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Jiahong He

Methodology of Judicial Proof and Presumption

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We cannot see history, and some truths might be lost forever. We can only try to recover them with pieces of evidence. How to obtain and use the evidence constitutes procedural justice, without which the people will lose confidence in social justice.

Jiahong He, *China Daily*, 30/04/2015

*To my lovely granddaughter,
Luo Yiran*

Preface

The basic function of judicial proof is to revisit the past, and hopefully to reconstruct the past event with the materials of evidence. It is just like to see something through a glass darkly, as said by Saint Paul. In my life, I have had some opportunities to revisit the past, in one way or the other.

I was born in Beijing more than 60 years ago. During the Culture Revolution, in 1969, I went to a farm in Heilongjiang Province, the very northeastern part of China. In November 1977, after working on the farm for 8 years, I returned to Beijing, became a law student 2 years later, and then a law professor. For many years, I tried to forget the hard life on the farm, but my effort could only push the memory deeper and deeper. When I passed the age of 50, the desire to revisit the farm became stronger and stronger, even in my dreams.

...As I stand between the two tall, familiar mud buildings, the Great Barracks and the Great Mess, I feel a rare excitement. But it is shaded with anxiety and unease.

The old company commander seems happy to see me. He calls his company of young people together to listen to me give a talk in the Great Barracks. This is unexpected, but I have given many lectures during my years in education so I am never troubled by nerves. I stand by the door of the barracks building and tell them of my life in the company, of the struggles and triumphs of those years. I watch the young people who are sitting on heated kang beds that line the room. As I grow more animated, their strange faces remain stony. I find it hard to stifle my alarm and, flustered, struggle to find the right words. I start to gibber. When I finally finish speaking there is a smattering of applause. The commander seems unhappy too: he barely speaks to me before leaving. I am so used to enthusiastic acclaim from my audiences that I don't know what to make of this cold reception.

Disheartened, I leave the barracks and wander aimlessly along the muddy paths. Before I know it, the sky has turned dark. Hungry, I head for the Great Mess to buy something to eat, but I have no mess tin and the staff will not lend me a bowl and chopsticks. Everyone stares at me coldly. Their smiles seem to mock me. I have to escape.

I go looking for the commander but he is nowhere to be found. The faint yellow light from the windows of the mud buildings makes me realize how lonely and wild this mountain is. A shiver runs up my spine. I stumble towards the dark-tiled building where I had once lived and push open the door. In the dim light I can make out that the two kang beds are covered with sleeping people. The spot I had once slept in is free, but there is no bedding. I ask my roommates if I can sleep here, and where I might find bedding. They are lying on their stomachs, wrapped in their bedrolls, and look at me without speaking, a strange smile on their faces. Embarrassed, I have no choice but to lie down fully clothed on the cold, hard kang, and suffer until dawn...

This was a dream. More precisely, it was a recurring dream I had. Although the details differed each time, the basic content and tone were the same. I don't know why I had this dream so often, nor did I know how to interpret it psychologically or psychoanalytically, but it had indeed long been a part of my life—something I could neither end nor forget. Eventually I really did revisit the farm. This time, it was no dream.

On the morning of June 10, 2005, straight after giving a lecture at the Law School of Heilongjiang University in Harbin, the capital of the province, I went on a “trip of remembrance”, accompanied by some professors of the university. We drove through many towns—Anda, Mingshui, Baiquan, Kedong, and Bei'an—before reaching the famous dormant volcano range of Wudalianchi at 4 o'clock in the afternoon. After we checked in to our hotel, a female guide drove us to see Old Black, the most well-known volcano in the whole range. We passed the meandering Stone River and the magnificent Stone Lake, and then abandoned the car and continued on foot, climbing to the peak of Old Black. I was filled with both terror and joy. Terror at the majesty of nature: the summit and the gigantic, awe-inspiring crater at my feet. And joy at its beauty: the blue skies, the towering volcanoes spread across open countryside, and the interconnected lakes.

The farm where I had once been an educated youth was not far away, but during all my years here I had only heard talk of the five lakes of Wudalianchi, and had never been able to visit them. Tourism was an incredibly decadent concept in those years of the Cultural Revolution when, as our generation like to say, our “passion first burned bright then died away”.

Back in Wudalianchi after dark, the town's streets were still lively and it was not until after midnight that the noise dwindled to just the occasional bark of a dog. I lay on my bed, physically exhausted but unable to sleep. The events of 30 years ago replayed in my mind like a film.

...At 1 o'clock in the morning of 7th October, 1969, we pull into Zhaoguang railway station after more than thirty hours of travel. We push our way noisily through the dimly lit station square, bags on our backs and in our hands, like crowds fleeing calamity. Eventually we are divided up into military trucks. My truck leaves the station, leaves Zhaoguang, and heads into the pitch-black wilderness. The headlights illuminate a small patch of road ahead; each frequent jolt of the vehicle shoots beams of light deep into the night sky. By the light of the stars we can make out the contours of the dark mountains that surround us. If we pass the lights

of a house, there is a clamor from the back of the truck. After bumping along the uneven road for around an hour, we finally come to a stop next to two mud buildings. The company commander comes to meet us and tells us we will spend the rest of the night in the storeroom next to the mess hall. There is a kang bed in the storeroom. The jars by the wall stink of old pickled vegetables. Nineteen of us, boys and girls, squeeze together in this tiny building to spend the first night of our new lives as educated youths. I can clearly hear stifled sobs after the lights are extinguished...

I finally drifted off to sleep as the sky was turning hazy. When I woke up, a trickle of sunlight had made its way through a gap in the curtains. I looked at my watch: not yet 6 o'clock. After a quick wash, I went downstairs and into the square outside the hotel. It was the day of the Dragon Boat Festival and also of Wudalianchi's annual Water Festival, so the early morning streets were already bustling with pedestrians and cars. I went around the back of the hotel and stood near a small tree. It was calm here. I gazed at the distant volcanoes. Breathing the clean air in deeply, I took in the scenery around me, but my mind had already flown to my second hometown, the place I had been parted from for 28 years. I had offered up 8 years of my youth in the Eighteenth Company of the Seventh Regiment, First Division, Heilongjiang Production and Construction Corps for the Shenyang Military Region.

After breakfast, we bypassed the city of Bei'an and took a smooth, broad, asphalt highway to Zhaoguang, where Zhaoguang Farm was headquartered. As soon as we drove into town, my heart started to beat more quickly, and I felt a nameless anxiety. I scanned both sides of the road, but not a single home or shop was like the Zhaoguang of my memory. Finally, I recognized the now somewhat rundown old building of the regimental hospital, the familiar train station next to a large chimney, and a few buildings and streets that I thought I had seen before. We paused briefly at the intersection with the "Second Battalion" railroad, where we were joined by comrades from the local law court and Procuratorate, and then headed straight for our old Battalion Headquarters.

The roads around here were all made of sand. Because it had recently rained heavily, the surface was covered in deep ruts, and many sections were still muddy. The road brought back strong memories. Back then, I had traveled along this road countless times, sometimes on foot, sometimes in a cart or tractor—occasionally I even drove the tractor myself. We jokingly called these basic tracks our asphalt-lined freeways, though in fact as soon as the wind blew, they became a sea of dust and the slightest drop of rain turned them into a mud pit. The landscape surrounding us was also very familiar. Fields stretched out to the horizon; long unbroken stretches of forest covered the land in an enchanting green, buildings dotted the hillsides, and the clear rippling valley pools added vitality to the panorama. It made me realize for the first time how beautiful the Great Northern Wilderness was—especially the distant blue skies with their white clouds. Perhaps, this proves the truth of the saying that "distance creates beauty"—distance is not merely a scientific measure but also a psychological one. My life now was far removed from my past life here.

I was still in a reverie as car drew to a halt. A stocky, gray-haired old man was stood next to the lead car of our group, talking to the people inside. He came toward our car and I stared at him. It was Chen Wang, the man who used to drive the tractor years ago. I jumped out of the car and went to greet him. We embraced tightly, both excited. It turned out that one of my hosts here had told Chen Wang that I was coming back, so he had been waiting at the roadside since early that morning. I visited his home (he had long since been transferred from the company to the battalion), then I went to the Battalion Headquarters to meet the current leader. After that Chen Wang and I drove to the last stop of my trip: the Eighteenth Company farm where I had once lived and worked.

The farmland was as large as ever, the road as muddy, the sun-baked buildings, and the stick fence had not changed. But the storeroom where we had spent our first night and the great canteen where we ate every day no longer existed, and neither did the Model Theater and Great Hall where we had so often sung and held meetings. The well-house where we learned to draw water by pulley had gone. The field where our tractor and our tools were kept had changed beyond all recognition. Only the maintenance room still stood there forlornly. The Great Hall that we had built from stone and tile ourselves to use as a social club had long since been divided into offices. The dark-tiled building used by the educated youths and the small school behind it had both become homes for workers. What had originally been the basketball court was now divided into vegetable plots for each household. However, the rows of small poplars we had planted, running along the road by the fields, had grown into large trees, testimony to the sweat and ideals of a generation of educated youths.

As soon as the old workers heard that one of the educated youths had come back, they rushed out of their homes. They surrounded me in the yard, pulling at my hands in excitement, telling me simply how much it meant that one of us had come back, and gushing with excitement and pride at having seen me on the television. They showed me around, discussing people and events of the past. It was a real wrench to learn that so many people with whom I had worked back then had died. Then, a middle-aged woman came over and asked me if I recognized her. When I couldn't, everyone laughed and told me she was the daughter of the former canteen team leader, Old Zhang. I had spent 2 years as Mess Officer, responsible for the canteen work. Eventually, I recognized the little girl from all those years ago and sighed with regret. That's when it hit me: we had been young people in the prime of life back then, and now we were all over fifty.

Reluctant to say goodbye again so soon, all the old workers from the Eighteenth came back with us to the Battalion Headquarters. I had always believed that the Company and Battalion Headquarters were a long way apart. But in a four-wheel drive Toyota, the distance was nothing. Back at headquarters, we ate a typical northeastern meal at the restaurant run by Chen Wang's son. Chen Wang very seldom drank alcohol. He was 65 years old now and still barely touched a drop, but today he was so happy he drank until he was red in the face. During the course of the lavish meal, he would often take my hand to tell me of things that had happened back then, and of more recent events. After the meal, we had to hurry

back to Harbin. Chen Wang stood next to the car, his eyes moist, and held my hand. My eyes also brimmed with tears. I saw the vague past.

In the summer of 2006, I went back to Heilongjiang again. I was invited to give a lecture to the judges, prosecutors, and police officials in Harbin. Serving as Deputy Director-General of Department of Dereliction of Duties and Infringements of Human Rights, the Supreme People's Procuratorate, I lead a group of researchers to the City of Yichun for empirical study of wrongful convictions. We wanted to revisit the original scene of the wrongful conviction case of Shi Dongyu and to learn more details about it. Shi Dongyu was sentenced to death with 2-year suspension in a murder case in Heilongjiang in 1989 and exonerated in 1995. I will discuss the case in details in Chap. 6.

Criminal cases are events of the past, so judicial personnel cannot see the facts directly and must use the indirect means of reviewing a range of evidence to do so. In other words, they must reconstruct the case with evidence. Consequently, to judicial personnel, the facts of a case are like a flower seen in a mirror. The flower may, indeed, objectively exist, but what the judges see is the image formed by reflection or refraction in the mirror. And that mirror has been broken and shattered during the course of the case, so if they wish to establish the facts of the case, they must first collect all these shattered, scattered fragments and put the mirror together again before they can attempt to understand the flower. In many cases, however, the fragments collected are incomplete or eroded, and the judges can see only the image of the flower, which in some instances is so opaque as to be distorted. That is to say, if there is no evidence, there is no way to know the facts of the case, and a fact established through evidence did not necessarily happen in reality.

Theoretically speaking, in judicial proof of a criminal case, people may see three "facts" through evidence. Fact I is the fact originally happened in the reality. Fact II is the fact basically established by the prosecution with the evidence. Fact III is the fact finally found by the court with the evidence. We may put the three facts into two categories. Fact I is an objective fact, while Fact II and III are subjective facts. Since Fact III has the legal effect on the parties of the case, it may also be named as a "legal fact".

In a given case, the three facts may be same or similar and may be dissimilar or even very different. For example, in the case of Shi Dongyu, Fact II established by the People's Procuratorate, as well as Fact III found by the Intermediate People's Court in 1991, was that Shi Dongyu was the murderer. However, with some new evidence appeared in 1994, the fact was reconstructed as that the true perpetrator in the case was not Shi Dongyu. This should be the objective fact in the case, i.e., Fact I. So, Fact II and III in the original trial of the case were very different from Fact I.

In criminal trials, the judicial personnel should try their best to make Fact III as identical to Fact I. However, the evidence may not always be sufficient, and the facts may not always be clear. With the shortage of evidence in a case, the judicial personnel could only see the case "through a glass darkly". This is by no means an easy job. This is a challenge to all judges in judicial proof. And this is the main theme for this book.

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In recent years, Prof. He has been invited to give lectures on the issues of criminal evidence, wrongful convictions, judicial reform, and anti-corruption to judges, prosecutors, lawyers, and police officers all over China. He has also been invited to give lectures around the world, in places such as New York University, Columbia University, and Cincinnati University in USA; University of Sussex, University of London (SOAS), Kingston University, Leeds University, and Chatham House in UK; the Seventh University of Paris, Aix-Marseille University, and the Third University of Montpellier in France; Max-Planck Institute for Foreign and International Criminal Law, and Korber Forum in Germany; Australian National University, La Trobe University, and Curtin University in Australia; Nagoya University in Japan; the University of Bergen in Norway; and the National University of Mexico and University of Chiawawa in Mexico.

Abbreviations

APL	Administrative Procedure Law
CiPL	Civil Procedure Law
CPC	Communist Party of China
CPCL	Common Provisions of Civil Law
CPL	Criminal Procedure Law
DIC	Discipline Inspection Commission (CPC)
GPCL	General Provisions of Civil Law
IICPL	Interpretation of the Supreme People’s Court concerning the Implementation of the Criminal Procedure Law of People’s Republic of China
MOJ	Ministry of Justice
MPS	Ministry of Public Security
NPC	National People’s Congress
PEAP	Provisions on Several Issues Concerning Evidence in Administrative Procedure
PECP	Provisions on Several Issues Concerning Evidence in Civil Procedure
PEDPC	Provisions on Several Issues Concerning Assessment and Judgment of Evidence in Death Penalty Cases
PEIE	Provisions on Several Issues Concerning Exclusion of Illegal Evidence in Criminal Cases
PRC	People’s Republic of China
PSB	Public Security Bureau
SPC	Supreme People’s Court
SPP	Supreme People’s Procuratorate