

# The confrontation between legalism and consequentialism in difficult cases

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**Abstract:** *Legalism fails in the face of difficult cases, while consequentialism can start from the social consequences caused by the trial results, and consider social ethics, public opinion and other factors to make the trial results as much as possible in line with the public's moral values. Although consequentialism has certain advantages compared with legalism in handling difficult cases, it should not be arbitrarily enlarged or even blindly pursued. Consequentialism also has limitations in application. Even so, consequentialism can be justified in the aspects of ethics and economic analysis. Except for the influence of the judges' own factor, our country still adopts legalism to reason cases as the mainstream. So to cater to the mainstream legalism, the judges should not implicate their thinking process when they hear cases. In addition, the judge will also be affected by factors outside the case, the judge must learn to "judge the situation" when hearing the case, but the judge cannot inform the public, implicit thinking is the current judge's helpless action.*

**Keywords:** *Difficult cases; reasoning; legalism; consequentialism; implicit thinking*

## 1. Introduction

Social life is far more complex than movies. The existing legal rules cannot accurately match the facts of the case one to one. Not even the most profound legislator can control everything that happens in the future like a prophet. And when the existing law can not perfectly interpret the facts of the case, the judge will fall into the dilemma of trial. In the face of these "difficult cases", the judge, as the subject of judicial trial, does not enjoy the legislative power like the legislator. So judges will use legal interpretation to bridge the rift that has been exposed between the rules and the facts.<sup>[1]</sup>In the process of interpretation, the thinking of the judge often determines the direction of the trial of the case. However, when facing some cases, it is difficult to find the thinking process of the judge in the judge's judgment. The judges seem to reach a consensus that outsiders can only see the law according to the judge in the judge's judgment, even if the result of two trials is different, it is only the law according to the difference. Chinese judges handle a large number of cases. When you ask them how they started, reasoned and reached a conclusion on each case, they will either avoid talking about it, or they will tell you calmly that it is the natural result of the application of the law.<sup>[2]</sup>

## 2. Question raised: The failure of legalism

Influenced by the contemporary Chinese ideology of rule of law, our country carries out the principles of "legal punishment", "law must be followed", "rule of law", "equal protection of law" and "procedural justice" rather than "substantive justice".<sup>[3]</sup>Although many scholars have criticized legalism, the mainstream of our judicial judgment is still legalism. The procedural process provided by legalism is highly logical and reproducible. Legalism is indeed a powerful tool in simple cases, and judges are indeed mechanically dependent on syllogism. Difficult cases have always been rare, and in most cases legalism has played a great role in allowing judges to deal with tens of thousands of cases because of its logical structure. Legalism can be understood as a simple logical structure, which is composed of a complete and comprehensive set of general rules and principles, and all problems arising in the system can be solved by deduction. Legalism tends to identify law as a rule or system that forms a logical closed loop. In each system, the practice of judicial decision is carried out in accordance with the logic, and the result of the case will come to a conclusion under the established rules.<sup>[4]</sup>

Legalists would view the judicial system as a syllogist "machine," and they would view purist formalists as a giant syllogist machine, with a definite, externally authorized rule of law providing the primary premise and objectively "true" pre-existing facts providing the secondary premise. The judge's

job is to act as a highly skilled mechanic, with heavy responsibility for identifying the externally mandated "right" rules, but with little legitimate discretion over the choice of rules. But the syllogism machine also "malfunctions" when difficult cases arise. The failure of syllogism can be roughly divided into two types, and each type is supported by classical cases.



Figure 1: syllogism

As shown in Figure 1, this model refers to the fact that due to the progress of modern science and technology, or the ill-considered legislation at the beginning, the case facts can be single anchored according to only legal rules, but the conclusion of the case is unacceptable to the public.

For example, the once sensational case of Xu Ting is a true portrayal of the failure of legalism. In 2006, Xu Ting, a migrant worker in Guangdong Province, withdrew 175,000 yuan from his bank card with only 170 yuan in it due to the failure of his ATM system. After the Guangzhou People's Court in the first instance in accordance with the provisions of "Criminal Law" Article 264, convicted him as theft, and the court considered that Xu Ting's behavior had constituted "theft of financial institutions, the amount is particularly huge" aggravating circumstances, so the first instance Xu Ting was sentenced to life imprisonment. The trial of the court of first instance seemed to be conducted in accordance with the law and strictly followed the syllogism. Judging from the reasoning of the judge alone, the judge did not make mistakes. However, shortly after the verdict of the first instance, Xu Ting's case aroused the attention and discussion of all walks of life. All the major jurists said that Xu Ting did not constitute a crime.

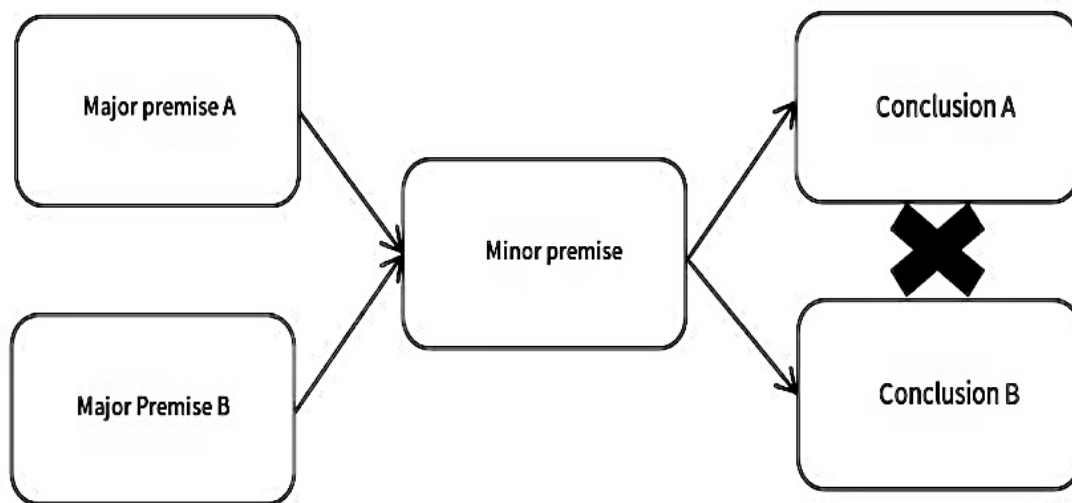


Figure 2: Conflict situation

As shown in Figure 2, this model means that when the facts of A case do not anchor the only rule of law, both Law A and Law B can be applied, and because of the deviation (or conflict) between Law A and Law B, there will be two different results in the final judgment, and there will be deviation (or conflict) between the results.

For example, the case of Zhang Xueying vs. Jiang Lunfang is a typical representative of this model. Jiang Lunfang is Huang Yongbin's wife, while Zhang Xueying is Huang Yongbin's "mistress". During the period of Jiang Lunfang's marriage to Huang Yongbin, Zhang Xueying and Huang Yongbin illegally lived together. If you look at the process of making a will, the will is completely defensible. However, from the point of view of public order and good customs, the husband who already has a family gives his inheritance to his mistress, which is not in line with the principle of public order and good customs of the civil law, so the will should be invalid. The same legal fact, according to different legal norms, comes

to completely different conclusions.

When facing the difficult cases in the above two situations, reasoning thinking only according to the syllogism is completely unworkable. Therefore, the author believes that the judge is not the "legalism" of hearing the case completely according to the law,<sup>[5]</sup> in other words, the judge is carrying some of his "private goods" under the mask of legalism. Next, the author will analyze consequentialism, in order to analyze the advantages of consequentialism compared with legalism in the face of difficult cases. In the face of difficult cases, judges not only have their own thinking about the case itself, but also have a set of their own thinking methods and logic for political factors outside the case. And the judge won't talk about it. What's the point? The judge protecting himself or the judge doing what he had to do. After analyzing the advantages of post-consequentialism, this paper will also excavate the thought process implied by judges in the process of trial and analyze why judges implied their own thinking process in order to get a reasonable explanation.

### **3. An analysis of the Legitimacy of consequentialist reasoning in difficult cases**

In order to avoid the pursuit of consequentialist mindless reasoning, the author needs to make two points clear before analyzing the legitimacy of consequentialist reasoning. First of all, we need to make it clear that consequentialist reasoning is not applicable to all cases, its scope of application and practical function are not universal, can not be arbitrarily enlarged and generalized.<sup>[6]</sup> The characteristic implication of Jia Zhangke's film aesthetics is mainly discussed from two aspects of regional culture and bottom culture. When it comes to simple cases, the law has the uniqueness, the case facts are simple, and the reasoning of the law doctrine is enough to deal with. Secondly, consequentialism also has certain disadvantages, that is, because the measurement of consequences depends on the judge himself, it is easy to lead to the judge's own bias, which leads to the trial process full of personal colors. Posner also argues that "pragmatism is not a machine that separates the wheat from the chills and comes up with provably correct answers to legal questions. Different judges weigh the consequences differently, and different judges see the consequences differently."<sup>[7]</sup> Even so, consequentialism exists and is used by many judges. This is enough to justify the doctrine.

#### **3.1. Justification analysis of ethics and morality**

Consequentialism is a philosophical concept, which is a modern variant of utilitarianism. Consequentialism or consequentialism is an important concept in moral philosophy, which bases the evaluation of an action on whether its consequences are morally desirable or not.<sup>[8]</sup> When there is a unique result according to the law, and the result even the ordinary people of society will conclude that this is immoral. If blindly adhere to the rule of law, this is indeed to achieve the "law must be followed". But the result was not satisfactory to the general public, and even other judges were likely to grumble. In the Xu Ting case, the court of first instance sentenced Xu to life imprisonment. Jiang Xingchang, vice president of the Supreme People's Court at that time, said, "The Xu Ting case is a special case, and a life sentence is obviously a heavy sentence." Please note that Jiang Xingchang here said the sentence was "heavy" rather than "wrong". Xu Ting's repeated withdrawal of cash from an ATM should not be encouraged by society, but should he really be sentenced to life imprisonment? This is clearly a disproportionate sentence. Ordinary people here and Jiang Xingchang know that it is a heavy sentence, but if we simply follow the rule of law, we can only get life imprisonment. Even if it is life imprisonment, the judge will give a light sentence according to the law, because the maximum sentence for stealing financial institutions is death. Due to consequentialism's consideration of realistic ethics and morals, in addition to the Xu Ting case and the ernai case, there are many cases in real cases that use consequentialism for trial, and some even use Tao Te Ching as the basis for judgment. Compared with the dogmatism of legalism, consequentialism highlights the research on the level of ethics and morality. In the trial of a case, once the law has lagged behind the real life or when multiple rules can be applied and the results are quite different, the judge will first judge the facts of the case and then judge the judgment result obtained according to the law. When the result is a violation of ethics, judges will seek legal principles (such as the principle of public order and good custom) or apply special provisions to solve the problem.

#### **3.2. Economic perspective of justification analysis**

Economic analysis is a concept in the field of economics, emphasizing the relationship between cost and income and grasping the relationship between supply and demand. Posner, as one of the most

representative figures in the theory of law and economics, combines law and economics perfectly. Consequentialism, as a variant of utilitarianism, will naturally use economics to analyze the impact of consequences. Consequentialism is also a process of comparing costs and benefits: if the positive effect of the judgment is greater than the negative consequence, the judge will agree with the result. The author thinks that judges in our country will carry on economic analysis consciously and unconsciously, just not placed in the "clear face" to discuss.

#### **4. The Implication of the Judge's Thinking: The judge's helplessness under the battle between legalism and consequentialism**

As mentioned above, legalism will fail in the face of difficult cases. On this basis, judges will use consequentialism to reason cases, but why do judges hide the situation of using consequentialism? In my opinion, there are two possibilities: either the judge himself is unaware that he is using consequentialist reasoning, or it is simply a sensible way to protect himself.

##### ***4.1. The contradiction between the "non-self" required by the judge profession and the "self" of the judge***

As the arbiter of judicial trial, the judge should play the role of settling disputes. Based on this requirement, the judge should be a "god" general existence. Only God can not be boxed in by the limitation of the level of cognition that man can reach, and does not have an ego. But in fact, the judge is also selected from people, even after years of systematic legal training, the judge's cognition can exceed the "ordinary people", but the judge still can not get rid of the "human" this layer of background color. People can not escape from the "self", this is nature. Moreover, there are still some judges in our country who have not gone through systematic legal education. And the process of becoming a judge is different for everyone. In the special environment and education, judges form their own values, moral standards and ideologies, and have various preconceptions, prejudices, hobbies, aversions and even some habits. All these constitute the self of judges as ordinary people. Judges are more used to getting answers to questions with insufficient information and uncertain judgment in an intuitive way.<sup>[9]</sup> These personality characteristics and personal experience and knowledge will inevitably influence their case handling as "preconceptions".<sup>[10]</sup> Based on this contradiction, the judge is likely to include his "private goods" in the process of the trial, and then affect the justice of the trial result. In the trial, some judges may adopt the mindset of "convict first, then choose the right charge" due to prejudice. Therefore, many judicial officials are often puzzled: the defendant's actions clearly "constitute a crime", why can't find a proper charge? Under the influence of this inertia of thinking, it is difficult for the book "nullum crimen sine lege" to become the basis of court reasoning in reality, and even the legal principle of "making explanations in favor of the defendant when in doubt" has been abandoned. But the judge's preconceived ideas are subconscious, and even when he realizes that he has problems, he is shy to tell others about his preconceived wrong ideas. In the case of Xu Ting, the Guangzhou Intermediate People's Court made two judgments successively, and Xu Ting was identified as a crime of theft. If the first judgment could be used as the argument that the judge made the judgment in accordance with the law, the judge could be excused. However, the original judgment was overturned, and Xu Ting was still considered as a crime of theft in the second judgment, which was partly caused by the judge's preconceived thoughts, the author believes.

##### ***4.2. The shell of legalism and the core of consequentialism***

Influenced by the construction goal of ruling the country by law at present, the main way of reasoning supported by the government is still law doctrine. However, the judge himself clearly understands that legalism alone is insufficient in dealing with difficult cases, so there is a combination of legalism and consequentialism, or under the shell of legalism, consequentialism is actually applied in the trial. For example, when Xu Ting's case was retried, the Guangzhou Intermediate People's Court still considered Xu Ting to be guilty of theft, but the sentence was reduced from life imprisonment to 5 years, on the ground that "considering that Xu had made a criminal intention to steal the operating funds of financial institutions with his card after he found that there was something abnormal in the automatic teller machine, The act is different from the crime of stealing a financial institution with premeditation or sabotage; From the crime has a certain contingency, Xu Ting crime is not very subjective malignancy." Among the articles cited was paragraph 2 of Article 63 of the Criminal Code. The judge through this clause not only sentenced Xu Ting theft, but also made the punishment under the law. What seems to be

a judicially subtle way of reconciling the relationship between the public and the court. However, in the author's opinion, if the first trial was the result of the judge's judgment in accordance with the rule of law, then the retrial is the judge under the pressure of public opinion and the upper leadership (whether there is or not), and is struggling to find a way not to lose the face of the court but also to shorten the sentence of Xu Ting, and the second paragraph of Article 63 is this "lifesaving straw". Through this article, the judge's judgment is again based on legal and reasonable. This kind of thinking process is "decision before trial". Under some pressure or consideration, the judge qualifies the case and then finds the appropriate legal provisions to support it. Suppose that the superior leadership gives instructions that Xu Ting's speculative behavior is not advocated by social values and is not encouraged, so he should be punished. However, Xu Ting's behavior is also caused by the failure of ATM, so he should not be punished heavily. When the retrial judge receives this kind of instruction, he will "desperately" look for the right law to support his decision. When he finds it, the judge can say that he made the decision according to the law. Of course, the judge should not tell people about his inner journey, otherwise the public's evaluation of the judge will be greatly reduced. It has to be said that the judges at the Guangzhou Intermediate Court are lucky that they have found a legal cover they can use to cover up the idea of setting trial before trial.

### ***4.3. The influence of extrinsic factors on the judge's hearing of a case***

It has to be admitted that the pressure of public opinion plays a certain positive role in the supervision of judicial trials, but sometimes the judge will be perplexed by public opinion. Because of the constraints of public opinion, the judge will consider too many extra-case factors in the trial. Judges will unconsciously consider whether the public will be convinced of the verdict if they hear it, and whether it will cause a stir..... For sensational retrials, the judge will consider more factors than ever before, because the first trial was already against public opinion, and if the retrial does not "correct", the judge in charge of the case is bound to be the "rack of shame" of history. Based on the above considerations, judges will become passive in the hearing of cases. In the Xu Ting case, the retrial verdict changed the sentence from life imprisonment to 5 years. However, from this case, from a certain perspective, the result of the retrial was achieved by the public through active participation in the case. But we can not simplify it, sentence change in the author's opinion, more is a helpless. As a result of the public's victory, the judges found section 2 of Article 63 of the Penal Code, without which it is unclear whether the sentence could have been reduced.

In addition to public opinion, the influence of political factors is also one of the important factors for judges to hear cases. In the face of difficult cases such as Xu Ting's, the judge is likely to consult the leaders in the retrial, and the leaders will make a certain value judgment and expect the outcome of the trial to be acceptable to the public. Jiang Xingchang, deputy to the National People's Congress and vice president of the Supreme People's Court, said: "Xu Ting's case is a special case. It is clear that a sentence of life in a trial is heavy." On January 17, 2008, Lv Botao, then president of the Guangdong Provincial High Court, said, "The Xu Ting case does have many particularities. I fully understand the difficulty of the court of first instance in dealing with this issue. The purpose of the retrial by the provincial High Court is to make people study this issue more carefully, so that the case can be decided legally, reasonably and reasonably, and achieve the unity of legal and social effects." In the end, the pressure from the Supreme Court and Guangdong Province came down on the Guangzhou Intermediate People's Court, and the judge had to change his sentence even if he didn't want to.

Whether it's public opinion or political considerations, does the judge show that? Obviously not. If a judge writes in the judgment that "based on the consideration of public opinion and taking into account the opinions of higher leaders (courts), the court, according to the Criminal Law of the People's Republic of China....." Although the public opinion is full of criticism of the original trial judge, what the public expects is that the judge will make the most fair judgment. The judge should not be influenced by the pressure of the public opinion or the superior leadership and change his decision at will. As mentioned above, the judge in the public mind is no longer a "man" but an embodiment of the symbol of justice when conducting trials. The judge is in a dilemma. The judge must learn to "judge the situation" when hearing a case, but the judge cannot inform the public about it, which is the helpless move of the current judge.

## **5. Conclusions**

Legalism and consequentialism both serve justice, and each doctrine has its rationality and limitation. In the face of simple cases, legalism can quickly reach a verdict according to the logical framework, but

when difficult cases appear, it will fail. Consequentialism is mainly based on the consideration of the social consequences of the case, and brings political factors and social ethics into the scope of judges' thinking, but it also has the disadvantage of over-reliance on judges' judgment level. At present, our official hearing mode still takes legalism as the mainstream. Although judges will consciously or unconsciously incorporate the analysis of consequences into their thinking process when facing difficult cases, they can only implicate their thinking process due to the contradiction with the current mainstream hearing concept.

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