

自由心证原则研究——以刑事诉讼为视角

On Free Evaluation of Criminal Evidence

郑未媚 著



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(京师刑事法学博士文库8)

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自由心证原则研究

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京师刑事法学博士文库

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编辑部

主上任富会深渐举罪你会举夫国中,而是半十世。标

刘志伟。北京师范大学刑事法律科学研究院中国刑法研究所副制作,所长、教授、博士生导师,中国法学会刑法学研究会

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袁 彬 北京师范大学刑事法律科学研究院讲师、法学博士

经过精心筹划,"京师刑事法学博士文库"在北京师范大学这 所拥有百年历史的著名高等学府面世。该文库在今日之北师大创 办,可谓生逢其时,躬逢其势,恰逢其地。

新聞生逢其时,乃指文库诞生于中国刑事法学理论研究进入精耕细作阶段。这是一个需要并且能够产生精深的刑事法学理论专著的时代,文库的内容恰好迎合了这种时代的需要。

所谓躬逢其势,乃指文库诞生之时,恰逢中国法律改革和法治 现代化运动如火如荼地展开,方兴未艾,文库有幸见证并参与到这 一国家与民族法治振兴的大业之中。

所谓恰逢其地,乃指北京师范大学为文库的茁壮成长提供了良好的环境和肥沃的土壤。众所周知,北京师范大学是我国极少数目前即拥有百余年历史的著名高校之一。她发端于1902年的京师大学堂师范馆。经过百余年的历史积淀,她不仅有着深厚的文化底蕴与优良的人文环境,而且在诸多人文社会学科领域达到了国内或者世界一流的水平,培养了大批国家栋梁之材。长期办学实践形成的厚重稳健的办学风格和"学为人师、行为世范"的办学理念,为法学这一逻辑严谨、内容深邃、价值超凡的社会科学在北师大的发展提供了得天独厚的条件。古人云:"源不深而望流之远,根不固而求木之长,德不厚而思国之安",犹如"伐根以求木茂,塞源而欲流长"。没有深厚的人文底蕴与长期的学术积淀作为基础,要想在法学领域有所建树,即便费尽一时之心力,亦难免流于肤浅,不成大器。在北师大创办刑事法学博士文

库, 自始避免了先天不足。

毋庸讳言,与众多成熟并稳步前进的学科相比较,北京师范大 学的法学学科还是非常年轻的学科。由于种种原因,不管是学术人 才的培养和引进, 还是学术理论的创新和发展, 法学学科都要比其 他社会学科逊色。这不仅使得京师法学在20世纪90年代错失发展 的良机, 而且与北京师范大学闻名遐迩的国内与国际地位极不相 称。今人欣慰的是,这种情况自2005年有了重大改观。在北京师 范大学校领导的大力支持下, 以著名中年法学家赵秉志教授为院长 的北京师范大学刑事法律科学研究院于2005年8月18日在北京隆 重成立,成为中国国内刑事法学领域中首家且目前唯一的、专门从 事刑事法学研究与人才培养的独立性、综合性学术研究机构。2006 年4月26日,在北京师范大学法律系的基础上,北京师范大学又 正式成立了法学院。两院相继成立并得以迅速和良性的发展, 标志 着北京师范大学法学学科全面繁荣的新时代的到来。"人事有代 谢,往来成古今。江山留胜迹,我辈复登临。"随着法学科学建设 在北师大的全面展开, 我们完全有信心经过若干年的努力, 让北师 大法学研究跻身于中国乃至世界法学强者之林。

"桃李不言,下自成蹊"。北京师范大学以其深厚的学术底蕴与宽松、自由的教育环境,吸引着国内外的青年学人慕名而来,追求精神的提升与文化的发展。"千里之行,始于足下",任何宏大的事业都必须从一点一滴做起。北京师范大学刑事法律科学研究院深知,"百年之计,莫如树人",十分重视刑事法学学科的人才建设,在建院不长的时间里,不仅引进了多位学术功底深厚、科研能力突出、在国内外有一定学术影响的中青年法学学者,而且招聘了一批毕业于国内外著名法学院、综合素质优秀、学术功底扎实的青年才俊。为了培育新人,使其在学术上不断推陈出新,北京师范大学刑事法律科学研究院凭借学校坚实宽广的学术综合实力与浓郁深厚的人文氛围,决定建立"京师刑事法学博士文库",支持年轻的法学博士和博士后将其博士学位论文、博士后出站报告以学术专著

的形式付梓出版,以此作为促进京师刑事法学发展的重大举措之一。由北京师范大学刑事法律科学研究院的资深学者组成的编委会负责"京师刑事法学博士文库"的运作。

"京师刑事法学博士文库"主要面向北京师范大学刑事法律科学研究院所培养的法学博士、博士后以及引进的具有法学博士学位的教学科研人员。鉴于目前刑事法律科学研究院已经初步形成学历层次高、年龄结构年轻化、专业知识结构合理、团结和谐、奋发向上的学术研究梯队,本文库将同时兼顾实体法学与程序法学,以多学科、多维度的精神兼容并蓄,以开放的态度欢迎跨学科方面的研究成果,使其具有视野宽广、包容性强的时代特征。简言之,"京师刑事法学博士文库"将以质取文,唯质取材,但凡有所创新、质量上乘的著作,均可入选。

京师刑事法学博士文库编委会将主动联系新加盟的北京师范大学刑事法律科学研究院的法学博士和研究院毕业的博士生,了解其博士学位论文的选题、内容及结构等,以宁缺毋滥、铸造精品的原则及严谨、踏实、创新的学术态度从中谨慎选择优秀之作,并认真审读,提供切实的修改补充建议,供作者修正参考,并负责联系出版,虚心接受国内外刑事法学同行和社会读者的批评指正。我们希望"京师刑事法学博士文库"的作品虽属阳春白雪之作,却能洞明世事,传递俗理;虽属曲高之作,却不至于合者甚寡。同时特别申明:文库的范围不仅限于博士学位论文,只要是加盟刑事法律科学研究院的法学博士同仁创作出的学术精品,均可列入此文库见诸世间。愿同仁闻弦歌而知雅意,愿我等奏流水而遇知音。

"泰山不拒细壤,故能成其高;江海不择细流,故能就其深"。 学术事业的发展与壮大依赖于理论的点滴积累。"京师刑事法学博士文库"在目前也许只是我国刑事法学学术事业中刚刚吐青的新芽,但是我们相信,它会在京师刑事法学博士文库编委会、加盟刑事法律科学研究院的诸位博士以及国内外方家学者和同行的精心培 育之下,逐步成长为国内外瞩目的参天大树,从而为繁荣、深化我国刑事法学学术研究,推动国内外刑事法学思想交流与学术合作,促进社会主义法治建设,作出有益的贡献。

科對表專照學大該剛東北前面要主 與文士與學表專例則有" 動學士制學表育具的整件及以圖北京师范大学刑事法律科学研究院 刑學為承集隊發出網索聯舉縣數太京师刑事法学博士文库編委会的

巨永高日三月三年七零零二年业知误结构合理、团结和潜、奋发向

上的学术研究梯队。本文库将同时兼顾实体法学与程序法学,以多

学科、多维度的精神兼容并蓄,以开放的态度欢迎跨学科方面的研

师利意先尝推上文库" 垛以席取文 峰质取材、但且有所创新

2011年以下 1011年 101

京师刑事法学博士文库编委会将主动联系新加盟的北京师范

大学刑事法律科学研究院的法学博士和研究院毕业的博士生。了

作、并认真审读、提供切实的修改补充建设、供作者修正参考、

并负责联系出版。虚心接受国内外刑事法学同行和社会读者的批

评指正。我们希望"京师刑事法学博士文库"的作品虽属阳春自

雪之作,却能洞明世事,传递俗理;虽属曲高之作,却不至于合

者甚基。同时特别甲明:又华的范围个仅张士博士学位论文。从

品、场可列入此文库见诸世间。原同仁闻弦歌而知稚意、愿我拳

奏流水而遇知音。

"泰山不抱细爆,故能咸其高;江海不择细流,故能就其深"

学术事业的发展与壮大依赖于理论的点滴积累。"京师刑事法学博

芽, 但是我们相信, 它会在京师刑事法学博士文库编委会、加盟刑

事法律科学研究院的诸位博士以及国内外方家学者和同行的循心培

Doctorial Series of books of Metropolitan Criminal Law Science of guidal to describe the description of ming a school has provided the unique condition for not not described the provided the school and the school and

law science which requires rigorous logic, deep content and high value. Our ancestors said: "Fopreface include hot deep enough but hoping the water can flow farther, the root being not solid but hoping the

After carefully planed and prepared, "Doctorial Series of books of Metropolitan Criminal Law Science" has been established in this distinguished University with over a century history. We can well say that the establishment of "the Series" is on a proper occasion, in a proper situation and at a proper place.

Being on a proper occasion means "the Series" was established in the exquisite stage of China's criminal law scientific theory. This is a stage which needs and may produce profound masterpieces of criminal law scientific theory. The content of "the Series" is just right catering for the requirements of this era.

Being in a proper situation means while "the Series" being established, China's law reform and modernization are experiencing her development in the ascendant, just like a raging fire. "The Series" is lucky to witness and participate in the development of this great cause.

Being at a proper place means Beijing Normal University has facilitated "the Series" with healthy environment and fertile soil. It's well known, Beijing Normal University is one of the few distinguished Universities with over one century's history. She grew out of the Faculty of Education of Metropolitan University founded in 1902. After a century of development, through a century of accumulation, she not only holds deep-seated cultural foundation and good environment of the humanities, but also her disciplines of the humanities and social science have reached to the world standard or at the level of First Class in China. She

has cultivated large numbers of National Talents. Firm and steady style and the conception of "studying to teach and acting to example" of running a school has provided the unique condition for the development of law science which requires rigorous logic, deep content and high value. Our ancestors said: "Fountainhead being not deep enough but hoping the water can flow farther, the root being not solid but hoping the trees can grow big, morality being not high but thinking about the safe of our State" is just as "cutting the wood in order for the exuberant trees, blocking up the fountainhead in order for the water flowing far". Without deep-seated cultural foundation and long term academic accumulation as its base, it seems a bit superficial and ne'er-do-well to get major attainments in the field of law science, even though momentary mental and physical efforts have been used. The establishment of "Doctorial Series of books of Metropolitan Criminal Law Science" avoided the congenital deficiency from the very beginning.

No need for reticence, compared with the many ripe and steadily developed disciplines, the Law Science for Beijing Normal University is still very young. For the varieties of reasons, discipline of law science seems inferior to other social sciences, either in the cultivation and introduction of talents or in the innovation and development of academic theories. It not only made the Law Science of Beijing Normal University lost the chance of development in 1990s, but it is not matching with her famous international and national status as well. To be relieved, things have changed dramatically since 2005. With the support of the leaders of Beijing Normal University, College for Criminal Law Science of Beijing Normal University was solemnly founded in Beijing on August 18, with the noted jurist Professor Zhao bingzhi as the Dean. She has become the only independent and comprehensive academic unit in the criminal law scientific field specializing in taking on the criminal research and the tal-

ents cultivation. Based on the Faculty of Beijing Normal University, Law School of Beijing Normal University was formally founded on July26, 2006. Successive founding and rapidly well developing of these two schools signifies the prosperous new era is coming. "Human and nature have their own metabolization, old events have passed by. The world left wonders and interests, our generations step up". With the construction of Law Science of Beijing Normal University opening comprehensively, we believe absolutely we can enable Law Science of Beijing Normal University to rank among the world's most advanced influential universities nationally or even globally.

"If we are strict with ourselves, others will surely respect us". With deep-seated cultural foundation and free educational environment, Beijing Normal University has attracted young learners out of admiration home and abroad to pursue for spiritual promotion and cultural development. "A thousand-li journey is started by taking the first step". Any great cause should be done bit by bit. College for Criminal Law Science of Beijing Normal University knows deeply" as to a project of vital and lasting importance, human should be cultivated first". So she strongly emphasizes the construction of talents. Not long before the establishment of the college, she not only has absorbed many middle and young law experts who hold deep-seated academic foundation, good scientific research ability and academic influence home and abroad, but also has engaged a number of young talents who graduated from the famous universities home and abroad and hold good comprehensive qualities and solid academic foundations. In order to cultivate new talents and gradually make them weed through the old to bring forth the new and depend on her solid and wide comprehensive academic ability and strong and deep environment of the humanities, College for Criminal Law Science of Beijing Normal University decides to establish "Doctorial Series of books of Metropolitan

Criminal Law Science" to support young law doctors and postal doctors to put their fruits to be published in the form of academic books, as one of the great measures of promoting law science of College for Criminal Law Science of Beijing Normal University. Noted Editorial board organized by College for Criminal Law Science of Beijing Normal University is responsible for the management of "Doctorial Series of books of Metropolitan Criminal Law Science".

"Doctorial Series of books of Metropolitan Criminal Law Science" is designed to face the young law doctors and postal doctors cultivated by College for Criminal Law Science of Beijing Normal University and the teaching and researching staff who have doctor degrees in law introduced by the College. Because College for Criminal Law Science of Beijing Normal University has preliminarily formed her united and harmonious academic research group with high record of formal schooling and reasonable specialized knowledge of structure, "the Series" will give considerations to both substantial and procedural law science and welcome multiple disciplines' academic fruits with her open minded attitude and her spirit of multiple disciplines and sides. Thus she will hold her strongly magnanimous character of era with her wide vision. In brief, "Doctorial Series of books of Metropolitan Criminal Law Science" will choose the fruits merely according to its high quality. If the works are creative and is of high quality, it can be chosen. "Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science" will positively contact the new doctors graduated from College for Criminal Law Science of Beijing Normal University, getting to know the topic, content and structure of their essays. We will abide by the principle of putting quality before quantity and producing fine works and strict and steady and innovative academic attitude, choose the excellent works from them and carefully read and check, provide practical supplementary suggestions of amendments for the

authors to amend as a reference. We will be responsible for contacting publishing house, listen to criticisms with an open mind from our fellow scholars and social readers. We hope the works of Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science can find and know affairs of human lives, communicate common saying, even though they belong to the spring snow works; They are welcomed by many, even though they belong to the elegant works. Meantime we declare particularly the scope of "the Series" is not restricted in the field of doctorial degree essays, all the fine works or articles from the fellow law doctors in law are welcome. These articles and works can be listed in "the Series" and can be published throughout the world. May our fellow researchers know the real meaning while listening to the music; May we can meet our bosom friends while playing the flowing water.

"Mountain Taishan accepts small soils, so it can become high; Rivers and seas accept small streams, so they can become large". The development and expanding of academic causes depends on theoretical accumulation bit by bit. "Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science" may be the heading sprouts in the process of academic causes of our State's Criminal Law Science. But we believe that she can gradually become towering tree, attracting the attention home and abroad. It can make beneficial contributions for making our state's academic research of Criminal Law Science, promoting exchange and cooperation of Criminal Law Scientific thinking home and abroad, and accelerating rule of law's construction of our Socialism.

College for Criminal Law Science of Beijing Normal University
Editorial board of Doctorial Series of books of
Metropolitan Criminal Law Science
March 3rd, 2007

9差异, 各在不同类型的自由心证。

证多特否定态度,并将其文明挂钩,"这种情况直至20世纪90年代才有所改观。作者政能地把握了学术的潮流,

证据评价以及最终的事实认定是证据法的基本问题,是案件能否得到正确处理的前提。试看古今中外,为何出现冤案? 主要缘于评判证据、认定事实出了错误。在西方现代证据法中,大陆法系国家明确规定评价证据采取自由心证主义,英美法系国家也认同此原则。因此,自由心证在整个证据制度中占据着关键地位。他山之石,可以攻玉。对自由心证之研究,无论是对我国理论还是实务,皆有重要的价值。本书即是以刑事诉讼为视角对此重大问题进行研究的一个尝试,也是国内第一部比较系统全面研究自由心证原则的著作。本书的开拓性、创新性也正在于此。

作者首先对自由心证的历史演变和国外现行制度状况进行了系统的梳理,进而对其法理、结构要素展开深入的探讨,并分析其制度上的制约与保障。最后,在了解中国历史与现状的基础上,提出了在我国确立自由心证的构想。其观点鲜明、思路清晰、语言简练。本书特点有:

一、客观对待自由心证。作者认为,自由心证原则也 称内心确信原则,是指事实裁判者依据良心和理性对证据 的证明力进行自由评价,以达到内心确信从而对案件事实 作出认定的原则,是近现代以来以大陆法系为代表的西方 国家普遍采用或者认同的证据法基本原则。由于诉讼模式 的差异,存在不同类型的自由心证。

由于特殊的历史原因, 我国以往的证据理论对自由心证多持否定态度, 并将其与擅断挂钩, 这种情况直至 20世纪 90 年代才有所改观。作者敏锐地把握了学术的潮流,在汲取已有研究成果之基础上, 对证据制度之历史进行了全面整理, 对两大法系的相似概念之异同予以深入辨析, 于把握历史脉搏演化之中, 提出客观看待自由心证之观点, 持论有据, 引人深思。

二、全面地总结自由心证的结构要素。在研究理念、制度宏观构建的同时,作者以庖丁解牛之手法,将自由心证分为四个要素:主体——事实裁判者、对象——证据的证明力、方法(内在依据)——经验法则和逻辑法则,结果——内心确信,从而展开对微观具体的探讨,增强实践操作之可能性。作者将自由心证原则与证据裁判原则相结合,开拓了自由心证客观化这一核心问题深入探讨的理论空间。所谓自由心证客观化,是指事实裁判者对事实的认定必须以证据为根据;对证据证明力达到内心确信,实际上是指其确信所证明的事实客观存在。

三、系统阐述自由心证的制约机制。对于证据的评价 乃至事实的认定遵循自由心证是符合认识规律和诉讼规律 的,同时从自由心证原则产生开始,就伴随着如何使事实 裁判者的这种心证不至于陷入主观擅断的问题。本书从始 至终关注着防止事实裁判者主观擅断、使自由心证的自由 和不自由形成合理的协调,并明确主张对事实裁判者心证 的控制可以从两个方面入手,一是内在制约,包括逻辑和 经验法则以及客观的证明标准;二是外在制约,包括合议 制度、证据调查程序、证据规则、裁判理由制度、复审程序等。

四、世界的视野,中国的问题。作者在研究世界各国自由心证历史与现实的基础上,提出在中国确立自由心证原则的构想。为了验证自由心证在中国是否需要和如何建立,作者通过调研等方式获得了丰富的实证材料,以论证其必要性与可能性,并提出了具体的模式设想。

本书有不少创新之处,如将自由心证的对象区分为证据的个别证明力和综合证明力;明确提出在我国立法上确立自由心证原则。此外,对自由心证的内外约束机制的阐述也颇有特色。当然,我国三大诉讼法明确规定自由心证原则近期现实可能性不大,即便如此,在理论上提出超前的主张,其学术价值也不容忽视,也许正体现了其真知灼见。

本书的作者郑未媚,现任教于国家法官学院,我是她的博士生导师。她在读博期间,勤奋好学、热情大方、品学兼优,还参加了我主持的许多重要课题,具有扎实的理论功底和较强的科研能力。本书是其在博士论文基础上修改、增写而成的专著,也是她学术道路上的第一本著作。希望今后继续努力,取得更大成绩。

是为序。

陈光中 2007 年 12 月