The Legal Backgrounds to the Influenceability of the Decisions of Judges from Factors beyond Law

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Abstract— Paying attention to the role of judges in legal system transformations and realization of judicial system justice has been always a necessity specially respected by legal thinkers and schools in recent centuries. Some schools including realism and formalism believe that law has a determined nature and the judges has no function rather than implementing the laws and in his judicial decision he acts like a mechanical machine and lacks any feeling. Therefore, there is no assumption of his alluring and threat. In contrary, a group of other schools including legal realists, legal critical studies movement and legal pragmatism have rejected this theory and believe that with their describable nature, laws are in the service of human needs and interests. Therefore, judges impacted thinking is based on factors beyond law and rejecting the theory on pure obey by judges from laws and regulations. In legal systems that are based on context – orientation, what undoubtedly yields into judges liberty in using description and his decision impact from factors beyond law is emanated from law nature. Thus, the approach of legal schools in recent centuries is based on the fact that such legal ambiguity and legal instrumentalism are the main legal backgrounds to the influenceability of the decisions of judges from factors beyond law expounded and clarified in present paper.

Index Terms— Laws Ambiguity, Instrumentalism, Legal Realism, Legal Critical Studies Movement, Factors Beyond Law.

1  INTRODUCTION

STUDIES on legal and judicial system transformations show that legal schools address the role of judges in judicial decisions through two approaches. Formalists and realists believe that legal system of any society in manifested by its laws and regulations. Hence, judges should just obey the law to establish discipline and governance.

In recent century, legal transformations are emerged which believe that legal schools, laws and regulations are instruments in the hands of judges. The connoisseurs of such schools as natural laws, legal realists, legal expedients and legal critical study proponents believe criticized the thoughts of realists as the main proponents of legal formalism that say judge is a mechanical and senseless machine. According to these schools, law is in service of human needs and interests and judges decide by different models that none of them are final. Therefore, single laws and regulations cannot be considered as a hallmark for a judicial decision. Thus, Therefore, judges impacted thinking is based on factors beyond law and rejecting the theory on pure obey by judges from laws and regulations. In legal systems that are based on context – orientation, what undoubtedly yields into judges liberty in using description and his decision impact from factors beyond law is emanated from law nature. Therefore, the legal backgrounds to the influenceability of the decisions of judges from factors beyond law include:

1. Laws ambiguity seen as the result of penetration of linguistic theories into laws. Hence, many legal scholars believe that the concepts of legal norms are unclear and the laws have different meanings and can be interpreted.

2. Objectivity disseminated among judges under the influence of legal instrumentalism theories so that law is the only toll to achieve the aims of legal system equity. Some believe that this thinking based on law ambiguity would cause that judges considers law as a tool to achieve justice which would undoubtedly lead into legal pluralism.

Since legal ambiguity and objectivity are the main grounds for the emergence of impacts by factors beyond law such as social and psychological factors over judicial decisions, when judges is in the situation of law interpretations, he attempts to interpret the law based on his own perception on his social role and function on the one hand and his personality types and psychological talents on the other hand. Thus, we initially explain these grounds and their impacts on judges’ decisions.

2  LAWS AMBIGUITY

Concerning linguistic theories and their penetration into laws, many legal connoisseurs believe that laws ambiguity is that most important basis of judges’ freedom and other legal executives. They believe that legal norms have become ambiguous and plural and legal questions lack a right or at least a single right answer. The principle is that legal norms have several meanings and are interpretable. More ambiguity would lead into judges authority in posing his own opinion. The point which should be considered clearly is that whether all laws are ambiguous or judges intentionally say that they are ambiguous to achieve their rational result from existing items? According to some contemporary thinkers, legal ambiguity is a strength point of the law. For instance, in his book laws Interpretation Philosophy, Hassan Jafarytabar points out that some
authors intentionally say that law is ambiguous for the fair interpretations by judges. However, they believe that if lawmakers are looking for such behavioral norm, they are recommended to distinguish from two problems:

(1) Problems to which legal dialogue is concluded and concurrence is achieved; in such case, law is clear and there is no room for interpretation.

(2) Problems to which legal dialogue have not come to an end and there are always disputes ion their social concurrence. In such cases, law can stop the problem by creating ambiguity. The benefit of such stoppage is that law has opened the window of interpretation for law scholars and judges to use the equal opportunities adapted to contemporary social norms (Jafaritabar, 2009: 159 - 165).

To this end, we study the concept of law ambiguity and its reasons and impacts on judges as well as opponent and proponent schools in this regard.

2.1 The Concept of Law Ambiguity

This is linguistic philosophical term rooted in works of Wiengstein. According to his proponents, language has an ambiguous trait. It means that letters, terms and sentences constitute language that have sometimes different meanings and it is not obvious which meaning is right and better: one, some or all? It is not obvious which one was the meaning of speaker (Ansari, 2006: 285).

For more calculations, it is necessary to point out some examples mentioned by C. B. Grey in his book culture under the definition of legal ambiguity in laws philosophy. He says that “tree” seems a simple word. If someone asks how many trees are in Canada, since accounting trees is a practical difficulty, there is also such ambiguity that whether long bushes are also tree or not? For instance is elm in its seven species a tree? Are slips considered as tree? If the answer is that slips have separated roots so they are “trees” then one can say that Indian fig with its disseminated roots is one tree or several trees. Hart recommends that when a term has its own core meaning, it is clearly a “tree”. Therefore bushes and slips are under the shadows of “tree” which creates practical problems for us. For example, concerning the term “person” in the 14th amendment of the US Constitutional Law (concerning financial grants by the government) and based on the most recent taken decision in relevant meetings, a three- month fetus is not seen as a “person” while a six – month fetus is seen as a person “since the spirit is aspired). He says that if by a practical definition, we cans laws as commands, forbidden, alarms, symbols, terms and sentences used by the executive guarantee of the administration to regulate human behavior, we should now that they cannot enter real world automatically. They should be executed and interpreted by those people who are obliged to follow them and are guaranteed by judicial system. To the same reason, some legal experts believe that law is an interpretative entity and these symbols and alarms have not clear meaning per se. for instance, red color in traffic light means stop; but, does red color always mean stop and green color mean motion? What shall we do when traffic red light is disturbed? Shall the cars stop and wait to repair the light or under exclusions they can pass? Do such laws include firefighting vehicles and ambulances (C. B. Grey, 1999: 398)?

So, there is no disagreement among philosophers and connoisseurs on the existence of ambiguous words and sentences in language. However, the intensity of such ambiguity is disputable. In his book on “radical translations”, Quine claims that any linguist who plans to compose a dictionary for a foreign language cannot be assured that his translations are right. We can never prove that the meaning we give to a word is the same meaning given by other people or even people in the same culture. Others may have different perceptions. We share our ideas in our daily life based on the assumption that there is a joint perception of meanings (C. B. Grey, ibid: 400).

In his book “laws, language and legal ambiguity”, Bryan Bix says that since language is a tool to express and execute laws and its ambiguity is obvious, laws ambiguity is influenced by language ambiguity. He explains: “ambiguity means that legal questions have no right or at least single right answers and they are raised in other ways: is a set of legal material sufficient for providing a single right answer to a legal questions? The second classification is based on the claim that law is ambiguous per se and one can find a single right answer for legal questions only through some non-legal materials (ethical principles or prejudgets) (Bix, 2010: 239).

Hence, concerning the claim that law is remarkably ambiguous, connoisseurs point to such reasons as general nature of norms, language nature (i.e. prevalent ambiguity or ground - breaking), gaps or conflicts in laws, exclusions of legal norms, incompatible laws and principles, judicial record ambiguity and ambiguity in general norms over detailed ones.

To this end, Bix asserts that many theorists who believe that law is ambiguous have raised the question that “is law predictable in practice?” According to some critical theorists, the result of many cases in courts is predictable due to social prejudgets or policies of judges. These prejudgets determine the result rather than legal facts (ibid: 240).

By studying the resources and opinions of legal experts as mentioned in above sentences, laws ambiguity by an insight toward linguistic philosophical approaches is seen where existing words and terms in legal laws and regulations have different meanings and we do not aware of the meaning of the speaker and its correctness or wrongness. According to Bix, legal ambiguity means that legal questions have no right or at least single right answer and social prejudgets determine the answers, noteworthy, laws ambiguity definition is discussed in details at next sections.

2.2 Laws Ambiguity Criteria

As mentioned before, concerning laws ambiguity, connoisseurs point out such reasons as norms general nature, language nature (i.e. prevalent ambiguity or ground – breaking), gaps or conflicts in laws, exclusions of legal norms, incompatible laws and principles, judicial record ambiguity and ambiguity in general norms over detailed ones.

Therefore, four criteria are mentioned for laws ambiguity:

The first criterion is the types of disputes in which ambiguity exists. Some law experts limit ambiguity to important and
challenging disputes in the level of tribunal courts and others believe that ambiguity exists in all claims and supreme courts. For instance, in his book, Bix provides the definition of “hard claims” and says that in discussion on judicial decision making and relevant issues, some experts have distinguished easy claims from hard ones in answering the question whether there is always a right answer for legal questions or not. Hard claims are those ones to which judges or skillful may achieve different results. The easiness or hardness of a proposition can be related to many variables: the concurrence of all experts on the result, the velocity of achieving the result and the decisiveness and certainty of the result (ibid: 188). In this line, Hart as a connoisseur of positivism school and a critic of legal realism has pointed in his book law concept to the fact that legal system is ambiguous since it believes that judges have to make laws. However, he admires that judges should not do this freely and it means that they should have enough reasons to justify their decisions. If they act in this way, they are allowed to follow practical reasons or criteria to which no law exists and even they may differ from reasons and criteria followed by other judges in facing with hard claims (Hart, 2011: 398 – 400). Therefore, one can claim that laws ambiguity is a principle to which there is no disagreement between connoisseurs of both positivism and realism. The disagreements are on their criteria.

The second criterion is that interpretations of ambiguity are different based on the question that whether courts enjoy full discretion in achieving the results of disputes or they are limited to a few options or they have a balanced status (Kenkirs, 1992: 202).

According to the third criterion, laws are ambiguous when different results can be achieved by legal obligating resources and references. Radical interpretations claim that when there is a reason for different results or disintegrated legal conclusions, laws are ambiguous. Interpretations on ambiguity are different on obliging resources. Some believe that norms or principles, or policies or legal culture are obliging while others believe that social norm, ethics and common or critical spirituality are obliging. It is normal that difference in perception on obliging resources would cause ambiguous results (ibid).

According to the fourth criterion, there are perceptions on ambiguity theory. They give different explanations on the reasons of ambiguity and justify their claim by conflicted methods. Some say that ambiguity is emanated from the gap in legal resources, linguistic deficiencies, flexibility in interpretation on current procedures and conflicts among the norms that have not been resolved by higher principles or norms. Lack of integration in obliging norms may be due to errors and historic changes, ideological disputes among numerous authorities to create that norms or lack of political philosophy integration of each decision maker (Ansari, 2008: 24).

For more explanation, we mention Jeremy Frank as a proponent of laws ambiguity. The reputation of Jeremy Frank as one of the fans of legal realism in USA is the difference he mentioned in his book titled laws and modern mindset to study the forces which impact on exploring and describing the events of claim. Like other US realists, he has accepted doubt in principle. What added by him is that even in cases that law is clear, there is another problem that doubt is neglected in principle. Finding facts and realities of any case is a part of verdict issuance. If the court’s decision is unpredictable due to its interpretation on legal norms and laws, in cases that law is clear and the decision of the court seems predictable, again its verdict is unpredictable. According to Frank, law is court’s decision on a set of realities. When the court has issued no court, there is no law on the facts. According to him, no one knows the laws on a case, situation, transaction or event before court’s decision. Therefore, any imagined law before verdict issuance is only a personal opinion or guess by legal experts on court’s decision (Frank, 1931: 17 – 53). Frank believes that the origin of law decisiveness among people and legal experts emanated from quasi – paternal laws to satisfy the tendency to decisiveness and security left from childhood and the reason of institutionalization of a wish inside people either legal or non-legal is that they need an origination for decisiveness and security to which they can rely upon like the role of father for children (Carlos Brezni, 2009: 183).

Frank believes that different prejudices by judges and jurists (like the extreme of their reactions toward children, women, etc.) impact on the results of a claim. Frank says that claims, simplicity or complexity of them, how to introduce the events and affairs, the authorities of judges, assessing the reason and, more importantly, special traits of each claim and parties are different case by case. Judges is impacted by such difference and his interests and tastes are different. One judges likes fat or religious people while another one is indifferent. In each claim, the events and affairs are ambiguous and such ambiguity leads into judicial results. Thus, he believes that legal assignment through legal norms is irrational since if it is supposed that legal norms should determine claim results, what’s the need that people endure to resolve the case? Parties can refer legal norms and find the legal solution and they will be released of any judges (Saneei, 2010: 420 – 452).

2.3 The Impact of Ambiguity on Judges’ Decisions

Certainly, judges’ authorities will be increased when there is ambiguity in the concept and scope of legal laws and regulations on a phenomenon and describing the behavior of defendants. For instance, such ambiguity in new Iranian Islamic Penal code is seen in article 19 in which punishments start by lash (degree 6) while it is no paid attention that degree 1 to 5 punishments may not be accompanied with lash. In article 658 of the old Penal Code, stealing in areas that have suffered flood or earthquake or war is punished between 1 and 5 years and to 74 lashes that its degree is not clear and if it is degree five, 74 lashes should be eliminated while if it is degree 6, 1 to 5 years of prison is not adapted with degree 6 in which imprisonment is between six months and 2 years. Is article 658 negated? How one can interpret it in the benefit of accused? In such cases, judges enjoy more authorities for decision making. Such authorities may motivate them to find fair solution for these claims.

Therefore, one of the most impacts of ambiguity for judges is the decision he should make when he faces with an unfair
law. Damato says my answer to this question is that judges are not typically facing with unfair legal actions. In any case, judges have countless options to consider which norm for which part of the claim. During legal procedure, judges use hundreds and thousands of irrevocable discretions to resolve disputes (Anthony Damato, 1983: 8).

On the other hand, ambiguity gives an opportunity to both parties to change the result of procedure to their benefit by recourse to events and norms. In many cases, these can impact on judges’ opinions.

Therefore, the reality of ambiguity is undeniable and judges authority increases by extremity and weakness. Such reality can have disadvantages alongside its deficiencies which can only being mitigated by training judges and other legal executors of its negative impacts.

### 3 Laws Objectivity

In studying legal systems and the necessity of realizing the aims of judicial justice system, legal connoisseurs are always looking for finding the answer of the question that are judges tasked to follow laws in their judicial decision apart from their valued content or they should also consider profitability, ethical justice and social, political, religious and cultural values? Answering these questions have yielded into two ranges of legal schools. Formalists believe that law system is manifested in its laws and regulations. So, judges task to follow law in order to realize discipline and governance. Therefore, an unfair law should be also respected.

According to realists, in a democratic system, recognizing the judge to make decision based on fair rules would lead that the laws are impacted by judge’s consciousness and his political philosophy or religious beliefs would determine his judicial decision. Any person except than judge can object to current law in order to realize discipline and governance. Therefore, an unfair law should be also respected.

As mentioned before, in recent century, new legal transformations are emerged which believe that legal schools are tools in the hands of judges. Such transformations have caused that that such thinking is criticized.

In this regard, Perlman studied different theories on justice and asserted: to study the justice, one should study that what is fair act? What is fair norm? Who is just person? Realists have only focused on the first question. The result is that a just practice is one not done by a correct norm. On this basis, the ideal is that decision should adapt to weight, size and number. Judge give the share of anyone based on law like a machine which gives the relevant goods to customers based on weight, number and size for which it computes the total price and receives it. Justice is respected when the total receive sum is right and no one ask questions about the correct calculations by the machine. By this opinion, judge is like a machine protected from mistakes and when he is supplied with the elements of problem, he answers without any mistake. Judge is impartial so he is steady in judgment whether the parties are his friends or enemies, strong people or weak people, rich people or poor people. He behaves them similarly apart from the result (ibid, p. 67). In recent century, along with legal system transformation throughout the world, scholars and philosophers have criticized the opinions of realists and contrary to them; these practitioners have expounded news foundations. According to them, the role of judge in facing with human and legal phenomena is not just to listen to the voice of law; rather, the judges should judge and interpret the law in the shadow of his ethical, social, political and fair perceptions. Therefore, one can claim that to consider the law as an aim or instrument plays a vital role in judges decision making since the result would impact on his decision and it is the law which says the final point. One believes that judges decision nature is free from any factors beyond law influence while another one believes that factors beyond law are important factors in decision making. Ultimately, one believes that only law governance is important while another one believes that law governance is good but only law governance is excessive and there are disadvantages. Therefore, we discuss on the ideas of mentioned legal schools and study their impacts on the role and decision making of judges.

#### 3.1 The Impact of Law Objectivity on Judges’ Decisions

As mentioned, formalists and legal realists believe that judges as the executors of legal system aims should only implement the law. In other words, they are like mechanical devices to implement legal norms. However, it is extendable to all proponents of these schools and in some cases; this theory is admired by trivial differences. Thus, in societies that their approach on legal system and its aims adapt to the theories of these legal schools, laws are the only way to realize justice as “legal justice” and the judges should just exert the laws. In these societies, judges are missioned to protect the laws as a law expert. In law-oriented societies, judges should be fully impartial and decide based on the reasons and statements by both parties and they cannot act as advisor or mediator while the approach by most legal schools is toward law objectivity. Such approach causes that judges can be granted active roles in their judgment. In such societies, judges can resolve the claims while act as mediator and arbitrator. Along with administration the judge contributes to realize predetermined polices and to regulate the interests of conflicting parties in order to achieve such aim. Here, one can refer to either Anger’s approach on the principle and anti-principle of the society or expediency findings. However, it me be criticized here that the aim of judge’s decision making is law governance in the first step while many connoisseurs believe that the nature of law governance is that people should be governed by law. This opinion has three pillars: (1) administrations namely political authorities should not believe that they are higher than
law, (2) the law by which administration are going to govern people should guide and conduct human behavior, (3) lawmaking should be separated from judicial ones (Ansari, ibid: 17). Thus, many contemporary legal connoisseurs believe that the main task of judges is to adapt justice and interests with discipline and security. By accepting laws objectivity, the judges would have an opportunity to be loyal to laws and to select fair and rational solution for any phenomenon. In most legal systems, it is accepted that using legal and judicial rationality should flexible and in line with social transformations since the most radical value in law is justice so that good or bad criteria for any law or legal norm is its proximity and farther from justice. Hence, on expediency in judicial decision making, Naser Katuzian asserts: “legal expert should use justice and his consciousness and prefers expediency to principle – orientation.” To prevent any misperception, he addressed to laws elites and says: “I have severally repeated that all problems of laws philosophy is that it should be submitted by voice and speech: it should tell the ordinaries to implement the law and to show elites how to open a way from laws to justice (Katuzian, 2010: 153).

It can be only achieved through laws objectivity. Thus, legal system transformation and its excellence owe to expand the scope of judges’ discretionary authorities and right training to its applicants and their proper selection.

4 Legal Approaches

So far, our studies indicated that legal schools such as legal realism, laws critical studies movement and legal expediency emphasis on laws ambiguity and believe that laws are like tools in the hands of judges. Hence, we would explain the theories of such schools in this section.

4.1 Natural Laws School

Its proponents consider the law as the common aim of human societies and believe that it is necessary to follow natural principles. Further to criticisms against this school in 19th century, new concepts were emerged. In most new natural laws theories, the basis of this school in 17th and 18th centuries were retained except than some theories in which it is relied on the feeling of justice in anyone’s consciousness. In new theories, the aim is to protect public interests and the main aim of all principles is to keep human convenience and security. Therefore, its proponents believe that ethics is a constructing element of any legal system. Hence, judges should pay attention to them in treating legal phenomena. Authors like Durkein, Finis and Fuller are the most important thinkers who have always emphasized on ethicality of laws. They believe that law should not be appraised rather the judges is obliged to say the true and cannot allow to deduct legal texts. He should determine whether the results are accepted or not. If the results are plausible, mechanical acts are not discussed but if they are not plausible, judge should interpret and change one of the preliminaries to avoid non-plausible results. Obviously, a judge can be deprived of such assessment power and ask him just to follow the law although it was criticized since send half of 19th century (Perelman, ibid: 51). As the natural law proponents, Fuller and Finis have criticized realists’ thoughts and have defended justice and ethical ideals. The deficits mentioned by Fuller on formalism include:

1. Any legal norm regulated even carefully may lead into undesired results.
2. In implementing legal norms, judges should always try to avoid undesired results.
3. In implementing any legal norm, judges should consider the relevant goals see whether it can develop the goal or not.
4. On this basis, implementing any legal norm needs to interpret its goals.
5. The meaning of a legal norm cannot be understood otherwise through objective - oriented interpretation (Stone, 2002: 117).

Therefore, studying the opinion of natural legal school proponents indicates that laws and rules are tools to realize social justice and interest. On this basis, this school considers high freedom for judges so that they believe that a good judge is someone who exerts the law well rather than governing law! Thus, judges should use not only the law but also all necessary mechanisms to achieve ultimate legal goal.

4.2 Legal Realism School

As mentioned before, legal realism is a title for a group of legal authors in 1930s and 1940s as “realist” authors, that is, citizens, legal experts and judges conceive what really goes on beyond legal terms and complexities. In research area, these authors have linked a set of synergic issues. Many of them challenged judges’ scientific methods in investigating the claims and verdict issuance, what judges described their initiatives as a deduction from simple or fundamental concepts while their decision making is based on political preferences or pre-judgments. Other realists claim that in more radical and abstract levels, legal verdicts cannot determine the result of special claims. The best descriptions include that summary expression of judges’ decision making in similar cases to past or brief predictions on judges resolve the likely proposition (Brian Bix, ibid: 375 – 377). According to realists, judges create the laws. Court is an organization of government links directly to different claims and sees the characteristics of each claim and feel the meaning of justice. Judges is the representative of Judiciary and also a society’s human member who is influenced by all social factors. Therefore, laws and regulations are not the only affecting factors on judges but also social, political and mental factors impact on their decisions. In his decision making, judges revives dead legal terms and clarifies its right meaning. In criticizing Hems who believe that court’s verdict should be investigated out of all factors, laws philosophy professor, Leon Fuller asserts: “if we want to predict smartly that what court will do really, we should look for the fact that what they try to do.” We should pass surface and consider ourselves as judges and participate in process of creating and retaining and legal system to see that many issues have ethical aspects (Katuzian, ibid: 405 – 410). So, one can conclude that according to realists, since laws ambiguity and objectivity pave the ground for preferences such as judicial decision making based on social sciences, sociology, psychology and crimi-
nology and instead of prejudicing for theories of objectivity and clearness, another instruction of legal realism is to pave the ground for judges’ expediency because that realists believe that laws and regulations cannot alone resolve judicial claims and provide supply. Such laws and regulations are tools in the hands of judges to resolve claims. In fact, they are objective not the subjective for judges.

4.3 Laws Critical Studies Movement

The law radical criticism was active in USA since the beginning of 1970s to end-1980s. Critical legal studies combined critical left political positions by a radical narration of critical arguments mentioned before by US legal realism schools. Critical studies include laws ambiguity, public law separation criticism on private laws and the claim that law is only in service of rich strong people. According to this movement, law is fully ambiguous and legal argument is a cover for interest conflicts of groups with different ideologies summarized in this maxim “law is the same politics” (Bix, ibid: 318).

Therefore, the results of our studies on laws critical studies movement indicate that its proponents accept laws ambiguity and other instructions of realism schools by a radical and political attitude and refuse the theories by which judges are seen as machines to implement laws. The proponents of this movement including Roberto Anger believe that all conflicts between social and individual interests can be only resolvable through objective and certain laws and the separation of laws and politics is seriously criticized. Anger who is believed as the founder of laws studies movement has determined two radical problems in liberal political theory: the problem of law and the problem of judgment. Concerning the judgment, the criticism is that even if well-established laws and regulation are established, judges are not able to implement those norms without considering political judgments. Anger believes that against each principle in a legal system, there also anti-principles to change the structures and to identify them in order to establish judgment (Kerly, 2003: 625). According to the proponents of this movement, legal argument has a political nature by its own aims and results and in judicial decision making, they are more effective than abstract legal laws.

4.4 Legal Expediency School

Expediency or pragmatism believes legal norms as tools. According to its connoisseurs such as Cardus, judge is not founder of the laws rather it is its constructor. Cardus believes that the ultimate purpose of law is social welfare. To this end, he considers high freedom for judges. However, he does not mean that judge has the authority to replace people’s opinion by his own opinion. He says that judicial norms are objective in a pragmatic meaning not as adaptability to an external reality. Judges do not use their personal as the basis of his judgment. His benchmark for judge’s rational attitude on people’s right perception is right (Keyvanfar, 2007: 153).

Therefore, pragmatists believe that due to permanent existence of public suspicious in facing with legal phenomena, judges has always the authority in describing phenomena and to accept one option among different ones and to refuse other ones. In contrary to legal formalists which believe in the clearness of legal texts, they believe that whatever exists in texts is ambiguous and indecisive and one can revise it by resort to one option or additional information.

Hence, the instructions of this school consider freedom and conditions for judges that constitute measures to assess necessity and profitability of judicial reaction. For instance, in facing with a criminal phenomenon in investigation process, the judges looks for the most suitable balanced reaction as the outcome of interests of offender, victim and social expediency. Based on such measures, they take judicial decisions that its samples can be highly seen in penal and judicial verdicts. For instance, in Iran, someone convicted to execution has been discounted by judges since he has memorized Holy Quran to 15 years of imprisonment. Therefore, the instructions of this school can cause that in different conditions and factors, it shows the lack of necessity and profitability of punishment on offender and officials and authorities create the grounds for returning to crime by offender by resort to non-penal initiatives and values considered by lawmaker and it is necessary that they determine punishments for more profitability for offender, victim and society in the framework of punishable reactions.

As a pioneer of pragmatism, James believes that the correctness of any norm in claim solution depends on reasons and expediencies. To the same reason, it refuses following past verdicts of the court since he believes that a reality determined in a dispute by considering the special conditions have no value in other disputes. To the same basis, Homs as a famous US judge and the follower of pragmatism has criticized respects to antecedents and has called it as a regretful phenomenon. He says clearly: “undoubtedly, I believe that judges create the laws and it should be the same.” In his famous speech on “laws prediction”, he asserts: “my purpose is to predict the verdicts which courts would issue in external events” (Katuzeian, 2009: 180).

As one of the hard defenders of judicial pragmatism, Richard Pasner says on the differences between realist and pragmatist judges: “pragmatist judge has different priorities. He wants to take the best decisions by considering past and future needs. So, he is not committed to adapt with past decisions. He is not looking at past decisions as an aim and considers it as a tool to achieve the best results in disputes. A pragmatist judge knows that there is a mutual relationship between implementing the justice in disputes and predictability of laws. Such relationship which can be seen overtime, the judge may sacrifice justice for respecting the laws or past judicial decision against current and rational expectations to run the society (Pasner, 1998: 238).

5 Conclusion

Investigating different legal schools and principles of justice indicates that the main mission of judges is to realize justice and judicial security. As lawmakers are looking for realizing law administration to adopt fair, rational, correct and comprehensive laws, judges as the most important pillar of law administration should consider the condition and to make legal
laws and regulations to achieve justice since law is a like a dead body without justice. Undoubtedly, it can be achieve by mechanical aims. Legal laws and regulations have an ambiguous nature and its interpretability is unavoidable. Hence, in recent centuries, the thinking of laws clear nature and mechanical actions of laws by judges is refused and laws objectivity is obvious for judges.

By accepting law objectivity, the judges would have the opportunity to select fair and rational solutions while being loyal to laws for any legal phenomenon. It is accepted in most legal systems that using a judicial and legal rationality should be flexible and along with social transformations since the foremost value is law is justice so that good or bad criterion for any law or norm is its proximity or distance from justice.

However, one should note that law instrumentalism should not been seen extremely. In this kind of insight, there are also concerns by critics that judges taste and personal opinions are replaced by lawmaker’s will and legal governance as well as judicial stubbornness and exploitation. Our response to such concern is that legal systems follow formal principles to guarantee fair procedures in penal and legal areas. These principles are shaped to prevent judicial stubbornness and abuse of power and preventing social and individual rights aggression. In addition to formal laws, reviving individual and citizenship rights depends on judicial formalism since it judicial formalism creates a disciplined framework for judges diagnostically authorities.

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