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The system of formation of the inner conviction of a defender

Abstract: Based on an approximate presumptions the formal system of evidences has not justified itself with epistemological positions.

In a great extent the inner conviction of a defender is formed on a subconscious level which does not come to formal and logical buildings.

In case with the defender, the inner conviction acts only as logical and psychological category, and on attitude to other participants of process it acts also as procedural one.

Keywords: inner conviction; lawyer; defender; evidence; cognition; formal system of evidence.

In procedural activity the inner conviction is first of all the legal concept, fixed in the law, but from our point of view, this legal aspect of the concept is considered to be worked out less of all among scientific works. It is presented that some problems have not found a proper reflection yet, in particular: which legal consequences bears nonperformance of the requirements of article 145.2 of CPC of Azerbaijan Republic; what means the inner conviction as legal category and other. Let's try answer on some from listed question.

As it known, it is existed only two systems of the assessment of evidences – formal and on the base of inner conviction, i.e. free assessment. Both of them are related in equal extent to any cognitive activity, and not only to court proving. When it is available a clear rule, hard algorithm of obtaining of a conclusion and acceptance of a decision then there is not a place of the inner conviction, especially, if such rule has obligatory character for an investigator. Consequently, in this case, a formalized and profound ways are mutually exclusive (2, p. 103-104).

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A formalized way of knowledge has number advantages since it excludes or minimizes the mistakes, does not leave a place for subjectivism and arbitrary judgment, and also more economical. Though, it is true only on condition of correctness of algorithm. As it known, based on approximate presumptions a formal system of evidences did not justify itself and first of all, from epistemological positions in mind the unreliability of the algorithm received.

In a great extent the inner conviction of a defender is formed on subconscious level and does not lead down to the formal logical constructions (although under influence of number of objective factors). As result, this process is often uncontrolled as the learning subject so and other ones. In connection with this the inner conviction cannot be considered as legal obligation of a subject of proving. L.M. Karneyeva is right in her assertion that "a category of the right and a requirement to have is not applicable to the inner conviction that has psychological substance... Requirement to have a conviction is also unfounded as a demand to have it... Any requirement of the law assumes an opportunity to control it observance. But, this does not deny a control regardless of presence or absence of the conviction" (1, p. 77-78).

Actually, about sense of the inner conviction and other subjective states of man can be judged only on some external manifestations. It stays a riddle for the surrounding people until this sense is not manifested in any external actions, judgements. The only form of such external objective manifestation in process of proving is substantiation of a defender his conclusions in appropriate procedural documents (petitions, complaints etc.) or in the verbal speeches of procedural character. Just only on factual substantiation of the conclusions (and, naturally, on factual presence of proving material) are judged about their correctness, but not on internal state of a lawyer, decision accepted.

As far as we know, there is no any case of a repeal of the sentence, taking back a case for additional investigation on the ground that an investigator or a court accepted appropriate decision, not being convinced to end in it justice. For example, if an investigator submit a case to a court in spite of he has some doubts (it is not important, in respect of sufficiency of the evidences or actual guilty), he goes on a

certain risk but this circumstance would not have any legal significance. If a court accepts this combination of the evidences as sufficient, it would pass a sentence independently on a presence or absence of any inner conviction to an investigator. It is naturally that this action of an investigator is fitting of moral condemnation. It is not excluded his official liability (if this action becomes public knowledge), but one cannot speak about any procedural consequences.

In overwhelming cases the decisions of the participants of criminal process are made on the inner conviction, but it is difficult to check it in each specific case. The moment of formation of the inner conviction does not mean. If the inner conviction is formed to the judges before completion of a court investigation then it cannot be a base to a repeal of the sentence. It is certainly, before passing a sentence the judges have to examine their conclusions, to analyze evidences and etc. though this is from a sphere of professional ethics and moral but not the right.

Requirements, which the law makes to the inner conviction that it would be based on comprehensive, complete and objective examination of the circumstances of a case in their combination, are related to procedural activity previous it formation but not to a content of the inner conviction and it presence. This rule should maximum guarantee substantiate of the inner conviction, impede of appearance of the motiveless, arbitrary judgement. Though, how stated requirement is done, can be judged only on the arguments of decision accepted, that is fixed in appropriate procedural documents and other materials of a case. It is impossible to determine on the materials of a case as far as this decision corresponds of an actual opinion of a subject.

What are the legal requirements relating to the assessment of evidences on the inner conviction? On our view they can be arranged as follows:

- the law guarantees of absence of any established in advance rules about force and significance of separate evidences and their sufficiency for conclusion (in respect of permissibility of the evidences such rules are available). Therefore, during solution of these issues a researcher has only one way to trust to his inner conviction. The

absence of formalized way of knowledge does not leave other choice besides a free assessment of evidences;

- the law obliges to a subject of proving to implementation of procedural activity, previous of formation of the inner conviction (and directed to formation of such conviction) - thoroughly, objectively and comprehensively to check the collected evidences, comprehensively, completely and objectively examine all circumstances of a case in their combination and others;

- each subject of proving is obliged to motivate, substantiate his conclusion or decision on a case in appropriate procedural document (or verbal speech of procedural character);

- the law contains the guarantee of nonintervention at the assessment of evidences of other bodies and individuals, providing of the subjects of proving with opportunity to assess the evidences and make a decision without any external influence. Nonperformance of this requirement may be caused rather serious procedural sanctions.

These are general legal signs of the inner conviction that is also related to a defender. In view of unreality of the direct control under the inner conviction, the law provides only the guarantees of it correct formation and also an obligation of substantiate of the inner conviction, creating by this an opportunity of some indirect it test. All other it aspects are out of the bounds of legal regulation and create a sphere of action of the logical and psychological, moral and ethics and other laws.

Now we consider the inner conviction of a defender as criteria of the assessment of evidences. The present issue is arguable in the juridical literature; it is expressed various points of view on it. Ones authors believe that the inner conviction acts in the assessment of evidences as subjective criterion of their sufficiency (3, p. 72). Others ones believe that it is generally wrong to speak about the inner conviction as a criterion including subjective one, since the criterion should be out of a subject but not inside it (4, p. 165-168).

On our view, the inner conviction of a defender can be considered as one of the criterions of the correctness of the assessment of evidences, and to be exactly, the

criterions of truth of a conclusion. But it is not is that sense as it is considered as by the followers so and opponents of this conception.

A practice is criteria of the truth. But, an opportunity of the direct experimental checking of the conclusions in proving is usually absent. In generally, in proving a criteria of practice acts indirectly, and forms it manifestation very various - collective practice of the law enforcement bodies, usage of achievements of the natural and technical sciences, application of different devices and instruments etc. The collective practice is always accumulated in knowledge of the specific individuals. They are persons carrying out the assessment of evidences - lawyers, investigators, prosecutors, judges. In a certain extent, their everyday and professional skills concentrate of the knowledge accumulated and tested by a society. The inner conviction is formed on a base of such experience and consequently, it is one of the indirect manifestations of the criteria of practice (in wide sense of this notion).

It would be simplification to suppose that during assessment of evidences the inner conviction is a direct and unambiguous indicator of the correctness of this assessment. The inner conviction of the one subject is not mandatory for others, it does not take into account during examination of the reasonableness of a decision and in general it does not have a legal significance. But, criterion of practice in any it manifestation is always out of the bounds of a court proceedings since it acts in a court proving only indirectly. For instance, common scientific provisions, devices and other technical means, which are used in process of proving, are created and tested not in a process of court proceedings. If in court proving existed direct and immediate criterion of the truth, it could be formalized in the law and then would lose necessity in the inner conviction.

The inner conviction is a criterion of the truth only being as reflection of the objective in subjective. One can be speak about the inner conviction as on criterion of the truth only in the stated sense. Without saying, the criterion is the single. It is an one of the much manifestations more general criterion - practice, and a comparative, but not absolute. Nevertheless, it would be wrong to deny a role of the inner conviction.

All existed system of hierarchy of the subjects of proving, great number of court institutions, collective examination of the cases are admitted maximum to use this criterion. Growth of the number of the subjects increases an efficiency of the subjective criterion. This is especially important under absence of the direct objective criterion. The guarantees of the truth is considerably increased if many subjects (and independently from each other) would come to the single conclusion.

In this aspect it is presented a certain interest so named category of subjective (or personal) feasibility, using in some informative procedures (probing of public opinion, expert assessments of a situation etc.). The core of a subjective feasibility is that it is studied not the subject, but a subjective opinion about it. Nevertheless, under sufficient number of interviewed persons such method gives quite representative results and as rule, the close to the truth.

Thus, contradistinction of the objective to subjective criteria of the truth does not have absolute character. Under impossibility of the direct experimental checking of a conclusion the subjective criterion acts as one of the indirect manifestations of the objective, like a concentrated expression of the collective experience, a public practice. Analogical function performs the inner conviction of the subjects of proving, which is from one side, a method of the assessment of evidences and from other side, it acts as one of the criteria his correctness.

Consequently, the inner conviction can act as a method of the assessment of evidences and so it result. Society is interested in that the stated method would use more efficiently, and the result is the truth. Therefore, the law does not limited with providing of the subjects of proving an opportunity free assessment of evidences, and it contains the objective guarantees of a right formation their inner conviction, in particular, the duty of performance of certain actions, previous of a formation of the inner conviction and the duty his procedural justification. Besides, the inner conviction as the result of the assessment is one of the criteria of it correctness. Optimal usage the criterion is also come in a sphere of legal regulation. Established by the law hierarchy of the subjects of defense, his presence or absence does not have any procedural significance. The law contains number of requirements which are

related to his correct formation and using. These are the legal aspects of the inner conviction of a lawyer under the assessment of evidences.

At the same time, the article 145 of CPC does not indicate a defender in a list of the subjects of the assessment of evidences. Does it mean that a defender does not participate in the assessment of evidences or he assesses them on other criteria?

It can be given a categorical response on this question. In a case of with a defender, the inner conviction acts only as logic-psychological category. On attitude to other participants of a process (an inquirer, investigator, prosecutor and court) it acts also as procedural one.

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