**The Spirit and The Letter of the Law**

Investigation into the Legal System and Judicial Activism

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# Introduction

In the year 30 A.D., Jesus Christ was crucified by two Roman soldiers. Shortly after, his apprentices, Peter, John, Paul, etc., left Israel where the Jewish people lived, went to the Roman Empire, and began to spread the Christian faith, marking the official break between Christianity and Judaism.

Although Christianity had evolved from Judaism, it has significant differences with it in many ways (Zhao, 45~51). Moses led the Jews out of Egypt and made an agreement with God on the top of Mount Sinai, called the "Ten Commandments of Moses." According to records, in addition to these ten commandments, Judaism has 248 orders and 365 injunctions that restrict all aspects of Jewish life. There is a ban ordering that only cloven hoofed and ruminant animals among beasts could be eaten. Sacrificial laws stipulate that when offering sacrifices to God, one hand of the priest must be placed on the head of the lamb, slaughter it before the tabernacle, and so on. In addition, the law stipulates that theft is to be put to death; tooth must be repaid for by tooth for tooth and an eye for an eye. These harsh laws govern the daily lives of Jews like oomnipresent supervisors.

Jesus was a rebel in among the Jewish. He opposed these trivial legal bans, arguing that the most important thing was the devotion of the soul, the love of God and the love towards others. This was the true intent of the Ten Commandments of Moses and the other laws in the Old Testament. He didn't pay much attention to traditions and laws outside of these fundamental precepts and beliefs. Those, he saw as the fundamental ‘spirit’ of the laws. Even in some things, what Jesus did was considered by the Jewish elite class Pharisee to had gone against the law.

From the conflict between Jesus and Jewish laws, we can see a deeper divergence of ideas: in the legal system of a country, which one should take priority, the spirit of the law (the law’s intention) or the letter of the law (the legal texts)? Modern jurists and legal experts also have tremendous disputes over this issue.

# Concept of the Spirit of the Law

### Definition

According to the Merriam-Webster Dictionary, the spirit of the law is the “aim or purpose of the law when it was written”, or to say the intent of the legislators. For example, we could say that the spirit of traffic laws is to ensure safety on the roads and to minimize congestion. The spirit of child protection legislation is to shield minors from potential harm and abuse.

The spirit of these laws seems rather conspicuous. But the not all spirits of the laws are this simple and comprehensible. To inquire deeper into the formation of the spirit of the law, we must go on to look at the process of legislation.

### The Process of Legislation

For a description of the legislative process in a democracy, we will take the United States as an example.

After the Senate and House of Representatives pass a law with a simple majority, this law will be put before the president. The president can either choose to sign the bill and put the laws into effect, or he can veto the law in question, and send it back to the legislature and together with his own opinions and comments. The two houses can choose to amend the law as suggested by the president, or they can vote again on the original law and decide whether the law will be passed even if the president opposes it. The houses could override the president’s decision by a two-thirds majority. Throughout the United states history, only 4% of presidential vetoes were overridden by the legislative branch, showing that presidential veto is an important consideration in the legislative process.

In this entire process, many factors influence the final outcome of legislation. The first is the opinions of all the members of the Senate and the House of Representatives. Their thoughts will be dictated by their personal opinions and interests and those of their constituents. What comes into consideration next is the president's opinion? He is in a different position than Senators and Representatives. He might be able to see things from another perspective, or he might have different interests in consideration from the legislators.

Therefore, the seemingly simple “spirit of the law” actually incorporates the opinions and demands of many different parties. While discussing the spirit of law, we must keep in mind that the legislator is not a single person with a clear aim, but a group of people with different, and even conflicting opinions. Can their different opinions be averaged like numbers and integrated into a unified spirit of the law?

### Interpreting the Spirit of the Law

The textualists, the group of jurists and legal professionals who believe that judges should strictly adhere to the letter of the law, could give us a quick answer. They believe that this average or congregation of opinions already exists and has been recorded, in the form of a statutory text, or the letter of the law (Manning, 447). The bill, in its textual form, had been passed by the majority of legislators and the president. Every word and every sentence in the legal provisions had been carefully expressed and formulated to reflect the opinions of all parties involved. It is highly possible that if subtle changes occur in a few words and expressions in the legal provisions, this law would not have been passed.

Furthermore, some textualists even believe that there is no such thing as a unified spirit or intention of the law, or that the spirit of the law does not exist (Eskridge, 642~643). The only optimal output of the legislation is the letter of the law, which documents the opinions and concessions made by the legislators or the president. Resorting to the Game Theory, they believe the legal text to be a kind of equilibrium of the interests of different groups, and has no intention or ‘spirit’ in itself. This view calls into question the fundamental existence of the spirit of the law.

On the other hand, the purposivists or intentionalists, who argue the priority of the spirit of law, believe that when future generations try to determine the intent of legislators, they can refer to the records of meetings and debates left by legislators, and refer to the historical background and events before and after legislation to know the spirit of law. Some laws also have preambles which can inform the reader what the intent of the law really was.

To bring the spirit of law as close to the truth as possible, the person who interprets the spirit of law must be a legal expert with sufficient experience and knowledge, such as a judge. But not even they can guarantee the accuracy of their interpretation of the spirit of the law, much less members of the jury and the general public, who have little legal education and experience. The legal spirit in their opinions is predominantly influenced by their own backgrounds and personal values.

### Cases

To illustrate the euphemism of the spirit of the law and the difficulties in its deciphering, let us take a look at a couple cases.

A taxi driver in China drove through a red light in order to send a passenger suffering from heart attack to hospital. In the end, the passenger was successfully saved, but the driver received a ticket, a fine and several points off his driver’s license. Many people have expressed their outrage at the law punishing good people. They believe that the spirit of traffic law is to protect the safety of people's lives, and the purpose of the driver driving through the red light is exactly to save the passenger's life. These people's views are grounded in a broad moral view. However, from another perspective, the legislators did not classify the possible situations of driving through the red light, indicating that they intended to treat all such situations equally.

Please note that in the above discussion of exactly what the spirit of law is, no legal text was cited as evidence. In this case, the so-called legal spirit has degenerated into people's common values. Although we could see no harm in this case in following common sense, it does show a certain tendency of common views and opinions replacing the rule of law through the so-called spirit of the law.

Another classic example is the interpretation of the US Bill of Rights. The word "privacy" has never appeared in the Constitution or the Bill of Rights. However, in a 1965 ruling of the Supreme Court, the Supreme Court confirmed the existence of the so-called "right to privacy" by analyzing the first, third, fourth, and fifth clauses of the Bill of Rights (Justia Law). We see here an explicit attempt to try and grasp the spirit of the law. However, if one examines the clauses in question, one could see that the main focus of these articles is the right of safety against unwarranted intrusions, of private property and freedom of believe. The legislators of these amendments might or might not agree that a right of privacy exists, but it was by no means made explicit in the law, and was at least partly grounded in the personal beliefs of the judges.

Thus, we could see that any interpretation of the spirit of the law is always inevitably and inextricably intertwined with contemporary public opinion and that of the judge and jury in question.

Here, we may sense a distant resonance with the ancient Chinese philosopher Confucius. Confucius said that he was only responsible for compiling and explaining the doctrines and works of his predecessors, namely that of the ancient Zhou emperors and scholars, and of those benevolent rulers in even earlier times. In his view, he does not generate new ideas, but simply elucidates those of others before him. However, as Chinese scholar and philosopher Feng Youlan mentioned in the "History of Chinese Philosophy", when Confucius lectured on "The Collected Poems" and "Shangshu" (ancient Chinese books), he focused on the moral connotations rather than the original literary creation and stories; Confucius talked about "Zhou Divinations", focusing on the moral extension and implications of the original divinations which may or may not have been intended by the original authors, and revolutionized its meaning and its influence on posterity. Consequently, we could see that although Confucius might have claimed to be only passing on the ideas spanned by his predecessors, he actually put a lot of his own views into his analysis, views which frequently transcend the original meaning of the text (Feng, 48).

Similar to Confucius, the judge may claim that he had interpreted the spirit of the law correctly and without bias, but the inclusion of personal value judgements in those cases is an inevitability. Thus, the question becomes whether or not we should let judges and law enforcers have a certain level of discretion based on their own understanding of the legal texts.

# Summary of the Problem

From the above analysis, I believe that the debate surrounding the spirit of law should mainly carried out in two aspects. The first is a purely theoretical approach, discussing what is the spirit of law, how can it be known, and whether it exists at all; on the other hand, we can seek to evaluate the practical harms and benefits of applying the spirit of the law, deciding on whether it will increase fairness and stability. To prove that the spirit of law is to be prioritized, one must first prove its existence and indicate how to determine what the spirit of law is through documentary records and historical background; secondly, one can analyze its pros and cons in reality. We will examine each of these questions in turn.

## The Existence of the Spirit of the Law

Earlier in this passage, I mentioned the opinion of some textualists that there is no such thing as the spirit of the law, and that legal texts are documentations of the interests and concessions of the parties involved and contains no spirit in and of itself.

Let us pause here and consider other, somewhat irrelevant cases. Kant's moral philosophy is based on the notion that "every human being is rational and deserves respect", but this in itself is a personal judgement. Nothing in science defines the existence of something called ‘ration’. In "A Brief History of Mankind", Uval Harari classifies the hierarchical order stipulated in the Hammurabi Code as well as the contemporary democratic belief in freedom and equality as “purely imaginary orders” (Harari, 124). Aside from human belief and human faith, there is nothing in the objective world that could proof the existence of such social orders, or of the belief that rational beings deserve respect. But just because these human rights, morals, etc. are only conceived in the human mind, should we be entangled with their existential issues and deny them altogether? Obviously not.

Let us then come back to the issue of the spirit of the law. It is true that there is no proof that the integration of numerous diverse opinions, could form a unified thought with moral force in itself. But if such a possibility is denied, then the “will of the sovereign” Rousseau and many other social contract philosophers talked about will not have a basis of existence. I believe that when we talk about the integration of opinions, we are not talking about how this is physically or mentally possible, but rather, we are acknowledging the moral force of such an integrated opinion. In the case of the spirit of the law, it expresses the combined opinion of the representatives of the people on what issue needs to be solve through legislation, and what kind of behavior should be governed or restricted. The letter of the law, is, therefore, trying to elucidate the specific criteria of judgement and course of action for the law enforcers.

## Judicial Discretion and Activism: Pros and Cons

Next, we are moving on to examine the practical effects of the prioritization of the spirit of the law. It could be agreed upon that the acknowledgement or prioritization of the spirit of the law will give the judge, and law enforcers in general, more room for independent actions or decisions not entirely justifiable by the letter of the law.

### 3.3.1. The ‘Weakest’ Branch of Government

Among the three branches of government, the judicial branch was originally designed and commonly seen as the weakest. Alexander Hamilton, one of the main supporters of the Constitution of 1787, wrote in Federalist Papers No.78 that the judiciary “had no control over the sword or purse”, and consequently, it could be said to have “neither force nor will but merely judgement” (Hamilton et al., 380). This could also be seen in the widely held notion of legislative supremacy, dictating that the duty of judicial branch is to carry out the statutes created by the legislature, without any need for further discretion or objection to existing laws.

However, it was the judicial branch itself that gave the greatest expansions to its own powers. In the 1803 case of Marbury vs. Madison, the Supreme Court struck down the 1789 Judiciary Act as unconstitutional, establishing the principle of judicial review which would have profound influence over American courts in the cases thereafter (Justia Law).

Many later activist judges made use of the right of judicial review to combat existing laws or precedents, or to establish new constitutional rights. Notable examples of judicial activism include the declaration of abortion and same sex marriage as constitutional rights (Leddy, 2018). Let us now walk through a few examples and discuss the harms and benefits of an active judiciary.

### 3.3.2. Opportunity for Change?

An argument for judicial activism is that it could promote radical change in the laws and functioning of a country, while the majoritarian legislative branch is frequently bogged down in debates and disputes between the interests of different parties, and controlled by the opinions of the majority.

Since a lot of judges, including the Supreme Court justices, are not elected, some experts argue that the judiciary provides a ‘counter-majoritarian element’ in a democracy, and protects against the ‘tyranny of the majority’ (Cover, 1294). Alexis Tocqueville elucidated this idea in his famous ‘Democracy in America’. He said of the power of Judicial review in Chapter 6 of his work: “I am inclined to believe this practice of the American courts to be at once the most favorable to liberty as well as to public order” (Tocqueville, 150) In this view, the Judicial Branch has ceased to be mere tool for the legislature to carry implement laws; it has become a monitor, with political influence of its own, imposing checks and balances on the actions of the majoritarian legislative branch.

Indeed, the legislative branch frequently encounters problems of efficiency and of decisive protection of certain rights. But this creates a sharp conflict with some of the original principles of majoritarian democracy, in which the majority or the representatives elected by it has sole control over the laws of the state. This is known as the ‘counter majoritarian difficulty’, a concept first proposed by Professor Bickel at Yale in 1962.

Therefore, I am inclined to believe that these two different views of the position of the judiciary represent two forms of government in a democratic system, where the Judiciary only acts either only as a law enforcer subordinate to the majoritarian legislation or as a political organ, as Tocqueville said, with political influence on the country’s laws and affairs. Deciding on which form to adopt puts into debate some of the fundamental principles of democratic government.

The juxtaposition between the Spirit and Letter of the law reasserts itself as the juxtaposition between two completely different positions of the judiciary: an activist one with much room to interpret or even to challenge laws on its own or one completely subservient the majoritarian legislature.

### 3.3.3. Judicial Bias and Corruption

A major concern the textualists bear towards judicial activism is that law enforcers are frequently biased or corrupt, and might use activism and the spirit of the law as cover for their personal ideals or interests. A rather extreme example would be the case of the Nazi persecution of the Jewish. Some scholars believe that the Nazis explained their persecution by distorting the spirit of the law. They used the values of fascism to explain the laws left by the Weimar Republic. They sought to explain the spirit of every law with ‘spirit of the age’ Nazi doctrines including the “Final Solution”, which was clearly an abuse of legal spirit (Sunstein, 636). Some other scholars believe that the Nazis justified their actions by employing euphemistic jargons and ambiguous legal terms. I personally think that the coming of Hitler into power already spelled a terrible disaster for the Jewish people, and it wasn't really important how the Nazis tried to justify their actions.

There have also been a series of questions raised about police selective law enforcement on minorities or police "self-defense" shooting. Many people believe that it is the result of too much discretion power given to the police. However, in those cases, the decisive factor is still the subjective judgement of law enforcement officers. Neither the spirit of the law nor the letter of the law can know what a person's true motivation is.

Additionally, I believe that for those judges whose bias is deeply ingrained and whose corruption is beyond remedy, it is not their interpretive methodology in prioritizing the spirit or the letter of the law, but their personal predilections and self-interest, that determines their positions on the court.

That being said, it is irrefutable that the prioritizing of the spirit of the law makes misconduct on the part of the judge much easier and less risky.

### 3.3.4. Judicial Amendment to Laws

A major argument that could be employed by the internationalists in favor of the spirit of the law is that unintentional loopholes in the letter of the law could hopefully be complemented by the application of its spirit.

For example, loopholes in the letter of the law let internet companies get away with obtaining the private data of millions of social media users for commercial purposes. The letter of the law only requires tacit consent by the user to cede his privacy through checking the ‘User and Privacy Terms’ box every time he creates an account on any online platform without really looking at what he is agreeing to, while the spirit of the law requires an informed and clear choice of the user, knowing the full consequences of his action (Waldo et al., 335~336).

When it comes to taxes, according to the tax justice network, loopholes in tax laws allow the world’s 10 million wealthiest people to hold nearly 32 trillion dollars in offshore financial assets that are untaxed, causing more taxes to be paid by the poor and middle class, and continually growing inequality (Tax Justice Network, 2012). Other loopholes let oil companies to get tax reductions and reduced fines if a seriously polluting oil leakage happens (Baxandall et al., 2013). One oil company evaded 4.5 billion dollars through loopholes in tax and environmental law.

The spirit of tax laws is to let every citizen pay his due share of contribution to the government and society. But the letter of the law allows certain influential corporations and rich people to evade tax and responsibility.

This line of argument in favour of the spirit of the law is a very strong one. However, one main setback of using the spirit of the law to undertake those ventures is that it undermines business confidence.

It is true that the businesses in question are responsible for some kind of misconduct for which legal responsibility has not been determined due to ambiguity in the letter of the law. However, as far as those businesses and rich people could see, they have done nothing that is illegal. It is not incumbent on those multinational companies or rich individuals to abstain from doing aggressive (and technically legal) tax planning and take huge amounts of shareholder money to pay taxes that are not required (Worstall, 2013). In a legal system it is very important that if you follow the laws you do not have some second standard. And the judges’ finding them liable on this matter would only harm their faith in the legal system of the country, causing them to contemplate transferring their capital, assets and businesses abroad to a safer environment. Those kinds of capital flight and the discouraging effects on entrepreneurs who are considering investment in that country is no doubt detrimental to long term development. A more cautious and impeccable approach is to use the legislative process, and see to it that the loopholes are fixed, so that the judiciary need not do unnecessary discretion to bring about justice.

### 3.3.5. The Rule of Law

This therefore leads to the textualists’ second main argument, the importance of the rule of law. It is of paramount significance for the legal system of a nation to be as trustworthy and predictable as possible. If business and individuals deem a legal system as capricious and unreliable, the willingness for them to live in or invest in such a country would be decimated. Nobody wants to live in a society where the judges could bend the law with relative ease, and the holy, inviolable rules according to which the society must operate cease to be the laws established by the legislators elected by the sovereign, and becomes something inscrutable: the personal will of the law enforcer. Now, one might argue that using the spirit of the law to complement loopholes are of no harm to the general rule of law. However, from the point of view of an outsider, the only question they care about is whether or not the actions of the judiciary are all following the established laws. If that answer is ‘No’, it would deal a hard blow on his confidence in the legal system of that country.

# Conclusion

## Outcome and Procedural Justice

The preceding discussion on the rule of law brings us to a central problem: Why are laws established in the first place? If justice is the ultimate ideal, why can’t justice be determined without written texts defining the spheres of actions of individuals in societies?

The answer is that different people in society have different conceptions of justice. If they are depended upon to each implement what they believe is just, there would be countless different courses of actions proposed my many different individuals. It would be impossible for the majority of society to convene and agree upon the ‘just outcome’ in every single case. If we are to follow the guidelines of a democratic society, we have to let our actions follow some criteria established by the sovereign majority. If those criteria are applied purely to the outcome of every single different case, the majority would have to establish new criteria for every case as to what outcomes are just, and what outcomes are unacceptable. This would be a vastly impracticable project, mainly due to the divergence of opinion on what the optimal outcome is.

However, if such criteria were not applied to the outcome of any situation, but more generally to the procedure through which the outcome would be determined, things would take a turn for the better. The institutions authorized by the will of the people could then follow the guidelines already established when a fresh case in encountered.

The criteria aforementioned are therefore the laws in our society. Whenever dispute arises over whether a particular action is unjust and deserves punishment, the legal process is triggered, and the outcome of the judgement is determined by the legal procedure established and governed by law.

To make sure that the criteria represent the view of the majority, the legislators are elected by the people, and their opinions are supposed to represent those of their constituents. In this way does the legislative branch construct the framework in which individuals, businesses and the government itself must operate, a framework based upon democratic legitimacy.

Looking at our problem from the perspective of outcome and procedural justice, we can get a rather comprehensive overview.

### 4.1.1. Procedural justice under the current system

From the perspective of procedural justice and principle of legislative supremacy, it is clear that the Separation of Powers in the eyes of the founding fathers ordains the supremacy of the legislature on lawmaking and prioritizing the letter of the law would be a better choice. This adherence would mainly come in two parts.

Firstly, strictly relying on the letter of the law in the adjudication of each case ensures to the largest possible extent that the judiciary is following the instructions of the legislation in enforcing the laws.

Secondly, if a law has loopholes or improper places, it should go through the legislature for repeal or amendment, instead of being struck down by the judiciary, bypassing the regular process of legislation.

Here, I must say that although sufficient respect and loyalty to the original text is strictly necessary, absolute dogmatism and disregard for explicit faults in the text are not to be recommended.

### 4.1.2. Outcome justice

Many arguments in applying the spirit of the law over the letter have to do with the positive effects of correcting loopholes and ambiguous places in the letter of the law, leading to more positive outcomes. We have pointed out the even if, to some extent, this is true, the judicial adjustment of laws has its side effect in undermining trust and confidence in the judicial branch.

Moreover, such readings of the spirit inevitably increase the risks of biased or corrupt judges meddling with the legal process. We could come to a conclusion that the effects of extending the scope of action of the judges contain both positive and negative elements. But the uncertainty it poses, and the unpredictability of the effects determine that a more cautious approach is to be advised. A safer and less refutable way would obviously be to

## Conclusion under the existing system

Under this overall framework of legislative supremacy and a Judiciary dedicated only to the enforcement of law and not political influence, judges should try to stick to the instructions of the legislature to the largest possible extent, unless ambiguity in the law forces them to make their own reading or a unanimous agreement among judges and legislators could be made that there are inarguably conspicuous faults in the established legal provisions which belie common sense or all possible purpose of enactment. J. F. Manning, Professor of Law at Harvard Law School, gives this ideal a felicitous elucidation:

In a constitutional system predicated upon legislative supremacy (within constitutional boundaries), judges—as Congress’s faithful agents—must try to ascertain as accurately as possible what Congress meant by the words it used. On this premise, federal judges long assumed that when a statute was vague or ambiguous, interpreters should seek clarification, if possible, in the bill’s internal legislative history. Thus, when a sponsor or committee expressed an understanding of the bill or the mischiefs at which it was aimed, federal courts often took that as probative evidence of the text’s meaning. And because a legislature—like any other user of language—might speak imprecisely, or use language loosely or idiosyncratically, federal judges long assumed that a statute’s semantic detail, however clear, must yield when it conflicts sharply with the apparent spirit or purpose that inspired its enactment.

## Another Option

The system and procedures established by the constitution of 1787 clearly indicates that a weak Judiciary was originally intended in America. And if the constitution and the intentions of the founding fathers is to be seen as the fundamental and immutable basis for all later systems, the letter of the law approach should clearly be recommended.

However, taking into consideration the views of Tocqueville, we can see that an activist Judiciary has its own peculiar benefits in counter majoritarian societal progress and monitoring legislation as well as its extra risks.

The current system in America is somewhere in between those two systems. Depending on the time in history, Courts and Judges in America would follow completely different approaches of adjudication and statutory interpretation, and the system is therefore in constant flux. It might also be that there could be no established rule or fixed system on the position of the judiciary, but that society is constantly seeking an equilibrium between these two.

All in all, it could be agreed upon that the rule of law is to be upheld at all cost, but laws should not dogmatically and stubbornly refuse reformation, and should to the largest possible extent, progress with time, either through an efficient and capable legislature, or through the checks and balances imposed by an active judiciary.

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