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JUSTICE HOLMES'S RESPONSE TO LEGAL FORMALISM IN CONTEXT: A VIEW ON THE CORNERSTONE OF A REALISTIC APPROACH TO THE COMMON LAW

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Abstract English: A realistic approach to common law is one of the most authoritative views on the role and potential of judges in law-making. American judge Oliver Wendell Holmes, Jr. was a mastermind of legal realism and held a very special position among his fellows. Conventionally, legal realism is considered a progressive and innovative movement of the late XIX and the first half of the XX centuries. However, as this study demonstrates in several respects, some of its proponents can be labelled conservatives who defended their view of the traditional approach of judge-made law. Realists inspired by Holmes countered the formalist trends within common law, which was initially and historically alien to them (e.g. Langdellism). The formalist methodology and its results were often reminiscent of the Reception of Roman Law, which ancient common law rejected. Not surprisingly, it was highly criticized as an imposition of artificially invented legal ideals on a particular society regardless of its real-life experience. Based on Holmes's original writings and their credible interpretations, this survey aims to explore his anti-formalist approach within a broader context of its theoretical origins. It reveals the historical and legal roots of the 'realism formalism' antagonism in the common law, reflecting, as a result, the global contrast of two civilizational approaches to legal epistemology (common law v. civil law). Case-based conceptual legal thinking typical for common law is considered through the lens of Holmes's findings on the process of gradual formation of legal principles. Realistic aspiration to ensure that law reflects the actual demands of the community is explained as a claim for real democracy as opposed to the formal one. A refreshing contextual view of Holmes's teachings may unfold for a continental reader the possibility of treating the modern concept of deliberative democracy and models of constitutional interpretation, such as the living constitution or popular constitutionalism, from the perspective of a realistic approach.

Keywords: Oliver Wendell Holmes, Jr.; legal realism; legal formalism; common law; law and logic; legal methodology; deliberative democracy.

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A. Abstract (pure) logic and the arrangement of law. – B. Influence on legal reasoning and interpretation (realism v. syllogism). 4. Democracy through Common Law: Experience-based Law-finding and the 'Marketplace of ideas' Doctrine. 5. On the "True" Logic. – A. The law is not exempt from the impact of universal (not formal) logic. – B. Some of Holmes's examples of logical extension of the rules of law. – C. Logical extension must not be arbitrary. 6. Conclusion.

1. Introduction

Legal realism has long occupied its meritorious place in the multi-coloured palette of currents of legal thought (a body of views on the nature of law), along with *jus naturale*, legal positivism, normativism, Marxism, psychological school, etc.[1] Although it had not acquired such a separate standing, legal formalism nevertheless crept into this chain, especially in relation to legal realism.

First of all, to grasp this issue, the distinction should be borne in mind between *legal realism* as an American ideological and academic movement of the 1920s and 1930s and *a realistic approach to common law* as a concept of adjudication and judicial law-making. It was developed by American judges and eminent lawyers as an alternative method of practicing law in a precedent-based system. The latter gave rise to the former, preparing the basis for a methodological shift from excessive rationalism (relying upon *formal* logic) to empiricism.

US Supreme Court Justice *Oliver Wendell Holmes, Jr.* is widely reckoned to be the forerunner of the realistic approach to common law, as long before the 'legal realists' he encouraged a discussion about the principles that govern (or should govern) judges in the process of determining the rules of decision. The crux of the matter was the role of logic in this process as well as the terrain of its applicability. Therefore, sufficient mastery of the problems of legal formalism within the context of the US legal system is methodologically necessary for a deep insight into the *realistic approach*, as well as subsequent *legal realism*.

Before proceeding to the study, it is essential to make a *methodological reservation*. Holmes's legacy is multifaceted and extensive, scattered through major treatises, articles, speeches, correspondence, and, last but not least, judicial opinions. Not surprisingly, his works, as a product of the living intellectual activity of an outstanding mind, subject to its experiences and values, could undergo reformations; as a result, different parts thereof may seem heterogeneous and sometimes cause the opposite reactions from readers. Gilmore, for example, clearly demonstrates that in Holmes, one can see a liberal, a conservative, and even an anarchist, not to say fascist[2]. Reading Grey and Gordon, we see Holmes, on one hand, as an anti-formalist, i.e. a realist, on the other hand, as a positivist[3].

[1] Kelly, 1992.

[2] Gilmore, 1999, p. 394 ("Holmes was not a middle-of-the-road man").

[3] Gordon, 1982, p. 724; Grey, 1989, p. 795.

White also differentiates the interpretations of Holmes as a scientific positivist, progressive preacher, Liberaltarianism-Egalitarianist[4]. But is this positivism in the strict sense of the term, in its orthodox perception? Do these fundamental ideological dogmas that make up Holmes's teaching, which Grey compared as realism and positivism, actually contradict each other? In addition, there is a seemingly significant contradiction between conceptualism (as if this is also a kind of logic) and the methodology of empiricism in case law. In fact, it is hardly possible to consider these two repositories of Holmes' legal thought as self-sufficient, separate from each other, and even more so as a change in his views over time[5].

As White aptly notes on the issue, "despite its diversity, the critical literature on Holmes almost uniformly fails to assess him on his own historical terms. Holmes was, first and foremost, a late nineteenth century intellectual radical"[6]. For continental legal scholarship, which not very much oriented on theoretical issues of common law or American jurisprudence, the historical and theoretical context can provide a refreshing view of the question of whether some rationality gently connects the critical features of each of these "manifestations" of Holmes (if we recall his own ideas, two opinions on the legal issue are initially opposite to each other, but as new life experiences enrich each of them with the matter, a "successive approximation" commences and approaches the determination of a certain common sense, although not absolutely accurately).

With that said, the subject of this article is explicitly limited to the study of Holmes's teachings as follows: 1) in the aspect of anti-formalism[7]; 2) therefore, mainly relying on the central works before the 20th century and his opinions as a Supreme Court Justice[8]; 3) through the lens of legal history; 4) from the point of view of a continental jurist; 5) given that many of his ideas are obviously inapplicable to the existence of modern *political* law (*gubernaculum*)[9], but with

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[4] White, 1971.

[5] Gilmore, 1999, p. 386 ("[It was a] despairing view of the universe to which [Holmes] came as a young man and from which he never departed").

[6] White, 1971, p. 74.

[7] That is, not of other "Holmeses". One of the central aims of this article is to look at Holmes's main ideas from the perspective of legal history. Of course, the purpose is not to analyse and present Holmes's comprehensive legal ideology (if at all possible) or reconcile many completely opposite interpretations of his teachings. See Gilmore, 1999, p. 386 ("there was a pervasive ambiguity that he never clarified … which is why it has been possible for succeeding generations to have discovered or invented so many different Holmeses").

[8] Gilmore, Horwitz, and Kennedy claim that "the 1870s to the 1920s in the United States were 'the heyday of legal formalism'". See Leiter, 2010, p. 114.

[9] Referring to Holmes's thoughts about the impasse of a soldier being sent to slaughter by the state, Gilmore fairly notes that "To twentieth-century ears that passage has, I dare say, an embarrassing ring. But Holmes was a nineteenth-century man". See Gilmore,

the same evidence, many of his other conclusions relate to issues of *judicial law-making* in those branches of law that are still considered rooted in deep case law history (e.g. torts, contracts[10]).

A. Defining legal formalism consciously

For a continental jurist interested in Holmes's approach to judge-made law, it may be challenging, perhaps quite more than for their Anglo-American colleagues[11], to catch on to what he meant by formalism, especially given that he sparsely used this exact term in his major writings. Common views on legal formalism in Europe may be misleading when trying to read Holmes as an anti-formalist. Hence, there is a methodological task to define the types of legal formalism to which Holmes addressed and those to which he did not, as well as the extent to which he did (or did not) so.

On one hand, with a superficial appeal to this term (that is not uncommon for continental discourse)[12], *legal formalism* can hardly be considered a neutral category or *current of* legal thought – the concept itself hides a portion of scepticism, implying something beyond common sense (in the negative sense, formalism is about a formality, i.e. the triviality of mechanical action, inaction, decision and their argumentation, supported only by external (formal) trappings and little intellectual inclination, brought to a systemic scale, that may be characterized as a whole process with this particular word with a specific suffix pertinent for such purpose). At the same time, for example, the schools of positivism and jus-naturalism do not arouse *a priori* suspicion – they are conceptions about the nature of law, their attention is focused on what law is or should be, what its sources are, etc. From an academic and theoretical point of view, these concepts are neutral and are part of a healthy political and legal discussion. One can agree with them or not. But formalism, at first glance, does not fit into the range of supposed compromise due to the principle of diversity of opinions, and in the ordinary sense thereof it is almost impossible to remain neutral to it[13].

1999, p. 386.

[10] Farnsworth, 1998, pp. 25-26.

[11] However, this challenge may be relevant even for jurists much closer to common law. For instance, see criticism of Tamanaha's approach (Leiter, 2010, p. 115).

[12] For instance, Beccaria's teachings significantly impacted the continental legal thought of the Modern Era and dramatically advanced human civilization towards humanism and a just society. However, citing some parts of them, Brian Leiter emphasizes that legal formalism, in its most exaggerated meaning, assumes the judicial decision-making as a mechanical process of deduction based on a syllogistic schema. See Leiter, 2010, p. 111.

[13] For instance, Professor Butler singles out legal orders with "extreme formalism" as a separate category of legal system for the purposes of comparative law. See Butler, 2021, pp. 15-16. In these systems, according to comparativists, there is a formalistic

Thus, it is not surprising that manifestations of such legal formalism can attract criticism[14]. Consequently, if we are treating the question of the criticism by realists towards formalism for the first time, then we may be tempted to think that they were trying to correct the formalist pattern of judicial thinking in law enforcement, notwithstanding two circumstances. Firstly, the perniciousness of such *'bad' formalism* is evident, as was the case already in the XIX century. Secondly, if we take formalism in this sense, then there are doubts that something so evidently reprehensible could become the subject of a full-fledged public and professional discussion in America, where, under the conditions of the common law, such problems have never had a systemic scale[15].

On the other hand, there is another kind of formalism that is also concerned with the regulation of human behaviour, but is not shrouded *ab initio* in negative connotations. Kantian formalism, as a key component of deontological theories of ethics, is more of *an epistemological model* designed for obtaining knowledge about proper behaviour, than a set of techniques for the application of already established legal rules. As an epistemological model that goes back to Cartesian

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pattern of legal thinking and a superficial treatment with legal texts. In particular, they "prompt judges to think (mostly if not exclusively) about the wording of norms, not about substantive legal institutions, principles and concepts". See Belov, 2013, p. 363. Leiter agrees that "in some civil-law jurisdictions, the opinions are often written precisely in the form of vulgar formalism!". See Leiter, 2010, p.111 n. 3. For more analytics on this version of formalism, see later in this paragraph.

[14] In this case, we are talking about the formalist *ultra vires application* of legal provisions, the substantive content of which does not raise disputes. This is the formal and literal enforcement of the legislative text by the court, which is also contrary to the common sense of the situation. It is, *inter alia*, about judges relying just on wording of a written norm while ignoring its legislative purpose. This is what Justice Holmes's contemporary, the outstanding Russian judge and Privy Councillor A.F. Koni (1844-1927), referred to as "soulless clerical formalism" and "automatic application of the law". See Koni, 1989, p. 301; Koni, 2018, p. 21. One of the judges of the district court, who, under a guise of the formal requirements contrary to common sense, refused to allow the great Russian writer Ivan Turgenev into the courtroom (as he needed this visit to write a novel), Koni awarded the "title" of a "stupid formalist". Koni, 1989, p. 127. Koni was not alone in such views: both the then Minister of Justice of the Russian Empire, I.G. Shcheglovitov, and the then Dean of the Faculty of Law of Moscow University, I.T. Tarasov, reflected on "formally correct", but "capricious and ruinous requirements", and on "lawful official actions that have only formal justification". They argued that such formalism was a generic problem of law enforcement practice. See Tarasov, 1887, pp. 33-35; Shcheglovitov, 1887, p. 109.

[15] Common law system operates on the basis of working primarily with cases, not with legislative texts. On the contrary, in legal systems built around the statutory legislation, by their very nature, the question of the comprehension of the text, which may be substantive or formalistic, inevitably arises. Fertile ground for formalism in some of these systems "reflected in greater distrust of the judiciary, less honesty in the administrative system, and higher levels of corruption". See De Geest, 2020, p. 32.

reason and Aristotelian logic, formalism offers *a methodological alternative to empiricism*, and therefore there is no *a priori* ground to suspect it of social harmfulness. Kant followed the method of "*normative formalism*" [16], according to which the evaluation of proper behaviour stems from the *norm* itself and does not depend on anyone's will (his own or external). Consequently, such a methodology is directly related to the question of how to seek a rule of decision. The formalist answer was *pure reason*, separated from feeling-based contemplation. Kantians did not recognize the utility of empirical (casuistic) knowledge. At the same time Kantian formalism itself was rather a philosophical methodology and was not originally intended to form meaningful rules of behaviour, that is, it was harmless from the point of view of potential social impact.

However, the growth of Kant's ideas in the works of his followers and transfer thereof directly into the legal perspective led, on one hand, to the derivation of "unconditionally recognized" synthetic ethical-legal concepts by virtue of abstract philosophical reasoning (e.g. absolute will, equity, truth, impartiality)[17]. On the other hand, it was formed with the conviction that such artificial reasoning and logical deduction of some concepts from others can be a sufficient tool for building an integral legal system. This kind of formalism neglects empirical trends (experience) in solving legal problems, separating social regulation from real life and people's relations. The content of legal norms in such a system depends solely on intellectual activity. Hence, strict universal principles, the reliability of which can only be tested by logical means, completely oust 'soft' factors, such as a sense of social rhythm and experienced intuition, from legal matters, although they often reflect the balance of interests much more effectively than pure reason. Thus, in its exaggerated meaning, formalism may seem to propose social experiments, since the central declared goal of it is to *improve* existence through *ideas* of what is 'due' (to bring the actual, i.e. imperfect, situation into strict accordance with the synthetic 'universal rationality' that does not take into account the self-interests of the stakeholders of a given social relation).

In addition, the focus of 'formalist issue' covers the mechanism of filling in the legal gaps by means of the analogy of rules or the analogy of principles, that is, normative (textual) analogies, the methodology of which may be traced back to the European tradition of Reception of Roman law and which is based exclusively on jurists' and judges' logical activity. Normativism as such presupposes reflection on legislative provisions, linguistic analysis of the closest legal 'institutions', and identification of systemic-structural connections 'around' the missing cell in the body of law in order to formulate a decision, i.e. to 'fill' the gap *instead of the legislator* (one might say, repeating the intellectual model of the legislator's

[16] Frolova, 2023, pp. 43-44.

[17] For a splendid analysis of such categories generated by Kantian formalism see: Jensen, 1934, pp. 195–208.

rule-making technique[18]). Formalism in such cases is manifested by the fact that nothing but the tools of formal logic are used to make a final decision on the case (and, in fact, to create a rule of decision, to 'fill' the gap).

It is therefore not surprising that the proponents of *empirical epistemology*, to which the American jurists of the realist wing can be attributed, despite all their internal disputes on certain issues, generally agreed in their criticism of formalism in the indicated methodological sense. Their views were not about a specific course of legal thought, but about the type of reasoning used in deciding legal cases and working with legal matters. Among other issues, they juxtaposed formalism with the type of empirical judicial thinking, that, as American jurists have shown, is inherent (or should be inherent) in courts of common law. In this case, the type of legal thinking affects how the substance of the rules, by which society should be governed, is determined. In fact, the question of the proper *source of law* was touched upon by such considerations, and in this perspective, the anti-formalist attitude opened the way to the assessment of both positivism and natural law. The origins of such methodological confrontation can be traced back to the initial antagonism of the perception of Roman law in England and Europe, as a result of which two different approaches to the solution of legal issues were formed – based on cases and based on abstractions[19]. The first was a method of 'translating' concrete social relations (situations with overlapping interests that need to be harmonized) into the language of law, and the second was a "scholastic method"[20] of treating the external sources of law (e.g., *ius*

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[18] In one of the flagship civil codes of Europe, the Swiss Civil Code, it is stated that in the absence of a legislative provision or legal custom, the judge decides the case in accordance with *the rule that he himself would have created as a legislator* (Article 1, paragraph 2). See: https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en [Accessed 4 July 2024]. This approach apparently goes back to the European version of sociological jurisprudence (Ehrlich) and to the Free Law Movement. See Langford, Bryan, 2020, pp. 113-145.

[19] The casuistic nature of English and American law (even today) refers to the method of classical Roman law, while the "symmetrical system" of codified continental law is interested in "synthetic analysis" and is characterized more as post-Roman than genuinely Roman. See Yntema, 1949, p. 78 ("Even today the law of England and the United States is dominantly casuistic"); See also Quint, 1989, p. 311 ("[For continental legal tradition] maintenance of the general principle in the abstract may seem to some to be the most important thing" while "[in common law tradition] general principles are extracted from decisions in specific cases") and Robinson et al., 2000, p. 150 ("[It is important to note] the procedural nature of the Common Law; this is largely due to its being a system which offered remedies not rights, just like classical Roman law"). See also Pound, 1921, p. 450. Pound credited Holmes with authoritatively explaining to American lawyers the importance of "the relation between the law-finding element in a judicial decision and the policies that must govern lawmaking".

[20] Tomsinov, 1993, pp. 128, 131.

proprium or *ius commune*) that did not work directly with life empiricism. Not surprisingly, they acquired the labels of *case law* and *learned law*[21], respectively.

Finally, in American law, another, *special kind of legal formalism* has developed[22]. As in the case of the previous type of formalism, the main aspiration of the American version was to create a clear system of legal norms, laid out on the shelves and catalogued like books in a library. However, the method of designing this system differed from pure rationalism and took into account the originality of case law. Under the auspices of Professor Langdell, supporters of this approach believed that legal rules should be derived from judicial precedents in precise formulations, so that all situations (sets of facts) arising before the courts could be analysed as minor premise and 'put' under or 'invested' in one of the 'formulas' in the library's extensive 'catalogue' of judicial precedents (major premise). The catalogue, in turn, could be subjected to further logical improvement, including systematization and precise structuring, in order to allow lawyers to quickly and without 'unnecessary' intellectual effort find the suitable 'formula' and 'simply' (without using conceptual thinking) apply it. Consequently, they risked turning the common law system into a civil law system. Dean Pound critically evaluated this approach as "mechanical jurisprudence"[23].

Conventionally, legal realism (sociological jurisprudence) is considered *a progressive and innovative movement* of the late XIX and first half of the XX centuries (against the background of "the heyday of of legal formalism"[24]), but in some respects, they could be respectfully called *conservatives* who defended their view of primordial (traditional) approach of common law[25]. The stumbling block between the realistic approach and formalism seems to be the thesis of the latter that a system of law can be built with the help of formal logic, using only its syllogistic techniques. In contrast to formalist deontology, the realistic approach attaches great importance to the social results (consequences) both of behaviour itself and obtained in the resolution of life situations caused by that behaviour. That is, it replaces deontology with the teleology (the importance of goals that should be achieved based on the experience of resolving cases). The realistic

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[21] Bellomo, 1995, pp. x, 106.

[22] As Leiter aptly observes, neither formalist theory of nature of law preoccupied with the idea that judges do not make law (i.e. formalist arrangement of non-judicial sources of law) nor problem of formalist application of legal rules were the objects of cardinal interest of American legal realism. See Leiter, 2010, pp. 115-116. Nonetheless, it should be borne in mind that Holmes, who was an inspirer rather than an integral part of Legal Realist Movement, produced quite plentiful criticism towards Kantian and post-Kantian systems of ethics as well as doctrine of *jus naturale*. See Holmes, 1918.

[23] Pound, 1908, pp. 605-607.

[24] Tamanaha, 2010, p. 1.

[25] From this angle, the words of Thomas Grey are worthy of note: "While conceptualism *was universal during the classical period of Anglo-American legal thought*, adherence to the Langdellian notion of legal science was not" (italics added). See Grey, 1989, p. 825.

approach does not accept the proposition that a system of law can be created without leaving the office by a clerk, commentator, or philosopher, or even by a whole group of them, even the most intellectual and educated, having only *ideas* about the order of things and logical tools, but not working *directly* with the experience of daily life of community "to see what the law is in reality"[26], case by case, in the continuous process of studying past and potential solutions to social disputes (collisions of interests). This will be discussed in detail in para. 2.

B. Preliminary observations on classification, methodology and relevance

In any case, the key point is that eminent American lawyers, in particular Justice Holmes, presented the realist approach as a reaction to formalist trends *within judge-made law*[27], which was initially alien to them[28]. There is no reason to believe that Holmes argued with the continental type of legal understanding *per se*, since the logical treatment of law is more than familiar and understandable for Europe. At the same time, it is hard to fully and unconditionally share the view of the modern American legal scholar and judge R. Posner that Holmes was 'fixated' on formalism in the sense of Langdellism[29]. Opposite extremum, the attitude of G. Gilmore who said that "Langdellian jurisprudence had, in truth, been largely created in Holmes's image" [30], is no less fervent. More temperate and sensitive evaluations can be found in the splendid work of T. Grey who, whereas indicating Holmes's particular influence on the denouncement of Langdellianism ("They did not accept Langdell's insistence that legal thought could and should be autonomous and universally formal"[31]), emphasized the presence of both common and different in their theories, signifying this question as one that cannot be answered like an open-and-shut case. He rightly marked that Holmes's approach may be treated not only like *criticism* of but also like *deviation* from Langdell's method[32], since both of them told of logic as a tool of conceptualist

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[26] As Kelly referred to Holmes's ideas. See Kelly, 1992, p. 365.

[27] Brian Leiter specifically underscores that judicial law-making was so deeply entrenched in the common law ("Every beginning law student is taught… that… *judges make law*"), hence the anti-formalist (i.e. realist) debate could not be either detracted from this fact or principally focused on other types of formalism. See Leiter, 2010, p. 115. Tamanaha also has treated the issue of judicial law-making as a key point of realist-formalist tension, though the substantive magnitude of his treatment has been repudiated by Leiter. See Tamanaha, 2010, p. 175.

[28] Rearrangement of common law by dint of logic was proposed as a means of improving the system in order to enhance legal certainty, but it was never denied that initially the technique of holistic systematization was not typical for English law.

[29] Posner, 1986, pp. 184-185.

[30] Gilmore, 1999, p. 393.

[31] Grey, 1989, p. 825.

[32] Ibid, pp. 816, 825.

legal systematization but diverged with regard to empirical base, stability, rigidity and adjudicatory relevance thereof.

Indeed, Holmes's contribution seems broader than just designing the anti-Langdellianism and enters even into the sphere of the philosophy of law (take, for example, his discussions with the leading minds of that generation about the metaphysical postulates of the theory of knowledge and the relationship of consciousness with the Universe[33], or the vivid and unambiguous evaluation of the European Reception of Roman law and the historical school of law based on the Kantian method, which occupy a separate place in his writings[34]). He obviously took these considerations into account when speculating on formalism. Moreover, in his epochal magnum opus "*The Common Law*" there are only three references to Langdell, and in rather restrained tonality (though Holmes was rarely shy in his expressions[35]), while in the most cited articles "*The Path of the Law*" and "*Law in Science and Science in Law*" there is not a single mention of the formalist professor at all.

It becomes clear that in this vein, both positivism and the school of natural law can represent manifestations of the formalist approach and, consequently, be 'antagonists' of legal realism: *positivism* – when it talks about the creation and transmission of 'commands' detached from real life and not conditioned by anything except the reason of those who legislate and adjudicate, and *natural law* – when it proposes to deduce 'subordinate' (concrete) rules of behaviour from some 'higher' (universal, preexisting or even 'speculative') general principles, i.e. the mode of adjudication referring to some universal moral principles[36]. That is, it is formalist manifestations that, apparently, became the reason why

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[33] Luban, 1994, pp. 468-472.

[34] For example, in the series of lectures "The Common Law", Holmes separately examines the plot of possession on the example of the opinions "most of the speculative jurists of Germany, from Savigny to Ihering" (including Pukhta, Bruns, Hans), which laid the foundation for the "German interpretation of the Roman law, under the influence of some form of Kantian or post-Kantian philosophy". See Holmes, 2009, pp. 186, 197; In his article "The Path of the Law", Holmes assesses the formalist techniques of adopting the legal experience of Roman civilization as "perverting influence of Roman models". See Holmes, 1997, p. 1006. ("[H]igh among the unrealities I place the recommendation to study the Roman law"). It is noteworthy that we find similar conclusions in another founder of sociological jurisprudence, Dean Pound. See Pound, 1908, pp. 606-607. ("One of the obstacles to advance in every science is the domination of the ghosts of departed masters. Their sound methods are forgotten while their unsound conclusions are held for gospel").

[35] For instance, in effect, Holmes referred to German jurists "from Savigny to Ihering" as the authors of speculative theories, and attributed a lack of knowledge of English law to Austin.

[36] See Gilmore, 1999, p. 387 ("To Holmes, and to me, law has no role to play in the remaking or bettering of a society").

these concepts received the lion's share of criticism from the realist bloc. For example, it would be quite strange to believe that Justice Holmes had a sincere and primordial hostility towards the right to life, but he criticized[37] the theory of natural law precisely because it synthetically deduced this right with the help of formalist methodology and recognized it as universal for any society, requiring no proof.

Holmes in turn demonstrated that these conclusions had not been supported either by history of law, or by then-actual legislation[38]. Furthermore, as will be shown later, formalism is *undemocratic* (or *formally* democratic) in allowing the imposition of 'better' rules on people as compared with those which are formed in their real lives, while Holmes's empirical methodology strove for '*substantive*' democracy (not in the Athens version): "I always say, as you know, that if my fellow citizens want to go to Hell, I will help them. It's my job"[39]. The line of anti-formalism (which is in some extent akin to pragmatism and empiricism) is integral to the works of Holmes, while the criticism of various theories is concomitant. His approach, referring, *inter alia*, to the determination of actual demands of the community concerning well-known situations under fair and competitive judicial mechanisms, may be beneficial in drawing a distinction between the methodologies of judicial law-making in the aspect of the real democratic capacity thereof. It seems to be the acute issue within the European legal tradition where judge-made rules of decision, although quite widely recognized as a fact, have historically such nature and path of creation[40] as leading to contemplation thereof from the perspectives of positivism and natural law and 'continental' legal realism (sociology of law), all quite far from ideas of democracy.

As a result, *on one hand*, methodologically, the realistic approach to law falls into obvious contradiction with approaches based exclusively on the ideas of rationalism, formalism, deontology, and scholasticism (including the formulation of textual 'norms' for their subsequent interpretation and application). At the same time, it should be borne in mind that polemics with formalism in this vein were not an end in themselves and did not exhaust the potential of the realistic approach. *On the other hand*, substantively, the realistic approach engendered by Justice Holmes engaged into an open polemic with 'Langdellism'[41] (in terms of "exact and deductive" or "autonomous and universally formal" common law reasoning[42] reposing merely on axiomatic principles derived from precedents

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[37] Holmes, 1918, pp.42-43.

[38] See also Holmes, 2009, p. 192 ("Law, being a practical thing, must found itself on actual forces").

[39] Howe (ed), 1953, pp. 248-249.

[40] Which may be aptly described in such terms as "common opinion of the legal profession" or "*arrêts de règlement*". See Holdsworth, 1924, p. 220.

[41] See Posner, 1986, pp. 184-185.

[42] Grey, 1989, p. 825.

as *noumena*), and in this respect, opposed formalism directly in judge-made law[43], including the *stare decisis* doctrine in its rigid version. These aspects are discussed in the *para. 2 and 3 infra*. One of the most inspiring conclusions that Holmes drew from these two aspects was that judges, although they should be unbiased (blind) in establishing facts, but they should not be blind to the results of their decisions[44]. They can and should participate in the discussion of the principles which guide their decisions, and maintain the law as a living instrument, answering new questions not through formal discussion of the *existing*, but through *democratic* verification of the *possible*. The means to help them in this process are discussed in the *paras. 4 and 5 infra*.

Both aspects, revealed in the works of Justice Holmes, may be of theoretical interest for *continental jurisprudence* if treated by continental jurists with due account of both civil-law experience and appropriate methodology. Over the past decades, if not a century, the phenomenon of judge-made law has permeated deeply into European (continental) legal life, and it is still gaining momentum. Many constitutional and other highest courts of European states are also involved in the struggle to counteract formalism, not only guiding ordinary courts towards the true fairness of their decisions, but also ensuring the development of 'living' constitutional law. The concepts of precedent, judicial doctrine, and case law have become firmly entrenched in the *continental legal scholarship*. However, this kind of living development of law, and this type of 'case law,' differs from the realistic approach to common law, so the question arises of comparing the two types of judge-made law. The issue is relevant not only from the point of view of theoretical comprehension of the actual manifestations of judicial law-making in European countries and the development of concerning doctrinal trends (e.g. the Free Law Movement)[45], but also in the aspect of the active development of supranational orders, for which the concept of case law has firmly entered everyday life[46].

In addition, awareness of the realistic approach is evidently valuable for dealing with the American legal system as a unique, historically conditioned phenomenon.

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[43] Kelly even designates the relevant part of his compendium on the history of legal doctrines as "Law and the Courts," while the other schools bear their common academic names (e.g., Sociological jurisprudence, Historical school). See Kelly, 1992, p. 365. Moreover, with respect to the US legal tradition some authors explicitly argue that discussions of legal formalism from the perspective of legal theory are irrelevant as compared with debates on judging and adjudication. See Tamanaha, 2010, pp. 3, 160.

[44] *Cf.* the approach preached by Justice Scalia who was self-identified formalist and "would not permit purpose to trump the plain meaning of statutory terms". See Tamanaha, 2010, p. 179.

[45] Langford, Bryan, 2020, pp. 113-145.

[46] Wojtyczek, 2022, pp. 233–250; Karlijn, Eric, 2008, pp. 827-841; Jacob, 2014. See also Butler, 2021, p. 130 ("That 'precedent' is an integral component of modern Russian law is contested by few").

Holmes is one of the most credible (and indeed one of the most-cited ever[47]) authorities who dealt with this phenomenon. Moreover, the treatises of Justice Holmes in this regard are of particular interest, since they not only draw a comprehensive picture of the history and ontology of a particular legal civilization (common law), but also shed light on the key trends in the development of judge-made law in America of the XX century. As Dean Pound said of Holmes's major writings in the first half of the XX century:

> [They] addressed directly to problems of immediate importance in the law of today, and might have been written in the second decade of the twentieth century instead of the last decade of the nineteenth[48].

Summing up the intermediate results, it is necessary to emphasize once again that legal formalism attracted the attention of the eminent Justice Holmes precisely in the above sense, and *not in the sense of 'bad' formalism*. Firstly, the problem of 'bad' formalism was not generic in common law systems, and secondly, it, properly speaking, does not relate to issues of a global, conceptual, and legal nature[49]. It is not directly related either to the body of existing law[50] or to the ontology of the system of law, either to the theory of nature of law or to the process of emergence of rules of law. This type of formalism mainly concerns specific practices within the daily judicial proceedings and certainly doesn't raise the problem of judicial law-making, but rather the problem of the human factor, professionalism, impartiality, and fairness in law enforcement. This issue is definitely no less important for the triumph of legality, but, unlike formalism in law-making, everything here seems clear and does not require special epistemological efforts. It is difficult to imagine a truly impartial lawyer who would assert that "stupid formalism" (in the words of A.F. Koni quoted earlier) has a beneficial effect on the legal system. In fact, this type of legal thinking is dissonant with the very essence of the judiciary, since it actually represents the unwillingness of judges to fulfil their main duty – to *consider* cases and comprehensively *take into account* the whole set of circumstances *that are important* for a particular case. Instead, it is assumed to be sufficient to establish a *formal minimum* according to the composition of the facts and blindly apply the letter of the law.

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[47] Shapiro, 2000, p. 424; Shapiro, 2021, p. 1602.

[48] Pound, 1921, p. 449.

[49] R. Posner confirms that in order to consider the realistic approach to law in the American version, it is necessary to "purge 'formalism' of its pejorative connotations by using it simply to mean decision by deductive logic". Posner, 1986, p. 184.

[50] Given the subject of discussion, within this article, referral to the issues concerning the "body of law" implies those related to the body of "rules of decision" in broad terms, whether of legislative nature or elaborated in the process of common law adjudication.

Thus, Justice Holmes responds to formalism in terms of the *searching for* rules of law, the clarification of what is proper and improper, and the process of defining the concepts of lawful behaviour. Formalism and realism[51] collided in legal matters as two *epistemological models – rationalism and empiricism*. For the continental reader, studying Holmes in this context can provide a two-way theoretical synergy. On one hand, historical correlations between certain turning points in the development of common law and the modes of legal thinking they generated can explain, in a special way, the idea that Holmes sought to convey. On the other hand, his own mode of thinking, which is engendered by and aimed at common law and its history, offers an opportunity for a renewed understanding of two historically established methodological approaches to resolving legal issues. This includes a more accurate understanding of the differences between the two methods of judicial law-making, making it possible to raise questions and open perspectives that might not be evident in a separate study of each approach.

2. Historical context of Discussion on Legal Formalism in the Common Law

The history of common law as an original mechanism for resolving social disputes is a solid empirical basis for pondering the anti-formalist issue. It commenced audibly in the twelfth and thirteenth centuries with the formation of a special principle (method) of judicial decision-making. Instead of centralized preparation of 'law in books', the textual content of which would be recognized as a self-sufficient, unconditional, and only source of knowledge on how a particular case should be resolved ('downward' thinking), the English monarchs legalized a decentralized (i.e. casuistic and 'bottom-up') system of decision-making. It was based on the two pillars of justice: the jury of "local men" (as an integral part of trial courts and the equivalent of average prudence and the detector of truth) and the rule of similar cases (like cases maxim).

A. Legal sources and methodology: The origins of two approaches are duly discerned

Of course, the existence of *written law*, as well as of *doctrinal commentaries* of authoritative jurists, at any stage of the development of common law was not and is not denied. As for the former (*lex scripta*), initially, it was specific codified legislation[52], then legislative enactments of the king and constitutional acts of

[51] In this article, the terms "realism", "realistic" and "realists" are used to refer to the realistic approach to common law as described above (adhered by Holmes and a number of prominent American judges and jurists), and should not be reduced in their meaning to the organized current of "American legal realism" as well as its radical branches.

[52] Their nature can be conveyed by various concepts such as "law", "code", and "lex". The most famous collection of such texts is The Tome of Rochester (*Textus de Ecclesia Roffensi per Ernulphum episcopum*), which contained more than 30 enactments, adopted

England (Grand Assize, Magna Carta, etc.), and later Acts of Parliament. As for the latter (English version of *ratio scripta*), besides the well-known commentaries by *Glanville* and *Bracton* (who were, *inter alia*, proponents of the enhanced role of Roman law), it was common practice among lawyers at a certain stage to reflect and comment on Year Books, not to mention the influence of Lord Coke, who claimed that the training of *artificial reason* is essential for every lawyer ("Logick… Syllogisms,· Inductions, and other arguments…"[53]). The important point is not that written legal forms *existed*, but *how* they existed (operated) *vis-à-vis* common law (i.e. case law) and what was their place in the hierarchy of sources that guided judges in dispute resolution.

Firstly, England had decisively rejected the Reception of Roman law by the 13th century[54], along with the 'textual' pattern of developing it in the manner of glossators and commentators, in favour of the development of a native law; that fact, given the above-mentioned peculiar reforms of royal justice, largely determined the further methodology of legal thinking. As written law had been gradually enhanced, the 16th century became the period of rivalry between the *lex scripta* and the case law (*lex non scripta*). On the contrary, continental adjudication was directly impacted by Roman and canon law (through the *ius commune* techniques), which contended for supremacy with *ius proprium*, i.e. the two sources based on abstract legal reasoning. And there has always been a greater reverence for *lex scripta* and textualized *ratio juris* as a receptacle of these sources.

Secondly, as a consequence, English and European law were developed by distinct subjects who worked on distinct objects. English rules of law were derived largely from *real judgments* by practicing lawyers on a *case-by-case* basis, whereas continental law was principally developed by 'learned men' on the basis of abstract reasoning on infinite textual formulas. As Sir William Holdsworth, a

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mainly by the Anglo-Saxon kings before the Norman conquest (in the aspect of this study, it is important that all of them were published before the reign of Henry II, which is associated with key events in the genesis of common law).

[53] Holdsworth, 1924, p. 224 n. 5. Nevertheless, the sharp distinct between the two types of *ratio scripta* is that in England "there was no other means of developing legal doctrine than by attending to the rulings in [the] cases". See Holdsworth, 1924, p. 225.

[54] King Stephen prohibited the teaching of Roman law in 1149. It is argued that "Roman law was hardly received in the twelfth and thirteenth centuries, and in 16th it was definitely rejected". See Robinson et al., 2000, pp. 125, 138. Holdsworth attributed the cessation of Roman influence to the end of the 13th century. See Holdsworth, 1924, 218. Anderson also notes that "Although the Common Law has received some influence from Roman law, it is largely the result of independent development by medieval English lawyers… [since] the early emergence of a sophisticated court system and legal profession insulated English law from developments elsewhere". See Anderson, 2018, p. 111. It should also be pointed out that English common law, unlike European *ius commune*, was not much influenced by canon law and the Church. See Robinson et al., ibid, p. 125.

pre-eminent authority in this field, described this process with respect to English lawyers, they "were developing the principles of the common law by means of arguments used in *actual* cases reported in the Year Books" (italics added)[55]. In contrast, a renowned master of European legal history, Professor *Manlio Bellomo*, denotes a particular role of Medieval scholars and jurists and even students in elaboration of *ius commune* by virtue of "written and rewritten *additiones*" while the whole "printing presses worked ceaselessly to print… glossed [corpuses] of civil law and of canon law" that were indispensable attributes of a "judge or lawyer of any prominence"[56]; regarding the 14th century, i.e. the turning point of a divergence of legal methodologies, he notices that these attributes were quite convenient to "mask the true face of their operational choices behind *solemn proclamations of ideals* and *mythical principles*" (italics added)[57].

Thirdly, the pervasive use of cases rather than 'texts' for dispute resolution has led to the formation of an autonomous and primary body of law developed by the courts exactly as *lex non scripta*[58]. The key point is that the common law acquired the status of senior law of the land[59]. Unlike this, though the priority of sources of law in continental adjudication has evolved with the gradual expansion of Reception (from *ius proprium*[60] to *ius commune*[61]), neither the autonomy nor primacy of *real case* law has been recognized here.

Fourthly, and crucially, the different patterns of legal development (through decided cases or through the writings and the common opinion of the profession) made a vivid mark on the European and English lawyers' mode of thinking. The

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[55] Holdsworth, 1924, p. 220.

[56] Bellomo, 1995, p. 216.

[57] Bellomo, 1995, p. 198.

[58] See Holdsworth, 1924, pp. 218, 220-225 ("English lawyers constructed their law from the cases decided in the King's court"; "As there was no other means of developing legal doctrine than by attending to the rulings in these cases, these rulings necessarily came to be regarded as authoritative").

[59] Holdsworth, 1924, p. 218 ("[although, as early as the 16th century, developing English civil law] did not get the upper hand… [the common law] was obliged to contend for supremacy with the rival bodies of law"). See also Coke arguing in *Thomas Bonham v College of Physicians,* 8 Co. Rep. 107 ("when an Act of Parliament is against the common right and reason, or repugnant, or impossible to be performed, the common law will controul it").

[60] Bellomo, 1995, pp. 95, 151 ("[judge was obliged to act without ius commune] if an appropriate principle could be found in royal law"; "the highest priority given to the law that was the most direct expression of the organs of government…"). Holdsworth, 1924, p. 224 ("Books upon the texts, upon the cases… were the Responsa, which had the force of law").

[61] Holdsworth, 1924, p. 221 ("[Speaking of glosses and commentaries] In the sixteenth century their authority was almost equal to that of the text 'quidquid non agnoscit glossa, id non agnoscit curia'").

casuistic and conceptual habit of mind was the only possible tool for 'gathering' a rule of decision for the new case from those already decided in the common law. Common lawyers with each new case "started *ab ovo* or nearly so"[62], hence, each case was important as it could make a difference to further development of law by sculpting its own rule of decision to take the pertinent place within a body of the common law. In contrast, most cases considered by the continental courts could be easily forgotten once they were decided. They were subordinate minor premises to *ius proprium* and *ius commune* (major premises), a mere application thereof. Thus, such model of legal reasoning implied neither care of each precedent nor their sensible influence on the whole body of law. Moreover, although continental legal reasoning was also conceptual by nature, the concepts were substantially the result of either scholastic dialectic (abstract thought and technical language[63]) or pondering on imaginary cases[64] rather than real ones.

Finally (last but not least), the peculiarities of the system of sources of law and methods of legal thinking essential to the adjudication could not but affect the approaches to the training of lawyers. Not surprisingly, a monopoly of the Bar on training new members of the legal community emerged in England[65], where adjudication was inextricable from real cases. On the contrary, in continental Europe, where legal practice depended on knowledge of legal texts and the

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[62] Holdsworth, 1924, p. 225.

[63] Bellomo signifies the "increasing precision in the technical language perceptible in the sources [of law] beginning in the late eleventh century". He adds that the interpreter of the law, e.g. judge, could not ignore "the common and accepted meanings of the technical terms". His admirable description of *ius commune* shows that continental legal concepts and doctrines were the direct outcome of abstract logic. "[Roman law] penetrated the jurist's reasoning mechanisms because *its language was the vehicle for all ideas*"; "[ius commune] radiated juridical logic… and mechanisms of legal reasoning – ... the jurist's mode of being". See Bellomo, 1995, pp. 90-91, 153. Holdsworth even doubt if there was any methodological diverge between continental lawyers and "their contemporaries the scholastic philosophers". See Holdsworth, 1924, p. 222.

[64] While being the vital force of legal development for several centuries, continental doctrinal writings commonly relied upon abstract consideration of, *inter alia*, *potential* cases that *might* occur in practice. Professor J.C. Gray drew a sharp line between *the two modes of case thinking* which is quite relevant for the subject of the present study: "There is unquestionably one evil caused by the habit of considering imaginary cases rather than real ones: a tendency to develop distinctions purely theoretical, and to complicate the law with principles and deductions which have no place in the conduct of life". See Gray, 1909, p. 261.

[65] See Robinson et al., 2000, p. 138. ("Legal training became the prerogative of the practitioners…". Civil and canon law taught by those who visited Europe, but the efficiency of King Henry's reforms "was such that Englishmen saw no need to acquire the new learned law…"). See also Anderson, 2018, p. 111 ("Legal education in medieval England took place in the Inns of Court and not, as it did elsewhere, in the universities").

opinion of the profession[66], a tradition of university legal education was formed, and although practical training took place, it did not play a decisive role.

It should be noted that the features outlined were merely the roots of a significant divergence between the two legal models, which evolved over centuries and reached a peak in the 19th century. Professor Bellomo characterizes this period in Europe as the "strict formalism" with regard, *inter alia*, to Pandectists[67]. On the other hand, in England, there existed a rigid doctrine of precedent. As will be seen from further study, many mentioned aspects of the development of common law can be comprehended *through the lens of Justice Holmes's anti-formalist approach*. The fact that he designed his two central treatises – "The Common Law" and "The Path of the Law" – as guidance for proper training lawyers speaks for itself.

This point is where the watershed emerges between the two approaches to dispute resolution (and, indeed, to legal thinking and reasoning) – in effect, this may be considered also as one of the origins of the discussion about formalism and realism in jurisprudence. The point in the most simplified form can be presented as follows: in the common law system, legal texts were not considered the only source of law, and the courts were not just a "technical tool" for the enforcement of these sources (application of law by deduction or other logical methods). England did not follow the path of giving the text an unshakable Justinian authority, "according to which the thought embodied in the text is true in itself and cannot be refuted by real life"[68]. Written law existed along with rules of case law formed in a decentralized manner, and together they formed a system consisting of two integral interrelated elements[69]. As we have seen, in contrast to the course of development of continental law, in Medieval England, there was a visible division of *gubernaculum* and *jurisdictio* (or, one might say, *potestas* and *auctoritas*), which, among other things, allowed the legal profession to autonomously elaborate approaches to resolving social disputes. As Mcilwain explained the difference relying upon analysis of Bracton's treatises, the King was imbued with an autocratic and irresponsible authority only within the *gubernaculum* (i.e. royal administration and the Executive), but never beyond it. Moreover, there were rights that resided wholly "outside and beyond the

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[66] As Holdsworth witnessed, determination of a rule of decision in Europe was sometimes undertaken even by technically counting the "votes" of well-known lawyers for or against a particular rule. In such a situation, given the reliance on imaginary cases, justice could be administered by chance, while the formulated opinions went far from the texts they were supposed to comment on. See Holdsworth, 1924, p. 222 (It was a "Judge Bridlegoose who decided causes in law by the chance and fortune of the dice").

[67] Bellomo, 1995, p. 19.

[68] Tomsinov, 2010, pp. 262-264.

[69] See Wheatle, 2019, p. 348 ("Common law norms are accordingly definitionally distinct from statutory norms").

legitimate bounds of royal administration and fall properly under *jurisdictio*, not under *gubernaculum*"[70]. In the continental tradition, nothing of the kind had been observed, perhaps until the 20th century era of constitutionalism, – legal systems of that tradition typically rely upon legislative acts, and judicial activity does not lead to the formation of an independent body of law[71].

Notably, the idea of common law as a body of fundamental principles on which a community is built and on which political branches must not encroach continued to exist precisely in American constitutionalism. Unlike the doctrine of Parliamentary sovereignty developed in England, America has become a bulwark of judicial constitutional review, which Justice Holmes aptly described in *Lochner*:

> [Statute may be held unconstitutional if] it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law[72].

Moreover, even at the end of the 20th century, American judges referred to the mentioned opinions of Lord Coke to justify the President's subordination to the law (e.g. *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994).

Turning to the issue of the correlation of the sources of common law only "tangentially" for the purpose of posing the problem of this study, we should also note that the institution of the jury has rapidly shifted the emphasis from the formal text towards *daily life experience*. Sources of law began to operate against the background of the principle of fair dispute resolution with the mechanism of making moderate, balanced decisions, the synonym and embodiment of which was the provision *of legal equality* (save for the peculiarities of structure of feudal society)[73]. The jury has long been associated with the experience of everyday measured (law-abiding, not harmful) human behaviour, theoretically bringing this institution closer to the ideal of justice not only due to its visible democratic nature, but also by virtue of the equality it provides ('the court of equals' as opposed to the subjective opinion and 'deductive abilities' of the government agent). An authoritative confirmation of this is the conclusion of Glanvill, who named the jury as a "gracious gift" of the monarch, owing to which the English had the opportunity to resolve disputes by means of an institution stemming from the highest equality[74]. The unsurpassed constitutional significance of this

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[70] McIlwain, 2007, pp. 72, 74.

[71] For the analysis of the dominant role of a legal text on the continent, see: Bellomo, 1995, pp. 53, 151, 153.

[72] Lochner v. New York, 198 U.S. 45, 76 (1905). Holmes's J., dissent.

[73] See Robinson et al., 2000, p. 134 ("suspect, of whatever status (so that serfs as well as free men here became subject to royal justice)… Nor was any other court to have jurisdiction over those accused by this sworn jury").

[74] Glanvill R. de. *Tractatus de legibus et consuetudinibus regni Angliae*, as cited in Thayer,

mechanism of direct appeal to experience (life) as a source of law, as well as the attitude towards it as a fundamental guarantee of civil rights, is evidenced by the key documents of the American Revolution, naming the institution of jury as the "inestimable privilege of being tried by their peers of the vicinage", the deprivation of the benefit of which was called one of the "grievances" that awakened the new nation[75].

From the point of view of law-making, it is essential to note that the jury has become an integral part of considering not only matters of fact but also matters of law, not only in criminal but also in civil cases[76]. Regarding the question raised about the correlation of legal sources, Spooner's observations are noteworthy: almost all civil law was unwritten, and royal laws did not dominate jurors' minds beyond what they themselves considered to be just. As he emphasized: "*it is also their right, and their primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive*"[77].

As for the *like cases maxim*, which constitutes the very core, principle of the functioning of case law, it literally means that the same circumstances should be assessed in the same way, the same events should entail the same consequences. Such an approach can be traced back to Aristotle's "Nicomachean Ethics" and is a natural requirement of human reason, since the other does not find a sufficient explanation in the order of things and is limited to arbitrariness. It is not about a synthetic mind, initially detached from the real-world life, but about the rational treatment of conclusions drawn from experience. Prominent American jurist K. Llewellyn confirmed that this principle has acquired a system-scale significance in common law, where justice has always demanded that similar people be treated in a similar way under similar circumstances[78]. In a clear legal wording, the maxim requires that "like cases should be treated alike". As case law developed, the constitutional significance of the prohibition to deviate from the "already resolved" became apparent as one of the main checks on arbitrariness for the sake of certain interests arising from case to case. On one hand, in comparison with the methodology of interpretation of legislative texts, this means that it is impossible to substantiate a fundamentally different decision in a case, if it is analogous to previously resolved cases, by means of a free scholastic interpretation of the formal trappings of law – technical language and legal semiotics, logically developed concepts and institutions, etc. Taking experience into account as a primary source of case law (see the page *infra*), it would be unacceptable to make a *formally* identical decision in similar circumstances, if this did not lead to

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1898, p. 41.

[75] Declaration and Resolves of the First Continental Congress, 1774; Declaration of Independence, 1776.

[76] See Robinson et al., 2000, pp. 135-136.

[77] Spooner, 1852, p. 110.

[78] Llewellyn, 2008.

a *substantively* similar legal result. This is due to the fact that English law, as has been partly discussed earlier, perceived the *classical* model of Roman law with its tendency to conceptual thinking as the main tool for 'translating' cases into the language of principles. In contrast to the continental approach, each case here was therefore reflected to a greater or lesser extent on the content and patterns of development of the principle, which was not regarded as frozen or petrified and forever complete[79]. R. Posner explains this as follows:

> The common law, like the system of real numbers, is a *conceptual system - not a textual one*. The concepts of negligence, of consideration, of reliance, are not tied to a particular verbal formulation, but can be restated in whatever words seem clearest in light of current linguistic conventions[80].

The same way of reasoning can be found in Justice Holmes himself, who described the nature of the process of an Anglo-American lawyer's work on a case as the synthesis of what in English is called "broadest rules" or "fundamental conceptions". He especially noted that "one mark of a great lawyer is that he sees the application of the broadest rule"[81], which is hidden in the circumstances and results of the consideration of cases.

B. Formalism infiltrating the common law: A challenge to conceptual thinking

Approaching the sticking point of the confrontation between formalism and realism in common law, it is enough to indicate that the cause of the realistic response seems to be *non-compliance* with the described fundamental principles and traditional patterns of legal development. Like any system dependent on the human factor (free intellectual activity), case law did not have absolute immunity from the negative effects associated with it. By the beginning of the XIX century, common law had become one of the most developed and experienced legal systems in the world. In the heritage of precedent experience, the key principles and concepts governing the life of Anglo-American society were collected. The regulation of relations took place due to the understanding and feeling of these principles, not due to the appeal to clearly formulated textual provisions with rigid content. But two factors should be noted as hurdles to further continuous development of the system in that spirit.

On one hand, with the development of human civilization, science, and technology, new questions arose that could not be answered within the

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[79] See Merryman, 1985, pp. 61-67. See also note 19 *supra* & notes 120, 138 *infra*.

[80] Posner, 1986, p. 186 (italics added).

[81] Holmes, 1997, pp. 1005-1006. While Posner and others describe the method of work of Anglo-American lawyers as thinking by cases, concepts, unwritten doctrines, Holmes often referred to this method as *analogy*. See Holmes, 1870, p. 3 ("In the first place it points out at once the leading analogy between groups… The perfect lawyer is he who commands all the ties between a given case and all others").

framework of the ancient system of legal coordinates. On the other hand, the rigor of the procedure in the courts of common law and the inflexibility of the doctrine of precedent (*stare decisis*), which was aggravated by the supporters of 'Langdellism', multiplied by the 'venerable age' of precedent conceptions, gradually led to stagnation, when it was sometimes even more difficult to overcome the previously formulated judicial position than to adopt a new parliamentary statute[82].

After the methodological revolution of Descartes, Kant, and Hegel in Europe in the nineteenth century, the abstract type of legal thinking, already inherent in the techniques of the European Reception of Roman law, started a new round of growth. At the same time, there was a desire in America to bring the casuistic legal material accumulated over more than 500 years into a system of clear interrelated 'cells' (norms) to ensure legal certainty and create a more precise, more logically arranged structure of common law. The way to overcome this problem of precedent stagnation was to 'adjust' new facts and situations to the earlier wordings of strict notions extracted from previously decided precedents, even if they went beyond the actual reasoning and policy that were achieved in that case under those circumstances at that time. Posner called this technique "smuggling the conclusion into the premise", citing an example when the courts began to apply the "rule of capture", which was originally intended to resolve issues of obtaining possession of wild animals[83], to the issues of oil and gas that became especially relevant in the XIX century.

Among English and then American judges, the practice of formal application of the *stare decisis* doctrine became widespread, when they saw in a precedent the formal composition of facts and the 'rule' applied to them, without immersing themselves *either in the reasons for emergence of this rule exactly, nor in the ends of legal regulation* of the situation as a social relationship. Consequently, they did not bother themselves with the creativity characteristic of judge-made law and did not go beyond these formal boundaries when making subsequent legal decisions. Thus, the latter ones became dependent on formal reasoning, shielding the content of decisions from results of empirical research and assessment of relevance, although in common law as an autonomous body of law (separate from statutory law), there are judges who legislate[84], and who therefore *must* assess relevance, that is, engage in public policy issues[85].

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[82] For example, according to the official position of the House of Lords, English case law is "rigid" and difficult to change. As cited in Lobingier, 1946, p. 995.

[83] Posner, 1986, p. 183. To describe this approach, Frederick Schauer's ironic formula seems to be successful: "Treating unlike cases alike." See Schauer, 2018, pp. 437-450.

[84] Posner, Ibid, p. 186. See also Wheatle, 2019, pp. 347-348 ("The common law is therefore understood as a system of law characterized and sustained by judge made law").

[85] Discussing the reasons why, in common law, in determining the principle of compensation to an employee for injury suffered in the workplace, the judges instructed

The problem was, *inter alia*, that in resolving cases, judges began to resort to techniques that were not characteristic of the common law, namely, to interpret the concepts formally enshrined in legal sources (including precedents) in a logical way, *abstracted from the circumstances that prompted them to come to life, and the factors that influenced their primary content*. The *dura lex* doctrine of precedent was that it was supposed to focus on the "niceties of internal structure" of rules and evaluate them "by the beauty of its logical processes or the strictness with which its rules proceed from the dogma", as Pound described it[86]. These techniques began to resemble the logical interpretation of a well-organized, closed set of 'selected' provisions, which is characteristic of the systems of Reception of Roman law. Dean Pound said that in such a systematized shape, law was *a petrifaction*, in contrast to the real empirical ("scientific") nature of common law rules.

One of the striking examples of such a departure from the origins of common law was the position taken up in English case law, which was developed in the practice of American judges in the XIX century as a full-fledged judicial doctrine of "contributory negligence". The rapid complication of social relations (especially economic ones) at the turn of the XVIII and XIX centuries caused an unceasing murmur against the juries on the part of influential businessmen, bankers and industrialists, who were interested not only in a more stable and predictable exercise of judicial power, but also in its greater leniency to new methods of doing business and entrepreneurial practices[87]. Then an 'inflexible set' of formal arguments was invented, used by judges to evade the power of juries who represented real life concerns (interests), and who were not alien to feelings of compassion, mercy, or fear of collective (corporate) oppression[88], but were actually far from desire to satisfy the interests of the headily developing businesses (industry, railway corporations, etc.). The objective of this doctrine was to exempt a company or person from liability if the actions of the plaintiff indicated signs of even the slightest, even the most insignificant contribution to the harm caused to him. In California, for instance, between 1880 and 1900, this remedy was used in half of all cases against railroad corporations (the most significant category at the time)[89]. On one hand, this doctrine dehumanized

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the jury to exempt the employer from liability unless he was negligent, and the jury tried to satisfy the plaintiff on the contrary, Holmes wrote: "There is a concealed, half conscious battle on the question of legislative policy, and if anyone thinks that it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong". Holmes, 1997, p. 999.

[86] Pound, 1908, p. 605.

[87] Horwitz, 1992, pp. 140-141.

[88] Friedman, 1987, pp. 351, 367.

[89] Friedman, 1987, pp. 351, 367. By the way, Holmes himself in the series of lectures "The Common Law" actively refers to examples from precedents in disputes with railways, which confirms their special relevance at that time.

the law by excluding the influence of the real feelings of the community[90], the experience of ordinary people, on the judicial process and *determination of whether the law is just* (see the note 77 *supra*). On the other hand, clinging to the formal trappings of "contributory negligence" in a lonely English case of 1809[91], which had nothing in common with railroads, the judges detached particular legal formulations from the real circumstances that gave rise to them in order to artificially create a doctrine that they could freely apply as a majestic 'principle of law' in opposition to the power of the jury[92]. It seems pretty remindful of the "mythical principles" that Bellomo described concerning *ius commune*.

Thus, instead of classical judicial work using the casuistic method (*conceptual thinking* – facts generate principles that seek to solve a certain problem and achieve a specific end of social policy), jurists began to resort to the opposite model, adjusting the facts to artificially invented 'frozen' wordings reminiscent of natural law (*cf.* with Langdellism *supra*). Justice Holmes called them a "brooding omnipresence in the sky", "useless quintessence", or "mathematical formulas". On one hand, they did not ensure the connection natural for the casuistic methodology between the *rule of decision* and the empirically pressing *demand of public policy*, the latter being substituted either by "magisterial caprice, however honest, and however much disguised under the name of justice"[93] or by "arbitrary personal preferences or antipathies, or class bias"[94], which have nothing in common with classical judge-made law, despite the widespread false

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[90] Response to which is, according to Holmes, is a "requirement of a sound body of law". See Holmes, 2009, p. 39.

[91] On the origin of the doctrine in 1809 in England and the process of its relocation to America, see magnificent analysis by Professor Fleming. Fleming, 1953, pp.691-696.

[92] Judge's cynical reasoning in Haring v. New York and Erie Railroad 13 Barb. 2 (N.Y. Sup. Ct. 1852) are now cited as a textbook example of such judicial tendencies of the second half of the nineteenth century: "We cannot shut our eyes that in certain controversies between the weak and the strong—between a humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously, run to the assistance and support of the feeble... [C]ompassion will sometimes exercise over the… jury, an influence which, *however honourable* to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice», as cited in Friedman, 1973, p.418. Against this background, it is especially noteworthy how Dean Pound drew a line between scientific law (i.e. empirical, teleological, result-oriented) and judicial arbitrariness: "Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, *however honest, and however much disguised under the name of justice* or equity or natural law." Pound, 1908, p. 605. Pound interestingly noted that in the 19th century, American judges were divided into two camps: those who still knew how to make "strong decisions" (in the words of Chief Justice Earle), and those who "forage in the books for cases to sustain the desired result." Pound, 1908, p. 622 (italics added in all citations).

[93] Pound, 1908, p. 622.

[94] Posner, 1986, p. 182.

continental opinion about its prevailing 'uncertainty'. On the other hand, this approach has come to resemble the textual interpretation pertinent to statutory law rather than the *case-based conceptual thinking* that initially constitutes the very nature of common law as a body of *unwritten law*[95].

Historically, in order to overcome the rigidity of common law, the Englishmen began to resort to equity and parliamentary legislation, which are freer and faster in decision-making. At the same time, this did not extinguish the criticism of the development of common law itself according to such a 'synthetic' scheme as well as an attempt to designate it to the right methodological direction. On one hand, it can be asserted with confidence that the active development of parliamentary lawmaking was brought about by the inability of precedent law within a certain period to guarantee the previous degree of adequacy of the content of law to the content of developing relations, as well as the refusal to consciously "face the problem of harmonizing or compromising conflicting or overlapping interests"[96]. On the other hand, it was this 'detached from reality' practice of exercising judicial power that became the primary cause of the emergence of one of the largest currents of legal thought – the sociological jurisprudence and legal realism. Empirical epistemology for the search for material for legal doctrines in facts was substituted by rationalistic (scholastic) methods that are not typical for classical precedent (casuistic) regulation. Thus, careless distancing from the primordial connection of common law with empirical, vital sources, which occurred because of such substitution, led to the fact that legal scholarship and realist judges, committed to the values described earlier, *rebuffed legal formalism*.

Considering the aforementioned, legal realism based by Justice Holmes — a unique method of approaching American law, specifically common law — cannot be regarded as having emerged out of thin air as an abstract philosophical polemic in opposition to other theoretical currents in legal thought, such as positivism or natural law or the historical school. On the contrary, the new (or, more accurately, revisited) approach to common law has become the antithesis of legal formalism. Consequently, in order to undertake synthesis, according to the classical dialectical method, it is necessary *to teleologically and axiologically compare realism with formalism*. The main proponents of the new method were realist judges rather than scholars, who established the fundamental principles and theoretical framework based on the history and practice of common law. For example, one of the critical differences between Holmes and the Legal Realists Movement is his unyielding commitment to conceptual thinking and the inevitability of generalization (as opposed to fragmentation of law)[97].

[95] Posner, 1986, p. 186.
[96] Pound, 1921, p. 450.
[97] Gilmore, 1999, p. 393.

C. Holmes on guard of conceptual thinking: Realistic approach formed by generations of American judges

Unlike Justice Holmes who is renowned primarily for his figurative and often 'startling' expressions of legal wisdom, the background of the discussion on legal formalism and legal realism was outlined as accurately and directly as possible by R. Posner, the crown jewel of which was his book "*Reflections on Judging"*. Firstly, he pointed out what is meant by formalist approaches to law – "approaches premised on a belief that all legal issues can be resolved by logic, text, or precedent", while the personal qualities of the judge, cultural and historical background, or real-world experience do not matter in the slightest[98]. Secondly, he directly stated that he was a representative *of the realistic approach* to law, *formed by generations of American judges,* precisely as an antagonist of the formalist approaches. This antagonism is an ontological element of realism itself – it is on the rejection of formalism that the originality of realism is based, it exists "in the sense of rejecting formalist approaches to law"[99].

It should be emphasized that the key theoretical, ideological, and definitely practice-oriented advances in this area originated well in advance of our time – in the heyday of the sociological-realistic discourse of the XIX – the first half of the XX centuries. This fact emphasizes the relationship between the long-established methodological foundation– especially that advanced by Justice Holmes – and the twentieth-century trends in the evolution of American law. Therefore, studying the origins of the realist approach is also valuable for understanding one of the conceptual directions and driving forces of the development of American law, which are firmly embedded in history and have a specific relevance now[100]. Posner himself, while successfully attempting to provide, given the current landscape, an accessible modern representation of the problem at hand, nevertheless confirms that the "program" and the major turning points of legal realism as a timeless school of legal thought have been established by the writings and professional activities of such notable judges as J. Marshall, O. W. Holmes, L. Brandeis, B. Cardozo, R. Jackson, R. Traynor, and others[101]. In the aspect of the above-described peculiarities of training lawyers and traditional methodology of common law, their work, along with that of R. Pound, should be acknowledged as the catalyst for a shift in American legal thought, which, as Professor D. Ingersoll pointed out quite before the publication of R. Posner's paper, was aimed primarily at "*demythologizing the study of law* in the United

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[98] Posner, 2013, pp. 1-2.

[99] Ibid.

[100] Nevertheless, formalist trends in American adjudication have also developed actively and have a great influence, especially in matters of interpretation of legislative texts (for example, Justice Scalia's well-known originalist approach). See Leiter, 2010, pp. 131-132.

[101] Posner, 2013, pp. 1-2.

States"[102] (that is, at elaborating an appropriate *method of practical work* with the common law and shaping the correct attitude of practicing lawyers toward the subject of their profession).

Posner's ideas about distinguishing the general "realist approach" in American jurisprudence, which remains relevant, in comparison with the movement of 'scholar' or 'radical' legal realists that "petered out, though not without leaving a mark" [103], are actually not entirely novel – the same logic was adhered to by Dean Pound, who did not separate the sociological jurisprudence and legal realism, both united by pragmatic values. This endemic, self-restrained, and most authoritative 'realistic approach to law', as Ingersoll confirms, does not coincide with later attempts to study judicial behaviourism and more scientific studies of the judicial process[104], but is their ideological and axiological predecessor, not to mention the "new legal realism" of the late XX century, whose representatives, as Sunstein and Miles fairly noted, also promoted empirical methodology in law but made law even more scientific, striving to "understand the sources of judicial decisions on the basis of testable hypotheses and large data sets" [105]. In turn, it should be remembered that Holmesian 'classical' empirical methodology did not exactly create legal science in the most literal sense of the word (actually, this is commonly attributed to Professor Langdell); rather, it drew attention much more to the 'soft' factors affecting the law-making, such as an awareness of social rhythm, experience-based intuition, and a sense of *the path* that law and public policy are anticipated to take. As Grey aptly observes, there is some irony in the fact that Realists used Holmes's ideas, whom they called their inspiration, to attack the conceptual thinking to which he was sincerely committed[106].

Proceeding from the above, it is necessary to distinguish between the study of legal realism as a current of scholar teachings and the study of *the realistic approach to common law,* i.e. really functioning system. The former may be viewed as one of the sets of opinions about what the law is, can, and should be, i.e. opinions which will never find a common language among themselves[107]. The latter, and this is true for the study of Holmes's writings, is not a *philosophical* conception in the genuine meaning of the term, but a *judicial* one (as explained

[102] Ingersoll, 1981, p. 490.
[103] Posner, 2013, pp. 1-2.
[104] Ingersoll, 1981, p. 490.
[105] Miles, Sunstein, 2007, pp. 1-2.
[106] Grey, 1989, p. 818.
[107] Researchers from Harvard Law School confirm that 'scholar' (theoretical) movements of legal thought (including scholar legal realism) perpetually argue among themselves. The Scandinavian realists accused positivism, the schools of natural and free law, Gurvich and Kelsen, as well as the Americans of being unrealistic; American legal realists accused sociological jurisprudence of the same matter; the latter, together with the Free Law Movement, accused American legal realism of being unrealistic. See Escorihuela, 2003, p. 753.

by Posner); it argues not with the names of reputable theorists, but with approaches to judge-made law and to training of common lawyers (e.g. Burger's and Rehnquist's *constructionism* or Scalia's *textualism* or Langdell's rigorous case-study). It influenced the former, and therefore is interesting *to* understand the major advancements of subsequent branches. At the same time, it concerns practice, and this is why it is interesting *for* understanding the patterns of historical and modern development of a particular legal system. These *contextual explanations are essential for comprehending the realistic approach* to law in the American version (as compared with the Scandinavian legal realism or with the Free Law Movement, which only at first glance superficially resembles the train of thought of the American realistic approach).

Within the above row of honourable realist justices, Justice Holmes occupies a special position, separating (and simultaneously uniting), on one hand, perhaps the most famous Chief Justice of the United States, John Marshall, who laid the 'seed' of the realistic approach with his jurisprudence (suffice it to recall the case of *Marbury v Madison*), when there was no talk of doctrinal arrangement of realism; and, on the other hand, associate justices Brandeis, Cardozo, Jackson, and Traynor, who were already working against the background of a pertinent actively developing realistic discussion. Holmes was the one who served as *a bridge between successive generations of American judges*, he became the 'harbinger' of legal realism and the inspirer of this 'background', who deeply comprehended the ontology of common law from its very origins. Besides all "Holmeses"[108] that may be inferred from Holmes's plenty works, it may be supposed, regarding the issue of judge-made law, that he called for a return, to paraphrase Husserl, "back to the fundamental principles of the common law"[109] as they have been discussed in *para. 2-B*.

These principles, as he demonstrated, are inextricably linked with the category of *daily life experience* as a source of law, with a sense of public policy and social demands and needs, with the jury as the equivalent of average prudence, and with the methodology of the judge's work geared toward identifying the *core conceptions, analogies, and patterns from cases* that arise and are resolved in real life. This was authoritatively ascertained by Pound, who not only actually

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[108] For instance, Gilmore demonstrated how different theorists distinguished between "liberal Holmes, conservative Holmes, anarchist Holmes". See Gilmore, 1999, p. 394. Grey, in turn, sought to show the difference between pragmatist Holmes and positivist Holmes. See Grey, 1989.

[109] See note 25 *supra* in context. Notably, Holmes himself indicated the aim of his "The Common Law", which was to "analyse what seem to me the fundamental notions and principles of our substantive law". Cited in Grey, 1989, p. 817. Modern researchers also conclude that the uniqueness of common law as an autonomous legal system is based on the methodology of "reasoning by unwritten principles", where the rules draw their authority "not from appearing in written form but from a combination of reason and practice", *as it was in classical era of case law*. See Wheatle, 2019, pp. 341, 347.

referred to Justice Holmes as the 'guide' of America to a new generation of legal thought[110], but also explicitly pointed out the relevance of his writings for understanding the subsequent development of American law ("[They] might have been written in the second decade of the twentieth century instead of the last decade of the nineteenth"[111]). At the same time, he stressed that for this, it was necessary to turn *directly to Holmes's works*, and not to numerous reprints of the most popular excerpts, which had lost their meaning ("epigoni could easily forget whose armor they were wearing and whose weapons they were wielding")[112]. This conclusion was fully supported by the work of G. Gilmore, Holmes's biographer, who showed that subsequent scholars saw in Holmes what they wanted rather than the real Holmes[113].

Thus, the Holmes's writings are of particular interest in order to study two approaches to law – *legal formalism and legal realism*. The peculiarity of his works in this regard is that they are based on the study of common law as a completely unique and different model of judicial activity and law-making as compared to what existed in Europe – his conclusions not only follow from common law, but they are also straightforwardly aimed at this system. This means, contrary to the opinion of some modern legal scholars[114], that it is difficult to believe in the suspicions of Holmes of banal 'rewriting' of ideas from *European realists* (in particular, R. von Ihering), who, quite obviously, *based their scholarship not just on different, but significantly dissimilar empirical material*. The fact that Justice Holmes did not separate in the usual sense the issues of the theory of law ('jurisprudence') from the issues of common law practice complicates the correct perception of his thoughts by continental jurists without necessary command of common law history and methodology, especially given the contextual imprint of the time of the drafting of his cardinal writings, the peculiar style of presentation, and the fact that his later positions, which became a significant replenishment of the former (and, importantly, had immediate practical value beyond the treatises of Ihering or anyone else), are scattered throughout the various materials of the US Supreme Court jurisprudence. In this regard, the study of his 'response' to legal formalism does not lose its relevance and can reveal the factors that affected, firstly, the choice of ways of further development of *American legal realism*, and secondly (which is no less important), specific patterns of the development of the *US courts' jurisprudence* in the XX century as well as the nature of their decisions as a legal phenomenon and source of law.

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[110] At the end of the 20th century, the famous legal historian and professor of Harvard Law School M. Horwitz confirmed that by creating "The Path of Law", Holmes advanced American legal thought directly into the twentieth century. Horwitz, 1992, p. 142.

[111] Pound, 1921, p. 449.

[112] Ibid.

[113] Gilmore, 1999.

[114] Gruzdev, 2021, p. 296.

Concluding the interim findings, it appears that *two methodological features must be considered by a continental lawyer* to accurately comprehend Holmes's writings and fully utilize their heuristic potential. First, it is unfeasible and worthless to read Holmes while accepting the concepts and categories he used as equal in meaning to the concepts that we use today, i.e. like they are outwardly identical to those from continental jurisprudence. The debate between realism and formalism is unrelated to judicial action in the context of statutory regulation and instead concentrates on techniques for determining broad legal principles within the *common law system*, i.e. the case law[115]. Consequently, the concepts of "court", "law", "judicial law-making", "principles of law", and "legal rules", which are firmly planted in the minds of continental lawyers, are not always appropriate to the works of Holmes – it is necessary to exclude their excessive overlap and constantly keep in mind the *historical features of common law*. Second, it is inappropriate to merely draw superficial parallels between the realistic approach to common law and popular currents of legal thought (positivism, normativism, natural law, and others), as if the former came into conflict with the latter as an independent *ideological* alternative. Primarily, it is necessary to consider Holmes's realism as a *reaction to formalism*, and contact with other trends is a natural consequence of this reaction.

3. On the "Wrong" Logic

A. Abstract (pure) logic and the arrangement of law

Justice Holmes outlined his position within the framework of the above-described discussion unambiguously and quite resolutely. Unlike Posner, however, he did not accompany his conclusions, which directly addressed the practice of common law, with a straightforward explanation that they should be regarded as the ideological antithesis of legal formalism. Rather, he provided a thorough and coherent description of the ontology and the system of common law as a functioning mechanism, working according to primordial realistic principles; while he accompanied the deviations from these principles that arose or were proposed at the time with appropriate criticism. Perhaps for this reason, one of his most well-known quotes – which later turned into a foundational tenet of sociological-realistic movement[116] – is not often considered to be a clear-cut

[115] On the brightest contrast between the Continental and Anglo-American approaches to the application of legal norms and principles in judicial practice, see: Quint, 1989, 310-312. On the capital difference between the methods of logic in the judicial interpretation of statutes and formalism in common law, see Posner, 1986, pp. 186-190.

[116] Gilmore criticized them for "making a selective use of some of the more corrosive epigrams… while totally ignoring what Holmes had meant by them". See Gilmore, 1999, p. 393. It is hard to disagree, given that, utilizing Holmes's central postulates, the Realists sought to refute his crucial idea of the virtual significance of experience-based

critique of legal formalism in the previously indicated meaning of this term: "*The life of the law has not been logic: it has been experience*"[117]. Since Holmes was a common law lawyer to the depths of his soul and covered primarily the problems arising from the practice of case law, it is difficult, especially for a continental lawyer, to instantly understand that it was *logic* that became the cornerstone category in his critical system in relation to legal formalism.

In continental jurisprudence, as in philosophy in general, the notion of logic has a rather positive connotation, so when reading Holmes's works, especially their translations into national languages, it is tough to promptly associate it with something bad or negative. However, when Holmes used this notion in a critical way, he associated it precisely with *practical legal formalism*, the concept of which, perhaps, in any lexicon, has a negative connotation in relation to the evaluation of legal practice[118]. In turn, in positive connotations, has been used for a long time used extensively by continental philosophers and jurists of the Rationalism and Enlightenment wings, e.g. by numerous supporters of the Kantian philosophy with regard to the method preached by it. Under the common heading of "logic", Holmes meant the totality of *the methods of formal logic*, that is, syllogistic models and methodology of "pure reason", which, both before the fall of the Roman Empire (the post-classical period of Roman law) and after (glossators, commentators, legists in Europe, partly positivists and naturalists in England) were used as the basis, as Holmes believed, of an artificially invented system of law. In the part that goes beyond the Anglo-American common law, the range of his implied criticism obviously includes the *French and German schools of codification of private law*, the years of particular renown of which fell precisely in the period of Holmes's youth and professional activity in the XIX century. However, in his writings he did not often refer to the relevant codified acts (for the previously mentioned reasons), as well as to civil law in general – more as an illustration of the arrangement of law on the basis of "wrong" logic than as a cardinal subject of discussion.

The primary motive for Holmes's rejection of the model based on formal logic, including the so-called Reception of Roman law and the continental paradigm of the codification of private law, is not surprising. It stems from the character of a realistic approach to law with *society* itself at the centre of its attention[119] (*in contrast to statist theories* popular in Europe, which combine the state and

codification.

[117] Holmes, 2009, p. 3.

[118] Butler, 2021, pp. 15-16.

[119] This follows from the very nature of the so-called 'common law constitution': "The constitutional significance of the common law was thus expressed mainly in the fact that its principles and rules delineated the sphere of public life in which the royal power could not interfere". See Tomsinov, 2010, p. 43. See also reflections on *gubernaculum* and *jurisdictio* distinguished earlier, *supra* note 70 in context.

society into a single whole). The rejection counters, first and foremost, the notion that rules governing interpersonal interactions within a specific community, each with its own customs, traditions, and values, may be 'manufactured' on the basis of intellectual material that has no explicit relation to the *community itself*, and even by means of logical manipulations alone, i.e. 'adjusting' and 'adapting' life (facts) to certain axioms accepted as a given and assumed as a ready-made container for absolutely all possible life situations. In the 'logical' paradigm, these axioms can be artificially introduced into the life of society *from the outside* by 'enlightened' persons[120]. Justice Holmes strongly disagreed with this approach, and this position became a guideline for evaluating any other ideas about law, philosophical doctrines, legislative proposals, or judicial techniques.

Thus, for instance, Sir J. Stephen's treatise on criminal law in its part concerning the protection of possession and the famous book "*An Essay on Possession in the Common Law*" by F. Pollock and R. Wright were elegantly criticized by Holmes for trying to find a "useless quintessence" for law as a whole, universal for all social structures (i.e. for undertaking a formal logical argumentation), instead of devoting their efforts to the study of the "accurate anatomy" of one of such structures (i.e. instead of adherence to a realistic view of law)[121]. According to Holmes, because of this mischief, their aspiration to subject legal phenomena to analysis was in vain, whereas, to conclude his thought, a realistic study of the empirics of a particular legal system could be much more valuable by identifying the patterns of its functioning in the conditions of a particular society and clarifying the pertinent vulnerabilities[122].

Justice Holmes also did not overlook John Austin, who, in his opinion, was a poor expert in English law[123] and theorized without deep concern for law in action, for the emerging legal practice, and the peculiarities of the functioning of the English legal system (roughly speaking, he was, in the Holmes's judgment, exclusively a theoretician, remote from the everyday 'life' of law that developed in English courts). But nevertheless, Holmes made one significant emphasis, which, on one hand, partially mitigates the burden of the 'accusations' presented, and, on the other hand, draws a red line, distinguishing between realism and formalism as global modes of thinking that affect the approach to law. He noted:

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[120] Dean Pound similarly explained the retreat from the "scientific" successive development of common law in unison with the development of society itself towards a fixation on axiomatic postulates taken for granted: "[It tends] to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another". Pound, 1908, p. 606.

[121] Holmes, 1997, p. 1006.

[122] Such a dichotomy corresponds to the earlier conclusion about the difference between "theoretical" currents and the judicial realism as a "practice-oriented" approach to law.

[123] Holmes, 1997, p. 1006. ("The trouble with Austin was that he did not know enough English law").

> But still it is a practical advantage to master Austin, and his predecessors, Hobbes and Bentham, and his worthy successors, Holland and Pollock. Sir Frederick Pollock's recent little book is touched with the felicity … and is wholly free from the perverting influence of Roman models[124].

This means that their writings can be of some practical use, unlike the advice to study Roman law, which Holmes labelled one of the principal "unrealities" of legal education.

In hundreds of pages of his historical and legal survey, Holmes sought to demonstrate that within the community of people, the practice of social relations is primary, i.e. the experience-based determination of the boundaries of what is reasonable, permissible; the 'testing' of the rightness of this or that mode of behaviour in the natural process of community members' 'shared living' with the central reference point – the need to prevent harm to each other (later it became fashionable to call it the process of collision and compromising of interests). Gilmore distinguishes this semantic line as a "preventive theory," according to which the community is interested in establishing only such sanctions that will prevent undesirable harmful behaviour and nothing more (relevant for both criminal and civil law)[125].

Holmes aimed to prove the fallacy of treating law as self-sufficient autonomous ideas, which supposedly precede the resolution of life's disputes, being a product of synthetic reason. On the contrary, according to his observations, first there was always a case (a set of facts that are important in people's lives), then its consideration by the joint efforts of the community in the open judicial arena, resulting in the determination of the goal that the community considers necessary to achieve as a solution to the situation[126]. Before law is defined, there must occur a specified social process, contemplation, and comprehension of the obtained empirics in order to understand how to *effectively* resolve disagreements between *specific people* in this *particular community*. That is, a random passer-by cannot simply 'enter' here 'from the outside' and establish, according to his intellectual aptitude, some (but necessarily the 'most appropriate', from his point of view) abstract principles. In other words, *imposing a model of right living on people from above is undesirable*; instead, the law should be revealed "*from the bottom up"* as a result of the cumulative experience of "proper" human interaction. That's the point of Holmes's realistic approach.

It was for these reasons, as we can see, that Holmes and other eminent American

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[124] Ibid.

[125] Gilmore, 1999, p. 388.

[126] Confirming this line of thought, Dean Pound also contrasts the empirical methodology of common law with the methodology of systematization as an end in itself: "[Common law with] a functional point of view in contrast to the purely anatomical or morphological standpoint of the last century". Pound, 1921, p. 450.

jurists whom he influenced were sceptical of the 'legacy' of Roman law[127]. In this respect, of course, they are *opponents of the ideas of the historical school of law* (although, it would seem, the historical school is associated primarily with the doctrine of the "national spirit", the history of the nation, i.e. with *what, it would seem, is similar to the category of the experience of people's life* in a particular community and to the attitude of Holmes toward the study of the history of the development of legal institutions). But F.K. von Savigny, under the label of "people's beliefs" (then the "national spirit"), did not at all seek to establish in the historical method the authority of the national law of the German lands, but, on the contrary, sought to "cleanse" the contemporary pandects from the "admixtures" of canon and national law, and their application and interpretation from the influence of ideas other than the true "spirit of Roman law", in order to bring pandect law closer to the sources of Roman law in their "true form" (clearly, this pertains to post-classical Roman law). And his follower Georg Puchta explicitly proposed the concept of a formal-logical "pyramid" of concepts, in which a new stair (norm) can be derived by the deductive method from the logical systemic connection of concepts[128].

As for the historical school of law, Holmes demonstrated the relevance of the above conclusions to its elaborations by giving the example of the concept of possession, which "has fallen into the hands of the philosophers, and with them has become a corner-stone of more than one elaborate structure" [129]. These doctrines, especially the German ones, according to Holmes, were developed on the basis of views on Roman law that were preached by

> [M]ost of the speculative jurists of Germany, from Savigny to Ihering, [who] have been at once professors of Roman law, and profoundly influenced if not controlled by some form of Kantian or post-Kantian philosophy[130].

"German speculation" in the formation of the concept of possession, as Holmes called it, was based not on historically conditioned relations between people regarding the possession of articles and not on the real purpose for which people introduced appropriate rules and protective mechanisms (*empirical reasons*), but on the allegedly *self-evident concept* of freedom of human will as a "thing-in-itself" that does not require proof and is "only recognized and protected" by society or the state. Encroachment on it is evil-in-itself, therefore, must be suppressed regardless of any causes, "and so on in a Kantian vein", to which Holmes attributed, among other things, Puchta's axiom: "The will which wills itself, that is, the recognition of its own personality, is to be protected"[131].

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[127] See notes 19, 120 and 124 *supra* in context.
[128] Puchta, 1841, p. 35.
[129] Holmes, 2009, p. 186.
[130] Ibid.
[131] Holmes, 2009, p. 187.

The tendentiousness of primary statements and the lack of "empiricism" devalue the claims of such theories about their universality for any society, since their effectiveness can be refuted by specific experience and expertise.

B. Influence on legal reasoning and interpretation (realism v. syllogism)

The pandect (Germanic) and institutional (French) models of *systematization of private law* (it is noteworthy that the Romano-Germanic legal tradition is also called the *civil law* system) became the embodiment of the ideas that the legal system can be arranged on the basis of the priority of textual formulas made by dint of the techniques of formal logic[132], *as a mathematical system*, where each nexus occupies a well-defined position designated to it in advance. This position cannot be changed, since the commission of sages has already evaluated all existing legal rules and determined their weight, i.e. thought for all people and judges at once, while creativity and everything that can be described as a '*cogito ergo sum'* are no longer required[133]. Due to this, each of the provisions included in the code is systematically connected with the others, and, therefore, conclusions about one can be drawn by analysing the others, just as in mathematics equations when unknown values are solved, where the missing link is "calculated" with the help of known ones.

Professor M. Hoeflich, in his article "Law & Geometry: Legal Science from Leibniz to Langdell", as the title already implies, draws clear parallels between mathematics and jurisprudence, built on the so-called "geometric paradigm", which arose as a result of the scholastic approach to the rethinking of Roman law. He observed that medieval jurists were struck not by the language or taxonomy of Justinian's codification, but by the accuracy, logic, and measurement they found in Roman legal argumentation, and by which they developed "*the ability to derive general principles, both explicit and implicit, from The Digest and the application of such principles in a syllogistic manner to a detailed factual pattern*"[134]. Substantively, Langdellism was obviously far from what Professor Bellomo called the "rigid formalism" of the Pandectists. Langdell sought to systematize the case law, and his model of teaching lawyers is called casebook method. Nevertheless, Hoeflich was able to draw thriving parallels between Leibniz, Roman law, and Langdell. The fact is that what is meant is similarity not in substance but in form.

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[132] On the activities of glossators and commentators, as well as the relationship between the logic of Corpus Juris Civilis and subsequent codifications of private law in Europe, see Skyrms, 1980, pp. 3-14.

[133] Reminiscent of Justinian's approach, which abolished the classical method of Roman law and gave the legal text absolute authority. See Monro, 1904, p. XXX. *Cf.* Llewellyn explained that the legal doctrine that guides judges in America is not simply a well-developed set of written guidelines that are known as rules of law. Llewellyn, 1960, pp. 19-20.

[134] Hoeflich, 1986, p. 97 (italics added)..

Based on different material, *Langdell proposed to detach rules from precedents*, i.e. real situations and facts, so much (to *formalize them*) that the effect would be no less formalistic than that of the Pandects. This would lead, *inter alia*, to the severe variance from principles historically inherent to case law (see para. 2-A *supra*).

Holmes responded to all mentioned concepts of arranging law based on formal logic (*ius commune* with subsequent codification, *jus naturale*, Langdell's reductive case law), revealing

> the failure of all theories that consider the law only from its formal side, whether they attempt to deduce the corpus from a priori postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part[135].

The problem is that mathematics is a formal science concerning inanimate matter, which cannot be said of law. In the described paradigm of treatment of law, which is, to be honest, not alien to modern continental legal systems, concrete rules of decision can be "derived" by "decomposing" (deducing, reducing) general provisions contained in a legal enactment, and in the absence thereof; logical "derivation" of the missing link can be employed based on the analysis of the abstract meaning of the entire set of existing provisions, or even general ideas about legal ideals and values (the theory of normativism, the Free Law Movement, neo-Kantianism). Conversely, any situation that arises, unique in its factual composition[136], should be adapted to a pre-existing general provision, even if it is too abstract and has no *evident* connection with the nature of the situation that is present, instead of looking for an empirically substantiated solution[137].

Additional comprehension of their legal content from the point of view of the situation that has arisen (with the possibility of development if necessary) is not allowed; it may be even *more acceptable to disregard* the principle in this particular case than to *justify the development* by judicial means of its normative content based on the situation that has arisen[138]. Realistically minded American judges and legal scholars considered this approach to law to be formalistic[139]. As

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[135] Holmes, 2009, p. 35.

[136] As Holmes noted, "Facts do not often exactly repeat themselves in practice". Holmes, 2009, p. 112.

[137] For example, the general formulation of the rule of law is not directly relevant to any life situation; but if desired, any situation can be expanded to that principle, if it is understood as an abstract universal ideal (e.g. principle of fairness).

[138] For a visual comparison of the difference between working with the principles of law in the continental and Anglo-American traditions, see: Quint, 1989, pp. 310-312.

[139] See Posner, 1986, p. 182 ("They liked to give the impression that the premises were self-evident meanwhile packing as much into the major premises as possible, to shorten the chain of deductions").

Dean Pound clearly explained the claim:

> Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly… The nadir of mechanical jurisprudence is reached when conceptions are used, *not as premises from which to reason*, *but as ultimate solutions*. So used, they *cease to be conceptions* and become empty words[140].

In the same fashion, Justice Holmes, although 10 years before Pound, reflected in his landmark lecture "The Path of the Law":

> The fallacy to which I refer is the notion that the only force at work in the development of the law is logic… . The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct[141].

These pompous theses could be called only a subjective opinion and only one of the ideas, of which the history of political and legal doctrines alone counts hundreds, while thousands of them have been expressed during the history of jurisprudence overall. But Holmes merited the widest recognition precisely for the fact that he was not a philosopher far from life – he underpinned his conclusions by working with direct sources of the common law, not only as a legal historian, but also as a practicing judge. He did not miss the opportunity to reaffirm the above-mentioned postulates in the official position of the US Supreme Court, supported by majority of the Justices, and, in his own emphatic manner, stated:

> Provisions of the Constitution of the United States are not mathematical formulas having their essence in their form, but are organic living institutions transplanted from English soil. *Their significance is not to be gathered simply from the words and a dictionary, but by considering their origin and the line of their growth*[142].

Even here, there is a global (perhaps even civilizational) contrast between the formalist and realistic approaches: on one hand, treating the constitution as with ordinary written documents focusing on the *text, linguistic technicalities and formal logic*; on the other hand, treating the constitution with the traditional common law approach as a system of *unwritten conceptions* that require a creativity of thinking and methodological efforts to find their content in a case-based experience (see *supra* notes 70-72, 115 and 120).

Following the described precepts, Holmes quite succinctly explained the meaning of the previously mentioned "postulate" of legal realism about the

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[140] Pound, 1908, pp. 612, 621 (italics added).

[141] Holmes, 1997, pp. 997-998.

[142] Gompers v. United States, 233 U.S. 604 (1914), (italics added).

relationship between logic and experience:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed[143].

In this regard, he draws attention to the fact that *law embodies a centuries-old history of national development*, and it cannot be treated as a textbook of mathematics, consisting exclusively of axioms and the inevitable conclusions that follow from them[144]. In order to determine the legal principle appropriate for resolving a specific case in the common law system, it is necessary not only to understand what the law has already been, i.e. to study the existing experience, but also to reasonably assume "what it tends to become"[145]. The latter means that the conception, collected piece by piece from the accumulated case law experience, should be applied not formally, not axiomatically, not as a given, but as a semantic tendency subject to assessment from the point of view of the situation that has arisen and, perhaps, even requiring slight modification to achieve the *underlying purpose* of the determined legal policy.

Having said that, we may note that, as in the old times of the origination and growth of common law, Holmes's realistic approach raises the question of the *self–sufficiency of the text* as the predominant source of law, and its cognitive interpretations as the primary method of adjudication. Despite the resonance with which Holmes's realistic thoughts were voiced not only in his writings but also in judicial opinions, judicial formalism has maintained a confident position in the United States for decades[146]. *According to the criterion of "Wrong" logic, key modern models of constitutional interpretation can be divided into two "camps"*, which directly affect the issue of the relevance of the historical constitutional role of common law as an element of *jurisdictio*. On one hand, *originalism*, and *textualism*[147], and *strict constructionism* methods can be categorized as formalistic (e.g. a frank confession by Justice Scalia). Although often contradictory, they all de-emphasize the importance of empirical judicial research and case-based conceptual thinking in favour of considering legislative formulas as static

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[143] Holmes, 2009, p. 3 .

[144] Holmes, Ibid.

[145] Holmes, Ibid.

[146] Leiter, 2010, p. 132.

[147] Holmes spoke, supposedly, in favour of the textualism: "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used ... We do not inquire what the legislature meant; we ask only what the statutes mean". See Holmes, 1899, pp. 417, 419. It should be highlighted, however, that Holmes wrote these words only about a statutory interpretation, not a constitutional one, hence did not question the 'common law element' of the Constitution, especially given the previously cited positions.

instruments. On the other hand, given Holmes's ideas cited above, the theory of the *living constitution*, the *purposeful approach*, and *popular constitutionalism* can be considered from a realistic approach and, relatively speaking, *"True" logic* (see *paras. 4 and 5 infra*).

4. Democracy through Common Law: Experience-based Law-finding and the 'Marketplace of ideas' Doctrine

The critical idea of anti-formalism would seem insufficient if Justice Holmes did not propose an alternative version of legal activity that would match to the realistic approach. To reveal this approach, it is necessary to trace through the works of Holmes the answer to the key question: *what should we do if there is no legal rule for a given situation at all, but we need it*[148], and at the same time we cannot follow the scholastic (formalist) method?

One of the answers to this question, which we can conclude from Holmes's ideology and the history of common law associated with it, may seem very surprising. In this aspect, an opportunity arises to reconsider the "free market of ideas" doctrine against the background of Holmes's works. At first glance, the doctrine of the free market of ideas, which is primarily associated with the practice of the US Supreme Court on the First Amendment to the US Constitution (freedom of speech), is vaguely comparable to the polemics of realism and formalism. But it should not be overlooked that it was Justice Holmes who founded the widespread application of this doctrine in American jurisprudence (and it is still the dominant principle of free speech legislation). He theoretically and empirically substantiated the doctrine of "free trade in ideas... in the competition of the market" in a dissenting opinion to the decision of the US Supreme Court in the case *of Abrams v. United States*[149].

The point is that, as the persuasive researcher of Holmes's work, Professor F. Kellogg, explained, at an early stage of the development of any social contradiction (the emergence of unresolved disputes, no matter whether today or several centuries ago), it is not possible to find a fair solution to it based on life experience (to determine the average common sense of the community in relation to these new facts and conditions), and it has yet to be done. Referring to legal texts (where nothing has been said about this yet) and to formal logic is useless

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[148] Thus, we are talking about a situation close to *tabula rasa*, i.e. when the experience of resolving disputes on specific issues has not yet been accumulated and it is impossible to determine the pattern of common law by virtue of conceptual thinking. In contrast to the situation where, in the presence of stable doctrines, the case seems clear to the judge, Professor Kellogg calls the second situation a "doubtful case". See Kellog, 2010, pp. 1-14; Kellog, 2011, pp. 218-223. See also Holmes, 1870, p. 2 ("New cases will arise which will elude the most carefully constructed formula").

[149] Abrams v. United States, 250 U.S. 616 (1919). Holmes J., dissent.

for the reasons previously observed. What to do then? There must be *complete freedom of legal claims*, as well as freedom of public and scholarly debate, so that they demonstrate the full palette of social experience on the issue and be "fully representative of all considerations relevant to their resolution"[150]. There is no conception of a single correct course of action yet, it must be defined, and this must be done according to a realistic approach; not as a result of scholastic reasoning, but *as a result of the natural social struggle of competing interests* in the free and, importantly, genuinely open arena of the judicial forum, to which *all members of the community have access*. The latter can take part in this process as plaintiffs, defendants, interested persons, members of a grand or petty jury, or, finally, as listeners in the courtroom ('public gaze'). Witnesses, experts, and specialists, "friends of the court" (*amicus curiae*), are capable of developing public discussion. The judge (together with the jury) is obliged to put all this together, compare the entire set of ideas and judgments presented, "grains" of daily life experience, with the experience of other resolved cases, which have already been accumulated by generations of judges and the juries before, and *make an informed decision under the pressure of this entire empirical array* and conflicting interests. Any claim presented before the court must be evaluated, and if declined, it is necessary to justify its inconsistency in comparison with the claim that is being accepted (sustained). In this paradigm, the judge, of course, makes a decision in accordance with the *most weighty feeling of public policy and the demands of society* (the purposes that it seeks to achieve), and this decision can be one or the other, but necessarily in accordance with the identified *reasoned tendency*, that is, not arbitrary. This is a "fair" process by ensuring its adversariality and openness.

Holmes wrote about the role of lawyers in this struggle of interests and claims:

> [T]raining of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions[151].

Holmes himself had an interesting observation on this matter, which he expressed in one other dissent long before the *Abrams case*: "Every opinion tends to become a law"[152]. But not every opinion will become one, and Holmes conducted many of his legal studies to demonstrate how this judicial "selection" of opinions, reflections, and sensations of legality that claim to be termed law occur. In the *Abrams case*, he concluded:

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[150] Kellog, 2011, pp. 218-219.

[151] Homes, 1997, p. 1000.

[152] Lochner v. New York, 198 U.S. 45, 76 (1905). Holmes's J., dissent.

> [T]he *ultimate good desired is better reached by free trade in ideas* - that the best test of truth is the power of the thought to get itself accepted *in the competition of the market*, and that truth is *the only ground upon which their wishes safely can be carried out*[153].

In his epochal "The Path of the Law ", Holmes insisted figuratively: "Why is a man at liberty to set up a business which he knows will ruin his neighbor? *It is because the public good is supposed to be best subserved by free competition*"[154]. Apparently, this idea was relevant for Holmes, not just in business matters.

Consequently, in contrast to the approach, which American jurists label "formalist" and which always focuses on pre-existing rules of decisions (in the texts of codes or judicial precedents or authoritative commentaries, i.e. authority and truth are not in life, but in a text, even if not concrete, then at least abstract)[155], realism consciously asserts: if there is no rule, then the situation is free. However, though it is opposed to an imperious imposition of logically invented rules, it is not about sinking down into chaos. That is, it is necessary to allow maximum freedom of opinions, ideas, and experience that, under the auspices of an independent, open court and before a jury, will *prove* their feasibility, safety, and validity, rooting in the traditions of the community and in the soil of public support.

G.E. White neatly accentuates Holmes's extremely reverent attitude to the freedom of speech clause[156]. We can even assume that Holmes took it out of the framework of ordinary constitutional rights and elevated it to a general constitutional paradigm inherent to American society (at least in his times). However, Holmes avoided falling into the trap of precisely what he criticized (creating ideal abstract principles). As White explains, Holmes did not consider liberty of speech as an absolute but rather as the principle "subsumed in the consensual values of contemporary America"[157]. Another realist Justice, L. Brandeis, rendered the position in a dissenting opinion in *Duplex Printing Press Co. v. Deering*, which Justice Holmes joined: "All rights derive from the purposes of the society in which they exist"[158]. Extending this idea to freedom of speech, we can assert that society is highly interested in the free dissemination of

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[153] Abrams v. United States, 250 U.S. 616 (1919). Holmes J., dissent (italics added). See also the depth review of Holmes's positions on importance of comprehensive evaluation of facts for making right legislative decisions: Luban, 1994, pp. 491-496 ("It may be perfectly reasonable for an ignorant person to do something that would be preposterous for one adequately apprised of the facts").

[154] Holmes, 1997, p. 998 (italics added).

[155] And if there is no rule for the situation, it implies refusing to satisfy the claim rather than seeking a rule in a complex competitive process of harmonising interests in struggle.

[156] See White, 1971, pp. 61, 74-75.

[157] White, 1971, p. 74.

[158] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). Brandeis J., dissent.

information and exchange of opinions, as they affect many questions of public policy, including (perhaps even to the greatest extent) making honest and indeed necessary legislative decisions that would truly suit the majority (as a result of a "competitive" selection). White confirms that "for Holmes, the liberty [of speech] flowed not from any inherent right of the individual but from the interest of society in a free flow of ideas"[159].

Hence, as such 'free' practice of considering similar cases and making balanced decisions expands, the process that Holmes denoted as "*successive approximation*"[160] takes place. It becomes possible to *determine the legal pattern*, the common sense of all decisions made, and the *purpose* that community seeks to achieve in the given circumstances, in order to *form a conception* of a specific rule of decision (a legal doctrine). As Gordon neatly explains Holmes's mode of thought regarding the law of torts:

> The judge is encouraged to look over the field of *primary data - jury verdicts*… - and extract from them a prediction regarding future outcomes… The judge is then to freeze the probable verdict in law as a standard… Juries, however, are an imprecise tool of measurement since their verdicts may vary; thus, in formulating the standard, the judge must take readings *from several juries, average them*, and then dispense with the jury[161].

As expected, such a standard will have real empirical (and not formal or logical) content and the property of *empirical, not formal, democracy*. It is democracy through community experience, not through formal institutions. Such an approach to judicial law-making justifies the relevance of the common law as a separate body of legal rules even today, since it has clearly *expressed signs of democracy* not only due to the integral role of the jury in the law-making process, but also due to the above-described model of free democratic competition of public opinion with the assistance of an independent judge. This approach obviously has both advantages and disadvantages in comparison with the direct (Athenian) and representative models of democratic government. In this regard, researchers note the *affinity between common law and the "deliberative" scheme of democracy*, according to which "democratic law is legitimate because it arises out of a collective process of public deliberation over the wisdom of a proposed policy"[162]. Considering Holmes's theory anew against the background of models of constitutional interpretation, it now seems appropriate to observe that it may be especially relevant to the method of *popular constitutionalism*. According to this, the courts are to be

> responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to

[159] White, 1971, p. 74.
[160] Holmes, 1870, pp. 2, 7.
[161] Gordon, 1982, p. 725 (italics added).
[162] Steilen, 2011, p. 437. See the paper cited for excellent evaluation of this theory.

> overturn their decisions - an *actual authority, too, not some abstract 'people'* who spoke once, two hundred years ago, and then disappeared[163].

This seems pretty consistent with the previously discussed positions on the perniciousness of imposing laws on a particular community "from the outside" or just by means of intellectual abilities of a particular person. As White aptly notes, "Holmes had never been enthusiastic about paternalistic legislation"[164]. And even more:

> His approach to free speech, in fact, assumed the ultimate *impotence of all forms of unpopular expression*. Because Holmes was critical of nineteenth century judicial formalism and had demonstrated a consciousness of the element of bias in judicial decision making, he was said to support the whole of realism[165].

Thus, according to the position of Justice Holmes, law must be experienced by society itself, even with suffering and endurance, in order to authentically *reflect its interests and not someone else's*. Yes, he insisted that it is impossible to create a 'good' law in a hurry – it is vital to be patient and turn to the course of everyday life (and not to the texts) in order to fix the rules that are not only really useful for this life, but, more significantly, durable (common law is an example of this in many instances). Yes, Holmes also did not deny that at first it would be necessary to resolve situations quite casuistically – here and there – but at once the jury and the conditions of free marketplace of ideas come to the rescue, thereby ensuring greater fairness and moderation of causal decisions than if they were resolved by one person on the basis of a formal and logical analysis of textual formulas or ideal abstractions within the framework of his subjective system of values.

Finally, life situations and cases, *sensu lato*, repeat themselves (not facts, but situations), and if they are decided on average fairly (jury + free marketplace of opinions), then the judgments must be (and there are, as the centuries-old practice of common law demonstrates) *approximately the same in their common sense*. That is, the decisions, of course, will be different in each case (to satisfy or reject, how much to award, etc.), but they will have the same common sense. Holmes aptly remarked: "Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned?"[166]. We can call it a special kind of 'learned law' as compared to that discussed in *para. 2-A*.

As a result, once the above-mentioned process has taken place, the courts, particularly the appellate instance, will be able to trace this common sense through the multitude of decisions made throughout the country, extracting

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[163] Kramer, 2005, p. 253 (italics added).
[164] White, 1971, p. 76.
[165] White, 1971, p. 75 (italics added).
[166] Holmes, 2009, p. 112.

from them the purpose (demands) of regulation in order to form an *empirically verified idea of the general rule* (principle, doctrine). Since then, the validity and efficiency of this rule have been tested by life itself (the practice of social relations) and demonstrated in public democratic competition. The realistic approach considers such a process of law-making to be fairer and more democratic than any system built on formal justice (writing a textual rule 'in advance' for any theoretically possible life situations by dint of the formal doctrine of popular representation, but without considering real cases and making difficult choices with the participation of community itself). The realistic approach encouraged to cease to have heads in the clouds, discussing abstract categories such as the *volonté générale*, and to return to society itself, for the sake of which law exists.

The comment of Justice Holmes himself appears very weighty in this regard:

> The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies[167].

5. On the "True" Logic

A. The law is not exempt from the impact of universal (not formal) logic

What has been said above has significant value in comprehending the concept of law that Holmes adhered to. On one hand, through the notion of some distinctive manifestations of logic in law, we find an explanation of the formalist approach to it, while through the inversion of this approach, accordingly, an explanation of the realistic approach focused on the negation of the former. On the other hand, it is no less clear that Holmes did not deny the possibility, but even endorsed the pressing need of a *positive impact of logic,* as the greatest invention of human reason, on law.

Making the proper distinction between these two usages of logic is the crucial snag and at the same time the key to comprehending the realistic method that Holmes outlined.

The nature of one of them, which is condemned, has been revealed earlier in *para. 3 supra*. As for the second, it is interesting to note that Holmes himself, after the previously quoted idea (that logic cannot be the only force guiding the creation of law), *recognized the inevitability of the contact of law with logic* in a certain meaning of the term: "In the broadest sense, indeed, that notion would be true"[168]. Explaining his approach in "*The Path of the Law*", he argues that the universe as a whole is built on the principle of a quantitative relation between a phenomenon, its antecedents, and consequences. If there is an object outside

[167] Holmes, 1894, p. 9.
[168] Holmes, 1997, p. 997.

of such a stable quantitative relation, it is, according to Holmes, a "*miracle*". It is precisely such a thing that is not subject to logic and rational explanation, it is *transcendental* for human consciousness and belongs to metaphysics. But *law, according to Holmes, is not such an object*; law is the same part of our lives and the world around us, the same creation of the human mind and hands, like all the others that we are able to cognize. Holmes insisted that all such phenomena are subject to the universal law of cause and effect, that is, logical sequence, and therefore the creation of law as such (including the process that has been described in para. 4 *supra*) is also the result of logical development[169].

"The danger" of which he spoke "is not the admission that the principles governing other phenomena also govern the law…" [170]. In effect, the danger of which he spoke was a danger in the understanding of logic, according to which a specific system of law and rules which it comprises can be elaborated only by dint of formal logical methodology, i.e. the "Wrong" logic.

At the same time, drawing from the findings of the examination of Holmes's primary works – the lectures "*The Common Law*" and the paper-lecture "*The Path of the Law*" – three components of "True" logic may be identified, which are necessary for the existence of law:

firstly, it is about the logic and consistency of the system of law at the final stage of the previously described process of law-making, that is, the logic of law as a result of this process – as a system created not by the methods of formal logic, but as a result of working with real life experience. In other words, when initially disparate unresolved cases find their resolution, the "fairness" of the decisions made is tested, and empirically substantiated rules of decisions are gradually accumulated, all these rules should be generalized and brought into a consistent system[171]; Grey and Gordon label this *positivism*[172], which is true to a certain extent; however, given the decentralized nature of such standards' appearance and their dependence on community, it is difficult to equate them with a strict command of the court or a product of the state alone;

secondly, of course, it is about logic of the application of law. Legal practice based on the already existing rules of common law should rely on them with clear and strict observance of the laws of logic. The opposite of this is making

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[169] Holmes, 1997, pp.997-998.

[170] Holmes, 1997, p. 998.

[171] See Holmes, 1997, p. 991 ("Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system"; "Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions"). This is the nature of the codification process in common law systems, as shown by Holmes in a separate paper on the subject. See Holmes, 1870, pp. 1-13.

[172] Grey, 1989, p. 795; Gordon, 1982, p. 724-725.

judicial decisions at the discretion and whim of specific people[173], which has been resolutely rejected by American jurisprudence since the founding of the United States (this is one of the cardinal proclamations of the revolution against the arbitrariness of the King and his courts). Requirement of compliance with the laws of logic is especially strong in relation to legal activity, since this is what primarily distinguishes it from purely political activity[174]: the application of law, and justice in general, are based on the establishment of links between causes and effects, this *is the core of court activity*, and in the absence thereof it is nonsensical. In particular, the requirement of logic and consistency is most obvious in relation to *legal practice in similar cases*: it is impossible to solve the same situations today in one way, and tomorrow in another way – this would contradict common sense and the foundations of human reason, would bring confusion and turmoil into social relations, and make them unstable and unpredictable. Holmes affirmed this stance in relation to the common law system, where, as judicial experience accumulates and generalizes, as has been outlined in *para. 4 supra*, a pattern should be revealed and a specific rule of decision should be established ("narrowing" the sphere of uncertainty)[175]; such rule is subject to consideration in all like cases, unless the facts and circumstances that have arisen in a particular case explain it in a special way. The very purpose of the Holmesian model of generalization is not to confine a lawyer's mind within a formal norm but to *guide their conceptual thinking* and help them orient themselves in case law experience[176]. Holmes recognized that exceptions (special explanations of situations) may occur in categories of cases where the rule tends to change rapidly, as in some matters of medical care. But when the question does not belong to such categories, Holmes concludes that if a certain judgment is true for clear, similar cases, then "further consequences ensue"[177], that is, it is necessary to "stand on what has been decided" (*stare decisis*) and ensure the logical consistency of legal relations;

thirdly, in the common law system, as described by Holmes, it is required to constantly engage in law-making in the sense that *each case is able to enrich,*

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[173] Dean Pound contrasted the "scientific" common law and the magisterial caprice. See Pound, 1908, p. 605.

[174] See Posner, 1986, p. 182 ("The reason, if it is a good reason, has to be traceable to some notion of policy rather than just be the result of arbitrary personal preferences or antipathies, or class bias, or some other thoroughly discredited ground of judicial action").

[175] Holmes, 2009, p. 115 ("The tendency of the law must always be to narrow the field of uncertainty").

[176] See Grey, 1989, p. 822.

[177] Holmes, 2009, p. 112-113 ("[B]ut cases with comparatively small variations from each other [repeat themselves]. A judge who has long sat at nisi prius ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury").

clarify, and if necessary, modify the existing principles (following *the functional trend* instead of fixating on the textual form). At the same time, the judge must do it reasonably and ensure the logic of the development of law (the process of *successive* approximation as explained in *para. 4 supra*).

It is the third element that can be marked as one of the backbones of the realistic approach to judge-made law in the tradition of American realist judges[178]. He provided a response to the 'precedent stagnation through formalization' of the nineteenth century by proposing a softening of the doctrine of precedent (*stare decisis*). This approach proceeds from the fact that law should not remain a dead letter within a specific precedent (set of facts) but should develop along with the development of social relations (law as a *living instrument*), and as the sufficient social and judicial experience is accumulated, *expand the understanding and content of rules and doctrines* that have been previously established by means of empirical induction. This conceals another antithesis that separates the formalist and realistic approaches to law.

B. Some of Holmes's examples of logical extension of the rules of law

In his lecture "*The Path of the Law*", Justice Holmes shared the story of a magistrate from Vermont, who considered a dispute between two farmers – one accused the other of breaking a churn. The judge was tormented by doubts for a long time, but in the end he said that he had studied the laws (statutes) and found nothing in them about churns, so he decided to make a ruling in favour of the defendant (to dismiss the claim). Holmes, as a member of the Massachusetts Supreme Court at the time, concluded that the same *mode of legal thinking* and logical reasoning was reflected in many digests and legal textbooks of the time, where promising titles like 'Railroads' or 'Telegraphs' or 'Law of the Sea' actually conceal the application of "rudimentary" principles[179]. Such an approach is not endorsed from a realistic point of view, since it is a manifestation of a completely *trivial judicial argumentation* and one of the extremes of formalism. Obviously, in these sections there was nothing about a developed railway infrastructure, new trains, new methods of communication, new practices of sea transportation, and much more, which, for obvious reasons, became commonplace in the XIX and early XX centuries. Is that the reason why, even while the notion of conscientious behaviour in certain circumstances can be obtained from solid links between cases and more broad principles (*conceptual thinking*), a court can refuse to provide protection to people who seek it solely by invoking the formal absence of certain phrases in the language of the statute or precedent? Justice Holmes

[178] See *para. 2-C* and notes 115, 122, and 126 *supra* in context. One of Holmes's achievements, which Pound noted, was instilling in lawyers "faith in the efficacy of effort to improve the law and make it more effective for its purposes".
[179] Holmes, 1997, pp. 1005-1006.

responded negatively to this question. Instead, he referred to the deep meanings of decisions concealed in the volumes of case law, as in a secluded place, to the conceptual shapes of law, the general patterns of experience, and the purposes (reasons) of regulation on a particular socially significant issue. He explained that it is necessary to take this body of already existing experience, extract a common sense from it, determine a general rule of decision for this type of case, and extend to a similar (although not identical) case before the court at the moment, striving to *achieve the revealed purpose* of regulation.

This is the point of a responsible approach to the exercise of judicial duties in common law systems, where, according to Holmes, judges should not shirk their major duty – to *consider* and *resolve* social disputes by referring to the collective wisdom of community, i.e. to real existing rules that have developed particularly in this community and are evident (available) in case law. This is how Holmes's concept of 'living law' evolves and, if we go further, judicial law-making is carried out: by expanding our understanding of the meaning and substance of existing rules, undertaking empirically based parallels to *attain results substantively (not formally) similar* (as opposed to an arbitrary promulgation of legal norms and rationalistic scholasticism[180]). Each new case can reveal to the judge new facets of the previously formed principle of law, and he will have to smoothly develop its content with his "strong decision" (in Chief Justice Earl's terminology), i.e. the judge acts as a legislator, but *within the boundaries of the determined pattern* of common sense and tendency of public policy. The words of Holmes in one of his dissents are noteworthy in this regard: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions"[181].

Such an approach to dealing with law is probably facilitated, in general, by the common practice of training lawyers in the United States, which, especially after the introduction of the case method by K. Langdell at the end of the XIX century, resembles the 'laboratory' model[182], although Holmes and Langdell were diametrically opposed in determining the objective of studying precedent empiricism by students.

Holmes gave another vivid example in his lecture "*The Path of the Law*", this time on criminal issues. The point was that since antiquity, liability for theft (larceny) had been established, but there was no formalized concept of misappropriation or embezzlement[183]. In effect, Holmes explains, these are comparable offenses, consisting of the unlawful deprivation of someone's property, and according to

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[180] Dennis v. United States, 341 U.S. 494, 528 (1951). Frankfurter, J., concurring. ("Since the significance of every expression of thought derives from the circumstances evoking it, results reached rather than language employed give the vital meaning").

[181] Pacific v. Jensen. 244 U.S. 205, 221 (1917). Holmes J., dissenting.

[182] Stevens, 1983, p. 35.

[183] Holmes, 1997, pp. 1001-1002.

the 'True' logic, both of them should be criminalized. However, there was the concept of larceny, but there was no concept of embezzlement in written law, so that led to the situations when the perpetrators, resorting to formal tricks regarding the formal language of larceny law, avoided being brought to justice. Holmes's idea is that such formalism *is not only useless, but also harmful* to the legal order, since it raises problems where, it would seem, from the point of common sense, there is no dispute. That is, instead of smoothing over conflicts and preventing disputes, the law and the judicial machinery, on the contrary, provoke them. With regard to the example of larceny-embezzlement, Justice Holmes elegantly summed up the consequences of the formalist approach: "The law suffered from not having embodied in a clear form a rule which will accomplish its manifest purpose"[184]. Such examples can be found in the practice of English courts even in more recent times[185].

It is another matter when judges, using the 'True' logical tools (in the designated meaning) and the vast experience accumulated over centuries of judicial practice, expand the existing principles and apply them to new situations, supplementing and specifying them if necessary. It is this type of dealing with empirical material, not abstract logical reasoning, that Holmes labelled as the *theory of law* (jurisprudence), designating it as the highest skill of the legal profession. Theoretical abilities, according to Holmes, consist of the skill of revealing the general patterns of accumulated experience, including a precedent one, to determine the tendency of legal (public) policy, and to use common sense, which remains the same, despite the variability of the 'kaleidoscope' of facts.

The practical side of the posed issue has been considered by the example of the principles of the common law on the *statutes of limitations*, which, as Holmes noted, "never have been explained or theorized about in any adequate way"[186]. The key in the process of "theorizing" (conceptualizing) for the logical 'extension' of the previously established rule is, as follows from the above, the establishment of its "obvious purpose", that is, the solution of the problem for which it was awakened to life, its historically conditioned teleological orientation ("social teleology", as V.S. Gruzdev noted[187]). It is the point of *conceptual thinking* (think by conceptions) as compared to thinking strictly by *rules*. Thus, according to Holmes, the ultimate (formal) purpose of the rules on the statute of limitations is quite obvious – to prevent the possibility of litigation and contestation of certain facts after a certain period of time. At the same time, Holmes asks: "But what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?"[188]. Some have justified this approach

[184] Holmes, Ibid, p. 1007.
[185] See, for instance, Smith v Hughes [1960] 1 WLR 830.
[186] Holmes, 1997, p. 1007.
[187] Gruzdev, 2021, p. 403.
[188] Holmes, 1997, p. 1007.

by saying that all evidence has already been lost, but in Holmes's view, this is only of secondary importance. Others have delved more substantively into the problem and argued that the reason for everything is the desire to live in peace and serenity (not to touch what for a long time has not 'hurt'), but Holmes again disagrees: "But why is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation"[189].Finally, against the background of this problem, which seems insoluble, Holmes substantiates the importance of theoretical and historical comprehension of the rule in order to reveal its genuine purpose and real tendency of public policy. Referring to the example of the law of prescription, he shows that the case can be resolved in a diametrically opposite way, depending on whether one blindly follows the formal wordings that are usually applicable to such relations, or delves into the functional component of the established regulation and understands the necessity for the fulfilment of which this rule should be applied.

As a result of a deep comprehension of the history of the law of prescription, Justice Holmes substantiates that it is the failure for so many years[190] to perform prudent actions aimed at protecting property, which subsequently deprives the owner of the right to demand such protection in court, and not the desire for general serenity. In essence, as he explained, with the passage of time, as a result of inaction, there is a real "dissociation" of right with one person and a gradual "association" with the other, and the former is endowed with the right only on formal grounds. As Holmes aptly noted, "if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example" [191]. At the same time, following the realistic paradigm, it is important to remember that such a general phrase alone, without a deep analysis, would not be enough to justify (substantiate) the legislative policy in question, not to say its slight refinement.

C. Logical extension must not be arbitrary

Thus, according to Holmes, law (namely, the common law) is based on the logic of legal thinking, which has been formed, over centuries of legal practice. The idea seems to be that the basic principles of social relations in most spheres have already been formed and they continue to operate if the actual circumstances logically correspond to those that were before, but only their external form has changed. Such logic and such a *conceptual thinking (theorizing, jurisprudence)* as the tools of the lawyer's work, from the point of view of the realistic approach, have a legitimate place in the legal profession.

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[189] Holmes, 1997, p. 1007.

[190] It was about 20 years of use of the land plot with the consent of the owner, given to the representative, allegedly under a transaction with a defect in the subject composition.

[191] Holmes, 1997, p. 1007.

This approach was clearly and very interestingly demonstrated in the case law of the United States by another realist justice, B. Cardozo, as he considered the case of *MacPherson v. Buick Motor Co.*[192] A person was injured as a result of a malfunction and destruction of one of the wheels of his car, but according to the English *doctrine of privity*, the manufacturer, as a person who was not in relations with the end buyer, was not liable. Furthermore, earlier, the courts in comparable circumstances brought a manufacturer to justice only if the object in dispute was one whose normal function it is to injure or destroy. There was no formal rule for resolving the dispute (satisfying the buyer's claims) – the judge could easily dismiss the claim, following the example of the 'judge from Vermont'. Despite this, Cardozo was guided by a realistic approach and defined the common sense of regulation: by consciously dealing with things that are dangerous to people's lives, any prudent member of the community is obliged to take all necessary measures of care and prudence in order not to make an error, and, therefore, otherwise, is obliged to compensate for all damage caused.

The content of the previously applied norm was expanded, not arbitrarily, but as a result of a full-scale analysis of precedent and related legal experience, as well as following *like cases maxim (sensu lato)*. To do this, Cardozo investigated various cases in which the courts *gradually departed from the doctrine of privity* (damage from scaffold, coffee urn, bottles of aerated water, etc.). He undertook a logical 'extension' of the previously established rule by revealing its "obvious purpose," i.e. the problem the community seeks to solve. It is pretty reminiscent of Holmes's vision discussed in previous paragraphs. As Grey observes, "Holmes believed that adjudication should and must be *result-oriented*, fundamentally legislative"[193].

The safeguard against judicial arbitrariness here was that Justice Cardozo could not have made a fundamentally opposite decision by inventing a new rule 'from scratch', 'out of his head'. But what he could do was base himself on the 'already decided' (stare decisis), drawing an analogy: like circumstances entail like consequences. Analogy by its very definition does not imply arbitrariness. Otherwise, it would be possible that essentially the same circumstances entail different consequences, and this is a cardinal departure from the principle on which common law is based (see *para. 2-A supra*). Considering the nature and constitutional significance of English lawyers' conceptual thinking, Lord Cook concluded that "common law is superior to civil law in the certainty of its rules"[194]. Hence, the *judge's discretion* here is limited and boils down, in effect, to an assessment of the meaning of the cases observed and already recorded in precedents, extracting common sense from them, establishing analogies between them, and expanding a determined pattern to the facts before him.

[192] 217 N.Y. 382, 111 N.E. 1050.

[193] Grey, 1989, p. 847 (italics added).

[194] As cited in Holdsworth, 1924, p. 225.

Such an assessment, of course, has a secondary influence on the substance of the law, but *it is not at all identical to the unlimited promulgation of legal norms* in the conditions of a 'tabula rasa' or relying only on formal sources (textual formulas). Of course, Holmes's model does not provide such a rigid certainty of adjudication compared with Langdell's mechanical deduction. However, it cannot be called arbitrary either. To achieve greater case-based (deliberative) democracy, he tried *to sacrifice some degree of certainty* of the rule, leaving it still in the view of and reachable to an inquisitive mind. As Grey evaluates, Holmes's concepts born in generalization are to be instrumental since "they serve a practical purpose, and that purpose [is] typically a heuristic one"[195].

This fact, at the same time, provides the guarantees for non-arbitrariness of judicial action. Gordon explains the judge's mission as

> to develop a method *to extract* from legal materials the regularity and order *that is already present* inside them, *not to impose, by a creative act of interpretation*, a new order upon them[196].

It assumes that the wisdom of a community is not based on the shaky foundations of the latter, but is deeply grounded in the clearly perceptible empirical coordinates of daily life. In this paradigm, *there are no judges who legislate relying upon their pure reason and their whims* which proclaim to be the source of law, since this would contradict the fundamental foundations of American constitutionalism[197]. In addition, it is essential that when judge 'legislates', he does this under the close scrutiny of a well-designed corpus of the legal profession.

Thus, the realistic approach of Justice Holmes, as we have seen, does not imply that if there is no rule of decision, then the judge can create a fundamentally new one on his own here and now (in such a situation, it is desirable to turn to the jury for experience, to 'open' a free marketplace of ideas, to start this circle again, as described in *para. 4 supra*). However, after experience has been gathered, its consistent progression, fixed by successive generations of judges in precedents, compels us to consider it and reach a conclusion that, as Holmes put it, close to the general line of common sense:

> [A]nd at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little farther to the one side or to the other, *but which must have been drawn somewhere in the neighborhood of where it falls*[198].

Nevertheless, taking into account all of the preceding points, it is worthy of note

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[195] Grey, 1989, p. 822.
[196] Gordon, 1982, p. 726 (italics added).
[197] Adams, 2000, p. 288 (America is "an empire of laws, and not of men").
[198] Holmes, 2009, pp. 115-116 (italics added).

that the judge's tool in this continuous process is "a very slight preponderance of feeling, rather than of articulate reason"[199].

6. Conclusion

As opposed to popular belief outside of the United Stated and common-law world, according to which the American realist approach to law may be associated with a lack of a strong normative foundation and unrestricted judicial discretion over the content of laws, this paper not only clarifies why realists have levelled similar accusations against other movements of legal thought, but it also provides evidence for these claims with several examples drawn from common law. In addition, thanks to this convergence of theory and practice, it becomes possible to see the boundaries of the Holmesian concept of judge-made law and to understand that within its framework, judges cannot make arbitrary decisions and create such a law as they wish. An attempt has been made to provide the continental reader with an adequate historical background and a methodological guide to understand the core of Holmes better.

As a result, the nature of the realistic approach to American law, the core value of which was anti-formalism, becomes clear. This approach opposed formalism, which was inclined toward *formal* but not *real* logic. The realistic approach denies that rules of law may be created logical in form, but not connected with real life; it rejects the possibility of inventing any rule 'out of one's head', when it is not conditioned by the patterns of social relations and does not meet the criterion of daily life necessity. In addition, the reduction of law-making to the methods of formal logic makes a body of law dependent on the intellectual abilities of the subject of law-making, and his mastery of logic becomes, quite arbitrarily, the only factor influencing the quality of the rules that govern a society.

The proclamation of law as a system of concepts built by virtue of formal logic can give rise to the accompanying problem of formalism – when the intractable situations in practice emerge (*non liquet*). The formalist approach in that case directs the lawyer to reflect on the wording of legal texts, that is, to immerse himself in his own mind, detached from the real experience of other cases, with all the ensuing consequences. The implementation of the ideas of the Free Law Movement in the legislation of some European states has led to the fact that it is the judge who creates a legal rule, "as the legislator would do", relying on a logical interpretation of the system of written concepts. At the same time, no one except the judge is allowed to participate in this process; he personally thinks through the rule from scratch. This rule will be the judge's opinion about the law and practice, in fact, his free reasoning (the name "Free Law" seems characteristically). As Kelly aptly noted, in Germany in the 1930s this led to the

[199] Ibid.

legalization of judicial arbitrariness at the level of the criminal code[200], whereas legal realism in the United States influenced the adoption of quite fair and logical decisions by such outstanding judges as Holmes, Cardozo, Brandeis, Posner, Breyer[201], as well as, probably, Sotomayor and Kagan (both proponents of a *living constitution*, implying the smooth evolution of constitutional standards in line with the development of relations within community itself). Having said that, the paper draws some parallels between the two 'camps' of approaches to the interpretation of the US Constitution based on Holmes's *"Wrong" logic criterion*.

The realistic approach to judge-made law did not adhere to such views as mentioned by Kelly. In each disputable situation, it advises the judge to work, not with the texts, but with the consistent progression of precedent experience, with the circumstances of specific cases, from which it is possible to gather the meaning of the decisions made, that is, the principle of their settlement. The judge should inductively gather the common sense of this social experience in order to determine the purpose of such a principle and achieve this purpose in the case before him. And in the absence of the necessary experience (including due to social progress), the judges have the opportunity not to act alone, but together with the jury to open the 'arena' for the formation of a new rule according to the principles of the "free marketplace of ideas", to allow all interested parties from society to participate. Thus, this approach has little in common with the ideas of V. Eggenschwiler about the sovereign role of *each individual judge* in all his mental 'irrationality', i.e. even the judge who is 'abnormal'.

Some of Holmes's thoughts can indeed be seen as manifestations of *positivism* (Gray, Gordon, White) since he talked a lot about "actual forces" and their enforcement through court decisions (as well as their generalization and prediction). However, if we consider Holmes in the context presented in this article, the same ideas can be manifestations of a *realistic approach to common law*. Because the courts do not appear as an organ expressing the will of the state but as a free arena for the prepondering (average) opinion of the community to be formed into an "actual force" through 'deliberative democracy'. This force is not static but dynamic. In turn, the generalization proposed by Holmes as a tool of "True" logic is not a scholastic codification with a fixed content to which the state gives binding force (the Justinian model) but an authoritative guide for judges and lawyers to grope for common sense.

Finally, I've tried to demonstrate in this paper that, despite the well-known postulates "the life of the law has not been logic: it has been experience" and "general propositions do not decide concrete cases", Holmes and his approach to law did not at all deny logic in law as an indisputable and greatest achievement of mankind. The usefulness of logic as a normative system of intellectual activity was not denied, including in the field of law (consistency and sequence of regulation

[200] Kelly, 1992, pp. 360-361.

[201] See e.g. Sunstein, 2014, pp. 490-491.

and development of law). Logic was rejected in the sense of *a direct source of* law and as a mode of legal thinking that determines lawfulness and unlawfulness only by means of formal logic methodology.

Peculiar correlation between formalism and realism in law and judicial law-making, as explored in this paper, may be of interest to the continental legal scholarship in at least three aspects. *On one hand*, the realistic approach, which rejected the possibility of the 'imposing' of formally substantiated legal ideals 'from the outside' on a particular society with its own history and experience, is relevant for understanding the new challenges that 'natural law globalization'[202] poses to modern legal orders. In particular, the problem of cultural relativism in human rights law often raises issues that are close to the spirit of a realistic approach. *On the other hand*, it makes it possible to understand the fundamental difference in the practices of judicial law-making actually implemented in different legal traditions, which sometimes, especially taking into account the interest of the judicial community in the postulates of realism, may be even more important than *a priori* attempts to establish points of interrelation and potential convergence between them. *Finally*, the problem of legal formalism is global in itself and is not alien to any legal order. After all, the unwillingness to resort to a thorough analysis of complex situations and take responsibility for a non-trivial decision that makes up for the incompleteness of existing sources of law tends to cause a similar reaction from both American and continental judges – it is easier to hide behind the 'letter' of the precedent or behind the abstract letter of the statute. Therefore, familiarization with the problems faced by one of the most experienced judicial and legal systems, as well as with its original responses to the challenges of formalism, can be useful for *expanding the boundaries of anti-formalist thinking* and comprehending the opportunities available, *mutatis mutandis*, in the pursuit of making truly fair and balanced legal decisions.

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[202] Alston, Goodman, 2013, pp. 531-553.

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