Towards the Adaption to the Open Texture of Law

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Abstract: The open texture of law is one of the core content of the new analytical-positivist jurisprudence[1], which is defined by H. L. Hart[2]. In this paper, we try to put forward a new view for the theory that the judiciary should exercise at certain limited discretion to fill the legal loopholes in the long term. Analyzing from the angle of the uncertainty of the rule of law, namely, the open texture, we describe how to achieve the goal of reasonable judicial discretion through the correct legal interpretation method, namely, the legal interpretation system. We will end up arguing that, faced with the open texture of law, what we need to do is not to fill the loopholes, but to adapt to and optimize it, and make it maintain the internal structure at the same time.

Introduction

As H. L. Hart wrote in *Concept of Law*, "Law is a part of imperfective and uncertainty, so judges should exercise at given limited discretion to fill the legal loopholes." We share the view of the existence of uncertainty, but not quite approve of the make-up method. In our point of view, the uncertainty of the law is a fundamental fact that is deeply rooted in the nature of law, and more essentially, in the nature of all rules. More intuitionally, law is alive with the characteristic of open texture, and we are required to optimize it rather than vanish it. We devote ourselves to proposing our theory and method through critical thinking and analysis in the remaining part of the paper.

I. The Open Texture of Law

Objective Reasons for the Formation

Objectively, the formation of the open texture is based on the fact that both legislation and precedent are legal norms' route of transmission.

In order to keep people aware of what to do under certain circumstances, we have to propose general standards of behaviors, which can be accepted by people even when they are waiting for further instructions [1]. The criterion is divided into legislation and precedent. It's easy to find uncertainty in precedent, for example, the one given the instruction "do as I do" might be confused with the norm in the precedent he should follow. Meanwhile, we cannot ignore the imperfectness in legislation nothing is labeled to be some general specification of concrete examples in reality, though it's much more reliable of legislation's subsume, namely, syllogism. Besides, laws and regulations never come with their concrete examples, leaving us with the problem of uncertainty.

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[1] One of the core content is the open texture, and the other one is the legal interpretation.
[2] H. L. Hart (1907-1992), a professor at the University of Oxford. As the pioneer of the new analytical positivist jurisprudence, Hart is famous in western jurisprudence as his superb legal theory.

Root of the Open Texture

People are striving to see a real law, however, the natural rationality of men does not match legal wisdom at all [2]. Take criminal law as an example. There is a discussion in the writings of Beccaria[3]: only law has the very power to judge criminal and define penal code, and no judiciary can exercise at certain discretion arbitrarily, even in the name of justice. That is to say, justicial penalty never oversteps the law, which is a tough mission for law. On one hand, the law requires its own interpretation as a support, and on the other hand, the law, bound to be in specific applications and development, is complex. The meaning of criminal law itself and the specific application of criminal law problem are impossible to be completely separated. As a result, literal interpretation is nearly idealism to access to the true meaning of criminal law, which is not a feasible approach.

From this perspective, we should not only follow the principle of legality but also pay attention to systematic interpretation, for law needs to be interpreted, continuously, from enactment to repeal. Between these two aspects of principle and interpretation, open texture can be found.

Guiding Function from Legal Positivism[4]

The theories of Beccaria and Hart could be extreme cases. But in order to find feasible approaches to the open texture, we refer to their theories again. Hart focuses on the soft positivism, which is an important part of legal positivism: "I have clearly expressed, standard of law's validity includes ethical principles and real values. So my theory belongs to soft positivism." We agree with soft positivism. In our point of view, although the statute law is a written form on behalf of justice, it does not mean that text tells all the true meaning. People who admire law try with the memorization of the definitions of concepts at the beginning, such as injury, instrument and property, but finally they realize that definitions do not provide further assistance to answer the problem. Unfortunately, taking subjective or objective interpretation theory, they cannot simply reveal the meaning; with "behavioral worthlessness say" or "worthless results say" when sentencing and convicting, they cannot completely disclose legislators' intention.

Hart's approach is summarized in his saying: "Marginal uncertainty should be tolerated, and for many legal rules it should be welcomed. When we encounter cases that are unpredictable, we were able to confirm the judgment of the relevant issues in uncertainty space allowed by law. Relying on this kind of interpretation, judges will reasonably resolve any cases in full consideration of the relevant information and issues in the final judicial decision. [1]" Here connotation of *interpretation* is the very problem. We believe that only if text, justice and fact as well as the many more factors are simultaneously taken into considerations that law could be reasonable.

When given rules are applied to specific cases but they cannot determine the answer, the law itself becomes part of the uncertainty. These cases are difficult to tackle with, not only because the disagreement might be among the wise and well-informed lawyers, including both practical lawyers and academic lawyers, but also that references are nowhere to be found. Hart believes that law does not require contentious issues; in order to reach a decision, the court must have the legislative function called discretion. But we believe that discretion is uncontrollable in such conditions. Discretion on open texture is like drawing a blank, based on which any discretion has no criterion,

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[3] Cesare Bonesana Beccaria, a criminal jurist of Italy in the 18th century who created the famous jurisprudential work Crime and Penalty.

[4] Legal positivism, also known as positivist jurisprudence, is a contemporary jurisprudence and philosophy of law, which advocates that laws are human rules, and there is no intrinsic and necessary relationship between law and morality.

and the result could be far away from justice. According to the analysis above, we believe that discretion is not to vanish the open texture, but to adapt to and optimize it.

Rationality of Optimizing the Open Texture

As human beings rather than God, our ignorance of the facts and relative uncertainty of targets hinder our plan of using generalized standard. At the same time, legal system attempts to meet two requirements: determining the meaning of the rules, and resolving issues or specific cases even without enough resources to get to the final settlement. Human expectations for the future are powerless, yet legal system, in the process of adapting to the open texture, applies handling skills with strong targets in a variety of techniques to deal with extreme cases. As a result, it maintains the internal structure in open texture, and succeeds in relative stability in the instability.

II. Methodology of Open Texture

How to Optimize through Valid Interpretation

Examine the issue in a comprehensive view with the example of criminal law. We know that in written law system countries, written criminal law is just words, and righteousness is not only written in the text, but also hidden in the concrete social facts. Even if the interpretation were based solely on the conclusions of law with justice, it's just the general justice. However, the application of criminal law, in addition to general justice, must also be implemented in the specific case of individual justice [2]. If we try to use any kind of explanation, or authoritative interpretation to be more precise of the final basic text to replace the open texture, we will devour the text's life prematurely [3]. As for an interpreter, it is not enough if his or her vision is on the text or barely referring to his dictionary; he or she should put justice in heart, and has round-trips continuously with the criminal law between norms and facts of life, to and from [4].

For further explanation, the round-trip refers to the idea that in legislation, justice share correspondence with the facts that might happen; likely, in judicature, justice corresponds to the formation of a criminal verdict. Here we quote the saying of ACTO Kaufman, the author of *Philosophy of Law*: "On one side, legal concept should be open to social life, which brings it materialization; on the other side, concepts could foresee and lead life in some right way." In short, the process of optimizing open texture through interpretation is a complex and ambitious task.

Here we emphasize that legal interpretation is to help optimize open texture, yet it is a creative activity, rather than a negative discovery to the original intent of legislators. In the legal system, the more the cases occur, the more accumulation is gained, and the legal system becomes more and more complex. In turn, it provides an indispensable reference to optimize the structure.

In practical law systems, judiciaries tend to put more attention to certainty and neglect the open texture. But what cannot be overlook is that our interpretation of the law contains the analysis, understanding, and introduction; that's why we need a systematic interpretation. We believe that the extreme and narrow view angles or approaches should be abandoned when making explaining and solving problems, and flexible systematic interpretation is recommended.

Case Study

Here is a case (categorized in civil law, Chinese) shows the open texture and systematic interpretation in legal practice. In 2003, to the south of his own contracted land, S built a drainage canal; and to the north of it, he planted poplars. Another contracted land is exactly to the south of the canal of S, which belongs to T. In 2006, T put plenty of straws in the canal, which burnt later for some reasons unknown. As a consequence, 37 of S's poplars were also burnt, which caused a huge

loss of RMB 15,960. S regards T as the defendant to court. The plaintiff requests the defendant to bear the joint of several liabilities, for he put strews in his canal without admission, which led to the fire. T insisted that he was not the firebug and the person in charge should be the fire setter.

According to our systematic interpretation theory, the analysis order is shown in the following figure, in which we arrive at the final conclusion by considering the joint of several liabilities through the concurrence of infringement and unreal joint. Limited by the length of paper, we show the detail analysis only on common behaviour and causal relationship.
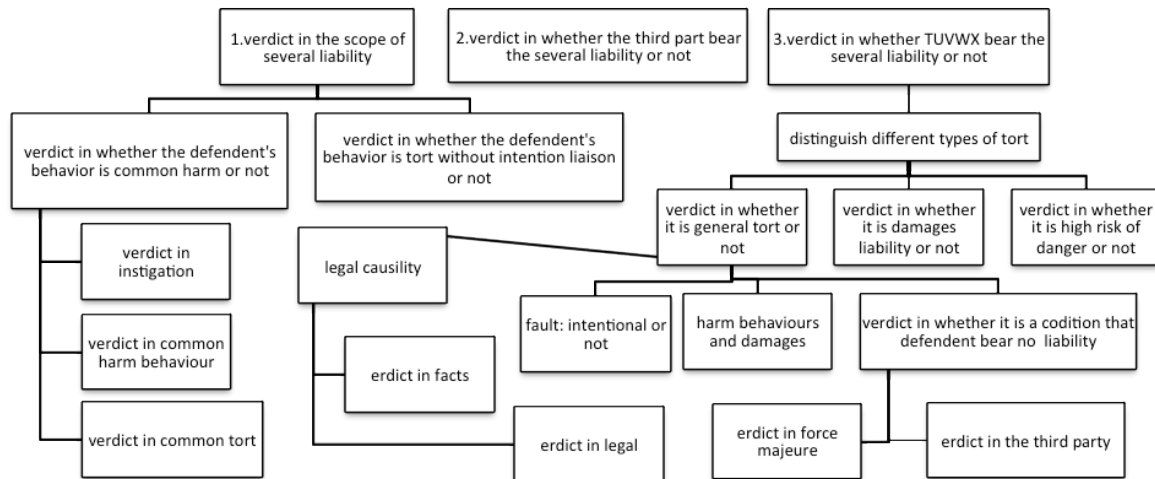

Figure 1. Case analysis order

Legal Causality

Legal Causality, which is a basic concept in imputation, refers to the relationship of cause and effect resulting in the same damages. And causality in tort law refers to the relation of behaviors or possessions of the actor and the relative damages [5]. The cause in legal causality is the actor's behaviors or possessions, that is to say, "the actor we investigate have controlled the factors leading to the damages [6]." What's more, legal causality is the facts with legal meaning, "causality is a basic concept in imputation and compensation [7]."

As a result, we take two steps when discussing the causality in liability: verdict in legal (fault) and verdict in facts (damages). "Judges have to find the very causality between damages and disadvantages according to law. [8]" The fault is the behavior which is in the actor's control [9]. Carbonnier pointed out that severe fault refers to a striking degree which the actor is lack of ability or attention [10]. It is T that brought about damages, so it was his fault. After verdict of causality in fault, we find rationality of it in facts. Damages in law are compensable [11]. Damage is not only factors of civil liability, but also includes any disadvantage to body rights [12]. Not all damages deserve legal remedy; "disadvantage to body rights can result in liability only if it should be remedied [5]." Back to our case, the usufruct of S was violated, and the damages are compensable, because T put the straws in canal without permission, which resulted in big loss.

Common Behaviour

Common harm behaviour is a typical tort, whose legal basis can be found in Section 8 of the *Tort Law*[5]. Harm behavior is controllable and disadvantageous to others' civil rights or interests [13]. Common harm behaviour consists of the bodies (two or more bodies), commom behavior, leagal causility and damages [14]. The harm behaviour here is only intentional common behaviour.

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[5] Section 8 of Tort Law: Actors (two or more) with common harm behaviors, bear the joint and several legal liabilities once they cause damages.

Section 11 and 12 of the *Tort Law* can be a reference frame because their explanation on behaiour without intention liaison just interpret intention liaison in common harm behaviour [15]. As far as we are concerned, common harm behaviour can only be intentional because unintentional fault is no where to be seen in reality. In our case, the third party has no subjective intention with T, as a result, the behavior of the third party is not common harm behavior.

Conclusions and Analysis

S suffered from the damages indeed, but T was not the accomplice. Here comes the open texture of law. We propose, as in this case, to consider the joint of several liabilities, namely, the concurrence of tort, through the concurrence of infringement and unreal joint.

In fact, the third party in this case is tough to find, if Section 12 of the *Tort Law* is reluctant to use, we will be trapped in giving a clear explanation of the direct damages the defendant caused. In the Tort Law of China, there is no definition of the behavior of unreal joint liability, and some scholars put forward the joint of several liabilities. Concurrence of tort refer to infringer party's (two or more civil bodies) behaviors, of which, some cause direct damages and the others don't; meanwhile, all the behaviors have legal causality with the damages so that the actors have to bear the joint and several liabilities [16]. Different actors in this case, no matter main or minor behavior they made can be seen as a whole party, which belong to the concurrence of tort's factors. As a result, T bears unreal joint liability, whereas the real liability is on the third party's side, in which way the victim could get merited compensation for a certain percentage of the damage compensation at least[6]. That's the very way to optimize the open texture.

III. Two Sides of Judicial Discretion

Existence of Judicial Discretion

Now we focus on discretion. Nowadays conviction tends to be based on empirical analysis, rather than logicality. We are not in favor of Hart's discretion, and we propose judicial discretion based on systematic interpretation.

Concretely said, on liability fixation of strike mistake, we agree with the theory of statutory conformation. If the facts perpetrator expected correspond to actual facts in the same offence, it's considered the same as its legal nature, responsibility for the results are not negated though the damage occur due to an error; Conversely, if the perpetrator expected facts and actual facts are different between crime constitution, it is considered legal nature are not identical, then systematic interpretation is needed, to identify whether the perpetrator bear legal liability.

Theoretical Analysis of Judicial Discretion

It's significant to deal with the conflicts and coordination of values in law. The human beings have limited altruism, resources, understandings of the universe and strength of will. So much is limited that law with interpretation aims at self-protection to a great extent.

In addition, we cannot ignore the core values of law. This law value system includes the following four aspects: the maintenance of social order; the public safety and tranquility; the victims' need of being soothed; and the protection of human rights of criminals. Value conflicts in individualism turn into value selection in collectivism, and these different values may be in neutrality state, the coupling relationship or competing relationship, anyhow, they are always there,

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[6] The compensation for victim is still a big problem because the third party is so hard to be found that law could fail protecting one's full interests. It's a long way to go on optimizing the compensation system.

making the open texture of law, legal interpretation and judicial discretion closely related.

Requirements for Judicial Personnel

We won't repel giving judicial personnel judicial discretion, yet we also won't ignore the rule skepticism. The rule skepticism questions whether the rule system is in the sharp center of law system, and we cite Gray's famous phrase in *Nature and Origins of Law*: "No! It is the personnel that is the real master of law, who has the absolute authority to give interpretation of law to the public, because they control the purposes of law, not the first person who wrote or told them. [1]"

We also believe that the judge's discretion must take the finality and infallibility of justice as a precondition. Furthermore, giving discretions to judicial personnel calls for qualifications. Qualified personnel comprehend the value of law and are aware of the application of law as well. Only in this way could the law attracts public participation in the legislative process, and at the same time, with full participation of the parties in enforcement process, can we see justice in value conflicts.

IV. Conclusions: Fill Vacancy vs. Optimize Texture

In this paper, we started from legal positivism and open texture of law. We demonstrated that optimizing the open texture is rational and practical; we took an example to conduct case analysis to show how to make optimizations through valid interpretation, and proved system interpretation as well. In the end, we make requirements on judicial personnel through theoretical analysis of judicial discretion. As a conclusion, the core points of view of this paper are: facing the open texture of law, what we need to do is not to fill the vacancy, but to adapt to and optimize it, which makes it maintain the internal structure.

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