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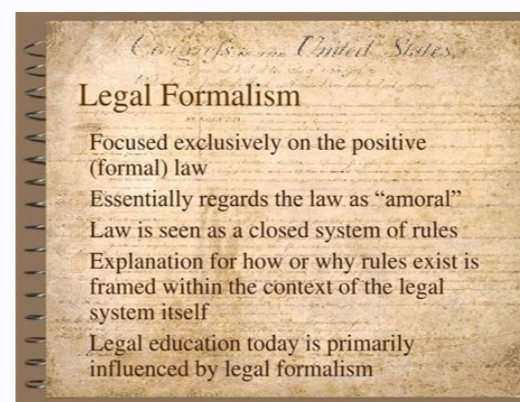
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## What is formalism law

What is a formalism. What is the difference between formalism and realism in law. What is the theory of formalism in law.



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Two Types of Formalism of the Rule  
of Law

Konatsu Nishigai

**Abstract**—The aims of this article are twofold: (i) to propose an explanatory framework, focusing on law-making acts, for accounting for whether the formal requirements of the rule of law are fulfilled; and (ii) to propose two further models within this framework. One model, which I call 'rulebook formalism', pertains to Parliament's law-making acts; another model, which I call 'rights formalism', concerns the courts' law-making acts. This distinction results from the different modality of laws, i.e. the different natures of law-making acts. Drawing on speech act theory, I give a general account of the formal requirements as the success conditions of law-making acts. Then, applying this framework, I discuss the formal requirements for Parliament's law-making acts and the courts' law-making acts respectively.

**Keywords:** adjudication, rule of law, common law, Dicey, jurisprudence.

1. Introduction

Certain requirements must hold for the rule of law to function. Lon Fuller enumerates such requirements, including the law being general, open, prospective, clear and without contradiction, not requiring the impossible and being relatively stable.<sup>1</sup> Joseph Raz, in his 1977 article, argues that this list represents the formal concept of the rule of law, as distinct from the substantive concept of the rule of law.<sup>2</sup>

As Fuller presented the list as the requirements for Rex to make law, this list is legislation-centred. When laws are made by legislation, they are typically explicit and general rules that mandate or prohibit certain actions of the norm subjects. Because Fuller's list of requirements primarily focuses on the laws made by legislation, the list does not account for other types of law-making acts, namely laws arising from officials' law-applying practices, including judicial law making. Being aware of this problem, in his 2019 article, Raz admits

<sup>1</sup> PhD Candidate in Law, Corpus Christi College, University of Cambridge. Email: kn24@cam.ac.uk. I am grateful to Timothy Endicott, Trevor Allan, Adam Smith, Joshua Goldstein, Matthew Stebbins, Lars Vinx, and Matthew Kramer for extraordinarily helpful comments at various stages of writing this article.

<sup>2</sup> Joseph Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law: Essays on Law and Morality* (OUP 1993) 8–11.

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