

# Ability and Inability of a Judge: Boundary for Balancing of Interests

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## Abstract

The fact that a judge can make a discretion on a case has currently acquired recognition. This article is going to make a discussion on employment of the method of balancing of interests by a judge under the active judicial background. It mainly discusses the following several issues: whether a judge should choose a standard inside the law or seek for a standard for judgment outside the law when he makes a judgment? What kind of standards the judge should take? Which standard the judge starts out to make a value judgment? Whether the judgment on the value will enable the judge to make an unscrupulous judgment?

**Keywords:** Balancing of interests, Judgment of value, Objectivity

## 1. Introduction

After the 15<sup>th</sup> Congress of the Communist Party of China established the strategy of governing the country by law, the 2<sup>nd</sup> Conference of the 9<sup>th</sup> National People's Congress further put the basic strategy of governing the country by law into the constitution. In the "Opinion of the Supreme People's Court's video and telephone conference about deeply carrying out the national political and legal work", it was emphasized that, "we should attach great importance to active judicature, strengthen policy direction and make all work always comply with demands of social and economic development." As a slogan, "active judicature" has been ultimately established formally through documents of several judicial organs.

As for a court, generally speaking, the active judicature can be applied in the following three meanings. In the first place, active judicature plays the active and initiative role of a judge within the framework of legal interpretation and emphasizes the right of discretion of a judge. In the second place, it emphasizes reconciliation for interference in a lawsuit, which returns to the trial method of Ma Xiwu. In the third place, its interference in the economic and social life emphasizes that the court should "serve the whole situation and set up a consciousness of the whole situation" in social development.

What the active judicature is going to answer is not the issue whether judicature is active or not, but the issue how much the judicature is active and whether the active judicature will evolve into an arbitrary judicature or a judicature without law, which stimulates this article to discuss the issue of activeness of judicature. This article merely discusses degree of the right of discretion of a judge in active judicature, especially the degree that a judge employs the method of balancing of interests in a trial.

## 2. Origin of balancing of interests and possibility of its abuse

### 2.1 Process and necessity of China bringing in the theory of balancing of interests

As far as the process of China bringing in the theory of balancing of interests, the earliest person who brought in the theory of balancing of interests is Professor Liang Huixing, a domestic scholar. In 1994, the second volume of "Civil and Commercial Law Review" by Professor Liang Huixing interpreted "Interpretation of Civil Law and

Balancing of Interests” by the Japanese scholar Kato Ichiro.

The starting point of the article by Professor Kato was the conceptual jurisprudence, criticizing the conceptual jurisprudence making a judgment merely with the method of syllogism, namely, with the big precondition of legal provisions and the small precondition of an actual fact, and then coming to a mechanical and formal conclusion based on syllogism. With influences of the conceptual jurisprudence, a judge does not make a judgment on his own, but accepts constraints of rules and regulations mechanically. He does not add any of his own value judgment or balancing of interests, but merely comes to a unique correct conclusion according to rules and regulations formulated by lawmakers, which is the mechanical role a judge plays. Under the circumstance with fierce social changes and continuously turbulent situation, this thinking method of conceptual jurisprudence is hardly able to obtain an appropriate conclusion or appropriate judgment. Thus, Professor Kato proposed adopting more flexible thinking methods, namely, the method of balancing of interests. According to Professor Kato, it is inevitable that a judge makes a substantial judgment when he makes a specific judgment. That is, balancing of interests has its necessity. The process of balancing of interests can be generally summarized as follows. Firstly, a judge makes a substantial judgment on which party's interests he should pay attention to. After a subtle balancing of interests, the judge may recognize the interests of a single party as an overall judgment. After having got such an initial conclusion, the judge then takes into consideration what kind of reasons he should add. That is, how he is able to legalize or rationalize this conclusion from a logical perspective by combining legal terms. This thinking method of balancing of interests goes exactly counter to the syllogism of the conceptual jurisprudence in that the former makes a substantial judgment first of all and then seeks for legal provisions to rationalize his judgment. This kind of method has broken through the rigid thinking of the conceptual jurisprudence, makes a public discussion on the balancing of interests of a judge and reflects social conditions at different times and the concept of value that takes a dominant position. (Kato Ichiro, 1995)

Ever since Liang Huixing introduced the theory of balancing of interests, relatively fierce response has been produced in the field of theory and field of practice. There are several papers discussing the theory of balancing of interests, and, in the mean time, there are also multiple cases in the field of practice that are judged according to the theory of balancing of interest. With development of domestic economy, a lot of new legal problems have emerged and a lot of new interests conflicts have occurred, but these actual problems have no appropriate answers in legal provisions. Thus, it is necessary for the judges to make discretion, explore the purpose of positive law, resort to social standards of customs, habits and morality and adopt balancing of interests.

### *2.2 Possibility of abuse of balancing of interests*

Then, why abuse of the method of balancing of interests exists? Firstly, the abuse has something close to do with employment of the method of balancing of interests by judges. Since finiteness of rationality of human beings decides that vulnerability is inevitable in legislation, in the situation when legal rules are indefinite, or, fundamentally, there is no relevant legal rules at all, a judge usually tends to resort to abstract concepts, legal principles or general terms, which have come powerful means and the most authoritative instruments for a judge to make up for legal vulnerability in exercise of law. The method of balancing of interests is a method with extreme subjectivity, since it is often attitudes and intuition of a judge is likely to enter a legal judgment, which is the subjective situation in which the method of balancing of interests is likely to be abused. Secondly, the essence of balancing of interests lies in the fact that a judge makes judgment of value. Therefore, objectivity of this sort of value judgment per se is unlikely to be guaranteed, that is, it is likely to become unscrupulousness of the judge. Finally, what is the standpoint of a judge in the process of balancing of interests? In previous trials, the standpoint of a judge was the standpoint of the judge per se, namely, an intermediate standpoint. However, the theory of balancing of interests also points out that the judge is also a human being, so it is inevitable that he adds substantial judgment in his trial. In such case, the standpoint of the judge becomes indefinite and if a judge makes substantial judgment from the perspective of a common person, then it is likely to give rise to abuse of the method of balancing of interests.

### **3. Boundary of balancing of interests**

In order to make the balancing of interests of a judge persuasive, a judge is not allowed to be unscrupulous in balancing of interests. Professor Kato also pointed out, “If interpretation of law is unscrupulously conducted according to value judgment of an interpreter, then, without doubt, it is suicidal behavior of law.” (Duan Kuang, 2005) “So long as you affirm that, even within the civil law field, you can in no way let go unchecked abuse of the national power in order to protect rights of national citizens. Instead, you have to prescribe a limit to rights within a possible limit, then you will necessarily criticize any judge without legal constraint and you will be dedicated to confirmation of legal interpretation theory that can effectively constrain a judge.” (かい みちたろ

う) Hence, which standard on earth a judge adopts and which standpoint he stands in the process of balancing of interests is unlikely to be left not discussed.

### 3.1 Standard of application of balancing of interests

Just as the wife of the author of the article, the judge process of judge can be classified into the two processes, namely, psychological process in which a judgment is formed, and a legal adaptation process which is based on syllogism. The psychological process in which a judgment is formed is mixed with multiple factors. That is to say, a judge will necessarily make a comparative balancing in the process of making a substantial judgment of interests. The key issue at present is how to set up the standard for a judge to make a judgment. The following work needs to be done: whether a judge should select a standard within the scope of law or seek for a standard for judgment outside the law when making a judgment? What kind of standard should a judge select to make a judgment?

According to classification method of the Japanese scholar おおむら あつし, interpretation of the civil law can be classified into the two kinds of intrinsic interpretation and surpassing interpretation. The so-called intrinsic interpretation refers to such a viewpoint that the civil law should be interpreted as such and that, and necessarily, here a judgment should be made as such and that. Relatively speaking, the so-called surpassing interpretation refers to a viewpoint that regardless of the civil law, an interpreter starts out from his own standpoint to give suggestions on handling an issue and a provision. (おおむら あつし, 2004, 96)

Kato Ichiro, initiator of balancing of interests in Japan, advocated adopting the surpassing interpretation. Then, which type of interpretation the judicial practice field in China should select for balancing of interests? This article prefers to adopt the intrinsic type. Ever since articles by Kato Ichiro have been brought into China, influences of Kato Ichiro on the academic field and practical field of China have been quite profound. However, we have to pay attention to the domestic social economy and legislative background in Japan when Professor Kato wrote "Interpretation of Civil Law and Balancing of Interests", and the economic condition and legislative background in China. The social condition and legislative condition in Japan at that time had essential differences from that in China. And even if the social development stages of the two countries had similarities, we can still adopt different solutions. We should not take it for granted that since it was of appropriateness that Japan adopted the standard of surpassing interpretation at that time in the theory of balancing of interests, this theory would also be appropriate in China. although we are still in a social environment that is similar to the social environment of Japan in the 60s, we are not a country in the absolute meaning of being under the rule of law. Thus, if we intended to resolve miscarriage of justice and then entrust a judge great discretion rights and allow a judge to seek for standard of value judgment outside the law, this might possibly give rise to judicial corruption. Therefore, as for our country, what a judge needs to do more is to make an analysis of a legal text and the value judgment standard that the judge seeks for in balancing of interests should also explore the value orientation and interest orientation of the legislators through interpretation of legal text.

In interpretation of law, the so-called balancing of interests has to be based on certain value judgment and a legal judgment is then made by such interests comparison. Then, whether this kind of value judgment has a definite standard? If the answer is positive, then what the standard is? There are two attitudes towards this problem. One attitude is relativism, with the representative Kato Ichiro. According to him, "In the modern society with multiple values, what is most important is not to mould a value system with absolute meaning, but to admit diversity of value in interpretation of law, explore value judgment in a specific case and oppose stiffly getting a conclusion thorough deductive inference from pre-established absolute value." (Kato Ichiro, 1974, 76) As a matter of fact, the viewpoint of Kato Ichiro is to advocate diversity of value judgment and he does not admit a standard which can determine whether a value judgment is correct or not. Comparatively speaking, ほしの えいいち believes that there exists objectivity in value judgment and there exists an objective standard. According to him, we should admit the objectivity and appropriateness of value, but this is not abstract value, but is just to admit objectivity of specific value to a certain extent. That is to say, in the historical progress, quite a lot of values have been gradually recognized and have become something that nobody can deny, such as, dignity, equality and spiritual freedom of human beings. All these values have not been recognized all along. However, once they are identified as common properties of human beings, they will not be negated in the future. (Duan Kuang, 2005, 279) The objectivity theory of ほしの えいいち recognizes or approves that a universal standard for value judgment exists in this society. Thus, ほしの えいいち terms his own theory as "Neo-natural Law Theory". ほしの えいいち believes that the objective appropriateness based on this theoretical value is manifested as the value that everyone is clear about and that is correct and which is then discovered little by little. For this kind of value, we should uphold it uncompromisingly, such as, respect towards people. (Duan Kuang, 2005, 280) In order to ensure objectivity of value judgment, ほしの えいいち believes

that in explanation of law, contribution of sociology in recognition should not be too exaggerated. Knowledge of sociology is quite necessary for explanation of law based on value judgment due to his defining the significance of the proposition that his explanation of law is value judgment --- adoption of certain explanation will necessarily bring about realization, protection or restraint of certain value or interest. Generally speaking, in this article, the authors believe that there exist standards of balancing of interest within the framework of law and these standards should be common value that people generally recognize. In contemporary China, human rights, treating others as equals and spiritual freedom are supposed to become standards of judges in their balancing of interest. Besides, all the common value is contained within the legal system of the country. How a judge can appropriately discover and apply the common value requires them to indulge in the legal system of the country for a long time. Also, the judges are required to promote the common value in selecting practice of the value. "In order for the value one chooses to be realized in the actual society, one has to be able to predict the developmental direction of the history in the future and play a constraint role as a subject in the social development in the future." (かい みちたろう) This requires the judges to possess high quality historical responsibility.

### 3.2 Standpoint of balancing of interests

So long as the property of judicature is concerned, judicature should strictly follow procedures of legal regulations according to obligations stipulated by the law and resolve disputes of interest between different parties involved in a detached and impartial standpoint and attitude. As for a judge, the standpoint he is supposed to take is self-evident. That is to say, he ought to hold an impartial standpoint. It is required that the judge should neither be partial the plaintiff nor to the defendant, but should make a justified court decision. Since experiences, family backgrounds and beliefs of all judges are varied from each other, the standpoint of each judge differs from each other also. However, all judges share one identical identity, namely, all of them are judges. If a judge is said to have a standpoint, then the standpoint of a judge is one as a legal person. Corresponding to the legal person is a common person or a layman who is not a legal person. As a legal person, a judge has an obvious distinction with the common person is that the judge takes a legal thinking mode which is a normative thinking mode and depends on whether it is legal or not. By contrast, the common person takes a social popular thinking mode who usually employs such factors as customs, habits and morality, etc., which are something outside the law to make evaluations. Then, what standpoint should a judge take if he makes a final verdict on a case with the method of balancing of interest? Different from the traditional view, Kato ichiro thought that the judge ought to take the standpoint of a common person to make substantial judgment.

Then, why initiators of the theory of balancing of interest, such as, Kato ichiro, advocate making a substantial judgment from the stand of a common person? One important reason is that the drastic social changes have led to large unconformability between the society imaged in advance by the Pandekten System in modern Japan and the actual social life. Reconciliation and close connection between a variety of systems and concepts of the statutory law and the reality of the modern society becomes more and more impossible. As a way of resolving the problem, Kato ichiro et al chose to mitigate stringency of the existing framework of judgment, replace it with naked balancing of interest and value judgment or responds to the reality appropriately with this priority (Duan Kuang, 2005, 294). The reason why Kato ichiro takes the stand of a common person to make a substantial judgment is to intend to connect realistic life with explanation of law and complete integration of the legal system with realistic life.

It is one of the reasons for being criticized in Japan that the theory of balancing of interest mitigates stringency of the framework of legal regulations (Duan Kuang, 2005, 294). Formulation of legal regulations is aimed to exclude unscrupulous balancing of interest and value judgment, which has the effect of securing objectivity. In order for a judge to make the judgment he makes coincide with the law, he may resort to an appropriate positive law as the foundation for his judgment. If a judge is unable to make judgment based on constitution of the law and carries out the law merely on the precondition of the compelling force of the nation, then his behavior can not be accepted by the modern society. The higher the degree of a system in formal rationality, the more it depends on rationalized logical rules. Predictability and uniformity of a judge depends on the highly developed logical rules of the legal system. In the process of balancing the interest, what does a judge need to do if the substantial judgment he makes from the standpoint of a common person comes into conflict with the original intention of the legal regulations? Here emerges the trend to mitigate legal regulations with balancing of interest. For this, the Japanese scholar ミズモト ヒロシ believes that the process of balancing of interest should be as it is to come to terms with the positive law. That is to say, before a final verdict is made, first of all, suppositions of the two parties involved should be objectively identified as the fact. Then, a judge ought to judge whose interest to recognize on the basis of the fact identified and this judgment mainly takes legal regulations as the

center and starts out from the theory to deduct and makes judgment according to the conclusion deducted (Duan Kuang, 2005, 293).

From the analysis of ミズモト ヒロシ in the process of balancing of interest, we can find that he has closely connected judgment of law with knowledge in regulations of law, which indicates that he believes a judge has the obligation to make a judgment in pursuant to the statutory law and the judge ought to choose the value within the value system he believes in when he makes judgment on the value, the value system offered by the existing statutory law. Thus, it can be seen that he stands on the ground of a legal person to make reflections. If a judge takes the stand of a common person to make a substantial judgment, he lacks a value system similar to the statutory law that is of objectivity, so the value judgment of the judge is difficult to predict and ascertain. Furthermore, from the perspective of relationship between legislation and judicature, the value system established in the legislation has to be realized in the specific cases of a judge in terms of judicature based on the principle that the value system of a judge should not go into conflict and contradiction with the basic value established in the legislation. For the value judgment to coincide with the basic value contained within the legal system, it is required that a judge have high level of intuition in law and that the judge who is able to assume this role can only have a stand that is taken by the judge. Above all, this paper adopts the viewpoint that the stand of balancing of interest is the stand of a legal person.

#### 4. Scientificity of balancing of interests

"Law is a kind of technique about social control," (かわしま たけよし, 2004, 238), which achieves the purpose of control through such activities of legislation and trial. Regardless of legislation and as far as aspects of trial is concerned, the judges at present are at an agonizing condition. Why they are at such a condition? Legislation is based on value judgment, which is without doubt. However, it is not that simple when a judge makes a judgment. In a country with civil law system, a verdict conclusion of a judge can totally be regarded as a necessary and logic one from norms of a statutory law, which is the train of thought in the conceptual jurisprudence that had been in vogue for a time in Europe and America. Nevertheless, the actual life is not to simply have congruity with a legal provision. If the statutory law system could integrate with and not detach from the social reality in the 18<sup>th</sup> Century and the 19<sup>th</sup> Century and a verdict did not lose its appropriateness that was merely based on logics within a legal system, then we can say that during the fierce social changes, it was quite difficult for maintain congruity between the statutory regulation and social reality. It is exactly under such a circumstance that the theory of balancing of interests emerged as response to social reality.

The theory of balancing of interests firstly places emphasizes on the value judgment that a judge judges whose interests of the two parties is more important from the perspective of a blank paper and then seeks for theory constitution to rationalize the judgment. Here, one problem occurs, namely, whether antecedence of value judge may give rise to unscrupulous verdict of a judge? Or, in other words, whether balancing of interests has its scientificity? Whether balancing of interests has its scientificity depends on whether the value judgment that has been made in advance has objectivity. Thus, whether balancing of interests has scientificity equals to the question whether balancing of interests has objectivity.

For convenience in stating the problem whether balancing of interests has scientificity, we can classify it into the following two propositions. The first proposition is, "Whether there exist factors of value judgment in balancing of interests and to what extent has value judgment been mixed"? If the answer to this proposition is that there is no mixing of value judgment, then the problem becomes simple. If the answer is that value judgment has to be mixed in balancing of interests, then the second proposition is involved. The second proposition is "Whether or to what extent mixing of value judgment in balancing of interests may damage objectivity of the result of interpretation"?

##### 4.1 Position of balancing of interests in value judgment

It is obvious that there exists value judgment in legislation. Judgment is also a kind of value judgment, which requires to establish a most appropriate value system in bringing in a verdict when hearing a case. "However, the content of law a judge refers to is not necessarily quite definite. Especially, when degree of separation between the concepts used by a legal norm and common expressions, the legal concepts may have multiple meanings, namely, a phenomenon in which there is no distinct difference between it and common expressions" (かわしま たけよし, 2004, 286) Then, legal interpretation came on the stage. "Legal interpretation refers to a practical activity in which an interpreter proposes a due law he himself believes to be true based on certain value judgment." (かい みちたろう) Not only legislation has value judgment and a trial has value judgment, but also legal interpretation has value judgment. As a kind of method of interpretation, the fact that balancing of interests has value judgment of a judge is doubtless. The characteristics of the theory of balancing of interests lies in the

fact that the value judgment made by a judge is prior to constitution of a theory and even a legal provision, and balancing of interests can be deemed as an existential pattern of two parties involved in a dispute about value judgment. The theory of balancing of interests per se is to explore how to come to an appropriate conclusion through substantial judgment.

For those who believe in the conceptual jurisprudence, laws and regulations in the process of making a judgment is something which adapts to the fact to deduce a unique correct conclusion. Constraint force of laws and regulations is deemed as absolute, regardless of influences of factors outside laws and regulations on the judgment. However, balancing of interests is exactly to the opposite side of the conceptual jurisprudence, which pursues substantial appropriateness through weakening constraint force of laws and regulations. Value judgment in balancing of interests is the substantial reason of a judge in a trial. Previous judges have already made this substantial value judgment in making a verdict on a case, but concealed substantial judgment in the final court verdict, and just simply deduce a conclusion from laws and regulations just like the conceptual jurisprudence. This, on one hand, is out of consideration for respect for the statutory law, and, on the other hand, is because the judges are afraid that this sort of substantial judgment which represents their value tendency might suffer from investigation of a court of appeal or because this is a good choice to escape from social pressure. In the case of *Mayflower*, the court verdict made by the judge of trial of the second insurance manifested the substantial value judgment of the judge. Nevertheless, it is also this part that has aroused doubt of the academic field. Then, whether the judge should not manifest the substantial reason for his making a verdict, namely, his own value judgment? The answer is negative, because only if the value judgment is manifested to the public, responsibility of the judge for the case can be witnessed.

#### *4.2 Whether mixing of value judgment gives rise to subjectivity*

Value judgment always accompanies with balancing of interests, which is the clear-cut feature of the theory of balancing of interests. Then, a further issue emerges. That is, whether existence of value judgment decides that balancing of interests, to some extent, can only be subjective? Solution to this issue depends on solution to the issue of its pre-conditions, namely, whether the standard of value judgment is of objectivity?

Different from the conceptual jurisprudence, the theory of balancing of interests holds the view that it is absurd to say that there only exists a unique correct conclusion. Legal interpretation is not merely a sort of single text interpretation or logical interpretation to legal provisions, but there is possibility of plural interpretations. It is just that a judge selects one sort of interpretation according to his own personal value judgment. In this way, it seems that subjectivity of legal interpretation is inevitable. According to かわしま たけよし, “social value, and even value of law exists for behaviors of human beings who live in the society, so it is more or less co-owned by people within a certain scope. Thus, it can be thought that, as for a judgment subject, the behavior of value judgment is a kind of activity which regards superiority selection of value as the medium and which has high subjectivity, and the content of value judgment only corresponds with the scope of people who obtain a behavioral motive based on the same social value and is only in common use by people within a certain scope of the society. For that purpose, the degree of ‘objectivity of value judgment of law’ coincides with the number of people who support the value system that constitutes this foundation for judgment.” (かわしま たけよし, 2004, 244) The value judgment and the objectivity of value system that are mentioned here are totally different from subjectivity of scientific judgment. The so-called objectivity in a scientific theory means that the scientific theory is decided based on experiences and facts. And even if there is only one person who supports the theory, if it is proved by experiences and facts, we have to admit its objectivity as a scientific truth. (かわしま たけよし, 2004, 245) Whether a value judgment made by a judge only takes into consideration the subjective aspect or it has its objectivity because we can find out that this value judgment surpasses a personal subjectivity? This kind of problem puts all focus on the standard according to which a judge makes a value judgment --- the problem whether the value system itself has objectivity. “Since the value system of law exists for endowing the behavior with a motive that builds the social order, it will necessarily possess a unified and coordinated power that maintains its existence and development.” (かわしま たけよし, 2004, 246) The statutory law can be deemed as the manifestation form of the above value system. Then, judgment of a judge should be based on this value system of law and serves it. Therefore, the value judgment made by a judge should not be subjective and unscrupulous, because he is obliged to maintain this value system. It is exactly within this sort of objective value system of law that objectivity of balancing of interests gets realized.

## **5. Conclusions**

The above are some reflections on application of balancing of interests by a judge in deciding a case in the case of active judicature. In the conclusions, the authors will not put forward some viewpoints, but merely propose

several issues that are outside their knowledge so as to make those engaged in the same pursuit to reflect on the issues.

1) How much a judge is constrained by the statutory law in deciding a case it determined by political relations between the legislative power and judicial power of a country. Then, how much the statutory law constrains a judge is appropriate in a country that is gradually approaching a modern democracy society?

2) Law is a kind of technique for social control. This kind of control is manifested in two aspects, on one hand, control performed by a judge over the society in handling a social dispute, and, on the other hand, control over the judge per se. Then, who is the controller of active judicature?

3) The method and purpose of balancing of interests is to measure which of two disputing parties should be recognized. Active judicature requires that the balancing of interests achieves an effect that is satisfying to both of the two parties. Then, whether there exists tension between the two?

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