

## ЮРИДИЧЕСКИЕ НАУКИ

UDC 343.148

### PECULIARITIES OF LEGAL REGULATION, APPOINTMENT AND PRODUCTION OF FORENSIC EXAMINATIONS IN CRIMINAL COURT PROCEEDINGS OF THE REPUBLIC OF KAZAKHSTAN AND RUSSIAN FEDERATION

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*The article contains a comparative analysis of the normative legal regulation of forensic activities and procedures productions of forensic examinations in criminal court proceedings of the Republic of Kazakhstan and Russian Federation, reflecting the features of legislative regulation and law enforcement practice, formulated suggestions for enhance of modern criminal procedural legislation.*

**Key words:** forensic activities; state expert institutions; organisational and procedural ground for the appointment and production of forensic examinations.

In the terms of development and improvement various kinds of technology, computerisation and informatisation of the society, not only appear a new criminal acts and new ways of committing traditional crimes, but naturally form new methods of expert studies, making it possible to solve previously inaccessible problems. In this regard, there is an increasing need for law enforcement agencies to use specialist knowledge in the investigation of criminal cases. Almost every second criminal case involves the appointment and carrying out of various types of forensic examinations. An analysis of investigative practice allows made a conclusion is in present traditional methods of committing crimes have undergone significant transformation, and that criminals are increasingly using information and communication technology to execute their criminal intent, therefore need for computer, video, phonographic and art forensic examinations growing. In criminal cases, involving economic crimes, economic and construction forensics continue to be in high demand. The effectiveness of using such type of evidence as expert opinion in crime investigation is directly proportional to the organisation of resource pro-

vision of expert activity, including financial, personnel and scientific and methodological components. In accordance with the Law of Republic of Kazakhstan dated 10th of February 2017 No. 44-VI «On forensic activities», forensic examinations are appointed in criminal cases as part of criminal proceedings in cases, where special knowledge of science, technology, art or craft is required to resolve arising issues of the investigation bodies or the court [3]. The appointment and conduct of a forensic examination is an investigative act that results in new knowledge in the form of an expert opinion. The detailed procedure for this action is regulated in the Criminal Procedure Code, so that the rules of criminal procedure must be consistent with the scientific and technical process in order to ensure effective evidence. However, analysis of the procedural norms of the legislation of the Russian Federation regulating the procedure for the use of special knowledge reveals some contradictions that prevent uniform interpretation and application.

In this article, we would like to consider in more detail the peculiarities of legal regulation of application of such forms of special knowledge as appointment and performance of forensic exami-

nation, conducting a comparative analysis of criminal procedural legislation of the Republic of Kazakhstan and Russian Federation.

For beginning, let us look at the notion of «special knowledge». The Criminal Procedure Code of the Republic of Kazakhstan (hereinafter – CPC of the RK) provides an unambiguous position on this issue. The CPC of the RK that has entered into legal force has quite a few innovations, one of which is the introduction of the definitions of «special knowledge» and «special scientific knowledge» [2]. Well, «special knowledge» means «knowledge not generally known in criminal proceedings, acquired by a person in the course of professional training or practical activities and used to solve tasks of the criminal proceedings» (clause 5 of article 7 of the CPC of the RK), and «special scientific knowledge» means «field of special knowledge, which content is scientific knowledge realized in the methods of forensic investigation» (clause 6 of article 7 of the CPC of the RK). The mentioned innovations, in our opinion, allow bringing clarity to the directions of special knowledge application.

Further on, as we continue to analyse the provisions of the CPC of the RK, we conclude that the introduction of concepts such as “special knowledge” and “special scientific knowledge” are inextricably linked to the terms “specialist” and “expert”. Thus, according to the legislator, an expert has special scientific knowledge (article 79 of the CPC of the RK), and a specialist has special knowledge (article 80 of the CPC of the RK). In that way, an expert performs expert examinations based on forensic investigation techniques, while a specialist uses his knowledge to solve other tasks of criminal proceedings.

It should be noted that, unlike the Kazakhstani legislation, it should be noted here that the Criminal Procedure Code of the Russian Federation (hereinafter – CPC of the RF), and also the Federal Law «On state forensic activities in the Russian Federation» do not disclose this concept (article 9), moreover, in the CPC of the RF along with the term «special knowledge» (articles 57, 58, 195, 199) we can find the phrase «special cognition» (part 4 article 80), which leads to numerous discussions among scientists and prosecutors, as well as ambiguous interpretation law enforcers' side [1]. A.N. Petrukhina, for instance,

supposes that «instead of the words «special knowledge» it is necessary to use «special cognition», because only this concept allows us to fix in itself the procedural side of comprehension of the researched subject, the world as whole» [5]. Nevertheless, we share the opinion of scientists, who deems that the most correct term is “special knowledge”, justifying their position by the fact, that “cognition is a definite process of reflection and reproduction of objective reality in human thinking, accumulation of experience, assimilation of skills and acquisition of ability, while knowledge is a product of social-labour and thinking activity, already based on experience, skill and ability”.

The situation is somewhat different in Russian criminal court proceedings. According to the CPC of the RF, both the expert and the specialist have special knowledge, yet also the expert being appointed to carry out a forensic examination and give a legal opinion (article 57 of the CPC of the RF); forms of participation by the specialist results of assistance in locating, consolidating, seizing objects and documents; application of technical items in examining criminal case files; raising questions for the expert; and explaining questions to the court by sides within his professional competence (part 1, article 58 of the CPC of RF). The analysis of investigative-judicial practice leads make the conclusion, that the most common form of participation of a specialist in a criminal case is his involvement to assist in the effective conduct of investigative actions, as this function is the most expedient and meaningful.

It should, also be noted, that there is still no consensus in criminal court procedure of Russia, as to whether an educator, psychologist or doctor can act as a specialist or whether they are separate participants with their own rights and responsibilities.

In our view, the functions of the specialist are better, defined in the CPC of RK. Thus, in accordance with part 1 of article 80 of the CPC of the RK, a specialist is engaged to assist in the collection, investigation and evaluation of evidence by explaining to participants in criminal proceedings the issues within his special competence, as well as the use of scientific and technical means. The same rule unambiguously resolves the question

about procedural status of teachers and psychologists, who participate in investigative and other procedural actions involving minors, also doctors, who take part in investigative and other procedural actions, except when they are appointed, as experts, these participants acquire the rights and obligations of specialists.

Hence, in accordance with the criminal procedure legislation of Kazakhstan and Russia Federation, an expert and a specialist are engaged to perform specific functions. The results of their work can become types of evidence such as an opinion and testimony of expert and specialist's opinion and testimony. The classic form of using special knowledge is the appointment and production of a forensic examination.

The CPC of the RK regulates the form and content not only of the expert report (article 116 of the CPC of the RK) but also specialist's report (article 117 of the CPC of the RK). At the same time, these types of evidence are based on two different types of examination: forensic examination (expert's opinion) and examination, conclusions on questions, put to the specialist by the person conducting the criminal proceedings or by parties (specialist opinion). In our point of view, it is important that the specialist's opinion is not binding for the body conducting the criminal proceedings, however their disagreement with the opinion must be motivated (part 7 of article 117 of the CPC of the RK). All that remains is to understand the fundamental differences between these studies, but, according to a number of scholars, this distinction is a formal one.

Unlike the criminal procedure law in Kazakhstan, in Russia, under part 3, article 80 of the CPC of the RF, a specialist's opinion on the questions put to him by the parties, submitted in writing, serves as the specialist's opinion. Herewith, procedure for getting an specialist's opinion unlike procedure appointment and production (chapter 27 of the CPC of the RF), is not defined in the Criminal Procedure Code of the Russian Federation which justifiably causes difficulties for law enforcement agencies in using it as evidence during the investigation of criminal cases. Most commonly, in practice, the expert's opinion is, provided by the side of defence during the trial in order to cast doubt on the expert opinion. At the stage of the preliminary investigation, the in-

vestigator or inquirer either refuses to satisfy the defence's motion to attach the expert's opinion to the case file or questioning a specialist as a witness, so that the specialist's opinion loses its status as independent evidence. In addition, there is no consensus among procedural scholars and law enforcement officials interviewed as to whether a specialist conducts research to give his or her opinion. The CPC of the RF contains contradictory norms on this point. While, part 3 of article 80 of the CPC of the RF defines a specialist's conclusion as a judgement, part 3 of article 226.5 of the CPC of the RF as one of the features of evidence during the inquiry in abbreviated form establishes a norm, according to which, a specialist's opinion given by him as a result of examination during the verification of a crime, report acts as an alternative to an expert's opinion.

Thus, the question may arise again: is specialist's opinion capable to replace an expert's opinion in terms of its content? In this regard, E.A. Alimova, emphasizing the full evidentiary value of the conclusion of a specialist on a par with the conclusion of an expert, proposes to rename chapter 35 of the CPC of the RK and call it «Forensic expertise and investigation of a judicial specialist» [4].

E.A. Zaitseva emphasises that the activity of an expert is an integral part of the appointment and production of a forensic examination [6]. That is why that the issue of whether an expert is competent to carry out a particular forensic examination arises acutely. In practice, the pre-trial investigation authorities face a number of problems concerning organisational issues, regarding the appointment and conduct of judicial examinations. One of the main reasons is that the state forensic institutions cannot cope with the large volume of sorts and kinds of expertise assigned to them.

Thus, appeared a necessity to find a different approach to the procedure for paying for judicial examinations. In our view, rather interesting and at the same time ambiguous in this matter is the practice of the Republic of Kazakhstan, which has minimised the expenditure of the state budget on forensic examinations by the statutory opportunity to allow the side of defence to initiate conducting of forensic examinations. Accordingly with article 175 of the CPC of the RK, an expert who carries out his work in a criminal case may receive remuneration in an

amount determined by contract with a party, if he has carried out the work by arrangement with that party. Pursuant to part 11, article 272 of the CPC of the RK, the costs of the forensic examination must be borne by the person in whose interests the examination was carried out. On this basis, payment the expert's services at the preliminary investigation is not always possible by the state, which implies a certain budgetary savings, unlike in Russian law. In article 131 of the CPC of the RF, remuneration paid to an expert is classified, as a procedural cost and is reimbursed from the federal budget. In the course of analysing the norms of the CPC of the RK, a question may legitimately arise as to the credibility of the results of the forensic examination carried out under contract with the defence, which a priori cannot but pursue its interest in a positive resolution of the criminal case. Thus, articles 122 and 272 of the CPC of the RK contain detailed regulation of the right of attorney to participate in the collection of evidence by initiating, on a contractual basis, the appointment of a forensic examination and sending a request to the expert institution for its production in accordance with the contract. In this case, the authority in charge of the investigation may not refuse to appoint a forensic examination, except in situations where the questions submitted for its permission are not relevant to the subject matter of the inves-

tigation or the criminal case (part 2 of article 272 of CPC of the RK). It follows that, in criminal court proceedings of the Republic of Kazakhstan, the guarantees of the right of the defence to participate in the evidentiary process are much broader and more detailed than in Russian criminal proceedings. Thus, according to clause 3 of part 1 of the article 53 and part 2.1 of article 58 of the CPC of the RF, attorney may only engage a specialist to clarify matters within his professional competence, but at the same time article 198 of the CPC of the RF states that, when he familiarizes with the order to appoint a forensic examination, he has the right to apply for certain persons to be invited as experts or for an examination to be carried out at a particular expert institution.

In such a way, a comparative analysis of the legal regulation of certain aspects of the appointment and production of forensic examinations is an increasing need, which is caused by the progressive development of various spheres of activity in modern society. It enables us to conclude, that the criminal procedure legislation of the Republic of Kazakhstan not only clearer and more detailed regulates the application of special knowledge in criminal proceedings, but cardinal differs in its approach to the implementation of procedural forms of private interest, which is manifested, not only in the process of proof, but also in financial responsibility for participation in it.

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УДК 343.148

## ОСОБЕННОСТИ ПРАВОВОГО РЕГУЛИРОВАНИЯ НАЗНАЧЕНИЯ И ПРОИЗВОДСТВА СУДЕБНЫХ ЭКСПЕРТИЗ В УГОЛОВНОМ СУДОПРОИЗВОДСТВЕ РЕСПУБЛИКИ КАЗАХСТАН И РОССИЙСКОЙ ФЕДЕРАЦИИ

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*В статье проведен сравнительный анализ нормативной правовой регламентации судебно-экспертной деятельности и процедуры производства судебных экспертиз в уголовном процессе Республики Казахстан и России, отражены особенности законодательного регулирования и правоприменительной практики, сформулированы предложения по совершенствованию современного уголовно-процессуального законодательства.*

**Ключевые слова:** судебно-экспертная деятельность, государственные экспертные учреждения, организационные и процессуальные основы назначения и производства судебных экспертиз.