

### **Criminal procedural characteristic of witnesses' testimony**

**Abstract:** It is substantiated existence and functioning of criminal procedure characteristic of an object of cognition, its system and structural elements are researched.

It is studied criminal procedure characteristic of testimony of the witnesses as a kind of evidence, considered particularities and their normative substantiation.

Suggestions on changing and supplementing of criminal procedural legislation are given.

**Keywords:** criminal procedure characteristic; testimony of witnesses; rights and obligations of a witness.

There is a point of view in the legal literature that denies an existence of criminal procedure characteristic of an object of cognition [2, p. 116-117]. Moreover, there has recently been appeared some works, which are impugning availability of criminalist characteristic as description of cognized system or its separate elements [1, p. 168-169].

It seems that similar assertions do not correspond to the reality as a characteristic-description is replaced in them by the notion of private theory.

Cognition, i.e. gaining of knowledge, like a kind of human activity, is a system of interlinked elements: object, subject, organization, technology, actions, means and others, each of which is also the system. The object of cognition might be separately taken element of outward thing or combination of certain elements entering in one system formation.

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♦ **Aliyeva Tarana Ilyas qyzy** – a dissertator of the Institute for Philosophy, Sociology and Law of the NAC of Azerbaijan Republic, a member of the IOLR (Azerbaijan). E-mail: mopi\_sid@yahoo.com

Cognition of any object is carried out by separation of it into components, studying of the constituents, correlations between them and subsequent synthesis of knowledge received into unified image. Description of cognized system or its separate elements is named by characteristic [7, p. 747].

In our point of view, cognition and its description, even relative, might be subjected any kind of human activity, including an activity on receiving of knowledge – cognition.

In methodology of science the description of cognized system or its components is denoted with name of cognized object. As result, there are appeared various characteristic such as: legal, psychological, criminalistical, medical, criminal legal etc.

There has been existed numerous views in the notion and content of criminal process in juridical literature, but all of they, as mandatory elements, contain: a) activity (a system of ordered actions) said in the law bodies and persons; b) relationships appearing at fulfillment of this activity and c) legal regulation of activity and relationships. Foregoing determines and opportunity of existence of criminal procedure characteristic of indicated cognition's objects, the details of which will be given below.

It is possible the objections that due to well-defined legal regulation of criminal procedural activity and relationships appearing at performance of it the criminal procedure characteristic will be present itself a blocked monolithic formation.

Actually, well-defined regulation any kind of human activity, especially of legal one, is a goal of many researches, but unfortunately, there is no always possible to reach of it. Not less clearly regulated criminalistical and criminal legal activity that does not exclude an existence of criminalistical and criminal legal characteristics.

There are procedural characteristics of separate kinds of investigative actions in juridical literature, for example interrogation [6, p. 5], however, criminal

procedural characteristic like a special description of cognized system and its elements have not been considered earlier.

In our point of view, a common object of cognition in criminal process is a system consisting of interlinked elements: regulated activity of specific subjects and relationships appeared that directed to specific aim. Elements of the system of common object of cognition, being the systems themselves, might also be cognized and described.

System of common object of cognition in criminal process and its elements are dynamic and are in interconnection with other systems and their elements.

Suspected, accused are the subjects of criminal process, i.e. its participants and therefore it might be appeared an issue about existence of criminal procedural characteristic of crime, in commission of which they are suspected or accused, and also investigator, prosecutor, an inquiry officer, defender, witnesses, representatives and others, activity and existence of who determined with activity on revealing, prevention, disclosure and investigation of crimes.

As it known, any crime, being a systemic formation of activity-directed type, consists of combination interlinked elements, the main of which are a subject, object, subjective side, objective side.

It turn, indicated elements (systems) might be subdivided into subsystems (systems): characteristic of subjects; characteristic of objects; goal, tasks, motive; situation (spatial and temporal characteristic); means of achievement of criminal aim; mechanism of crime; casual link and others.

All enumerated elements are related to a number of evidence that have significance for establishing of truth and adoption of legal decisions in criminal proceedings. In addition, according to Article 139 of Code of Criminal Procedure (hereinafter, the CCP), they enter in circle of circumstances, subjected to establishing on each criminal case.

It seems that a content of the notion of common object of cognition in criminal proceedings is exhausted with subject of proving, subjects participating in it and appearing interrelations.

Consequently, common criminal procedural characteristic is a description of the system consisting of indicated elements. This case, from positions of activity-directed approach will be distinguished the systems of criminal procedural characteristic of crime and activity on disclosure (investigation) of crime, each of which consists of the subsystems, and in whole consisting of the notion of criminal procedural characteristic.

Afore to come to characteristic of testimonies of witnesses it seems necessity to be determined with a status of the procedural figure, as, in our point of view, the CPC contains number gaps and contradictions in this part.

According to Article 95 of the CCP of Azerbaijan Republic, a person who knows any circumstances having significance for a case might be called and questioned as a witness by prosecution's party during preliminary investigation or court proceedings, and by defence' party at time of court proceedings.

The following persons might not be called and interrogated as witnesses:

- Persons, who on nonage or due to physical or mental deficiencies cannot correctly perceive and state circumstances, which are subject of investigation;
- Lawyers, who due to legal aid provided by them as defenders, know information relating the criminal process;
- Persons who received information relating the criminal process due to their participation in it as representatives of victim, civil plaintiff or civil defendant;
- Judge, juror, prosecutor, investigator, inquiry officer performing their procedural powers in connection with criminal process, or a secretary of court session, except made during criminal prosecution deficiencies and abuses of office, resumption of production on newly discovered circumstances and restoring of lost production [9, p. 99].

Persons who received information relating the criminal process due to their participation in it as representatives of victim, civil plaintiff or civil defendant may give testimonies in favour of a client or person, rights of which they present, from their consent. This fact excludes further participation of these persons in criminal process.

Witness has to perform the following duties in cases and in order, provided by the CCP:

- to be appeared on subpoena of the body carrying out a criminal process, for participation in investigative or other procedural actions, full and truthfully to answer all questions in questioning on known him/her circumstances;

- to confirm with his/her signature correctness of reflection of his/her testimonies in a record of investigatory or other procedural actions;

- on demand of a body carrying out criminal process, to submit available items, documents and samples for comparative investigation;

- on demand of a body carrying out criminal process to pass ambulatory expert examination for checking his/her ability to comprehend and state circumstances at presence of serious grounds to be in doubt in this;

- to be subordinated to instructions of inquiry officer, investigator, prosecutor and chaired in court session;

- not to go to other territory without permission of a court or without prior notification of a body, carrying out criminal prosecution, about place of his/her residence;

- not to leave without permission a court session room and building of a court before break announcement;

- to observe an order in court session;

- to fulfill other obligations that provided by the CCP [9, p. 100].

Witness has the following rights in cases and in order provided by the CCP:

- To know at what criminal case he has called;

- To submit a challenge to an interpreter who participates in his questioning;

- To lodge requests;

- To refuse from giving of testimonies, submission materials and information against himself and his/her close relatives;

- With permission of a body carrying out criminal process, while giving testimonies to use with documents, which are difficult to remember such as complicated mathematical calculations, numerous geographical names and other

data, and also to use written notes that made at time or at once after perception of events;

- To accompany his/her testimonies with designed by him/her plans, schemes and pictures;

- In course of pre-trial production on criminal process to write in person his/her testimonies;

- To be familiarized with records of investigative or other procedural actions, in which he/she has taken part, and also with the records of court session that are concerned him/his; to require inclusion in a record of supplements or remarks in order fully and exactly to reflect his/her testimonies in it;

- To receive compensation for expenses incurred by him/her during criminal process, and compensation for damage incurred by him/her due to illegal actions of a body carrying out of criminal process;

- To take back items, original of official documents that taken by the body carrying out criminal process as material evidence or other grounds;

- To have a representative prior and in course of production of investigative and other procedural actions;

- To have other rights provided by the CCP [9, p. 100-101].

According to cl. 5 of Article 95 of the CCP, non-performance by a witness his/her obligations bears responsibility provided by the legislation of Azerbaijan Republic.

Let's try to make foregoing clear since, in our point of view, it contains a number of contradictory provisions that make difficult and some cases exclude an applying of procedural norms.

So, according to Article 227.4 of the CCP, before questioning witnesses, the investigator shall determine their identity, inform them of the case in which they are called and of their duty to give evidence on all the circumstances of the case known to them and warn them of the criminal responsibility incurred for refusing to testify, evading questioning and intentionally giving false testimony.

Interrogation is begun with suggestion to a witness to tell all circumstances, he/she knows concerning a case, after that he/she might be asked questions [9, p. 226].

According to Article 178 of the CCP, to a person participating in criminal process and summoned to authority, carrying out criminal process, at availability of number of terms (failing to attend without good reason, absence of permanent address) may be applied forcible bringing. Thus, forcible bringing might also be applied to a witness [9, p. 183-184].

The question arises, at what time a person receives a witness' status, and how it is determined.

If to proceed from the content of Article 95 of the CCP, then it appears that availability to an investigator of information about awareness of some person on circumstances having significance for a case, gives him ground to summon and question of the person as witness.

However, the investigator's information might be wrong and the person may not have any information. In addition, there are cases when investigator discloses information's bearers through interrogation, i.e. searches witnesses. It might such be happened that only one of few interrogated persons provides information having attitude to case, and other ones say about their full unawareness. But, it happens when they will be questioned as witnesses, i.e. they will be explained their rights and duties, notified on responsibility for giving false information etc.

It created paradox situation, when a person as witness will be deprived the main – awareness on case's circumstances. Besides, the person may be subjected to bringing not receiving a status of process' participant.

This is one side of matter. Other one is concluded in determination of time of witness' status receiving. If to recognize such time of person's signature in record on familiarization with rights and duties, then it appears collisions with the norms that regulating an order of production other investigative actions with witnesses, for instance, examination [5, p. 50-51].

The law does not say that examination should be preceded an interrogation, and there are often situations, when examination can be urgent investigative action.

But, who and in what status is examined, is remained controversial, in addition there is no similar section in a record's requisites of this investigative action.

According to Article 95.2.1 of the CCP, the following persons may not be called or questioned as witnesses, who because they are under age or because of their physical or mental disabilities cannot understand and testify about the matters to be investigated in the criminal proceedings.

This provision of the law presents to be wrong. First, correctness of perception and statement (for rare exception) might be determined only on completion of these processes and on comparative analysis of the results received. Second, it might so be happened that perception and statement of underage and the persons with physical or mental disabilities will considerably be exceed analogical mental processes of other persons.

It seems that in this situation a notion of the status wrongly equated to the notion of testimonies' evaluation.

In this connection, in our point of view, Article 95.2.1 of the CCP should be excluded from the Code, a fortiori that Article 126.4 of the CCP the matter on evidential significance of witnesses' testimonies regulates in details.

According to Article 95.4.2 of the CCP, witness' duty is to confirm the accuracy of his/her testimony by signing the record of the investigative or other procedure actions. This provision of the law presented to be declarative as indicated duty provided with nothing and forcibly may not be performed.

In addition, Article 230.7 of the CCP says that "... if the witness refuses to sign the record, the investigator shall inquire as to the reason for this refusal and endorse the record with his own signature.

If the record cannot be signed by a witness due to his/her illiteracy or physical disabilities, the investigator shall note these circumstances in the record and endorse the record with his own signature" [9, p. 238].

In connection with foregoing, it seems that refusal of a witness without good reasons to confirm with his/her signature accuracy of reflection his/her testimonies in the record should be regarded like failure to give testimony. Good reason of



failure to sign might only be wrong writing of the testimonies by investigator, wherein witness should have an opportunity to explain his/her failure to sign the record.

In our point of view, an investigator's right to confirm by his/her signature the record, which has failed or cannot sign a witness, should be limited by mandatory participation attesting witnesses in that. It will allow preventing abuses with official status: to write in the record the facts that useful for investigator but not the testimony given by a witness.

According to Article 95.4.7, a witness should be at the disposal of the court, not to go elsewhere without the permission of the court or without notifying the prosecuting authority of his whereabouts. It seems that a notion "not to go elsewhere" is non-concrete, and the ban violates right to move freely.

In connection with foregoing, it seems necessary to change Article 95.4.7 of the CCP and to oblige a witness to receive permission of a body, carrying out criminal prosecution or a court, while go in other state.

According to Article 95.6.3 of the CCP, witness has right to submit requests, but there is absent this among the main notions of Azerbaijani criminal procedural legislation.

According to Article 124 of the CCP, reliable evidence (information, documents, other items) obtained by the court or the parties to criminal proceedings shall be considered as prosecution evidence. One of the evidence's kinds is testimonies of witnesses [9, p. 138].

According to Article 126 of the CCP, oral and written information received through questioning by the prosecuting authority from the suspect, accused, victim or witnesses in pursuance of this Code shall be considered as evidence.

Only statements based on the information or conclusions of a person directly comprehending the act and its causes, character, mechanism or development may be considered as evidence.

Information given to the prosecuting authority by the suspect, accused, victim or witnesses on the basis of hearsay may not be used as evidence. Only

information derived from the words of a deceased person may exceptionally be accepted as evidence by court decision.

Information from persons who may not be questioned as witnesses shall not be used as evidence and also the persons recognized incapability in appropriate time to perceive or reproduce circumstances having significance on criminal prosecution and the persons, who refuse to undergo an examination by experts of his ability to comprehend or describe significant matters [9, p. 141].

In addition, according to Article 125 of the CCP, testimonies of witnesses will not be having evidential significance, if they received in the following circumstances:

“ if the accuracy of the evidence is or may be affected by the fact that the parties to the criminal proceedings are deprived of their lawful rights, or those rights are restricted, through violation of their constitutional human and civil rights and liberties or other requirements of this Code;

- through the use of violence, threats, deceit, torture or other cruel, inhuman or degrading acts;

- where the rights and duties of a party to the criminal proceedings are not explained, or not explained fully and accurately and, as a result, he exercises them wrongly;

- where the criminal prosecution and investigative or other procedures are conducted by a person who does not have the right to do so;

- where a person whose participation should be objected to, and who knows or should know the reasons precluding his participation, takes part in the criminal proceedings;

- where the rules governing investigative or other procedures are seriously violated;

- where the document or other item is taken from a person unable to recognise it or who cannot confirm its accuracy, its source and the circumstances of its acquisition;

- where evidence is taken through means conflicting with modern scientific views” [9, p. 139].

Some of listed provisions are presented to be contradictory and wrong. So, it is not understandable why has information been received by witness from other person may not be recognized as evidence? This “other” person may be questioned, and in case of confirmation of witness’ testimony there will be two evidence available, but one.

In case with a dead person on the contrary, the accuracy of witness’ testimony cannot be verified.

Attribution of deception to cruel, inhuman or degrading actions seems to be wrong since the most of criminalistical techniques of testimonies’ reception based on concealment from questioned person available information or his/her misleading concerning volume and content of it [8, p. 92-103].

In connection with foregoing, it seems reasonable to exclude the Article 126.3 from the CCP as contradicting the notion of evidence and logic, and from the Articles 15.2.3 and 125.2.2 of the CCP – mention about deception.

There is no the notion of gross violation of rule of conducting of investigative or other procedural action in the law, in this connection the provisions of Article 125.2.7 of the CCP are declarative ones. Rule of conducting of investigative or other procedural action is regulated by law; in this connection division of law’s violations into gross or other ones seems to be wrong.

In connection with foregoing, seems to be right to exclude a word “gross” from Article 125.2.7 of the CCP and set up it in the following edition: “125.2.7 – with violations of the rules of conducting of investigative and other investigatory actions, stipulated in the present CCP”.

“Evidence is taken through means conflicting with modern scientific views” (Article 125.2.19 of the CCP) is a notion non-concrete, vague. So, number of the authors suggests accompanying an interrogation with quite classic music [4, p. 104-109], other ones – with smell background [3, p. 106-110] etc. There is no any

scientific ideas concerning reasonability and lawfulness of such suggestions, in this connection an issue about contradictions is remained open.

In addition, science has particularity to be developed and scientific concepts – to be changed. Main is not to violate rights of personality. In connection with foregoing, in our point of view, Article 125.2.10 should be excluded from the CCP.

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