

## **Forensic psychological examination in a system of criminal procedural proving**

**Abstract:** Number of provisions of criminal procedural proving does not correspond to reality; they are contradicted in essence and are not correlated with other provisions of the law.

It is considered the provisions containing contradictions, and is given suggestions on eliminations of them.

**Keywords:** forensic psychological examination; proving; criminal prosecution; evidence; assessment; inner conviction.

According to article 138 of the Code of Criminal Procedure (further, the CCP), proving is collection, checking and assessment of evidence with purpose of circumstances' establishing, which have significance for legal, well-founded and fair resolution of accusation [12, p. 161]. In principle, such goal of proving contradicts to part 7 of article 125 of the Constitution of Azerbaijan Republic, where in noted that criminal proceedings should ensure establishing of the truth [8, p. 43]. Problem might be considered as exhausted if resolution of accusation on specific case conditionally consider as relative truth in parameters of tasks resolved. The problem is not resolved if conditionally to recognize the goals of parties of criminal proceeding as identical.

According to article 139 of the CCP, in course of criminal prosecution a fact and circumstances of crime's event are established only on base of proving; complicity in a crime's event of suspected and accused person; signs of crime in committed deed stipulated by criminal law; guilty of a person in committed deed, stipulated by criminal law; circumstances, which mitigate and aggravate punishment, stipulated by criminal law; circumstances, on which participant of criminal process or other

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person-participant of criminal process, is based his requirements, if it is not provided by the CCP other one [12, p. 161-162].

Accent on criminal prosecution gives grounds to presuppose that during implementation of other kinds of procedural activity, ex. defence, circumstances, which are subject to be proved (subject of defence), are established with other way, but not on base of evidence. In our view, these “inessential” and “not related” to subject mistakes and contradictions of investigation are not corresponded to criminal procedure law and should be eliminated.

Research made by us to allow asserting that a number of provisions of criminal procedural proving do not correspond to reality; they are contradicted on essence and are not correlated with other provisions of the law. In this connection, while to pass on consideration of psychological aspects of proving, we should first consider some general procedural moments of it.

So, according to article 141 of the CCP, the following circumstances are confessed to be proved without use production’s materials on criminal case: notorious facts; correctness of researching methods common in modern science, technique, art and other spheres; circumstances established by decision, which has in prejudicial order mandatory force for a court.

The following circumstances are recognized as established without use of production’s materials on criminal prosecution: knowledge the law by persons; knowledge the official duties and rules of his profession by persons; absence of special skills or education of a person not submitted the documents, which confirm his special skills or education, not named educational institution or other institution granted him special skills and education [12, p. 163].

Most of provisions listed have already received rather negative assessment by Azerbaijani scholars. We will consider only those provisions, which have attitude to topic of the present article [6, p. 47-49].

Statements about infallibility of the scientific researching methods contradict to postulates of science studies. Nowadays, life and science are developed. It is rejected old methods and developed new ones. Unfortunately, there is no universal

informational bank anywhere. It might be happened that the methods have been used at one state, are confessed as obscurantism at other one. In addition, it is clear who will be a judge under decision of this issue. Court, prosecutor, investigator and other participants of the process are incompetent, and an opinion of specialists (experts) is subjected of assessment on inner conviction, which is very problematic to be formed.

In our view, issues on knowledge of the law, his duties and profession's rules by the persons are contained psychological aspects of cognition and have to be resolved in criminal proceedings on cognition laws.

In actually, criminal proceeding is a cognitive process, and cognition takes the form of proving. Process of accumulation of certain facts, which prove or reject crime's event and also the circumstances associating with civil legal arguments is a process of proving.

So, I.S. Yashin notes that thinking activity of persons carrying out criminal process is subordinated to common regularities of psychic processes and looks like thinking processes carried out in other areas of knowledge and social life. In addition, thinking cognitive activity of these persons has a specifics determined by a subject of cognition – illegal actions and civil legal arguments [15, p. 41-42].

Categories of dialectics are widely applied in process of cognition carrying out in criminal proceedings. Being the steps of cognition, the categories of analysis and synthesis, cause and effect, essence and phenomenon, general and individuality, identity and difference are allowed to establish objective truth, which is determined by the Constitution of Azerbaijan Republic as a goal of proceedings [8, p. 43].

Considering various information persons, who carrying out criminal process, analysis of it, establish causal relationship to examined facts, synthesize and evaluate results received, determining an evidential significance of them. As A. Efron notes, when versions are designing, detecting their confirmation or refuting, the persons use the methods of cognition, which assisting to establish objective truth [14, p. 24].

Thinking process of an employee of inquiry office, investigator, prosecutor or judge is a process of resolution of complicated tasks that linked with application of certain creative efforts. There are no always the tasks might be resolved only on basis

of available initial data. In opinion of I.S. Scherbin, a past experience, knowledge, data are acting as a source of such imagination. Push to creative imagination is needs in resolution of assigned task, and an experience of a man is considered as social and personal [13, p. 51-52]. This connection, S.I. Lyubimov writes: "... imaging a nature of research task, a participant of process mobilize stocks of knowledge, which allow him saying a number of presuppositions – versions about deed's circumstances. Considerable place in further resolution assigned task belongs to modeling as a way of recreation these or those circumstances, which assisting to cognition. Role of theoretical models in cognition is very significance; they help detection new regularities and laws, but only to cognition of specific, deep cognition" [9, p. 66-67].

Modeling assumes creation of imaginative or practical structure, which reproduce certain actions or circumstances, features or states these or those objects [4, p. 16].

Modeling in activity of participant of criminal process assists to cognition of particular, has wide opportunities to study the features and sides of separate objects, solve a matter about existence of this or that event, fact. So, combination of traces at place of occurrence allows assuming imaginative model of an event, its dynamics, and number persons-participants of it. Conducting of investigative or judicial experiment gives a chance in process of its modeling process to establish probability commission of certain actions, receiving these or those results. According to I.G. Kraynov, activity linked with modeling at any forms assists to cognition of some circumstances and facts, and final, establishing of objective truth [5, p. 114].

Models, which used in cognitive activity, are divided into two kinds: material and ideal. Any items, situation, actions, phenomena are reproduced in nature by material models. Casts, prints, photos, patterns and others that have significance for criminal proceedings might be related to them [2, p. 26].

Ideal or imaginative models as the samples that have certain sense are expressed in the notions. In opinion of I.M. Gazelin, these are, first of all, any presumptions, versions, imaginative forecasting that committed to achieve a certain goals of actions. For example, hypotheses about nature of crime's event or goal of civil legal deal,

forecasting of a course of forthcoming interrogation, search, testimonies check present the models of various directness that have united content – imaginative reproduction of the past or future in area of criminal procedural or civil procedural activity [3, p. 100].

The models are classified into static – material and dynamic – imaginative. The latter is movable, developing or lost its significance in course of checking their cognitive features. Mostly, the material models are preceded to formation of imaginative one, fulfilling a number of important functions, in particular, orientation, comparison of data for expert examination [1, p. 61-63].

V.E. Konovalova justly notes that process of cognition in course of proceedings is determined by logics of thinking. Right sensing of facts watched, establishing causal relationship of them, designing of reasonable versions, evaluation of information received are necessary stages in establishing of the truth [7, p. 71-72].

Inner conviction is also related to psychological basis of proving. It is necessary element of evidence's assessment, which presents itself a relation of a subject to his knowledge, come from them conclusions and decisions made on these grounds.

According to I.S. Nikolayev, full conviction is psychological guarantee of decisions' correctness that is accepted in course of proceedings. The conviction is coloured by emotional and volitional signs as knowledge forming in area of social relations [10, p. 119].

In actually, category “inner conviction” expresses subjective assurance in compliance with subjective assessment of objective existed circumstances or facts.

I.S. Nikolayev justly notes that inner conviction acts by one of the forms of representation of objective reality. Being of reflection of objective reality, inner conviction does not do a role of verification criterion of cognizable in criminal case. Practice is a criterion of truth in this area of cognition like at other ones [10, p. 120-121].

It seems that process of inner conviction formation consist on the following stages: 1) analysis of certain circumstances, materials (sensible cognition precedes to a stage named); 2) comparison of analysis' results with other materials (here, the past

experience and level of knowledge of investigated area have a great significance); 3) colligation of data received.

Legal awareness of a subject is run through psychological stages of inner conviction. In course of analyzing and evaluating each circumstance of investigated or examined case the participants of process are guided with a complex their moral, legal imaginations, which finally determine a social nature of inner conviction. Therefore, all attempts to interpret sense of awareness, conviction as intuitive one, which is not subjected to any control, should be recognized as contradicting to materialistic understanding of conviction forming.

S. Stark and R. Bring note that sufficiency of inner conviction constitutes its integral feature as is presented necessary informative base of structure of cogitative processes under formation of inner conviction [11, p. 100].

In our opinion, inner conviction has to meet certain requirements: a) to be based on information, which confessed admissible as evidence; b) each evidence should be examined separately and in combination with other evidences; c) to proceed from comprehensive, complete and objective consideration of case's materials.

As for evidential significance of forensic psychological examination, according to article 124.2.2 of the CCP, expert's record is related to the kinds of evidences, but we believe that this is a source of proving.

According to article 127.3 of the CCP, expert's record is not mandatory for inquiry officer, investigator, prosecutor or court as like any evidence it should be checked and evaluated by a body, which carry out criminal process, in links with all circumstances of a case. It should be make motivated decision in case of disagreement with expert's record [12, p. 147].

Meantime, in modern foreign books devoted to the problems of psychological expert examination is repeatedly expressed opinion that expert-psychologist's record might be refuted only by other higher qualification expert- psychologist.

In addition, there are more radical suggestions to exclude an expert-psychologist's record from the list of evidences, limited its significance only with directing factors.

So, Bruce A. Stevens in his book “Crossfire! How to survive giving expert evidence as a psychologist”, pointed out that, as rule, records of the expert-psychologists on cardinal issues of criminal process are subjective ones, which depend on applied methods of research, and in the same success will be protected polar points of view on the same issue. Therefore, an author offers to limit a record of the experts only with auxiliary significance for evaluation other evidences and, in his view, will exclude subjectivism on fateful decisions [16, p. 60-62].

It seems that statement on possibility of the conclusions’ refutation of an expert-psychologist by other higher qualification expert (specialist) is wrong and uncompleted. First, level qualification might not be resolved on basis of diplomas and certificates or work experience. Second, level qualification also does not guarantee a compliance of the conclusions of an expert-psychologist to the truth. This case, argument about truth of the conclusions might be lasted up to infinity and continued with appearance of a new higher qualified expert.

In our view, dissent with a record (conclusions) of an expert-psychologist might not be intuitive, and should be substantiated with specific facts on its incompliance with other evidences.

In fact, incompliance ones evidence to other ones does not give grounds for conclusion on correctness of any of them. But, in our view, it is a ground for further work to eliminate contradictions. Therefore, decision on dissent with conclusion of an expert-psychologist in mandatory order should be grounded with the facts of his contradictions to other evidences or presence of mistakes in research made.

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