Zaitseva S.A.♦

DOI: 10.25108/2304-1730-1749.iolr.2018.56.158-182

Genesis of free evaluation of evidence in Russian criminal process

Abstract: Theory of free evaluation of evidence, proceed from logical nature of proving in total and proving in court proceeding in particular, replaced the system of formal evidence by the system of all circumstance of a case in their connection and collection. Abolition of the theory of formal evidence and its replacement by the principle of free evaluation was a significant step in improvement of historical forms and methods of administering the justice.

Currently Russian theory of evidence considers the evaluation of evidence on inner conviction in dialectical unity of objective and subjective evidence, which have no force established in advance.

Keywords: evidence; evaluation of evidence; inner conviction; criminal process; law of evidence; proving.

In different historical periods, approaches to evaluation of evidence in Russian science were distinguished by qualitative uniqueness, to which there are a number of explanations [12; 13; 2; 5; 7; 14; 9; 18; 19; 20].

At operation of the accusatory process, a system of evidence, which was influenced by the religious beliefs of that time, included various kinds of ordeals - tests of fire, water, hot iron, etc., as a kind of archaic law.

Characteristic for the search (inquisition) process was the so-called system of formal evidence, which is manifested, first of all, in strict regulation of actions on evaluation of evidence. The system of evidence had built on initial provision based

♦ Za**itseva Svetlana Aleksandrovna** – PhD in Law, Associate Professor of the Department for criminal process of Saratov Juridical Institute of the MIA of Russia, Saratov, Russia. E-mail: k_ugpro@ssla.ru

on the fact that a value of every kind of evidence should be in advance established by monarch's will that vested in form of law. Law determined what evidence was perfect (complete), which were secondary and exalted the accused person's confession of guilt into 'the queen of evidence'.

Significance of concrete evidence determined not only by its content, but also with social status or any other personal qualities of witnesses that had found expression in strict hierarchy of evidence: testimony of noble man had advantage before testimonies of non-noble one, testimonies of a cleric had advantage before secular one, testimony of man – before testimony of woman.

Theory of formal evidence for its time was, unconditionally, one of the religious achievements in comparison with previous system of evidence early feudalism. It had reached its aim – to protect the administration of justice from arbitrariness of a judge, but had not achieved the main goal, for which it was created – purpose of justice. Court judgement satisfied formal requirements of law, but had not satisfied the requirements of justice. Theory of free evaluation, proceeding from logical nature of proving in total and proving in court proceedings in particular, had replaced the system of formal evidence with the system of free conviction of a judge, which is formed on base of consideration all circumstances of case in their connection and collection. Abolish of theory of formal evidence and its replacement with principle of free evaluation was a significant step in improving of historical form and methods of administration of justice.

For the first time, evaluation of evidence on the basis of inner conviction was developed in a competitive criminal procedure that has spread in states with the Anglo-Saxon system of law. However, there is kept here some elements of formal evidence - giving special importance to recognition by accused person his guilt, the normative fixation of the criteria for admissibility of evidence, etc. Based on subjective ideas on the unknowability of objective truth, theory of free evaluation of evidence has provided judges with opportunity to recognize truth on criminal

cases the fact that on their inner conviction is such. Judges had not to refer on evidence, which had led them to this conviction. Their decisions had not been motivated. Recognition of inner conviction as a criterion of truth in criminal proceedings had been agreed upon idealistic direction of bourgeois legal ideology of the heyday of capitalism. Wherein, it should keep in mind that determined like 'free' evaluation of evidence produced by judges on their inner conviction was far from free from the class interests of the bourgeoisie, the protégés and spokesmen of which they were.

It seems unjustified mixing of evaluation of evidence on inner conviction with principle of 'free evaluation of evidence', which, on essence, legitimized the unaccountability of the jury in matters of finding evidence of or lack of evidence of facts, freeing his from obligation to give any reasons and motives in support of these conclusions. 'Free evaluation' consists of independent of the concrete facts and their objective properties, in possibility of irrational conviction on impressions. Western jurisprudents emphasized in their works that first, often in a state "evaluation of evidence is based on… not in analysis of their internal strength, and in direct impression of the jurors, produced on them by that or other testimony or by personality of spoken in front of them" [6, p. 491]. Second, judgements of such court "are built on testimony, which are not linked with merits of a case, on data from the past of defendant and his reputation, on appearance of a defendant and his relatives", and third, by judges "at resolution of an issue on innocence are applied the templates" and "if difficult case and bad impression are combined then it might be pernicious for innocent" [21, p. 291; 17, p. 181-182].

The most complete and widely free evaluation of inner conviction was revealed in a combined criminal process. The first to adopt the new system was the French Criminal Procedure Statute. Most vividly it was expressed in Article 342 of this Statute and in the Instruction to the jurors. The law does not require jurors to report the means by which they come to their conviction; it does not prescribe to

them the rules, according to which they must evaluate the completeness and sufficiency of evidence. It prescribes them to ask themselves "in silence and focus and seek out in purity of their conscience" what impression has produced to their mind the evidence, which were brought against accused and the means of his defence. Law does not suggest them to consider as the truth every fact, which confirmed by some number of witnesses or unreliable the evidence, which was not confirmed by any number of evidence. Law put only one question: do you have inner conviction that accused is guilty or innocent?

Theory of free evaluation of evidence has expressed the declaration such principles of organization and activity of court like participation of people's representatives, publicity, openness, competitiveness, freedom of judge's conscience.

Interest to free evaluation of evidence in Russia became most acute in connection with innovations brought by the judicial reform of 1864. By this reform was introduced a court of jurors and Russia became involved in free evaluation of evidence on inner conviction.

Judicial Statutory adopted in 1864 were, on just definition of A.F. Koni "a fruit of sublime labour, imbued with consciousness of the compilers of their responsibility to Russia, the thirst for justice in its actual meaning" [8, p. 5].

With efforts of home scientists-jurisprudents was developed the theory of judicial evidence of the Russian criminal process.

Trying to limit arbitrariness in evaluation of evidence, they had asserted that an inner conviction cannot be merely a subjective impression of a judge who has no grounds. It must be based on evidence, verified in court. At the same time, some of them recognized that the establishment of truth is the goal of proving, since imperfection of evidence, emotional experiences of judges lead to the establishment of criminal judicial reliability, which is the degree of probability [12, p. 182].

The criterion for evaluation of evidence in court was declared an inner conviction of judges. “It follows from objective grounds that give a judge an objective confidence; it must be conscious, i.e. such, in relation to which a judge could always give himself a report, why he had it” [14, p. 379]. Criticizing the views of V.K. Sluchevsky, the soviet scientist-specialists in procedure often referred to his following statement: “in the affairs of the judiciary,” one cannot speak of “complete certainty”. But it seems that these words expressed not the concept of inaccessibility of truth in the criminal process, and not a refusal to set such a goal before the court. The meaning of the above words is in other: to warn lawyers against excessive optimism and belief in the infallibility of their conclusions. In this textbook, V.K. Sluchevsky wrote that the inner conviction “must be a product of the judge’s critical attitude both to the facts he observes, and to the psychological process by which he perceived them” [14, p. 379].

However, the authors of the Statutes feared that the novelty of such evaluation could cause a number of practical difficulties in courts, especially in those cases where evaluation of evidence should be performed by jurors, that is, people who do not have a legal education. Therefore, the drafters of the Statute decided that it was necessary to place in the form of a special appendix the most important rules for evaluating evidence that did not have the force of law, but based on everyday experience and logic. They were supposed to help judges and jurors to understand complex cases and come to the right conclusions in matter of the proof of crime commission by defendants. Among the rules for assessing evidence, which the authors drafted, were the following:

1) Defendant is recognized innocent until the contrary is proved. Any doubt about the guilt or a degree of guilt of a defendant is explained in his favour.

This provision is a form so named presumption of innocence [14, p. 74; 18, p. 64-65; 13, p. 345], that recognized in theory of procedural law, an essence of which was repeatedly subjected to discuss [19, p. 216-220; 2, p. 166].

2) A number of circumstances were indicated, in presence of which "the defendant's own confession was not respected".

3) A number of circumstances were also indicated, in presence of which "testimonies of witnesses were not respected".

4) The acts recognized as reliable, which were compiled in presence or by an official in relation to the facts certified by them "until the contrary is proved".

5) It had given the following definition of evidence and their evidential force: "Evidence is recognized any circumstance, of which might be concluded either on an event of crime or on guilt of suspected person. Only those evidence might be accepted into account at resolution of a case, which have undoubted connection with a subject of judgment".

6) "Neither own confession of defendant nor testimonies of witnesses accepted in respect; if it made beyond court, and preliminary investigation, without presence of extraneous persons" [20, p. 791-792].

However, an idea of placing these rules in the Statute was later rejected. It was recognized that this instruction would represent to judges and jurors "an easy way to resolve decisions by bringing circumstances to known and once-for-all-established formulas, without independently analyzing the meaning of each circumstance and without carefully considering a strength of all circumstances in an aggregate" [15, p. 275]. Since chaired judge was obliged to explain to jurors "general juridical grounds to judgement on strength of evidence, which were brought in favour or against a defendant" (Article 801 of the Statute of Criminal Proceedings, hereinafter the SCP), the law made the following demands: "General grounds to judgement about strength of evidence are explained by a chair of court not in form of immutable provisions, but only in meaning of warning against any passion for accusation or acquittal of a defendant" (Article 803 of the SCP).

In the modern period, these rules are forming the basis for the parting word of a presiding judge to juror before they are removed to the advisory room. "It should

be done simply and comprehensively, carefully evaluating the evidence, not allowing the jury to evade the way of logical thinking in different back streets and streets-sides, and taking off wrongly written decoration, which obscure the sober truth of a case" [13, p. 510-511].

This theory of free evaluation of evidence was used as the basis for the development of the theory of evidence's law. Its main rule was that only those circumstances, which were a content of this case and were part of its elements mattered, i.e. constituted a subject and limits of proving.

It followed that the first rule of proving concerned the relevance of evidence. Relevant circumstances and represented questions that are subject to investigation. Naturally, they only acquired their significance when they stood in a logical connection with the content of a case and its legal elements.

Second rule of proving concluded in the fact that circumstances, which subjected to be proved, should be confirmed only by evidence, admissible from procedural point of view. In this sense the theory of evidence divided them on initial received from primary source (witness observed in person the fact or this fact established by a document), and second that received from second hands (witness heard on a fact or their a copy of a document), and recommended a court to use more reliable initial evidence, and second one – only when there is no an opportunity to get an initial evidence.

Third rule of proving consisted in that for case had the same significance all evidence in indicated bounds of their connection with a case and their admissibility. More or less degree their persuasiveness, their evidential strength led only to simplicity or complexity that thinking process, through of which court comes to conviction in existence or non-existence legally significant facts. Theory of formal evidence had divided proofs into direct and indirect (evidence) and considered the latter evidence imperfect [10, p. 11].

In order to a forming of an inner conviction of a judge was quite free and did not transmitted in a system of arbitrariness in resolution of cases, the Statutes were foreseen the general rules, which were mandatory for every judge the both "in force of their reasonability and due to protection them with courts of cassation instance". First rule said that a ground for sentencing should extremely be the data received by a court and verified in court order (Articles 119, 733 of the SCP). Hence – it could not be evidence, for example, circumstances, only personally known to a judge, the data of a police inquiry or a letter of a witness not questioned in a court, etc. Second rule had foreseen adoption of legal sentence only provided that it substantiated on all circumstances of a case, i.e. none of information remained without discussion. All participants of a process have right to submit available information, which serve to disclosure of truth, and court unable without especial ground to refuse in their examination. Moreover, apart from petition of that or other participant of a trail, a court has to gather itself proofs if available proofs are not sufficient to establish truth. Third rule came down to the fact that all circumstances of a case had been discussed only in their aggregate, i.e. (as we understand), in comparison with each other: court must bear in mind not only all proofs on the case, but to discuss meaning of each of them to establish known fact or its denial upon presence of other ones, which are related to the same fact or contradict these proofs; only by comparing such evidence with each other and taking into account others, independently leading them to a conclusion about existence or non-existence of the same fact, and it is possible to form a correct conviction, wherein mandatory guiding by the laws of logical thinking. If, a higher court discerns from motivation of a judgment the illogicality of the court's arguments made in comparing the circumstances of the case with each other, as in other respects, the sentence should be 'rescinded'. The fourth rule, at last, concerned a way of evaluation of each separate proof: it should be estimated: 1) it is appropriate to an essence or the nature; 2) by "it proximity to the known

subjective proof of the fact, by it connection with the latter". For example, what is an interest of a witness in the outcome of case or what is his moral personality, how closely he observed an event, about which he narrates, etc. [1, p. 71-72].

Citing the opinions of drafters of judicial statutes Professor I.Ya. Fointintsky wrote: "Persuasion does not know other laws, except for the instructions of reason and suggestions of conscience. Evaluation of evidence is a mental activity resolved by doubt or persuasion" [19, p. 216], - he pointed out further limiting the evaluation of evidence on inner conviction from evaluation on impressions, which are, on his words, a product only sensual perceptions, which do not verify by thinking process.

According this theory, inner conviction is a yardstick of 'criminal judicial reliability', which means 'moral obviousness, i.e. that high level of probability, at which 'prudent man' believes possible to operate in cases, when 'a fate own and highest his interests depend on an issue on reliability of facts determining the act of resoluteness' [2, p. 14].

The procedural scientists of the late 19th century and especially the beginning of the 20th century reduced the entire task of judicial decision to a subjective confidence of judge in correctness of his decision. They were far from objective or material truth, from recognition of possibility to establish in court process doubtless, absolute truth and were ready to be satisfied with simpler and easier matter – obtaining of impressions that might be even not very deep and confirmed with basic and serious analysis.

After October revolution of 1917 and abolition of jurors' court up to 1922 in legislative acts about courts were not contained regulation of issues of law of evidence, though requirement of evaluation of evidence on inner conviction of judges, which based on socialistic legal conscience, was declared by soviet law from the first days its existence.

Already in the first Decree on the court of November 24, 1917, was emphasized the special role of 'revolutionary legal conscience' in activities of a court. Further, this had been repeatedly pointed out in other decrees [2]. Carrying out a clear orientation on the judges' inner conviction in assessing evidence, the first decrees did not explicitly call internal conviction as a criterion for evaluation of evidence. This was done in the Code of Criminal Procedure of 1922, which proclaimed the principle of evaluation of evidence on the basis of inner conviction, based on consideration of all circumstances of a case in their totality (Article 57 and Article 319 of the CCP of 1923). In 1924 evaluation of evidence on inner conviction is established by the Basics of Criminal Proceedings of the USSR and union republics (Articles 20, 23). The Basics of Criminal Proceedings of the USSR and union republics of 1958 in Article 17 and the CCP of RSFSR of 1960 in Article 71 again and finally enriched this principle of evaluation of evidence.

In addition, it should be noted that soviet criminal process had the theory of 'objectification', according to which material evidence, documents, expert opinions have more evidential strength than testimonies of witnesses.

In 1920-1940 a number of soviet jurisprudents understood judicial conviction not as principle of evaluation of evidence, and as a criterion of truth in criminal proceedings [9, p. 11-13; 12, p. 15-28]. However in 1955-1966 criticizing the understanding of inner conviction as a criterion of truth and proceeding from the provisions of dialectical materialism, they proved that the only criterion of truth in criminal proceedings can only be practice [16, p. 290; 3, p. 15-16; 11, p. 61-63].

Currently the Russian theory of evidence considers the evaluation of evidence on inner conviction in dialectic unity of objective and subjective proof that have no in advance established strength.

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