Research on Legislative Clarity

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Keywords: Clarity, Legal Texts, Legal Norms, Debate, Techniques of Legislation

Abstract. The principle of legislative clarity is first proposed by the newly amended Legislation Law of the People's Republic of China. The concept of legislative clarity has two connotations: the readability of legal texts and the determinacy of legal regulations. However, the readability of legal texts may not accurately convey the intention of laws and it is difficult to achieve the foresee ability in law. A debate over the existence of legal determinacy was triggered between Harter and Dworkin, which fully reveals the possibility of legal indeterminacy. It could be seen that legal determinacy is not an absolute standard of the quality of legislation. How to achieve the principle of relative clarity is a specific technical problem of legislation.

Introduction

As stipulated by Paragraph 2, Article 6 of Legislation Law of the People’s Republic of China, “legal rules shall be definite, specific, pertinent, and enforceable”. This is the first time in China to put forward the requirement of legislative clarity in the amendment of Legislation Law. From a functional approach, a definite legislation serves to clarify the boundary between right and right, right and power, power and power, which will protect the exercise of right and prevent the abuse of power. It will give full play to the law’s role of settling disputes, and thus improve the validity of the application of law. Yet for technical concerns, legislative clarity is nothing but an ideal view of legislators. To achieve legislative clarity, further exploration into the connotation of clarity needs to be carried out. This paper focuses on analyzing the connotation of legislative clarity and sorts out the controversies between legislative theory and practice, which will develop a basic understanding of legislative clarity and provide a feasible standard for legislators in their work.

The Expectations of Legislators on Clarity

Clarity is the basic requirement of legislation and the basic element in evaluating legitimacy. Legislative clarity not only implies a definite standard of legitimacy for law-executors and judicial officers, but also provides definite instructions, reasonable predictions of behaviors and appropriate evaluation of legitimacy for law-abiding citizens. Indefinite laws, on the contrary, will make legitimacy a goal out of reach for everyone.

For legislators, clarity is a principle of former legislative linguistics commonly recognized by lawmakers worldwide. For instance, in the European Community law, the Inter-institutional Agreement on Better Law-Making stipulates that the three institutions (European Parliament, the Council and the Commission) should “agree to attach to legal simplicity, clarity and consistency in the drafting of legislation” and “ensure the quality of legislation that is clear, concise and effective”. The foreword of Agreement on common guidelines for the quality of drafting of Community legislation expresses the motif of being clear, simple and precise, to promote a better understanding of law among public and effective implementation. The Agreement also elaborates the relationship between legal determinacy and the foreseeability of law: “the principle of legal determinacy, which is part of the Community legal order, requires that Community legislation must be clear and precise and...
its application foreseeable by individuals. That requirement must be observed all the more strictly in
the case of an act liable to have financial consequences and imposing obligations on individuals in
order that those concerned may know precisely the extent of the obligations which it imposes on
them.” [1] However, a clear and concise legislation is not an easy thing. In fact, there has been a
controversy over the legislative clarity in the academic and practical circles. Since the 20th century,
related theoretical controversies and disagreements have become so publicly violent that it has
become quite a scene in the domain of legal philosophy. This problem of legislative clarity has never
been resolved by now.

How to Understand Legislative Clarity

Readability of legal texts

From the perspective of linguistics, the clarity of legislation firstly implicates the readability of
legal texts. The so-called readability means how much a legal text could be understood by readers.
Legal norms are expressed in the form of language. Language as a medium is the key to legal
objectives if it is readable and easily understood by readers. It is well known that brevity is the core
requirement of readability. Most legislation grants the public rights as well as obligations, which finds
general effects on the rights and interests of the public. This objectively leads to the public's intrinsic
need for a clear and concise legal language. “This is by no means radical: the public should be able to
refer directly to the statutes rather than pay for professional interpretation”.[2] Laws which are closely
related to public life such as Law on the Protection of Consumers' Rights and Interests, Labor
Contract Law, Administrative Penalty Law, Law of Punishment for Public Security and
Administration should be generally informed to the public. Legal texts which are lengthy, tedious and
obscure tend to be confusing and repulsive. As a matter of fact, early in the Age of Enlightenment,
Montesquieu proposed that “The laws ought not to be subtle; they are designed for people of common
understanding, not as an art of logic, but as the plain reason of a father of a family.”[3] However, legal
experts always try to express their “expert system” by making up complex norms that only
understandable by insiders, making themselves an inevitable target of cynicism and criticism.

Determinacy of legal norms

The clarity of legislation also implies determinacy of legal norms, that is, a unique and right
interpretation of law. The law is determinate with respect to a given case if and only if the set of
legally acceptable outcomes contains one and only one member. [4] Legal determinacy plays a
significant role in maintaining the stability and authority of the law. The discussion on legal
determinacy is a major topic of western jurisprudence. It originates from a fierce criticism on legal
determinacy by the law realism movement in the United States. Realists, by analyzing the process of
judicial decisions, declare that a judicial decision is a direct result of irrational factors such as
emotions, intuitions, prejudice, temper of the judge, and the knowledge gained from the legal norms is
of little help. Demanding unfulfillable determinacy from a law is nothing but “a basic legal myth” and
“remnants of Electra complex” of a child. [5] This view, though obviously overemphasizes the
elements of contingency, conjecture and irrationality in a judicial decision, is pioneering in observing
the actual operation of the law. The following critical law movement considered that law was
absolutely indeterminate. Its advocates think that the indeterminacy of law often results from the
nature of language or the linguistic operation of legal reasoning. This view acknowledges, but
exaggerates the effect of language on laws. In fact, the relationship between languages and laws is
quite complicated. Laws use languages in different ways, but many words and phrases in a legal text
contain specific meanings different from those in a non-legal context. In addition, in most laws,
scientific methods will be adopted to clarify their application, even if the language used is ambiguous.
Furthermore, the authority of law can also find a determinate legal effect on obscure laws. Therefore,
legal determinacy is not as unreachable as a castle in the air.
The Debate over Legislative Clarity

The dilemma of readability of legal texts

While considering the application of law, a brief legal text does not necessarily guarantee a determinate legal instruction. On one hand, over-simple legal norms fail to cover sufficient legal facts and fully express the intentions of legislators in face of increasingly complicated social relationships. Legislators have no alternative but to resort to a complicated language, which inevitably increases the public’s difficulty in understanding legal texts. On the other hand, for the general citizens without any professional legal training, they could never fully understand most statutes written by the plainest language. This is because understanding law requires far more than a general understanding of its text. It also demands an in-depth knowledge of the hidden background, spirit, and logic, which are exactly what the general public is lacking of. In that aspect, “simplicity and understandability can also be two contradictory extremities.” [6] The above factors will reduce the principle of readable legislation into an empty political slogan. Some people might rejoice at the idea that brief legal texts could be interpreted flexibly so as to leave great room for free legislation, jurisdiction and enforcement. However, it is not an encouraging thing for the foreseeability of the application of law. Thus, it could be safely concluded that how to manage the readability of a legal text is a technical problem of legislative art.

The Debate over the Determinacy of Legal Norms

H. L. A. Hart’s “Open Texture” theory

H. L. A. Hart, a representative of new analytical-positivist jurisprudence, believes that legal content mainly involves the whole people, behaviors, things and conditions of a class or a group. Under normal circumstances, generalized vocabulary might cover familiar and recurring cases and make general adjustment without interpretation. In this case, the instruction of law is determinate. In a case where the application of law is not clear, there might be some voices of advocators and protestors. At this point, the application of norms is indeterminate, which is a direct result of the open texture of legal norms. He advocates that the “open texture” of legal norms should be treated as an advantage. When the norms are applied to unforeseeable conditions and problems seem to be impossible to legislators, the open texture will allow some room for a reasonable interpretation. [7] This requires the judge to achieve balance among different competition for benefits (whose importance varies in different cases). [8] From another point of view, the “open texture” manifests the partial indeterminacy of legal norms, for which language could not be fully blamed. “Part of the argumentation of open texture is that legislative objectives are not complete or precise. Legislators have not taken all contexts into consideration, and as a result, legislative intents (even if they are clear and determinate) fail to answer every potential problem of the applicable norms. Another part of the argumentation is that language itself is not precise. In some cases, it is uncertain whether a frequently used word applies to a particular object of controversy.” [9] It can be seen that Hart’s “open texture” simply originates from a linguistic view. Words, phrases, sentences, norms and meanings are seemed to be employed alternately in applying the “open texture” theory, which brings about imprecision in the spread of ideas. In fact, what Hart cares about is the ways of application of the law. He simply inevitably encounters the language issue in a legal context while analyzing the application of norms. This reflects the dynamics of the concept of “open texture” on one hand, and on the other hand, shows the need of distinguishing the suggestion of a speaker from the actual meanings of his/her words. It is a pity that Hart’s indeterminacy of norms is generalized by the ambiguity of language, and many accusations against the theory of open texture are attributed to the false belief of the theory’s overreliance on the indeterminacy of language.
Ronald Myles Dworkin’s “right answer” theory

The “right answer” theory proposed by the representative of the new natural law school, Ronald Myles Dworkin, is a direct response to Hart’s “open texture”. Dworkin insists that every legal question has only one right answer, and therefore law is determinate. This is because a judge must seek for a unique and right/most suitable conclusion for any legal question. He further argues that the problem of “open texture” could be addressed by procedural solutions, since there always exists some guidelines for the interpretation of statutory laws, and the judge is obliged to proceed by selecting an acceptable interpretation from an indeterminate norm. [10] Responding to this assertion, Hart argues that the interpretation of norms could not eliminate the “interpretative” indeterminacy, pointing out that these regulations are simultaneously the general norms applied to language, and the application of common words itself is also in need of interpretation. The process of eliminating indeterminacy by interpreting theories is also in face of the challenge of reinterpretation. Dworkin’s explanation is also attacked by the theory of incommensurability. The theory claims that certain things—whether it is a value, a view, a piece of writing or a particular person—cannot be compared between “good and bad” and “the best”. Sometimes it is difficult to say which one of the two opinions of a legal question is more persuasive. In many cases, the two legal opinions are almost equal to each other. Dworkin, however, only refutes that his theory preset one rather than a variety of moral concepts. In accordance with multiple moral concepts, different theories of morality are incommensurable. [11]

But if the answers to a legal question are incommensurable, which choice is to be made? To Hart, the hope is laid on the judge’s judicial rationality. “A judicial decision often involves choices among moral values rather than invoking a particularly significant moral principle…these virtues include fairness and neutrality in weighting the choices. As the interest of every person is affected, some widely accepted principles are selected as the theoretical base of the decision. Of course, these principles are numerous so that it is impossible to prove which decision is the best one, but the decision is acceptable as long as it is a product of careful evidence and fair choices.” [12] It shows that Hart does not stick to his argumentation to the end like Dworkin, which supplies a possible solution to problems besides law and affords us some referential value.

Worthy of noting is that Dworkin puts forward a concept of “integrity” as a principle for judicial decisions. He proposes that a judge should construct a theory of law while tackling a legal question. An integral law requires the judge to assume that the law is constituted by a set of coherent principles and legitimate proceedings relating to justice and fairness. It demands the judge to implement these principles in face of new cases and render people with fairness and justice based on the same criteria. [13] Dworkin’s interpretation of integrity manifests his clinging to the legal determinacy. He stresses that in managing complicated cases, the judge will make a decision guided by irregular standards including policies and principles. Legal principles conform to norms and provide them with utmost moral legitimacy, based on which a decision is made by the court. This implies that every case contains a solution which is to be “discovered” rather than “invented” by the judge. Hence, every legal question could be resolved by legal resources. Nevertheless, almost every critic believes that the Dworkin’s description is an ideal interpretative theory, which Dworkin himself also acknowledges. “Of course, even the utmost attention of every judge of all courts is paid to the integrity of law could not guarantee a unanimous judicial decision, universal approval or hatred from the public. There is no way to this end.” [14] Indeed, in legal practice, the factors affecting a judge’s applying correct interpretative methods to find out the unique correct answer is varied and uncertain. Perhaps a relatively right answer could be produced only by referring back to Hart’s theory of judicial rationality.

Conclusion

The clarity of legislation could be approached by two means. The first means is the readability of legal texts, which requires the texts to be brief and concise in a simple legal linguistic style so as to
satisfy the need of general comprehension by the public. However, readability is an ideal status difficult to be realized by the persistent legislators. A precise and foreseeable law is often lengthy and complex because of its elaborations. Clear legal texts, though are good for common understanding, will soon to be restrained by reality during implementation and subject to complexity arising from derivative legal interpretations and norms. The second means is the determinacy of legal norms. The existence of complete determinacy is controversial. Compared with the theory of skepticism in law (legal realism believes that law has no determinacy at all), Hart’s assertion, holding that legal norms are indeterminate only when applied to special cases, is categorized as a modest theory of indeterminacy. For Dworkin, the right answer theory could address the indeterminacy in knotty cases, but it is only applicable under an ideally presumed condition. As a theory, the role of “right answer” is to encourage judges and lawyers to prove the correctness of one or another answer in coping with tough cases, provided that they are convinced of the existence of such a unique and correct answer. In a case when a unique and right answer does not exist in a more complicated legal question because of the exhaustion of law, incommensurability or linguistic indeterminacy, the attention of the judges and lawyers should be diverted to the study of the legal question—which ones are the best norms.

To sum up, the readability of legal texts is restricted by the application of law, and the indeterminacy of legal norms is an objective existence in complicated cases. Therefore, we come to the conclusion that complete clarity in laws, which is an ideal view of legislators, cannot be an absolute criterion of legislative quality. In many circumstances, what we are confronted is the ambiguity of legal norms, but clarity as a principle places a stricter technical demand on a scientific legislation.

References