THE INSTITUTE OF DEPOSITION OF TESTIMONIES: CRIMINAL PROCEDURE CODES OF POST-SOVIET STATES

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This article argues about the importance of gathering written evidence (testimony) which, as a prototype of judicial deposition, may be regarded as an effective instrument for criminal procedure. The article incorporates the works of the British, German, and Russian theorists of the 19th century, and the legislative regulations of this period. Despite the fact that the concept of "judicial deposition" has only recently entered into practice in the new criminal procedure codes of post-Soviet states, its roots can be traced back to the 19th century English law. This paper focuses on the legislative regulations of the post-Soviet countries, in particular, the procedures set out in the new criminal procedure codes, including the novelties and peculiarities of the Draft Criminal Procedure Code of the Republic of Armenia. The authors have referred, in more detail, to the Criminal Procedure Code of the Republic of Armenia, which has substantial peculiarities. In this respect, the article presents the opinions of the experts on judicial deposition testimonies. Discussing the differences in the legislative regulations of several countries, this article, through a comparative analysis, points how different countries approach deposition of testimonies. Additionally, the article examines the fundamental differences between deposition testimonies and hearsay evidence.

Keywords: deposition; testimony; file a motion; pre-trial interrogation; hearsay evidence.

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Introduction

The new criminal procedure codes of Georgia, Ukraine, Kazakhstan, and the Kyrgyz Republic envisage deposition of testimonies as a new institute in criminal procedure. The Russian and Belarusian specialists point out the need for introducing judicial deposition as well.[1] The essence of judicial deposition consists of the following three points:

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[1] *Зинченко И.А., Попов А.А.* Структура уголовно-процессуального института депонирования показаний, цель и основания его применения (компаративистский взгляд) // Библиотека криминалиста. Научный журнал. 2015. № 1(18). С. 301–308 [Igor A. Zinchenko & Artem A. Popov, *The Structure of the Criminal Procedure Institute for the Deposition of Evidence, the Purpose and Grounds for its Application (Comparative View)*, 1(18) Library of the Criminalist. Science Magazine 301 (2015)]; *Данько И.В.* Обеспечение явки в суд потерпевших и свидетелей обвинения: новеллы законодательства Республики Беларусь // Государство и право в XXI веке. 2017. № 2. С. 30–37 [Igor V. Danko, *Ensuring the Appearance of the Victims and Witnesses of the Prosecution in Court: Novels of the Legislation of the Republic of Belarus*, 2 State and Law in the 21st Century 30 (2017)].

1) Testimonies are deposited by an independent person, not being a party to the pre-trial proceedings (*proper person*);

2) Testimonies integrate the opposite party during the deposition and provide the right to confront (*proper provision of the right of the participation*);

3) Deposition of testimonies is based on certain grounds provided by law (*proper grounds*).

1. *Who carries out the deposition of the testimonies?* As a rule, testimonies are deposited mainly by a judge, however, these can also be done with his/her participation. In fact, the deposition of testimonies can be realized even when the interrogation is conducted by an independent official who is not a party to the proceedings, such as an assistant judge or a notary. According to Article 34.8 of the English Civil Procedure Rules of 1998, a party might apply to interrogate the witness before the hearings under oath (deposition testimonies).[2] Before the hearing of a witness, he could be questioned by the judge, the examiner of the court, who could be a lawyer (barrister or solicitor), who has at least three years of experience in this particular job or by another person appointed by the court.[3]

2. *Who participates during the deposition of testimonies?* As a rule, the opposite side has the right to utilize the right of confrontation during the deposition of testimonies. For instance, the accused cannot be involved in the deposition of testimonies of a witness if he waives his right (the right to confront witnesses), and witness testimonies must be urgently deposited in case the witness suffers from a fatal disease.

3. *What are the grounds for judicial deposition?* Judicial deposition is allowed if there are certain grounds provided by law, such as the probability of death or illness, the possibility of leaving the country or from administrative-territorial unit, security of the person, and so on.

1. General Provisions

1.1. The Lack of the Best Forms of Interrogation Does Not Exclude the Worst Form of Interrogation

In the criminal justice system, the best way to interrogate witnesses is through the participation of the judge and the parties involved in the criminal procedure. Scientists still criticize the separation of powers to collect evidence and resolve cases in competitive procedure. Regarding this issue, the English philosopher and lawyer of the 19th century J. Bentham stated:

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[2] The Civil Procedure Rules 1998 (Feb. 12, 2020), available at https://www.legislation.gov.uk/uksi/1998/3132/contents/made.

[3] *Кудрявцева Е.В.* Гражданское судопроизводство Англии [Elena V. Kudryavtseva, *Civil Procedure in England*] 282, 285 (Moscow: Gorodets, 2008).

> The duty to listen to witnesses and collect evidence is often entrusted to a simple bailiff or a judicial investigator who send them to a judge in the written form for verification of the documents. Such regulation prevails in many countries, including England, in the spiritual and admiral courts. The separation of these two responsibilities (collecting evidence and solving the case) does not have any advantages, and meanwhile generates many drawbacks. Speaking about disadvantages, the authors refer to the interest of justice, because this separation delivers many facilities for the judges themselves.
>
> When the judge does not interrogate witnesses, he can never be sure that the protocols or testimonies are true, accurate, and complete. If parties and witnesses are present, he can feel that their testimonies are insufficient, and resume to asking them other questions. This is the way the judge can obtain the necessary information.
>
> What is more, when the parties and witnesses are present during the procedure and the judge cannot make an objective decision upon the collected testimonies, he/she can ask them other questions in order to gather sufficient information. It is difficult for the judge to clarify the circumstances of a case based mainly on the written evidence. Specifically, the judge cannot get acquainted with those outstanding and natural features of truth through personal observation that are seen in his/her face, or voice.[4]

Despite the fact that the interrogation of the witness in court is the best way of collecting evidence, in reality, there can be exceptional cases when it is impossible or extremely difficult to call a witness to court and hear his testimony. In this regard Bentham states:

> If judicial proceedings can't be carried out in the best way, it does not mean that it should not be carried out in the worst way.

In addition, he says:

> There are cases when parties and witnesses are unaware of the authority of the court who examines the case: in case of departure to another province there may be more or less important difficulties.
>
> There may be reasons for which it can be prudent to refuse presence or appearance, in order to avoid delays, harassment, expenses which are more important.[5]

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[4] *Бентам И.* О судебных доказательствах [Jeremy Bentham, *Rationale of Judicial Evidence*] 100 (Kyiv: M.P. Fritz's Printing House, 1876).

[5] *Id.*

These grounds are the bases for the judicial deposition of evidence stated in the criminal procedure codes of some post-Soviet States.

1.2. Deposited Testimony Without Judicial Interrogation (the Affidavit)

First and foremost, it is necessary to distinguish deposited testimonies from a widespread *affidavit* in the Anglo-American procedural law. In this regard, T. Loskutova noted that a testimony in the form of a deposition can be used in the concept of "affidavit in the form of a deposition."[6] After a few years this concept was renamed as the "deposition" in the new post-Soviet criminal procedure codes.

Affidavit (from lat. *affido*) is traditionally defined as testimony under oath. In this case, it should be understood that the veracity of the testimony in the form of written evidence must be mentioned and signed by the witness. In England and the United States, questioning the witnesses is not the only form of collecting evidence. In particular, the legislation has allowed the use of individual written and signed testimonies that the witness has given orally. This type of testimonies can be presented in court when the personal appearance in the trial is impossible.[7]

Deposited testimony and affidavit as related institutions:

1) In both cases the witness gives testimony before the trial;

2) In both cases the affiant and the deponent[8] give testimonies under oath and are warned about the consequences of a false testimony;

3) There are similar reasons or grounds for deposition and an affidavit (illness, another location, etc.).

However, there are essential differences between them, which are as follows:

1) The interested or the opposite parties do not participate in this process, when the witness gives an affidavit in the presence of the official representative. Meanwhile, during judicial deposition, the opposite or interested party usually participates in order to realize the right to confront;

2) Many American lawyers note that the affidavit reduces formal burden of proof without sacrificing accuracy or the reliability of the testimony.[9] However, we hold the opinion that this is a controversial approach. Specifically, the affidavit cannot have the same reliability as the "live" testimony. The affidavit is considered as a "low level"

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[6] *Лоскутова Т.А.* Свидетель и его показания в уголовном процессе Англии и США: дис. ... канд. юрид. наук [Tatyana A. Loskutova, *Witness and His Testimony in the Criminal Proceedings of England and the USA*, PhD Thesis] 222 (Moscow, 2005).

[7] *Молчанов В.В.* Свидетели и свидетельские показания в гражданском судопроизводстве [Valery V. Molchanov, *Witnesses and Testimonies in Civil Proceedings*] 246–247 (Moscow: Gorodets, 2010).

[8] Cindy Hill, *Use of Affidavits in Criminal Cases*, Legal Beagle (Feb. 12, 2020), available at https://legalbeagle.com/5514156-use-affidavits-criminal-cases.html.

[9] Fred A. Simpson & Deborah J. Selden, *The Truth About Affidavits* (2018) (Feb. 12, 2020), available at https://kipdf.com/the-truth-about-affidavits-1-by-fred-a-simpson-2-and-deborah-j-selden-3-introduc_5aec6d717f8b9a4a278b459e.html.

proof and has a lower degree of reliability. Bentham stated that the affidavit does not have such guarantees that would ensure its clarity and integrity. In this case, the judge does not have the opportunity to determine the nature of the evidence. There are no appropriate guarantees, transparency, neither are there predictable responses in advance;[10]

3) The subject of the deposition is information about the factual circumstances relevant to the determination of the case (case settlement), meanwhile the subject of affidavit is more broader in sense.[11]

2. Historical and Comparative Aspects of Judicial Deposition

2.1. The Institute of Judicial Deposition in English Law of the 19th Century

In the 19th century English lawyer J. Stephen in "Essay Evidence" described a procedure of giving testimonies before the consideration of the merits of the criminal case. In modern post-Soviet criminal proceedings, this procedure is called the judicial deposition of testimonies. In particular, he wrote:

> The recorded testimony can be submitted and read in favor of or against the accused at the trial of any criminal or for any offence to which it relates:
>
> 1) If the witness is dead, or if it is proven that there are no reasonable grounds that he will be able to arrive at the Court or give testimony, and
>
> 2) If it is proven that a written notice of the intention to take a recorded testimony was notified to the person against whom it is supposed to be read (the prosecutor or the accused), and
>
> 3) If it is proven that such a person, his adviser or a lawyer would have full opportunity to realize the right to confront – in case they wished to be present during the questioning.
>
> If a witness cannot come to court because of illness but there is still hope for recovery of a witness, the judge is not obliged to accept the recorded testimony. In this case, the judge can only delay the investigation.[12]

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[10] Bentham 1876, at 44.

[11] *Захарова Р.Ф.* Особый вид письменных доказательств (аффидевиты) в странах англо-американского права по делам о наследовании советских граждан // Проблемы государства и права на современном этапе. Труды научных сотрудников и аспирантов. Вып. 6 [R.F. Zakharova, *A Special Kind of Written Evidence (Affidavits) in the Countries of Anglo-American Law on Cases of in Heritance of Soviet Citizens* in *Problems of State and Law at the Present Stage. Proceedings of Researchers and Graduate Students. Issue 6*] 221 (V.F. Kotok (ed.), Moscow: Publishing House of Institute of State and Law of the USSR Academy of Sciences, 1973); *Костин А.А.* Условия допустимости отдельных видов доказательств, полученных в иностранных государствах // Закон. 2015. № 9. С. 156–167 [Alexander A. Kostin, *Conditions for the Admissibility of Certain Types of Evidence Obtained in Foreign States*, 9 Law 156 (2015)].

[12] *Стифен Дж.* Очерк доказательственного права [James Stephen, *A Digest of the Law of Evidence*] 143 (St. Petersburg: Senate Printing House, 1910).

To wrap up, in criminal procedure of English law, the affidavit and the deposition are permitted in court in the following three cases:

1) The testimony was taken by the judge, who participated in the recording of the testimony;

2) The statements are taken in the presence of the accused;

3) The witness is dead or ill and is not able to come to the court and testify.

2.2. Analogies of Judicial Deposition in German Law of the 19th Century

First of all, it is necessary to answer the following questions in order to find out whether the German procedure of pre-trial interrogation of the 19th century is similar to the English model of pre-trial interrogation:

1. *Who carries out the pre-trial interrogation?* In German law, judicial investigators who have the authority to interrogate witnesses significantly differ from the English judges. The German lawyer C. Mittermaier notes:

> The authority of English judges quite differs from the position of the German judicial investigators. The English judges acted everywhere including the preliminary investigation. The judge listened to the testimonies, and only when he noticed any ambiguities and contradictions, started to ask questions in case there was a need to eliminate the incompleteness of the testimony. If there was not a private prosecutor, or if the accused did not have a lawyer, the judge started to interrogate the witnesses more accurately, because there were no people who could offer them appropriate questions.[13]

Based on the above, we can conclude that, unlike English law, in German law the investigating judges had more tools during this process than their English counterparts.

2. *Did the opposing party have the right to be engaged in pre-trial interrogation?* Unlike English law, the pre-trial interrogation in German law was carried out in the absence of the accused. In this regard, P. Degaya notes:

> The main difference between the German and English legal regulations is that, in German law, the interrogation was carried out in the absence of the accused. Beyond that, in English law, during the interrogation of witnesses the accused had the right to ask questions to them.
>
> Thus, in German procedural law where the pre-trial interrogation was carried out by the investigating judge cannot be considered as an historical analogy of

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[13] *Миттермайер К.Ю.А.* Уголовное судопроизводство в Англии, Шотландии и Северной Америке [Carl J.A. Mittermaier, *Criminal Proceedings in England, Scotland and North America*] 75–76 (Moscow: A. Unkovsky, 1864).

a judicial deposition as there were not sufficient rights (for example, the right to confront) and the proper body who could conduct the interrogation.[14]

2.3. Analogies of Judicial Deposition in Russian Law

1. *"Testimony of the eternal memory" and deposition of testimonies*. The possibility of interrogating the witness before the start of the proceedings was provided in "A Brief Picture of the Processes and Judicial Challenges of 1715."[15] According to the general rule, the courts interrogated the witnesses after the petitioner brought the complaint and received the defendant's objection. At the same time, this document contains a provision (which was called "a testimony of the eternal memory"). In particular, in cases where the witness could not be present and questioned in the court because of the fact that "he was already on the road, and his return could have any influence on the case" at the request of the witnesses, their interrogation was allowed even before the complaint was filed, as well as the defendant's objections were received.

V. Molchanov, who used the modern terminology, considers the institute of the "testimony of the eternal memory" as the analogy of deposition of testimonies.[16] "Testimony of the eternal memory" can be considered the Russian prototype of the deposition of testimonies, because in both cases the judge carries out pre-trial interrogation. In addition, there are similar grounds for both institutes, such as moving to another place, or illness.

At the same time, the "testimony of the eternal memory" cannot be considered a historical analogy of the deposition of the testimonies, because the opposite side did not have the right to participate in this process. After all, the opposite party should be able to participate in the process of deposition according to the general rule of judicial deposition.

2. *Is the interrogation of a witness by the judicial investigator equivalent or similar to the deposition of testimonies?* Firstly, it is necessary to refer to the above-mentioned issues in order to find out whether there was an institution similar to the judicial deposition of testimonies in the criminal process of pre-revolutionary Russia.

Who carries out the pre-trial interrogation?

The position of a judicial investigator was introduced during the judicial reforms of 1860–1864, by the decrees of Alexander II. It is important to discuss some issues relevant to this change. First and foremost, we should clarify whether the Russian

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[14] *Дегай П.И.* Взгляд на современное положение уголовного судопроизводства [Pavel I. Degay, *A Look at the Current Situation of Criminal Proceedings*] 96, 210 (Moscow: Printing House of the Ministry of State Property, 1847).

[15] Краткое изображение процессов или судебных тяжб (1715) [A Brief Picture of the Processes and Judicial Challenges (1715)] (Feb. 12, 2020), available at http://www.history.ru/content/view/1276/87/.

[16] Molchanov 2010, at 222.

judicial investigators were independent and impartial and whether it is possible to compare their collected testimonies with those done by the judge.

1. The judicial investigators were appointed "by the highest authority according to the views of the Minister of Justice." They were members of the district courts. The investigators had the power to initiate criminal proceedings on their own and to carry out preliminary investigations. It is important to note that judicial investigators did not exercise judicial control. I. Zinchenko notes that the authority of the investigators was mostly related to departmental affiliation. For this reason, in later periods of the Russian history, they were called investigators of the prosecutor's office, investigators of the state security bodies, law enforcement agencies, and so on.[17]

2. I. Foynitsky argues that the preliminary investigation ignores the rights of the parties and the very concept of the parties. In particular, the functions of both the prosecutor and the defender are concentrated in the hands of the investigating judge.[18] During this period, an approach prevailed, according to which the investigator could not simultaneously perform the functions of a prosecution and defense in the same case with equal measures. S. Poznyshev wrote that he should not be relieved of the pressure from the authorities.[19]

Although the judicial investigators were institutionalized, actually they were not judicial officers, and they did not have impartial judicial control over the investigation, including the quality of evidence.

Did the opposite party have the right to engage in the pre-trial interrogation?

In accordance with Article 446 of the Statute of Criminal Justice,

> witnesses were interrogated separately and, if necessary, the interrogation could be conducted in the absence of the certain parties, including the accused.

Based on the detailed analysis of this regulation we make the following conclusions:

1) The accused was to participate in the interrogation of the witness;

2) It was allowed to interrogate the witness in the absence of the accused in exceptional cases;

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[17] *Зинченко И.А., Фетищева Л.М.* Следственный судья как участник досудебного уголовного производства (компаративистский взгляд) // Вестник Калининградского филиала Санкт-Петербургского университета МВД России. 2015. № 3(41). С. 43 [Igor A. Zinchenko & Lidia M. Fetishcheva, *Investigating Judge as a Participant in Pre-Trial Criminal Proceedings (Comparative View)*, 3(41) Bulletin of the Kaliningrad Branch of the St. Petersburg University of the MIA of Russia 41, 43 (2015)].

[18] *Фойницкий И.Я.* Курс уголовного судопроизводства [Ivan Ya. Foynitsky, *Course of Criminal Justice*] 389 (St. Petersburg: Alfa, 1996).

[19] *Познышев С.В.* Элементарный учебник русского уголовного процесса [Sergey V. Poznyshev, *Elementary Book of the Russian Criminal Procedure*] (Moscow: G.A. Leman, 1913).

3) It was possible to take a testimony from the witness in the absence of the accused only during the initial interrogation. In the case of an additional interrogation, the participation of the accused was mandatory.

According to the general rule, the interrogation of a witness was possible only when the accused was present, and this procedure is similar to the deposition of testimonies. In particular, during the interrogation, the opposite party has the right to participate in interrogation and exercise the right to confront. A. Skopinsky notes:

> Within the meaning of Article 446 of the Statue of Criminal Justice, the absence of the accused during the interrogation of a witness is allowed only as an exceptional measure; but in practice, the presence of these people is a rare case, and usually they are allowed to be present during interrogations only at their request. However, if the investigator interrogated witnesses in the absence in these interrogations, they may demand their presence during interrogation of certain witnesses.[20]

In which cases is the announcing of pre-trial testimonies in the court possible?

As a rule, testimonies of witnesses given at the preliminary investigation can be read only in the cases provided by the law (for example, imprisonment, illness that makes it impossible to leave home).[21] Unlike the trial, there was no provision to warn about the consequences of giving a false testimony. As a rule, the investigator only warns the witness that he can be interrogated in court under oath, and explains to him the importance of telling him the whole truth. The oath is given only in the following cases:

1) The witness is preparing for a long journey, and his return may slow down the investigation;

2) The witness suffers from a life-threatening illness; and

3) The witness lives outside the district of the court or in such a distance from the court that his appearance in court is impossible. In particular, under the term of "impossible," it was implied that he can appear in the court but is connected with special difficulties.[22]

Thus, in the Russian Empire, the interrogation of a witness by an investigator can be considered analogous to the deposition of testimonies only in "*droit positif*," but, in reality, the process of taking the testimony from the witness by the judicial

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[20] *Скопинский А.В.* Свидетели по уголовным делам: Пособие для практиков [Alexander V. Skopinsky, *Witnesses in Criminal Cases: A Handbook for Interns*] 78–79 (Moscow: I.K. Golubev's Bookstore, 1911).

[21] *Духовской М.В.* Русский уголовный процесс [Mikhail V. Dukhovskoy, *Russian Criminal Procedure*] 219 (Moscow: A.P. Poplavsky's Printing House, 1910).

[22] *Викторский С.И.* Русский уголовный процесс [Sergey I. Viktorsky, *Russian Criminal Procedure*] 286 (2nd ed., Moscow: Edition by A.A. Kartsev, 1912).

investigator because of the absence of the accused did not look like the court deposition of the testimony.

3. *Analogies of deposition testimonies in Soviet procedural law*

Is the interrogation of the witness considered analogous to judicial deposition of testimonies?

T. Loskutova notes:

> In the Russian criminal procedure, the analogy of the judicial deposition is the interrogation of a witness at the preliminary investigation.[23]

Despite this statement, judicial investigator of the Russian Empire is not considered an appropriate body from the point of view of the institution of judicial deposition. In fact, the Soviet investigator was more than an official, he was in fact a "prosecutor's investigator" with a full authority. Moreover, in the Soviet criminal procedure, there were no such terms as "right to confrontation" and "cross-examination." The investigator had absolute authority to make a decision whether to carry out confrontation between the accused and the witness or not to make such a decision at all. During the proceedings, there were no requirements to call witnesses to the court and interrogate them. There was also no exception when the case could be examined in the absence of both the accused and all the witnesses.[24]

3. Actual Problems of Judicial Deposition

The institute of judicial deposition of testimonies is especially in the focus of post-Soviet experts' attention.[25] The idea of depositing testimonies was in the spotlight of the

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[23] Loskutova 2005.

[24] Памятники российского права: в 35 т. Т. 29: Уголовно-процессуальные кодексы РСФСР [*Monuments of Russian Law. In 35 vols. Vol. 29: Criminal Procedural Codes of the RSFSR*] 178–179 (R.L. Khachaturov & V.A. Lazareva (eds.), Moscow: Iurlitinform, 2016).

[25] *Крицкая И.А.* Проверка вещественных доказательств на досудебном расследовании: некоторые спорные вопросы // Закон и жизнь = Legea si Viata. 2017. № 1/2 С. 91–95 [Irina O. Krytska, *Verification of Physical Evidence in Pre-Trial Investigation: Some Contentious Issues*, 1/2 Law and Life = Legea si Viata 91 (2017)]; *Крицкая И.А.* Целесообразность распространения правового режима депонирования на вещественных доказательствах во время досудебного расследования // Актуальні питання кримінального процесу, криміналістики та судової експертизи: матеріали міжвідомчої науково-практичної конференції (Київ, 24 листопада 2017 року) [Irina O. Krytska, *The Expediency of Extending the Legal Regime of Depositing on Physical Evidence During Pre-Trial Investigation* in *Topical Issues of Criminal Procedure, Forensic Science and Forensics: Proceedings of the Interagency Scientific Conference (Kyiv, 24 November 2017)*] 37 (Kyiv: National Academy of Internal Affairs, 2017); *Гловюк И.В.* Депонирование показаний по УПК Украины и УПК Республики Казахстан // Әубәкіров оқулары: Халықаралық ғылыми-тәжірибелік конференция материалдары, 19 ақпан 2016 ж. [Irina V. Glovyuk, *Deposition of Testimonies Under the Criminal Procedure Code of Ukraine and the Criminal Procedure Code of the Republic of Kazakhstan* in *Aubakirov Readings: Proceedings of the International Scientific and Practical Conference, 19 February 2016*] 107 (Almaty, 2016); *Аубакирова А.А.* Закрепление показаний несовершеннолетнего

Soviet lawyers from the very beginning of the formation of the Soviet judicial system. They have raised many topical issues and some of them are discussed below.

3.1. Judicial Deposition of Testimonies Should Not Be Transformed Into a Fake Form of Judicial Interrogation

The judicial deposition is not the best way of interrogation, however, the impossibility of implementing the best method of judicial interrogation should not exclude the worst form to interrogate the accused during the pre-trial proceedings. Judicial deposition of testimonies is an exceptional way, which makes possible to combine several procedural interests especially in case of impossibility to appear in court.

At the same time, we should not forget that the deposition in the pre-trial process is an opportunity for prosecution because they can interrogate witnesses. This stage is the defendant's right to confrontation and is more important because in this case he does not have the opportunity to fully exercise this right. Therefore, the realization of the right to confrontation, in the process of deposition is strongly fragmented and superficial.

In fact, it is possible to foresee the possibility of abuse of judicial deposition by the prosecuting authorities. Judicial deposition of testimonies can be transformed into a fake form of judicial proceedings. It is extremely dangerous that the majority of witnesses may be interrogated in the mode of deposition during pre-trial proceedings, instead of being interrogated during the legal proceedings.

The Kazakh specialists offer different mechanisms to prevent such cases. Some authors suggest to limit the number of deposited testimonies by law, for example, no more than five persons for each of the parties of the criminal process. This will make it possible not to turn the trial into an absentee process.[26] Another group of authors believes that the parties are required to agree on the number of persons of interrogation. If such an agreement is not reached, then the decision on the number of persons should be made by the investigating judge.

We think that the formalized approach to fixing the number of witnesses by the law or the official is unacceptable, because it is impossible to foresee how many testimonies will be objectively required for a particular case. For not to be transformed into a fake form of interrogation, judges must strictly observe the grounds for deposition provided for by the law.

потерпевшего в современном уголовном процессе Республики Казахстан // Вестник Южно-Уральского государственного университета. Серия «Право». 2015. № 15(2). С. 43–48 [Anna A. Aubakirova, *Fixing the Testimony of a Minor Victim in the Modern Criminal Process of the Republic of Kazakhstan*, 15(2) Bulletin of South Ural State University. Series "Law" 43 (2015)].

[26] *Ахпанов А.Н.* Депонирование показаний потерпевшего и свидетеля в уголовном процессе Республики Казахстан // Вестник Омского университета. Серия «Право». № 4(45). С. 178 [Arstan N. Akhpanov, *Deposition of the Testimonies of the Victim and Witness in the Criminal Procedure of the Republic of Kazakhstan*, 4(45) Bulletin of Omsk University. Series "Law" 173, 178 (2015)].

In addition, the judge finds out whether the ground for deposition is reasonable. For example, he/she must find out whether the witness should return to that state, if even he will not, the judge is obliged to take measures within the framework of an international survey to interrogate the witness in the proceedings.[27]

3.2. Competition of Deposition and Hearsay Evidence

The rule of inadmissibility of testimony taken from other people's words was formed in English law at the end of the 17th century. English society formed an understanding about the rule of *hearsay* evidence. In fact, testimonies from other people were called "stories from other's mouth." In this case it was impossible to verify the testimony during cross-examination and the veracity of witness' words could not be verified because the court did not have a real opportunity to question the witnesses directly.[28]

In modern English law, testimonies from other people's words are permissible if the person is identified and one of the following conditions was on place:

1) He/she is dead;

2) He/she cannot be questioned because of his physical or mental condition;

3) He/she is not in the United Kingdom;

4) He/she cannot be found, although all reasonable measures have been taken;

5) He/she refuses to testify because of fear and the court gives permission to not appear (Art. 116 of the Criminal Justice Law of 2003).[29]

If we compare the grounds of judicial deposition and Hearsay's testimony in court, it becomes clear that in fact they are similar. In particular, the grounds for judicial deposition are more prospective and in the future such events may possibly take place.

But here, a competition between these two types of testimonies arises. Unlike the judicial deposition testimonies, in case of hearsay the defendant's right to confront is not ensured. Therefore, it is necessary to give preference to the judicial deposition. If there are grounds foreseen by the law, in pre-trial proceedings it is necessary to urgently deposit the witness's testimony, and not wait until hearsay testimony is used. In this context we have the following options.

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[27] *Хан А.Л., Тяжина А.Ж.* О некоторых проблемах депонирования показаний потерпевшего и свидетеля в уголовном процессе Республики Казахстан [Alexander L. Khan & A.Zh. Tyazhina, *On Some Problems of Deposition of Testimonies in Criminal Procedure of the Republic of Kazakhstan*] (Feb. 12, 2020), available at https://online.zakon.kz/Document/?doc_id=33504069.

[28] *Александров А.С., Бостанов Р.А.* Использование производных доказательств в уголовном процессе [Alexander S. Alexandrov & Ramazan A. Bostanov, *Use of Derived Evidence in Criminal Procedure*] (Moscow: Iurlitinform, 2013); *Галяшин Н.В.* Показания с «чужих слов» как производные доказательства в уголовном процессе [Nikolay V. Galyashin, *Testimonies from "Other People's Words" as Derived Evidence in Criminal Proceedings*] (Moscow: Prospekt, 2017).

[29] *Барабанов П.К.* Уголовный процесс Великобритании [Pavel K. Barabanov, *Criminal Procedure of the Great Britain*] 467 (Moscow: Sputnik, 2015).

1. *An eyewitness of a crime suffers from a severe and fatal disease*. The investigator, being aware of his illness and the possibility of the death of a witness, is obliged to deposit his testimony. The use of hearsay testimony in court is unacceptable if the investigator does not deposit the testimony of a witnesses. Moreover, even if a witness before his death told somebody about what he had seen, that person's testimony also cannot be used as evidence in court. The fact is that the investigator had a real opportunity to deposit the testimony of the witness before his death and also to ensure the right of the accused to confront, but he did not fulfill his obligation. In such a situation it is allowed to use the pre-trial testimony of the witness as evidence or to question in the court by the person whom the witness told what he had seen before his death. This practice will become the "best" way to evade the obligation for using judicial deposition.

2. *An eyewitness of a crime gives a testimony in the investigator's office, and then he gets into an accident and dies*. In this case, the use of hearsay evidence is permissible. In fact, written testimony given before death can be used as evidence in the criminal procedure. The testimony can also be used as evidence in court if the witness has told about what he saw before his death. The sense of this regulation is the lack of the possibility to foresee the death of a witness and then deposit his testimony.

Thus, summarizing the above mentioned statements, we can highlight the following important points:

1) Despite the fact that the modern concept of "the judicial deposition of testimony" is used in the criminal procedure codes of post-Soviet states, this institution was essentially provided by English law at least in the 19th century. In fact, in the English criminal trial, the pre-trial questioning of the witness was carried out by the proper person or body. Moreover, during the pre-trial the interrogation right to confront was properly ensured and concrete grounds for pre-trial interrogation were provided in those times;

2) Unlike the English criminal procedure, the German criminal procedure did not have any institution or regulation similar to the court deposition. After all, in Germany, a pre-trial testimony was taken by a forensic investigator, but his position was not the same as the position of the English police judge. In addition, the accused has not participated in the interrogation of the witness and that's why his right to participate and to confront them was not ensured;

3) In spite of the fact that in the legal field of the Russian Empire certain regulations were provided (the participation of the accused in the pre-trial questioning of the witness, the testimony under the oath, the certain grounds for the interrogation of the person during the investigation), in reality there was no process similar to the judicial deposition of testimony. Despite the fact that the pre-trial questioning of the witness was carried out by a forensic investigator who was considered as a judicial officer, however, he was not an appropriate person of court because he was a person conducting only the investigation. Moreover, the right of participation

of the opposite party was an illusory right, since in practice it was neither ensured nor implemented in the Russian Empire.

4. Judicial Deposition in Criminal Procedure of Post-Soviet States

4.1. The New Criminal Procedure Code of the Kyrgyz Republic[30]

The former Criminal Procedure Code of the Kyrgyz Republic has not provided the rules about the institute of judicial deposition of testimonies. As a result of new judicial reforms in 2015, there was provided a separate chapter for the judicial deposition of testimonies.

1. *General provisions*. Article 204 of the Criminal Procedure Code of the Kyrgyz Republic defines detailed proceedings of judicial deposition and specifies the person who has the authority to carry out the interrogation. In particular, Article 204 provides that the deposition of testimonies is carried out during the preliminary investigation. In fact, the grounds of judicial deposition are applicable only on the testimonies of the witness and the victim. Thus, pursuant to Article 204(1), at the request of the defense attorney and the parties for the defense, during the pre-trial procedure the examining magistrate shall interrogate the victim or witness about the circumstances of the criminal case known to them. The defense attorney and parties for the defense shall file a motion requesting deposition directly with the court. Paragraph 2 of Article 204 clarifies cases where the implementation of a judicial deposition of testimonies is applicable. Particularly, according to Article 204(2), in exceptional circumstances, should there be reasons to believe that any later interrogation of the victim or witness during the pre-trial or trial procedure may become impossible for objective reasons that have to do with the risk to life or health, or a serious illness of the victim or witness, their forthcoming departure for a permanent residence outside the Kyrgyz Republic, such victim or witness may be interrogated by the examining magistrate at the investigator's motion and with the consent of the prosecutor.

It is clear from the content of Article 204 that there are determined the scope of the persons who can be interrogated at the stage of preliminary investigation, the circle of persons who can file a motion, and a proper body or a person who is competent to question the witness or the victim. The procedural and detailed regulations of the judicial deposition of testimonies are envisaged in other articles of Chapter 27 of the Criminal Procedure Code.

2. *The procedure of judicial deposition*. Articles 205–208 of the Criminal Procedure Code of the Kyrgyz Republic refer to the motion for questioning of a witness or a victim. There are certain provisions which are related to the presence of the suspect and the

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[30] Уголовно-процессуальный кодекс Кыргызской Республики [Criminal Procedure Code of the Kyrgyz Republic], Ch. 27 (Feb. 12, 2020), available at http://cbd.minjust.gov.kg/act/view/ru-ru/111530.

place of interrogation as well. In particular, pursuant to Article 205(1), the investigator may ask the prosecutor to file a motion with the examining magistrate requesting deposition of statements. The investigator shall enclose with the motion materials of the criminal case supporting the need to have statements by the victim or witness deposited. Having considered the submission, the prosecutor shall, within one day, address the issue of submitting the motion requesting deposition of statements to the examining magistrate. Paragraph 2 of Article 205 regulates decisions made by the examining magistrate as a result of the motion review. The examining magistrate shall consider the motion within three days from the receipt and issue, as a result, a reasoned ruling for granting the motion or refusing it. Should the motion be granted, the examining magistrate shall appoint the time for the earliest possible interrogation, informing the prosecutor, the suspect and his defense attorney.

Paragraph 3 of Article 205 prescribes that the examining magistrate shall look into the investigator's motion requesting deposition of the statements by the victim or witness within three days from its filing in a court hearing at the location of the pre-trial procedure with the participation of the parties to the criminal process and paragraph 4 defines important rules such as the annunciation the motion to be heard, and informing of their rights and obligations of the parties. Then, the investigator shall argue the need to have the statements by the victim or witness deposited. Article 205 of the Criminal Procedure Code defines some provisions about the refusal and satisfaction of a motion, based on the materials which are presented during the hearing. In particular, based on the hearing of the motion, the examining magistrate shall make a reasoned ruling for granting the motion for the deposition of the statements by the victim or the witness, or for refusing it. In case the motion is granted, the magistrate appoints the date, time and place to interrogate the witness. However, if the motion is rejected, it may be appealed to the Court of Cassation. Paragraph 8 of Article 205 directly limits the possibility for the investigator to file a motion for questioning the witness or the victim if it contains the same grounds as before. Thus, in case of the rejection of the motion for questioning witnesses or victims, the investigator may make a double application to examining magistrate only if he contains substantiate reasons for the deposition of the testimony. Article 207 regulates the order of procedure for considering the motion by defense attorney and parties for the defense requesting deposition of statements by a witness. Pursuant to paragraph 1 of Article 207, the examining magistrate shall consider the motion by the defense attorney or parties for defense requesting deposition of statements by the witness within three days from the filing alone, without any court hearing, and appoint the time and place for the interrogation of the witness, informing the defense attorney and parties for the defense, as well as the prosecutor and parties for the prosecution. Paragraph 6 of Article 208, defines that the interrogation ends with the relevant procedural document such as a protocol. In particular, after the interrogation is over, the examining magistrate shall forward the protocol of the court hearing on the deposition of statements by the victim or witness to the prosecutor, to be entered in the criminal case file.

3. *Some provisions regarding the place of disposition*. According to Article 208(1), the victim or witness shall be interrogated by the examining magistrate in a court hearing at the location of the pre-trial procedure or at the location of the gravely ill victim or witness, in the presence of those persons who requested deposition of statements, in compliance with the addition, according to Article 208(5), a visiting court session may be held in case of questioning a gravely ill victim or witness.

4. *Consequences of non-appearance of parties to the disposition*. Article 208(4) provides the consequences of non-appearance of interrogation parties. First of all, pursuant to Article 208(1), the victim or witness shall be interrogated in the presence of those persons who requested deposition of statements, in compliance with the rules for the interrogation of victims or witnesses at the trial as stipulated by other article of the Criminal Procedure Code. According to paragraph 8 of the same article, the interrogation of the witness or the victim shall be carried out by the magistrate in the presence of the person who requested the interrogation and deposition of the testimony. The suspect shall not be summoned to interrogation if the presence of the suspect threatens the safety of the victim or witness. In particular, the absence of a suspect in the interrogation cannot serve as a ground for failing the deposition of witness' testimonies. Interrogations should not take place if the prosecutor or lawyer does not appear for good reasons, if they have informed the court in advance. Moreover, interrogations should not take place when the party who has required to interrogate the witness cannot be present during the interrogation or it is not possible to ensure the presence of the person who will be interrogated.

5. *Consequences of judicial deposition of testimonies*. Article 209 precisely prescribes the cases, when the further interrogation of the victim or witness is possible after the proceedings. Thus, during the trial procedure the court may examine the witness or victim who has been interrogated during the pre-trial proceedings when the interrogation has been conducted in the absence of the party for the defense, or should there be a need to specify statements that have not been elucidated during the interrogation by the examining magistrate.

4.2. The Kazakh Criminal Procedure Code and Amendments[31]

The institute of judicial deposition is introduced in Criminal Procedure Code of the Republic of Kazakhstan as a result of legal reforms in 2014.

1. *Competencies of involved participants in proceedings.* The Criminal Procedure Code provides the scope of the persons who can be interrogated at the stage of a preliminary investigation, the circle of persons who can file a motion, and the proper body or a person who is competent to question the witness or the victim. In particular, Article 53(2) and (3) provide and define the power of the court.

[31] Уголовно-процессуальный кодекс Республики Казахстан [Criminal Procedure Code of the Republic of Kazakhstan], Arts. 53, 55, 70 (Feb. 12, 2020), available at https://online.zakon.kz/document/?doc_id=31575852.

Particularly, in accordance with the provisions of paragraph 3(2) of Article 53, the prosecutor may deposit the testimony of a victim or a witness at the request of the prosecutor. Paragraph 2 of Article 53 specifies cases when only the court has the right to interrogate a witness and a victim. According to paragraph 1(3) of Article 70, the defense counsel shall have the right to apply to the investigating judge on depositing evidence of the witness and the complainant.

2. *Peculiarities of interrogating the victim or the witness by the investigating judge (judicial deposition)*. Article 217 prescribes the peculiarities of interrogating the victim or the witness of the investigating judge. In particular, it is clarified in what cases the trial participants may file a motion for interrogation, the procedure for examining the motion, and the peculiarities of the presence of the trial participants. In particular, pursuant to Article 217(1), the procurator, the suspected or his/her lawyer, involved in the case as a defense counsel, shall have the right to make petition for interrogation by the investigating judge of a person who is a victim, a witness, and in the case, if there is reason to believe that their late interrogation in the course of the pre-trial investigation or the court session may not be possible due to objective reasons (permanent residence outside of the Republic of Kazakhstan, travel abroad, serious health condition, the use of safety measures), as well as in order to avoid the subsequent interrogation of minor witnesses and victims to exclude traumatic effects.

The person, who conducts the pre-trial investigation, shall have the right to initiate before the procurator the issue of sending a request to the investigating judge on the deposit of the testimony. The person, conducting the pre-trial investigation, shall attach to the request the criminal case materials, confirming the need to deposit the testimony of the victim or witness. Article 217(2) defines the time limits for the filing a motion and the possibility of appeal. In particular, the investigating judge shall consider the request within three days of its receipt, and shall make a reasoned decision on approval or refusal based on the results so as to satisfy the request. In the case of satisfying the request the investigating judge appoints the time of interrogation as soon as possible, as notified the procurator, the suspected and his/her lawyer, involved in the case as a defense counsel. The decision of the investigating judge to refuse to satisfy the request shall be appealed and protested in the manner provided in Article 107 of this Code. The refusal of the investigating judge to satisfy the request shall not prevent the repeated applying of the persons, referred to in the first part of this article, if there are circumstances pointing to the existence of grounds for sending the request on the deposition of the testimony to the court. According to paragraph 3 of Article 107, the interrogation by the investigating judge of the victim and the witness shall be carried out in the presence of the procurator, the suspected (if any), his/her lawyer involved as a defense counsel, and, if necessary, and other participants to the proceedings. The suspected is not called for interrogation, if the presence of the suspected during interrogation threatens the safety of the victim or the witness.

4.3. The Criminal Procedure Code of the Republic of Estonia[32]

Legal regulations of judicial deposition testimonies in the Criminal Procedure Code of the Republic of Estonia were introduced in 2011.

1. *General provisions*. Article 69^1(1) of the Estonian Criminal Procedure Code defines precisely the scope of those who have the power to file a motion to the investigating judge before the examination by the court. Particularly, the prosecutor, the counsel or the accused may request from the court deposition of the testimony of the witness before examination by the court or during the recess of court sessions. Paragraphs 2 and 3 regulate the proceedings of filing a motion and also the powers and responsibilities of the investigator judge. In accordance with Article 69^1(2), in case of the refusal of the motion, the court shall formalize the dismissal of the request by a reasoned ruling.

2. *Peculiarities of the judicial deposition*. Article 69^1(1) provides the possibility of depositing a witness' or victim's testimonies only when imprisonment is prescribed as a punishment for that criminal offence. In particular, the prosecutor, the suspect or the defender may file a motion for interrogating the witness or the victim if the object of the criminal proceeding is an intentional criminal offence for which the three years' imprisonment is prescribed as a punishment. Article 69^1(2) provides the cases when the investigating judge has the power to satisfy a filed motion. In particular, a court shall satisfy the request if circumstances arise which enable to conclude that later hearing of a witness in the court hearing of a criminal matter may be impossible or the witness may be influenced to give a false testimony. According to paragraph 3 of Article 276^2, if a party to the court proceeding wishes to deposit the testimony of a witness who is not specified in the statement of charges or statement of defense as the person summoned to court or questioned in pre-trial procedure, the court may satisfy the request under the conditions specified in Article 286^1 of the Criminal Procedure Code.

3. *Consequences of non-appearance of parties during the disposition*. Article 69^1 of the Criminal Procedure Code defines the obligation of some participants to be present during the deposition and the consequences of not appearance being present there. In particular, pursuant to paragraph 4 of Article 69^1 a suspect shall not be summoned to hearing at the request of a witness or the prosecutor if the presence of the suspect at the hearing poses a threat to the safety of the witness. According to paragraph 5 of the same article, the failure of a suspect who has received his or her summons to appear, does not hinder the hearing. Moreover, no hearing shall be conducted if a prosecutor or counsel who has received his or her summons, does not appear for a good reason and has given a prior notice thereof to the court. It becomes clear that the defense attorney or prosecutor's participation in the deposition of

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[32] Уголовно-процессуальный кодекс Эстонской Республики [Criminal Procedure Code of the Republic of Estonia], Art. 69^1 (Feb. 12, 2020), available at https://v1.juristaitab.ee/ru/zakonodatelstvo/ugolovno-processualnyy-kodeks.

evidence is obligation and necessary to ensure the legitimacy of the interrogation and the right of the suspect to be present in such circumstances, such as the witness security, can be restricted.

4.4. The Institute of Judicial Deposition Testimonies in the Criminal Procedure Code of the Republic of Lithuania[33]

The Criminal Procedure Code of Lithuania envisages the suspect's deposition institute during the preliminary investigation. The institute of judicial deposition of the suspect's testimonies is not envisaged in the legislation of the post-Soviet countries, except in the Draft Criminal Procedure Code of the Republic of Armenia and the new Code of Lithuania. In particular, in the Draft Criminal Procedure Code of the Republic of Armenia judicial deposition institute of the accused's testimonies during the preliminary investigation is introduced. From this view it is interesting to refer to Article 189 of the Criminal Procedure Code.

1. *General provisions*. Article 189 of the Criminal Procedure Code of Lithuania defines precisely the scope of those who has the power to file a motion to the investigating judge before the examination by the court and the proceedings of the motion's examination. In particular, the investigating judge receives the prosecutor's motion about deposition of the suspect's testimonies, and also may question the suspect during the preliminary investigation. It is important to highlight that the prosecutor may file a motion by the defender's, suspect's or by his own initiative. Paragraph 2 of Article 189 defines the duties of the prosecutor in the case of the interrogation of a suspect.

2. *Peculiarities of suspect's testimonies deposition*. The Criminal Procedure Code of Lithuania mentions precisely the cases when it is necessary to interrogate the suspect during the preliminary investigation by an investigating judge. In particular, pursuant to Article 189(3), the prosecutor is initiated to deposit testimonies in cases where it is assumed that during the proceedings the defendant may change his testimony or refuse to give a testimony. According to Article 189(5), during the interrogation the defender must be present at the suspect's request. This procedure of the judicial deposition is envisaged in Article 189(5).

3. *Comparative analysis of deposition of the accused's confession.* Comparative analysis shows that foreign countries such as Kazakhstan, Ukraine or Georgia, do not have such a regulation of deposition testimonies.[34] At the same time, it should be

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[33] Уголовно-процессуальный кодекс Литовской Республики [Criminal Procedure Code of the Republic of Lithuania], Art. 189 (Feb. 12, 2020), available at https://www.infolex.lt/portal/start_ta.asp?act=doc&fr=pop&doc=10708&title=LR%20baud%FEiamojo%20proceso%20kodeksas.

[34] *Гамбарян А.С., Оганесян А.А.* Судебное депонирование показаний на предварительном следствии (сравнительно-правовой анализ) // Библиотека криминалиста. Научный журнал. 2014. № 2(13). С. 320–325 [Artur S. Ghambaryan & Anna A. Oganesyan, *Judicial Deposition of Testimonies at the Preliminary Investigation (Comparative Legal Analysis)*, 2(13) Library of the Criminalist. Science Magazine 320 (2014)].

noted that some codes of criminal procedure allow them to deposit testimonies of the accused people. Thus, it is directly envisaged by the Lithuanian Criminal Procedure Code. In particular, according to Article 189(3) the interrogation of the suspect is carried out the investigating judge by the initiative of the prosecutor, if there are grounds to believe that the defendant may change his testimony or refuse to give a testimony during the trial. This regulation of the Criminal Procedure Code has been criticized by many theorists, as they are interested in the real exceptional circumstances that can hinder participation of the accused in the trial. Theoretically, it can be assumed that such a situation could arise when the crime was committed by the group. In particular, in that case one of the defendants' life or health is in danger and that's why it should necessary to deposit testimonies. In all other cases, the interrogation of the defendant under the rules of the deposition testimonies is impossible because it is a useless and unacceptable procedure.[35]

Rules of deposition of testimonies of the Lithuanian Criminal Procedure Code differ from the regulations of the Draft Criminal Procedure Code of Republic of Armenia.[36] The main differences are as follows:

1) The deposition of suspect's testimony in the Criminal Procedure Code of Lithuania is not directly related to the confession statement;

2) In the Criminal Procedure Code of Lithuania such grounds for deposition testimonies are envisaged as changing the testimony during the trial, or refusing to give a testimony, whereas the ground to deposit testimonies according to the Criminal Procedure Code of Republic of Armenia is to ensure its legitimacy.

4.5. The Criminal Procedure Code of the Republic of Moldova[37]

In the Criminal Procedure Code of the Republic of Moldova, the institute of judicial deposition is provided under Article 109, which was introduced in 2012. In the Criminal Procedure Code the judicial deposition is possible only in the case of a witness. In particular, Article 109, unlike other codes of post-Soviet countries, allows only the deposition of witness's testimonies.

1. *Grounds and limits of judicial deposition*. Article 109(3) defines the limits of the interrogation of the witness. Thus, the presence of a witness in a case hearing should be impossible due to his/her departure abroad or to other justifiable reasons, and

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[35] *Попов А.А.* Проблемы регламентации досудебного депонирования показаний в уголовном процессе // Пробелы в российском законодательстве. 2014. № 6. С. 196–200 [Artem A. Popov, *Problems of the Regulation of Pre-trial Deposition of Evidence in Criminal Proceedings*, 6 Gaps in the Russian Legislation 196 (2014)].

[36] Проект Уголовно-процессуального кодекса Республики Армения [Draft Criminal Procedure Code of the Republic of Armenia], Art. 306.

[37] Уголовно-процессуальный кодекс Республики Молдова [Criminal Procedure Code of the Republic of Moldova], Art. 109 (Feb. 12, 2020), available at http://bizlex.ru/6-ugolovno-processualnyy-kodeks-respubliki-moldova-obschaya-chast.html.

to reduce or eliminate the exposure of a witness to an evident risk or to reduce the possible victimization of the witness, the prosecutor may require the examination of a witness by the investigating judge providing the suspect/accused, their defense counsel, the injured party and the prosecutor with the possibility to address questions to a witness so examined. It becomes clear that during the preliminary investigation, the prosecutor may file a motion for interrogation of the witness only in the presence of the above mentioned grounds, and only the investigating judge has the power to examine the motion. At the same time, during the judicial deposition it is primordial to ensure the presence of the parties.

2. *Appealing the decision to deposit the witness testimonies*. Article 109 provides that a witness may question the claims of a suspect, accused or witness. At the same time, this article provides an opportunity to appeal against the decision of the prosecutor to refuse the petition. In particular, according to Article 109(3[1]), the suspect, accused or the injured party may request the prosecutor to examine a witness under the conditions of Article 109(3). Prosecutor's refusal to examine a witness may be appealed before the instructive judge, who upon establishing the foundation of the complaint shall examine the witness under the conditions of Article 109(3).

4.6. The Institute of Deposition Testimonies in the Armenian Criminal Procedure Code[38]

The institute of deposition is a novelty in the Armenian criminal justice. It was implemented based on the summary of the results of judicial process monitoring. In general, it represents a special format of person's interrogation in the pre-trial proceedings which is called to ensure the lawfulness of getting a testimony in case of further use.[39]

According to Article 306 of the Draft Criminal Procedure Code of the Armenia, the deposition is made in order:

1) To ensure the legitimacy of obtaining the confession of the accused;

2) If there is a reasonable doubt that the person cannot appear during the trial and he/she may not give a legitimate testimony during the trial.

According to the same article, the deposition of testimony is made if the investigator or the private party of the procedure files a motion to interrogate the accused.

1. *Judicial deposition of the accused confession in the Armenian reality*. As it was mentioned, a number of lawyers criticized the institute of deposition of testimony. In particular, the necessity of judicial deposition of testimony is criticized by the

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[38] Draft Criminal Procedure Code of the Republic of Armenia, Art. 306.

[39] *Гамбарян А.С., Симонян С.А.* Судебное депонирование показаний в современном уголовном процессе [Artur S. Ghambaryan & Simon A. Simonyan, *Deposition of Testimonies in Modern Criminal Procedure*] (Moscow: Iurlitinform, 2016).

Human Rights Defender,[40] the Chamber of Advocates of Armenia[41] and a number of lawyers.[42] The lawyers who support to deposit the accused confession are divided into two groups. In particular, according to the first group the institute of deposition testimonies is intended to deny the widely accepted opinion according to which investigators obtain testimonies by violence. Thus, H. Ghukasyan, the Head of the Working Group on the Draft Criminal Procedure Code, notes:

> We have a widespread perception that confessions in all cases are obtained through the violence and torture. Also these perceptions have the power of presumption, according to which there is no honest investigator. This idea was confirmed when the accused said publicly that the confession was obtained by torture. Often the defendants are inclined to take such a step in order to delay the investigation of the case.[43]

In contrast to this, the second group holds the opinion that the institute of deposition of testimonies is envisaged to prevent the investigator from falsifying the testimonies. Thus, R. Melikyan, Member of the Working Group on the Draft Criminal Procedure Code, considers the deposition of the confession statement an additional remedy, which aims to prevent the falsification of a testimony.[44]

As we have seen, the justifications of the supporters of the deposition of testimonies differ from each other. In particular, first group considers it a way to deny the presumption of non-legitimacy of the investigator and the other to prevent the falsifications. In order to ensure the legitimacy of the accused confession, the institute of deposition of testimony is unacceptable and, in some cases, dangerous. In particular, judicial deposition of the accused confession may contribute to the restoration of the practice based on the "*Confessio est regina probationum*" rule.[45] A. Tatoyan, Member of the Working Group on the Draft Criminal Procedure Code notes that the confession is only a simple evidence, and in the future, the defendant

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[40] The Ombudsman Will Be Careful About the Draft Criminal Procedure Code, Pastinfo.am, 10 February 2013 (Feb. 12, 2020), available at http://www.pastinfo.am.

[41] Discussion on the Draft Criminal Procedure Code of the Republic of Armenia, Chamber of Advocates of the Republic of Armenia, 14 November 2013 (Feb. 12, 2020), available at http://www.advocates.am.

[42] P. Ohanyan, *There Are Numerous Cases Where the Testimony From the Accused Is Taken Under Pressure*, 168.am, 19 December 2013 (Feb. 12, 2020), available at http://168.am.

[43] H. Ghukasyan, *We Want Justice to Be Protected From Lies and Intrigues*, Pastinfo.am, 10 July 2013 (Feb. 12, 2020), available at http://www.pastinfo.am.

[44] R. Melikyan, *On the Criminal Procedure Code of the Republic of Armenia*, Hraparak.am, 4 November 2013 (Feb. 12, 2020), available at http://www.hraparak.am.

[45] For centuries the Latin phrase "*Confessio est regina probationum*" (in English: Confession is the queen of evidence) justified the use of forced confession in the European legal system.

can either deny or give another testimony.[46] And beyond that, a person may not be convicted based solely on the confession. It may serve as a ground for condemnation of a person, only if there are sufficient evidences obtained within the legal procedure. We think that the confession of the defendant obtained in the presence of a judge can be considered more reliable even when the accused later presents a credible statement of torture. The urgency of this issue is also expressed in the Draft Criminal Procedure Code of the Republic of Armenia. In particular, before depositing the testimony of the witness, the court should explain the right of the accused to appear to the court with the lawyer and use the of right to remain silent, as well as inform him that the deposited testimony may further be used as evidence, even if the accused refuses to give further evidence. The point is that during the pre-trial proceedings the accused is under direct supervision of the criminal prosecution body and he can have an influence on the defendant's position both before and after the trial. This is especially true in case of any defendant in detention. In the absence of a criminal prosecution body, a separate meeting between the judge and the defendant does not itself neutralize the dangers.

In fact, the deposition of the confession contradicts the essence of the deposition testimonies. The purpose of the deposition is to disseminate judicial control over the evidentiary process in the pre-trial proceedings (the use of judicial safeguards) if there are grounds to believe that such an evidence is impossible or dangerous to present in the court. Thus, the pretrial testimony is deposited because there are grounds to believe that the witness or the victim cannot appear in the court in the future. The essence of deposition testimonies does not refer to the confession because the defendant's presence in the proceedings is mandatory, and he can give a direct testimony in the court. In this regard, the deposition of the confession contradicts the main essence of the deposition of testimonies, and as A. Ghazaryan, an Armenian attorney, mentions "it doesn't make any sense to deposit testimonies as the accused shall be examined later in the court."[47]

Thus, the pre-trial testimony (and not only the confession) of a defendant may be in line with the deposition testimony in following two cases:

1) In the case of a group offense, one of the accused cooperates with the law enforcement agencies and gives evidence against the other defendants. If the co-defendant is in danger and he cannot appear in court for security reasons, the testimony of the co-defendant and other defendants during the preliminary investigation can be deposited. It is important to ensure the right to confront witnesses;

2) In general, the pre-trial testimony of the accused may be obtained in the case where there is a reasonable assumption that the defendant may not give evidence

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[46] A. Tatoyan, *The New Criminal Procedure Code Will Help to Increase Confidence in Courts*, Iravaban.net, 13 March 2014 (Feb. 12, 2020), available at http://iravaban.net.

[47] A. Ghazaryan, *The Testimonies Must Be Deposited, but Only Testimonies of the Witness*, Iravaban.net, 14 October 2014 (Feb. 12, 2020), available at http://iravaban.net.

during the proceedings. During preliminary investigation the accused testimonies can be deposited if the investigator has a reasonable assumption that during the preliminary hearings the defendant may refuse to give a testimony even if he/she uses the right to testify. In this case, even if the defendant participates in trial but refuses to give a testimony, the court may publish testimonies of preliminary investigation.[48]

2. *OSCE/ODIHR opinion on the new institute of deposition testimony in the Draft Criminal Procedure Code of the Republic of Armenia*. The new procedure of the Republic of Armenia should serve as an important tool for preserving the witness testimony for the use at trial in case a witness dies, becomes ill, or due to fear or other reasons is unable to testify at trial and be subject to cross-examination by the defense. Taken in conjunction with the rules prescribed by paragraph 7 of Article 22 and Article 336, the deposition procedure aims to prevent the reading, at trial, of pre-trial statements taken by the law enforcement officials a rather common malpractice in the criminal proceedings of many post-soviet countries, including Armenia. The new deposition procedure prescribed by the Draft Criminal Procedure Code, compares favorably with similar provisions from different procedures and represents a commendable step forward for Armenia's criminal procedure.[49]

4.7. The Criminal Procedure Code of Ukraine[50]

The institute of judicial deposition is also envisaged in the Criminal Procedure Code of Ukraine. In particular, Article 225(1) provides the possibility to deposit witnesses or victim's testimonies during the preliminary investigation. Legal regulations were introduced in 2013.

1. *Cases of judicial deposition of testimonies and its specifications*. Article 225(1) of the Criminal Procedure Code of Ukraine first of all provides on exceptional basis, when it is necessary to obtain testimonies from a witness or victim during pre-trial investigation in case of the existence of a threat to witness's or victim's life and health, his serious illness, the existence of other circumstances that may make the interrogation impossible or affect the completeness or reliability of a testimony. A party of criminal proceedings may file a motion to the investigating

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[48] There is not provided such a procedure to deposit testimonies because Article 336(1) of the Draft Criminal Procedure Code provides only two separate grounds for publishing testimonies in court:

1) The accused's testimony in pre-trial proceedings has been deposited in accordance with the requirements of this Criminal Procedure Code;

2) The accused has plead his right to not give testimonies.

[49] OSCE, Armenia, Trial Monitoring Project, April 2008 – July 2009: Final Report, 8 March 2010, at 88 (Feb. 12, 2020), available at http://www.osce.org/odihr/41695.

[50] Уголовно-процессуальный кодекс Украины [Criminal Procedure Code of Ukraine], Art. 225 (Feb. 12, 2020), available at https://kodeksy.com.ua/ka/ugolovno_protsesualnij_kodeks_ukraini.htm.

judge requesting to interrogate such witness or victim in a court session, including simultaneous interrogation of two or more already interrogated persons.

2. *Choice of interrogation place.* Article 225 (1) regulates issues related to the place of interrogation. In particular, in a number of cases, a witness or victim is interrogated in the courtroom and, in some cases, also at a place where the sick witness or the victim resides or maintains the requirements of the Criminal Procedure Code.

3. *Consequences of non-appearance of a properly notified participant.* According to Article 225(1) the non-appearance of the party duly notified of the place and time of the court session, for participation in the interrogation of a person upon motion of the opposed party, shall not prevent the conduct of such interrogation in court session.

Conclusion

Thus, this article focused on the origins and historical development of the institute of deposition testimonies. As it was already mentioned it is usually in the interest of justice to allow a deposition if the witness won't be available for trial and if the witness is unavailable to testify. The court will also allow the admission of a deposition if the witness gives inconsistent testimony at trial. It can be used for the purpose of impeaching the trial testimony. To impeach means to challenge the credibility of the witness and his testimony. Many courts require a good faith effort to obtain the witness' presence at trial before allowing a deposition. The circumstances of each particular case must be examined to determine whether a deposition is needed. The decision is within the discretion of the court. One factor the court examines whether the testimony is relevant to the case. This means that it could affect the result of the case. It is important to highlight the fact that the institute of judicial deposition testimonies is a novelty in criminal proceedings and its proper application can lead to the development of criminal proceedings. Nevertheless, the introduction of the institute is one step for the development of criminal proceedings, but it should not be forgotten that its absolute application can cause different abuses.

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