

One Important Approach to Promote the Development of Criminal Law: Controversial Case Studies

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Abstract

From 1979 Criminal Law to 1997 Criminal Law, the Criminal Law of New China has been implemented for more than thirty years. In the past thirty years, the content of the criminal law has been continuously enriched and the spate of criminal law amendment and judicial interpretation is proof; continuous innovation appears in the theory of criminal law and the debate about the elements of the crime and the recognition of legal interest is evidence; the degree of public concern about the criminal law is increasing and hot discussions caused by the introduction of the new judicial interpretation and the Criminal Law Amendment are proof. However, throughout the development of the criminal law and theory, the author finds that the phenomenon that the theory and practice are disconnected is serious; discriminating law with the law and arguing theory with theory or repeated demonstration between the law and the theory are still outstanding. This phenomenon is not conducive to the scientific development of criminal law and the theory. The author believes that strengthening the fine study of controversial cases in reality, identifying the problems, using a variety of methods, giving a reasonable, just conclusions that can be accepted by the public, and then rising to the theory by inductive method, closely combining the practice and theory would be a breakthrough and an important method for the future development of the criminal law in China.

Key words: Criminal jurisprudence; Controversial case; Study method

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INTRODUCTION

Chinese criminal law has been implemented for over 30 years. The theory of criminal law continues to develop; however the practice of criminal law is limping. The emerging of miscarriages of justice has challenged the authority of criminal law in people's minds. How to make the criminal law theory truly serve the criminal law application and the criminal law application, in return, promote the development of criminal law theory has become a problem in today's Chinese Criminal Law. Through analysis and demonstration from a methodological point of view on this issue, the author believes that to conduct fine studies of controversial criminal cases and then to introduce related systems around controversial cases can effectively solve this problem.

1. THE CURRENT STATUS OF THE HANDLING OF CRIMINAL CASES IN CHINA

A criminal case is a double-edged sword. There are no winners in a criminal case, in which, for the victims, some lose their economic interests; some lose their ability to work, and some even lose their lives; for the criminals, some are restricted of freedom, some were deprived of their liberty and some even are deprived of their lives. In view of this, in the handling of criminal cases, the judiciary and judicial theorists should be in line with a more rigorous approach to identifying the facts and applying the law and they cannot act in haste. However, the handling of criminal cases in judicial practice is not optimistic. According to statistics, from 2008 to 2012, the national court system concluded 4.141 million criminal cases in the first trial and sentenced 5.235 million criminals with an increase of 22.3% and 25.5%, respectively.¹ During this period, procuratorial organs urged investigation organs to file 118,490 cases which should have been filed, urged to withdraw 56,248 cases which should not have been filed and lodge a protest in wrong criminal judgment of 24,178 cases.² Only in 2009, National procuratorial organs received 3,390 appeal cases in which the parties refused to accept the criminal judgments, which does not include appeals the parties submitted to the people's courts (Sun, 2011, p.528). From 2006 to 2008, for three consecutive years, in the process of handling the appeal cases in which the parties refused to accept the criminal judgment put into force by the courts, the number of first time appeal cases that the procuratorial organs have lodged a protest is gradually increased at an annual rate of 9.2%, 15.2% and 12.5% (Xian, 2009).

As can be seen from the above data, the number of criminal cases in China

¹ Excerpt from the *2013 Work Report of Supreme People's Court*.

² Excerpt from the *2013 Work Report of the Supreme People's Procuratorate*.

in recent years is in sustained growth; however, a growth of case number does not mean an increase of the investigation quality. The quantity of prosecutorial organs' protests continued to grow and this fully explains the quality of handling criminal cases needs to be improved. On the one hand, not high quality of handling can easily lead to error handling of criminal cases and form wrong cases. In recent years, quite many wrong cases have been found out and have aroused widespread concerns, such as Hubei She Xianglin Case, Henan Zhao Zuohai Case and Zhejiang Uncle and Nephew Case, etc. These misjudged cases have produced serious negative impact on the judiciary and caused public question of criminal justice. From the perspective of the formation of wrong cases, a lot of wrong cases belong to controversial cases in the beginning, but due to improper handling, they eventually become wrong cases. As in the Zhao Zuohai Case³, In the investigation stage, the police did not trace the weapon or determine whether the injuries caused by the weapon are consistent with the body's scars. They were unable to determine the identity of the deceased after four DNA tests. The police transferred the case to Shangqiu City Procuratorial organs twice, but it was returned because of "unclear facts and insufficient evidence" and they called for "supplementary investigations". When cleaning cases of extended detention, Shangqiu Municipal Political and Legal Committee convened a meeting on the case for many times to discuss this case. The Procuratorate subsequently proposed that: when the police transferred the case file to the prosecution, they needed to provide identification of DNA. Since there was no result for the DNA identification, prosecutors finally gave up this doubt and prosecuted the case. From the view of the court, from the indictment on November 11, 2002 to the judgment on December 5 that year, the case was heard in the court only for more than 20 days. The court completely agreed to the prosecutor's opinion, and the prosecutor's opinion is actually the opinion of the police department. In the court hearing, Zhao Zuohai and his defense lawyer denied the murder. However, the court held that, Zhao Zuohai had made nine murder records at the investigation stage, so his denial of the killing at the court was not credible. Thus, Zhao Zuohai Case lost the last chance for error correction. On the other hand, people's concerns and expectations of justice have been increased. In the most recent period, terrorist crime, a serious threat to the safety of people and property safety and social order, rises. The relevant fabricated, deliberately spread false terrorist information crime shows a clear upward trend. "The ruthlessness of crime" phenomenon has intensified. Cases such as murder of the whole family, explosion arson have become more often (Ji, Lü, & Ji, 2013, pp.71-72). Whether the criminal behavior has been promptly punished and whether the case has got a

³ *The Apology from the Secretary of Shangqiu Politics and Law Committee and Compensation Program to Zhao Zuohai Starts*. Retrieved from <http://news.qq.com/a/20100512/000143.htm>, last accessed on July 10, 2014.

fair trial has become important considerations for people to measure the level of justice and social governance. General Secretary Xi Jinping has put forward that “we should try to make people feel judicial fairness and justice in each case.” This is a positive response and solemn commitment to people’s expectation of further judicial impartiality and openness. However, in criminal cases, especially in controversial cases, whether we can correctly identify the facts and accurately apply the law is the key to establishing the judicial authority. Thus, fine study of controversial cases has great practical significance for changing the status of criminal justice in China, reducing miscarriages of justice and increasing public satisfaction with the administration of justice

2. THE CHARACTERISTICS AND ELEMENTS OF CONTROVERSIAL CASES

As the object of the study, controversial cases have some corresponding essential characteristics on; as a research method, they must meet certain formal requirements.

2.1 Characteristics

Looking from the cases in recent years, there are many criminal cases which have caused more attention from the public. In Hubei Deng Yujiao Intentional Injury Case, the focus of the debate is whether her actions constitute self-defense. In Liaoning Xia Junfeng Intentional Homicide, the focus of the debate is whether his acts are self-defense; in the Guangzhou, Xinkuaibao Reporter Chen Case, the focus of the debate is whether a reporter’s inappropriate remarks published due to a professional conduct could constitute damage business reputation crime; in the case that a female singer Wu claimed to “bomb the Construction Committee” in her Weibo and then was in criminal detention, the focus of the debate is whether the threat in remarks published online constitutes a crime. All these cases relate to the appropriate application of the criminal law.

By sorting out controversial cases, the author finds that these cases have the following four characteristics: (a) Typicality: Although the philosopher Leibniz once asserted that: “There is no two identical leaves in the world,” yet any controversial case, just like other ordinary cases, necessarily has a different degree of commonality. Due to the “extreme” of the findings of fact or law application in these controversial cases, disputes arise. Controversy is an external attribute of such cases and typicality is the essential attribute of such cases. We need to clarify that the representative sample of a case in the case study should not be confused with a representative sample of the survey. Since case studies do not require the case has a “general representative”, but a “representation type”; therefore, the sample logical in the case study differs markedly from the survey sample logic

(Wang, 2007). (b) Novelty: Many controversial cases are innovations in the *modus operandi* and the objects of the crime. For example, the traditional crime of theft means the theft of real property of others, but with the development of the Internet, there has been virtual property, so theft cases of emerging virtual property, they would be controversial cases. (c) Difficulty: Controversial cases arise controversy and that is because of the difficulty in fact finding and application of law. They are usually plausible and difficult to define. For example, the crime of damage to business reputation requires fabricating and spreading falsehoods, damaging the business reputation and product reputation of others and causing heavy losses to the interests of others. The perpetrator used hearsay and published false news without investigation and that violates the company's business reputation. Whether it is a crime needs further study. (d) Extrapolation. Because controversial cases are typical, namely controversial cases have some issues of "extreme" and fully embody the characteristics and attributes of certain criminal law problem; therefore, controversial cases belong to individual cases from the surface, but they represent a group of cases similar in content and form. Conclusions from controversial cases are extrapolative and they can be referred in dealing with cases with similar facts or of similar legal problem. The solution of controversial cases means the proper handling of a number of similar cases. They make up for the deficiency of statutory law.

Considering from the above four characteristics, we can find that the Xu Ting Case occurred in 2008 is a typical controversial case: from the typical aspect, Xu Ting Case involves not only the interpretation of the crime of fraud, embezzlement and theft in the criminal law, but also the grasp of the basic principle of consistency in the crime and the responsibility in the criminal law and the criminal policy of combining punishment with leniency. In terms of novelty, problems as whether the "machine" can be deceived in credit card fraud and the nature of automated teller machines have a very strong attribution of the times. In terms of difficulty, on the case that Xu Ting took advantage of the fault of ATM to withdraw over a hundred thousand of cash, the general public and experts and scholars are very controversial on whether it constitutes a crime and it constitutes what crime, which fully reflects the difficulty of the case. In an extrapolative regard, the Xu Ting Case has not only solved the problem of factual findings and legal application in cases of crimes against property in the criminal law, but also make a more typical interpretation of how to embody the combination of punishment with leniency through legal punishment sentencing in criminal cases.

2.2 Formal Elements

The importance of controversial cases as a study method is that after the case is resolved it will form an extrapolated conclusion; therefore, controversial cases need to meet certain formal requirements. In terms of formal requirement of controversial cases, their controversy should be different with a simple hot highly controversial

case. Their extrapolation should be different from effective criminal judgments which have not been formatted and do not have the extrapolation. Controversial cases' formal elements need to meet certain logic specification, namely criminal judgment syllogism. The process of studies on controversial cases is actually the process of applying formal logic syllogism: first, determine the facts of the case (determine the minor premise), then look for the applicable laws and regulations (determine major premise), and finally through the comparison between the finding facts and legal norms, draw the corresponding penalties result. Accordingly, controversial cases should include at least the following four elements in their forms: (a) the facts of the case: the facts of the case are the basis for the study of controversial cases. The biggest difference between controversial cases and judicial interpretation in the form is that: The former is always based on specific facts to expand, and then discuss around specific facts, and ultimately come to the conclusion the judgment and form the abstract case gist; the latter completely lacks the thinking process described above and there is only an abstract interpretation of results there (Lin, 2013). It should be noted that the facts of controversial cases are not a statement of the whole case, but rather facts reflecting the characteristics of the case and they can fully reflect the typicality, novelty, difficulty and extrapolation of the case. Facts of the case should also include the judgment process of controversial cases. (b) The relevant legal provisions: Specifically enumerating the relevant applicable legal provisions is the requirement of one of the basic principles of criminal law - the principle of legality. "Legal provisions are the object of the judicial determination of law. Under the guidance of the principle of legality, the law requires clarity." (Chen, 2006, p.19) The determination of the crime and the determination of the sentence determined by law are the premise to appropriately solve controversial cases. Explicitly listing the relevant applicable legal provisions and legal provisions which generate controversy is the premise to extrapolate controversial cases. (c) The judgment reasoning: Judgment reasoning is the key to extrapolate controversial cases. Judgment reasoning first needs to sort out the controversial issues, including the determination of facts and legal application; followed by judgment reason (theoretical analysis), in which we need to make a clarification of the controversial issues summarized before and may also make a statement on the handling of cases similar to the controversial case. "To explore the case is not only to pursue the abstract judgment reasoning. Discussion of the case facts themselves and exploration of the association with previous cases is extremely important." (Fujikura, Tsuyoshi, Takahashi, & Higuchi, 2005, p.1) Handling and studies of controversial cases cannot be confined in isolation to solve the case. It should be based on the "typical representative" to combine with law, doctrine and precedents to make a judgment and with the full reasoning to extrapolate it to have certain impact on future cases. (d) The conclusion of the case: the conclusion of the case includes the results of the convictions and the sentencing

outcome. The conclusion of the case is not only the logical destination of the settlement of controversial cases, but also the logical starting point to study and criticize controversial cases. Therefore, the conclusion of the case must include the conclusions of the controversial issues, otherwise this controversial case does not really get properly resolved, nor its conclusion can be extrapolated.

3. THE NECESSITY TO STUDY CONTROVERSIAL CASES

3.1 Judicial Practice Requires Studies of Controversial Case

Controversial cases occur in reality. When they occur, no matter what the situation is, the judiciary has to give a conclusion. Before presenting the conclusion, the judiciary needs to carefully study the case to give relatively reasonable and justice judicial conclusion enabling the public to accept. If they do not take good care of controversial cases and hasty conclusions are given, this is bound to cause public discontent and damage the credibility of justice. If controversial cases are properly processed and be extrapolated, they can make up for the insufficiency of enactment. Common law countries to implement legal precedent system. Legal precedent is the product of “judge-made law” and its importance goes without saying. In civil law where Case Law is not implemented,

there is not any imposed provision of the judge to accept the bound of the superior court. However, the actual situation is different. In today’s practice, a judgment of the French Supreme Court and the German Federal Supreme Court, like a judgment of Britain or the United States Court of Appeals, is expected to be followed at the lower court...it is rare and is not representative for judges to publicly turn away from this judgment. (Zweigert & Klotz, 2003p.382)

There is no established legal precedent system in China, but it does not mean that legal cases do not have the space to play a role. In July, September and November of 2010, the Supreme People’s Procuratorate, the Ministry of Public Security and the Supreme People’s Court have issued normative documents of the relevant case guidance system to formally establish case guidance system.⁴ Studies of controversial cases can be a source of important cases in the case guidance system. Therefore, for the judiciary, controversial cases are both opportunities and challenges. It should be noted that the judiciary here not only refers to courts and procuratorates and the status of public security organs should be given a high degree of attention. Their conclusion of whether to start a case will have a direct impact on the development process of controversial cases.

⁴ As of July 2014, the Supreme People’s Court issued a total of six batches of 26 guiding cases, in which there were six criminal cases, accounting for 23.1% of the total guiding cases; the Supreme People’s Procuratorate issued a total of four batches of 16 guiding cases.

3.2 Development of the Criminal Theory Requires Studies of Controversial Cases

The emergence of any theory must be closely integrated with practice. Practice promotes the development of theory; theory, in turn, guides practice. In the field of criminal justice, it is criminal cases that promote the development of criminal theory; criminal theory, in turn, guides the dealing with criminal cases. Legislators in civil law usually pull out the common problems of various types of crimes to form the Criminal Code mode of “general provisions + sub-provisions”. This legislative mode, on the one hand, has simplicity; on the other hand, unavoidably it is abstract (Lin, 2006, p.6). Recalling the development of criminal law theory, there are numerous examples in which practice has promoted the development of theory. With the crime, there comes the theory of criminal law; with specific criminal behavior, there comes the study of the specific charges; with cases in which the perpetrator turned himself in, there comes the theory of turning oneself in; with the self-defense cases, there comes the self-defense theory; with cases in which the parties have intentionally self-trapped state of mental disorders and use such a state to commit a crime to evade criminal sanctions, there comes the cause-free action theory; with the Addicted Horse Case in the German Empire in 1897, there comes the formal establishment of the anticipated possibility theory. Thus, studies of controversial cases are of great significance for the development of the theory of criminal law.

3.3 Full Demonstration of Equity and Justice of Criminal Law Requires Studies of Controversial Cases

“In the Crime Legalism, legal precedents in statute law countries are concretized criminal law. Written criminal law is abstracted precedents.” Ignoring precedent, “causes not fully vision subjectively and objectively it is to abandon a part of the whole criminal law.” (Cai, 1947/2000) The spirit of equity and justice of criminal law needs to be reflected fully in cases. In judicial practice, the majority of criminal cases do not involve controversial issues and the handling of these cases can fully reflect the spirit of equity and justice of criminal law. However, controversial cases belong to difficult cases and in practice it is prone to the phenomenon of “different sentences to the same case and different interpretations of the same law.” In addition, people are high concerned about controversial cases. If we do not pay attention to the study of controversial cases, we may give wrong or unreasonable conclusions. Then it is difficult to demonstrate the spirit of equity and justice of criminal law and sometimes it is even contrary to the spirit of equity and justice, thereby affecting the implementation and authority of the criminal law and having a negative impact on the credibility of the judiciary.

3.4 It Is Conducive to Resolving Petition Conflicts Involving Law and Litigation

Currently, problems of petitions involving law and litigation remain serious. According to statistics, in 2012 the national court system received a total of 601,000 petitions from the masses.⁵ In those petition cases involving law and litigation, many are controversial criminal cases. If the judiciary blindly avoids the conflict, just receiving the case but not closing the case, it will make problems protracted. Because there is no clear, persuasive, convincing conclusion in the end, they will submit another petition again, which potentially increases social conflicts. To screen and select controversial cases from petitions involving law and litigation and to strengthen the research and interpretation of such cases will no doubt be of significance to defuse conflicts in petitions involving law and litigation.

3.5 It Is in Line With the Requirements of Inductive Method and Is Conducive to the Innovation of the Criminal Law and the Theory

Induction is a logic method to deduce general principles from individual facts. Inductive method has great creativity, because it can infer the unknown from the known and infer general conclusions from individual knowledge. It can not only summarize and explain social facts of life, but also expand knowledge results and form new general principles. Its conclusions are often beyond the scope of its premise. In the study process of criminal law and theory, deductive method is more conducive to systematic thinking and able to provide logical proof for a number of criminal law theories. However, it should be considered that inductive method may be more conducive to innovation and development of criminal law theory (Zhang, 2006, p.115). Studies of controversial cases proceed from specific cases to study existing problems, find solutions to problems, sum up the rule of similar problems and then develop a new theory to promote the development of criminal law and its theory. In real life controversial cases are emerging. This feature determines that criminal law and its theory also continue to advance. The driving force is the studies of controversial case and the study results.

4. THE SPECIFIC APPROACH TO STUDYING CONTROVERSIAL CASES

4.1 To Establish the Recognition System of Controversial Cases

Controversial cases require standardized recognition system to narrow the scope of cases, reduce the waste of judicial resources and at the same time limit the

⁵ Excerpt from the *2013 Work Report of Supreme People's Court*.

randomness of judicial officers' judicial activities as well as the randomness of relevant parties' demands. There are two sources of controversial cases in judicial practice. One is the cases in which the judiciary officers have some doubts about the application of the criminal law upon examination. The other is the cases in which the judiciary does not believe the application of the criminal law is controversial while the relevant parties or other persons propose reasonable suspicion about the application of the criminal law. What is considered as a controversial criminal case? According to the judicial practice, the author proposes the following situations: (a) there is a controversy about guilt or innocence in a case; (b) there is a controversy about this crime or that crime in a case; (c) there are other applicable laws and regulations such as administrative law and civil law in a case; (d) there is no controversy about the nature of the case, but there are controversy about some specific circumstances, such as turning oneself in and rendering meritorious service. There are controversies about the application of criminal law considering all these circumstances and they may have some impact on sentencing. If a case belongs to any of the above case situations and there is evidence of it, it should be treated as a controversial case. The author believes that, to expand the recognition scope of controversial cases is conducive to protect the legitimate rights and interests of citizens and is also in favor of the realization of justice and the studies of controversial cases.

4.2 To Establish the Research Institution of Controversial Cases

When a controversial case happens, we should think about how to resolve the controversial case. The author believes that we can set up a research institution to complete the following work: (a) it should be determined that whether a case is controversial, and then the relevant organs should internally fully study the case to provide basic conclusions and fully explain their rationale and justification; (b) a special department should be in charge of collecting different opinions and justifications on the controversial case from the relevant parties and other people (including scholars, lawyers and other citizens, etc.); (c) the superior department of the organ which has identified the controversial case provides final conclusions combining the preceding two opinions; (d) If the superior department finds it difficult to recognize the case, they can consult their superiors or reorganize evidence to provide the final conclusions; (e) For those who do not perform the research institution or who perform the research institution formally, severe punishment should be applied.

4.3 To Establish the Conclusion Release System of Controversial Cases

Controversial cases belong to difficult cases. The judiciary at any level cannot guarantee the correctness of the conclusions; however, one of the values of the law

is to maintain social order. Even if there are problems, we must give a relatively reasonable, justice and clear conclusion, and the conclusion must be made public to inform the public the final conclusion of the case. After the public learns that conclusion, even if some people do not agree, they are already clear about the conclusion and are sure that such behavior may or may not be acceptable in the future living and working and thereby to establish a good social order. Making the conclusions of controversial cases public can resolve social conflicts and maintain the credibility of the judiciary. When the judiciary makes the conclusion of controversial cases public, even if the relevant parties do not accept the conclusion, they can be sure that the judiciary has already conducted a series of investigation and research and it is responsible. The publication of the conclusion also means that the conclusion of similar cases in the future will be the same, and thus they will be able to voluntarily accept the conclusion, so to resolve the conflict between the relevant parties and the judiciary and safeguard judicial authority and credibility.

4.4 To Establish a Joint Database to Ensure Conclusion Effectiveness of the Case

In China, there is no clear hierarchy relationship among the public security system, the procuratorial system and the court system. In judicial practice, the phenomenon of buck-passing often occurs. To ensure the unity and authority of the conclusion of controversial cases, the author suggests that the public security system, the procuratorial system and the court system may jointly establish an online publishing platform for conclusion of controversial cases. The level of the platform can rise to the central judicial authorities. For example, the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security may jointly establish a publishing platform. To release the conclusion of controversial cases is binding to the three systems. Meanwhile, the three systems should arrange for people to review the conclusion before making it public to prevent the emergence of conflicting conclusions. For cases where conflicting conclusions emerge, they should re-investigate and re-justify to ensure the unity of the conclusion. In terms of the validity of the conclusion of controversial cases, the author thinks that the timely validity of the conclusion is not retroactive. It only applies to similar cases after the conclusion is made public. In terms of the specific application of the conclusion, the author believes that the conclusion made in controversial cases should serve as an important reference for all aspects of the criminal justice process. In controversial cases, the process of abstract norms and specific conclusions is greatly simplified. As long as the judge is sure that there are similarities between the facts of a pending case and a controversial case, he can refer to the judgment of the controversial case. This means that the law application process of the judges can be simplified, which is particularly reflected in the looking for big premise, the connection between the big and small premise and justification obligations of the judge (Wang, 2012). Because

China is not a Case Law country, we cannot directly apply a case as the basis of a criminal judicial act. However, the legal provisions and applicable reasons cited in the case conclusion can be a basis for case processing.

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