

Judicial Presumption of the Clear Knowing in Cultural Relics Crimes and Its Improvements

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Abstract: Presumption is the main approach used in criminal justice practice in China for determining one's clear knowing, and there are sufficient standards for it in the crimes of intentionally damaging cultural relics, scenic spots and historical sites. The presumptions of one's clear knowing regarding the crimes of intentionally damaging cultural relics and scenic spots stipulated in Article 324 of Criminal Law of the People's Republic of China exhibit three structural types: "presumption as the mainstay with inference as a supplement," "comprehensive presumption as the mainstay with single presumption as a supplement," and "presumption based on general possibility as the mainstay with presumption based on high probability as a supplement." Currently, China lacks clear legal rules for presumptions of one's clear knowing related to the crimes of intentionally damaging cultural relics, scenic spots and historical sites. When relying solely on Article 14 of the Criminal Law to determine one's clear knowing, it often leads to excessively high standards of determination and unreasonable specific measures. Based on the distinction between "intentionally targeting specific cultural relics, scenic spots, and historical sites" and "knowingly causing damage to cultural relics, scenic spots, or historical sites as a result of one's own actions", Chinese judicature should improve the basic rules for presumptions of one's clear knowing related to the crimes of intentionally damaging cultural relics, scenic spots and historical sites. It should establish presumptive empirical rules centered on the rationality of ordinary people and refine the content and methods of presumptive knowing.

Keywords: One's clear knowing; Presumption; structure; Cultural relics; Scenic spots and historical sites

1 The Problem Raises

Article 14 of the Criminal Law of the People's Republic of China stipulates, "knowing perfectly that your behavior will lead to the dangerous result of the society, and hoping or letting go of this result is a intentional crime that constitutes a crime." One's clear knowing is one of the cognitive factors on criminal intent, and it can be recognized either by direct affirmation or indirect presumption. Recognizing directly, that is, to recognize according to the direct evidence (such as the defendant's guilty confession, etc.). Presuming indirectly, that is, in the absence of direct evidence, to presume the defendant has the subjective knowing of crime according to the defendant's behavior and situation at that time. With the increase of the defendant's consciousness of exoneration, the difficulty of being able to obtain the evidence of the defendant's confession of his or her clear criminal knowing will continue to increase. At present, China mainly takes the presumption as the approach of recognizing one's clear criminal knowing, which has also

triggered the theoretical and practical disputes.

Presumption is a method for deducing unknown facts from known ones, which, in some means, integrates the criminal law and the criminal procedure law, including presuming by facts and presuming by laws.^[1] In most cases, the expression of presumption refers to the former one. China's supreme judicial organs have some interpretative provisions about presuming one's clear knowing. For example, in 2002, Supreme People's Court of the People's Republic of China, Supreme People's Procuratorate of the People's Republic of China and China's General Administration of Customs issued Opinions on Several Issues Concerning the Application of Law in Handling Criminal Cases of Smuggling containing the provision of one's clear knowing about smuggling crime (Article 5, Paragraph 2), saying that one's clear knowing of the subjective intention in smuggling crime means that the actor knows or should know clearly that the behavior is smuggling. Under any of the following circumstances, it can be deemed as knowing it clearly,

except when there is evidence proving that one is indeed deceived: (1) Transporting, carrying, and mailing the goods and items which are prohibited from entering and exiting the country, while evading customs control; (2) Smuggling goods and items with special equipments or transportation tools; (3) Transporting (transferring), purchasing, or selling illegally imported or exported goods and items at non-customs docks, seashores (riverbanks), land borders, and other locations without the Customs' permission; (4) Providing false contracts, invoices, certificates and other commercial documents to entrust others to handle customs clearance procedures; (5) Commissioning others to handle import (export) business on behalf of oneself at a significantly lower taxable amount than the normal import (export) duties payable for the goods; (6) Having previously been subject to criminal or administrative penalties for the same type of smuggling behavior; (7) Other circumstances evidenced by proof. In 2008, Supreme People's Court of the People's Republic of China issued Summary of the National Symposium on the Trial of Drug-related Crime Cases by Selected Courts containing the provision of one's clear knowing about drug-related crime (Article 10), saying that "in drug-related crimes, judging whether the defendant is aware of the involved drugs cannot solely rely on the defendant's confession. Instead, it should be comprehensively analyzed and judged based on evidence such as the process and manner of the defendant's drug-related criminal behavior, the circumstances surrounding the seizure of the drugs, as well as the defendant's age, experience, and intelligence" , "If the defendant cannot provide a reasonable explanation for any of the following circumstances, it can be deemed that they clearly knew that the drug was involved, except when there is evidence proving that they were indeed deceived: (1) When law enforcement personnel conduct inspections at ports, airports, stations, harbors, and other checkpoints, and require the actor to declare items carried for others and other suspected drugs, and inform them of their legal responsibilities, the actor fails to truthfully declare and

drugs are found in the items they are carrying; (2) Evading customs, border inspections, and other checks through misreporting, concealing, disguising, and other deceptive means, and drugs are found in the items they are carrying, transporting, or mailing; (3) When law enforcement personnel conduct inspections, and the actor flees, discards carried items, or evades or resists inspection, and drugs are found in the items they are carrying or have discarded; (4) Concealing drugs within the body or in intimate, hidden places; (5) Carrying or transporting items for unusually high or disproportionate compensation, and drugs are found among the items; (6) Carrying or transporting items in a highly concealed manner, and drugs are found among them; (7) Delivering items in a highly concealed manner, which significantly deviates from the usual methods of legitimate item delivery, and drugs are found among them; (8) Deliberately bypassing inspection points in their travel route, and drugs are found in the items they are carrying or transporting; (9) Using false identities or addresses to handle consignment procedures, and drugs are found in the consigned items; (10) There is other evidence sufficient to conclude that the actor should have known".

Chinese Criminal Law has extensive provisions on criminal acts that violate the safety of cultural relics, which have played an important role in preventing and controlling crimes related to cultural relics. However, based on specific cases of crimes involving the destruction of cultural relics, scenic spots and historical sites, the author has found that Article 324 of Chinese Criminal Law stipulates two subjective forms of intentional and negligent crimes related to the destruction of cultural relics, scenic spots and historical sites. In judicial practice, the determination of subjective aspects of the crime, especially the varying standards for presuming subjective intent varies.

The author searched the China Judicial Documents Network using the keywords "intentional damage to cultural relics" "negligent damage to cultural relics" and "intentional damage to scenic spots and historical sites"

in the judgment results section. From 2012 to 2022, over a ten-year period, a total of 71 valid final criminal judgments were retrieved. After reading and organizing all of these judgments, it was found that almost all cases raising objections to the criminal facts and charges brought by the procuratorate (either intentional damage to cultural relics, or intentional damage to scenic spots and historical sites, or negligent damage to cultural relics) were eventually convicted of intentional damaging to cultural relics. The defense or appeal reasons put forward in these cases all included the content that “the defendant did not have subjective intent.” Among them, regarding the defense or appeal reason related to the intentional cognitive factor of “the defendant did not know that the object of his behavior was a protected cultural relic or scenic spot,” the court mainly recognized the defendant's clear knowing through presumption and evidence. However, there are many issues in the recognition process. Therefore, the author intends to summarize the contents of the existing judgment documents, investigate the actual standards for the recognition of one's clear knowing in crimes related to the damage of cultural relics and scenic spots in current practice, analyze the shortcomings of the existing recognition standards, and attempt to propose reasonable suggestions for improving the presumption of one's clear knowing.

2 The Structure of Judicial presumption of One's Clear Knowing in Cultural Relic Crimes

2.1 The General Structure of Presuming One's Clear Knowing

The fundamental reason for adopting presumption instead of direct affirmation is at recognizing one's clear knowing is the lack of evidence to directly establish the subjective intent of the perpetrator. The basic process of criminal presumption involves inferring presumptive facts from known basic facts based on certain rules. It comprises three essential elements: basic facts, presumptive facts, and the basis for presumption (rules of thumb). In criminal presumption, the basis for presumption is the most crucial aspect, which determines

whether presumptive facts can be inferred from known facts according to presumptive rules of thumb. The presumptive basis mainly includes two basic rules: rules of thumb and allowance for exceptions.^[2]

Firstly, the basic basis of presumption is the rule of thumb. In criminal presumption, the presumptive facts can be inferred from the basic facts because there exists an inherent connection between them. That is, as long as the basic facts exist, the presumptive facts also exist, or it is highly probable that they exist. This inherent connection is typically manifested in two types: one is objective causal logic, where the basic facts are the consequences and the presumptive facts are the sole causes. Since the basic facts as consequences have been established, the causes leading to them (i.e., presumptive facts) must also exist; otherwise, the basic facts would not have occurred. For example, in a bribery case, even if the briber does not confess, the existence of presumptive facts can be inferred from the testimony of the briber's family that the briber withdrew money from a bank on a certain day and left with a specific bag of money to find the recipient, combined with the recipient's confession of receiving the money in the same bag. Based on the objective causal logic of the behavior, it can be presumed that the money involved was sent by the briber. The second type is reasonable empirical logic, where there is a high degree of association between the basic facts and presumptive facts based on social experience. This association is typically manifested as a lateral concomitant relationship with a high degree of probability. For instance, in a case of environmental pollution, if a perpetrator discharges pollutants into a river during a certain period and subsequently, there are consequences such as a large number of fish deaths, water pollution, and illnesses among locals after drinking the water, based on the high temporal correlation, it can be presumed that the relevant consequences were caused by the perpetrator's discharge of pollutants. In the case of Wang Peng and Others Using Undisclosed Information for Trading^[3] released by the Supreme People's Procuratorate (Case No. 65), the court

directly presumed the establishment of the facts of the case based on the high degree of similarity between the stock transactions involved and the transactions of a certain fund product, the significant deviation from previous trading habits, and the connection between Wang Peng and the illegal transactions. The most crucial fact was the “high degree of similarity between the stock transactions involved and the transactions of the fund product”, indicating an inherent connection between the two types of transactions. Since Wang Peng was the only possible link in the case, it could be presumed that he had engaged in trading using undisclosed information.

Secondly, the basis for presumptive exclusion: allowance for exceptions. Presumptive facts are those that are highly probable, meaning that based on general social experience, there is a high probability that the presumptive facts are triggered by the basic facts, allowing one to infer the existence of the presumptive facts. However, a high probability is not equivalent to certainty; it remains a possibility. The reason why presumptive facts are allowed in criminal justice is that judicial officials seek certainty but are unable to obtain it, resorting instead to a high degree of probability. If conclusive facts emerge indicating that the basic facts are caused by other facts, or if legitimate reasons significantly reduce the likelihood of the inference (i.e., it cannot be ruled out that the basic facts are caused by reasonable doubts unrelated to criminal conduct), then the inference cannot be established, and the presumptive facts cannot be recognized. In the case of Wang Peng and others trading on undisclosed information, the “allowance for exceptions” rule in presumption is mainly reflected in the public prosecutor’s argument that “there are sufficient reasons to exclude other possibilities”. These reasons include: “From the perspective of Wang Huiqiang and Song Lingxiang’s age, work experience, and trading habits, they do not possess the background and experience of professional stock investors, and they have consistently been unable to provide a reasonable explanation for their abnormal trading behavior.” Additionally, “when

the China Securities Regulatory Commission (CSRC) conducted an investigation at the fund company involving Wang Peng, he fled out of fear of punishment and never returned to work at the fund company, nor did he go through any leave or resignation procedures. His claim that he left because he was afraid of the CSRC conducting an investigation at his home is clearly unreasonable.” In other words, there is no evidence that Wang Peng, Wang Huiqiang, or Song Lingxiang caused the “high degree of similarity between the stock transactions involved and the transactions of a certain fund product” through other actions, indicating that there are no exceptions and that the presumption can be established.^[4]

Therefore, when there is an inherent connection between the basic and presumptive facts, and this connection is consistent with empirical rules and able to exclude exceptions, the presumptive facts can be inferred from the basic facts, allowing for the recognition of the presumptive facts. The presumption of one’s clear knowing follows the aforementioned rules of presumption, inferring whether the perpetrator knowingly committed a crime. Depending on the content, manner, and other factors of the presumption, the presumption of criminal knowing can be distinguished into presumption and inference, comprehensive presumption and single presumption, presumption based on general possibilities and presumption based on high possibilities.

2.2 The Basic Structure of Presumption One’s Clear Knowing in Cultural Relics Crimes

Through a case-by-case screening process, the author has consolidated the standards adopted by the courts in cases of intentional damage to cultural relics, scenic spots and historical sites when determining whether the defendant has a clearly criminal knowing involved. The analysis revealed that there are three main types of practical determinations regarding one’s clear knowing in judicial practice:

2.2.1 Primarily Relying on Presumption, Supplemented by Inference

In criminal law theory, there exists a distinction

between presumption and inference. Inference refers to “a logical method of making certain judgments or ascertaining a fact...where the comprehensive judgment of all evidence in a case often requires the application of deduction, inference, or reasoning; otherwise, these evidentiary facts would remain isolated, their logical connections would remain undisclosed, and the facts to be proved in the case would be difficult to establish convincingly.” Article 140 of the 2021 Interpretation of the Supreme People’s Court on The Application of the Criminal Procedure Law of the People’s Republic of China clearly stipulates: “In the absence of direct evidence, a defendant can be found guilty if the indirect evidence simultaneously meets the following conditions: (1) the evidence has been verified as true; (2) the evidence corroborates each other, without any unresolved contradictions or unexplained doubts; (3) the entire evidence forms a complete chain; (4) the facts of the case determined based on the evidence are sufficient to exclude reasonable doubts, and the conclusion is unique; (5) the reasoning using the evidence is logical and empirical.” Indirect evidence refers to evidence that cannot independently and directly prove the main facts of a case but needs to be combined with other evidence to do so. Using indirect evidence to determine the facts of a case is a form of inference. When only indirect evidence is available in a case, the burden of proof lies with the party presenting the evidence to demonstrate the authenticity of the facts to be proved. This involves combining various evidentiary facts, applying rules of thumb and logical rules, and using logical reasoning to argue for the existence of the facts to be proved. In the process of examining and judging evidence, judges must not only review the probative value and admissibility of each piece of evidence but also scrutinize the process and conclusion of the party’s logical reasoning using the evidence. Particular attention should be paid to whether the final proof forms a complete “proof system”, whether there are reasonable doubts, whether there are alternative possibilities, and whether a unique conclusion has been

reached.^[6] Unlike inference, presumption involves deriving a fact to be proved (presumed fact) from a known fact. Inference is a process from indirect evidence to facts, while presumption is a process from one fact to another.

The objects of intentional damage to cultural relics, scenic spots and historical sites are unique, having been designated and graded by cultural relics protection units. Compared to the objects of other crimes, such as property crimes, they possess specificity and professionalism, thus adding complexity to the determination of the defendant’s clear knowing regarding the objects of their harmful actions. When addressing defense or appellate arguments of “lack of clear knowing”, courts generally adopt both forms of inference and presumption, exhibiting a structural characteristic of predominantly using presumption with inference serving as a supplementary tool. For example, in the case of Lu, who intentionally damaged cultural relics (Xianyang Intermediate People’s Court of Shaanxi Province, Criminal Case No.00037, 2012), the defendant appealed, claiming that he was unaware that the location where he dug sand and stones fell within the protected area of Zhengguo Canal Head, and that the original sentence was too severe. However, the court held that “the testimonies of witnesses Yang A, Wang, Yang B and others, as well as the on-site photos and the defendant’s own confession, mutually corroborated the fact that the appellant Lu Mou knowingly dug soil and stones within the cultural relics protection zone”. Therefore, the court did not accept the appellant’s reasoning. This is currently the most commonly used method for determining one’s clear knowing in criminal judicial practice in China, namely, inference from evidence to facts. In this case, the court adopted a basic “inference” approach, reaching a conclusion of appellant’s clear knowing regarding the object of his harmful behavior through comprehensive reasoning based on multiple evidentiary facts.

However, in most cases of intentional damage to cultural relics and scenic spots, a complete chain of evidence may not be available for the court to conduct relevant judicial determinations. Therefore, in

such circumstances, the court also adopts the form of “presumption”. Similar to judicial proof, presumption is also a method of determining the facts of a case. Specifically, presumption is a method of recognizing the presumptive fact based on the proven basic fact. For instance, in the case of Wang Leiqun intentionally damaging cultural relics (Suiping County People’s Court of Henan Province, Criminal Case No. 196, 2019), the court reasoned that the defendant “knowingly destroyed the ‘Wufang Ancient City’, a provincial-level cultural relic protection unit”, based on the fact that “Wang Leiqun stated that he had heard from people in the community that there was something special about the mound to the north, and that it was not allowed to be built on or disturbed, and that it was rumored to be an ancient city wall. Additionally, considering Wang Leiqun’s long-term experience contracting odd jobs in the ‘Hengtaihejiayuan’ community, it can be determined that Wang Leiqun knew or should have known that the excavated city wall was a protected cultural relic of the provincial-level protection unit”. It can be seen that there was no absolute causal relationship between Wang Leiqun’s confession and work situation and his knowing or ought to have known that the excavated city wall was a protected cultural relic of the provincial-level protection unit. However, in the determination process, the judge filled this logical gap by combining existing evidence with relevant background and relying on empirical rules.

2.2.2 Primarily Relying on Comprehensive Presumption, Supplemented by Single Presumption

In the context of presumptive determination of one’s clear knowing engaging in behavior, based on the number of basic facts referenced in judicial trials to make presumptions, it can be further categorized into comprehensive presumption and singular presumption. In crimes involving the intentional destruction of cultural relics, scenic spots and historical sites, a common practice is comprehensive presumption, which involves considering multiple factors to presume that the defendant or appellant had clear knowing of his criminal behavior.

For example, in the case of Wang Xuesheng intentionally damaging cultural relics (Jiangxi Shangrao Intermediate People’s Court, Gan 11, Criminal Case No. 4, 2021), in response to the appellant’s argument that “he did not know that Shidu Wang’s House was a key national cultural relic protection site, his renovation had little impact on Wang’s House, he did not intentionally damage cultural relics subjectively, and therefore did not constitute the crime of damaging cultural relics”, the court upheld the verdict of the original court that “after Wang’s House was designated as a Jiangxi provincial cultural relic protection site and a national key cultural relic protection site, various levels of government and relevant departments in Guangfeng District, Shangrao City, conducted vigorous publicity through various methods such as posting notices, organizing calligraphy activities at Wang’s House, etc. Additionally, a stone tablet was erected at the house, and a plaque and doorplate were hung on the gatehouse. The staff also informed the defendant Wang Xuesheng in writing. Therefore, it should be presumed that the defendant Wang Xuesheng knowingly destroyed a provincial cultural relic protection site and a national key cultural relic protection site”. In the above-mentioned verdict, the original court combined multiple factual factors such as “posting notices” “promotional activities” “erecting a stone tablet and hanging a plaque” and “written notification” to presume that the appellant should have known.

However, in some cases, the court’s presumption of the perpetrator’s subjective knowledge is based on a single fact. For instance, in the case of Liu Chen, Yang Yanjun, Ge Lei, Lv Jiang, and Xu Hewei intentionally damaging cultural relics (Heilongjiang Harbin Hulan District People’s Court, Hei 0111, Criminal Case No. 135, 2018), in response to the defense argument that “they did not know that the land acquisition site was a provincial cultural relic protection site, and they destroyed the provincial cultural relic without a clear knowing, so they did not have subjective intention”, the court pointed out that “the defendants Liu Chen, Yang Yanjun, Ge Lei, Lv Jiang, and

Xu Hewei all reside near the Tuanshanzi Ancient City Ruins. The five defendants should know that the black soil they stole was from the Tuanshanzi Ancient City Ruins. It can be presumed that the five defendants knowingly damaged the cultural relics of the provincial cultural relic protection site". This means that the defendants' residency status was used as the sole basis for the presumptive conclusion.

2.2.3 Primarily Relying on Presumptions with General Possibility, Supplemented by Presumptions with High Possibility

Based on the varying degrees of one's knowing, it can be divided into knowing of the general possibility, the high possibility and certainty of causing harmful social consequences from one's actions. Knowing of the general possibility refers to the knowing that one's actions may potentially lead to harmful social outcomes. Knowing of the high possibility means knowing that there is a high likelihood that one's actions will result in harmful social consequences. Knowing of certainty is the certainty that one's actions will definitely result in harmful social consequences. Given the high demand for certainty in terms of facts and experience, certainty-based knowing is essentially nonexistent in presumptive situations. Therefore, the presumption of knowings mainly involves the presumption of the general possibility-based knowing and the high probability-based knowing.

Currently, China has not yet issued any legal norms related to the presumption of one's clear knowing in crimes involving the intentional destruction of cultural relics and historic sites. In specific judicial practices, the only method used to replace judicial proof is factual presumption. Due to the wide variety of criminal intent and understanding among perpetrators, coupled with the discretionary judgment exercised by judges in factual presumptions, even when the court ultimately reaches a presumptive conclusion that the defendant/appellant "knowingly" or "should have known", there is often a discrepancy between this conclusion and the actual facts of the case. At the same time, in many existing

cases, the basis for the court's presumption of one's clear knowing has not reached a specific high level of probability. Therefore, there is a distinction between "general possibility-based presumption" and "high probability-based presumption" in the presumption of one's clear knowing related to cultural relic crimes in current judicial practices. Based on the cases I have access to, the presumption of knowledge in crimes involving the intentional destruction of cultural relics and historic sites is primarily based on the general possibility-based presumption, with only rare cases reflecting a high degree of possibility on the part of the perpetrator.

3 The Limitations of Judicial Presumption of One's Clear Knowing in Cultural Relic Crimes

Presumption in criminal proceedings is a process of inferring unknown facts from known ones, based on experience and logical rules. Whether the conclusion of presumption is correct depends on two aspects: whether the basic facts have been ascertained and whether the application of experience and logical rules is reasonable (i.e., whether reasonable doubts can be excluded to ensure the uniqueness of the conclusion). "The existence of knowledge is the starting point for judging intentionality."^[7] Since the specific provisions on one's clear knowing in the intentional destruction of cultural relics and historic sites are not stipulated in the specific provisions of the criminal law, it can only be determined in accordance with the general provisions of the criminal law, namely Article 14 of the Criminal Law, which states that one's clear knowing refers to the awareness that one's actions will result in the destruction of cultural relics and historic sites as the cognitive factor for the crime of intentional destruction of cultural relics and historic sites. According to academic theories, this cognitive factor should be divided into two parts for the constitutive requirements of one's clear knowing: first, the perpetrator must "knowingly target specific cultural relics or historic sites as the object of the harmful act"; second, the perpetrator must "knowingly cause the harmful result of the destruction of cultural relics or historic

sites through their actions”, meaning that the perpetrator should have clear knowing of both the object of damage and the harmful result caused by their actions. However, due to the specificity of the criminal objects of intentional destruction of cultural relics and historic sites, in specific judicial practices, courts and procuratorates often focus on the judicial proof or factual presumption of the former one while paying little attention to the latter. In addition to the deviation in the focus of determination between the two constitutive requirements of one’s clear knowing, I believe that there are still many structural limitations in specific judicial practices.

3.1 The Deficiency in the Object of Presumption: The Ambiguity of the Connotation of One’s Clear Knowing

The original meaning of one’s clear knowing refers to clearly or definitely knowing, encompassing both the certainty and the possibility of the occurrence of harmful consequences. In the context of intentional crimes of damaging cultural relics and historic sites, the current presumption of subjective knowing intent in China’s judicial practice has two issues regarding the object: Firstly, when identifying the cognitive factors, the presumption of knowing intent in the crime of intentional damage to cultural relics and historic sites often replaces the second constitutive requirement (the perpetrator must know that it is his action that cause socially harmful consequences) with the perpetrator recognizing that the harmful consequences will occur. However, the scopes of cognition encompassed by the two are not identical. For instance, in the case of Ma, who intentionally damaged cultural relics (Balinzuoqi People’s Court of Inner Mongolia Autonomous Region, Criminal Case No. 39, 2014), the defendant argued that “although paving the road caused some damage to the surrounding environment, the purpose was to facilitate travel, not to intentionally destroy cultural relics”. This indicates that while the defendant was aware that his actions would lead to environmental damage, he was not knowingly aware that his actions would lead to the

socially harmful result of destroying cultural relics. Confusing the two lacks rationality. Secondly, in different intentional crimes, perpetrators may have both absolute knowing and possible knowing of the occurrence of harmful consequences. Some courts do not distinguish between these two situations, which can lead to blurred boundaries between direct intention and indirect intention in the crime of damage to cultural relics and historic sites. Additionally, when perpetrators have possible knowing of the occurrence of harmful consequences, it is necessary to pay attention to their volitional factors, otherwise it is easy to confuse excessive self-confidence leading to negligence with indirect intention. In the case of Shen Jingge and He Jun, who intentionally damaged cultural relics (Yindu District People’s Court of Anyang City, Henan Province, Criminal Case No. 246, 2018), the court clearly stated that “both indirect intention and excessive self-confidence leading to negligence involve recognition of the possibility of harmful consequences occurring... in terms of volitional factors, indirect intention adopts a lenient and tolerant attitude towards the occurrence of consequences, while negligence holds a negative attitude towards their occurrence”.

3.2 The Deficiency in the Basic Facts of Presumption: Inconsistency in the Facts Used as the Basis for Presumption

The difference between comprehensive presumption and single presumption lies in the different facts used as the basis for presumption. Comprehensive presumption involves a comprehensive evaluation of the perpetrator’s personal situation and the specific circumstances surrounding the act, and its basis for presumption lacks a specific scope. In contrast, single presumption relies on a particular key fact to infer the target fact. In the case of presumption regarding intentional damage to cultural relics and historic sites, it is necessary to consider various issues related to cultural relics and historic sites comprehensively. However, not all factors contribute in the same direction or consistently towards proving the target fact. When different factors have

conflicting effects on the proof of the target fact, it poses a practical challenge to determine how to proceed with the presumption.

In the presumption of intentional knowledge in the crime of intentional damage to cultural relics, scenic spots and historic sites, factors such as the perpetrator's cognitive abilities, their history of contact with cultural relics and historic sites, and the excavation status of local cultural relics and historic sites serve as the basis for presumption. However, these factors do not play a uniform role in the presumption of the perpetrator's knowledge in different cases. For instance, in the case of Shen Jingge and He Jun, who intentionally damaged cultural relics mentioned earlier, the court and the defense had differing opinions on whether the tombs damaged during the construction process were part of the Yin Ruins (valuable cultural relics deserving protection) and whether the defendants were aware of the actual condition of the damaged tombs. Given the complexity of the professional identification process for cultural relics and historic sites, which involves excavation, registration, and announcement procedures unrelated to criminal law, current judicial practice needs to determine a specific scope for comprehensive presumption based on the consideration of various factors to accommodate complex and diverse real-world situations.

3.3 The Deficiency in presumptive rules: “Knowingly” Determination Requires an Unreasonably High Standard of Empirical Evidence

Presumption involves inferring the fact to be proved from basic facts, relying on logic and experience as the intermediary. Among them, experience is the key to the application of presumptive rules and directly affects the standard of presumption. Cultural relics protected by criminal law (cultural relic units) are those that have been verified and announced by the State Council, provincial (autonomous region, municipality directly under the Central Government) governments, as well as districted cities, autonomous prefectures, and county-level governments, possessing clarity and specificity. However,

can we automatically assume that the actor holds a knowingly attitude towards the nature of the object of their action based solely on the announced results? If not, what standard should be adopted to determine the actor's understanding of the nature of the criminal object? Where lies the boundary of the judge's discretionary power?

From a practical perspective, different actors may have subjective differences in their level of awareness of potential harmful outcomes during the commission of their acts, and some actors may even lack the ability to foresee the possibility of harmful outcomes. Currently, prominent issues in Chinese judicial practice in this regard include: first, adopting a completely rational person standard, which assumes that the actor is a fully rational social being capable of mastering various knowledge related to cultural relics and presuming that the actor possesses a knowingly state for cultural relic crimes based on relevant regulations; second, adopting a completely hindsight standard, which presumes the actor's foresight based on hindsight outcomes, but in terms of information mastery, actors often have less understanding of cultural relic conditions before the event than after. Objectively speaking, this approach exceeds the normal state of ordinary people, and the excessively high standard of determination may lead to unreasonable standards for determining the knowingly state of cultural relic crimes.

For example, in the case of Chang Jingrui intentionally damaging famous historical and cultural sites (Shuangcheng District People's Court of Harbin City, Heilongjiang Province, Hei 0113 Criminal Case No. 149, 2017) and the case of Xi intentionally damaging famous historical and cultural sites (Weiyang District People's Court of Xi'an City, Shaanxi Province, Shan 0112 Criminal Case No. 392, 2018), the courts' opinions on whether the defendants knowingly destroyed famous historical and cultural sites differed. In the former case, the court adopted a completely rational person standard, assuming that the defendant should have a complete grasp of the famous historical and cultural sites registered and announced by the administrative department of culture,

and thus presumed that the defendant intentionally destroyed cultural relics. In contrast, in the latter case, the court held that “the public security authorities had warned Shi that the site belonged to the remains of the ancient Weihe Bridge and prohibited further sand excavation to prevent damage to the site... However, the defendant Xi did not repent and illegally excavated sand again in the same area, causing multiple ‘bridge piers’ and ‘pillar bases’ of the ancient bridge site to shift.” In this case, the court did not adopt a completely rational person standard but instead considered the defendant’s actions and intentions based on the specific circumstances.

Another example is the case of Zhang intentionally damaging cultural relics (Qingzhou City People’s Court of Shandong Province, Qing Criminal Case No. 239, 2014). In this case, the court found that “a batch of Tang Dynasty stone cultural relics were unearthed on the west side of the Shifang Road Bridge in Qingzhou City, Shandong Province. The defendant Zhang used a hammer to smash the relief warrior heads on two Tang Dynasty relief warrior pagodas and took the heads home. After identification by the Shandong Provincial Cultural Relics Appraisal Committee, the destroyed relief warrior pagodas were determined to be national third-grade cultural relics”. The court then found the defendant guilty of intentionally damaging cultural relics. Since the heads were identified as national third-grade cultural relics after the fact, it seems unreasonable to presume that the defendant had a full understanding of the cultural relic status at the time of the act based solely on hindsight standards, which exceeds the normal understanding of ordinary people.

One possible consequence of the aforementioned defects is that the presumptive conclusion may not be singular. The 17th batch of guiding cases issued by the Supreme People’s Procuratorate in 2020, specifically the Wang Peng et al. Case of Trading on Unpublished Information (Guiding Case No. 65), clearly stated: “When using indirect evidence to prove the facts of a case, the indirect evidence constituting the evidentiary system should be mutually connected, mutually supportive, and

mutually corroborated, with a complete evidentiary chain and a unique conclusion.” The presumptive conclusion must also be unique; otherwise, factual errors may occur.

4 Improving Judicial Presumptions of Knowledge in Cultural Relic Crimes

The basic process of criminal presumptions involves inferring presumptive facts from known basic facts based on certain rules. It consists of three basic elements: basic facts, presumptive facts, and presumptive basis (empirical rules). Among criminal presumptions, the presumptive basis is the most crucial, referring to whether presumptive facts can be inferred from known facts according to presumptive empirical rules. The presumptive basis mainly includes two basic rules: empirical rules and allowing exceptions.^[8] In addressing the structural issues in the presumptions of one’s clear knowing related to intentional damage to cultural relics and scenic spots in China, the country should improve the standards and measures for presumptions of it.

4.1 Improving Empirical Rules for Presumptions of One’s Clear Knowing: Using the Understanding of the Average Local Person as the Standard

“One’s clear knowing includes the recognition of descriptive constitutive elements and the recognition of normative constitutive elements.”^[9] Firstly, it should be clarified whether the criminal objects in the crimes of intentional damage to cultural relics and scenic spots are descriptive constitutive elements or normative constitutive elements. The author believes that even if the list of culturally protected relics has been fully publicized, and no judge’s value judgment is required in the identification of cultural relics and scenic spots, it cannot be expected that everyone has the ability to know or master the content of the list. Therefore, the knowing of whether the object of the act is protected by law in this crime should belong to the normative constitutive elements.

Chinese professor Zhang Mingkai defines the normative constitutive elements in the cognitive factors of intention as “elements that are judged based on laws and regulations, empirical rules, or the values of the average

person.”^[10] Referring to the theory of “parallel evaluation in the field of laymen belonging to the perpetrator” proposed by German scholar Metzger, he believes that “in the case of normative constitutive elements, it is not required to recognize them based on the normative concepts in criminal law. It is only necessary to recognize the crime-related meanings indicated by the normative concepts.”^[11] Following this logic, when presuming whether the perpetrator “knowingly targeted protected cultural relics or scenic spots as the object of harmful acts,” it cannot be expected that the perpetrator possesses the level of expertise like a professional in mastering the grading standards of cultural relics. However, it is also inappropriate to simply use the understanding of the average perpetrator as the presumption standard. The reason is that cultural relics and scenic spots have a high degree of regional recognition, and locals often have more experience and common sense in this regard. In most cases where outsiders do not have a clear understanding, as long as the average local people are aware of the nature of the criminal object, it can be presumed that the perpetrator also has a clear knowing of it. For example, residents of a certain place generally understand that a particular area has special historical and cultural value, but not all of them are aware of the specific protection level. They only know that it is specially protected by law. Based on this, it should also be presumed that a defendant with a local residence background has a clear knowing of the criminal object. On the one hand, if it is presumed that everyone should know which cultural relics are protected based on the public availability of the list of cultural relics, the scope of punishment for related crimes will be indefinitely expanded, and it is obviously unreasonable to impose such high requirements on the perpetrator. On the other hand, using the level of understanding of the average local person rather than the average perpetrator as the presumption standard can not only enhance the effectiveness of combating cultural relic crimes but also promote local people’s awareness of cultural relic protection.

4.2 Specific Measures for Improving the Presumption of One’s Clear Knowing: the Scope, the Possibility and the System

Specific measures for improving the presumption of one’s clear knowing mainly focus on enhancing the presumptive factual basis, target facts, presumptive logic, and empirical rules. This is reflected in the presumption of one’s clear knowing in crimes related to intentional damage to cultural relics and scenic spots, which mainly involves the following three aspects:

4.2.1 Expanding the Scope of Recognition for One’s Clear Knowing

In judicial practice, it is common for the perpetrator’s recognition of “awareness of the occurrence of harmful consequences” to be used interchangeably with “knowing that their actions will lead to harmful consequences”. However, these two concepts do not have the same meaning. “Being aware that one’s actions will lead to harmful consequences implies that the perpetrator is aware of what actions they are taking, the social significance of those actions, and the harmful consequences. In other words, it cannot be simply assumed that the content of direct intent is merely the recognition of the occurrence of harmful consequences; instead, the recognition should include knowledge of the content, social significance, and harmful consequences of one’s own actions.”^[12] Therefore, based on current judicial practice, when presuming one’s clear knowing in crimes involving intentional damage to cultural relics and scenic spots, the scope of recognition for one’s clear knowing should be further expanded.

In addition to being aware that cultural relics and scenic spots will be damaged, the perpetrator should also be aware that their actions carry a negative social evaluation. This ensures that the perpetrator has a clear understanding of the causal relationship between their actions and the harmful consequences. It is worth noting that incorporating the content of “awareness of the negative social evaluation of one’s actions” into the scope of knowing recognition aligns with the perspective of dual behavioral worthlessness theory when determining

the illegality of an action—that is, “the criterion for judging the illegality of an action is whether the action itself is immoral, that is, whether it violates the ethical and normative system of the country and society, and whether it lacks general social appropriateness”.^[13] In other words, when an action does not violate the ethical and normative system of the country and society and is socially appropriate, it should not be deemed illegal. Chinese professor Zhou Guangquan points out that “in situations where the importance of social ethical norms is emphasized, the subjective evolution of the perpetrator’s inner state, such as whether they have ‘evil’ motives or purposes, should receive greater attention. The relationship between the infringing facts and the perpetrator cannot be severed”.^[14] Accordingly, if the perpetrator can prove that their actions conform to social norms and were not aware of the reprehensibility of their actions at the time they were committed, then subjective intent should not be attributed to them. As social life becomes increasingly complex, the possibility of legal interest infringement resulting from normative behavior has increased significantly. For example, in the era when agricultural machinery was not advanced, farmers relied heavily on simple farming tools for cultivation, and daily farming activities only involved the topsoil layer. However, the continuous advancement of mechanical civilization has made it easier and more efficient to extract sand, soil, and stones, which has also increased the risk of damage to historical relics and sites that may be buried beneath the topsoil layer. Another example is the need for economic development, which has led to large-scale urban construction and real estate development projects. These projects have increased the risk of damage to sites, ancient cities, and ancient buildings that may not have established adequate protection measures. Even if relevant exploration or protective measures are taken in the early stages, there is still a risk of damaging valuable cultural relics that have not yet been unearthed. Therefore, it is not reasonable to require perpetrators to have knowledge of potential risks when they comply with relevant regulations. Otherwise,

it may put farmers and construction workers who comply with social ethical norms into a constant state of legal uncertainty, and it may also lead to more serious illegal behaviors and greater losses due to the conflict between the need for development and the fear generated by this state of uncertainty.

4.2.2 Clarifying the Degree of Knowingness

“Generally speaking, the cognitive factors stipulated in Article 14 of the Criminal Law include two scenarios: the first is knowingly engaging in conduct that will inevitably (certainly) result in harm to society; the second is knowingly engaging in conduct that may result in harm to society.”^[15] In intentional crimes, the perpetrator has two kinds of cognition regarding the harmful consequences: knowing that they will definitely occur and knowing that they may occur. While the distinction between these two cognitions does not affect the determination of the crime, it is not deeply explored in judicial practice. However, theoretically, the difference between the two is related to the distinction between direct intention and indirect intention, and subsequently affects the assessment of the perpetrator’s subjective malice.

Moreover, the degree of the perpetrator’s knowing about the possibility of the harmful consequences occurring will also determine, to a certain extent, the magnitude of their subjective malice. Therefore, while grasping the breadth of the scope of knowingness, we must not overlook the degree of knowingness. When adjudicating cases, it is necessary to determine the level of the perpetrator’s knowingness possibility within the range of 0-100% (with 0 representing the belief that the harmful consequences are impossible and 100% representing the certainty that the harmful consequences will occur) based on the actual circumstances. For example, if a perpetrator knowingly hires a construction company to undertake large-scale repairs to an ancestral home that is a provincial protection unit, it is evident that the perpetrator is fully aware that the result of damage will occur. Another example is when a perpetrator plants trees near a scenic spot without permission and, while realizing that their

actions are inappropriate, only believes that there is a possibility of causing damage to the scenery. In this case, the perpetrator's awareness of the possibility of harmful consequences occurring is less subjectively malicious than in the previous example.

It is important to note that "knowing possibility" is not equivalent to "possible knowingness". When a perpetrator knows that harmful consequences may occur, it indicates that they have recognized the causal connection between their actions and the consequences. However, when a perpetrator may know that harmful consequences will occur, it means that they may not be aware of it. In such cases, the perpetrator's subjective aspect towards the occurrence of harmful consequences cannot be deemed as intentional. For instance, if a construction worker suspects that their construction activities may cause damage to cultural relics and indeed causes such damage, it can be determined that the worker had a knowing possibility of the harmful consequences. However, if the facts of the case indicate that the construction worker may have been completely unaware of the potential harmful consequences, "based on the principle of favoring the defendant when facts are in doubt, it should be determined that the perpetrator was unaware... Therefore, knowing possibility and possible knowingness are related to the intentional cognitive factors and negligent psychological states".^[16]

4.2.3 Establishing an Indicator System for Presuming Knowingness

As previously mentioned, in cases where existing evidence is insufficient to meet the requirements for determining knowingness, courts generally adopt the approach of presuming knowingness. Moreover, compared to using evidence for logical inference, the application of presumption is often more common in judicial practice when it comes to the subjective determination of crimes involving the intentional destruction of cultural relics and scenic spots. However, "up until now, there exist diverse views in the legal community regarding the most fundamental issues related to presumption... Researchers

hold differing opinions on the role and limitations of presumption in addressing difficulties in judicial proof, and there are considerable differences and debates".^[17] Therefore, based on the determination of the scope and degree of knowingness mentioned above, it is of utmost importance to establish a reference indicator system for presuming knowingness required for the crimes stipulated in Article 324 of the Criminal Law by drawing on the operational concepts from empirical research and measuring whether the standards for presuming knowingness and its degree are satisfied through specific empirical phenomena. This will be crucial in standardizing current judicial practice.

The specific approach can be as follows: First, based on existing judicial practice, list out the presumptive bases (legal norms, ethical and moral norms, the perpetrator's personal background, etc.) involved or potentially involved in this crime. These may include the presence of corresponding warning signs or notice boards near cultural relics (protected units), the prior intervention, warnings, or issuance of a "Notice of Rectification" by administrative authorities, extensive local propaganda and education on cultural relic protection, and whether the defendant is a repeat offender. Second, treat each presumptive basis as a single indicator, quantitatively assign scores to the presumptive force of each indicator based on empirical logical rules, and set a minimum score threshold for making a presumption of knowingness. Third, when the cumulative scores corresponding to the presumptive indicators in a specific case exceed the minimum score threshold for making a presumption, it can be presumed that the perpetrator knowingly caused the harmful outcome.

In summary, it is necessary to reasonably improve and standardize the standards and measures for determining knowingness in crimes involving the intentional destruction of cultural relics and scenic spots. In specific judicial practice, these standards and measures should be followed, and based on the established criteria and scope of determination, the two aspects of knowingness

constitutive elements of the perpetrator in individual cases should be examined through judicial proof or an objective and systematic presumption system to avoid potential loopholes in judicial activities.

5 Conclusion

Currently, China is making efforts to enhance the protection of cultural relics. In this regard, numerous scholars have pointed out that there are some unreasonable aspects in the provisions regarding cultural relics crimes in China's Criminal Law, including issues with the system, charges, and prescribed punishments. To address the shortcomings in the protection of cultural relics in China's Criminal Law, scholars have suggested "adjustments to the structure of the crime of obstructing the administration of cultural relics, the addition of a crime for negligent damage to scenic spots and historical sites, the revision of the crime of negligent damage to cultural relics to negligent damage to precious cultural relics, and modifications to the prescribed punishments for the crimes of intentional damage to scenic spots and historical sites and intentional damage to cultural relics".^[18] "Without any changes, the criminal law provisions (referring to Article 324 of the Criminal Law) are difficult to keep up with the times and increasingly hamper the effectiveness of cultural relics safety protection."^[19] However, enhancing efforts to combat crimes against cultural relics does not necessarily mean expanding the scope of criminality or increasing prescribed punishments. On the contrary, in the face of already caused losses to cultural relics, harsher imprisonment penalties are more difficult to achieve corrective and compensatory effects compared to property penalties. It is true that unlike other types of material property, cultural relics and scenic spots, as precious cultural heritage carrying the vicissitudes of thousands of years of history, possess immeasurable cultural value beyond their financial worth, and any damage caused to them is irreversible and difficult to compensate for. However, due to the constraints of current social and legal development conditions, standardizing and improving judicial practice is instead one of the

means that can more quickly and efficiently enhance the efficiency of regulating crimes against cultural relics. In judicial practice, it is necessary to fully rely on facts, take the law as the criterion, adhere to the important bottom line of safeguarding human rights, and not overlook the subjective malice of the perpetrator in the face of already committed criminal acts and objective losses to cultural relics. Reasonable sentencing should be conducted based on the circumstances of each case. At the same time, policymakers should strive to find a balance between punishing crimes and protecting cultural relics, establish sound social norms, and use reasonable and appropriate penalties to effectively punish criminals while highlighting the country's emphasis on the protection of cultural relics. Against this backdrop, this article explores the basic approach to determining knowingness in the crime of intentional damage to cultural relics and scenic spots. On the one hand, it aims to address the issues exposed in judicial practice and attempt to provide a unified standard for determination. On the other hand, the author hopes to use this as a breakthrough point, based on the current situation of crime, to propose some reflections from the perspective of criminal law, hoping to play a certain role in promoting the improvement of presumption of knowingness in crimes against cultural relics and scenic spots.

Reference

- [1] Bin Yuan, "Reasonably Grasping the Scope and Rules of Criminal Presumption," Procuratorate Daily on December 11, 2021.
- [2] Bin Yuan, "Reasonably Grasping the Scope and Rules of Criminal Presumption," Procuratorate Daily on December 11, 2021.
- [3] The basic facts of the case are as follows: From November 2008 to May 2014, the defendant Wang Peng served as a bond trader in the trading management department of a certain fund company. Due to work requirements, the fund company granted Wang Peng and other bond traders access to the account 6609 on a certain system. Since

July 7, 2008, the account 6609 has had access to the stock trading instruction query function, enabling Wang Peng to inquire about undisclosed information related to stock trading, such as the direction of securities trading, investment categories, security codes, transaction prices, transaction amounts, and the person who issued the trading instructions. Between March 2, 2009, and August 8, 2011, the defendant Wang Peng repeatedly logged into the 6609 account to obtain undisclosed information such as stock trading instructions from the fund company. Wang Huiqiang and Song Lingxiang operated the securities accounts of Niu Mou, Song Mouxiang, and Song Mouzhen, conducting securities transactions either concurrently or slightly later than the fund company. These transactions exhibited a high degree of similarity to the trading instructions of the fund company, with a total securities transaction amount of over 878 million yuan and illegal profits totaling over 17.73 million yuan.

- [4] Bin Yuan, “Reasonably Grasping the Scope and Rules of Criminal Presumption,” *Procuratorate Daily* on December 11, 2021.
- [5] Ruihua Chen, “On Presumption in Criminal Law,” *Jurist*, 2015, Iss. 5, pp.105-116.
- [6] Ruihua Chen, “On Presumption in Criminal Law,” *Jurist*, 2015, Iss. 5, pp.105-116.
- [7] Guangquan Zhou, “Knowledge and Criminal Presumption,” *Modern Law Review*, 2009, Vol. 31, Iss. 2, pp.109-118.
- [8] See Bin Yuan, “Reasonably Grasping the Scope and Rules of Criminal Presumption,” *Procuratorate Daily* on December 11, 2021.
- [9] Guangquan Zhou, “Knowledge and Criminal Presumption,” *Modern Law Review*, 2009, Vol. 31, Iss. 2, pp.109-118.
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- [11] See Machino Saku, *Lecture Notes on Criminal Law Volume I*, 1995 ed., Xinshan Press, p.225.
- [12] Mingkai Zhang, *Criminal Law (Volume I)*, 2021 ed., Beijing: Legal Press, 2021, p.338.
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- [16] Refer to Mingkai Zhang, “Knowingness in Criminal Intentions”, *Journal of Shanghai University of Political Science and Law (Journal of Rule of Law)*, 2023, Vol. 38, Iss. 1, pp.38-54.
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