ON FREEDOM AND REGULARITY OF JUDICIAL PROOF

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ABSTRACT

Free proof and regulated proof are two basic modes of judicial proof. The system of 'legal proof' established in France in the 16th century is a classical model of regulated proof. The system of 'free proof with intimate conviction' established in France in the 19th century is a classical model of free proof. The force of seeking truth pushes the judicial proof towards the free mode, while the force of seeking fairness, predictability, and authority pushes the judicial proof towards the regulated mode. The interaction of these two driving forces causes the 'reversal development' of the judicial proof. In the long history of China, the judicial proof was in the scope of free proof. In responding to the need for judicial reform, Chinese system of judicial proof has been going from free proof to regulated proof, and is a mixture of the two modes now. The new technologies of internet, big data and artificial intelligence have provided great support for the development towards the regulated proof.

KEYWORDS: regularity, judicial proof, free proof, regulated proof, intimate conviction

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I. INTRODUCTION

In October 2014, the Forth Plenum of Communist Party of China (CPC) Central Committee made a decision to promote the rule of law in China. The decision called for the reform of criminal procedure system towards the mode of trial-centeredness. The Chinese criminal procedure mode had the feature of investigation-centeredness. On 10 April 2015, Chinese central leadership published the Implementation Plan to Cary out the Decision of the Forth Plenum of the Party's 18th Congress to Deeper the Reform of Judicial System and the Social System. One priority of the Plan was to promote the reform of criminal procedure system from the mode of investigation-centeredness towards the mode of trial-centeredness.[1]

Since then, Chinese courts started the experimental reform to promote the trial-centeredness of the criminal proceedings, and to establish a more centralized judicial system. In December 2014, three trans-district courts of intellectual property (IP) were established in Beijing, Shanghai, and Guangzhou. In 2015 and 2016, six circuit courts of the Supreme People's Court (SPC) were established in Shenzhen, Shenyang, Nanjing, Zhengzhou, Chongqing, and Xian. In 2017 and 2018, three internet courts were established in Hangzhou, Beijing, and Guangzhou.

The internet court is an online branch of the court system that will deal with disputes related to the internet, such as the internet copyright disputes, the internet contract disputes, the internet torts, and the disputes relating to online service and online transactions. Aside from the special focus on internet-related cases, the greatest breakthrough in judicial work is the innovative working mechanism based on new technologies. In a sense, the internet courts are products of the technologies of internet, big data and artificial intelligence (AI). In those internet courts, almost all the steps of litigation, including filing a case, submitting materials, and assessing evidence, can be done online. Even the hearing of testimonies, the questioning of witnesses, and the arguments of the parties can be held online via video calls. Therefore, judges of the internet courts are required to have a good knowledge of the internet, though they can get some help from an intelligent system and even an AI judge.

The Beijing Internet Court was established in September 2018. There were five judges in the Court, and they concluded the trials in 25,333 cases in the first year. In the online litigation service center of the Court, there was an AI judge, who was claimed to be 'the first of its kind in the world'. The 'female' AI judge, based on intelligent synthesizing technologies of speech and image, would help the human judges to do some repetitive basic work, such as the litigation reception, case filing, and providing guidance for litigants to use the online litigation platform. The innovation has improved the quality and efficiency of the judicial work. [2]

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[1] In fact, this author had advocated for 'changing from an investigation-centered mentality to a trial-centered mentality' long before 2014. See HE Jiahong: An Outline for the Reform of the Criminal Evidence System in the People's Republic of China, *Journal of Chinese and Comparative Law* (Hong Kong), Volume 6, Number 1, 2003.

[2] Refer to Beijing Internet Court entry at *Baidu Encyclopedia*, https://baike.baidu.com/item/%E5%8C%97%E4%BA%AC%E4%BA%92%E8%81%94%E7%BD%91%E6%B3%95%E9%99%A2/22789000?fr=aladdin , visited on April 15, 2020.

The operation of the internet courts, especially the employment of the AI judge, requires the unified standards for procedures and evidence, which are made possible by the new technologies. In the last years, some Chinese courts have tried to establish a system of the 'evidence standard' with the technologies of AI and big data. In 2017, for example, the High People's Court of Shanghai established the AI Assistance Criminal Trial System, which had the functions of providing the guidance of evidence standard, assessing the legality of each piece of evidence, and assessing the reliability and value of different pieces of evidence. However, the experimental achievements have received both appreciations and criticism. Some scholar said that the system would not only promote the efficiency but improve the quality of judicial work, while some others worried about the reliability of the evidence standard and the negative effect on the discretion of judges in assessing and evaluating evidence, which would be important for keeping justice in individual cases.[3] Here the controversial use of the new technology of AI and big data in judicial work reflects an old question about the mode of judicial proof: the free proof vs the regulated proof, which is better?

II. THE TWO MODES OF JUDICIAL PROOF SYSTEM

Judicial proof can come in two modes, the free proof and the regulated proof. Free proof means that the proof is in no way limited by the legal rules, the judges may assess and evaluate evidence freely. Regulated proof, on the other hand, is regulated according to the rules of law, which must be followed by the judges when they assess and evaluate evidence. Each mode of judicial proof has its advantages and disadvantages, and the two replaces each other in the history of judicial proof.

The adjudication of disputes in human societies originated in the mode of free proof. Although there are not historical records that testify directly to this claim, people may so conclude based on the developments of human societies and other knowledge related to this point. The legal rules of judicial proof evolved into existence as the product of accumulated experience of judicial practice. In the early stage of human societies, no rules of evidence were used in resolving conflicts between litigants. The authority, generally the chiefs or elders of a tribe, would give their judgments based on the evidence submitted by the litigants, and on their own experience and conscience. Clearly, such trials fall within the scope of free proof.

As societies grew larger and more complex, conflicts between parties increased, and the cases grew more complex. The general level of human judgment and the use of evidence to ascertain the facts in a dispute or a case were quite low, which might have resulted in some wrongful verdicts. Then some litigants lost their respects for the authority of the chiefs or elders, expressing skepticism or even outright challenges to the judgment. Anyway, the judicial decisions need authority. When the human authority was insufficient to hold up the judgment, the authority of the gods came in, with the form of the 'trial by the God' or the 'trial by ordeal', such as the trial by water and the trial by fire,

[3] See PanYonglu: Analysis of the Pathway of AI into Judiciary, *Oriental Law*, No. 3, 2018; Zong Bo: Analysis of the Use of AI in Criminal Evidence, *Legal Science*, No. 1, 2019.

used in some European countries during the Middle Ages.[4] The laws of ancient India also provided for eight such methods, including trial by fire, trial by water, trial by scales, trial by poison, trial by holy water, trial by holy grains, trial by hot oil, and trial by the casting of lots.[5]

In ancient China, there were methods similar to the trial by ordeal, such as the 'trial by Sacred Goat' conducted by Gao Yao, who was the official in charge of law enforcement during the reign of the King Shun (about 2100 BC). In the trial of a difficult criminal case, Gao Yao would bring in the Sacred Goat to face the accused. If the Sacred Goat butted the accused with its horn, Gao Yao would make a judgment that the accused was guilty. If the Sacred Goat didi not ram the accused, Gao Yao would make a judgment that the accused was not guilty. Besides, some minority peoples in the south-west part of China used the trial by ordeal for a long time, even until the first half of the twentieth century. For example, the Tibetan people used the trial by hot oil, the Jingpo people used the trial by boiling water, and the Yi people used the trial by a hot ploughshare[6].

The trial by ordeal was not rational and scientific, but had a unified standard for assessing the evidence and finding the facts. The rules must be followed by all the judges, and judgment must be declared in accordance with preordained standards. In other words, the judges did not have any freedom or discretion in assessing and evaluating the evidence. With the standardized proceedings, the judicial proof turned from the free mode to the regulated mode. [7]

The trial by ordeal may seem suspicious, or even ridiculous, to the modern people, but it was effective in solving the disputes. In the benighted age, the authority was more important than the rationality for judicial decisions. In the trial by ordeal, the judge was not the fact finder, but the host of the arbitration ceremony, in which the fact in a dispute was revealed by the God. At the time, even a criminal litigation was seen as a dispute between private parties, and what judges needed most was the authority to decide the case. In other words, an authoritative judgment was more important than a rational one.

Once judicial trials were no longer seen as purely for dispute arbitration, but also as a tool for governing the society and suppressing the anti-social activities, the rulers of the country became dissatisfied with 'the will of the God', and the trial by ordeal was gradually abolished. For example, in the 'Old West Frisian Law' of the Germanic tribe lived on the coastal lowlands of the Netherlands in the 11th century, the litigants' testimonies with the oath before the God were admitted in the trials, but if both parties gave the same oaths before the God, the law did not defer to the trial by ordeal, but to the 'legal representation' and human investigation. This was a challenge to the authority of the God. With the growth of the government authority and the increase of the people's distrust of 'the will of the God', the trial by ordeal was gradually abated. Then the judicial proof returned to the mode of free proof.[8]

[4] See Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal*, translated by Xu Xin and others, Hangzhou: Zhejiang Rennin Publishing House, 2007, pp. 14-17. Also see Chen Shengqing, ed., *Legal History of Foreign Countries*, Beijing: Peking University Press, 1982, p. 17.
[5] See Chen Shengqing, ed., *Legal History of Foreign Countries*, Beijing: Peking University Press, 1982, pp. 31-32.
[6] See Xia Zhiqian, *Trial by the Gods*, Beijing: SDX Joint Publishing Company, 1990, pp.1-7, 44-47.
[7] See Chen Yiyun, ed. *The Study of Evidence*, Beijing: China Renmin University Press, 1991, pp.19-20.
[8] See William Andrew Noye: *Evidence: its History and Policies,"* Australia: Butterworths Pty Ltd, 1991, pp.8-10.

However, the nature of judicial decision making requires a system of regulated proof. First, finding the truth in judicial proceedings is not equivalent to finding the truth in other social activities. A judicial decision will directly effect the rights to life and property of the litigants, so the law must use scientific and rational rules to minimize individual bias and error in judicial proceedings. Secondly, the judiciary is a mechanism of human society by which conflicts are resolved, and a symbol for justice and fairness. In a good society, justice and fairness must be upheld by the rule of law. In responding to this requirement, the rules of evidence come into judicial practice in different ways in different countries. In France, the development was very revolutionary, from one extreme to the other. While in Britain, probably because English people did not like revolution as much as French people did, the development took an evolution way towards the regulated proof, with establishing rules of evidence, one by one, in case laws, such as the rule of hearsay evidence, the rule of document evidence, the rule of witness qualification, and the privilege against compulsory self-incrimination, etc. In order to illustrate the differences of the two modes of judicial proof, this author will take the French models for analysis.

III. THE CLASSICAL MODEL OF REGULATED PROOF

Between the 13th and 15th centuries, the system of judicial proof in continental Europe, of which the kingdom of France was a representative, had the feature of free proof. The judges enjoyed absolute freedom over the use of evidence in the trials. In other words, the judges could make their fact findings based on their individual knowledge, experience, interests, desires and aversions. Without the consistent rules and standards, different judges would often make different judgments in similar cases with similar facts. This disorder within the judicial activities increased the general disorder in the continental European countries. When the political authorities became more stable and unified, the rulers of the countries started to reform the judicial system, and in particular to regulate the use of evidence in criminal justice. Thus, the judicial proof once again began to trend from the free proof to the regulated proof.

In the 16th century, a model of 'legal proof' was first established in France, and then learned by other continental European countries. The system of legal proof predicated the weight for each type of evidence, and the judges must adhere strictly to the rules. They did not have freedom or discretion in assessing and evaluating evidence in criminal trials. The rules were: (1) a full proof should have a conviction, while no full proof should have no conviction; (2) the best full proof should include two reliable witnesses whose testimonies determined consistently and conclusively the guilt of the accused; (3) no matter how reliable, a single witness could only constitute one half of the proof; (4) the other half of the proof could be comprised of a confession by the accused, an official record, or a witness testimony, that corroborated the first half of the proof; (5) the testimony of a witness closely connected to the case only counted for one quarter of the proof, and its value further reduced by half when being impeached; (6) the addition of any two halves of the proof constituted a full proof, and the addition of any two quarters or four eighths of the proof constituted a

half proof. In sum, when the evidence added up to a full proof against the accused, the judge must issue a guilty verdict, and if the evidence did not so add up, the verdict must be not guilty.[9]

The system of legal proof is an extreme or classical form of the regulated proof. It is a product of the social culture of worshiping to authority and hierarchy in the continental European countries at the time. Today, it is very easy for people to notice the unscientific and irrational contents of the system. However, those rules about the weight of evidence are the summation of judicial experience at the time, and have a degree of scientific and rational basis. In other words, it has both merits and demerits for judicial proof.

The legal proof system has some advantages for judgment. First, the system introduces the concept of 'full proof', which also acts as the standard for establishing a guilty verdict in criminal cases. The particular wording of this standard may not have been satisfactorily clear, but a degree of certainty was achieved in combination with other rules, to be discussed presently. This system was also a basis for assigning weight of proof to each piece of evidence. Secondly, the rule stipulating that consistent testimonies from two reliable witnesses constituted a full proof. Experience tells us that a case narrative compiled from the direct perceptions of the facts of the case as delivered from two fair and upright witnesses can prove the veracity of this case narrative. Thus, this rule was in accordance with the general principle of judicial proof. Moreover, the system of legal proof also contains a rule stipulating that the testimony of just one reliable witness does not constitute a full proof. This rule may seem a little simplistic and mechanical, but determining guilt based on single evidence increases the possibility of wrongful conviction. During a period when judicial practices were less orderly, such a prudent regulation was understandable. Still another rule stipulates that witnesses with close connection to the case could supply testimony that would be taken at only half the strength of proof otherwise admitted. Should such evidence be effectively impeached in court by the accused, its strength would be halved yet again. Since evidence from one side is often impeached in court by the other side, and it is often crucial, in making a verdict, to judge the strength of proof of such evidence, this rule is perhaps the most important and of the most significance in real trials. This was remarkable, given the historical conditions. Finally, the system of legal proof makes clear the additional rules that assign strength of proof to individual items of evidence, and reaffirms the standard whereby a guilty verdict can be delivered. The above analysis shows us that the regulations in the system of legal proof enjoy a degree of scientific and rational basis, and some of these rules would still be useful to criminal justice today.

The legal proof system also has some disadvantages. First, the system for assessing the strength of proof to items of evidence is too inflexible and not dynamic enough. The judges evaluate the evidence by mechanical application of the predicated weight to each item of evidence. The verdict is then arrived at simply by summing up the weights. In this manner, complex problems are simplified, which in certain cases can lead to wrong or inappropriate verdicts. Secondly, the system of legal proof makes it easy to abuse the use of torture to obtain confessions. Under this system, because the confession of the accused accounts for half the proof, and the law does not regulate how

[9] See Chen Yiyun, ed., *The Study of Evidence*, Beijing: China Renmin University Press, 1991, pp.25-26.

such a confession is extracted by law officers, confessions obtained through torture were quite common. In fact, the laws of the times seemed to say to law enforcement officers: if you have half a proof currently in hand, torture can get you the other half in the form of a confession. The system thus gives a 'green light' to the use of torture to extract confessions.

IV. THE CLASSICAL MODEL OF FREE PROOF

After the 17th century, the Bourgeois revolution and the Enlightenment movement in continental Europe spurred new reforms in criminal justice. The system of legal proof faced challenges from humanism and rationalism, which attached great importance to the human rights and freedom, as well as individual knowledge and understanding. The fierce criticism focused on the use of torture to extract confessions under the system of legal proof, because, according to the rules, when the court had a good witness against the defendant, the confession would make up for a full proof. The criticism reached their climax around the time of the French Revolution, and in the end led to the reform of the legal proof system.

On 26th December 1790, Adrien Duport, jurist in the post-revolutionary Constituent Assembly, presented a reform proposal. He said that the application of the system of legal proof was preposterous, a threat to both the accused and to society at large. Only by giving the judges the authority to freely decide on the evidence would ensure the court had the best chance of finding the truth in the cases. On 18th January 1791, the Constituent Assembly passed Duport's proposal to establish the system of proof with intimate conviction. The proposal became a part of the criminal procedure law on 29th September of that year, and was later written into the 1808 French Criminal Code, the *Code d'instruction criminelle.*

The term 'proof with intimate conviction' means that the value of evidence would no longer be predicated as legal rules. Instead, the judges and jurors should assess and evaluate all items of evidence in a case according to their own conscience and the 'universal understanding' of judicial proof. The 1808 *Code d'instruction criminelle* gives specific provisions for the system of proof with intimate conviction. It takes the jurors as the fact finders, and requires the judge to issue the following information before the jury meets to deliberate the case:

> 'The law does not require the jury to give the reasoning they have taken to reach the verdict; the law does not provide any advance rules for deciding the sufficiency of evidence; but the law does require the jurors to focus, deep in their own conscience, on the impression formed by the evidence against and in favor of the accused. The law will not ask the jurors to get certain number of witnesses to prove the facts. The law will not ask the jurors to reach a full proof comprised of specific combination of evidence, from oral testimony to documents and more. The law, in fact, asks them just one question for their sole duty to answer: "Are you certain with intimate conviction?"'[10]

[10] See Chen Yiyun, ed., *The Study of Evidence*, Beijing: China Renmin University Press, 1991, pp.31-33; See Chen Shengqing, ed., *Legal History of Foreign Countries*, Beijing: Peking University Press, 1982, pp. 239-244.

Obviously, such a system of proof belongs to the category of the free proof. Therefore, the system is known as the 'free proof with intimate conviction'.

The free proof with intimate conviction has the virtue of flexibility and adaptability with regard to individual cases. Cases with complex circumstances could also involve many different types of evidence. The social environment was also changing all the time, so that when judicial authorities were using evidence to determine cases according to the way they saw fit, this helped them stick close to the circumstances of the case, and so uphold justice and fairness in the judiciary. However, the free proof with intimate conviction lacked a consistent standard for judgments, making it easy for the personal bias of the judicial officer to influence the assessment and evaluation of the evidence. To large degree, the free proof with intimate conviction depended on the professionalism and moral rigor of the individual judges, which yielded many opportunities for unscrupulous and arbitrary action on the judge's part. Such a system, in other words, was suited to countries in which the highest elites of legal experts served as judges.

Since the 19th century, the system of free proof with intimate conviction has been the basic model of judicial proof in the continental European countries. However, in late 20th century, the system had some changes towards the regulated proof in some countries like France and Germany. New rules were adopted to strengthen the regulation of judicial proof, including the exclusionary rule against hearsay evidence, and the exclusionary rule against illegally obtained evidence. With those rules, the judges could not enjoy the absolute freedom in assessing and evaluating evidence. It seemed that the European countries attempted to find a compromise between the two extreme models.

V. THE REVERSAL DEVELOPMENT OF JUDICIAL PROOF SYSTEM

Over the history of judicial proof in the continental Europe, the developments of judicial proof exhibit a pattern of upward-moving spiral with reversing the system last applied, passing from the original free proof to the regulated proof with the trial by ordeal and to the free proof again, and from the legal proof to the free proof with intimate conviction and to a compromise of the two models. On the surface, each 'reversal' appears to be a return to an earlier stage, but in actual substance, each reversal takes the judicial proof to a higher level, with something new for every so-called 'return'.

The primary goal of judicial proof is to find the truth in a case. Comparing the free proof with the regulated proof, which mode is better for accomplishing this goal? Generally speaking, the free proof is better for finding the facts, because the law does not limit judicial discretion, and so the judges can use a greater variety of evidence to discover the truth. The system of regulated proof, by contrast, restrains the discretion of the judges, and is in allegiance with the social policies and values, which may be an obstacle to fact finding in some cases. For example, the exclusionary rule against illegal evidence may prevent judges to use some truthful evidence to bring the facts to light. However, some rules of the regulated proof may help judges to ascertain the truth, and the exclusionary rule against hearsay is a good example.

One substantial difference between the two modes is the division of power between the legislation and the judiciary. The system of free proof gives all the power of evidence assessment and evaluation to the judges, while under the system of regulated proof, some part of the power is retained by the legislators. Therefore, the prerequisite for free proof is that the judges are qualified legal professionals with great moral rigor, knowledge, skills, and experience. While the regulated proof begins with a skeptical stance towards the judiciary, so the legislators must produce universally applicable rules for evidence assessment and evaluation. It is easy to see that the system of regulated proof is harder to construct than the system of free proof, because the scientific and rational rules for evidence assessment and evaluation are not easy to be found and formed, especially when the types of evidence have become more and more varied and diversified, including the new physical evidence and electronic evidence.

However, the judicial work needs the system of regulated proof, especially when judges or fact finders are not highly qualified legal professionals, such as lay judges and jurors. In this regard, the regulated proof has three advantages over the free proof. (1) The regulated proof is good for promoting judicial fairness. One of the basic demands of judicial fairness is that the similar cases be dealt with by the judiciary similarly. To make all equal in the eyes of the law, judges and jurors should assess and evaluate the evidence in accordance with the unified rules. (2) The regulated proof is good for promoting the predictability of the judgment. In a society under rule of law, the decision of the judiciary should be predictable. In other words, members of society should be able to predict judicial decisions and so arrange or constrain their own behaviors. When the rules of using evidence are clear and specific, the predictability of the judicial decision will be high. (3) The regulated proof is good for promoting the authority of the judiciary. It is easier for the judiciary to obtain the approval and consent in the society when finding facts and making judgment in a case according to the prescribed rules. Therefore, it will in turn raises the authority of the judiciary. In this regard, the system of regulated proof is better than the system of free proof. In order to gain social approval, of course, the rules must be scientific and rational.

In summary, the goals and regulations of judicial proceedings demand the regulated proof. Once humans can devise scientific and rational rules, they should not endow judges with the power of free proof. Here we see two forces pushing the development of the judicial proof, and these forces are in conflict to certain degree. The force of seeking truth pushes the judicial proof towards the free mode, while the force of seeking fairness, predictability, and authority pushes the judicial proof towards the regulated mode. It is the interaction of these two driving forces that causes the ‘reversal development’ of the judicial proof in its history. Although in the long term, the system of regulated proof may be the grand trend and the mainstream of the judicial proof, the systems in the world now are all mixtures of the two modes. In other words, according to my limited knowledge, there is no absolute free proof nor absolute regulated proof in the world. If we roughly put the legal systems of this world into two large groups, as the common law system represented by UK and USA, and the civil law system represented by France and Germany, we may say that the former is more like the

regulated proof, because there are more rules of evidence in those countries, while the latter is more like the free proof, because there are less rules of evidence in those countries.

VI. THE ROAD FROM FREE PROOF TO REGULATED PROOF IN CHINA

In the thousand years of history, the mode of judicial proof in China was basically the system of free proof. Judges would make free judgments based entirely on their own experience and knowledge, and the specific circumstances of the case. As experience accumulated, however, the laws in some dynasties began to restrict the discretion of judges. In the Tang Dynasty (618-907 AD), for example, the laws provided for a rule of 'making a conviction on a group of witnesses'. [11]Here a 'group' means three or more witnesses, so this rule requires the identical testimonies of three or more witnesses for conviction. In the Qing Dynasty (1644-1911 AD), the laws provided for a rule of 'convictions must be made on confessions', or 'no confession, no conviction'.[12] Those rules resemble the rules of legal proof in France to certain degree. In general, however, the judges in feudal China enjoyed the freedom in assessing and evaluating evidence. In other words, the judicial proof was in the category of free proof.

When the People's Republic of China (PRC) was founded in 1949, the new legal system was established, including the laws and regulations regarding criminal proceedings and judicial work. However, the new laws did not have specific rules of evidence, except for some basic requirements, such as the evidence should be carefully examined and assessed, the evidence as the basis of a judgment should be truthful and sufficient, and the use of torture to obtain confession should be strictly forbidden. [13] Since the basic principle for judicial work was 'seeking truth from facts', the system of evidence was named as 'the system of seeking truth from facts'. Under such a system, judges enjoy the tremendous discretion in assessing and evaluating evidence. On the whole, the judicial proof was in the scope of free proof in PRC for many years.

However, there was a need for Chinese judiciary to go towards the regulated proof, because there were many problems with the judicial system and its practice, such as the lacking of authority and independence, the lacking of qualified professionals, and the uneven and inconsistent behaviors of judges. Some judges misused their discretion in finding facts and caused some wrongful convictions. Some judges abused their powers in judgments and even accepted bribes to bend the law. These problems had a severe impact on the fairness and effectiveness of the judicial work, as well as a severe impact on the stability and healthy development of society. Therefore, Chinese judiciary should take the road from the free proof to the regulated proof.

With the judicial reform started in China in the 1990s, the system of evidence law became a focus for academic discussions. The scholars did not address the issue directly to the system of judicial proof, but argued that China was in need of more specific rules of evidence. Since the beginning of the 21st century, the legislators and the judiciary started to work on the rules of evidence and made some achievements. The Supreme People's Court (SPC) issued *the Provisions on Several*

[11] See Chen Yiyun, ed., *The Study of Evidence*, Beijing: China Renmin University Press, 1991, p.62.
[12] See Chen Yiyun, ed., *The Study of Evidence*, Beijing: China Renmin University Press, 1991, p.66.
[13] See Zhang Jinfan, ed., *History of Chinese laws*, Beijing: Qunzhong Publishing House, 1985, p. 506.

Issues Concerning Evidence in Civil Procedure (PECP) and *the Provisions on Several Issues Concerning Evidence in Administrative Procedure* (PEAP) in 2002. Both PECP and PEAP included some rules regarding the collection, examination, assessment, and evaluation of evidence. In December 2019, SPC revised PECP in large skyle and it became effective on 1st May 2020.

The rules of evidence in criminal proceedings are more important, but more difficult to be made into laws, because of the conflict of the social values in criminal justice. For example, there is a conflict between the value of fighting crimes and the value of protecting human rights behind the the exclusionary rule against illegally obtained evidence.

In China, there was no exclusionary rule of illegal evidence in the Criminal Procedure Law (CPL) of 1979 and in the revised CPL of 1996, which, instead, only stipulates: 'judges, procurators and investigators must, in accordance with the legally prescribed process, collect various kinds of evidence. It shall be strictly forbidden to extort confessions with torture and to collect evidence by threat, enticement, deceit or other unlawful means' (Article 43, CPL 1996).

However, the highest judicial agencies made some efforts to establish the exclusionary rule against illegal evidence in late 1990s. Article 61 of the *Interpretations on Several Issues Concerning the Implementation of the Criminal Procedure Law of the People's Republic of China* issued by SPC in 1998 stipulates: 'Where it is ascertained, through investigation, that a witness's testimony, a victim's statement or a defendant's confession is obtained through torture, threat, enticement, deceit or other unlawful means, it cannot be used as the basis for deciding a case'. Article 233 of the *Rules of the People's Procuratorate of Criminal Procedure* issued by SPP in 1999 stipulates:

> 'Where a confession of a criminal suspect, a statement of a victim, a testimony of a witness or an appraisal opinion is collected through torture, it cannot be used as the basis for charging a crime; where the above-mentioned evidence is collected through threat, enticement, deceit or other unlawful means, thus seriously damaging the legitimate rights and interests of a criminal suspect, a victim, a witness or an appraiser, or having a possible impact on the objectiveness and authenticity of evidence, it cannot be used as the basis for charging a crime; where any physical or documentary evidence collected through unlawful means can prove the real circumstances of a case can, after being reviewed and verified, be used as the basis for charging a crime, unless the unlawful means seriously damage the legitimate rights and interests of the criminal suspect or other citizens.'

With the preceding provisions, Chinese exclusionary rule against illegal evidence is one in which 'different kinds of illegal evidence are handled differently'. However, these provisions are neither specific nor explicit. [14]

With a push of a well-known wrongful conviction case of Zhao Zuohai,[15] the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry

[14] See He Jiahong, *Back from the Dead: Wrongful Convictions and Criminal Justice in China*, Honolulu: University of Hawai'i Press, 2016, p. 47.

of State Security, and the Ministry of Justice jointly promulgated *the Provisions on Several Issues Concerning Assessment and Judgment of Evidence in Death Penalty Cases* (PEDPC) and *the Provisions on Several Issues Concerning Exclusion of Illegal Evidence in Criminal Cases* (PEIE) on 13th June 2010, which became effective on 1st July 2010.

The two Provisions not only stressed the importance of the exclusionary rule against illegally obtained evidence, but also provided quite clearly for the concept of illegal evidence, the different treatments to different types of illegal evidence, the procedures of excluding illegal evidence in the trial, and the burden of proof on the dispute of illegal evidence. Two years later, the main parts of the Provisions were adopted in the Amendment to CPL passed by NPC and the Interpretations of SPC on the amended CPL, which came into effect on 1st January 2013.[16]

On 21st February 2017, Supreme People's Court (SPC) issued the Implementation Opinions for Overall Promotion of Criminal Procedure System Reform with the Trial-Centeredness, in which the forth part stresses the rules of evidence, including the exclusionary rule against illegal evidence, in order to prevent wrongful convictions. On 27th June, the SPC, the Supreme People's Procuratorate (SPP), the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice jointly promulgated the Provisions on Several Issues Concerning the Strictly Exclusion of Illegal Evidence in Criminal Cases. Now China has more detailed rules against illegal evidence, but the problem may still exist in practice.

As illustrated above, the reform direction of the judicial proof system in China was towards the regulated proof, but this does not mean that the judicial proof should be an absolute model of regulated proof, as the system of legal proof in France. Generally speaking, the evidence rules mentioned above are about the admissibility of evidence, including the rules of collecting, producing, and assessing evidence. There are very few rules about the reliability and the weight of evidence, because it is much more difficult, if not impossible, to set up rules for evaluating the reliability and the weight of evidence.

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[15] On 8 May 1999, a corpse with no head and several missing limbs was found in an abandoned well in a village of Shangqiu City, Henan Province. Public security investigation determined that the body was that of Zhao Zhenshang, a local villager who had been missing for more than a year. They also determined the prime suspect to be Zhao Zuohai, also from the same village. Zhao Zuohai confessed to the murder during interrogation. The public security bureau sent the case to the procuratorate, which found the evidence insufficient and ordered the public security bureau to complete DNA analysis to verify the identity of the deceased. Public security officials ordered four separate DNA analyses, but none were able to certify that the body was actually that of Zhao Zhenshang. At this point the case reached an impasse: public security officials refused to release Zhao Zuohai, and the procuratorate refused to issue an indictment, leaving Zhao in a detention limbo. In 2002 the People's Procuratorate of Henan Province chose Zhao's case as one that required clearing up because of overdue custody. The local political-legal work committee held a joint meeting of the three branches and then made a decision to "issue an indictment within twenty days." On 22 Oct., the Shangqiu Municipal Procuratorate issued the indictment. On Dec. 5, the Shangqiu Intermediate People's Court gave Zhao Zuohai a suspended death sentence. On 13 Feb. 2003, the Hebei High People's Court reviewed and approved the decision of the lower court. However, this was not the end of the case. Seven years later, on 30 Apr. 2010, the victim, Zhao Zhenshang, turned up alive! On May 8, the Henan High Court reversed its decision and gave Zhao Zuohai a verdict of not guilty and released him the following day. See He Jiahong and He Ran: Empirical Studies of Wrongful Convictions in Mainland China, Volume 80, No. 4, *University of Cincinnati Law Review*, Summer 2012, pp. 1278–79.

[16] See He Jiahong, *Back from the Dead: Wrongful Convictions and Criminal Justice in China*, Honolulu: University of Hawai'i Press, 2016, pp. 151-157.

There is another way to go towards the regulated proof. It is to systematize the specific standards of evidence for certain type of criminal cases. It is done in two steps: (1) the clarification of the factual elements that are to be proved by evidence in a type of criminal cases: (2) the clarification of the necessary quantity and quality of evidence for each factual element. The former is generally based on legal provisions regarding the offence in the Criminal Law. The offence of larceny, for example, means taking, in secret and with criminal intent, relatively large amounts of public or private property, including repeated burglaries of public or private property. The law stipulates that a conviction of this offense entails the proving of the following factual elements: the identity of the perpetrator and the natural circumstances of the perpetrator, which may include their age and psychological state; the time, place and specific manner of the perpetration, as well as the value of the stolen property or the number of theft; the circumstances of the violation of the property rights; and the criminal intent to appropriate the property. As for the quality and quantity of evidence needed to prove these factual elements, the requirements may be generally provided as: (1) one piece of reliable, direct evidence, however, if the direct evidence comes from a person with close connection to the case, such as the testimony of the accused or the victim, corroborating evidence will be necessary, and such corroborating evidence may be circumstantial; or (2) two or more pieces of reliable circumstantial evidence that fit together to form a complete proof. On the basis of judicial experience, the types of evidence for proving the relevant factual elements may be provided as witness testimony, documentary evidence, physical evidence, electronic evidence, and expert opinion etc.

The judicial agencies in some part of China has done experiments in this regard. Since 2016, for example, the courts, the procuratorates, and the police departments of Guizhou province started the experiment to establish the 'Guiding System of Evidence Standards'. They used the technology of big data and AI to set up evidence standards for convictions in the offenses of intentional injury, intentional homicide, robbery, and larceny. The Basic Requirements for Evidence in Criminal Cases of Guizhou was promulgated later in the same year.[17] This experiment is an interesting step towards the regulated proof in criminal proceedings.

In summary, Chinese system of judicial proof has been going from free proof to regulated proof, and is a mixture of the two modes, in which the regulated proof is dominant, and the free proof is secondary. The new technologies of internet, big data and AI have provided great support for the development. With these analysis, the answer to the question left at the end of the Introduction shall be that the regulated proof is better, especially for the judiciary in current China. However, here comes another question: how far can the judicial proof in human society go on this road?

VII. CONCLUSION

In one sense, the mode of regulated proof and the mode of free proof can be drawn an analogy with the rule by law and the rule by man. This author is not talking about the difference between the rule of law and the rule of man as a basic principle for the political system a the country. All the systems

[17] See Peng Bo: Guizhou: Big Data Enlightened "AI Procuratorial Work", *People's Daily*, 31st May 2017.

have their merits and demerits. The rule by law is cold and strict, and may at times recommend an decision inappropriate to a case, in the interests of preserving consistency. The rule by man is nimble and flexible for different cases, but may result in abuse of power under the banner of 'specific analysis for specific circumstances'. In a given country, if the judicial officers are of high moral rigor with high level of professional ability, the rule by man, or the free proof, will be a better mode. If in a country, such as in present China, the professional ability and moral rigor of the judges are not very high, the rule by law, or the regulated proof will be better.

The basis of regulated proof is a clear and unified set of rules. Judges must assess and evaluate evidence according to the rules. They do not have much discretion, and there is little space for them to blow 'the black whistle'. The system of regulated proof, then, can increase the public trust in the judiciary, and the authority of the judgments. It can reduce the outside interference in judicial work, and protect the independence of the judiciary. It can also reduce the opportunity for judicial corruption. In a society based on *guanxi*, or personal relationships, if judges hold great discretion in decision making, some litigants will use all means to find the 'back door' or *guanxi* to influence the judge, and even use bribery to induce the judge to do a favor for them. If the rules of law are clear and specific, and known to all the people, the litigants will realize that *guanxi* is not useful. The psychological motives for using *guanxi* and giving bribes will be weaken. In this sense, the application of the regulated proof in judicial proceedings can help in promoting the rule of law in China.[18]

Just a few days before the festival of Chinese New Year, which falls on 25th January 2020, Chinese people were shocked at the outbreak of the novel coronavirus (COVID-19), which rapidly spread from Wuhan to other parts of China. At the same time, the epidemic broke out in many other countries in the world. Although the governments of many countries spared no efforts in fighting the virus, the pandemic developed into a serious disaster, causing a great number of deaths worldwide, and influencing negatively on the economy in many countries.

The coronavorus pandemic has changed the life style of human being. Now we basically stay at home and doing things on line, shopping on line, reading on line, talking on line, meeting on line, having conferences on line, and teaching classes on line. In future, shall we have more on line trials? Shall we have more internet courts and even more AI judges? We shall wait and see.

About the author

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[18] He Jiahong: China Is Closer to the Rule of Law than Ever, But..., *The World Post,* 4th March 2015.

novels in Chinese. His law book, *Back from the Dead: Wrongful Convictions and Criminal Justice in China*, has also been published in English, French, German, Hebrew, Spanish, Portuguese, and Japanese. His crime novels have been published in French, Italian, Spanish, and English. See Tom Mitchell: Lunch with the FT: He Jiahong, *Financial Times*, 21 February 2015.