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DEPOSITION OF VICTIM / WITNESS TESTIMONY – A NEW INSTITUTION IN CRIMINAL PROCEDURE OF THE KYRGYZ REPUBLIC

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The paper examines the issue of victim / witness testimony, an investigative procedure introduced in the Kyrgyz Republic Criminal Procedure Code in 2019. It can be argued that this institution enables the development of the adversarial principle and the principle of equality of parties in pre-trial proceedings. The author points out that for the Criminal Procedure code of some former Soviet states, this institution is new, though it was first reflected in English law of the 19th century. The author notes the debatable nature of re-examining a victim / witness when the merits of the case are considered. In this regard, improvement in Art. 208 of the existing Kyrgyz Republic Criminal Procedure Code is suggested. Additionally, the article examines the issue of what a deposition is – an investigative procedure or an institution. The author states that deposition of testimony is an investigative procedure.

Key words: *deposition of victim / witness testimony, investigating judge, adversarial system and equality of parties, depositor, pre-trial proceedings, examination, interrogation*

Introduction

The new Kyrgyz Republic Constitution adopted in 2010 required improvement in the existing Kyrgyz Republic Criminal Procedure Code as part of the legislation.

In the framework of implementing KR Constitution provisions, with the Decree of the President of the Kyrgyz Republic ‘On Measures Regarding Justice Improving in the Kyrgyz Republic’ dated August 8, 2012, the ‘Recommendations for Further Reforming the Judiciary of the Kyrgyz Republic’ were approved where the issue of evidence deposition was covered. The new Kyrgyz Republic Constitution signed into law on May 5, 2021, required improvement in the legislation, including the Kyrgyz Republic Criminal Procedure Code.

From the perspective of the Russian language, ‘deposition’ means ‘handing over for storage’.

Deposition (from Latin *depono* – *laying, storing*) means storage arrangement for something.

Deposition of testimony as a new institution is implemented in pre-trial proceedings in order to identify and secure evidentiary materials that will be later brought before the court as evidence.

Although in such countries as Georgia, Ukraine, Kazakhstan, Kyrgyzstan and Baltic countries where this institution has already been secured in the Criminal Procedure Code and considered new, as A.S. Gambaryan writes, ‘that institution was essentially set forth in English law at least in the 19th century’ (Gambaryan, 2018: 194).

Materials and Methods

Speaking of the current Kyrgyz Republic Criminal Procedure Code, it should be noted that Art. 205 of the KR CPC only covers the deposition of the victim / witness testimony.

Introduction of the entire deposition institution into the Kyrgyz Republic Criminal Procedure Code can be explained by the following facts.

First of all, when criminal cases are pursued, the courts face the problem of ensuring appearance by the witnesses to the court session.

We are all aware that the witnesses whose testimony is decisive for the case decision do not show up to court for various reasons. In such cases, the court postpones the examination of the case and re-sends summons to the victim and witnesses. This is not a guarantee of their next appearance though. The Kyrgyz Republic Criminal Procedure Code provides for another type of measures to ensure criminal proceedings in case of another non-appearance – attachment. However, this is arranged only when the relevant subjects do not appear in court without good reason. As a result, the terms of criminal proceedings can be prolonged for an uncertain and even lengthy period of time. This causes resentment and contradicts Cl. 2 Art. 23 of the Kyrgyz Republic Constitution, which sets forth human rights and liberties as the highest values.

Besides, the Kyrgyz Republic Criminal Procedure Code prohibits using attachment in respect to children under 14, pregnant women and ill people who cannot or shall not leave their place of residence for health reasons confirmed by a healthcare institution.

The summons to attend court and examination of victims' and witnesses' children is a psychologically traumatic and negative experience for them. In other words, while giving statements about the facts associated with the crime, they re-live the incident that causes emotional stress. All this has a negative effect on their moral and psychological condition.

Another circumstance underlying the introduction of the testimony deposition institution into the criminal proceedings is the fact that sometimes the judges face cases when the victims and witnesses examined during pre-trial proceedings do not confirm their testimony during the court session. This presents a challenge for the judges to assess the testimony of relevant subjects and does not allow them to be certain of the credibility and admissibility of the testimony received during the pre-trial proceedings to be used as evidence. These circumstances can eventually affect the legitimacy and fairness of the sentence given by the first-instance court regarding a criminal case.

Results

The International Covenant on Civil and Political Rights ratified by the Kyrgyz Republic sets forth with Cl. 3, Art. 14 that 'in the determination of any criminal charge against them, everyone shall be entitled to the following minimum guarantees, in full equality'. One these guarantees is the opportunity of the accused to examine the witnesses against him.

The current Kyrgyz Republic Criminal Procedure Code has expanded the effect of the adversarial principle and equality of the parties. Unfortunately, it should be said that the examination of a witness in pre-trial proceedings used to be dominated by prosecuting authorities (state authorities).

According to the Kyrgyz Republic Criminal Procedure Code, the defender of the accused could not examine the witness, but only move for examination. Here, this motion was not always granted. Even when a witness and victim were examined by the investigator, the accused and their defense counsel were deprived of the opportunity to examine them. An exception was made for such an investigative procedure as a face-to-face confrontation between the accused and the witness where the defender could pose questions to both the witness and the victim.

Therefore, witness and victim examination is conducted by the defense counsel in the course of judicial proceedings.

Discussion

The aforementioned proves that the examination by an investigating judge at the stage of pre-trial proceedings with the participation of the accused and their defense counsel is arranged with the introduction of the witness / victim testimony deposition. The institution of deposition of the victim / witness testimony has

been secured in many former USSR countries: Georgia, Kazakhstan, Ukraine, Moldova, etc. Introduction of this institution into the Kyrgyz Republic Criminal Procedure Code is reasonable. S.D. Shestakova and U.E. Imanalieva wrote in respect to this issue: 'The advisability and timeliness of introducing the deposition institution into the Kyrgyz Criminal Procedure Code should not go unnoticed, since it is necessary for comprehensive, full and objective examination of the circumstances of the case, rendering of legitimate and well-reasoned procedural decisions as well as for bringing the national legislation closer to the international standards of fair justice' (Shestakova & Imanalieva, 2022: 181).

Deposition of a witness and victim testimony is the examination of a witness or a victim by an investigating judge during pre-trial proceedings upon the motion by one of parties in order to ensure (preserve) judicial evidence in advance¹.

Subjects – deposition initiators – are the lawyer, the suspect, the investigator. Initiators move for the deposition of the victim / witness testimony. The executor of the deposition is always the investigating judge. A 'conserved' source of evidence is verified and assessed immediately during judicial consideration of the case. A special feature of testimony deposition is that further depositor examination is excluded. An exception is made as set forth in Part 2 of Art. 208 of the Kyrgyz Republic Criminal Procedure Code: re-examination of a victim or witness during judicial consideration is allowed in case it is necessary to refine their testimony or in case circumstances have been revealed that had gone unnoticed during the examination by the judge in the course of pre-trial proceedings.

In our opinion, this provision is problematic by nature. The law provides for permanent residence outside the Kyrgyz Republic as one of reasons for evidence deposition. In this case, an individual serving as a witness and residing outside the Kyrgyz Republic may avoid appearing in court. Additionally, the Kyrgyz Republic Criminal Procedure Code does not provide for cases of compulsory attachment under these circumstances. So, the investigating judge has to clarify all the circumstances during witness examination in the course of pre-trial proceedings.

Otherwise, we suggest that Art. 208, Part 3, should be supplemented and worded as follows: 'If a witness / victim stays or resides permanently outside the Kyrgyz Republic, admission in the pre-trial proceedings is arranged by the investigating judge online'.

A special feature of deposition of the victim / witness testimony is that depositor examination is conducted per the rules of judicial proceedings set forth in Art. 207 of the current Kyrgyz Republic Criminal Procedure Code.

It should be noted that the legislator has defined the victim / witness examination procedure during the court session as examination. Will this be an examination? To answer this question, first of all, we need to establish whether testimony deposition is an investigative procedure or an institution? To that end, the etymology of such categories as 'examination' and 'interrogation' needs to be understood. In the Russian language, 'examination' is interrogation of the accused or witness in order to identify something (circumstances of the case, crime) (Ozhegov, 2003: 223).

Interrogation is getting answers to some questions (Ozhegov, 2003: 583).

Based on the content of the two definitions, we can see that examination is procedural (judicial) by nature, while interrogation is collecting answers. Additionally, 'examination' is a broader term that embraces 'interrogation'. Therefore, an investigating judge examines a victim / witness in the course of pre-trial proceedings during evidence deposition.

From the procedural point of view, examination as a category is an investigative procedure (e.g., examination of a witness / victim during an investigation). The aforementioned allows us to state that victim / witness testimony deposition is a type of investigative procedure.

It should be noted that deposition of testimony is ensured by such guarantees as openness, participation by the parties, adversarial system and equality of the parties.

Data collection, data verification and further assessment made by an investigating judge in the process of deposition are arranged with the participation of the parties under the terms of the adversarial system and equality of the parties. Therefore, the system procedures are set to guarantee reception of relevant, credible and admissible evidence consistent with other evidence on the criminal case.

The specificity of an examination by the investigating judge implies reception and securing of the victim / witness testimony if it is reasonable to presume that further victim / witness examination might be

¹ Kyrgyz Republic Criminal Procedure Code, October 20, 2021.

required during pre-trial proceedings or during the court session. When the merits of the case are considered, it can become impossible for objective reasons. These include: a reason associated with a danger to life and health of the victim / witness; a severe disease of the victim / witness or their permanent residence outside the Kyrgyz Republic; prevention of psycho-traumatic impact on victims' / witnesses' children, witnesses.

Conclusion

Based on the aforementioned, the following conclusions can be drawn:

- 1) deposition of the victim / witness testimony proves the expansion of the adversarial principle and the equality principle of the parties in criminal proceedings,
- 2) deposition of victim / witness testimony is an investigative procedure,
- 3) a suggestion is made regarding improvement in Art. 208 of the current Kyrgyz Republic Criminal Procedure Code.

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