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LEGAL STATUS OF AN EXPERT IN CRIMINAL PROCEEDINGS OF THE REPUBLIC OF KAZAKHSTAN

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Abstract

The article reveals the problematic issues of the appointment and production of forensic examinations in the criminal procedure legislation of the Republic of Kazakhstan. The authors of the article analyzed the norms of the criminal procedure law, as well as the current state of judicial and investigative practice on the appointment of expert examinations. In the process of analyzing the criminal procedure law, a comparison of the legal status of 'expert and specialist' in the legislation of Kazakhstan was also made. The analysis will allow the legislators of the post-Soviet countries to take into account the shortcomings described in the construction of the norms of the criminal procedure law. For example, an analysis of the norms of the criminal procedure law shows that today the expert is deprived of the opportunity to go beyond the list of questions. The foregoing leads to the fact that some aspects important for the investigation remain without consideration. This negatively affects the resolution of the tasks of the criminal procedure law.

Keywords*:* expert; specialist; forensic examination; legal status; pre-trial proceedings.

Introduction

The new Criminal Code and the Criminal Procedure Code of the Republic of Kazakhstan, which came into force on January 1, 2015, radically changed the idea of the legal system of Kazakhstan, which currently differs significantly from the legal systems of the countries of the post-Soviet period, which currently represents a peculiar mix of Anglo-Saxon and Romano-German systems of law. With the adoption of the new Criminal Procedure Law, many traditional institutes of criminal procedure law have been modified. For the first time in the Republic of Kazakhstan a step was made to eliminate the stage of initiation of criminal proceedings, to significantly simplify the preliminary investigation, to introduce new legal institutions and norms, previously not typical for the domestic legal system [1].

Undoubtedly, the legislative decision aimed at the elimination of the stage of initiation of criminal proceedings was unexpected for the legal community - both for the theory of criminal procedure and for law enforcement activity. The role and significance of forensic examination in solving the tasks of criminal proceedings has changed.

The purpose of the study is to identify the problems of legal regulation of forensic expert's activity in criminal proceedings in Kazakhstan. To fulfill this goal, the authors propose to solve the following tasks:

- research the role of forensic expertise in solving the tasks of criminal proceedings;
- research the legal status of the expert in criminal proceedings of Kazakhstan;
- to investigate the correlation of the concepts of "expert opinion" and "expert opinion".

The following general scientific methods were used in the work: dialectical, analysis and synthesis of components, separate categories, generalization and classification. From special methods of legal research were used: comparative-legal, psychological, sociological, historical,

system-structural, formal-logical and others. Additional methodological basis for the development of scientific categories were the laws of formal logic and linguistics.

The authors relied on the research conducted by the authors mentioned in the list of used literature, on the analysis of modern expert practice, as well as on the Criminal Procedure Code of the Republic of Kazakhstan.

Problems of legal regulation of the expert's activity in the criminal procedural law of the Republic of Kazakhstan

Recently in the legal literature there have been many works that consider the issues of special knowledge in the detection, investigation and prevention of various types of crimes. The main provisions of the institute of special knowledge have been studied in detail in the works of both Kazakhstani and foreign proceduralists and criminalists. Among the numerous studies we can highlight the works of T.V. Averyanova, L.E. Arotsker, A.F. Aubakirov, R.S. Belkin, B.M. Bishmanov, J.R. Dilbarkhanova, A.N. Vasiliev, S.P. Varenikova, A.R. Volynsky, A.Y. Ginzburg, V.I. Goncharenko, E.G. Dzhakishev, A. V. Dulov, S.E. Erkenov, A.M. Zinin, E.P. Ischenko, A.A. Isaev, V.Y. Koldin, V.K. Lisichenko, N.T. Mailis, S.P. Mitrichev, V.A. Obraztsov, I. L. Petrukhin, E.R. Rossinskaya, N.A. Selivanov, M.S. Strogovich, G.I. Povreznyuk, B.H. Toleubekova, K.N. Shakirov and others.

The mentioned researchers have made quite a great contribution to the science of criminalistics and criminal procedural law. At the same time, the legal literature contains different interpretations of special knowledge. Despite this, "... all authors are unanimous in the opinion that it is knowledge in science, technology, art or craft, and for their application is necessary both knowledge of the subject and professional experience, the ability to use scientific and technical means and methods for detection, fixation, seizure and examination of evidence, providing various types of assistance to the investigator, employee of the body of inquiry in the detection and investigation of crimes" [2, p. 158]. [2, c.158].

It is correctly noted by A.N. Orkin: "... for detection, collection, research and evaluation of evidence general legal knowledge is most often insufficient" [3, p.3]. [3, c.3]. Highly qualified investigation of crimes is difficult to imagine without the use of specialized knowledge. In connection with the intensive development of science and technology at present, new types of professional activities of a person arise, which gives rise to new specialties and opportunities for investigative and judicial practice on the use of special knowledge in proving [4, p.7].

The current criminal procedural legislation provides for the possibility of using two areas of special knowledge in the form of participation of specialists in the production of investigative actions and operational-search activities; production of expertise. "In the forensic literature it is noted that the choice of this or that form of special knowledge should be tactically justified. First of all, it is necessary to take into account the materiality of the fact to be established. If the fact, established with the use of special knowledge, is evidentiary, i.e. can be used as an argument in the process of subsequent proof, as a means of confirmation or exclusion of the versions put

forward in the investigation and especially when the signs on the basis of which this fact is established, can be given a different explanation, it is necessary to produce an expertise" [5, c.374].

Despite the importance of the use of special knowledge in the detection and investigation of crimes, in connection with the adoption of the CPC of the Republic of Kazakhstan aggravated contradictions associated with the use of the conceptual apparatus by the legislator.

We suggest a step-by-step understanding of the problems of legal regulation of forensic expert's activity, starting with changes in the stages of criminal proceedings.

The issue of admissibility of expert examination, as well as a number of other investigative actions, at the stage of initiation of criminal proceedings has been discussed for several decades.

Various, sometimes diametrically opposed points of view have been expressed. Some authors were in favor of the maximum expansion of the list of investigative actions allowed at this stage, because it provides a quick and high-quality preliminary check and reliability of its results, and consequently - the legality and validity of the initiation of criminal proceedings. Others categorically objected to this, as such an expansion leads, in their opinion, to the erasure of the boundary between the stages of initiation of criminal proceedings and preliminary investigation.

The new Code of Criminal Procedure of the Republic of Kazakhstan, on the one hand, resolved this problem, but on the other hand, it created a number of other problems, including those of a conflict-of-laws nature. Elimination of the stage of initiation of criminal proceedings in the new CPC of the Republic of Kazakhstan has changed the idea of the concept, essence and importance of forensic examination in criminal proceedings, which in Article 184 of the outdated CPC of the Republic of Kazakhstan, along with inspection, seizure of objects and documents, referred to investigative actions, the production of which was allowed before the initiation of criminal proceedings.

At the same time, the justification for the production of these investigative actions before the initiation of a criminal case was the absence of an element of significant infringement of the constitutional rights of citizens. If the stage of initiation of a criminal case was a kind of filter for the adoption of lawful procedural decisions, then forensic examination played the role of a tool necessary to ensure legality in the adoption of procedural decisions in criminal cases.

On the other hand, not every forensic examination could be appointed at this stage. It is obvious, for example, that it is inadmissible to conduct a forensic psychiatric examination, as it involves many very significant restrictions (placement in a hospital, etc.), and it can be very long in terms of time. In addition to the above, the person placed in the hospital at the time of the examination had no legal status and was therefore powerless. The Code of Criminal Procedure of the Republic of Kazakhstan knew only the legal status of a suspect. How is this issue resolved in the new CPC?

At present, forensic examination loses its purpose, because in the new Code of Criminal Procedure (Article 179 of the CPC RK) the beginning of pre-trial investigation (previously the term "preliminary investigation" was used) is the registration of an application, a report on a criminal offense in the Unified Register of pre-trial investigations or the first urgent investigative action. The absence of specification of investigative actions indicates that the investigator is

authorized to conduct any urgent investigative actions, including the use of the analogue of forensic expertise - the conclusion of a specialist.

Another novelty in the criminal proceedings of Kazakhstan is the introduction of the institution of plea bargaining, as well as a simplified form of criminal proceedings. As negative consequences that may follow, the possibility of self-incrimination of the accused, the decision of issues of guilt of a person already at the stage of preliminary investigation is noted. In this regard, formalism in the collection of factual data, adaptation of the investigator to accelerated procedures of preliminary investigation by replacing some investigative or procedural actions by others (in our case, the conclusion of an expert for the conclusion of a specialist) are possible.

For a long time the criminal proceedings of Kazakhstan were characterized by such forms of preliminary investigation as preliminary inquiry and inquiry. Today (since the adoption of the new CPC RK) preliminary investigation can be completed in such forms as: pre-trial investigation in the form of inquiry; preliminary investigation; protocol form. Accelerated pre-trial investigation in criminal cases is becoming more popular in practice. As a negative moment it is possible to note the possibility of conducting accelerated pre-trial investigation of serious crimes, if the collected evidence establishes the fact of the crime and the perpetrator, full confession of guilt, agreement with the size (amount) of the damage (harm) caused (article 190 of the CPC RK).

Taking into account the mandatory terms of conducting an accelerated pre-trial investigation (must be completed within 15 days), the tendency to the maximum use of special knowledge in the form of a specialist's opinion as an analogue to the conclusion of an expert is predicted. Thus, the use of specialized scientific knowledge (through the appointment of appropriate types of forensic examinations) in a number of cases goes to the background, leading to the likelihood of judicial and investigative errors.

Comparative legal analysis of the concepts of "expert opinion" and "specialist's opinion" shows that the legislator does not give a full definition of the above concepts, calling them documents. At the same time, the evidentiary value of a specialist's opinion looks more convincing, since it is understood as an official document. As is known, the grammatical meaning of "official document" in the Russian language is very diverse. Most often, it is understood as a document drawn up, issued or in circulation by state bodies, institutions, organizations and enterprises, meeting certain requirements.

The analysis of law enforcement activity of criminal prosecution bodies shows the underestimation and negative attitude of law enforcement subjects to the conclusion of a specialist as one of the types of factual data in criminal cases. The first step, indicating the importance of the evidentiary value of the expert's opinion, was the introduction of amendments to Article 84 of the CPC RK of December 13, 1997, providing for the criminal liability of a specialist in case of knowingly false conclusion. Subsequently, in part 2 of article 111 of the new CPC RK the conclusion of a specialist, along with other factual data (including the conclusion of an expert), is legally referred to a type of evidence in criminal cases.

Thus, the legislator has resolved the controversial issues related to the recognition of a specialist's opinion as evidence in criminal cases. Based on the innovations, the question arises

whether the legislator does not put an identical sign between the concepts of "special knowledge" and "special scientific knowledge"? Despite the great importance of forensic expertise in the rapid and complete disclosure and investigation of criminal offenses, it should be noted that both in the doctrine and in the law enforcement practice of forensic activity there are still many debatable issues regarding the legal status of the expert.

At present, the expert acts as an independent subject of criminal proceedings, possessing its own procedural duties and rights, which distinguish it from other subjects of law. In the new CPC, as well as in the CPC RK of December 13, 1997, based on the meaning of Article 79 of the CPC RK, an expert is a person disinterested in the case, possessing special scientific knowledge (although according to a number of scientists, the distinction between special knowledge and special scientific knowledge is formal). In this case, the legal status of the expert, set forth in Article 79 of the new CPC RK, fully reproduces the provisions of Article 83 of the CPC RK of December 13, 1997. [6].

The person involved as an expert must meet such attributes as the absence of interest in the outcome of the case, as well as the presence of specialized scientific knowledge. Unlike the procedural status of an inquirer, investigator, judge, in respect of which the legislator operates with the term "independence", the legal status of an expert in the CPC RK is clearly limited, which indicates the formality of the expert's participation in the implementation of the tasks of criminal proceedings (impartial, prompt and complete disclosure and investigation of criminal offenses).

In turn, the right to initiative actions, undoubtedly, occupies an important place in the system of rights of the expert in the expert examination. But, like any right, it will remain purely declarative, if the law does not provide measures for the realization of this right, if it does not correspond to someone's obligations to implement the expert's initiative proposals. Thus, in accordance with the hypothesis specified in paragraph 5) of part. 3 of the new CPC RK the expert, in coordination with the body that appointed the expertise, within the limits of his competence has the right to give an opinion on the circumstances revealed in the course of forensic examination, which are relevant to the case, beyond the issues contained in the order to appoint a forensic examination. In turn, the unwillingness of the investigator to agree on the setting of additional questions can be regarded as a ban on expert initiative. The expert cannot go beyond the questions put to him for authorization, thus eliminating the insufficiently competent formulation of questions by the investigator.

Thus, based on the above, we have come to the following conclusions. To date, the criminal procedural legislation of the Republic of Kazakhstan needs to be amended, since the expert is deprived of the opportunity to go beyond those questions that are stated by investigators when appointing forensic examinations. In this regard, part 1 of Article 79 of the Criminal Procedure Code of the Republic of Kazakhstan should be amended as follows:

"1. A person disinterested in the case, independent of the criminal prosecution authorities and possessing special scientific knowledge, may be called as an expert. Other requirements for a person who may be entrusted with the production of an expert examination shall be set out in paragraph one of Article 273 of this Code.

Conclusion

Thus, despite the adoption of the new CPC of the Republic of Kazakhstan, many procedural issues related to the legal status of the expert and specialist, appointment and production of expert examinations remained unresolved. First of all, we would like to note the mistakes of the legislator in the construction of the definition of "conclusion of a specialist". We believe that it is illogical to include the concept of "official document" in the definition of "conclusion of a specialist", because such interpretation gives advantage to the conclusion of a specialist over the conclusion of an expert. The conclusion of an expert has always had priority over the conclusion of a specialist in the assessment of factual data in criminal cases. First of all, this is due to the fact that the conclusion of an expert represents the conduct of research by a person who has special scientific knowledge, whereas the conclusion of a specialist comes from a person who does not have special scientific knowledge. The knowledge of a specialist is limited to special non-scientific knowledge, in connection with which the conclusion of an expert always looks more convincing. In this regard, we propose to develop new definitions of "specialist's conclusion" and "expert's conclusion" through the prism of special scientific knowledge and specialized knowledge. This will allow to resolve the controversial issues of the Code of Criminal Procedure of the Republic of Kazakhstan, which unreasonably gives preference to the conclusion of a specialist in the evaluation of evidence in criminal cases. We do not claim to be flawless in our conclusions, but we believe that our proposed recommendations and conclusions will be of interest to specialists in the field of criminal procedural law and forensic examination.

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