that it makes the system stable. People believe they know their place in society, and this makes society stronger.

The reason for still following a strict set of rules from the past is more just talk than actual truth. People know and expect that the law will change to keep up with the times. Moreover, it is not a good idea to try to keep society stable based on a false claim. Some people might feel safe believing in this idea, but it's just like a security blanket from when you were a kid. As you grow up, you should let go of this belief. Overall, there is no reason to believe that a practical and principled approach would cause problems in the community.

It didn't cause problems in the past when judges required a reason for their decisions, and it doesn't cause problems today when judges have a lot of power given by the people's representatives. Reliance means depending on or trusting in something or someone [11], [12].

Another important reason to stick to precedent and follow past decisions is to protect existing property and contract rights. In fact, using a reliance interest, stare decisis has been referred to as a property rule. Citizens, especially people in business, make deals based on the existing court decisions. If the law is not followed, it could hurt the rights and safety of those deals.

The reliance argument for sticking to past decisions is sometimes seen as a moral duty to remain faithful to those who have trusted in those decisions or in the system of following past rulings. David Lyons has said that when a decision sets a precedent, it should be followed in similar cases because it shows a promise to make future decisions in the same way. This means that the commitment doesn't come from a general rule to continue as before. but instead, the promise to continue as usual is why we have to do it. This argument is very attractive and hard to ignore. A court that changes its mind from what it usually does can make people who were following its old decisions feel like they were let down. This supports the strict doctrine of precedent, but it also raises a question. People trust previous decisions because of stare decisis, which means we should stick with them to keep faith.

Without following previous examples, there is no reason to feel wronged if a later decision changes a previous rule. In simpler terms, the only reason the original decision should be a moral commitment to decide similar cases the same way in the future is because of the doctrine of precedent, supported by stare decisis. Take away that part and the strength of the argument is weakened. Realism should be allowed to come back. Even though case law can be unclear at times, when it is clear, people are less likely to go to court if they have arranged their affairs based on that clear case law. They will not judge unfairly. If the law is unclear, then a person has to go with what they think is right, or what their lawyer says is right, even if it might be different in court. This situation cannot be avoided and happens often. It's when both sides have different opinions about the law and believe they followed it in their actions.

Two conditions arise when considering the 'reliance interest' as a basis for stare decisis. The first thing to consider is that the law the person is following should be clear and definite. There's no good reason why people involved in a legal case should be able to benefit from past decisions if they based their actions on a wrong idea of the law. The second requirement is that people involved in a lawsuit should have actually used the rule mentioned in the previous decision. Parties in a case should not be able to convince the court to make a bad or unfair decision if they and others have not actually depended on that decision in a significant way.

Once more, we need to decide if we should follow the previous decision in this case. If the law is clear, and the person relied on it and changed their position, the courts will be very hesitant to not follow the previous decision. This resistance will mostly come from the unfairness of

changing the rule and hurting the person who trusted it. In these situations, this thing is probably more important than other things. However, it is just one thing to consider for each person. Legitimacy means something is accepted or allowed because it is seen as fair or right.

Stare decisis is said to help the courts be seen as fair and keeps people trusting and respecting the law. It makes sure that everyone is treated fairly by the courts and shows the public that the courts treat everyone the same way. This argument has hints of a specific idea about following the law. Allowing courts to change the law by overruling previous decisions is said to take away the power of Parliament. Overruling is when the government makes a decision. This belief is strongest when making laws. When the courts decide what a law means, people should usually follow that meaning, unless there's a really good reason not to. Citizens followed that interpretation, and Parliament has not changed the decision. Therefore, it is said that Parliament should be the ones to make changes to the law. That organization can make changes that will only apply to the future. The idea that the legal system should never change a law once it's been decided in a previous court case is not valid. As we have seen, everyone knows that judges make laws nowadays. That's why the idea that only Parliament should make the law is completely unacceptable now. Because it is not sensible, we should also not accept the argument for stare decisis based on preserving the legitimacy of the legal system. More and more, judges, lawyers, and scholars are arguing that a person should not be denied help because of an old rule. They think that only Parliament should be able to change the law to help future people in similar situations. On the other hand, sticking to old rules can stop or slow down the growth and use of important ideas. New ideas are kept hidden in the legal system so that it looks like the court follows previous decisions. Furthermore, if people don't trust the courts, following previous rulings to appear fair doesn't matter anymore. It has been said that the courts should not have to pretend to find differences in previous decisions when there aren't any. Sir Anthony Mason also said that when judges agree with a decision they don't like, and then find a way around it by making a small change, they are not being fair to the law and its rules. Don't we underestimate the intelligence of the public when we think they don't see the tricks used to avoid bad decisions in court? If we do, it doesn't make the courts look good. People won't trust the courts if they don't use past experiences to solve current problems wisely.

Judicial skill

One idea is that people trust the courts because they use a logical approach. Taking things one at a time, we can see that case law is what judgments are made of. The judge seems distant and not very friendly, using established laws to make decisions. As mentioned before, this is a made-up story and actually shows why formalism is important. Again, it's not good to keep pretending something is true in the legal system just to make people happy with the court's decisions. Following the rules of past decisions is an important part of this story, but it becomes clear that keeping up this made-up story is not needed and not a good idea for gaining respect from the public. In reality, the way things are set up is respected by lawyers who are experienced in following past decisions. But people in the community who don't care about that are not impressed by it. However, another similar argument supports the idea of following previous decisions, but it doesn't necessarily mean that the precedent must always be followed. In this argument, it is believed that judges analyze, interpret, and change previous cases in order to bring justice to the current case. So, it doesn't matter if the previous example is ignored or weakened; the outcome is still the same. The court is saying that even though the old king is dead, the new king is now in charge. It is important for judges to use past decisions wisely, but there are some rare times when they may need to change those decisions.

This argument is about following the rules strictly, but it seems like there might be some room to be flexible in applying the doctrine. But there's a surprise or problem at the end. We hope

that if judges do a good job, there won't be many times when they need to change a previous decision. The skill of making something will impress the judge and make them feel very creative. Once again, why pretend. Professor Benditt said that law is alike foreign policy because both try to avoid admitting what's really happening. Once again, there is a difference between the real reason for a decision and the reason given for it.

Even when a court changes or reinterprets a previous ruling, trying to explain the decision can limit the true independence of the court in a sneaky way. This problem happens when a previous decision, even though it was not accepted in the end, still influences how a judge thinks about a case. The previous decision could determine the important points in the current case, influence which facts are chosen, and show what is considered important or not important. It can also point out the specific aspects of the case that are seen as relevant. In these situations, even though it may be rejected, the example could still be very important in how the judge makes their decision. However, there is no specific reason why it has to be the right framework for that specific case. If there was no past decision to guide the judge, they could have decided the case differently and chosen different important points to consider.

CONCLUSION

Studying how previous decisions affect current ones leads to a request for careful thinking about how they are used in court. The problem of following strict rules while still allowing judges to make their own decisions shows that we need to find a fair way to handle it. While we recognize that stability and sticking to old ways can be important in some situations, it's also important to be open to change and adapt the law to fit what's happening now. Relying too much on precedents might stop us from making things fair and keeping the law up-to-date. The strictness of following legal precedents, especially in the common law system, is being looked at closely, and there is a request to get rid of its strict and rule-like nature. The conclusion is that while past decisions are important in the law, it's also important to be flexible and not always follow them exactly. This will help the legal system better serve the community. The argument is that the law must change and grow to make sure it serves justice. The conclusion says we should find a fair and adaptable way, instead of sticking to old justifications like stability, reliance, and legitimacy. Being stable is important, but it shouldn't make justice suffer. Depend on the law and not just follow past decisions without thinking. The idea that only lawmakers in Parliament should make the laws is being challenged. It recognizes that judges also have a growing influence in creating legal rules.

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CHAPTER 11

SHACKLES: CRITIQUING THE IMPACT OF STARE DECISIS ON JUDICIAL REASONING AND DECISION-MAKING

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ABSTRACT:
The intricate dynamics of stare decisis, critically examining its impact on judicial reasoning and decision-making. Stare decisis, while essential for maintaining stability and predictability in the legal system, is scrutinized for its potential constraints on adaptability and justice. The essay explores how an unwavering adherence to precedent can lead to an overemphasis on persuasive precedents, the undue elevation of famous dicta, and a reluctance to re-examine decisions even in the face of changing conditions or perceived errors. Drawing upon legal perspectives and notable cases, the discussion emphasizes the need for a balanced approach that considers the merits of precedent while allowing flexibility for evolving societal norms and individual case justice. The analysis sheds light on the potential pitfalls of a strict doctrine of precedent and advocates for a more pragmatic, case-by-case evaluation of the applicability and relevance of past decisions. Finally, the paper suggests that a nuanced, transparent approach to precedent can enhance the integrity and legitimacy of the judicial process.

KEYWORDS:

Adjudication, Decision-Making, Judicial Discretion, Jurisprudence, Legal Analysis, Legal Interpretation, Precedent.

INTRODUCTION

Some people say that the court follows past decisions because it has a lot of cases to handle. The amount of work would be too much if we had to rethink every idea mentioned during an argument. It's important to follow previous decisions in order to save time and resources, rather than starting from scratch each time. Cardozo said that judges would have too much work if they had to review every old decision in every case. People also wouldn't be able to build on the work of others if they had to start over with every decision. Courts can make things easier by looking at what judges have decided in similar cases [1], [2].

Certainly, it would not be wise for the court to’re-evaluate every possible problem in every case. However, the argument for efficiency does not address the main question. The question is not if the court can use past decisions in every case, but if it has to do so when it thinks the previous decision was wrong, the situation has changed, or if it would be unfair to follow the old decision in the current case. Everyone agrees that when judges make decisions, they start with a starting point. The premise can be a rule or a previous example. It will be the starting point for the reasoning. It's not a good idea to reinvent the wheel every time, and any argument that tries to justify strict rules about following past decisions is just a weak argument [3], [4].

The courts are too influenced by past decisions and often treat them as if they must be followed. Someone watching a legal argument may not be able to tell which cases the lawyer is required to follow and which ones they are just using as examples. Every case that the lawyer knows about and thinks is important is mentioned and discussed in detail to help make a point or show how the current case is different. The judgment will probably talk about the cases and look at them closely. Then, they will decide if they are valid or not. However, if the decision is convincing only, it is often not necessary to analyze it in so much detail to separate it from the

current case. Use the decision's own reasons to explain it, if there are any. But why mention a convincing past decision to show how it's different if it's not a rule. Sometimes, this can be helpful. Persuasive examples from the past can be used to either expand or restrict a previous decision, or to make a judge less hesitant to change the decision by showing that they aren't doing something completely new.

Besides cases like this one, it should only be necessary to look at and handle previous examples if they actually convince us. In simpler terms, the previous decision should help make the current decision better. Judges can get help from past persuasive examples as much as they can from binding examples.

Famous sayings

Another legal idea, which should not be given much importance, are the well-known statements expressing a specific principle or rule. The sayings are repeated in many texts and decisions, and eventually people start to think they can't be questioned. Judges' decisions are seen almost as important as actual laws. This strict following of past decisions shows how it can weaken our system. He/she is acting like a child. Cardozo said he was puzzled why judges, of all people, would believe in someone else's opinions. He knew it was important to separate things that happened by chance or are not important from things that are necessary and natural [5], [6].

Certainly, the saying may accurately summarize a law. That chance is not questioned. Treating a saying like it's a law is annoying. Usually, a rule should not be read without considering the situation it is referring to. The well-known saying will only be a small part of the judge's decision. Also, it shouldn't be assumed that the judge was trying to make a complete and final statement of the rule or principle in that statement. They claim to represent their era and they don't mind if the judges today do the same.

Away from well-known sayings, there is a collection of regular sayings. Such statements don't really add anything to the argument. Lawyers like to use other people's words instead of their own when making their points. The active quotation makes the argument seem better because it shows that it's not a new idea and the judge doesn't need to be worried about it. It also gives the argument some authority, even if it's not very strong, which wouldn't be possible if the lawyer just said it in their own words. Using quotes like this is the result of caring too much about legal arguments based on previous court decisions.

Relevance and justice

Sir Anthony Mason has shared similar feelings. Precedent means using past decisions and rules to make arguments. This can seem too formal and focused on the past, and may not be able to adapt to the need for change. He believes that looking at previous experts is the main way to make decisions in the law. The smart legal expert also notices that people talk a lot about old cases, but they don't talk enough about the important factors that could change the outcome of a case. This part of legal thinking makes it seem like the law is forcing its own rules onto the process of thinking. Sir Anthony Mason also states that in the past, the law's inability to change when needed was not important. Economic and social change happened slowly, and sometimes people couldn't even notice it. Because of this, the common law's inability to change wasn't seen as a problem. The speed of change has changed a lot, and now people are paying more attention to the idea of precedent. This has made the courts feel pressured to help change and update the law. Similarly, if the common law cannot give every person what they deserve in their own situation, it will have lost its strength and usefulness and become narrow-minded. Certainly, when past decisions create unfairness and make no sense, they go against the goals they were meant to achieve.

This question needs more thinking. I already said that the idea of putting certainty in the law before justice in a specific case is really old-fashioned and disgusting. This idea goes against the justice system that is supposed to bring fairness. The strange thing is even worse because it affects more than just one unfair decision. As Christopher Peters mentioned, the consequences can add up over time. One mistake in a court decision can lead to more mistakes in future decisions, creating a pattern of errors. This means that following precedent can bring unfairness into the law that can't be fixed. Frank has gathered many statements from judges where they admit to causing unfairness but say they have to do it because they have to follow previous decisions. The same things are being said on the other side of the ocean and at the bottom of the world. Frank called this process "a cruel but proud and dignified one". Judges used to say they had to follow old decisions even if they thought a case was unfair. We don't hear this as much now, but there's still a risk that judges won't see the unfairness or won't care about the harm it causes because they feel they have to follow old decisions. Following the rules of an organization should never be more important than following a commitment to fairness.

DISCUSSION

We mentioned before that even though the idea of following past decisions in court has become less strict, it still has a strong impact on how the law is formed. Sir Anthony agrees that sometimes past decisions are changed from a rule made by judges into a way of thinking. He noticed that sometimes people make decisions without really thinking about whether they are important or not. He thinks this is not a good thing for judges to do. He says it's okay to use a legal opinion that has been accepted in another case, but you shouldn't just use it without thinking about it first.

I totally agree with this view. The problem with precedent today is not how big the rule is, but how judges keep using it to make decisions. It is a way of thinking that goes together with formalism. This 'attitude of mind' also applies to how a judge sees the main idea behind the cases mentioned in an argument. In most cases, the rule can be stated in specific or broad terms. Judges who follow past decisions will likely give a strict definition to the principle. They do not want to go far from the current rules unless they have to. Since past cases are based on facts, judges who rely on past cases don't like general principles. Any principle taken from past cases is likely to only apply to those specific cases. Judges today believe that what matters most is not the past decisions, but the main idea or principle that comes from them. Most people agree, but they may not all do things the same way because judges have different opinions [7], [8].

You can easily see examples of this way of thinking in real life. Judges who always follow past decisions are likely to think that a new claim is not valid if there is no previous similar case. During an oral argument, the judge asks the lawyer if they can provide evidence for their argument. If they can't, it may lead to their argument being denied. This may cause the court to focus more on law rather than principles or policies. To give in to this approach shows that you don't want to try anything new, and it would make the law unresponsive to what the community wants.

This negativity affects potential plaintiffs the most. Plaintiffs don't have to show a specific ruling that supports their claim in order to continue with a lawsuit. They just need to mention a basic rule and try to argue that the legal case fits within that rule. When a judge prefers to stick to the closest past decision, it can make it hard for them to use a law in new situations. This natural hesitation can still happen even if the facts show the same principle when looked at objectively.

Consider how past decisions affect a judge's decision when they think it might set a new precedent. Judges, especially appellate judges, make their decisions knowing that it might be used as an example for future cases. This means that the doctrine of precedent works for the future. Current decisions are affected by future cases that have not been decided yet. The way the rule is explained in this case will likely be decided by how the judge thinks the court's decision will affect things in the future. The judge doesn't want to set a bad example or start a harmful trend. Sometimes judges have to decide when a rule should stop being used. Justice Holmes has said that figuring out where to draw the line is the key question in many important legal arguments. The rule gets more specific because the people making the decision worry that it might be used in situations they didn't think about. Simply put, the current judges might not trust people who try to change the rule the way they want. Some people might think that the court's wisdom should not rely on the wisdom of a different court continuing forever [9], [10].

This reaction has two bad results. Judges are not allowed to decide a case in a way that they think is fair, if they are worried about how it will affect other cases in the future. It's better to follow the rule, people might think, than to let a wild animal loose unexpectedly. The second problem is that even if judges change the rule to fit the current situation, they will still make it too specific or limited because they are worried about how it will affect future cases. Later judges are faced with a previous decision that is not very broad and might be hard to use for a similar case in the future. With a more open system of past decisions, a judge would know that future judges won't be too upset if their judgment isn't popular for a long time. It will be checked again to see if it's still true in the new situation.

In some cases, the belief in following past decisions can influence people's thinking, even when the past decision is different, explained, or changed. This happens when a previous decision, even if it's not followed, still affects how a judge makes their decision. The things that are important, the facts that are chosen, and what is considered relevant can all be decided by the old example that is no longer used. Using precedent in a more flexible way would help judges think and work differently. Instead of being too pushy or trying to make people think a certain way, we would look at past decisions practically, one situation at a time. We should learn from past decisions instead of blindly following a rule that claims to be wise. If one of the reasons for stare decisis applies to the specific case, it will be considered important. For example, a previous decision would probably have power if someone had acted based on that decision or a similar one. However, even if there is interest, we need to consider the current situation and the need for fairness in this case. In every situation, the need for stability, trust, and fairness will be weighed against the need to update the rules to fit modern needs and expectations while also being fair to each person's situation [11], [12].

The result of losing the importance of precedent would be very important. The close friend of Precedent, formalism, may become less important and eventually go away. Form is hardly ever more important than what really exists, because what has happened before doesn't matter more than what is true. Simple rules that are almost always followed because of a past decision would be avoided. Instead, general principles that can be used without being held back by blindly following past decisions would be preferred. People would no longer see case law as making sense and being easy to understand. Using a previous example to make decisions could be done by thinking practically, so that the community's ability to organize things would be carefully considered in a specific situation. But we won't use any past examples unless they are relevant and have value.

A good addition to this change in the rules would be for judges to openly and clearly say why they made their decisions. A thorough review of all the related court cases would be

unnecessary, and judges should openly explain their decision if there is a similar one in the past. The reasons for following past court decisions, and the reasons for not following them, will be thought about. The court will then decide whether to agree or disagree with the previous decision and give a reason for their choice. If we use an old decision, we need to explain why it still makes sense today. If a previous decision is not followed, you have to explain what changed to make the court think differently. The new decision needs to be better than the old one in order to work well. In every way, the judges would try to clearly explain the reasons for their decision and talk about the important reasons behind that decision. This way, the court system would be more responsible, and the legal process would become more honest and believable.

The problems of following past decisions - an example to study

In Lewis v Attorney-General of Jamaica, the Privy Council changed its mind about five past decisions on three different issues. All except one of these choices were made in the last five years. The case of Lewis v Attorney-General of Jamaica is an important decision to talk about in relation to the points and ideas mentioned in the previous discussion. Six people on death row in Jamaica asked the Privy Council to consider their appeals together. Five more prisoners waiting to be executed in Belize, and the lawyers for the government in Trinidad and the Bahamas, were allowed to get involved in the case.

The first problem was whether the Jamaican Privy Council has to tell the prisoner what information it got and listen to what the prisoner has to say. This is because it's supposed to advise the Governor-General about mercy. The questions were answered "no" in the case of Reckley v Minister of Public Safety and Immigration. This decision was made by following the previous decision in de Freitas v Benny. The second problem was whether it was okay to carry out a death sentence while the prisoner's request to the Inter-American Commission on Human Rights and the United Nations Human Rights Committee was still being looked at. The Privy Council made a decision in two cases, Fisher v Minister of Public Safety and Immigration and Higgs v Minister of National Security. In both cases, the decision was made by a majority of three to two. The decision was that the execution of the prisoner could go ahead, even though the International Court of Human Rights hadn't received the prisoner's petition. The third question was whether it is wrong to execute someone if they were treated unfairly or unconstitutionally while in prison. In the Thomas v Baptiste and Higgs v Minister of National Security cases, it was decided that, unless there are special reasons, bad prison conditions that harm a prisoner's rights don't make their sentence illegal.

I will talk about the first two issues for this discussion. Both issues raise the question of whether the process outlined in the Constitutions of the American Island States can be reviewed by a court before using the power of mercy. Both issues rely on whether or not the rules of fairness and justice apply to that legal process. If they agree, then it makes a strong case that the groups that give advice to the leaders of those states should share the information they have with the prisoners, and listen to what the prisoners have to say. So, the execution process has to wait for reports from international agencies. The rule of following past decisions made it hard to think again about this important question.

Most of the Board members agreed that they shouldn't change the Board's past decisions unless they were sure that the previous cases were decided incorrectly. Lord Slynn, who most judges agreed with, said that it is important to be very hesitant about changing recent decisions unless there are very good reasons. "But," he said, "they should be ready to change their minds when someone's life is in danger and the death penalty is involved, if they think the previous decisions were wrong. " "In this situation," he said, "strictly following the rule of stare decisis is not right.

Lord Hoffmann, who had been part of the unanimous decision in Reckley, part of the majority decision in Fisher, and wrote the majority decision in Higgs, strongly disagreed with the principle of stare decisis. "He said that the Board can change its mind, but there should be some rules to follow when doing so. If the Board just changes its decision because they feel like it, it would hurt the rule of law and make justice unreliable in the Caribbean. Lord Hoffmann suggested that a future panel of judges might be able to change the decision in Lewis.

Does this mean that most people in Lewis couldn't change their minds about the earlier decisions? It's a lot to ask a judge to follow the old cases when it comes to deciding the fate of eleven people if the judge really thinks the old cases were wrong. I will wait to talk about the Board's reasoning and instead make a quick point first. Lewis shows that the legal process can be very unpredictable. In Lewis, eleven prisoners were saved from being executed because most people were willing to ignore the rules and do things differently than before. With a different group of people in charge, the decision could have been different, and the prisoners would have been quickly put to death. The Higgs case shows how the people on the court can affect the outcome of an appeal. In the Higgs case, most of the judges were Lords Hoffmann and Hobhouse, along with Henry J from New Zealand. Lords Steyn and Cooke were in the minority. I think the opinions of the minority Law Lords are much better. So, if I were on the Privy Council instead of Henry J, 11 Mr Higgs would not have been put to death. In the American Island States, the process of deciding how the death penalty is carried out is seen as approved by one of the most advanced societies in the world. Many people think it's bad that the death penalty could be approved by the United Kingdom. It's even worse when that approval depends on who is on the appeal board. In these situations, we need to rethink how we use the doctrine of precedent.

However, we need to consider whether it was okay for most of the Board in Lewis to make a new decision that goes against previous ones without damaging the precedent. I think they could have been more flexible in following the rules. Previous decisions show that the thinking in those decisions was too focused on the law. This strict following of rules is not seen in the way the smaller group in Fisher, Higgs and the larger group in Lewis think. What comes out is a new way of doing things that shows a different way of thinking; one is more focused on following strict rules and specific cases, while the other is more focused on following fundamental human rights and principles.

CONCLUSION

Studying stare decisis shows how it's important to keep the law stable while also making sure it's fair in changing society. The doctrine is important for keeping the law consistent, but using it too strictly can make it hard for judges to think freely and make decisions. This paper shows how focusing too much on past decisions can cause problems. It can make it hard to tell which past decisions are most important, and can give too much importance to things famous people have said. The legal system may not be able to change and respond well if it doesn't reconsider decisions when things change or mistakes are found. This is a problem. The idea of using past decisions as a guide can sometimes keep unfair practices in place. This has been seen when judges recognize that they have caused unfairness because they felt they had to follow earlier decisions. It shows that we need a more adaptable and thoughtful way of making legal decisions. The paper supports a fair view that sees the importance of past decisions but also allows judges to make their own choices without too many restrictions. A request for judges to explain their reasoning and make an effort to clearly explain why they make their decisions is an important suggestion. Recognizing the possible problems with always following past decisions and instead considering each case individually, the legal system can find a better mix of staying consistent and being able to change.

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CHAPTER 12

CRITICAL ANALYSIS OF PRECEDENT IN DEATH PENALTY CASES

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ABSTRACT:
A critical analysis of the impact of legal precedent on judicial reasoning and decision-making in death penalty cases. Focusing on a series of decisions spanning multiple decades, the research examines the evolving jurisprudential landscape surrounding the prerogative of mercy and its interaction with constitutional and human rights considerations. The analysis reveals a tension between the rigidity imposed by stare decisis and the need to adapt to changing principles of fairness and justice. The study underscores how the reluctance to reevaluate past decisions may perpetuate legal precedents that are at odds with contemporary legal developments, leading to inconsistencies and potential violations of human rights. By exploring the challenges posed by the application of precedent in death penalty cases, this research aims to contribute to a broader understanding of the delicate balance between legal tradition and the evolving standards of justice.

KEYWORDS:

Capital Punishment, Case Law, Death Penalty, Legal Precedent, Jurisprudence, Judicial Decision, Legal Authority.

INTRODUCTION

The decision was made in Reckley, twenty-one years ago. The prisoner's lawyer argued strongly that de Freitas was not a valid law anymore and that the right to mercy could now be reviewed by the courts. The lawyer argued that the power of mercy given by the constitution should be fair, and that a person sentenced to death should at least have the right to a fair process when it comes to using this power. As a result, the Minister and the Advisory Committee have to carefully consider all the information. Lord Goff, speaking for the Board, said that these arguments were against the decision of the Privy Council in de Freitas. The Board stated that they cannot legally make decisions about showing mercy. Lord Diplock's saying in de Freitas, that mercy is not a legal right but starts when legal rights are finished, was openly supported. During its decision, the Board mentioned Cooke P's important opinions about the power of pardon in Burt v Governor-General.

The Board didn't accept these important opinions because they were just expressed as ideas and not directly related to the review of mercy in a death penalty case. Also, the laws were different. As we have seen, arguing against a decision to get rid of it is a common legal technique. But we should not forget that this technique helped the Board avoid dealing with Cooke P's reasoning. An outsider from Mars would probably think the Board's arguments were not very important, especially in a life or death situation. "What are these humans doing with their games," the Martian said [1], [2].

The Board's decision in Reckley is the most disappointing out of all the decisions being thought about. Their thinking was limited by the decision in de Freitas. They mostly defend and repeat their decision. The previous example had a strong influence. Administrative law had improved a lot in the last twenty-one years. The grouping of powers as judicial, quasi-judicial, and administrative is not used much anymore. The most important thing is that a power must be used fairly and following the rules of natural justice. The idea that some decisions can't be

judged in court was becoming less popular. Specifically, the House of Lords decided that the government's use of a special power could be reviewed by a court. Therefore, the problems in de Freitas needed to be looked at again based on the new rules of administrative law. Instead, the way of thinking created by the idea of following past decisions and legal principles was more important. A decision that was not good, but made sense based on the rules at the time, became a permanent part of the law because of a decision that didn't match the current beliefs and direction of the law and didn't take into account the growing importance of human rights [3], [4].

Fisher was settled in 1998. Lords Lloyd, Hoffmann and Hutton made up the most of the group. Discussion was mainly about Articles 16 and 17 of the Bahamas Constitution, which said that no one should be purposefully killed, except as punishment for a crime, or treated in a very cruel and harsh way. There was no argument that the prisoner could ask the IACHR for help, and the Government agreed to listen to the recommendations of that international group. Most of the judges in Fisher case said that the Constitution does not directly say that people have the right to stay alive while waiting for a decision from the IACHR. They also said that this right should not be assumed. To say that people have the right to see the IACHR's report before they are executed would mean that an international agreement becomes a law in our country without being officially made into a law by our government. The majority decision was based on a previous court case called R v Secretary of State for the Home Department, ex parted Brind. This case said that a prisoner about to be executed cannot force the IACHR to listen to their request.

Lords Slynn and Hope disagreed. They said it's wrong for the government to carry out the death penalty while waiting for a decision that could change it to life in prison. It would violate the prisoner's right to live. Furthermore, the prisoner had to wait for nine more months in a cell, just to see if the IACHR would make a recommendation. Doing it before getting the recommendation would be considered as inhumane treatment. They said it was very wrong to execute a man, especially when an international human rights group was still deciding his case. They decided that a strict interpretation of the law should be replaced by an interpretation that keeps people safe from unfair treatment and respects their basic rights [5], [6].

DISCUSSION

The prisoner's lawyer asked the Board to reconsider Reckley as a last option, but most of the members still agreed with that decision. The minority's argument was limited to how they understood the Constitution's articles. It seemed that previous actions had determined the limits of reasonable argument.

The Thomas v Baptiste case took place in 1999. In the Constitution of Trinidad and Tobago, Section 4 says that no one can be killed without a fair process. The Board said that fair treatment means being able to use the IACHR. The Government can set a time limit for international processes, but in this case, the actions taken limited the prisoner's right to have a fair legal process without interference from the executive branch.

The Board had to deal with and avoid the decision in Brind in order to make this decision. It said that the prisoners were not trying to make the IACHR listen to their petition. Instead, they were saying that everyone has the right to finish their legal case before the government does anything. Yes, it means that the right did not come from the treaty being discussed. Instead, it was a right given by the common law and confirmed by section 4 of the Constitution. Most people agreed that a similar argument had been turned down in Fisher. In the traditional way of using past cases as an example, the judges decided to say that the case Fisher was different because the Bahamas Constitution did not have the same due process rule as the Constitution

of Trinidad and Tobago. It was a made-up argument to avoid using Fisher as an example to follow. It was a small difference that didn't matter and would not be accepted by either Higgs or Lewis for different reasons [7], [8].

Fisher was used in Higgs. Higgs focused on the same question that year: should the execution be delayed until the IACHR's findings and recommendations were ready. Lord Hoffmann said that most people couldn't find anything significant that made the case different from Fisher. The Thomas v Baptiste case was limited because the Constitution of Trinidad and Tobago allows the government to agree to international jurisdiction for domestic criminal cases. Lord Hoffmann said that it is not up to the judges to decide if this was the right or the wrong thing to do. He said that it wasn't possible to do anything else without making the law very uncertain. That's why they had to apply the distinction that the Board had made in Fisher. In addition, the Board made this decision very recently and it was exactly what was needed. They did not believe it was right to reopen it unless they had to do it based on previous cases or if they were sure it was wrong. Also, most of the group did not agree that the Constitution forbids giving harsh treatment or punishment, in addition to the death penalty, unless the abuses in prison made the death penalty even worse [9], [10].

In a different opinion, Lord Steyn said it was cruel to lock up prisoners for 72 hours every weekend without letting them exercise. Thomas and Baptiste needed to be separated based on this issue. The respected legal expert said that in that case, the statements made by others hadn't been approved by three Board members. Also, Trinidad and Tobago's constitution has a different guarantee against torture and cruel punishment. The important decision in Conjwayo v Minister of Justice, Legal and Parliamentary Affairs, from South Africa's Constitutional Court, wasn't mentioned in that case.

Lord Cooke disagreed and took a wider view, trying to recognize that appeals happen in death penalty cases. Every person has the right not to be treated in a cruel or inhumane way. This right has always been a part of human societies and has been recognized in different human rights agreements. Whenever someone's rights are at stake, the court needs to carefully look at all the facts of the case and consider how the person was treated overall. This is important for the court to do its job properly. Usually, Lord Cooke said, decisions in this area are about facts and how much, not explanations of the law. If there are many tests available, the decision is not based on rules or laws but on judgment. The smart judge said that while the decision might have some impact on future courts dealing with similar cases and trying to be consistent, it doesn't have to be followed exactly. He said that following a different rule in law would be like sticking strictly to the rules. Lord Cooke finished by saying that the decisions made by most people and how they respond to similar situations can be different in the Judicial Committee and other courts that review appeals. He said that many members of the Privy Council have different opinions about what is right in cases of capital punishment. Lord Cooke wanted his opinion to follow that spirit. Lord Cooke said it would win in the end [11], [12].

In the end, that way of thinking did win in Lewis. Most of the judges in Lewis said that the government should follow proper procedures and allow for court review when making decisions related to Jamaica's international commitments. They also said that when thinking about what is fair, we should think about the human rights rules in international agreements that Jamaica has agreed to, even though they may not be able to be enforced in our country's laws by themselves. Secondly, most of the judges agreed that if the government agreed to treaties allowing individuals to ask international human rights organizations for help, then the Constitution gives prisoners the right to do that. They can also get reports from those organizations, and the Jamaican Privy Council will consider them before deciding on the prisoner's request for mercy.

Lord Slynn confirmed that the court does not have the authority to examine the benefits of using the power of mercy. He observed that the courts have been paying more attention to following fair rules in making decisions, especially since the Council of Civil Service Unions v Minister for the Civil Service case. Lord Diplock's saying does not clearly show the difference between showing mercy and following the law in terms of procedures. In addition, Lord Slynn said that there are many ways in which the use of the royal power can be checked by the courts. His Lordship then talked about what most people were thinking. Their Lordships believed that showing mercy is an important part of the entire legal process from being found guilty to being punished. The judges said that in serious crimes where the punishment is death, the judge has to give that punishment and can't choose something else. The clemency process means that the punishment can be changed or reduced to be fair in a specific case.

Regarding the question of whether the Governor-General should have to wait for the report and suggestions of the IACHR, most people had to deal with the argument that saying yes would not be in line with Fisher and Higgs, and would be like Thomas v Baptiste. Once again, most people did not want to take a strict or legal point of view. Section 13 of Jamaica's Constitution says that every person in Jamaica has the right to be protected by the law and it should be equal for everyone. They decided that "the protection of the law" means the same thing as "due process" in the Fisher case. So, when Jamaica agreed to the American Convention and the International Covenant and allowed people to ask for help individually, prisoners were given the right to follow the process for filing a human rights complaint. They could also get the reports from human rights organizations for the Jamaican Privy Council to review before making a decision about their request for leniency. The execution was going to wait until the reports were received and looked at.

Most people believed that the rules of fairness should apply to the Jamaican Privy Council. This idea was very convincing. This means that the power to show mercy is an important part of the Constitution. Clemency is the last chance for a person to avoid being sentenced to death after they have been convicted of a crime. In my opinion, the act of showing mercy is an important part of our constitution. It's the last step in a process that starts when a person is arrested and ends when they are sentenced. Every part of the constitutional process, including the way mercy is granted, must be fair. Rickley, Fisher, and Higgs do not have this fundamental understanding. In this situation, and for the reasons I have mentioned, the Board in Lewis did not need to follow the earlier cases. As Lord Cooke said, to stick to past decisions would be like insisting on strict and inflexible legal rules. Yes, it would have made fun of the legal rule that came before.

I think the Board in Lewis had the right to look at other cases and decide to change them because it involved the death penalty and many people's lives were on the line. First, it is important to note that most people in Lewis had a strong understanding of how the constitution applies to carrying out the death penalty and granting mercy. This understanding was overlooked in previous cases. That way of thinking cannot be controlled by what came before. Secondly, I want to point out that the limited idea of fairness that the previous decisions were based on is not enough to meet the worldwide expectations of basic human rights. If we want human rights to be meaningful, we need to review the decisions made before they were accepted by everyone. Third, I will pay attention to the Board's choice in the Reckley case. It is not enough to only consider Lewis and use past decisions as a reason to complain. The real problem happened in Reckley when the Board didn't rethink the de Freitas issue considering the important changes in administrative law. An appeals court should make sure that a bad decision doesn't keep being used as an example in the law. Also, I want to honestly admit the different ways judges make decisions. The majority's reasoning in Lewis is different from the

reasoning of the Board or the majorities in previous cases. In those situations, the strict legal approach had to eventually give way to the move towards being less formal. This trend sometimes needs to change from what was done before in order to move forward safely. In simple words, we should allow noticeable and recognized patterns to be more important than the forceful part of following past decisions.

A well-developed system of rules cannot ignore the need for this assessment. When the decision was made by Lords Steyn and Cooke in Higgs, it could be influenced by what humanity believes is needed in cases of capital punishment. Once again, we must follow the strong movement of that spirit, even if it means changing what was done before. Undoubtedly, the cases from de Freitas v Benny to Lewis show a sad story that highlights many problems with using past decisions as a guide. In de Freitas, people used the existing rules without thinking about how the power to forgive fits into the Constitution. They should have thought about it more carefully. Other developments in administrative law took over as an example, but Reckley still followed and used it. It's easy to understand that changes were needed in the legal system because it wasn't flexible enough to be useful. A wrong choice became part of the law. The way the House of Lords handled this case was very different from the way the Supreme Court of Canada handled a similar case. The Supreme Court of Canada looked at previous decisions and considered how international views on the death penalty were changing. In the end, the House of Lords' decision in this case seemed to focus too much on the law and didn't consider important human rights issues.

Reckley did not have to answer any questions. Precedent determines how the Board makes its decisions. With a new Board in place, Thomas v Baptiste showed a change, although small, from the idea that legal rights were not connected to using the power of mercy or the rules for using it. The Board had to find specific reasons to separate Fisher, but those reasons were not strong and didn't last. The majority of people in Higgs supported putting Fisher back in his position. They wanted to explain or change the meaning of what the Board said in Thomas v Baptiste so that decision would not have a lasting impact. In this process, we can see the clear signs of the traditional way of using precedent or stare decisis. A habit of using strict or technical reasoning; explaining and re-explaining past decisions to show they are different; focusing on small details to get around past decisions that are in the way; unquestionably following past decisions to make the law predictable; and repeatedly showing limited thinking based on past cases. All the complicated legal reasoning and confusion made it hard to see the main problem in those cases.

This sad story does not make the Privy Council and the top Law Lords look good. They are saying that the judges are not smart. Why did they agree to follow rules that didn't actually work as rules? It's because of a simple reason. They tried to follow the rules of legal decisions and were distracted from discussing the important question about how mercy should be used in the American Island States. They thought in a way that followed strict rules and relied heavily on past decisions. The way the Law Lords acted before Lewis showed the same way of thinking I've been trying to prove comes from past decisions. It still has a strong power that sometimes goes against the law.

But everything is not terrible. In the end, most people in Lewis refused to follow the example set before them. The negative mindset was stopped, and the smarter way of thinking that was used gives us some hope that the old-fashioned approach, while not completely gone, is losing its power. After the publisher received the manuscript, the Privy Council made three decisions about whether it was okay for the American Island States to have a mandatory death penalty for murder. The group of people who listen to appeals now has nine members instead of the original amount. In two cases, Charles Matthew v The State of Trinidad and Tobago and

Lennox Ricardo Boyce and Jeffrey Joseph v The State of Barbados, most of the judges said that the law requiring the death penalty is allowed by the constitution. Even though the issue was different from the previous case, it is clear that the positive and forward-thinking attitude seen in the earlier judgment has regressed in the recent appeals.

Most of the group were Lords Hoffmann, Hope, Scott and Rodger and Mr Justice Zacca, who was the former leader of the court in Jamaica. The minority group included Lords Bingham, Nicholls, Steyn and Walker. Lord Hoffmann gave the opinions of most of the judges in both cases. The minority's decision in Matthew was backed up by a strong separate decision from Lord Nicholls. Talking about the decisions is a little difficult because most judges made their decision in the Boyce case and the rest made their opposing decision in the Matthew case. It is helpful to mention the Constitution and related laws in the second decision and only mention the extra comments made in the first decision if it is useful.

It's not possible to look closely at the decision. In simple terms, the Constitution of Trinidad and Tobago said that Parliament couldn't make or allow cruel or unusual punishments. Current laws were kept safe from being declared invalid. Section 5 of the Constitution of the Republic of Trinidad and Tobago Act 1976, made sure that the existing laws would be changed if needed to fit with the new Constitution. The law that was being challenged was a law that required the death penalty. It was agreed that giving a mandatory death sentence was not fair and went against the Constitution because it was too harsh and not fair. Once again, it was decided that section 5 has the power to change a law to make it agree with the Constitution. It was also recognized that the law against mandatory death sentences made the States break some promises they made in international agreements. The Declaration of Human Rights and the Covenant for Civil and Political Rights were two important documents.

In his decision, Lord Hoffmann used the traditional way of understanding laws and did not use a specific section of the law about human rights and dignity. The core difference between a formal and non-formal way of thinking is what drives the decision that the judges make on the issue. We need a more open-minded approach than what most people are doing. Section 5 of the 1976 Act may not be part of the Constitution, but it still relates to it. The Act that follows the Constitution affects the rights and freedoms of vulnerable people and how well those rights and freedoms are protected. Section 5 is very important, even though it's not in the Constitution.

We can test what section 5 really does by pretending it is part of the Constitution. There's no doubt that the opinion of the smaller group would win. The Constitution says that a law already in place cannot be canceled out. This can't be understood in any other way because it's the most important law. The majority's judgment still emphasizes the same idea of being irrational or arbitrary. However, it is impossible to imagine that a part of the Constitution that gives the power to make changes to protect human rights could be ignored or removed. Current laws would still be protected from constitutional challenges, but the ability to change any existing law to make sure it follows the Constitution would need to be allowed. The only way to settle things is to agree with what the minority of their Lordships believes.

So, because the right to life is important, and people should not be treated cruelly, it would be a good idea to combine section 5 with the relevant parts of the Constitution. In other words, not using section 5 is like being mean and not taking the important task of the Board seriously. The section is in the law that follows the Constitution, but it's still very important. It should be pointed out that the only purpose behind section 5 is just an assumed intention. In making section 5, the Trinidad and Tobago Parliament likely thought there would be times when they should change current laws to follow the Constitution. That is definitely true. The Parliament may not have thought about using section 5 to change any specific law, like the mandatory

death penalty. Even if things had changed. In 1976, when the Constitution took effect, the mandatory death penalty was not seen as a harsh or unusual punishment, especially in the American Island States. The Parliament of Trinidad and Tobago never had to think about whether the punishment was too harsh and a violation of a basic right. However, most people, including a small group, agreed that the random death penalty was cruel and not allowed by the Constitution. This new way of thinking about the death penalty happened because people started to have different values and started to see the constitution as something that should change with those values. We should treat section 5 the same way we treat a living thing. And we should understand that what the legislature meant by section 5 is something the courts have to figure out. The majority should have started from the belief that the modern idea of cruel and unusual punishment has made Parliament's intention for section 5 mostly unnecessary, and that in this situation, the Board had to modify the provision to protect the fundamental rights in the Constitution.

Before the majority of judges used a common way of interpreting the law, they had to rethink how to interpret the constitution based on the usual rules. The courts must do more than just "interpret" the law when it comes to protecting people's rights in the constitution. They need to go beyond just finding vague language and make sure the laws protect people's rights and freedoms. The result should not depend on how well the drafter writes or avoids making things unclear. Nor can we say that Parliament had a clear intention in the current situation or with the values of the community. It is not okay to assume an intention for Parliament in this case. In these situations, the court's duty to find out what the legislature meant in the law when people's lives and basic rights are in danger is not enough. We should focus on what the constitution says, instead of what Parliament meant when it made the law. The strong desire shows that people want to feel safe while enjoying their basic rights and freedoms that are written in the constitution.

The majority shouldn't use their long-standing belief in parliamentary power to interpret the rules. In simple words, how can a court stick to a rule when there was no clear intention from the government, or when the original plan is no longer relevant because of changes in society? The House of Lords decided in the case of Ghaidan v Godin-Mendoza to use a more flexible approach and extend a law from 1977 to include same-sex couples. Lord Hoffmann's judgment in these cases, even though they involved life and death, does not have the same spirit as the majority's judgment in that case. In current cases, the courts were given the power to change a law to make it follow the Constitution. This meant that the idea that Parliament was the most powerful had to change to make sure the rights in the Constitution were the most important.

In Roodal, the Privy Council decided by a vote of three to two that the mandatory death penalty rule could be changed. This means that the judge could now decide whether or not to give the death penalty in each case. It stopped the majority from making a decision. So it was decided against. In this case, it is important to remember what Lord Hoffmann said in the Lewis case, even though he was the only one who believed it. Lord Hoffman then explained that just because the Board can change its previous decisions, doesn't mean there are no rules to follow when deciding whether to do so. He said it's important to have a good reason to change a previous decision, not just because you think it was wrong. His Lordship said that if the Board changes its decision just because the members feel like it, it could damage the rule of law and make the administration of justice in the Caribbean unstable. However, the important rules do not come from the decisions made by most people in these cases. Lord Hoffmann did not use any principles from past cases in these cases. Most people, just one more than Lewis, disagreed with Roodal because they thought the previous decision was wrong.

However, focusing on the previous decisions and following them is not the right approach. If we want constitutions to work well, we need to treat them as "living documents". This means that the rules about how past cases are used should be flexible enough to allow the constitution to change and adapt over time. Loyalty to past decisions can stop the growth and acknowledgment of important human rights and freedoms. Judges should stop giving so much respect to the doctrine and instead explain and defend their beliefs. They shouldn't just try to gather enough support to make a majority based on traditional beliefs. In any case, it is too much to ask of the legal rules that say to follow past decisions to expect a judge to use a decision as an example when the judge thinks the decision violates people's rights and will lead to someone being killed.

Remember that Lord Hoffmann cautioned in Lewis that a different Board in the future could change the decision because of their different beliefs. The two appeals show that the majority had a strict and literal interpretation of the law, while the minority had a more flexible approach to interpreting the Constitution and its related laws. The two groups have different beliefs and won't agree unless the people in charge decide if they should follow only what Parliament wants or if they can also choose a meaning that protects people's basic rights, even if it's not what Parliament intended.

Until we figure out the main question, the result in cases like Matthew and Boyce, and also Ghaidan and Lewis, will be based on the group of people who make the decision in each appeal. This unexpected result can be predicted based on the makeup of the Board. It won't be a surprise for readers who have been following along. But when it affects the lives and rights of vulnerable people under the State's Constitution, it's very disappointing. People's lives at risk and their basic rights become subject to competition among the judicial system. This bad situation will continue unless we openly talk about the problems and change the way we think. Although it may have taken some time, it is now the right time to start making the new judicial method. We need to start by saying that there are no rules that don't consider people's feelings.

CONCLUSION

Studying past cases where the death penalty was used shows how the law and human rights have changed over time. The research looks at a bunch of choices and finds a pattern where past legal decisions make it hard to change, even when the laws change. This inflexibility, mostly from the rule of following past decisions, makes it hard to decide cases about showing kindness and forgiveness. People not wanting to look back at their past decisions can make justice less fair and cause more problems. The struggle between following past decisions and dealing with new legal issues is especially noticeable in death penalty cases, which are very important. The result of this analysis suggests that we should use a careful and detailed approach when applying past decisions to death penalty cases. While it's important to keep legal traditions and stability in mind, the legal system needs to be able to change to fit new ideas about human rights and the constitution. The research shows that the justice system needs to pay more attention to past legal decisions to make sure it follows the changing beliefs and rules in society and around the world.

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