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# 99% Normal Adjudication and 1% Supernormal Adjudication ------ Posner Paradigm and Construction of Chinese Scholar-Type Judge Mechanism

Min Niu & Fang Chen

The Law Department, Nanjing University of Information Science & Technology, Nanjing 210044, China

**Abstract**

Law of individual equity pursues for scholar-type judges who are endowed with radical talents and revolutionary spirits. To trigger out these judges' natural advantages of mastering law theories and reform trends and overcome their shortcomings of ignoring equity of interests in criticizing legal system and seeking for radical reform are the key parts in the modernization of China legal system. "Double excellent law man" Posner's paradigm shows the core of constructing a scholar-type judge mechanism, that is, to cultivate judges who possess characters of being modest, wary, and responsible, gifts of openness, wisdom, and unselfish, super ability of logic analysis, loyalty to rationality, sagacity and courage of grasping reform chances and making supernormal adjudications, and avoid the attitude of "results-oriented adjudication".

**Keywords**: Scholar-type judge, Posner, Normal adjudication, Supernormal adjudication

Due to the inharmonious conflict-solving mode, to broaden the selection sources of judges, to reform the professional judge appointment system, and to construct a modern scholar-type judge mechanism has gradually become core measures for pushing professionalism of judge. From 2006 to 2007, the Supreme Court of PRC has already taken 14 law professors. "Judges are the ultimate judgers who can display social fairness and justness …… Selecting judges from law professors and layers has an innovative and practical meaning" (Jing Wu, 2007). Scholar-type judges have super understanding ability, sharp observing ability, higher logic analyzing ability, a sense of justness, and a consciousness of innovation. They can grasp the purposes of legislation and spirits of laws precisely and express them with exact and sharp law words, and win wide positive praises from all social fields. "Law learners must take innovation as the duty, whereas fogyism is the tenet of juridical practice" (Elena Kagan & Richard Posner, 2007). To integrate the two different tasks at minimum social oppositions and innovation prices to build up a green path for securing personal rights is an urgent issue needs to be solved right now.

"By other's faults, wise men correct their own." The most respectable American "double excellent law man" (excellent scholar and excellent judge, 2007) ------ the chief judge in the Seventh Court of Appeals for the Federal Circuit, Richard A. Posner is "an outstanding jurist …… and also one of the most famous judge of appeals in America, who contributes a lot to the judicature" (Steven Shavell, 2007). In China, the scholar-type judge mechanism is still at an initial stage. Looking back the success of Posner, we can further understand the authority's profound thoughts in the field of economic analysis of law and the essential spirits of American Judicature, which can help domestic scholar-type judges to accomplish the roles conversion and integration, constructing and perfecting the new scholar-type judge mechanism beared Chinese features.

## 1. Posner paradigm = 99% normal adjudication and 1% supernormal adjudication

Posner is a radical scholar who introduces economic principles into law and strongly insists to break through the inner study mode of traditional law. He has suggested in articles to adopt children by auction market in market, to execute the substitution pregnancy contract strictly, to analyze disastrous terrorism risks, and to decompose the State Security Law (Richard A. Posner, 2006). "Change widely-accepted opinions and form an assumption that the diversity of important social phenomena is predictable and finally enrich our knowledge about the world" (Richard A. Posner, 2003). Moreover, he is a doer who profoundly impacts the scientific, rational, and modern progress of American judicatory. He deals with almost all suits with calmness, conservativeness, and abstention and pushes innovation at the minimum social prices. Gradually he is recognized as the super scholar-type judge in America.

### *1.1 99% normal adjudication*

Taking a position in the Federal Court gives Posner amounts of chances to control the reform of branch laws. However, he always follows juridical rules carefully and severely blames the Supreme Court for dealing with the violation of the

constitution willfully. He sharply criticizes the judge Kennedy for his confusion of morals and laws (Anthony Kennedy introduced new moral theory in dealing with Lawrence v.Texas, using privacy to deny Sodomy Laws). Posner's self-restraint, modesty, cautiousness, and tolerance showed in the Jordan v. Duff & Phelps, INC suit are praised highly till now (William A. Klein, J. Mark Ramseyer & Stephen M. Bainbridge, 2006). In this suit, the accuser has been the accused company's security analyst who had the right of buying the company's shares periodically and had signed a "book repurchasing for quit" agreement. Later, because of the tight relation between his wife and moth, he had handed in a resignation to the president Harson and prepared to move in Washington. After a negotiation, he finally had agreed to continue to work till late the end of that year in order to acquire higher bonus (totally 23,000 US dollars). Soon after the accuser quit his job, the accused company declared a merger with Pacific Financial Corporation, which led to a sharp rise of stock price. The shares formerly held by the accuser valued 550,000 US dollars at that time. So he sued the company to the district court (District court thinks that if the purchaser adopts public offerings and the two sides reach an agreement, it is not necessary for the purchaser shouldering the responsibility of releasing important trade information. If the accuser refuses accept the result, it can sue to the Seventh Court of Appeals for the Federal Circuit). Most judges, Easterbrook taking the lead, thinks that the in nature accused company is to dismiss the accuser for the sake of improving managers' interests in merger, therefore its activity has great implicit malice. "The fundamental function of contract law is to prevent party's opportunism thinking, encourage the optimal time choice of economic activity, and guarantee for different self-protective measures." "The accuser is entitled to choose whether stay and hold shares …… The accused company did not release the important information that may impact the accuser's decision, betraying its duty of releasing information legally." This suit is an excellent change for Posner to practice his theories and assumptions. However, he clearly realizes that "no matter how much we admire personal right, employees' rights security is merely limited" (J. Mark Ramseyer, 2005). To release information legally has a precondition that investors can response to information at will. In this suit, the accused company is entitled to fire the accuser at any moment. It has not right to ask the accuser to manage all merger information independently. "May academic studies can not prove its rationality."

Professional judges should find out the truth of suits and apply appropriate laws with fairness and justness. The brave and radical spirits of Posner as a professor and the modesty and conservation as a judge deserve praises. He analyzes relevant laws in difficult suits with profound, reasonable, and scientific thoughts and precise, careful, and wide deductions. In dealing with amounts of self-insisting suits, he applies the principle of explaining the original intents and makes optimal choices by balancing normal adjudication and supernormal adjudication.

*1.2 1% supernormal adjudication*

Professional judges with discretion are not only machines obeying precedents but also the main powers in legislation innovation. They can make amendments based on development trend of laws after investigating present conditions thoroughly. Stable and ideal judiciary should tolerate a few of innovative supernormal adjudications. In "Judges' personal opinions", Posner advances the imagination-reconstruction and pragmatic anti-original ideas' explanation mode. The former is to reconstruct the initial legislation goals by rational imagination. The later is to explain the contents of laws flexibly according to practical needs. In the suit of Friedrich suing Chicago government, he details the meaning of flexible explanation in imagination reconstruction. He asks to reconstruct the duty of the court as the parliament made the laws by all means. "Law principles explain legislation intents and law words form legislation goals …… Judges should realize that "to be clear and exact" as the explanation core is very superficial. American laws are not for all special suits". Then he affirms that in special suits the fees for experts or witnesses paid by winners belong to retaining fees. "Legislation is a result of rational man in pursuing for justness by rational ways"(Henry M. Hart, JR. & Albert M. Sacks, 1994). As judges apply principles of laws, they must take legislators' intents into consideration carefully. "Make the law care about social benefits instead of focusing on making up victims' loses". In the suit of Equal Employment Opportunity Commission suing Sidley Austin LLP, Posner breaks the myth of partner obtaining privilege with complete practical attitude, cleaning up barriers for commercial reform of law offices. "This suit is like a sign for starting a banquet. Many lawyers try to present in the banquet of rights". Lots of unsatisfying partners raise suits. The Federal Supreme Court openly agrees Posner's opinion that "to judge whether a man is an employee or not must consider whether there is an effective control".

As Posner follows precedents and fulfils judge duties, he also emphasizes on explaining adjudications in detail and providing effective, legal, and sufficient reasons for adjudications. In appropriate conditions, he makes innovative adjudications that oppose to the regular academic principles and the opinions of the Federal Supreme Court and drives the law innovation. In dealing with the International Telephone and Telegraph Corporation suit, he cites his competitive management advantage theory to prove the rationality and feasibility of applying the law in crime-happening region. In the Aimster copyright suit, he carefully and limitedly applies the indirect liability theory to prove that the pirate burden should be co-taken by software wholesalers, users, copiers, and retailers, turning the traditional and mechanical burden-taking ways into the chief wrongdoer-taking mode, which is an important first step in the right way. The Federal Supreme Court adopts this idea in the Grokster suit two years later. In dealing with the United Airlines Group suit, he

discerns the trends of contract law and re-explains purchase protest, driving the amendment of this law.

By studying the important and difficult suits judged by Posner in ten years or so, we can easily know his modesty, carefulness, and loyalty to the profession as a judge, his openness, wisdom, justness, and unselfish quality, his profound thoughts, super logic analysis ability, his rationality, and his scholar-type attitude avoiding "result-oriented adjudication".

**2. Construction of scholar-type judge mechanism**

An ideal juridical system consists of more normal adjudications that flow juridical principles and precedents and less special adjudications that correct precedents and reform custom based on practical needs and law development trends by integrating advanced theories and exerting judges' discretion. Most suits in juridical field are simple and result in limited adjudication by referencing to law principles and preceding suits. Juridical adjudication aims at solving conflicts quickly, economically, and properly. Stability and predictability are the key for guaranteeing juridical effect, maintaining adjudication authority, and lowering suit costs. "Similar suits result in similar adjudication, which embodies juridical justness. Innovation is the mission of judges and conservation is the life of judges more. Even if compromise cost is slightly lower than suit costs, parties will choose a compromise" (Richard A. Posner, 2008, p96). Adjudication coherence and predictability is the key for guaranteeing juridical authority and reducing suits. Once a conflict happens, parties can predict the adjudication. Then most prefer to a compromise, reducing meaningless suits. However, written rules can not cover all features of unique suits. "The assumption that the court is seeking for truth but nothing is impractical". Under certain circumstances, strictly following rules and precedents may violate fairness and justness. Therefore, in this kind of suits, on one hand judges can deduct the truth according to proofs available. On the other hand, they should manage the suits at the edge of law principles, listening to both parties' proofs and reasons carefully and making supernormal adjudications that are relatively just and win acceptance of most people based on theories that are in accord with balance of interests and law development.

Scholar-type judges who are accomplished in all laws and understand academic dynamics possess super analysis ability and logic deduction ability. They do far better than other judges in balancing normal adjudications and supernormal adjudications. In China, a group of scholar-type elite judges comes into being gradually. Lots of well-known law professors (For example, the former president of East China University of Political Science and Law and now the vice president of the Supreme People's Court of PRC, Jianming Cao; the former president Nanjing Normal University and now the president of High People's Court of Jiangsu Province, Pixiang Gong; the professor of Zhongnan University of Economics and Law and now the vice president of High People's Court of Hubei Province, Zhongmei Lv, etc.) are not only "jurists who support and practice the rule of law and constitutionalism" but more the final guarders for social justness who "advocate laws instead of authorities or powers". However, for scholar-type judges, their criticizing views formed in long-term scientific studies and their radical innovation spirits become tremendous barriers for fulfilling judges' duties. Many wise and radical scholars practice their academic arguments by juridical activities by instincts. They fall over themselves for breaking up precedents and amending law principles by words, which seriously impacts the seriousness, authority, and predictability of judicatory, causing amounts of suits.

To construct a modern scholar-type judge mechanism is a key ring for China juridical reform. We should gradually perfect the juridical exam system, selecting elite judges from excellent talents with rich law theories. Speed up the construction of judge training bases and enhance trainings of theoretical knowledge, professional morals, and techniques. Especially, scholar-type judges should train regular judges during their work period. (1) Debase specialty training. Focusing on and thinking latest theories and new laws are the nature of scholar-type judges. Therefore, the collective training in this aspect is unnecessary for them; (2) Enhance quality training. Scholar-type judges usually apply themselves to seeking for the "only right solution" for a conflict and try their best to break the pre-determined framework of laws and precedents. The core of constructing a harmonious modern scholar-type judge mechanism is to cultivate a "conservative and steady" nature. "Responsible and professional judges not only take the true proofs for an adjudication but also keep coherence in all suits". Judges should notice adjudications' social effects, forming an attitude of keeping coherency in all suits and a tradition of maintaining suit efficiency and juridical authority.

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