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硕 士 学 位 论 文

现代自由心证制度研究

——证据审查判断方法之确立

Study on Modern Free Evaluation of Evidence

——Establishment of Means for Examination and Judgement of Evidence

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内容摘要

采取何种证据审查判断方法是否对证据加以采信及如何进行采信的前提，我国的《民事诉讼法》对证据审查判断的规定过于粗疏，法官在实践中难免有主观擅断之嫌。为弥补现行立法上的漏洞与缺陷，在借鉴其他国家的有益经验的基础上，最高人民法院于2001年12月21日颁布的《关于民事诉讼证据的若干规定》（以下简称《证据规定》）从我国的现实国情出发并结合我国法官队伍的基本素质，在证据的审查判断上确立了现代自由心证原则，即审判人员应当依照法定程序，全面、客观地审核证据，依据法律的规定，遵循法官职业道德，运用逻辑推理和日常生活经验，对证据有无证明力和证明力大小独立进行判断，并公开判断的理由和结果。这一证据审查判断模式为我国出台证据法提供了前瞻性准备，顺应了当今各国证据法的发展趋势；同时，这种模式包含着极为丰富的理论内涵。因此，笔者试图对其进行更进一步的探究，提出现代自由心证制度在我国全面实现的途径，为我国的证据立法在理论上起到抛砖引玉的作用并力图使本文在实践上具备可操作性。

本文除了引言和结语外，在结构上分为五章。第一章对证据裁判主义的概念进行解析，指出证据裁判主义的优势和缺陷，同时对证据的内在品格证明力与证据能力进行阐述，揭示证明力与证据能力之间的关系对于正确运用证据来证明案件事实的重要意义。第二章通过考察证据审查判断的发展历史，指出神示证据制度、法定证据制度、传统自由心证制度的特征及存在意义，从而表明现代自由心证制度登上历史舞台的必然性。第三章着重探讨了现代自由心证制度的基本含义和具体含义，针对将法官心证和证据规则区分绝对化的错误观点，通过阐明建立现代自由心证制度的原因，认为现

代自由心证制度体现的法官心证和证据规则是相辅相成的有机统一体。同时对现代自由心证下的法官心证进行层次性分析,认为法官心证自由是一种相对的“自由”,这种“自由”不是法官的主观擅断、随心所欲,制约法官审查判断证据的首要因素便是证据规则。第四章通过对心证在中国现状的说明,剖析了现代自由心证在中国产生并发展的必然性和现实性,提出在中国全面构建现代自由心证制度的途径。本文认为现代自由心证虽然推崇以证据规则对某些证据的证明力作出明确规定,但是证据规则的这种规定只是极个别的特例,现代自由心证的核心还是法官对证据进行独立地审查判断,不受法律程序以外的非正常因素干扰,在中国构建现代自由心证制度将会加速司法制度的彻底改革。

关键词: 证据; 证据裁判; 现代自由心证

ABSTRACT

Which means to take to judge evidences is the precondition of whether and how adopt the evidences. The rules of examination and judgement of evidence in our country's code of civil law are too scarce, so the judges are hard to avoid judge evidence subjectively and arbitrarily in practice. In order to make up the deficiencies of the actual law, the supreme court promulgate a law named the rules about evidences in civil procedure which uses other countries' salutary experiences for reference and integrates the situation of our country as well as the basic diathesis of the judges. It establish the principle of modern free evaluation of evidence that rules the judges look through the evidences according to the legal procedures. Other than following occupational moralities, the judges should handle logistic illations and experiences of daily life to estimate probative power and evidential ability of evidences roundly and objectively. Moreover, the judges should open the reasons and results of their judgements. The mode of this judgement of evidence which includes abundant connotation of theory laies firm foundation for the enactment of the law of evidence. Therefor, in order to make this article feasible in practice, the writer try to research on it ulteriorly and bring forward some approaches for all-around realization of modern free evaluation of evidence.

Besides the introduction and peroration, this article contains 5 chapters. Chapter 1 analyzes the concept of evidentiary adjudication principle, and points out the disadvantages and advantages of evidentiary adjudication principle. Chapter 1 also expounds the inner character of evidence namely both probative power and evidential ability and reveals the important sense of how to use evidences based on the relation of

ABSTRACT

probative power and evidential ability to prove the fact of the cases. By investigating on the development history of the judgement of evidences, chapter 2 points out the characteristics and existent bearings of the evidentiary system of divine denotation and the evidentiary system of legal provision as well as the evidentiary system of traditional free evaluation of evidence. Thereby, chapter 2 makes clear the inevitability of the appearance of modern free evaluation of evidence. Chapter 3 emphasizes on the discussion of the basic signification and idiographic signification of modern free evaluation of evidence and analyse the judges' free evaluation of evidence under this evidentiary system. It thinks that the freedom the judges had is not absolute and the rule of evidence is the chief thing to restrict it. Chapter 3 also mainly focuses on the why the the evidentiary system of modern free evaluation of evidence must be set up. It thinks that the freedom when judges valuate evidences had and the rule of evidence supplement each other. Chapter 4 analyzes the inevitability and practical connotation of the appearance and development of modern free evaluation of evidence in China. It also puts forward the approaches to set up the evidentiary system of modern free evaluation of evidence roundly in China. This article concludes that although modern free evaluation of evidence canonizes that the rule of evidence definitely prescribe the probative power of certain evidences, the core of this evidentiary system is that judges valuate evidences independently.

Key Words: Evidence; Evidentiary Adjudication;
Modern Free Evaluation of Evidence

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引言

发现案件的事实，从而判断是非曲直，一直是人类公平正义理念的体现，而且在当代已经取得了跨越文化体系的普遍意义。在运用证据再现案件事实的过程中，对证据的审查判断系决定是否对其加以采信以及如何进行采信的前提。《民事诉讼法》对证据的审查判断，只原则地规定了“人民法院应当按照法定程序，全面地、客观地审查核实证据”，这一规定过于粗疏，除了未将审判主体定位于法官而是采用“人民法院”这一集合式概念，已不适应当今法官职业化要求外，容易使法官在审查判断证据时，对行使这种裁量权属何种性质以及能够在多大范围内行使这种裁量权产生种种疑虑。实践中，法官往往依靠直觉和经验对证据进行审查判断，有时在行使这种裁判权上显得任意性过强，难免有主观擅断之嫌，有时又显得过于谨慎，担心办错案而受到追究，于是便将这种裁量权交由庭长、院长甚至审判委员会来行使，违背了直接言词的诉讼原则与证据法则。¹现代大陆法系各国关于证据的审查判断原则，既强调法官的自由判断，也强调遵循法律的规定以及判断的理由和结果的公开性，即由法官在遵循法律规定的前提下，依据良知和理性对证据行使自由裁量权，从而形成法官的内心确信。为弥补现行立法上的漏洞与缺陷，在借鉴其他国家的有益经验的基础上，最高人民法院于2001年12月21日颁布的《证据规定》从我国的现实国情出发并结合我国法官队伍的基本素质，在证据的审查判断上确立了现代自由心证原则。这一原则主要体现在《证据规定》第64条：审判人员应当依照法定程序，全面、客观地审核证据，依据法律的规定，遵循法官职业道德，运用逻辑推理和日常生活经验，对证据有无证明力和证明力大小独立进行判断，并公开判断的理由和结果。一方面司法中的证明活动是作为审理者的法官通过证据认定案件事实的活动，这一活动中不可避免会渗入审理者对证据的分析判断，即心证的因素。另一方面，法律不可能对处于诉讼制度核心地位的证据问题不闻不问，而只要法律对证据作出规定，无论是通过制定单独的证据法还是在诉讼法中规定证据问题，审理者运用和判断证据

¹ 毕玉谦.民事证据原理与实务研究[M].北京：人民法院出版社，2003.670.

就必然会带上法定因素。²该条规定弥补了诉讼法上的缺憾，为法官心证作出了制度性的开创，从而为我国进一步推进司法改革，加强法官职业化建设以及实行法官独立审判奠定了坚实的基础。目前，我国诉讼法中关于证据的规定非常简陋，虽然最高人民法院从准立法的角度颁布了一系列有关证据法的司法解释，但是我国在证据立法上的滞后性是明显的。由于《证据规定》有准立法的性质，且在形式上已初步具有立法的雏形，因为它在规一些必要原则的基础上又有许多的证据规则，且有一个极为重要的基本原则贯穿其中，即采用现代自由心证原则的立法模式。这一模式为我国完善诉讼证据立法提供了前瞻性准备，顺应了当今各国证据法的发展趋势；同时，这种模式包含着极为丰富的理论内涵。因此，笔者试图对其进行更深一步的探究，为我国的证据立法在理论上起到抛砖引玉的作用。

² 章武生.司法现代化与民事诉讼制度的建构[M].北京：法律出版社，2000.232.

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