Front. Law China 2007, 2(2): 281–296
DOI 10.1007/s11463-007-0013-1

RESEARCH ARTICLE

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Criminal trial from a crime control perspective —mode, function and judge's attitude

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Abstract Such ideas as upholding the advantages and merits of ex officio doctrine, gradually borrowing the fair factors of the adversary system, embodying a new-style concept of crime control and establishing the safeguarding rules and principles of the basic procedure for minimum justice criteria are macroscopical themes to which we must stick in the course of criminal trial. The effectiveness of a particular function in criminal trial in faith results from the choice of "degree" in the respect of crime control. The attitude of a criminal judge directly or otherwise exercises an influence on the trial of a case, and may even be decisive on some occasions. The concept of crime control is a barometer of the judge's attitude in criminal trial, and an indispensable component of the judge's rational attitude as well.

Keywords crime control, criminal trial's mode, criminal trial's function, judge's attitude

From the point of view of crime control, if criminal trial lays no emphasis on finding out major facts through trial, but instead tries to settle disputes solely on the basis of passive and negative judgment, paying no attention to the fact of criminals breaking social order, it is rather suspected whether such disputes can actually be finally resolved; on the contrary, crime may become out of control and a variety of disputes may occur one way or another, which would reduce the effectiveness of criminal trial and provide no way for the ultimate settlement of disputes. This, of course, involves the "degree" of crime control in criminal trial. Therefore, it is necessary to set certain principles for criminal trial, which entrust

Received January 16, 2007

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scientific features[1] (Chen, 1997) to modern criminal trial and help to find a proper stepping stone between trial and judgment. In the situation where the accused is confirmed to be guilty after trial, whether or not the court imposes a penalty on the accused, and if so, what kind of penalty is imposed and the graveness of that penalty, all relate to the fulfillment of state power in punishment and the recovery of broken social order; this cannot be realized by passive judgment. In the process of the measurement of a penalty, the concept of crime control occurs in the mind of judges and constitutes a staff gauge for criminal trial.

1 Modern criminal trial modes and crime control

Western scholars usually refer to the criminal trial modes of two modern legal systems as "ex officio trial mode" (inquisitional procedure) and "adversary trial mode" (confrontational procedure). There are two criteria to differentiate the above two modes. One is the legal traditions which are vital to the formation of these two modes and are closely related to the unique legal cultures in the history of their formation and evolution; the other is their different methods and access to discovering the truth. The former mode relies on the court-oriented official judicial investigation; the latter on litigant-oriented court confrontation (Miller, 1990).

1.1 Ex Officio Trial Mode and Crime Control

The ex officio doctrine trial mode is regarded as a type of judicial quasi-scientific search for the truth, which centers on finding out the truth of a case according to the ex officio of justice. In the nations of the Continental Law System, such as France and Germany, people generally show their trust, understanding and respect to the court's function in controlling judicial procedure and maintaining justice. However, this suggests the concept that judicial procedure is chiefly a tool or means for the court to find out the truth and pass fair judgment. In other words, every principle and formality which constitutes ex officio judicial procedure aims to ensure the judge's fulfillment of substantive justice. A judge is entitled to actively take any necessary measures and procedures to reach the truth (Chen, 1997). Nowadays, this procedural concept of regarding law as an absolute tool has lost its impact in the nations of the Continental Law System. Yet the court reserves the traditionally powerful right of judicial inquiry, since people still hold

[1]According to Professor Chen Ruihua, These characters including peace and no self-help, passivism and responsion, many participation, concentricity, lastness and authority, no-negotiable, etc.

great trust in the court as a judicial body to fairly enforce the law and maintain human rights.

From the point of view of crime control, the excessive concerns about the substantive reality and the stiff crackdown on crime are not the focus of crime control in criminal trial, but a rather passive choice of method. Frequent severe crackdowns on crime can lead to many problems in crime control, because the crime rate is increasing on the one hand and courts are producing more criminals by guilty judgment on the other hand. It appears efficient for a court to punish a crime; yet an improper punishment could bring about a new wave of increase in crime. Due to improper procedure and lack of opportunity for just trial, the accused prefers not to accept the result of the conviction actively, which reduces the effectiveness of the penal sanction. Meanwhile, the public is becoming less tolerant of crime and the number of complaints about the court's ability and methods in crime control is increasing; at the same time, the danger of out-of-control crimes is on the rise. Owing to the fact that the ex officio trial of the Continental Law System seeks the substantive reality at any cost, along with the values advocating state or social interests, and lopsided, defective trial objectives, and the fact of worsening human rights violation and judicial procedure infringement, the overall effect on crime control is not as expected; this incurs intense social complaints and brings about moderate reform in trial mode. For instance, values of due procedure in trial are increasingly obvious. Therefore, the ability to control crime by means of criminal trial is improving, too.

1.2 Adversary trial mode and crime control

The adversary trial mode, focusing on the procedure of alternate inquiry, is a competition between the accuser and the defender, with the judge as an arbitrator to ensure fair play. It stresses the balance of power between prosecution and defense. Trial activities mainly involve evidence production by the accuser and refutation by the defender. The judge, as a comparatively negative arbitrator, still has considerable authority and controlling power in court trial activities. The prosecutor and defense attorney take a leading role in evidence production and investigation of facts. The basic concept of adversary trial mode includes two aspects. One is the sporting theory of justice; the other is the procedural concept of justice based on upholding the individual subject principle to protect individual rights, restrict state power and maintain due procedure.

Under the adversary trial mode, the truth of a criminal case should not be actively explored solely by the judge, but should be discovered by the parties to whose interests the judgment of the case is directly related, through confrontation from the point of view of the individual. Embodying the principles of fairness,

justice and openness, and seeking to protect human rights, adversary trial negatively investigates a given crime. From the standpoint of crime control, "The intention of designing this system is to fairly prosecute people, not to control the spread of crime" (Jestor, 1982). Although it has a huge effect in maintaining basic human dignity and legal rights, the adversary trial mode is not quite effective in fighting crime. In order to put an end to a passive state of crime control, the adversary trial mode shifts its focus to an ex officio mode and borrows some rules from it about crime control. For instance, the UK has established the system of prosecutor prosecution in order to enhance the prosecution of criminals. Furthermore, the USA has revised the exclusive theory of unlawful evidence and added exceptional regulations to fulfill the goal of crime control.

1.3 Mixed trial mode and crime control

Since the 1940s, with the end of World War II, the criminal trial modes of the two major law systems in Western countries have merged somewhat more forcefully, especially the nations of the Continental Law System, which have, one after another, adopted the Anglo-American adversary trial mode or certain facets of it; this constitutes the mainstream tendency of fusion in the criminal trial modes of the two major law systems. The representative country in this aspect is Japan.

After a series of reforms in Japan, the positive leading role of the judge (chief judge) has been weakened to a large degree so that, in fact, he cannot "take any proof means and measures to find out the facts" as had been the case previously. However, the judge still plays a leading role in evidence investigation in order to determine facts by enlarging the scope of evidence investigation himself; the offering of witnesses, written evidence or material evidence, and also actively questioning of the witnesses and expert examiners all indicate that Japan still keeps certain features of traditional ex officio mode.

Japan did not adopt from the UK or USA the jury trial system, which internally restricts the establishment of confrontational procedure. Furthermore, the pure adversary mode with its inherent basic concepts is based on the legal traditions of the Anglo-American law system, while in Japan the legal traditions of the Continental Law System still have significant effects, imposing powerful rejection on every different procedural mode and system design.

In my opinion, the mixed trial mode in Japan, which combines due procedure with the substantive reality to maintain human rights and punish crimes and is characterized by restraining and complementing the adversary trial mode with ex officio trial mode, and vise versa, is out of consideration for the "degree" of crime control in the process of criminal trial. The combination of a restrained and complemented adversary system and the restrained and complemented ex officio doctrine, which reflects the increasingly perfected values embodied in this mode, avoids the fraud of stressing the protection of human rights while neglecting the

crime penalty due to the excessive factors of the adversary system, and the defect of stressing the crime penalty while violating citizens' lawful rights due to the excessive factors of ex officio. In fact, it conforms to the feature of law as the carrier of various values. Yet just as the old Chinese saying goes, "You can only take either one or the other," in practice this balance written on paper is always offset, though Japanese criminal procedure law, which does not want to miss any valuable content, prescribes a variety of saving clauses (Xu, 1990). After all, no ideal can be completely realized in its high-sounding political system. Therefore, we should be aware that the seemingly perfect Japanese-style trial mode cannot be fully realized in judicial practice though people endorse it as a symbol of multi-values and that of proceeding civilization and development trend (Gu, 1998).

1.4 China's criminal trial mode and crime control

In my opinion, thanks to its features of convenience, promptness and feasiblecess, China's previous ex officio trial mode played an important role in penalties on crime, anti-crime operations and social order maintenance, while gaining unanimous approval from both theoretical circles and judicial practice organizations, as well as recognition from the general public. However, because of the popular concept of procedure-as-tool doctrine and the idea that all crimes must be punished, it did bring about many problems in the protection of human rights and to some degree even abetted violations of human rights by judicial bodies; therefore, a myriad of unjust, framed and wrong cases arose. As a matter of fact, in spite of the strict anti-crime operations, the rapid growth in the crime rate was not brought under control. On the contrary, statistics indicate that criminal cases had been noticeably increasing for years in China and no one knew for sure where the "summit" was. As a result, crime control as well as the protection of human rights incurred more and more censure from the public. China's present criminal trial mode is based mainly on ex officio doctrine and partly on an adversary system. This mode, on one hand, affirms the positive significance of ex officio mode in crime penalty on which more efforts should be put by means of criminal trial according to China's crime situation. On the other hand, it introduces more adversary factors than before in trial procedure, which is clear proof of a better understanding about China's national conditions in respect of politics, economy, culture and legal traditions, as well as a leap in the concept that crime penalty does not equate with crime control and the protection of human rights is also a major segment of crime control. The establishment of a criminal trial mode has to conform to the tide of human legal civilization and advancement and to appropriately reflect the pluralistic conditions of citizens' civil rights and their interests in a nation's political and economic system. When rights conflict with interests, legislation should first ensure the protection of peoples' due rights

by means of a just procedure, and then call for judges to make fair judgment to achieve the goal of crime control. The increase of adversary factors in China's criminal trial mode resulted from the emphasis on such fields as citizens' political and economic life; it entrusts people with appropriate rights in legislation. There is the need not only for the protection of human rights, but also for a modern concept of crime control.

From the point of view of crime control, no distinction is made between the good and the bad, or whether greater weight is put on adversary factors or ex officio factors in a criminal trial mode. Whether a mode is suitable or not mainly lies in whether it generally conforms to the national conditions in politics, economy and the legal system, and in particular, to whether the present crime rate is on the rise, whether the degree of crime control is appropriate, and whether the protection of human rights is in line with international standards and developing trends, etc. Not only does the practice of copying indiscriminately the Western adversary trial mode not conform to China's national conditions—because Chinese law "does not develop and cannot possibly develop under the circumstances of absolute insulation from legal heritages and existing foreign cultures… No matter what we use for reference, either historical or foreign experience, it must proceed from our actual conditions and fit into our national conditions" (Chen, 1992)—but also the adversary criminal trial mode does not conform to China's present actual need for crime control.

In brief, with the increasing graveness of crimes after the introduction of reform and opening-up policy, China's criminal policy focusing on stiff crime penalty has been confronted with unprecedented challenges. The concept of temper justice with mercy has gradually gained recognition from the government, scholars and the public. The sense of the protection of human rights in criminal procedure is increasing to a certain degree. The concept of crime control is being updated. Under such circumstances, the reform of the criminal trial mode is also an evolutionary process. Such concepts as upholding the advantages and merits of ex officio doctrine, gradually borrowing the fair factors of the adversary system, embodying new-style approaches of crime control, and establishing the safeguarding rules and principles of basic procedure for minimum justice criteria (Chen, 1997)[2], are themes to which we must stick in the course of criminal trial. It is not a fundamental problem as to which mode the design of procedure should refer to in detail. Otherwise, a criminal trial mode would not fit into China's national conditions and therefore fail to realize the goals of crime control and protect human rights, even if it is perfectly designed in theory and legislation. What is the use of such a mode?

[2] The lowest standard of fair trial in International conventions including: Universal Declaration of Human Rights, International Covenant of Civil and Political Rights, European Convention on Mutual Assistance in Criminal Matters, Convencion Americana sobre arecho Humanos.

2 Functions of criminal trial and criminal control

Systematic functions, that is, their effectiveness or effect, are the inborn abilities of physical systems that are presented while acting on an outside environment. They have two features. First, systematic functions are exhibited only when the system and environment act on each other or in the course of their systematic movements; second, systematic functions involve objectives; whether among living things or non-living things, movements of the physical system, and changes of its functions will necessarily have something as its objective (Cyclopedia on Natural Dialectic, 1994).

2.1 Functions of criminal trial and general comments on criminal control

Every function of criminal trial is related to crime control. In other words, the strength of any function in criminal trials is the result of a certain degree of criminal control. For example, the function of criminal trial in solving social disputes is the most important one. In the trials, evidence is collected, cases investigated, and criminal laws properly applied, in order to decide criminal responsibility, punish criminals, solve disputes between accusers and the accused, guarantee a reasonable pattern of social interests and social order, enable those with rights—especially the harmed—to go to court in a good mood, and to be devoted to social production. On many occasions, criminal control can also teach criminals to be aware of their behavioral mistakes, and to finally correct their wrongdoings and to encourage them to be devoted to being useful members of society. This prevents the two sides from harming their ability to become useful members of society, and further prevents more serious consequences that may be caused by aggravated contradictions. All the above are important contents of criminal control. We should also be aware that any kind of trial means has its own limitations and is not easy to achieve the best result with the formality, procedure and antagonism of criminal trial. Modern society also requires intermediation, arbitration, compromise on both sides, administrative rules, and so forth.

Another example is the guarantee function. It does not seem to have anything to do with criminal control, but this is far from the truth. Criminal trial surely involves guaranteeing the accuser's legal status together with his related rights, otherwise criminal trials only serve as the tools of punishing criminals, which is not what the scientific perspective of criminal control requires. The reason for this is that sacrificing its guarantee function can help solve disputes logically. If criminal trials employed the measures of deterrence and intimidation like the feudal systems, then it would appear to achieve the effects of social control, but in fact would only aggravate the existing social upheaval, and our efforts to

criminal control would amount to nothing. This could place society in a serious dilemma, as every historic revolution was, more or less, related to the nation's excessive power and minimized rights on the citizens' part. Under those circumstances, not only criminal control, but also social control would break up. Therefore, we should avoid looking down upon this function, and should lay greater emphasis on it. The laws should clearly outline all kinds of procedural rights so as to at least reach the lowest international standard of justice, and guarantee the full play of these legal rights in the litigious process. However, we cannot overemphasize this function. The trial procedure should not pay too much attention to the application of these rights so as not to make trials ineffective and tedious, or even help real criminals escape from the court without being punished. Those frustrated trials will cause crime to become out of control.

2.2 Functions of criminal trials and criminal control

The functions of criminal trials are decided by trial patterns as well as many other factors, including the level of social and economic development, level of social civilization, quality of legal officials, citizenship, legal culture, the crime rate, and so on. Among these, the crime rate directly determines national, social and personal requirements on criminal trials, and thus becomes an important factor influencing the functions of criminal trials, as it directly affects the nation's criminal policies. Generally speaking, the more serious the crime and the more obvious the increase in the crime rate, then the stronger the necessity to maintain the present economic and political systems and ordinary living conditions. This then will result in the nation, society and the masses requiring criminal trials to play a more important role in criminal control, and the national criminal policies will be improved so that the functions of criminal trials are affected. Even without any change in the national criminal policy, the changes in criminal conditions and numbers will influence legal officials' viewpoints on criminal control and thus influence criminal trials. At the same time, the rising number of cases will increase the work load of the police, procurators and judges and overuse personnel, financial and material resources. It is more likely to influence the application of procedural laws in trials and the protection of suspects, the accused and other participants. Specifically speaking, the functions of criminal trials lie in the following aspects.

2.2.1 Function in realizing the legal justice

Criminal trials are a symbol and embodiment of justice in law-controlled societies, so to realize justice in criminal affairs is a social rather than a legal function; it is of high importance and a basic requirement of a law-controlled

society. As far as criminal control is concerned, every just trial will result in the increase of criminal control. Only the just criminal sentences achieved through just procedure can calm the people involved and help avoid appeals and prevent further disputes. By this, authoritative justice is ensured, judicial authority is established, and a law-controlled society will be developed through a good social system based on criminal control. On the other hand, every unjust trial will cause crime to become more difficult to control, because the unjust sentence on either side involved in a case can stimulate an increase in crime as the light sentences of serious crimes will encourage criminals to commit more crimes, while the heavy sentences of less serious crimes will also encourage criminals to commit crimes. For example, if embezzling one million dollars leads to the death penalty, then why not embezzle ten million? In particular, unfair sentences will, in no way, convince the parties involved of anything, except to appeal or become disappointed in the legal system. What is worse, unfair sentencing will result in many wrong, artificial, and misjudged cases. Due to the modern criminal trial saving procedures, we often see repeated appeals, which in turn lower the legal system's efficiency and wastes limited legal resources. In the above occasions, criminal control is obviously weakened. Therefore, legal justice supports the realization of criminal control.

2.2.2 The function of increasing legal efficiency

By design, criminal trial seeks only justice, and does not take into consideration the number of cases tried during a certain period of time. At most it may put forward principles to deal with cases within a particular time frame or to avoid any unreasonable delay. "This design encounters great challenges in practice; that is, people do not put up with the unlimited postponement of a case being tried and at the same time throwing an urgent case away" (Ma, 2003). Some scholars in Taiwan, China, hold that there are big differences between the pursuit of rights in lawsuits and the exercise of rights through deals in society, because besides the accuser and the accused in a case, thousands of people are using or are going to use the court. Therefore, the court cannot spend too much energy, time or finances on any single case so as to hinder other cases from entering the legal process (Qiu, 1992). That is to say, in trials, every delayed case means we, while in pursuit of legal justice, unconsciously are trapped in another occasion of legal injustice.

As for criminal control, generally speaking, the higher the legal efficiency in criminal trials and the more channels of solving disputes, the stronger criminal control will be; the lower the efficiency and the more delayed the cases, the weaker criminal control will be. In other words, legal efficiency can almost be regarded as the synonym of criminal control in criminal trials. However, we should be aware that justice is superior to efficiency, and legal justice is the

substance and soul of criminal control in trials. If legal justice is lost, the basis of criminal control collapses and the so-called legal efficiency will be a temporary conception. In the long term, owing to the existence of legal saving procedures, the repetition of trials is hard to avoid and some disputes cannot be completely resolved, which leads to the decline of legal saving procedures, and also to more serious problems in criminal control. As for our country's current conditions, various measures need to be taken and the realization of legal justice by means of procedure design needs to be ensured. For instance, criminal trials should offer basic procedures and methods and space to the concept of evidence-trial; the principle of open trials to guarantee the greatest degree of fairness under the regulation of laws needs to be stuck to; the neutrality of judges needs to be secured, with the precondition of the exercise of independent duties and just judicature; under the supervision of the public and in open courts, criminal trials should ensure conditions for equal status for both sides involved. Following these preconditions, criminal trials should further increase efficiency to reach the aim of criminal control. For example, firmly obeying legal deadlines and paying more attention to the principle of punctuality in trials needs to be followed; the principles of evidence presentation need to be established in order to increase the efficiency of the court; a process for self-defense transactions should be adopted; finally, the provision for simplified trials instead of routine ones needs to be made, or the range of simplified trials needs to be widened.

2.2.3 Function of ensuring legal democracy

From the point of view of criminal control, citizen participation can ease the workload of judges and save legal expenses and thus indirectly improve legal efficiency. The jury are chosen from the general public, so the weak and civil rights can be protected and the appearance of indifference psychology and bureaucracy be avoided. By participating in criminal trials, the jury can learn more about legal operations and their belief in the law can be maintained, which in turn benefits the maintenance of social order and the construction of a law-controlled country. Because the jury members are chosen from among the general public, the accused will more likely agree to the outcome of the case; this further helps criminals accept their sentences, and further causes criminals to be remolded in order that they return to society. Therefore, the objective aim of criminal control is reached. Furthermore, also related to this is that after the participation in court trials as visitors, common citizens can learn the law in a direct and active manner, or they can even express their different or opposing views on cases, which is also a representation of legal democracy. This is of great use in criminal control, as in the open court, the accusers and the accused will dispute face to face over the facts, evidence and criminal responsibilities of the

accused, which itself is spreading legal knowledge and awareness. Those who put forward their opinions about cases will consciously or unconsciously express their views on law, and then become participants in criminal control and contribute to it materially or immaterially to a greater or lesser extent.

3 The attitude of the criminal judge and criminal control

3.1 Judge who steps down the altar of "law embodiment"

It would seem that any criminal trial is made in the name of the court, which is necessary, because the judge (including the jury, as it will hereinafter) should not be left to confront society alone. At the same time, it is reasonable that the judge can take refuge behind criminal procedure and find protection in a law-governed country, even though in actuality all criminal trials are made by a specific judge after he reflects on the facts, evidence of the case and relevant law. According to the legal theory, both the judge and the court are the practitioners of national trial. What makes the judge different from the court is that while the court is the abstract practitioner, the judge is the specific practitioner. As a representative symbol, the court is the emblem of a grand state, the solemn courtroom and a top-level state institution with a board reading "such-and-such People's Court" hanging outside; therefore, the general public are impressed that courts together make a nationalized institute. In contrast to this, judges are particular individuals with great differences in stature, appearance, accent, character, personal experience, and academic backgrounds. In spite of this, the wording in legal provisions like "adjudicate" and "judge" still indicates that judges are abstract rather than living arbiters who step into reality from behind paper on the occasion of managing a specific case. The provisions concerning judges and their behavior in law are virtually the least important requirements for judges. Only the judge who adjudicates an entire case according to law and makes fair trial can be a qualified judge. It is certainly not easy to do so.

However, criminal cases vary greatly and have complicated suit procedures; violent argument occurs between the plaintiff and defendant, and most of the legal provisions are fundamental and subject to revision as time passes by. Therefore, the needs of the country and society cannot solely be met by a "qualified judge" who always abides by legal provisions instead of adjudicating with legal spirit. In a highly legalized society more requirements are put forward to the judge. People look forward to seeing more outstanding judges who can deal effectively with dissension, maintain social order, and realize the aim of criminal control. So, the judges who are "an embodiment of the law" are invited to step down from the altar and into real life and be examined again as common

men regarding their behavior and the result of their adjudication. Due to this, a judge becomes a living man who is bound by cognitive, emotional elements and values, instead of a "stone-made Buddha" who is ice-faced and ignorant of the things happening in the world and the increase in crime. It is believed that the trial a judge makes is determined by the case itself and the legal provisions, which may not be the case though it sounds reasonable. "Traditional criminal lawsuit mode believes that fact is the only variable that is of legal significance to trial by the criminal judge, in which law is invariable; the criminal judge's personality has no effect in trial. However, this mode does not conform to the fact of the situation" (Schneider, 1987) because on the one hand while the facts of the case do exist, it is hard to say whether the facts the judge believes to be true do exist; on the other hand, the legal provisions themselves and people's understanding of it are not invariable, and there is a large gap between what the legal provisions are and what they should be; furthermore, the judge's understanding of the same piece of legal provision may vary greatly when he manages similar cases in different periods. Thus the judge's attitude or personality is a key element which is sometimes even a decisive element affecting criminal trial. Of course, legal provisions are the mainstay of a judge's attitude on the grounds that "there is no other senior staff except the law" (Collected Edition of Karl Marx and Friedrich Engels, 1979). In addition, the concept of crime control is the weather glass of a judge's attitude in criminal trial because on most occasions "crime commitment is an action which is harmful to rights and benefits as well as to morality and emotion fully recognized by the public" (Garofalo, 1914). Moreover, the crime situation such as the nature, degree, and scale of crime during a certain time-span in a given country is what a criminal judge cares about as a man in society. In this case, a complex emotional response from a criminal judge could more easily be induced by criminal cases than other types of cases, which further affects his attitude in criminal trial (Adler, 1927). Criminal judges attempt to influence the features and patterns of crime control through their criminal trials which they think meaningful at least in judicatory control. As they themselves say, this is the last line of defense.

3.2 The attitude of criminal judges and legal provisions

Criminal judges should consciously respect and abide by legal provisions in criminal trial. In most cases, a criminal judge would put the defendants into prison, and even sentence them to the death penalty on occasion. Considering that the criminals are also human beings, the judge will feel tense and uneasy as a result of the pity for his fellow men if he does not make trials based on the law. However, the situation would be different if the judge made his trial abiding by the law because he believes that his trial stands for justice, or at least the law, and

that accordingly, the criminals deserve punishment. However, "the law is not only a set of provisions, but also a living man who puts separate rights and obligations, judges criminals, executes the law and covenants; a process which assigns the right and duty according to which a judge resolves disputes and creates cooperative relationships." In this process, "what a judge brings…is not only his colorful personal experience and political preference, but his special cultural ability, that is, his legal knowledge and experience as well" (Berman, 1974), which implies that judicatory trial is not simply a mechanical rule. "It would be wrong if it is taken for granted that the judge always tries to seek the "sole" right answer instead of making trials under the influence of his personal values and preference" (Posner, 1990). That is to say, legal provisions work through the judge—the living man whose personal knowledge, experience, values, preference, emotions, and so on, which influence the result of trial. It is, of course, natural that the influence of personal elements the judge has on trial usually works comprehensively. This comparatively permanent psychological trend in the mind of the judge is the judge's attitude. Modern psychology argues that attitude is composed of three basic elements—the belief in the object, feelings of like or dislike to the object, and preparatory elements in behavior based on belief, cognition, emotion and psychological trend. There is no exception for the attitude of a judge. The judge's attitude is based on cognitive belief, values and emotional elements. It is stable once it takes shape. Although people's cognitive beliefs and values vary as time passes by and emotional elements vary according to different people, the strict qualifications and selection manner for judges make it possible that the values and emotional elements of most of judges have already come into a comparatively stable period when they hold the position as judge; even if there is any change, it is usually progressive. The stability of a judge's attitude implies that he always makes his trial in relation to a particular cognitive value. To put it another way, a judge presupposes his attitude to any specific case; he adopts any applied rule with critical eyes and gives up or selects the rule in terms of his attitude. Although the responsibility of the position requires that a judge should not do his work with evident attitude (and there are regulations to exclude judges with evident attitude), the existence of value cognition and emotion determines that a judge has attitude, and that he is a judge with his own individual attitude.

The trial made by a criminal judge cannot ignore legal provisions because the trial has to be made under these provisions; and trial cannot surpass attitude because it is adjudicated with attitude. It can be said that criminal trial will not merely result from the application of provisions, and it is not fully determined by the attitude of a judge; it is the co-working and coupling of both provisions and attitude orientations. There is a relationship of mutual existence, prompts, regulations and restrictions between legal provisions and the judge's attitude. While provisions offer a proper form for the release and representation of attitude,

truth and reasonableness are gained from the attitude; at the same time, provisions restrict attitude and attitude clears up provisions (Zeng, 2003).

3.3 Influence of the judge's attitude on trial

The attitude of a criminal judge influences the trial of the case directly or indirectly; sometimes it is even decisive. Like everybody else, the judge has his own likes and dislikes, and his values which take shape together with the integration of personal growth environment, education and experience. It is impossible to remove personal influence regardless of who the judge is or what materials are chosen. "The result will not be better even if others are appointed to execute the judicatory right, although it will influence the trial on the whole with each specific case" (Liu and Xie, 2000). Ludwig and Bendix were the first in their work to express such ideas as legal trial as unreasonable, that there is ambiguities among facts and legal provisions, the comparative guarantee the law offers, the judge as loyal to the constitution with democratic spirit, "class judicature," the judge as separated from reality, and so on. For them, trial is not an objective fact, but the mental creation of the judge. The trial of a judge is influenced by his sex, age, life experience, sympathy or disgust with the case and defendant, sense of inferiority or arrogance and personal financial profit, and so on. The trial does not only result from the mere logical process, but is also influenced by unreasonable prejudice from the judge.

The writer thinks that criminal judges who can judge according to a rational thinking process are rare. In fact, they mainly make their trials unconsciously and intuitively in a habitual way in the judicatory field. They analyze the possible constitution of the facts in the case and choose the trial which they think "right" in the course of habitual or even skilled consideration. Criminal judges, as a group, achieve fairly stable, dependable and practical adjudicating experience, but they achieve it by choosing from the explanation of the information and facts in the case. Criminal judges tend to view the information of the case based on former viewpoints which are rooted in their personal attitudes. Meanwhile, they make efforts to filter the information which is against the image of criminals they have had in their minds for an extended period of time and make trial with reference to the information they have received, expecting the outcome to result in some public benefit or they make choices from among a variety of public benefits which are in conflict with each other. This manner of making trials is usually not comprehensive, and the opportunity to ascertain the influence of a criminal trial is limited as well, especially in our country—a country of written law—which is similar to a country of civil law. Generally speaking, the accurate judgment made by a judge will be affected by the limitation of the knowledge the judge himself has in certain fields, or the diversity in the accuracy of the information which is offered to explain the problems in the course of defense on

either one side of or between the litigants. Moreover, a criminal judge will pursue the influence made by "common social ideas" in the process of trial. However, in a pluralized society, since people's values are in the progress of sudden changes, it is usually hard to decide whether there is, in fact, a common idea on a certain issue. Furthermore, a judge's values will inevitably lead to a fixed mode of thinking when he tries to understand what the common social idea is. Even if it is beyond doubt that the criminal judge is honest, selfless, intelligent and strict with himself, the right to adjudge freely in criminal trial will be unconsciously influenced by personal elements. The determination of punishment is a good example. Different results of adjudication in similar cases will be allowed so long as the result does not go beyond the acceptable sphere.

In a reasonable judge's attitude, the concept of crime control is of great importance; this includes two correlated aspects. In the first place, the content of crime control contained in the judge's attitude affects the action and result of criminal trials as well. As a matter of fact, most of the criminal judges expect too much concerning the effect of penalties on crime control. There is a universal opinion among judges that once criminals are punished and put into prison or even sentenced to death, the social order which was destroyed by crime can be recovered, and that fairness and justice can be realized and the victims can be calmed down. They even believe that criminal punishment itself is crime control since they hold this right and only this right. Thereby they increasingly believe that all the defendants standing before them are guilty and deserve to be punished; consequently, the penalty is heavier than before, which results from the fact that the higher frequency in crime makes the judge wonder whether or not it is caused by their light penalty trial. This is certainly prejudice because crime control does not only mean punishment, but non-punishment as well; for example, non-criminalization and non-penalization for minor criminal acts, innocence trial in the cases of ambiguity over a clear verdict or not having full evidence, intermediation of private prosecution in great numbers, and so on. In addition, now that crime control is a matter of choice of "degree", there must be a certain amount of content concerning the protection of human rights. Achieving the goal of "crime control" at the expense of the protection of human rights has been rejected by the public, and even worse been the synonym of a runaway increase in crime. What is more important is that human beings are urged to choose judicatory control of crime which is, after all, subject to social control. The reason for the occurrence of crime mainly lies in social elements and has nothing to do with the degree of penalty. Accordingly, penalty does not play such an important role in crime control as judges think. Therefore, setting up the value of crime control in the judge's attitude is one of the symbols to judge whether the attitude is reasonable or not. Secondly, a criminal judge affects crime control, especially the developmental orientation of judicatory control of crime, through the act and result of judging. In turn, the objective effect of crime control will affect the

attitude of the judge. A criminal judge completes his adjudicating act in a dynamic system of crime control, and his trial is an important aspect in crime control. In the current social background, penalty, though not playing a critical role in crime control, is an indispensable condition. Each trial made by the judge not only determines the criminal responsibility of the defendant, but also appeases the victims, eliminates social conflicts, removes dissention, and maintains social order. All these, as a matter of course, are the content of crime control, and determine the direction of the future development of judicatory control of crime. In turn, criminal judges may mislead crime control if they cannot give full play to the above functions in their trials or if they develop unreasonable attitudes, which will result in the out-of-control crime. In that case, this is not only a failure in criminal trial, but more possibly an omen of the collapse of the country and its social construction.

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