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The Internal Conviction in the Evaluating Evidence in the Constitutional Judicial Process

The purpose of the study is a comprehensive analysis of virtually unexplored issues of the formation of the inner conviction of a judge of the body of constitutional jurisdiction as a subject of proof in the domestic constitutional process. The author focuses particular attention on clarifying the general and distinctive features of the formation of the internal conviction of subjects of proof in foreign bodies of constitutional jurisdiction and judicial bodies of general jurisdiction. It is planned: firstly, to determine the philosophical and legal principles of the procedure for assessing evidence in the domestic constitutional court process, which today are not only poorly investigated, but also legislatively unregulated; the second, to investigate the degree of influence on the formation of the internal conviction of the judge of the constitutional court in the process of assessing the evidence of objective and subjective factors; the third, to determine the differences in the procedure for the judge to pronounce the constitutional authority on the assessment of evidence by a collegial judicial body by way of a vote and in a separate opinion on the basis of internal conviction; the fourth, on the basis of the results of the study, identify ways to further research the problem and justify the need for its legislative settlement. For the solution of the tasks the general scientific methods of cognition were used, in particular analysis, synthesis, deduction, induction, logical, systemic, as well as specific scientific methods of cognition in the field of law – formal-legal, legal-hermeneutical, comparative-legal, as well as a method of analysis of the practice of judicial constitutional control. The empirical basis of the study consists of the works of domestic and foreign lawyers who studied theoretical issues of judicial evidence and evidence, acts of domestic and foreign law, the practice of the Constitutional Court of Ukraine. The scientific novelty of the work is that this is the first domestic comprehensive study of the process of forming the internal conviction of the subjects of evidence in assessing evidence in a constitutional court proceeding. According to the results of the research, the author substantiates that the philosophical and legal principles of the procedure for assessing evidence in the domestic constitutional court proceeding are still left out of the attention of law science and lawmakers. The practice and theory of the constitutional court process shows that the formation of the internal conviction of the judge of the constitutional court on the assessment of evidence has a significant impact on the objective (circumstances and facts that were established during the consideration of the case), and subjective factors (personal traits of character and consciousness: worldview, professionalism, legal awareness and justice). Being a form and a reflection of objective reality, the internal conviction of one judge is not a criterion for knowing the truth in a constitutional court process, since this criterion is solely the decision of the collegial body. Problems of proving in the constitutional court process require constant attention from the science of the philosophy of law and the urgent legislative regulation.

Keywords: inner conviction; emotion; truth; evaluation of evidence; mental activity; litigation; doubt; fact.

Introduction

In the legal literature, problems related to the functioning of institutions of constitutional judicial control have been studied by many Ukrainian and foreign legal scholars, in particular: O. Bandura, Y. Baalin, V. Boyk, V. Brintsev, Y. Groshev, N. Drozdovich, A. Dubinsky, V. Kamp, N. Klymenko, O. Kony, V. Konovalova, M. Kostytsky, N. Kusakova-Kostytska, V. Malyarenko, O. Myronenko, M. Mihienkom, M. Pogoretsky, B. Poshva, P. Rabinovich, A. Sevivanovym M. Sirim, I. Sliderov, A. Strizhak, V. Tatsiy, S. Shevchuk, V. Shepitko and many others.

However, despite the significant number of publications and scientific works, some topical issues, in particular, the philosophical and legal definition of the concept and essence of inner conviction when evaluating evidence in the constitutional court process, are still little studied.

The theoretical basis of the study are the works of domestic and foreign scientists in the fields of philosophy and constitutional law, as well as acts of the domestic body of constitutional jurisdiction.

The purpose

The goals and objectives of the study are:
– the definition of the philosophical and legal content of the concept of «inner conviction», when evaluating evidence in a constitutional legal process, understanding the psychological foundations of its use;

– the Identifying common principles and differences in the worldview functional specificity of evidence in a constitutional court process and their influence on the formation of decisions and conclusions of the Constitutional Court of Ukraine (hereinafter – the CCU, Court).

Presentation of the main material

The activity of assessing evidence as a separate stage of evidence, which ends with the formation of a final internal conviction of a judge on the admissibility or inadmissibility of certain evidence regarding the facts and circumstances of the case, has long been under the close attention of specialists in the field of the philosophy of law.

As he wrote at the beginning of the twentieth century I. Foinitsky (1996, p. 193), the inner conviction of a judge should be formed as a result of his mental activity and should be:

- a) a conclusion from evidence verified in the manner prescribed by law;
- b) based on consideration and assessment of all evidence in the case;
- c) based on the assessment of evidence in its entirety;
- d) based on the assessment of each evidence «by its nature and in the case».

A. Koni (2017, p. 10–11), who noted that «the freedom of internal contention is that the evidence can be taken by a judge as confirmation of the existence of a particular fact (circumstances) only when, in the case of a judge, After considering it, pondering and weighing, the court recognizes its source and content in such a way that it does not give rise to doubts and is worthy of belief in relation to all the evidence together that the comparison, opposition and verification of some evidence by others does not take place in advance Sami's program, but through clever critical work, finding acceptable for human perception of the degree of truth, and one truth, as if» in some cases it was not difficult to subjugate your personal feeling to the consistent conclusion of consciousness.

A. Koni (2017, p. 80–82) singled out five stages of the development of justice in the context of assessing evidence, according to internal conviction, of a court (judge):

- First, the freedom of the judge's inner conviction with a limited range of evidence (the ancient and other ancient worlds);
- the second, the uselessness of inner conviction under the domination of the Horde (the early Middle Ages, early feudalism);
- the third, the bias of inner conviction with the dominance of the dogmas of the Christian church (the heyday of the Middle Ages);
- Fourth, the connectedness of inner conviction in the theory of formal evidence (later Middle Ages, absolutism);
- the fifth – the freedom of inner conviction of modern times.

On this occasion, it should be noted that an eminent legal scholar died in 1927, therefore, he could not fully appreciate another stage, so to speak, of the «development» of such a psychological-legal phenomenon as the assessment of evidence, according to the inner conviction, of a court the influ-

ence of the ideology dominating in the state (the Soviet Union, the countries of the socialist camp, China, the USA of the times of McCarthyism, etc.).

In the modern legal literature, the concept of «inner conviction» of a judge is interpreted differently.

Thus, according to the doctor of psychological sciences M. Enikeev (2010, p. 504–505): «the judge's inner conviction is his firm conviction that the circle of facts and circumstances necessary for resolving a case is correctly defined. The fact that they took place should be established and irrefutably proved».

The professor S. Fursa (2006, p. 555) believes that the judge's inner conviction is «not an unconscious impression, a sensation that cannot be controlled, but confidence in the correctness of his conclusions, which form the basis of the court decision».

«The nature of the judge's internal convictions», observes Doctor of Law V. Konovalova (2005, p. 143), «is characterized by a certain state of consciousness of a judge – the assurance of the correctness of the decision (sentence) taken in the case, as well as the willingness of the will to act in accordance with his internal convictions».

Professor of Law at the University of Beaulieu, Pennsylvania (USA) M. Sax (2017, p. 290), – defines the judge's internal conviction as «a difficult marriage between the brain, behavior and the law».

A. Volkov (2015, p. 7) notes in this connection that «the judge's inner conviction in court proceedings:

- France and Belgium – is to «meet the burden of proof» and means the requirement to establish the existence of probabilities or probabilities sufficient to make a court decision;
- Italy and Spain, – this is a «black box» – that is, a free assessment of evidence that the judge considers relevant to the knowledge of «truth» or the establishment of «moral certainty»;
- in Germany, – the decision by a judge to declare evidence «true» or «false»;
- in Ukraine, – a direct assessment of all available evidence on the basis of their comprehensive, complete, objective research (study)».

These all concepts definitely have the right to life, however, in my opinion, the scientific position of M. Mikheyenko (1999, p. 44) is more appropriate. So, according to the scientist, inner conviction in the psychological aspect can be viewed both in dynamics (as the process of its formation) and in statics (as a result). In the course of its formation, a personal opinion is created, doubts and uncertainties are eliminated and overcome.

The judge comes to inner conviction as a state of firm confidence in the correctness of his conclusions, the determination to fix them in the procedural documents, if necessary, to publicly express them, and readiness to defend in relevant instances, to bear responsibility for them. In the epistemological aspect, the inner conviction of a judge is knowledge of both the individual factual circumstances that

constitute the subject of proof, and the conclusions of the case, including those concerning legal assessment, qualification of established facts, circumstances, events, etc.

The importance of psychological factors as the basis for forming the judge's internal convictions, and N. Drozdovich (2010, p. 250–251), who argues that «the will component is a factor involved in shaping the judge's internal convictions. At the same time, the individual mental qualities of the judge give emotional color to the judiciary, but they do not take part in shaping the internal convictions of the judge; they exist outside this process and are only "background phenomena" when establishing the actual circumstances of the case and can have a negative external influence, since they form a one-sided view by the way, misunderstanding of complex or unusual objects».

The opinion of the judge of the Supreme Court of Canada, McDowell (2008), is also pleasing, who points out that where evidence is balancing on the verge of probability, there are no clear rules as to when the judge can have an internal conviction that the evidence is incorrect or reliable. The judge examining the case should not consider the proof of isolation, but should consider the whole set of evidence in this case and assess the impact of any doubt on the credibility and reliability of the main issue in the case.

The topic of proof in the jurisdictional process was developed by various scientists, but it dealt mainly with such problems as the relationships between legal proof and fundamental epistemic concepts such as knowledge and justification, in particular, scientific articles should be noted: Michael S. Pardo. The gettier problem and legal proof (2010); Amalia Amaya. Coherence, evidence, and legal proof (2013); Ronald J. Allen. The nature of juridical proof: Probability as a tool in plausible reasoning (2017); Shane Kilcommins. Crime control, the security state and constitutional justice in Ireland: Discounting liberal legalism and deontological principles (2016); Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso. Extraneous factors in judicial decisions (2011); Chrisje Brants, Stewart Field. Truth-finding, procedural traditions and cultural trust in the Netherlands and England and Wales: When strengths become weaknesses (2016); Nathan J. Brown Julian G. Waller. Constitutional courts and political uncertainty: Constitutional ruptures and the role of judges (2016). In these and some other publications, various scientific aspects of legal proceedings and jurisprudence were examined to determine the characteristic features of evidence in the jurisprudence, as well as the role of the formalized probability theory in the context of forming the judge's internal convictions.

It is also worth paying attention to the comparative study of Greek lawyer Dimitrios Giannulopoulos «The exclusion of improperly obtained evidence in

Greece: putting the first constitutional rights» (2007). In particular, he notes that, unlike in England and Wales, where there is only the possibility of declaring inadmissible evidence of doubtful origin, in accordance with Article 177, paragraph 1, of the Code of Criminal Procedure, evidence obtained in breach of a statutory procedure is unacceptable automatically, including evidence, received in violation of the right not to interfere with privacy.

Considerable attention in scientific circles is given to the problem of subjective perception of evidence by various judges, based in particular on their political or religious preferences and moral principles, that is, the phenomenon of imbalance between individual knowledge and the assessment of evidence and their actual evidential weight, in particular, this is stated in the works:

Jacqueline M. Wheatcroft, Hannah Keogan. Impact of Evidence Type and Judicial Warning on Juror Perceptions of Global and Specific Witness Evidence (2017);

Sylvain Brouard & Christoph Hönnige. Constitutional courts as veto players: Lessons from the United States, France and Germany (2017);

Volodymyr Kampo: «The Constitutional Court of Ukraine Is on the Path to a Doctrine of Real Law» (2011);

Sullivan, Barry. Just Listening: The Equal Hearing Principle and the Moral Life of Judges (2016);

Lydia B. Tiede. The political determinants of judicial dissent: evidence from the Chilean Constitutional Tribunal (2016);

Diego M. Papayannis. Independence, impartiality and neutrality in legal adjudication (2016).

In my opinion, despite the heterogeneity of these and other scientific concepts, the generalizing factor between them is that the authors, de facto, reveal the essence of the process of forming the judge's internal convictions in the context of his independence and impartiality.

Certainly, these factors are acceptable and necessary for judges of constitutional jurisdiction, but there is also a certain difference, the essence of which is that the judges of these bodies forming their inner convictions are more focused on the study of evidence in the context of their correspondence with the axiological, ontological and epistemic aspects.

In the legislative activity and judicial practice, the issue of determining the content of the concept of «inner conviction» of a judge is also given considerable attention.

So the Constitutional Court of the Republic of Moldova in the Decision of May 22, 2017, in particular, noted that «the judge's inner conviction is formed after examining all the evidence presented and stressed that this concept cannot be considered in the sense of the judge's subjective opinion, but is based on the body of knowledge, «Acquired by a judge after consideration of all evidence as a whole, in a diverse, objective and guided by law» (2017).

Closest in meaning to the concept of «inner conviction» is the term «beyond reasonable doubt», used in the practice of the ECHR in the process of proving. This term is based on the principle of «rational doubt». Thus, in the Decision of January 18, 1978, the European Court of Human Rights noted that «when evaluating evidence, the court, as a rule, should apply the criterion of proof “beyond reasonable doubt”, which follows from the presence of a collection of sufficiently convincing, clear and consistent evidence or irrefutable presumptions of facts (circumstances)» (2011).

The legislation of Ukraine, which regulates the activities of KSU, does not contain the concepts «assessment of evidence» and «inner conviction of a judge». The Constitution of Ukraine in Part 2 of Art. 147 only determines that this activity is based on the principles of the rule of law, independence, collegiality, publicity, validity and commitment of its decisions and conclusions.

In our opinion, this significantly drops the significance of constitutional jurisdiction as an important element of the national mechanism for protecting the rights, freedoms and legitimate interests of citizens in the context of comparison with the legislative settlement of procedural activities of constitutional courts of foreign countries and domestic courts of general jurisdiction.

For example:

– According to art. 35 of the Law on the Constitutional Court of Lithuania: «the evidence provided to the Constitutional Court is not binding beforehand. The court evaluates the evidence in accordance with the internal confidence of the judges, which is based on a detailed, comprehensive and objective examination of the full range of circumstances of the case at the court hearing and in accordance with the laws (2010);

– According to Article 12 of the Law on the Constitutional Court of the Republic of Moldova: after the appeal of the judge or one of the bodies, the Court makes a decision on the full or partial recognition of evidence, according to his own conviction, (part 2) (1995);

– in § 30 of the Law on the Federal Constitutional Court of the Federal Republic of Germany, it says that the Court at the closed part of the discussion considers and evaluates at its discretion and on the basis of the law the results of the oral hearing and the evidence presented (part 1) (1993).

According to the norms of domestic procedural legislation, which regulate issues related to the assessment of evidence in the case by judges of courts of general jurisdiction, the situation is as follows:

– Art. 86 «Evaluation of evidence» Economic Procedural Code of Ukraine:

the court evaluates the evidence according to its inner conviction, based on a comprehensive, complete, objective and direct examination of the

evidence in the case; no evidence has a predetermined force for the court (part 1, 2) (2018);

– According to art. 94 «Evaluation of evidence» of the Criminal Procedure Code of Ukraine: a judge, a court of his own conviction, which is based on a comprehensive, complete and impartial study of all the circumstances of criminal proceedings, guided by the law, evaluate each evidence in terms of admissibility, reliability, and the totality of the evidence collected – in terms of sufficiency for making the appropriate procedural decision; no evidence has a predetermined strength» (part 1, 2) (2012).

Thus, it should be noted that modern domestic legislation in the field of constitutional jurisdiction is organically and functionally imperfect. One of the reasons for this, in my opinion, is the legislator's attempt to resolve in one law all issues related to the activity of the CCU, which resulted from the emergence of gaps, in particular, with questions of proof (obtaining, evaluating and using evidence and forming the judge's internal convictions) in a constitutional court proceeding.

In addition, it should be noted that the imperfection of the legislative regulation of the activities of the domestic body of constitutional jurisdiction is also a consequence of insufficient attention to these problems on the part of the legal science. Despite the fact that according to the current version of the Constitution of Ukraine, the Court does not belong to the domestic system of justice, a significant part of lawyers still underestimate the importance of philosophical and legal factors in its activities, giving preference to a positivist approach to resolving issues that fall within its competence.

However, this approach is acceptable mainly for courts of general jurisdiction, where the judge's internal convictions are formed on the basis of the assessment of the evidence provided by the parties regarding the correspondence of the facts, actions or circumstances with the letter of the law. Instead, since the CCU verifies laws and other legal acts for compliance with the Constitution, which is essentially a political document, it cannot ignore the ideological orientation of this act of higher legal force (its «spirit»).

In this context, the CCU emphasized in the decision of November 2, 2004 No. 15-rp/2004 «One of the manifestations of the rule of law is that the law is not limited only by law as one of its forms, but also includes other social regulators, including moral norms, traditions, customs, etc., which are legitimate by society and are conditioned by the historically achieved cultural level of society. All these elements of law are united by a quality that corresponds to the ideology of justice, the idea of law, which has largely been reflected in the Constitution of Ukraine»).

The above should not be understood in such a way that the Court does not at all check the challenged laws and other legal acts (their separate provisions) to comply with the text of the Constitution, but it is indisputable that philosophical and

legal factors have a significant influence on the decisions of this collegial body. The point is that the internal convictions of each judge on a matter which is considered by the Court are formed by methods of formal logic as a result of the assessment of the evidence of conformity:

– The ideological orientation of the Constitution for the protection of universally recognized human values, such as life and health, dignity and human integrity, etc. (axiological dimensions);

– Influence of the provisions of the challenged law or other legal act on legal relations in the socio-political, economic, moral-spiritual and other branches of society being (ontological dimensions);

– Modern concepts of scientific knowledge on issues raised in the constitutional petition, appeal or complaint (epistemic measurements).

Thus, based on the results of this research and foreign experience, I consider it expedient to introduce a scientifically substantiated modern system of legislative support for the activities of the domestic constitutional jurisdiction body, which can be conventionally defined as «the Constitution – the laws on the Constitutional Court - other laws and codes».

In particular, it is proposed by analogy with the law regulating the activities of courts of general jurisdiction, as well as by the example of some foreign countries to develop and adopt separate laws on the issues: first, the status of the body of constitutional jurisdiction and its judges; and secondly, the powers of the Court and the procedure for appealing to it, and thirdly, the constitutional court proceeding.

The latter, under the conventional name «On the judicial constitutional process», should consist of two parts: general and special. The subject of regulation of the provisions of the general part of this law should be, in particular, procedural issues related to the implementation of the judicial constitutional process, including the establishment of rules for the formation of the evidence base for the decision in the case, in particular, by assessing and using the evidence provided by the participants in the process, and received by the Court on its own initiative. A special part of the process «should consist of sections, each of which regulates the rules for reviewing cases on the activities of the Court, taking into account the peculiarities of constitutional proceedings in each of these areas».

Scientific novelty

Scientific novelty of the publication is that the author has researched the actual issues of formation of internal convictions as a separate judge of the CCU and collegial body of constitutional jurisdiction as a whole, which at this time still remain out of the attention of legal science and are not regulated by law.

Thus, the materials presented in the article are in essence the first comprehensive study of the laws of evaluation of evidence, taking into account the specifics of the constitutional court process.

Conclusions

Based on the above, in our opinion, it is possible to draw certain conclusions on issues related to the assessment of evidence in a constitutional legal process, according to your own conviction, the judge:

– firstly, the philosophical and legal foundations of the procedure for evaluating evidence in the domestic constitutional process are still poorly researched and not legally regulated;

– secondly, the study of the principles of the scientific approach and legislative regulation of domestic and foreign lawsuits in various branches of law, give grounds for some hypothetical assumptions on the definition of the concept of «inner conviction» of evaluating evidence in a constitutional court process:

a) the formation of the internal convictions of the judges of the Constitutional Court on the evaluation of evidence is significantly influenced by objective and subjective factors. The circumstances that were established during the consideration of the case should be attributed to the objective, to the subjective – personal traits of the judge's character and consciousness such as: worldview, professionalism, legal conscience, justice, etc.;

b) the philosophical-legal and psychological-mental category «inner conviction» of a judge in the

constitutional process is de facto a reflection of his subjective confidence in the correctness of the assessment, objectively established circumstances, that is, a specific form of reflection of objective reality. However, being in form and content a reflection of objective reality, the inner conviction of one judge is not a criterion for knowing truth in the constitutional process, since this criterion is solely the decision of a collegial body;

– fourthly, modern domestic legislation in the field of constitutional jurisdiction is organically and functionally imperfect, not least because of the failed attempt by the legislator to resolve in one law all issues related to the activity of the CCU, which resulted in a collision legal norms and gaps, in particular, on issues of proof (reception, evaluation and use of evidence) in the constitutional court proceeding. Based on the results of this study and foreign experience, it is proposed to introduce a modern system of legislative support for the activities of the domestic constitutional jurisdiction body, which can be conventionally defined as «the Constitution – the laws on the Constitutional Court – other laws and codes».

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Внутрішнє переконання під час оцінки доказів у конституційному судовому процесі

Метою дослідження є комплексний аналіз недостатньо досліджених питань формування внутрішнього переконання судді органу конституційної юрисдикції як суб'єкта доказування в конституційному судовому процесі. Автор акцентує увагу на з'ясуванні спільних і відмінних особливостей формування внутрішнього переконання суб'єктів доказування в конституційному судовому процесі вітчизняних та іноземних органів конституційної юрисдикції та судових установ загальної юрисдикції. Для досягнення поставленої мети необхідно було виконати такі завдання: по-перше, визначити філософсько-правові засади процедури оцінки доказів у вітчизняному конституційному судовому процесі, які є законодавчо не врегульованими; по-друге, дослідити ступінь впливу на формування внутрішнього переконання судді конституційного суду в процесі оцінки доказів об'єктивних і суб'єктивних факторів; по-третє, з'ясувати відмінності процедури висловлення суддею органу конституційної юрисдикції свого ставлення до оцінки доказів колегіальним судовим органом шляхом голосування та на підставі внутрішнього переконання; по-четверте, окреслити шляхи подальшого наукового дослідження проблеми й обґрунтувати необхідність її законодавчого врегулювання. Для виконання поставлених завдань застосовано загальнонаукові методи пізнання, зокрема: аналіз, синтез, дедукцію, індукцію, логічний, системний, а також специфічні наукові методи пізнання в галузі права – формально-юридичний, юридично-герменевтичний, порівняльно-правовий, а також метод аналізу практики судового конституційного контролю. Емпіричну базу дослідження становлять праці вітчизняних та іноземних правознавців, які вивчали теоретичні питання судового доказування й доказів, акти національного та зарубіжного права, практику Конституційного Суду України. **Наукова новизна** роботи полягає в тому, що це перше вітчизняне комплексне дослідження процесу формування внутрішнього переконання суб'єктів доказування під час оцінки доказів у конституційному судовому процесі. За результатами дослідження обґрунтовано, що філософсько-правові засади процедури оцінки доказів у вітчизняному конституційному судовому процесі досі лишаяться поза увагою юридичної науки та законодавця. Теорія та практика конституційного судового процесу засвідчують, що на формування внутрішнього переконання судді конституційного суду з питань оцінки доказів значний вплив мають об'єктивні (обставини та факти, які були встановлені в процесі розгляду справи) та суб'єктивні (особистісні риси характеру та свідомості: світогляд, професійність, правосвідомість і справедливність) фактори. Внутрішнє переконання одного судді, що за змістом і формою становить відображення об'єктивної дійсності, не є критерієм пізнання істинності в конституційному судовому процесі, оскільки цим критерієм є виключно рішення колегіального органу. Проблеми доказування в конституційному судовому процесі потребують посиленої уваги з боку науки філософії права та нагального законодавчого врегулювання.

Ключові слова: внутрішнє переконання; емоції; істина; оцінка доказів; розумова діяльність; судовий процес; сумнів; факт.