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Research paper



Moral-psychological and Legal Aspects of the Evaluation of Evidence in Criminal Proceedings (Comparative Approach)

Igor Alekseevich Antonov1, Yuriy Viktorovich Gavrilin1, Alexander Viktorovich Pobedkin1, Eldar Kyarimovich Kutuyev2, Mikhail Yurievich Vinogradov3

1Academy of Management of the MIA of Russia, 125993, Russia, Moscow, Zoi i Aleksandra Kosmodemyanskikh St., 8
2St. Petersburg University of the MIA of Russia, 198206, Russia, St. Petersburg, Letchika Pilutyova St., 1
3Administration of the Federal Service of National Guard Troops for the Rostov Region, 334038, Russia, Rostov-on-Don, Sheboldayeva St., 43

Abstract

The impact of moral, psychological and legal aspects of the evaluation of evidence by the officials conducting the criminal proceedings on the attitude of society to its results is considered in this article. The comparative legal, formal-legal, and logical methods of study are used herein to prove that the evaluation of evidence as a mental activity cannot be controlled externally. At the same time, a free assessment of evidence is the only way to establish properly the circumstances in a criminal case. At the same time, the moral and psychological aspects of the evaluation of evidence are inherent characteristics of human thought and do not interfere with the establishment of truth. The conclusion is substantiated that it is possible to provide an objective evaluation of evidence only by the external criterion – the moral requirements to the selection of judges, prosecutors, investigators and their upbringing, checked by the society.

Keywords: *criminal procedural averment, authority of the judiciary, confidence in criminal proceedings, moral principles in criminal proceedings.*

1. Introduction

Criminal proceedings have a noble moral purpose to restore the relationships, violated by a crime, through compensation for harm caused to the victim. However, the basic social purpose of the criminal proceedings is the product of public need for justice: for the establishment of the person who committed the crime and commensurating retribution according to the criminal conduct of such a person [3, p. 220].

First of all, the society, the residents of the country, who sometimes may be unsatisfied with compensation for harm to the victim, if the guilty person did not suffer a well-deserved punishment, are interested in the justice of the criminal procedure. The criminal procedure "protects the public interests" in both social and legal senses [7, p. 55]. Therefore, the unfair result of the criminal procedure creates a discomfort, nourishes a sense of anxiety, and supports a sense of insecurity. Hence the basis of bringing the perpetrator to responsibility is not only legal, but merely moral and psychological: the protection of society from the persons unable or unwilling to obey the rules of the common living, the creation of a normal psychological atmosphere in the country and attitude development in the persons brought to responsibility and prone to offenses. The judges, the prosecutors and the investigators bear a heavy burden of responsibility for the normal state of society and for the order. Only a firm moral and psychological basis for making fateful decisions makes it possible for a person to sustain it without being deformed mentally, morally and professionally. However, society must be convinced of the fairness of criminal proceedings. It will not be affected by the admonitions that the decisions are fair and just. Their moral and psychological grounds must be tangible, understandable to society, set in advance. Everyone should understand what was the procedure for determining the person's guilt, on what set of evidence the prosecution was based, who and based on what scale assessed the evidence. Here comes to the fore the problem of the level of confidence in the personality of the subject exercising the criminal procedure averment, in his moral and legal socialization, the level of legal culture, psychological resistance to continuous stress.

It is obvious that the moral and psychological grounds for criminal procedural decisions must be set by the legislator and serve as a support for the mentality of the person performing the procedural activity, allow him to compare his actions with the requirements of the society objectively expressed in law, and the latter to control the participants in justice, to verify their perception of justice of the criminal procedure.

Thus, the normative rules for the adoption of criminal procedural decisions serve moral and psychological values, but they themselves must be substantiated both morally and psychologically.

The problem of the content of such rules is quite acute and its quintessence is the matter of the adequacy of the statutory regulation of the order of evidence evaluation. If the theory of evidence in a figurative expression of Spasovich is "the soul of the entire criminal procedure" [12, p. 7], then the evaluation of evidence can with good reason be called his "heart", because it is by its results that any criminal procedural decisions are taken, and it reflects not only the results of cognition, but also the human qualities of the investigator, the judge. Meanwhile, the rules for evaluation of evidence are extremely brief and, actually, in all modern types of criminal proceedings they reduce to a conclusion that it is carried out by the internal conviction. Is this sufficient to objectify the fairness of criminal procedural decisions?

Since the evaluation of evidence on the basis of internal conviction is the achievement of a global scale, let us turn to the compar-

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ative-legal method of study, while analyzing the wording of the rules containing the rules for evaluation of evidence (formal legal method) in different countries, reporting that the keys to the problem in question cannot be found without taking into account its multidimensionality: the relation with psychology, ethics, philosophy, the specific level of social development of society in each individual country (dialectical logic).

In the Code of Criminal Procedure of the Russian Federation (hereinafter referred to as the CCP), the rules for evaluation of evidence are established in Articles 17 and 88. However, only Part 1 of Article 88 CCP is very indirectly addressed to the evaluation as it is. It refers to the subject of the evaluation: "each piece of evidence is subject to evaluation in terms of relevance, admissibility, reliability, and all collected evidence in the aggregate – in terms of sufficiency for the resolution of the criminal case". The remaining provisions of this article either establish the grounds for evaluation or regulate its consequences.

The rules for evaluation of evidence are provided only in Art. 17 of the CCP, whereby they are elevated to the rank of the principle of criminal procedure, which has the grounds – the rules for evaluation of evidence are ideological, conceptual, and have no exceptions. The idea of the possibility of exclusion from principles has the right to exist; however, it rather explains the eclectic nature of the law than determines the vector of its improvement [14, p. 6; 1, pp. 11-12].

The evaluation of evidence by the law enforcement and jurors is carried out on the basis of internal conviction, based on the totality of the evidence available in the criminal case. It shall be guided by law and conscience (Article 17 of the CCP).

It should be noted that the Russian legislator, firstly, directly emphasizes that the evaluation of evidence in the adoption of criminal procedural decisions is primarily moral work (the requirement to be guided by the legal conscience of the CCP RSFSR of 1960 was transformed into the requirement to be guided by the conscience), and secondly, a priori it declares the refusal to establish tangible rules for evaluation of evidence (the evaluation of evidence is a mental activity, not regulated by the rule of law, while the requirement to be governed by law applies obviously to the formation of the evidentiary base, which is subject to evaluation, and not to the evaluation itself).

The introduction of the concept "conscience" with exclusively moral content in the criminal procedure legislation is an attempt to identify the moral responsibility of the officials who determine the fate of people in the face of society. "What is conscience in general? ... Conscience is a living foreboding and a prediction of the perfect person and perfect society to which humanity keeps the path and the inseparable connection of all generations without exception – past and future. In relation to each of us, this is a control breathing, or, better to say, control movement of the universal idea in us..." [11, pp. 477-478], – subtly and precisely wrote about the conscience the outstanding writer V.G. Rasputin.

The criminal procedural legislation of Russia has made a long stride towards spiritualizing the criminal justice process by combining the psychological process with a moral responsibility for it. The criminal procedural legislation of the foreign states is more technocratic – it is generally limited to specifying that the internal conviction is the basis for the decision making (Article 427 of the CCP of France, Article 342 of the CCP of Belgium, Article 94 of the CCP of Ukraine, Article 50 of the CCP of Estonia). In Germany, the term "free conviction" is used (§161 of the CCP of Germany).

It should be noted that Kazakhstan followed the example of Russia, the CCP of which stipulates that the judge, the prosecutor, and the investigator, evaluate the evidence in accordance with their internal conviction, guided by law and conscience, and the jury – only by a conscience (Article 25). The jurors, indeed, cannot be required to be guided by law, but the jurors, of course, should consider all evidence in its totality.

Given that the requirement for the internal conviction to be based on totality of the evidence and be guided by law is outside the evaluation itself, and the conscience is an integral regulator of the behavior of a morally developed person, it can be concluded that actually the principle of freedom of evaluation of evidence is reduced to the provision that no evidence can have a predetermined force (Part 2, Article 17 of the CCP). Only in this case it is possible to evaluate the evidence by internal conviction, guided by conscience.

The moral psychological grounds of granting the possibility to evaluate the evidence to a person conducting the proceedings on the case, mean his freedom, independence, and autonomy in the evaluation of evidence. At the same time, the inner conviction should exclude all external coercion, psychological influence on the part of the participants in the process and third parties, and this property of conviction is highlighted by the word "internal". In this sense, the inner conviction is understood as the psychological self-confidence, as the formation of one's own view of the actual circumstances of the case. Moreover, in the psychological sense, the inner conviction is also one's own belief in the correctness of the evaluation [15, pp. 39-70].

Does a clear rule on the right of an official to evaluate the evidence, based exclusively on moral criteria, mean the refusal of the legislator to establish the objective criteria for justice and fairness of the decisions that society needs so much to achieve the psychological comfort? Partly, therefore in the literature, the provisions related to the positive aspects of the formal evaluation of evidence began to be justified [4, p. 168].

This question will be answered later. First, let us turn to the ways of its solution in foreign countries. Let us note that regardless of the attitude to truth in the criminal procedure, it is a transcendental force that can be denied, but cannot be ignored. Even in the countries where they insistently emphasize the adversarial nature of the criminal procedure, they turn to truth, if only to deny it.

J. Frank wrote in this connection: "The objectives of a lawyer are to win a fight, not to assist the court in the establishment of the facts" [16, p. 85]. G. Abraham writes even more vividly: "The judge in no sense of the word is an active seeker of the truth with respect to the evidence presented" [17, p. 100].

Conversely, a number of American scientists express their opinion on the need to establish the objective truth in the course of criminal procedural averment. B. Stanton calls the jurors to the truth as follows: "Evidence must establish the truth of the fact with moral certitude – a certainty that convinces and directs the mind of those who are obliged, guided by it, to act consciously, and also satisfies their prudence and reason" [18, p. 416]. As it can be seen, all hope is on a sufficient level of moral development and psychological determination of the juror.

According to the Paragraph 1096 of the Penal Code of the State of California: "The accused in any criminal case is presumed innocent until proved otherwise, and beyond a reasonable doubt that his guilt is convincingly confirmed, he has the right to a verdict of acquittal" [10, p. 296]. A reasonable doubt is "a doubt that is based on reason and common sense and can result from a thorough and impartial examination of all evidence or as a result of insufficient evidence. The provenness of guilt beyond reasonable doubt means a provenness that leaves one in the firm belief that the accused is guilty" [10, p. 296]. Clearly, even here the criteria for evidence evaluation are moral and psychological, but not legal.

Similarly, the problem of evaluation of evidence is also resolved in Western Europe. It should be noted that Part 2 of Paragraph 244 of the CCP of Germany requires the court, in order to ascertain the truth, to investigate all the facts and evidence that are relevant to the case. The truth is recognized at the level of the law. However, in Germany it is often interpreted as the subjective truth, as the internal belief, not always based on reality. In the works of German processualists (K. Birkmeiker, J. Wessel, W. Westhoff, A. Gutmann, V. Kesser, H. Spendel), the features of the eternal, universal imperfection, inferiority are attributed to human cognition. It is concluded that forensic research is inherent in the irremovable dependence on the subject carrying out such a research, his personality, individual experience [8, p. 44]. Actually, the specific

features of the psychology of a particular subject become a criterion for the evaluation of evidence. 67 years ago, the Supreme Judiciary of Germany formulated this principle: a simple theoretical or abstract doubt, due to the imperfection of human cognition, did not prevent the conviction of the defendant. "The procedural establishment of the fact that is subject to averment requires only the omission of doubt by a judicious, conscientious, experienced judge, but never a free of doubt absolute certainty" [13, p. 32]. In other words, there is always doubt, which is not an obstacle to the formation of an internal conviction, sufficient for making a decision.

The CCP of Georgia explicitly establishes the level of conviction, necessary for making decisions of various kinds: a sound assumption, the evidence, sufficient to render a verdict without considering the case on the merits, a high probability, beyond reasonable doubt. The last level is required for the decision of the conviction and consists of a set of evidence that would convince the objective person of the guilt of the defendant (Article 3). If the term "beyond reasonable doubt" refers to such a combination of evidence, then it is more about the truth. Recall that this is the understanding that follows from the above rule of the California Penal Code. Beyond a reasonable doubt means complete conviction of guilt.

It seems that the problem of truth should not be replaced by the problem of judicial conviction. The latter, for example, in the FRG (Federal Republic of Germany**)** is considered in the psychological aspect in connection with the presence or absence of various kinds of doubts: philosophical, abstract, theoretical, reasonable, and practical ones. Those or other doubts can always be seen in the psychological process of the formation of inner conviction. Each judge uses "his own discretion, knowledge, experience in the resolution of the sentence, in which his personality, sympathies, adherence, emotions, convictions are manifested" [19, p. 212]. This always happens, but it does not in the least prevent us from considering the knowledge obtained as true if it is justified. Not all states require the judges to be justified, however, the justification is "valuable for educators and for the review of the verdict in the appellate instance" [20, p. 4].

The problem of truth is not psychological, but exclusively cognitive and moral. Undoubtedly, knowledge always carries subjective features of the cognizer; at the same time, there is always an objective in it. It is not only possible to be able to find it, to rely on it and to set such a goal, but also necessary, both in terms of cognitive abilities of a person, and from the standpoint of morality. The fragility of the psychological process of evaluation of evidence is not an obstacle to the formation of an internal belief in the establishment of truth.

One can ask oneself about the possibility of believing one's own eyes, doubt the adequate reflection of reality by the human brain, being at the same time convinced of the correctness of establishing the circumstances in the criminal case.

The evaluation of evidence by inner conviction is really a process of thinking, proceeding "in the grip of a person's psychology", but it must be aimed at finding the objective, otherwise the relativistic mechanisms that destroy self-discipline and a sense of responsibility are launched in person.

So, the evaluation of evidence by internal conviction cannot and should not have formal criteria, except for two rules: 1) in the process of evaluation (mental activity), no evidence can have a predetermined force; 2) the subject of evaluation of evidence must set himself the goal of separating the subjective from the objective and drawing on the evaluation of evidence and taking decisions on the latter.

However, here arises the question posed at the beginning of the article: how can a society be convinced that when evaluating evidence, the court, the prosecutor, the investigator rely on solid grounds that they are objective (let us recall the Georgian CPC "to convince an objective person"), and in fact assess the evidence on the internal belief? Are there any objective criteria?

Clearly, a free evaluation of evidence as a mental process, with such criteria is not compatible. The legislator is unable to explain, clearly define all the legal, philosophical and moral-psychological categories that are used by the person evaluating the evidence and give him the whole algorithm of actions, as well as the criteria for making a decision. In addition, "No matter how good the rules of the activity, they can lose their power and importance in inexperienced or unscrupulous hands" [6, p. 12].

What is left? Only a conviction in the morality and professionalism of the officials evaluating the evidence. It is in this belief – the key to the confidence of the public in the fairness of criminal procedural decisions. The legislator can and should lay down the guarantees that ensure the implementation of criminal procedural functions by morally developed individuals. A morally developed specialist, for whom a sense of duty is the most important motive of behavior, "will place much higher demands on himself than his manager can imagine" [2, p. 121].

The respect for the persons authorized to determine the fate of people in criminal proceedings is formed in a multichannel manner: 1) through open, clear procedures for the formation of the law enforcement corpus (society should not be given the role of outside observers of these procedures, therefore the elements of electivity, public evaluation of candidates are the ideas that require development); 2) by means of justice of decisions, high culture of mutual relations of powerful participants of legal proceedings with citizens, respect for them in deed (to exclude long expectations, numerous challenges, provide real compensation for harm caused by crime); 3) through the way of life of judges, prosecutors, investigators, including their behavior at work and at home, their culture, manner of treatment, style of clothing, hair style, etc. [9, p. 143].

The experience of the regional and Supreme Qualification Collegium of Judges of the Russian Federation leads to the conclusion that little attention is paid to the moral education of judges. The All-Russian Congress of Judges also does not include measures of a moral and educational nature as a priority. Thus, the resolution of the 9th All-Russian Congress of Judges of December 8, 2016 No. 1 "On the main results of the functioning of the judicial system of the Russian Federation and its priority directions at the present stage" is mainly about the improvement of social guarantees for the activities of judges, the realization of the rights to medical care, sanatorium treatment, the provision of judges with accommodation, optimization of the workload, the development of simplified procedures for judicial proceedings, the introduction of modern information technologies and other issues of procedural, organizational, social and material nature. The matters of selection of candidates for the position of judges were reduced to the condemnation of the practice of dissemination of the provisions of Art. 9 of the Code of Judicial Ethics (on the inadmissibility of a conflict of interest) on candidates for the position of judges. In the future, the requirements to the judge to take measures to exclude the possibility of influencing his objectivity by the situations associated with a possible conflict of interests are completely excluded from the text of this code, although for the acting judges they had a powerful disciplining significance. For example, why did they abandon the provision according to which "the judge should avoid situations when personal relationships with participants in the process can cause justified suspicions or create the appearance of a judge having any preferences or prejudiced attitudes"?

The issues of moral criteria for the selection of candidates for the position of judges, its objectification and evaluation were not considered in the resolution of the said Congress of Judges.

Given that conviction in the correct evaluation of evidence by the officials conducting the criminal proceedings is the only way to ensure the psychologically calm state of society through criminal justice, moral and educational measures should become prevailing in the decisions of professional communities. These measures need to prove to the residents of the country that officials understand that the public service requires "... a great idea, clean hands and sacrificial service. ... It is not generally accessible, not dilettante, not streetwise" [5, p. 492].

Thus, it can be concluded that the main burden in resolving the

problem of forming an objective criterion for the correct evaluation of evidence as an exclusively intellectual activity lies not in the criminal procedural legislation, but in the legislation that ensures the formation, development and maintenance of a high moral and cultural level of the corps of officials, carrying out the criminal proceedings.

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