
()

:

:

()

**INTERNATIONAL LAW HERALD:
ACTUAL PROBLEMS OF THE PRESENT
(THEORY AND PRACTICE)**

2014 .

,

. . .

4–5 (8–9) 2017

20778-10578
24.06.2014

()

22055-11955
22.04.2016

РЕДАКЦІЙНА КОЛЕГІЯ

<p>“ ”</p> <p>()</p> <p>“ ”</p> <p>“ ”</p> <p>()</p> <p>“ ”</p> <p>“ ”</p> <p>()</p> <p>“ ”</p>	<p>“ ”</p> <p>“ ”</p> <p>“ ”</p> <p>()</p> <p>“ ”</p> <p>“ ”</p> <p>“ ”</p> <p>“ ”</p> <p>()</p> <p>“ ”</p>
--	---

Jozef Začko,
Doctor Honoris Causa, «Juris Doctor» degree
(Slovak Republic)

(16 5 2017)

21.12.2015 1328

23.12.2016 1604

	: , 31 08201 38(098)878-46-91 e-mail: in_yur_visnuk@ukr.net
--	--

34:33(477)(08)

Міжнародне право

.....6

Теорія та історія держави і права; конституційне право

1917–191812

1937 197819

.....24

.....28

с
(,).....34

Адміністративне право і процес; фінансове право; інформаційне право

.....40

.....46

.....51

Кримінальне право та кримінологія; кримінально-виконавче право

.....60

.....66

15071

.....76

.....81

.....87

.....93

.....99

.....105

.....	110
.....	116
<i>Кримінальний процес та криміналістика; судова експертиза; оперативно-розшукова діяльність</i>	
.....	123
.....	132
.....	138
.....	144
.....	150
.....	156
« » « ».....	162
.....	167
.....	173
.....	179
.....	185
.....	191
.....	197
.....	202
.....	208
.....	215
.....	221

_____	.....	228
_____	.....	234
_____	.....	240
_____	.....	247
_____	.....	254
_____	.....	261
_____	.....	269
Tsybal P. V., Kyhta M. V.	Problems of internal belief expert in the expert study.....	275	
Antoniuk A. B., Loza T. V.	Principles and conditions of appointment and conduct of forensic examinations are during criminal proceeing.....	282	
<i>Судоустрiй, прокуратура, адвокатура</i>	_____	289

P. V. Tsymbal,
*Doctor of Law, Professor of
department of criminal process
and criminalistics,*

M. V. Kyhta,
*Student University of the State
Fiscal Service of Ukraine*

PROBLEMS OF INTERNAL BELIEF EXPERT IN THE EXPERT STUDY

The article investigates the contents of internal belief expert in the expert study. Analyzed scientific approaches to the definition of «internal persuasion expert». Studied social, psychological and logical-epistemological beliefs aspects of internal experts during the expert study. Particular attention is paid to the role of intuition in the process of internal persuasion expert.

Key words: *inner conviction, expert, cognitive activity, thinking, consciousness, intuition.*

Expert research: at first, it is a difficult process in which his separate stages interconnected and interdependent; secondly, it is cognition of facts and circumstances (in a gnosiological value) which, in same queue, for an investigator and court also is the objects (by fact sheets in the procedural value of this word) of cognitive activity. A cognitive process can not be examined in tearing away from a social factor. Thus consideration of cognitive process from a active side foresees the account of both social and psychological, factors of cognitive activity.

Taking into account, that criminal procedure cognition part of which is expert research has a identity side also which shows up in a procedural form and, it is necessary to examine cognitive activity of expert as unity logical-epistemological, social, psychological and procedural factors [18, a. 6].

The process of cognition and logical proof to carried out an expert is in the process of expert research from point of in-use argumentation, intellectual activity, psychological processes does not differ from the process of search of truth in other spheres of establishment of truth, in a that number from activity of investigator and judge from a search verifications and estimations of proofs (in a criminal procedure value).

Problems of internal belief of expert during the conduct of expert research was the object of scientific searches of domestic and foreign scientists, such, as: A. Ya. Vishinskogo, M. V. Zhogina, G. O. Zorina, V. P. Kolmakova, Yu. K. Orlova, O. R. Ratinova, M. S. Strogovicha, I. Ya. Foynickogo, Ya. M. Yakovleva and others like that.

In literature the unique point of view absents in relation to nature and concept of internal belief, and also factors which influence on him. The problem of internal belief was probed known proceduralists of I. Ya. Foynickim and V. K. Sluchevskim [17, a. 188]. They examined internal belief not as lighting up of subject of estimation of proofs, but as mental act which was bound to consciousness and circumstances of case, as by the basic criterion of forming of internal belief.

M. S. Strogovich examined internal belief in relation to judges as subjective expression of objective truth, as a criterion, process, method and result of estimation of proofs [16, a. 67].

In opinion of A. Ya. Vishinskogo in quality of factors which influence on internal belief, selects a world view and legal consciousness as establishment of financial truth which makes one of basic tasks of soviet litigation is the result of difficult psychical activity which ends with the formation of the confidence of judge in the correctness of the decision he look in this case, that is the formation of the so-called internal belief of judge [7, a. 177–178].

This process of forming of internal belief of judge takes place on the basis of perception and estimation of court facts (proofs), which take place, the estimation of these facts (proofs) depends a decision measure, from such leading principles, as dominating in this society justice – from one side, and degree scientifically methodological preparedness or qualification of judge – from other.

Internal belief of judge is always organically related to his world view, with his legal consciousness, which dominate in this society. Near understanding of nature and essence of internal belief we find the most rational going in O. R. Ratinova and M. S. Strogovicha. They examine internal belief as pre-condition, process and result of cognitive activity of subject of proof. On this basis they select the gnosiological, logical and psychological aspects of internal belief [14, a. 474–478].

In literature an idea, in accordance with which it follows to examine internal belief as beginning, principle, speaks out also, as a method of estimation of proofs and as a result of such estimation.

Internal belief as a moral, ethics category is related to other ethics category – conscience. A conscience shows up in form clever awareness of moral value of the accomplished actions. A person judges about the acts as though in one's capacity, coming from the own ideas of justice, duty, about correct or wrong [15, a. 1242].

In literature attention applies yet on one aspect of internal belief – on obligatoriness of him external expression in the argumentation ground of the accepted decision in relation to the estimation of proofs [14, a. 476].

In procedural literature scientists mark indissoluble connection of internal belief and legal consciousness. Debatable is a question about character of connection of internal belief and legal consciousness. So, for example, A. Ya. Vishinskiy, examining correlation of legal consciousness and internal belief, marks that a “dialectical method lies at the heart of legal consciousness as a general system of legal, philosophical and political looks and internal belief as a method of decision of private, concrete questions of judicial order” [7, a. 182]. O. R. Ratinov, criticizing this position A. Ya. Vyshinsky pointed out that if “the assessment of evidence based on internal belief is directly based on the consideration of the particular circumstances of the case, then the necessary prerequisite for the possibility and correctness of this assessment is the content of the consciousness of the evaluating entity, that is, the judge, investigator, prosecutor” [14, a. 487]. We fully agree with the opinion of O. R. Ratinov and believe that consciousness is the basic value when applying the subjects of the assessment of evidence of internal conviction. Only with the help of consciousness is a qualitative subjective reflection of objective reality (in our case, of evidence) in the form of subjective qualities (their perception of a separate subject).

In a theory right legal consciousness is determined as a form or sphere of consciousness, which represents legal reality in form legal knowledges and evaluation attitudes toward a right and practice of his realization, legal settings and valued orientations which regulate the conduct (activity) of people in legally meaningful situations. It is absolutely right to note that legal consciousness is a subjective phenomenon, and consists of representations of people about the right, from the subjective attitude to the very phenomenon of law, its values, from legal psychology and even individual or emotional mass reaction to the right, sometimes intuitive, subconscious [2, a. 264]. Of all the characteristics of the properties and parties of legal consciousness, we are interested in those who contribute to the formation of an inner conviction or is an adjacent zone. Of course, to these aspects of legal consciousness is a set of knowledge and relations to law, as well as those experiences that the subject of assessment feels at the moment of evaluative mental activity. The literature expresses the idea of criminal procedural legal consciousness, which, along with general ideas and principles, includes a set of specific views and assessments relating to phenomena and institutions only procedural law [14, a. 484]. It must be accepted that the subjects of criminal procedural activity have a special specific legal consciousness, especially this applies to the subjects of appraisal of evidence, persons possessing legal knowledge. This, in our opinion, can be attributed to experts who work in expert institutions, even if they do not have legal education.

Professional legal consciousness in the literature is defined as the legal consciousness of lawyers. Its contents are accepted to include qualified scientifically substantiated judgments, conclusions, patterns, ability to apply the right [14, a. 484]. The content of professional legal experts can include special knowledge, knowledge of their rights and responsibilities as an expert, the relation to special knowledge and its professional and procedural status, knowledge of the procedural basis of appointment and conduct of expertise, as well as expert psychology.

Given out, that exactly in this plane there are difficulties of proof to and conduct of examination from the so-called “medical cases” or in cases of incorrect treatment which entailed heavy consequences.

Internal belief, as justly marks Yu. K. Orlov, serves one of methods of achievement of objective truth. Not repeating the analysis of discussions in science of criminal process about maintenance and character of truth, we will be stopped for that count truth which is set in case, relative and concrete [12, a. 8–13]. Difference of internal belief, which is formed for the subjects of estimation of

proofs, and internal belief, for an expert lies in plan different maintenance of truth which is set an investigator and court in criminal proceeding, and truth which is set an expert during expert research. The problem of internal belief of expert is examined criminal scientists-lawyers from 50th of XX of age. In particular, according to the expert's internal belief, a conscious and freely formed conviction, which has objective reasons, allows one only to draw a true conclusion [10, a. 30]. By factors which influence on the conclusion of expert, in opinion of V. P. Kolmakova, the followings come forward: 1) high readiness in the specialty and practical experience of an expert; 2) the reasoning and logic of expert judgments set forth in the general (synthetic) part of the examination act in such a way that the investigator and the court can trace the course of his thought; 3) sufficient volume and adequate quantity of material provided for research; credible circumstances established in the case [10, a. 31].

B. I. Yakovlev under internal belief understands consisting of confidence of expert of that his conclusions are represented by indeed existent facts. Internal belief, according to his opinion, is the result of activity of expert [19, a. 6–7]. Examining the structure of internal belief of expert, he marks unity of gnosiological, logical and psychological aspect of internal belief. A gnosiological aspect means that belief of expert must correctly represent found out as a result of research properties and signs of object of examination. The absolute merit of Ya. M. Yakovleva is a selection and consideration of the stages of forming of internal belief of expert. It is a very important moment from point of influence of the different stages of research on forming of expert internal belief [19, a. 8–9]. P. C. Belkin in quality of objective grounds of internal belief of expert examined, next to professional knowledges of expert, also ideological principles and settings [6, a. 331].

To our opinion, it is necessary to divide the concept of pre-condition of origin of internal belief, grounds of internal belief and result of internal belief of expert. We already talked that one of pre-conditions of forming of internal belief of expert there is his legal consciousness, component part of which is his world view. In this connection for us very valuable is a remark of O.R. Ratinova, in accordance with which the “estimation of any meaningful fact which violates interests of people is always given from positions of certain ideology, certain world view” [14, a. 491].

To the sense of expert judgment, in our opinion, should also include the special knowledge that the expert possesses. It is obvious that the nature of special knowledge applied in the field of law, criminal and civil proceedings is such that these knowledge with a certain degree of conditionality for their inclusion in the content of justice can be considered juridical (legal) to the extent that they serve to resolve the tasks of the criminal and civil justice [8, a. 214].

We name legal consciousness of expert not foundation, but pre-condition of origin of internal belief. Pre-condition – it that which is preceded internal belief, being the necessary condition of origin of internal belief, but pre-condition does not generate internal belief. It is possible to consider his noninteraction (independence) pre-condition of forming of internal belief of expert in the process of leadthrough of research from the leader of expert establishment and from an investigator and court, and also freedom from prejudice.

R.S. Belkin applied to the objective grounds of internal belief an expert also professional qualities of expert: observation, attention, depth, flexibility, logic, criticism of mind, independence of thought, the ability to overcome bias or prejudice [6, a. 331]. All these psychological qualities of expert are taken in such constituent of legal consciousness, as legal psychology, if pre-condition of internal belief of expert is legal consciousness as the phenomenon is not only individual but also group. Intuition in the theory of cognition is examined as one of varieties of cognition next to

cognition logical [3, a. 98]. In a theory cognitions are examined three methods of reflection and cognition of the objective world: vivid, concept and intuitional.

Intuition is basically a thinking experience, which includes both elements of the concept and concept, but not reduced to them [3, a. 99]. We can bring arguments of another kind, which lead to the same understanding of the psychological nature of intuition. Philosophers, examining the gnosiological and psychological aspect of intuition, come to the conclusion about that, which is «automated» convolute inference in a gnosiological relation differs nothing substantial from the complete unfolded deduction [9, a. 114]. Consequently, intuition is the psychological, but not gnosiological phenomenon. Thus in philosophy distinguish intuition “perceptible” and “intellectual”.

The supporters of dialectical approach in the theory of cognition select the followings ways of forming of perceptible appearances and concepts in human consciousness: 1) sensory-perceptual process which results in sensory images; 2) sensory-associative process in which a transition is from one perceptible appearances to other; 3) a transition process is from perceptible appearances to the concepts; 4) a transition process is from concepts to perceptible appearances; 5) process of logical conclusion, by which a transition is from one concepts to other.

In the theory of cognition to intuition as special method of cognition of the world take conceptual intuition essence of which consists in generalization of perceptible appearances and transition from perceptible appearances to the concepts, a right to attribute him to intuition gives unrealizedness of this process a subject. To eydetichnoy intuition take a transition from concepts to perceptible appearances, exactly this way of forming of knowledge in human consciousness is characteristic for expert research by a modeling [9, a. 120–121].

Somewhat different approach to intuition, we meet in forensic and procedural literature. Most of the work of criminologists is devoted to intuition in the process of investigation of crimes. M. S. Strogovich examines the problem of intuition in forming of judge persuasion and comes to the conclusion, that enlightenment has nothing general with acceptance correct decision in case [16, a. 345].

O. R. Ratinov in the first time considered the problem of intuition in the process of investigation. He cast aside mystic character of intuition and rotined its role in the process of investigation. In particular, he marked that in judicial sense intuition, certainly, has no value. The hundred most witty assumptions, unverified and unconfirmed the real facts, will remain the vain game of mind and, certainly, can not serve as foundation for the least limitation of rights for citizens and decision of tasks of the criminal legal proceeding [13, s. 198].

Ya. Peschak, examining the role of intuition in forming of consequence versions, marks that intuitional guess-work are more successful for a that investigator in which more rich experience of investigation in general and developments of consequence versions in particular. In other words, for intuition of Ya. Peschak considers information foundation as knowledges in the field of criminalistics and knowledges, got during experience.

Thus, acknowledging that expert intuition plays a certain role in the process of expert research, especially at the decision of the so-called heuristic tasks, it follows to acknowledge that any expert hypothesis or version must be grounded scientific researches, professional estimation of fact sheets, logical conclusions.

Yu. K. Orlov, examining the problem of internal belief, marks that on the nature internal belief is sense which is formed at subconscious level. He talks that sense of internal belief, equal as and

about other subjective states of person, it is possible to judge only from some external displays» [11, a. 73–74]. Serve as such external displays of internal belief of expert him the grounded conclusions, set out in the expert's opinion. But unright to equate internal belief with a subconsciousness. Subconsciousness as memory of brain, vital and professional experience is pressed, basis of the intuitive illumination at the unexpected decision of necessary expert task [8, a. 556]. A subconsciousness in criminalistics literature is used as a concept, identical intuition. G. O. Zorin determines investigation intuition as heuristic game with an own subconsciousness [8, a. 558]. In other words, the role of intuition as an unconscious solution to this problem plays a role in shaping the expert's internal conviction in solving creative, heuristic expert tasks.

However, intuition requires its justification, logically detailed reasoning. Note that as elements of the mechanism of expert intuition, applying the provisions put forward by G. O. Zorinim, one can distinguish: careful study of all the initial data needed to solve an expert task; prolonged domination (retention) in the consciousness of elements of the solvable problem; accumulation of interest, increased excitement when considering the problem being solved; multiple recoding of inoffensive information in visual images (expert modeling); accentuating the goals to which the expert seeks to solve an expert task; filtering all information through a dominant, that is, through the focus of excitation, caused by the unresolved problem; emotional immersion in the situation that created the problem [8, a. 560].

Thus, it is possible to draw conclusion that in itself intuitional conjecture is one of methods of decision of heuristic tasks during realization of expert researches. However grounded any idea, decision of creative task on the basis of the conducted researches, must be and argued by virtue of requirements of procedural law to the conclusion of expert as source of proofs. Intuition as one of forms of cognition plays an important role in forming of internal belief of expert.

Summarizing, will mark that internal belief of expert (as a result and criterion of expert research) – it psychological emotionally intellectual the state of expert, which consists in sense of confidence in the rightness of the applied knowledges, expert methods, methods, in the correct estimation of properties and features of expert objects and in the correctness of the conclusions made. In the light of expert legal consciousness it is possible to select the procedural aspect of internal belief: it is sense of confidence, that during the conduct of examination and forming of expert conclusion rules, set a penal procedural law, were not broken. Pre-condition of forming of internal belief is legal consciousness of expert (as a human factor) and independence (autonomy) of expert (as an objective factor) in the process of expert research. Foundation for internal belief is information, which turns out an expert in the process of study of expert objects and materials of criminal proceeding, given in his order.

LIST OF THE USED SOURCES

1. : 13.04.2012 4651-VI [] / // « » . – : http:// zakon3.rada.gov.ua/laws/show/4651-17
2. . . : – – : / . . . – , 1999. – 712 .
3. . . / . . . – , 1984. – . 98–108.

:

(	)	. 4-5 (8-9) 2017	281
4.			/
	//	.-1999.- 3.- .37-40.	
5.		: 3 .- .1 :	/
		,1997.-408 .	
6.		: 3 .- .2:	/
		,1997.-464 .	
7.			/-
		,1950.-308 .	
8.		/-	,2000.-608 .
9.		/-	
		,1984.- .109-122.	
10.			/
	//	.-1951.- .26-30.	
11.			
	(- ,	- /-
) :		
		,1985.-54 .	
12.			: -
	/-	,2000.-144 .	
13.			/
		,1967.- .180-199.	
14.			/-
		,1973.-736c.	
15.			,1980.-1657 .
16.			: 2 .-
	/-	,1968.-470 .	
17.			: 2 .- .2/-
		,1996.-607 .	
18.			/-
1984.- 4.- .5-18.			,
19.			/-
		,1975.-435 .	