

Free Proof in Criminal Procedure: What It Means and Why It Conflicts with Other Values

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Abstract

Article 155, Section 1 of Taiwan's Code of Criminal Procedure (hereinafter "CCP") provides, "The probative value of evidence shall be determined at the discretion and based on the firm confidence of the court, provided that it cannot be contrary to the rules of experience and logic." It seems clear that the criminal court has the discretionary power in principle to decide the probative value of evidence. However, the application of this rule has resulted in extreme public dissatisfaction with Taiwan's criminal courts, due to the commonly observed disparity between one judge's discretion and another's, when ruling on cases.

This Article argues that the disparity between judges' rulings, that leads to public dissatisfaction, results from a lack of understanding of the principle of "free proof", which principle discourages the lawmakers from pre-deciding the probative value and instead authorizes the triers, the judges or the jury, to exercise their discretionary power. This Article points out that the standard of evaluating the probative value of evidence is inconsistent with the standard of deciding the defendant guilty or not in Taiwan, unlike in most other countries where they are consistent. Therefore, Taiwan's judges have to evaluate the individual evidence by "the firm confidence of the court" but to achieve the final decision by the standard "beyond a reasonable doubt". However, "the firm confidence" is subject to the discretion of the particular trier, whereas "beyond a reasonable doubt" is subject to the rational standard of a third person. The two inconsistent standards inevitably result in conflicts of values and have made the public feel that there are discrepancies in how cases are decided.

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This Article also uses confession rules and hearsay rules, as provided in Taiwan's CCP, as examples to show how the principle of free proof may be limited by the Constitutional Court and lawmakers. As for confession rules, Taiwan's CCP requires the judge to examine the trueness of a confession by corroborating with other facts. That is, judges are not allowed to accept a confession as proof without other evidence. This Article holds that this limitation on free proof regarding confessions has its root in the Constitution and the CCP, but other types of statement evidence (such as eyewitness testimony) do not use the same standards. In regard to hearsay rules, the free proof used in deciding hearsay exceptions not only can decide the probative value but also admissibility of evidence. This Article argues that free proof should be restricted by the defendant's constitutional rights of confronting and cross-examining the witness accusing him.

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