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Subjectivism of the inner conviction

Abstract: It is examined influence of subjective beginnings on a process of formation of the inner conviction.

It is considered the rules of usage of the proofs for excluding subjectivism from the process of their evaluation.

Suggestions on changing and supplementing of the valid legislation are given.

Keywords: proving; subjectivism; inner conviction; proofs; evaluation of the evidence; criteria; information.

As a matter of fact, in criminal process all developed in details the appeals system of accepted decisions, a presence of appeal and appeal-cassation instance “is working” to exclude subjectivism during a consideration of specific criminal case. As it is right noted by N.P. Kuznetsov, an inner conviction as a sense of assurance of the subjects of proving in correctness of achieved cognitive result by them can be turned out wrong, if it is caused with consequence of non-critical, one-sided evaluation of actual information, if it is formed on a base of the doubtful evidence. Therefore, it is needed to be checked. Criterion of the truth of the inner conviction is only the practice (7, p. 49).

The inner conviction of some officials (even if their professionalism is not caused a question) cannot be a criterion of the truth in criminal proceedings. We note that this absolutely does not testify about fact that specific subject of proving carrying out criminal prosecution must not bear responsibility for decisions, in which he took part. In connection with this, it is difficult to be agreed with point of view of S.I. Slodin distinguishing illegality of action as happened real fact, and subjective one that based on the specific circumstances, assurance of an official in correctness, legality of an

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action made at that time, which can remove his personal responsibility (12, p. 99-100).

Presence of blunders and omissions in proving and forming on this base of the wrong inner conviction causing to serious consequences (for instance, to conviction of non-guilty individual) should not exclude responsibility of an officer of law enforcement body or the court. Principle of evaluation of the proofs on the inner conviction does not mean “an indult” on errors and omissions made by the officials in criminal process. At the same time we emphasize that the subject of proving – the official should bear responsibility not for own inner conviction, but for insufficiently qualified or wrong actions that is caused to formation of this conviction.

A lawmaker pointed out in article 145 of the CPC of Azerbaijan Republic that inner conviction has to be based on detailed, complete and objective examination of all combination of the proofs. This formulation is presented to be correct since used earlier term “circumstances of a case” is a very blurred and not a specific, as during of investigation and court proceeding are established the circumstances of a criminally significance event, but not a case: not crime as sometimes it is enable to answer to a question whether crime committed only after a verdict of guilty. They are established through formation of the proofs, i.e. a search, check and assessment of the evidentiary information about indicated event. But, not all information can be in further transformed into evidence. Certain information loses its evidentiary significance due to errors or omissions of the investigative officers, which do not observe the requirement of the criminal-procedural legislation.

As it known, considerable volume of the data, which under certain conditions (established by the criminal-procedural law) can be transformed into the proofs, is consisted the operational-searching information. It is presented itself that the operational-searching information should not be considered under evaluation of the evidence and development of the inner conviction of a subject of proving.

First of all, it should consider that the greater part of this information is differed with low degree of reliability and has an orienting nature. “Supporting” of the inner conviction of a subject of the proofs’ evaluation with such information can misinform of an investigator, to be the last argument for making wrong decision about inclusion

into a system of the evidentiary base of certain evidence. In addition, a lawmaker soundly makes equal demands on the subjects of the proofs' evaluation, which are listed in article 145 of the CPC. Obviously, that only an investigator and prosecutor possess with capability to use operational-searching information during evaluation of the proofs; but not the court, which is examined a case. The court assesses the proofs only on the base of other evidence that is presented in a case. It cannot and must not have an opportunity to make a decision on the base of information with orienting significance. We believe that it should agree in this case with developers of the CPC, which considered it necessary to emphasize that an inquirer, investigator, prosecutor, judge and jurors assess the proofs on their inner conviction that based on detailed, complete and objective consideration of the evidence which are available in a case.

Therefore, it should recognize unfounded the attempts of some authors to introduce into the scientific circulation a term of a notion "criminal detection", "criminal-searching", "operational proofs" (6, p. 127). Such overlapping of the terms can be caused to replacement by the practitioners of the proofs with operational-searching information that collected in a certain stage of investigation.

According to article 145 of the CPC, during evaluation of the proofs an inquirer, investigator, prosecutor, judge and jurors are obliged to be guided with the law and their conscience.

As it known, as the ground for the proofs' evaluation on the inner conviction in article 66 of the CPC of Azerbaijan SSR a lawmaker said a legal conscience (14, p. 44), the role of which in the proofs' evaluation by the subject of proving is assessed in scientific works ambiguously. In particular, a number of authors are against of normative requirement to be guided with a legal conscience during the proofs' evaluation (11, p. 8).

On opinion of other scientists, a legal conscience is an important guiding beginning of the proofs' evaluation since from the legal conscience of the judges, prosecutors, investigators depend on the fact how they are considering a significance of the procedural law in proving, how they are interpreting such categories as "sufficiency of the evidences under making a decision", "contradictions in evidences" etc. (11, p. 12-123).

It is presented, that during evaluation of the proofs by the legal conscience one should not be refused from the normative fixation of the guiding requirement. The more so, that article 25.3 of CPC says about an inner conviction and legal conscience. In modern interpretation under the legal conscience is understood the totality of ideas, views, assessments and emotions through which is expressed the attitude an individual and public associations to the effective law (4, p. 463).

Thus, a content of the legal conscience includes also valuable orientation of a certain person, i.e. the certain moral principles. What is more, that it seems important, in this case the moral landmark is used in the context of sphere the law's activity. Category "conscience" is more related to the philosophy categories, it has many aspects, is interpreted very ambiguously by the various representatives of the philosophy schools, and it is used applicably to the all spheres of vital activity. In our opinion, a lawmaker has to avoid using in criminal-procedural lawmaking the categories of such wide content. In addition, a category "conscience" has international, human nature and it does not reflect legal mentality of the citizens that or other country, which is usually formed during many centuries.

The normative fixation of the category "legal conscience" acquires an especial significance when we are talking about evaluation of the proofs by the non-professional participants of criminal process, in particular, by the jurors. Wittingly or unwittingly, during the proofs' evaluation of criminal case the jurors cannot be guided exclusively with common sense and conscience, as it is supposed by some authors (2, p. 281-283). Evaluating the evidence on criminal case, the jurors cannot professionally reason about legal reality without correlation of a common sense and conscience with personal and developed by the years the attitude to the sphere of criminal right and legal conscience. Other words, such assessment cannot be given by them without manifestation of their legal conscience.

Thus, from our point of view, it is necessary to fix legislatively the provision, in compliance with which under evaluation of the proofs on criminal case, the subject of proving (who resolve the issues of guilt and other matters on a case) has to be guided by the law and his legal conscience.

Interest is presented an issue about the subjects of the proofs' evaluation on the inner conviction. Article 145 says only about an inquirer, investigator, prosecutor, judge and jurors. Just these subjects indicated in this article, are obliged to assess the evidence on their inner conviction. Does it mean that other subjects of proving are not obliged to assess the proofs on their inner conviction?

It is the most discussible here is an issue about the fact whether a lawyer defending of an accused person is obliged during investigation or court proceedings to evaluate the proofs on his inner conviction or he is needed to form his inner conviction in dependent on the assessment given by his client.

Problems touching collision between a lawyer and his client are considered sufficiently in details in the juridical works but a lot of issues are to be remained of the discussion subject. In particular, R.R. Vagankin forms the following strategically important (on his opinion) principle of professional defense on criminal case: the proofs contradicting to the client's version are doubtful or can be interpreted on other way than they are used by the prosecution party (5, p. 211).

In our view, this principle, in it turn, arouses some doubts. With this approach it turns out that a lawyer at his first meeting with a client being not familiarized with case's evidence, is obliged (according to professional ethics) to be agreed and steadily to defend a version of his client, to be agreed with the inner conviction of his client in respect of the proofs' assessment, which are formed by investigatory body at this period of investigation. Under this, he is deprived the right to develop his inner conviction as to the evidentiary base.

It is presented that after familiarization with a case's evidence a lawyer, who is usually a specialist in jurisprudence, is obliged to develop his inner conviction in respect of the proofs having in the case. Moreover, he has to inform to a client his point of view as for reliability, relevance, admissibility and sufficiency of specific proofs of guilt of his client. With this, he has professionally to explain the more probable assessments of that or other evidence by the investigator, prosecutor, and that is especially important, by the judges who will be examine a criminal case. A lawyer is obliged to point out his client that a certain proofs, including those which confirm guilt of a client, are corresponded to all requirements presenting in a case.

We believe, that clarification to the client does not contradict to the professional ethics and opposite it is in accordance with it, and most likely indicated evidence will be the basic accusation as the investigator so and the court.

It should be especially emphasized that the lawyer does not have the right to force his proofs' assessment upon the client. If the client is not agreed with inner conviction of the lawyer as for that or other evidence, the lawyer is charged to be guided with an opinion his client and accept all measures that are not contradicted to the law in order to put the proofs on doubt contradicting to a version of the client. By other words, the lawyer has the right to the proofs' evaluation on his inner conviction, but he does not have the right to use it if his client is not agreed with this assessment. In this case we should be agreed with the statements that even if a defender in convinced in guilt of his client, and he continues to deny his guilt, the defender insisting on his arguments emphasizing non-guilt of the client does not speak untruth, he only fulfills his duties to defend a legal right of an accused not to be convicted without exposure of his guilt (10, p. 50-51).

In juridical works that are dedicated to issues of the proofs and proving, the discussible one is an issue about the fact whether the subjects of proving can use in criminal process the evidence, reliability of which looks doubt. There is an opinion, that each process of proving should be completed with appearance of assurance (inner conviction) in reliability of the proofs; if it is not such assurance it means that proving suffers from flaws, i.e. it is necessary to return to collection and check of the evidence (7, p. 224).

As noted by S.I. Odintsov, the most part of the American jurisprudents specializing in the branch of criminal process are also supported the rule that evidence of guilt out of reasonable doubt is the evidence, which leaves a person in hard conviction that an accused person if guilt. Under reasonable the American lawyers is understood, in particular, the doubt, which is based on the reason and common sense and can appear in result of detailed and impartial examination of all proofs or in result of insufficiency of them (9, p. 188-189).

According to other point of view, totality of the proofs "sufficiency" for a certain decision is not always mean that in this totality include the evidence the

reliability each of which has been established. Thus, at time bring a person as accused an investigator has to have sufficient proofs about the circumstances are needed to be made a decision on brought of a person as accused. But, due to the investigation is not completed at this time therefore, it is continuing the checking of reliability having proofs and collection new ones (1, p. 261-262).

It seems us that in this case an issue about possibility of usage in proving the evidentiary information, reliability of which is caused some doubts at the subject of proving, should be resolved with considering of procedural provision and procedural interest of this subject.

The subjects of criminal process carrying out criminal prosecution on criminal case do not have the rights to use in criminal process the proofs, reliability of which is caused any doubts. We believe that it cannot be agreed with opinion of P.A. Lupinskaya who supposes that for making of procedural decisions an investigator with combination of others can use the proofs reliability of which is not established (8, p. 27-32). As it noted earlier, the reliability is one of the mandatory and necessary features of the evidence.

When information having attitude to criminal case is not evaluated up to end from the point of view its reliability, it cannot be considered by the evidence. At the best case, it can be named the evidentiary information, i.e. criminal-relevant information is being in a process of transformation into the proofs. In our opinion, the usage of such information as a certain "semi-finished product" of the evidence for making important procedural decisions – detention, arrest, bring to accusation is not admissible. Using of such "not checked up to end" proofs can be has bad results about which is testifies the court practice' samples.

The Court Board on criminal cases of the Supreme Court of Azerbaijan Republic recognized that on a case of Agayev sentenced on 16 July 2005 by the Court of grave crimes for extortion on preliminary in collusion with a group of individuals with investigative bodies and the court was not collected sufficient evidence for conclusion about innocence of the convicted person and sentence in respect of him in considerable part is based on suppositions. In connection with impossibility to establish other evidence, the court board repealed the verdict and the

case in respect of Agayev and cancelled due to unproven his participation in committing of crime.

Demand on using in criminal process only reliable evidence should be spread on all subjects of proving. Mentioned does not mean that any doubt for indicated subjects should be excluded from a process of proving. Opposite, a process of detailed evaluation of the proofs should be preceded to recognition of information as evidence, during of which this information should be examined from the different aspects. Such checking in the most case is impossible without appearance to the subjects of proving some doubts it conformity with proofs' criteria. Moreover, it should be recognized as positive factor a presence of such doubts, which are allowed avoiding of accusatory emphasis and the subjects of criminal proceeding carrying out criminal prosecution.

As correctly notes S.B. Rakhmanov, a presence of irremovable doubt about the fact substantiating an accusation is caused its excluding from a system of the evidence, and consequently, justifying of an accused person. This fact is remained in the system of the proofs unless will be fully refuted, and consequently, appeared doubt is also interpreted in favour of the accused (3, p. 128).

It especially should be noted that if after detailed evaluation of the criminal-relevant information from the listed subjects are remained any doubts in it reliability then it cannot be assessed as evidence, and consequently, used for making decisions on the case.

In addition, procedural interests of these participants of the process as suspected (accused, client) and his defender are expressed in protection from charges by the all legal ways and means. A lawyer has the right to use in criminal process information, in reliability of which he is doubt, but it "works" on the version of the defense. It should be agreed with point of view about the fact that the lawyer has the right to reason before the court and the bodies of preliminary investigation in favour of such juridical conclusions, in reliability of which he is not convinced (10, p. 53). But, in this case incorrectly speak about the fact that a lawyer uses the proofs in reliability of which he is not sure. Term "doubtful" evidence does not have the right to exist in the theory of criminal process.

Stated above allows making the following conclusions: a) doubts in the process of proving and forming of the evidence are justified and are positive factor, but to be used as the proofs in criminal process should be only information, the reliability of which after their evaluation is not caused any doubts to the subjects of proving; b) the subjects of proving representing the defense party have the right to use in criminal process with purpose of protection the information in reliability of which they are not sure; the subjects of proving carrying out criminal prosecution and the court do not have such right.

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