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# Written testimonies as the sources of evidences in pre-trial production (comparative view)

**Abstract**: There are a lot of worthy institutions and norms are included in the criminal procedure legislation of the states so named near abroad (the CIS countries). They are the norms of evidential law establishing the testimonies status, explanations and the procedures of their receiving in course of pre-trial production. They allow unconventionally looking in at the same type of judgements at the same range of problems, which for decades have been moving without any sensible result from one paper to another one. It is undertaken by the author an attempt of comparative analysis of possibility of normative inclusion into the CPC of the RF the written kind of testimonies by various categories of the interrogated persons, first of all, records of their written testimonies. It is analyzed the particularities of procedural legal nature of the questioning records.

**Keywords:** testimonies; sources of evidence; interrogation; record of questioning; holograph record of the testimonies of interrogated person.

Holograph record of the testimonies by interrogated person. Before adoption of the CPC of RF in native doctrine the testimonies as the sources of evidential information considered mostly as verbal information of different categories of the questioned persons. It might be read about that at any textbook on “Soviet (and later - Russian) criminal process”. The same view on a nature of the testimonies prevails in the modern literature. In principle, this is right: ability of an investigator (further – also an inquiry officer) psychologically, tactically and legally to build

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correctly a verbal, talking with interrogated person is one of the evidences of the high level of his professional experience.

There are no attempts undertook in order to define a notion “testimonies” in some works. We should suppose that it was very obviously for the authors that they did not present to formulate it.

That situation was explainable: there were no legal definition of the testimonies in the Regulation of criminal proceedings of Russian Empire of 1864, the CPC of RSFSR of 1922, 1923 and 1960. Respectively, the doctrinal constituent of them had developed in direction, which excluded attention of the researches to other then verbal type of the testimonies. It is difficult to answer for “the vast ocean” of the native researchers of the process, but there were no in theory of proving, previous adoption of the CPC of RF, any noticeable trace in their works dedicated to the written testimonies.

But, there was an exception: the norms providing an opportunity written testimonies by interrogated person were included in the CPC of RF of 1960.

They were presented in the details in article 152 “Holographic records his/her testimonies by an accused person”.

Situation strongly changed with adoption of the CPC of RF and new CPC of the CIS countries[1] (Criminal procedure legislation of the neighbouring countries has paramount significance for us, because it had near past a legal and scientific basis unit with Russian one).

There were included the legal definitions of the testimonies in the articles 76-80 of the CPC of RF, in which they are determined as the sources informed by a suspected, accused person, victim, witness, expert (a then also with specialist) on interrogation, produced in compliance with the requirements of the Code. Such wide formulation is quite allowed an existence of the testimonies in any form.

Lawmakers of the CIS states have gone further ahead. The most part of them directly determine the testimonies as data (information) in verbal or written form

[1] Official names of the states of the CIS (except Georgia, Turkmenistan and Ukraine) have the term indicating of the ruling form – “Republic”. But, there are two ways of abbreviation of their names are used – with application of abbreviation or without a word “Republic”. We are used the second variant of the abbreviation.

presented by a questioned person in established by the law order (e.g. art. 126.1 of the CPC of Azerbaijan, p. 1 art. 115 of the CPC of Kazakhstan, p. 1 art. 102 of the CPC of Moldova, p. 1 art. 128 of the CPC of Turkmenistan, p. 1 art. 95 of the CPC of Ukraine).

Unlike anybody may say that this phenomenon is resulted by "Western influence" (though it is impossible to deny in some other aspects; e.g. strong impact of the Romanian legislation onto the CPC of Moldova, German and French – on the CPC of Lithuania and Estonia). Lawmakers of the far countries presuppose not to fix the norms-definitions in the CPC if they have no significance for procedure of pre-trial or trial production. Thus, inclusion definition "testimonies" in the law is a result of positive law – acting criminal procedural legislation of RF and neighbouring countries, which are drawn towards the scientists-innovators to fixation new definitions in the norms, first of all, in evidential law.

Analysis of home and foreign legislation allows doing the following conclusion: written statement of the testimonies by questioned person, independently on his/her status, is possible at the following situations:

1) When interrogated person due to his/her physical state temporally or relatively stable cannot speak, though he/she is able to give the testimonies in other ways. This situation is quite understandable and if predicted in procedural plan;
2) When a person being familiarized at what status and what criminal case he/she is summoned for questioning, is appeared to an interrogator (further also an inquiry officer) with prepared in advance written responses onto presupposed questions.

Here is typical sample: being come to the Investigative Committees of RF ex-minister of defence of RF A.E. Serdyukov, accompanying with a lawyer G.P. Padva, refused to give verbal testimonies stating that all known him circumstances are stated in written materials, presented by him to an investigator [2]. (About the samples, when accused persons were brought for questioning to investigator with prepared in advance and under participation of a lawyer written responses are talking below).

Trivia question about legal assessment of witness' refusal to give testimonies (here, we may note that the investigator planned to question of A.E. Serdyukov not

on the episodes, on which he presented his explanations) we in this case, leave out of brackets. We are interested in procedural nature of written materials, presented by interrogated person in frames of realization his rights to lodge petitions and submit evidences in course of questioning.

Let's try to evaluate this situation.

There are the special norms in the CPC of the two CIS countries, which dedicated to resolution of this matter. According to part 1 of article 131 of the CPC of Latvia, testimonies might be obtained not only during questioning of a person, but with interview of a person also. In compliance with part 2 of this article "Testimony is also an explanation about specific facts and circumstances written and signed personally by a person that addressed to pre-trial investigatory office or a court". We may reason about viodability of this statement as traditionally data said in a questioning and fixed at interrogation record is considered to be testimonies. A lawmaker of Latvia has been determined unusually but uniquely – information given at interview, questioning and containing in presented, certified and accepted by investigator written materials have equal evidential significance – a status of the testimonies.

There are no much original norms from position of tradition of the Russian law are included in the CPC of Moldova. In the context of considered situation, the CPC of the country contains a rule directly contradicted to those that is contained in part 2 of article 131 of Latvia's CPC. One of the norms of part 3 of article 104 of the CPC of Moldova is fixed: "Suspected, accused, defendant may not present or read the testimonies written in advance".

We do not call to copy one of these rules in the CPC of RF, but it worth to think for creation of procedural form for resolution of similar situations. In this case the rule containing in part 2 of article 131 of the CPC of Latvia presents to be more attractive;

3) Under personally handwritten records of the testimonies by a questioned person.

Despite that it is acceptable to consider that Russian criminal procedure legislation is developed on the way to extension of the principles of competition, rights and legal interests of the participants of criminal process; procedure of personally handwritten testimonies is not found its reflection in the CPC of RF. The position of a lawmaker is difficult to be explained. Therefore, there is in native literature opinion, according to which “non-logically to refuse” to accused person to write in person his/her testimonies, though such right is not provided by the law [3, p. 534]. It seems actual a formulation of question, the first, to reanimate of appropriate procedures in valid legislation, the second, to extend opportunities for application handwritten testimony’s records by accused person. But, in order to offer a new formulation of the article of the Code, let’s try to analyze the rules, contained in previous edition of the CPC of RSFSR, and also in acting CPC of the CIS countries.

Norm stipulated in part 1 of the article 152 of CPC of RSFSR contained two hypotheses and two dispositions. Hypotheses: 1) “After giving the testimonies by an accused person”, 2) “in case of his/her request. Dispositions: 1) “he/she has to be provided with opportunity to write testimonies by his/her own hand” and 2) “about which a note is made in interrogation record”. (In part 2 of the article was stipulated the following rules: 1) “After familiarization with written testimonies of accused person an investigator has the right to ask him/her additional questions”; 2) “These questions and responses are written in the record”; 3) “ Correctness of written questions and answers are certified with signatures of accused person and investigator”).

Lawmakers of all neighbouring countries (except Georgia and Lithuania, where we could not find sought norms) have included in their national CPC special rules, which regulate handwritten record of testimonies. Under this, they did not copy his (and moreover Russian one) previous legislation; and created independent and non-authentic legal norms.

Different interpretation of the form and content of these norms and their place in structure of the codes are manifested in the following:

1) Analyzing norms are placed in the same but not coinciding of its content articles and even heads of the CPC. In most codes (the CPC of Belarus, Kazakhstan, Turkmenistan, Uzbekistan and others) they are in the articles named like "Record of interrogation". But in the CPC of Azerbaijan – in article 126 "Testimonies of suspected, accused person, a victim and witness"; in the CPC of Ukraine – in article 224 "Interrogation"; in the CPC of Estonia – in article 74 "Record of witness' questioning". In CPC of Moldova they are included in two articles – part 12 of article 90 "Witness" and part 2 of article 104 "Questioning of suspected, accused, defendant". The CPC of Armenia – the only Code, in which is designed special article – article 214 "Holograph record of testimonies by suspected or accused person";

2) Considered rules distributed at various circle of questioned persons: in article 214 of CPC of Armenia – only in suspected and accused persons; in article 74 of CPC of Estonia – only in witness. In CPC other states – in all interrogated persons;

3) There is not uniform the structure of analyzed norms and parts concerning their hypotheses, i.e. those elements of the norms, in which are indicated the terms of dispositions' application. The most part of the codes are included the same hypothesis of norm, though it formulated various, e.g. part of 7 of article 224 of the CPC of Ukraine says "On wish of interrogated persons…" (further, on the text); part 4 of article 200 of the CPC of Tajikistan – "After free narration…". Part 6 of article 106 of the CPC of Uzbekistan – "Interrogated has a right to state testimonies by his/her own hand" – hypothesis of the norm is absent. (like we note above, CPC of RSFSR in norm of part 1 of article 152 contained two hypotheses);

4) As for different interpretation in dispositions of the norms, they have purely editorial nature and do not contain any innovations. One may pay attention only the fact that appropriate formulation of all analyzed codes have imperative colour – "investigator must" , "witness has a right" etc.

We would like to draw attention on the hypotheses and dispositions of the norms containing in part 2 of the article 104 of the CPC of Moldova. Here is citation of the article: "If suspected, accused person is agreed to give testimonies, then interrogator

asks his confession in incriminated him suspicious or accusation and offers him to give written testimonies, and in case a suspected, accused person cannot or refuse to write testimonies with his own hand, then the interrogator makes an appropriate note in a record".

There might be said different and even opposite comments in respect of this norm. Everything depends on position of commenting person. From one side, one may for example, to find guarantees in it, which provide maximum fixation correctness in position of an interrogated person; evidence of remorse of an accused person in deed etc. From other side, it makes an investigator and interrogated person in mechanical robots, one of which can write, another – to follow for written person.

We believe that any reader will agree – there is something to think for. In thi case, we are limited with the following opinion: norm, fixed in part 2 of article 104 of CPC of Moldova is not rather corresponded to the traditions of Russian criminal process, and formulation of question about it usage under improving of home criminal procedure legislation would be premature.

To strengthen our positions on this matter we applied not only to literature and normative sources, but also to number of competent scientist-specialist in criminal process with request to take part in expert evaluation of the norms of previous codes and perspective their restoration in the CPC of RF.

(The following Doctors of Law agreed to answer in our questions: Professors A.S. Aleksandrov, V.M. Bykov, V.N. Grigoryev, L.N. Loboyko, A.V. Pobedkin, A.P. Popov, B.G. Rozovsky, V.T. Tomin; PhD in Law, Associate Professors V.N. Avdeev, V.P. Gromyko, V.A. Svetichev, I.A. Titko, and Police Major-General in ret. V.P. Shushakov. We express our sincere gratitude to all).

All questioned by us specialists (experts) stated an opinion about reasonableness revival the rules about holograph record of the testimonies in existed model of pre-trial production.

The most part of the experts had supported our suggestion about distribution this procedure to all other kinds of interrogation, but only on questioning of an accused person.

Opinions of the scientist-specialists in criminal process distinguished when were discussed the following three questions:

1. Whether may be refused, in designed by us article of the CPC of RF, from that hypothesis of the norm, which stipulates an opportunity holograph record only after giving of testimonies?

Number of experts (V.N. Grigoryev, A.P. Popov, B.G. Rozovsky, I.A. Titko, V.T. Tomin) expressed for saving of it. V.N. Grigoryev pointed out, - “this term has system forming nature in this normative construction”. “I am sure, - wrote A.V. Pobedkin, - that in intention of a lawmaker the testimonies are verbal information despite an absence of direct instruction to it in articles 76-80 of the CPC of RF”. Consequently, in opinion of this group of the scientists, holograph record of the testimonies might be realized after carrying out a working part of interrogation like conversational communication between questioned person and interrogator, i.e. when there testimonies need to be fixed only.

It seems that an answer on the question is not unambiguously. Holograph record by an interrogated person his testimonies might be effective, useful and even necessary in various, often conflict situations pre-trial production. Let’s apply to an example. One of the authors of the article gave the testimonies as a witness on criminal case (fabricated as it was found later) in respect of a head of the institution of the MIA of RF, where he had served that time. Being supposed that his “testimonies” might be used in unseemly purposes, far from the interests of justice, he addresses to an investigator with petition to state his answers on the questions in holograph at once he knew a reason his calling to interrogation and the questions, the investigator was interested in. The petition was satisfied. Written responses were very concrete and correct that after reading of them, the investigator had not appeared a desire to ask specifying questions. In this situation might be acted in other way – to ask the investigator to write his information verbatim, but “the witness” had considered – personally written in a record would be more thought-out, true. Following events confirmed – a decision was absolutely right.

There was no an interrogation traditionally understandable as result of verbal communication between investigator and interrogated person in stated example. This investigated action, from formal legal position, is attackable, as written responses of the witness were not preceded to the testimonies, and they were used instead of them. But, it would be non-reasonable to deny admissibility of this form of interrogation and fixation its results in this and similar situations. Therefore, we are inclined to opportunity to refuse from hypothesis of norm indicated in question.

2. Should be the right or obligation of an investigator providing of opportunity to interrogated person to write his/her testimonies holograph?

Discussing this issue, most of the experts (V.N. Avdeev, A.S. Aleksandrov, V.P. Gmyrko, A.P. Popov, V.A. Svetochev) supported our opinion, according to which an investigator has to have the right to choice in acceptance of appropriate decision. B.G. Rozovsky and I.A. Titko act for providing an investigator with creative freedom in frames of normative instructions. Actually, there are possible situations in investigative practice when due to weighty reasons, e.g. physical or mental state of interrogated person, level of possession by him writing, providing a chance to write his testimonies not only impossible, but and inadmissibility to. Here a conclusion – disposition of analyzed norm should not have an imperative nature.

3. Where should be holograph written testimonies fixed: in procedural act – a record of questioning or in separate sheets attached to the record?

We believe that a record of investigative action and any proper completed enclosures are presented to be unified a source of evidential information.

Independently of space of placing a text, it considered to be an integral part of a record (e.g. in result of lasting many hours questioning, when there is no sheets in form of a record, testimonies continued to be fixed in separate sheets). Just therefore, despite various views of the experts on the third issue, a point of view of A.S. Aleksandrov is seen more attractive. He answered: “There are no obstacles to the fact that interrogated person himself stated, added or corrected his testimonies through any way”. A.P. Popov pointed out that it is irrelevant any restrictions. L.N. Loboyko

also expressed categorically: “There is no importance a place of testimonies’ fixation”.

As to a place of location the norms of holograph records of testimonies, then they, in our view, should be included in article 189 of the CPC of RF “General rules of conducting of interrogation” as part 33 of it. Other, i.e. fixation of these norms in article 190 of CPC of RF “A record of interrogation” would be meant only one – admissibility of holograph records of testimonies only at a final stage of questioning.

With considering of stated it seems reasonable to consider an issue about supplementing of article 189 of CPC of RF with part 31 of the following content:

“Upon request of interrogated person, he might be provided with an opportunity to state his testimonies holograph, about what a note is made in questioning record. Being familiarized with written testimonies, investigator may ask interrogated person additional questions. These questions and answers are written in a record”.

Not far idle looks one more question: whether has a significance to fix a holograph record of testimonies in articles of the head 6 and 7 of the CPC of RF regulating a status a witness, victim, suspected, accused person and other subjects who have a right to give testimonies? We think, yes. At first, there are a lot of the rights to listed participants of criminal process. If we try to enumerate and marking them with letters of Russian alphabet the rights only accused (defendant), then it would not be enough. It is not coincidence in the articles of the Code regulating legal status of the participants they are presented with blocks of the rights, e.g. “to lodge a petition”, “submit complaints”. Different volume the rights of specific participants of process are presented also in legislation foreign states. Second, what is a main - an investigator should be obliged to provide a participant with the right to written record of testimonies in interrogation protocol. But, as we made clear, there should not be an obligation of an investigator. Thus, a reason of negative response on the question is not only in technology of lawmaking.

Records of an interrogation. Unenviable fate came to attitude of a lawmaker and scientists-specialists in criminal process to interrogation records. During a few decades there is dominated a dogma in theory of criminal process, according to which

the testimonies of questioning persons are acted as sources of evidences, and the records are only a means of their fixation, which have no a status of independent instrument of proving. There other opinions are existed; they are exceptions. After collapse of the USSR the situation has changed with adoption of new criminal procedure legislation. This is testified by analysis of appropriate norms of the CPC of RF and CIS countries. So, article 134.2.11 of Azerbaijan is directly stipulated that the records of interrogation, confrontation and checking testimonies in a scene are the evidences. The records of all investigative actions were excluded from the list of procedural sources of the evidences of part 2 of article 84 "Evidences" of the CPC of Ukraine. In compliance with par. 3 of part 2 of article 99 of the CPC of this state, they and "carriers of information, which contain procedural actions" are included in a list of the documents as independent procedural sources of the evidences. The last norm is presented to be principally important as part 2 of article 104 of CPC of Ukraine provides the following rule, which is unique for Russian legislation: "If a questioning is fixed with help of the technical instruments, a text of the testimonies might not be included in appropriate record under condition that none of participants of procedural action insist on it". The CPC of Latvia (art. 137), Moldova (art. 290) and Turkmenistan (art. 131) were excluded the lists of investigative actions, records of which are the sources (in other terminology – "kinds") of evidences. That list was excluded also from article 83 of CPC of RF "Records of investigative actions and court session". The fact is meant – both the records of interrogation and the testimonies are recognized as the sources of evidential information.

Though, the scientists-specialists in criminal process are not satisfied with such status of the matters. It is noted in literature that previous formulation of article 87 of CPC of RSFSR was more reasonable. A.P. Ryzhakov writes: "Vicious circle. There is impossible a protocol without witness' testimonies; and the same time it cannot be testimonies without a questioning record" [5, p. 68].

A.R. Belkin has categorically spoken out on this case. He writes: "What evidence is – the testimonies itself or a record that fix? According to the Code, they are the both; but it is stupidity" [1, p. 239].

In principle, the specialists are known well of these problems, they have determined in their positions. We will try to speak out laconically our point of view.

Arguments of the opponents to recognize the interrogation records as the sources of evidences (in other terminology – "evidences") are presented to be unconvincing. They come to the two attackable arguments:

1. Particularities all investigative actions, except questioning, are the fact that under production of them, an investigator directly and sensibly ("visual-verbal way") perceives significant for a case circumstances.

In our view, this statement is inconsistent because it is fully applicable also to questioning: acoustic and visual (visual-verbal) perception of verbal speaking of questioning person, its particularities, intonation is directly carrying out also by an investigator.

2. "Due to possibility of multiple repetition of the testimonies by each accused, victim and witness in course of preliminary investigation, court might not limited with proclamation of questioning records" [4, p. 324].

On the second argument of our opponents we would like to say the following. Directness and oral nature are the general condition of judicial proceedings. Actually, testimonies of a defendant, victim, and witnesses are heard by court directly. Reasons are obviously – initial source is always much informative and universal of a primary one. But, a court is also proclaimed and heard a content of other written acts – numerous records and documents, experts' conclusions, and nobody can assert that they, in force of that argument, lose its evidential significance.

Further. Under production of preliminary investigation the norms of article 217 of CPC of Kazakhstan, article 225 of CPC of Ukraine, article 67 of CPC of Estonia stipulate a deposition of testimonies, which later might be announced in a court. According to articles 276 and 281 of CPC of RF, proclamation of testimonies of defendant, victim and witness given by them under production of preliminary investigation is allowed in course of judicial proceedings. Let's pay attention: in the listed norms is said just about testimonies as about written personal evidences. But,

can the testimonies as evidential information be kept out of the sources of evidences? Certainly, cannot be.

Conclusion (in our studying it was actively supported by A.S. Aleksandrov, V.P. Gmyrko, B.G. Rozovsky, V.A. Svetochev, and V.T. Tomin) is the following: both testimonies and records of questioning are the sources of evidences with one difference – testimonies are an initial sources, and record of interrogation, in which they fixed, is a derivative. There is nothing paradox and incongruous in it.

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