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Legal Formalism

'Legal formalism' is an important category in the history of law, the sociology of law, comparative law, and the cultural study of law, as well as in the philosophy of law and the interdisciplinary field currently called 'legal theory.' It is used in different senses in these different fields, and within each field it is a contested concept, rather than a well-established term with a clear meaning. This entry presents a catalogue of different usages and a brief introduction to the modes of contestation of the meaning of the term.

The modern usages of the word derive from the work of leading legal theorists of the late nineteenth and early twentieth centuries who were much concerned with two historical phenomena that play little role in the late twentieth-century discussion. One of these was 'primitive formalism,' meaning the practice of deciding disputes through devices such as oracles and trial by battle, regarded as 'irrational.' The other was the ancient Roman and medieval English system of 'formulary justice' or 'strict law,' in which a claimant could get redress through the legal system only by fitting his case into a closed class of 'actions.' No overarching principles were available, at least according to the theory, to deal with cases that fell outside the class, but within generally held ideas of moral responsibility. Modern law, in the nineteenth-century view, was characterized by its movement beyond both primitive formalism and formulary justice, but had to find a way to preserve some of the virtues of these earlier systems. (Maine 1917, von Jhering 1869, Holmes 1881, Pollock and Maitland 1898, Weber 1954).

1. Formalism as a Descriptive Category

Greater or lesser formalism is one of the dimensions along which we compare legal regimes and assess internal change, whether at the level of detail, of a large ensemble of rules, or of a system as a whole. One might also just say 'more or less formal,' or call it the dimension of 'formality.' In this usage, no positive or negative evaluation is indicated by categorizing a body of legal rules as more or less formal or formalist. A system is procedurally formalist to the extent that it makes the success of a substantive legal claim depend on following procedural rules (Schauer 1988). It is transactionally formalist to the extent that it requires specific formalities for transactions such as contracts or marriages (von Jhering 1869, Demogue 1911, Fuller 1941). It is administratively formalist to the extent that it surrounds the exercise of state power with procedural and transactional formalities. Rule formalism is a general preference for rules over standards.

Two important dimensions of formality are the degree of insistence on compliance with formalities (what exceptions are permitted?), and the degree of absoluteness of the sanction of nullity for failure to comply (what remedies, if any, for a person who fails to comply?). The degree of formality in each dimension varies within systems, between systems, and over time. What binds the types together is the willingness of the formalist to sacrifice substantive justice (or 'equity') in the particular case. Western legal discourse provides a highly developed set of arguments in favor of and against adopting more or less formal rule systems, and a rich literature on the moral and political meaning and practical consequences of the choice. Every argument for greater formality has a symmetrical opposite urging less formality (Kennedy 1976).

A different descriptive use of the term legal formalism refers to a range of techniques of legal interpretation based on the meaning of norms (whether established privately, as in contracts, or publicly, as in statutes), and refusing reference to the norms' purposes, the general policies underlying the legal order, or the extrajuristic preferences of the interpreter. Textual interpretive formalism decides by identifying a valid norm applicable to the case and then applying it by parsing the meanings of the words that compose it. Textual formalism is literalist to the extent that it refuses to vary meaning according to context, and originalist to the extent that it finds meaning only through the context at the time of enactment (Schauer 1988).

Conceptual interpretive formalism 'constructs' general principles thought necessary if the legal system is to be understood as coherent. It uses the principles to resolve uncertainty about the meaning of extant valid norms, and applies the principles according to their meaning to fill apparent gaps (Geny 1899). Precedential interpretive formalism interprets according to the meaning of norms derived as the holdings of prior cases (Grey 1983).

Interpretation positing gaplessness requires the interpreter to apply in every case, according to their meanings, the legal norms he or she can derive textually, conceptually, or through precedent; it categorically forbids reference to purposes and policies (Weber 1954). A final descriptive use of the term formalism in legal discourse refers to theories that purport to derive particular rules of law, or prohibitions on adopting particular rules, from a small group of internally consistent abstract principles and concepts (e.g., corrective justice, fault) understood as morally binding on legal actors (Weinrib 1988).

As with the discourse of the appropriate degree of formality of norm systems, there is a wide range of arguments for and against the adoption of each of these types of interpretive formalism. There is also disagreement as to their conceptual coherence and practicability (Kennedy 1997).

2. *Formalism as a Critical Category*

The critical use of the category of formalism was developed by the sociological jurists around the turn of the twentieth century, in their attack on mainstream late nineteenth-century legal thought. According to the critics, the mainstream saw law as having a strong internal structural coherence based on the two traits of 'individualism' and commitment to legal interpretive formalism. These traits combined in 'the will theory.'

In the sociological jurists' version, the will theory was that the private law rules of the 'advanced' Western nation states were well understood as a set of rational derivations from the notion that government should help individuals realize their wills, restrained only as necessary to permit others to do the same. In its more ambitious versions, the will theory made public as well as private law norms follow from this foundational commitment (for example, by generating theories of the separation of powers from the nature of rights).

The will theory presupposed consensus in favor of the goal of individual self-realization. It was not a political or moral philosophy justifying this goal; nor was it a positive historical or sociological theory about how this had come to be the goal. Rather, the theory offered a specific, will-based, and deductive interpretation of the interrelationship of the dozens or hundreds of relatively concrete norms of the extant national legal orders, and of the legislative and adjudicative institutions that generated and applied the norms (Pound 1917, Kennedy 2000).

The sociological jurists critiqued the individualist premises of the will theory in the name of 'social law' (Gurvitch 1932). They also critiqued its methodology, on two grounds. First, they argued that in practice it involved the widespread abuse of deduction, meaning that jurists habitually offered deductive justifications for interpretations that were in fact logically underdetermined (von Jhering 1877–83, Holmes 1897, Geny 1899).

Second, they argued that the will theory falsely assumed the possibility of constructing the legal order in such a way that it would be gapless in fact, and therefore susceptible to exclusively meaning-based interpretation. The sociological jurists claimed that particular instances of the abuse of deduction, and the theory of meaning-based gaplessness generally, disguised the biases of interpreters, and prevented the consideration of the 'legislative' element in interpretation. They advocated interpretation on the basis of 'scientifically' established social desiderata, as well as or instead of according to meaning (von Jhering 1877–83, Geny 1899, Cardozo 1921).

It is a matter of dispute in legal historiography to what extent late nineteenth-century legal thought was well characterized by its critics, and to what extent the will theory and formal methods caused it to have a politically conservative substantive content (contrast Kennedy 1980, Grey 1983, Horwitz 1992). It is nonetheless clear that sociological jurisprudence dramatically changed mainstream legal academic discourse through its critiques of the abuse of deduction and of the possibility of meaning-based gaplessness. However, structurally analogous conflicts, involving the same elements, preoccupied legal thinkers throughout the twentieth century. These reflect a historical dialectic of critique and reconstruction, in which new positions are only uncannily similar to, not identical with, previous ones.

Whether in the form of Geny's '*libre recherche scientifique*' (Geny 1899) or Cardozo's 'method of sociology' (Cardozo 1921), the sociological jurists' proposed alternative method was rejected during the 1930s by a new legal theoretical avant-garde, including both the American legal realists and Kelsenian neopositivists on the Continent, on the ground that its proponents confused facts and values, scientific and normative judgments. The critics argued that the social purposes or functions the sociological jurists used to base their means/ends rational derivations of legal rules were either vague or conflicted in particular cases, so that the claim to a scientific method was no more than a screen for a new form of politically progressive natural law (Llewellyn 1930, Kelsen 1934). In the US, the progressive academic elite abandoned sociology in favor of two (arguably contradictory) normative projects: in private and administrative law, 'policy analysis,' understood as the process of reconcil-

ing or balancing diverse legal desiderata on the basis of information about the social context (Fuller 1941, Kennedy 2000); and in constitutional law, civil libertarianism.

Critics of the Warren Court's progressive civil libertarian reform of American public law charged the Court with formalism, that is, with an abuse of deduction from personal rights exactly analogous to the earlier conservative abuse of deduction from property and contract rights (Hand 1958). Critical legal scholars critiqued the policy-based post-New Deal technique of private and administrative law as 'social conceptualism' or 'policy formalism,' because it selected policies arbitrarily, underestimated the conflicts among them, and offered no defense of balancing as a rationally determinate procedure. (Klare 1978). The post-1960s reconstruction projects that grounded adjudication either in the efficiency norm or in concepts like autonomy or commutative justice were vulnerable to similar critiques.

Modern legal theory (with the exception of natural law theorists) is antiformalist, in the sense of denying the possibility of strictly meaning based gaplessness. Positivism, whether in its Hart or its Kelsen variant, affirms that discretion in adjudication is inevitable, while limiting it to the 'penumbra' or to the area inside the 'frame' provided by the norm in question (Hart 1994, Kelsen 1934). American legal theory, from Cardozo to Dworkin, is antipositivist, and affirms gaplessness, but on the basis of policy, purpose, rights, or principles, rather than on the basis of textual, conceptual, or precedential formalism (Kennedy 1997). In the debate between H. L. A. Hart and Lon Fuller, Hart charged Fuller with formalism because Fuller believed in a gapless order, and Fuller charged Hart with formalism because Hart believed there were easy cases where norm application was truly meaning-based.

Since World War II, there have been a variety of theories that challenge not meaning-based gaplessness, but all meaning-based interpretation, in so much as it claims to be a matter of legal 'truth.' In the common law world, a first critique of precedential interpretive formalism is that policy argument is always necessary in order to determine the relevance of a precedent for a new case (Brewer 1996). A second is that common law theory, if it is to be coherent, must authorize the creation of an exception to a precedentially established rule in any case where an exception would serve the policies animating the system as a whole (Schauer 1991).

On the Continent, rhetorical and hermeneutic theories of legal interpretation assert that outcomes are always relative to horizons, no matter how superficially deductive (and then reground interpretation in the supposedly shared horizon of liberal faith) (Herget 1996). Postmodern theorists take it for granted that there are critiques of meaning-based and policy-based legal reasoning sufficiently conclusive that the interesting questions concern the interpretation of the subjective experience of legal certainty and the juristic status of concepts like 'justice' (Goodrich and Carlson 1998). Skeptical theories gain support from comparative law scholarship showing diametrically opposed interpretations of identical code provisions, and identical case law derived from contradictory code provisions (Sacco 1991).

3. *Formalism as a Category in the Sociology of Law*

Treves usefully distinguishes between sociologies that include law as one of the elements in an integrated representation of society, and sociologies that take law as their object, bringing to bear on it the variety of instruments of sociological investigation (Treves 1995). The concept of legal formalism has been deployed critically against the first type of theory and descriptively within the second type.

In both descriptive sociologies of modernity and prescriptive political philosophical accounts, it is common for law to figure as an important, sometimes an essential, building block. The theory is not about law, but if its representation of law is inaccurate, the theory fails. The charge of formalism, in this context, means that the general theory represents law as having a gapless, meaning-based internal structure, responsive to outside imperatives of some kind. In fact, according to the critics, the contradictory internal structure of Western legal systems leaves adjudicators and other legal administrators great discretion in the interpretation of norms. It follows that neither the legitimacy of the legal order, nor its content, nor the effects of legal institutions, can be inferred from the external imperatives the theorist imagines animate them.

In this vein, critical legal scholars attacked the Marxist sociology of law as no more than the will theory, with the 'logic of the commodity' in place of natural rights (Kennedy 1997), and then turned the same critique on American functionalist legal sociology (Gordon 1984), and finally against the Habermasian attempt to distinguish between discourses of justification and application (Michelman 1996). In each case, a formalist treatment of law was the weak link in the general sociological construction.

The field-defining work in Treves's second mode—the multifaceted investigation of law as a social phenomenon—has been Max Weber's *Economy and Society*. Weber there offers a descriptive typology of forms of legal rationality. The 'highest' type—a logically formal rational system—is a collection of norms that are internally consistent and that officials apply to particular fact situations according to textual and conceptual formalism premised on gaplessness, as described above. In Weber's phrase, interpretation is

the 'logical analysis of meaning.' Despite the superficial resemblance, this ideal type is not just the late nineteenth-century will theory under another name, because it is not intrinsically associated with either the concept or the social reality of individual freedom, and because it is a contingent product of Continental legal history, rather than implicit in a larger normative conception. Weber dismissed the critiques formulated by the sociological jurists, described above, as self-serving resistance to the inevitable rationalizing trend of modernity (Weber 1954).

For this reason, his ideal type today defines a problematic rather than offering a powerful description. First, it is a matter for investigation how an order claiming any of Weber's types of legal rationality operates through officials at the level of practice (Sarat 1985), how state law interacts with other normative orders, and what effects are plausibly linked to a type (Trubek 1972). Second, it is a question for further study whether it is ever plausible, given the critique of gaplessness and the ever-present possibility of the abuse of deduction, that a legal order operates in practice in a way usefully described as logically formal rationality. Third, as the above discussion shows, the legal/bureaucratic mode of legitimation no longer relies on the claim of logically formal rationality, but rather on a complex mixture of claims of local meaning-based closure, claims of policy rationality (substantively rational, in Weber's terminology), and claims of democratic procedural legitimacy. These have not precluded a 'legitimation crisis.'

Paradoxically, given Weber's starting point, the modern sociology of law typically takes claims of closure in interpretation as motivated errors requiring explanation, rather than as the accurate self-description of legal modernity. Since 1900 critics have argued that the claim of closure masks conscious or unconscious 'legislative' or ideological agendas, and, since the 1930s, that the same claim is in one way or another linked to the Freudian superego and the Father (Holmes 1897, Frank 1949, Kennedy 1997, Goodrich and Carlson 1998).

4. Conclusion

Formalism, in its various senses, has been an epithet for so long that it is a plausible act of rebellion to embrace it (Scalia 1989), and many of the doctrines of the late nineteenth-century US Supreme Court that provoked the sociological jurists' critique have been revived in recent American constitutional law. These developments have produced interesting new critiques, but have not revised the terms of the discussion. Toward the end of Karl Llewellyn's classic article, 'What price contract?' (1931), he writes: 'One turns from contemplation of the work of contract as from the experience of Greek tragedy. Life struggling against form, or through form to its will—"pity and terror".' One might respond, against Llewellyn's romanticism, that descriptively formal law—both formal rule systems and formal techniques of interpretation—involves the morally delicate refusal to respond to the call for justice in the particular case, for reasons that may be good or bad according to the circumstances. Formal law is part of the drama of governance, the trivial or murderous drama of breaking eggs to make omelettes. The critical use of the term formalism, against the abuse of deduction and the fantasy of gaplessness in legal discourse, is part of the twentieth-century battle between those who have wanted to depoliticize the drama as much as possible, through reason, and those who have seen it as inevitably a dangerous improvisation.

See also: Disputes, Social Construction and Transformation of; Justice and Law; Law and Society: Sociolegal Studies; Law as an Instrument of Social Change; Law as Constitutive; Law, Mobilization of; Law: New Institutionalism; Law, Sociology of; Natural Law; Procedure: Legal Aspects; Rights: Legal Aspects

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Legal Insurance

1. The Term 'Legal Insurance'

Legal insurance is a voluntary private insurance which covers the costs of lawsuits. It may also be called *legal cost insurance*, *legal expenses insurance*, or *legal protection insurance*. The German expression is *Rechtsschutzversicherung*, the French *l'assurance de défense*. The European Union directive EU 87/344/EWG uses the term *legal expenses insurance*, which is defined in Art. 2 as follows: 'Such consists in undertaking, against the payment of a premium, to bear the costs of legal proceedings and to provide other services directly linked to insurance cover, in particular with a view to:

(a) securing compensation for the loss, damage or injury suffered by the insured person, by settlement out of court or through civil or criminal proceedings,

(b) defending or representing the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against him.'

The expressions *Prepaid Legal Service* and *Group Legal Plan*, which are used in the USA, illustrate the particular economic context and judicial functions of the service in this country. In Asian and African countries, legal insurance is practically unknown.

2. Development and Actual Situation

Although the origins of legal insurance can be found in the nineteenth century, it grew into an economically and politically relevant insurance branch in Western Europe only after World War II, albeit with regional differences. In Great Britain, for example, until 1967 it was forbidden and punishable to financially support another party in litigation if one had no personal interest in the outcome of the trial ('champerty'). Thus, the first legal insurance policy entered the British market as late as 1974. The spread of legal insurance has since been hindered by the high costs of litigation in Great Britain and the resulting low tendency of the general population to go to court (Prais 1995, p. 433). The French have also shown little interest in legal insurance policies. Legal insurance has, in contrast, achieved its greatest importance in German-speaking countries. In 1989 average per capita spending on legal insurance was 23.5 ECU in Germany, 10.8 ECU in Switzerland, and 17.4 ECU in Austria. Other countries follow at some distance. Average spending in Belgium was 8.9 ECU, in the Netherlands 5.3 ECU, in France 1.7 ECU, and in Great Britain a mere 1.1 ECU per capita (Blankenburg 1994, p. 295). Since 1989 this branch of insurance has expanded rapidly in all above-mentioned countries, although at different rates. In 1997 the total revenues from legal insurance amounted in Germany to 2.44 billion ECU, or an average 28.4 ECU spent per capita. Swiss revenues reached a level of 17.16 ECU, Austria 30.6 ECU, Belgium 18.9 ECU, the Netherlands 11.9 ECU, and France 5.8 ECU (Comité Européen des Assurances 1999). Over 50 percent of all German

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