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Testimonies of witnesses as an object of cognition

Abstract: The common object of cognition in criminal process is a system consisting on interlinked elements, which being themselves by the systems can be also studied and described.

The system of the common object of cognition in criminal process and its elements are not frozen, and dynamical, they are interlinked with other systems and their elements.

Content of the concept of common object of cognition in criminal proceedings is exhausted by the subject-matter of proving, subjects participating in it and appeared during interrelations.

Keywords: object of cognition; criminal-procedural characteristics; system; court proceedings; evidence; testimony of the witnesses.

In the juridical science is existed the point of view denying existence of the criminal-procedural descriptions of an object of cognition (2, p. 116-117). What is more, in the last time it has been appeared the works, which impugn a presence of the criminalistical description as description of cognitive system or it separate elements (1, p. 168-169).

It is presented that these assertions do not conform to reality since their characterization-descriptions are substituted with concept of private theory.

Cognition, i.e. acquirement of knowledge as a kind of human activity is a system of interlinked elements: an object, subject, organization, technology, actions, means and etc., each of which is also a system. A separate taken object or combination of certain elements can be the object of cognition.

Cognition of any object is carried out by the way of it division on the constituted

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parts, studying of the constituted parts, correlations between them and subsequent synthesis of received knowledge in holistic image. Description of the cognitive system or it separate elements is called characterization (7, p. 747).

From our point of view, any kind of human activity including the activity on acquirement of knowledge can be subjected to the cognition and its description (even if a relative).

In methodology of science, a description of cognitive system or its components is accepted to indicate with name of cognitive object. As result, there are various characterizations such as: legal, psychological, criminalistical, medical, criminal-legal etc.

There are a lot of ideas on the concept and content of criminal process in the juridical science, but all they being as mandatory elements contain: a) activity (a system of ordered actions) of the bodies and individuals specified in the law; b) relations appearing during fulfillment of this activity and c) legal regulation of the activity and relations. Above stated determines possibility of existence of the criminal-procedural characterization of the indicated objects of cognition, about which we are talking below.

It is possible objections that in connection with clear legal regulation of the criminal-procedural activity and relations appearing during it execution, the criminal-procedural characterization will be presented itself a statuesque monolithic formation.

It is really, the clear regulation any kind of human activity, especially a legal – this is a goal of many research, which, unfortunately, cannot be always achieved. The same clear are regulated criminalistic and criminal-legal activity that does not exclude an existence of criminalistic and criminal-legal characterizations.

There are procedural characterizations of separate kinds of investigative actions in the juridical science, for example interrogation (6, p. 5), but criminal-procedural characterization as special description of cognitive system and its elements is not considered earlier.

From our point of view, the common object of cognition in criminal process is a system consisting on the interlinked elements: regulated activity of specific subjects and appeared, accordingly, relations directed to the specific aim. The elements of a

system of the common object of cognition, being themselves by the systems, can be also cognized and described. The system of common object of cognition in criminal process and its elements are not statuesque ones, and opposite they are dynamic, interlinked with other systems and their elements.

The subjects of criminal process (its participants) are suspected, accused individual in connection with this can appear question about existence of the criminal-procedural characterization of crime, in committing of which they are suspected or accused, and also an investigator, prosecutor, inquirer, victim, defender, witnesses, representatives and others, activity and existence of which are caused with action on detection, preventing, exposure and investigation of crimes.

As it known, any crime being of systemic formation of active type consists on combination of interlinked elements among of which it is necessary to say: subject; object; subjective side; objective side.

First of all, the indicated elements (systems) might be subdivided on subsystems (systems): characterization of the subjects; characterization of the objects; goal; tasks; motive; situation (spatial and time characterization); means to achieve criminal purpose; mechanism of crime; reasoning link etc.

All enumerated elements are related to a number of the circumstances having significance to establish the truth and make the legal decisions in criminal proceedings. In addition, according to article 139 of the CPC they all include into circle of circumstances subjected to establishing on each criminal case.

It is presented itself that content of the conception of common object of cognition in criminal proceedings is exhausted by the object of proving, participating subjects and appeared interrelations.

Consequently, common criminal-procedural characterization is presented itself a description of the system consisting on indicated elements. In this case, from position of active approach it will be distinguished the systems of criminal-procedural characterization of crime and activity on detection (investigation) of crime; each of which is consisted on the subsystems, constituting in whole the concept of criminal-procedural characterization.

Before coming to the characterization of the testimonies of witnesses, it is presented necessary to be determined with the status of this procedural figure since< from our point of view, valid CPC in this part has a number of gaps and contradictions.

According to article 95 of the CPC Azerbaijan Republic, an individual who is known any circumstances having significance for the case can be summoned and interrogated as a witness by the prosecution party during preliminary investigation or court proceeding, and by the defense party - during court proceeding.

The following persons cannot be summoned and interrogated as a witness:

- individuals, who due to childhood or owning to physical or mental deficiencies, cannot correctly perceive and state the circumstances subjected to investigation;

- lawyers who are known with information relating to the criminal case where they participate as defenders;

- individuals who are known with information relating to the criminal case where they participate as representative of a victim, citizen plaintiff or citizen defendant;

- judge, juror, prosecutor, investigator, inquirer carrying out their powers in connection with the criminal case, or a secretary of the court session, except the cases made errors and abuse of official duties during criminal prosecution, renewing production on new discovered circumstances and restoration of lost production (9, p. 99).

Individuals who are known information on this case in connection with their participation in criminal process as defenders, representatives of a victim, citizen plaintiff, citizen defendant can give testimonies in favour of client or person the right of which they are represented (to their consent). Such fact excludes the further participation of these individuals in criminal case.

A witness should fulfill the following obligations in cases and in order foreseen by the CPC:

- to be appeared on call to the body carrying out criminal process, for participation in investigative or other procedural actions, to answer to all questions completely and truthfully;

- to confirm his signature the correctness of his testimonies in the report of investigative and other procedural actions;

- on demand on the body carrying out criminal process to present items, documents and samples for comparative examination;

- on demand on the body carrying out criminal process to pass through examination

- on demand on the body carrying out criminal process to pass through medical mental examination;

- to subordinate to the instructions of an inquirer, investigator, prosecutor and chaired judge in court session;

- not to go to other region without court permission or preliminary notifying about his place of location to the body carrying out criminal prosecution;

- without permission of chaired judge not to leave a court session

- to keep the rules in court session;

- to fulfill other duties provided by the CPC (9, p. 100).

A witness carries out the following rights in cases and order provided by the CPC:

- hears on what criminal case he is summoned;

- challenges an interpreter participating in his interrogation;

- submits requests;

- refuses from giving of testimonies, submission materials and information against himself and his close relatives;

- with permission of the body carrying out criminal process, during giving the testimonies he is used hard to remember documents on mathematical calculations, numerous geographical names and other data, and also written notes made at the time or at once after perception of the events;

- accompanies his testimonies with the plans, schemes and pictures made himself;

- personally writes his testimonies during pre-trial production on criminal case;

- familiarizes with the record of investigative of other procedural actions, in which he took part, and also with the record of court session in respect of his part, demands including additions and remarks for completeness and correctness of reflection his testimonies in it;

- obtains compensation of his expenses made him during criminal process, and compensation for loss made him from illegal actions of the body carrying out criminal process;

- takes back items, originals of the official documents taken by the body carrying out criminal process in form of the material evidence or on other grounds;

- has a representative until beginning a production of investigative or other procedural actions;

- he carries out other rights provided by the CPC (2, p. 100-101).

According to clause 5 of article 95 of the CPC, non-execution of his obligations by a witness entails responsibility provided by the legislation of Azerbaijan Republic.

Let's try to examine above stated since, from our point of view, it contains number of contradicting provisions making difficult (and sometimes) excluding of application of the procedural norms.

So, according to article 227.4 of the CPC, before interrogation an investigator establishes a personality of a witness, informs him about the fact in connection of which he is summoned and notifies about obligation to tell all circumstances known to him on the case, and also about criminal responsibility for refusal from giving testimony, evading of giving testimony, giving deliberately false testimony. Interrogation is begun with suggestion to a witness to tell about all circumstances known to him as to the case, after that he can be asked questions (9, p. 183-184).

Question is appeared: at what time an individual possesses a status of the witness and how it is determined.

If to base on the content of article 95 of the CPC then it turns out that a presence to an investigator the data about awareness of a certain person about circumstances having significance for the case, give him grounds to call and interrogate of this individual as a witness.

But the data of the investigator can be incorrect and a person will not be possessed of any information. Besides, there are frequent cases when through the interrogations an investigator reveals information carriers, i.e. search for the witnesses. It can be happened that among of few interrogated only one gives information having attitude to the case, and others will say about their complete ignorance of the case facts. But, this is happened only after they will be interrogated as witnesses, i.e. they will be explained their rights and obligations, notified about responsibility for giving deliberately false testimony etc.

It will be created paradoxical situation, when an individual being a witness will be deprived the main necessary feature – awareness about the circumstances of a case. In addition, this individual can be forced to taking into custody not obtaining of a status of process participant.

This is one side of the question. Other one is concluded in determining the moment of possession of a witness status. If such moment is considered to be a written undertaking in a report of interrogation about familiarization with the rights and obligations then appears collision with norms regulating an order of production with the witnesses of other investigative actions, ex. examination (5, p. 50-51).

The law does not speak that interrogation should precede an examination and it is often the situations when the examination can be by an urgent investigative action. But, who and in what capacity examining is remained contradicted, and among of requisites of a protocol of this investigative actions is absence.

According to article 95.2.1 of the CPC, it cannot be summoned and interrogated as a witness the individuals which due to childhood or owning to physical or mental deficiencies, cannot correctly perceive and state the circumstances subjected to investigation.

This provision of the law is considered to be wrong. First, the correctness of perception and stating can be determined only on completion of these processes and comparative analysis of the results received. Second, it can be happened so that perception and statement of juvenile and individuals with physical and mental deficiencies will be considerable exceeded analogical mental processes to other persons.

It seems that in this situation a concept of the status is wrong leveled to the notion of the testimony evaluation.

In connection with above stated, from our point of view, article 95.2.1 of the CPC should be excluded from the Code, the more so that an issue about evidentiary significance of the witnesses' testimonies is regulated in the details in article 126.4 of the CPC.

According to article 95.4.2 of the CPC, a witness is obliged to confirm with his signature the correctness reflection his testimonies in the report of investigative or other procedural actions. This provision of the law is considered to be declarative since the indicated obligation is provided nothing and cannot be executed forcibly.

In addition, article 230.7 of the CPC says that "…in case of refusal of a witness from signing a report, an investigator ascertains a reason of this refusal and approves the report of his signature.

If the report of interrogation cannot be signed by the witness due to his illiteracy or physical deficiencies, the investigator indicates these circumstances in the report and approves by his signature it" (9, p. 238).

In connection with stated, it seems that refusal of a witness without valid excuse to confirm the correctness of reflection his testimonies in the report with his signature should be assessed as the refusal from giving the testimonies. The valid excuse of a refusal from signature can be only the wrong notes of the testimonies by an investigator; for clarification of this the witness should have opportunity of explanation of the motives of refusal from signing of the report.

From our point of view, the right of the investigator to confirm the report by his signature, which is refused or cannot sign a witness, should be limited with the mandatory participation in this the identifying witnesses that would allow preventing abuses by the position at work: write down in a report what is good for investigator, and but not what testified a witness.

According to article 95.4.7 of the CPC, a witness is obliged not to go to other territory without permission of the court or without preliminary notification of the body carrying out criminal prosecution about a place of his location. It seems that a

notion “other territory” is incorrect, and the ban violates the right a man to free movement.

In connection with stated, it is considered to be necessary changing article 95.4.7 of CPC and to charge of a witness to obtain a permission of the body carrying out criminal prosecution or the court, at departure to other state.

According to article 95.6.3 of CPC, a witness has the right to submit petition, but among the main notions of Azerbaijani criminal-procedural legislation this is absence.

According to article 124 of the CPC, the evidence on criminal prosecution are recognized information (messages, documents, items) received by the court or the parties of criminal process, obtained in compliance with requirements of criminal-procedural legislation and having significance for correct resolution of accusation. The testimonies of witnesses are one of the types of evidence (9, p. 138).

According to article 126 of the CPC, the testimonies are recognized verbal and written information received from witnesses and other participants of process (suspected, accused and victim) by the body carrying out criminal process, in established by the CPC order, i.e. through the interrogation.

The proofs can be recognized only those testimonies, which are based on information and conclusions of a person directly perceiving an event, it reasons, nature, mechanism and development.

Information of the witnesses that they obtained from hearsay cannot be used as evidence by the body carrying out criminal process. On decision of the court (as exception) as evidence can be accepted only data received from hearsay of dead person.

Cannot be used as evidence the testimonies of individuals not subjected to interrogation as witnesses, and also persons recognized incapability in appropriate moment to perceive or remember circumstances having significance no criminal prosecution and individuals refusing from checking through examination his capability to perceive and remember these circumstances (9, p. 141).

In addition, according to article 125 of CPC, testimonies of the witnesses will not have evidentiary significance if they are received:

"…- with violation of the constitutional rights and freedoms of a man and citizen or with violation other requirements of the CPC, which through the deprivation or restriction of guaranteed by the law the rights of participants of criminal process somehow affected or could affect to reliability of these proofs;

- with application of violence, threat, deception, torture and other cruel, nonhuman or humiliated dignity actions;

- with usage of misleading of a person participating in criminal process in respect of his rights and duties appeared due to non clarification, non-complete of wrong explanation him the rights and duties:

- with fulfillment of production on criminal case carrying out investigative and other procedural actions not having the right to execution of these actions;

- with participation of an individual subjected to rejection if he knew or had to knew about presence of the circumstances dismissing his participating in criminal process;

- with gross violation of the order of performance investigative or other procedural action;

- from a person incapable to indentify a document other item, to confirm its originality, source of origin and circumstances of receiving;

- in result of application of the methods, which are contradicted to the modern scientific ideas" (9, p. 139).

Some of the listed provisions are seemed contradicting and wrong. So, it is not understandable why information received by a witness from other person cannot be used as evidence? This "other" person can be interrogated and in case of confirmation testimonies of the witness it will be obtained two proofs, but not one.

In case with dead person, opposite, the reliability of testimonies of a witness will not be able to check.

Attributing of deception to the cruel, nonhuman or humiliated dignity actions is wrong since the most part of criminalistical techniques of testimony receiving are based on concealment from interrogated person having information or misleading him as to it volume and content (8, p. 92-103).

In connection with stated, it seems reasonable to exclude from the CPC article 126.3 as contradicting to a notion of evidence and logics, and from articles 15.2.3 and 125.2.2 of the CPC – mentioning about deception.

It is absent in the law the notion of gross violation of an order of the performance of investigative or other procedural action, and as result the provisions of the article 125.2.7 of the CPC are declarative. The order performance of an investigative or other procedural action is regulated by the law; in connection with it the division of the violations of the law on gross and others are wrong.

In connection with stated, it seems correct to exclude from the article 125.2.7 of the CPC word "gross" and to present it in the following wording: "125.2.7 – with violation an order of performance of an investigative and other procedural actions provided by the present CPC".

The notion "application of the methods contradicting to the modern scientific ideas" (art. 125.2.10 of the CPC) is incorrect, vague. So, a number of the authors suppose to accompany interrogation with silent classical music (4, p. 104-109), other ones – with odour background (3, p. 106-110) etc. It is not existed any scientific ideas about reasonability and legality of these suggestions, in connection with this an issue about contradictions is open.

In addition, science has a particularity to be developed, and scientific ideas to be changed. The main is that the rights of an individual are not violated by the methods. In connection with above stated, from our point of view, the article 125.2.10 of the Criminal Procedural Code should be excluded.

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