NOMOS
Direito e sociedade na Antiguidade Clássica
MORE THOUGHTS ON OPEN TEXTURE IN ATHENIAN LAW

Edward M. HARRIS

In his *The Concept of Law* Hart observes that laws are usually general rules that deal with broad categories of actions or individuals. When applying a law to a particular case, however, it is sometimes unclear whether a certain action or individual belongs in the category which the law covers. Legislators often try to formulate detailed definitions of key terms to resolve these problems, but it is impossible to remove entirely law’s “open texture”.

Modern scholars of Athenian Law have paid little attention to law’s open texture. On the one hand, formalist scholars like H. J. Wolff and H. Meyer-Laurin have assumed that Athenian laws were so clear and simple that they posed no problems of interpretation. On the other, those scholars who believe that the Athenian courts were mainly an arena for aristocratic competition think that Athenian law was mainly concerned with procedure. As a result, litigants paid little attention to the substantive issues raised by law’s open texture. This essay will show that litigants were aware of the open texture of Athenian law and often based their arguments on an interpretation of statute. The essay will also show that the Athenian courts tended to side with the litigant who based his case on customary or most straightforward reading of a statute and tended to reject cases that relied on new or unusual readings of the law.

In his *The Concept of Law* H. L. A. Hart observes that the law must refer to broad classes of persons or classes of acts, things, or circumstances. The operation of the law therefore depends on the «capacity to recognize particular acts, things and circumstances as instances of the general classification which the law makes»¹. In most cases, this is not a difficult process. From time to time, however, one encounters «fact-situations (...) which possess only some of the features of the plain cases but others which they lack»². One might try to avoid this problem by formulating detailed definitions of key terms that would clarify how they were to be applied in

¹ Hart (1961) 121.
² Hart (1961) 123.
any given situation. Yet, as Hart rightly notes, it is impossible to find a rule «so detailed that the question whether it applied or not to a particular case was always settled in advance and never involved, at the point of actual application, a fresh choice between open alternatives»3. The legislator simply cannot know in advance all the different kinds of situations that will occur in the future (‘ignorance of fact’). One might attempt to eliminate the problem by formulating canons of interpretation. As Hart observes, however, this approach would lead to similar problems because such canons would likewise be general rules, which one would also have to apply to particular cases of interpretation4.

In hard cases, where it is not clear how to apply the general rule to a specific situation, Hart believes «all that the person called upon to answer can do is to consider (as does one who makes use of a precedent) whether the present case resembles the plain case ‘sufficiently’ in ‘relevant’ respects.»5 One extreme approach to the issue of the ‘open texture’ of the law is formalism, which «seeks to disguise and to minimize the need for such choice once the general rule has been laid down.» In this ‘heaven of concepts’ a rule has the same meaning in all situations. The other extreme is an approach that regards all rules as ‘perennially open or revisable.» Hart criticizes this approach because it pays «too little respect to such limits as legislative language, despite its open texture, does after all provide.» In his opinion, most legal systems tend to compromise between two needs - first, there is the need for clear rules that everyone can apply to his or her conduct, and second, the recognition that there will arise disputes about the law that only an individual can resolve6.

Hart’s analysis of ‘open texture’ is perceptive, but his main observation is not entirely original. The view that the law must provide general rules goes back to Plato and Aristotle. In the Statesman (295a) Plato observes that a legislator who «has to give orders to whole communities of human beings in matters of justice and mutual contractual obligation will never be able in the laws he prescribes for the whole group to give every individual his due with absolute accuracy.» Instead the legislator will make «the law for the generality of his subjects under average circumstances. Thus he will legislate for all individual citizens, but it will be by what may be called a ‘bulk’ method rather than an individual treatment (...).» Aristotle (Politics, 1292a33) also noted that the laws should deal with all general matters, but that magistrates would deal with particular circumstances. This was necessary because of the «because of the difficulty of making a general rule to cover all cases» (Politics, 1282b2). In particular, Aristotle or one of his students (Ath. Pol. 9.2) noted that the laws of Athens were often unclear, leaving the power of decision for

---

3 Hart (1961) 125.
4 Hart (1961) 123.
5 Hart (1961) 123.