

**PROBLEMS OF LEGAL REGULATION OF THE
INSTITUTE OF THE EXPERT IN THE CRIMINAL
PROCEDURE LEGISLATION OF THE REPUBLIC OF
UZBEKISTAN**

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Abstract. In this scientific work, the author considers the problem of use of the inference of an extrajudicial expert as an independent type of proofs. Discussing the subject, the author addresses scientific works of the leading Russian experts of criminal procedure. Without stopping on the analysis of the current legislation, the author gradually discusses the development of institute of "expert" in procedural law of the Republic of Uzbekistan, motivated arguing the point of view according to which the inference of the extrajudicial expert actually is the specialist's inference.

Keywords: expert, specialist, special knowledge, information and communication technologies.

**ПРОБЛЕМЫ ПРАВОВОГО РЕГУЛИРОВАНИЯ
ИНСТИТУТА ЭКСПЕРТА В УГОЛОВНО-
ПРОЦЕССУАЛЬНОМ ЗАКОНОДАТЕЛЬСТВЕ
РЕСПУБЛИКИ УЗБЕКИСТАН**

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Аннотация. В данной работе автор рассматривает проблему использования заключения внесудебного эксперта как независимого вида доказательств. Обсуждая эту тему, автор рассматривает научные труды ведущих российских экспертов в сфере уголовного процесса. Не останавливаясь на анализе действующего законодательства, автор поочередно обсуждает также развитие института эксперта в процессуальном законодательстве Республики Узбекистан, обосновывая точку зрения, согласно которой заключение внесудебного эксперта, по сути, является заключением специалиста.

Ключевые слова: эксперт, специалист, специальные знания, информационные и коммуникационные технологии.

ЎЗБЕКИСТОН РЕСПУБЛИКАСИ ЖИНОЯТ- ПРОЦЕССУАЛ ҚОНУНЧИЛИГИДА ЭКСПЕРТ ИНСТИТУТИНИНГ ХУҚУҚИЙ ТАРТИБГА СОЛИНИШ МУАММОЛАРИ

Аннотация. Мазкур ишда муаллиф суддан ташқари эксперт хулосасидан алоҳида турдаги далил сифатида фойдаланиш муаммосини ўрганади. Ушбу муаммони муҳокама қилиш давомида, муаллиф жиноят процесси соҳасидаги етакчи Россия олимлари илмий ишларини кўриб чиқади. Мавжуд қонунчиликни таҳлил қилиш билан чекланиб қолмай, муаллиф навбати билан Ўзбекистон Республикаси процессуал қонунчилигида эксперт институти ривожланишига ҳам тўхтатилиб, суддан ташқари экспертнинг хулосаси, моҳиятан, мутахассис хулосаси эканлиги хусусидаги нуқтаи назарни асослантиради.

Калит сўзлар: эксперт, мутахассис, махсус билимлар, ахборот- коммуникация технологиялари.

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Development of the modern information and telecommunication technologies led to essential change of nature of committing crimes. Making of this type of crimes constitutes the greatest public danger than other crimes. The reason is that everything information crimes cause essential harm to legitimate interests of the personality, society and state. Usage of information and telecommunication by criminals allowed them to prepare, commit and hide crimes, to create certain barriers during investigations requiring use of special knowledge. For overcoming the barriers created by criminals, investigators need to understand correctly entities and possibilities of special knowledge in the sphere of information technologies.

According to Shayevich A. A., special knowledge in criminal procedure can be characterized as follows: it is the scientific knowledge which is beyond general educational preparation and simple knowledge of life, skills in a certain area acquired in the course of vocational training and activity necessary for identification and fixing in the corresponding procedural form of the circumstances important for criminal case, applied by specially prepared persons [14, p.14].

V.N.Makhov considers an essential sign of special knowledge is that it is inherent in different types of professional activity, except for knowledge which is professional for the investigator and the judges used at investigation of crimes and consideration of criminal cases in court for assistance to establishment of the truth and an order determined by the criminal procedure legislation" [7, p.46].

As there are many determinations of "special knowledge", we will stop on the definition of R. S. Belkin, according to which special knowledge is professional

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knowledge and abilities in the field of science, technics, arts or crafts necessary for the solution of the questions, which have arisen during investigation, or consideration in court of the definite cases [4].

Special knowledge in a procedural form can be implemented in the following forms [13]:

Use of own special knowledge by the investigator;

Involvement of a specialist to carrying out investigative actions;

Production of expertise.

Special knowledge of the investigator shall be some set of theoretical knowledge, practical skills and abilities in various fields of science (except legal), technics, arts, crafts, etc. They play important role for "... direct detection, fixing, preliminary studying, an assessment and use of proofs, the solution of a question of their relevancy and admissibility, correct qualification of deeds, definition of a subject and limits of proof, carrying out procedural actions on the high level, organization of interaction with expert persons (specialists, experts) in the course of disclosure and investigation of crimes" 11.

As it is mentioned by foreign researchers, in process of investigation of crimes in the sphere of information technologies, investigators should be able to handle computers without doing harm to the material values, means of livelihood and the rights of witnesses and the suspected users under investigation [10, p.6]. Experiment on the criminal case in 2011 against an under-18 person on the basis of part 4 of article 169 of the Criminal Code of the Republic of Uzbekistan (further – CC RUZ), theft made by unauthorized penetration into computer system showed how it is easy to cause damage in case of investigation of a computer crime and how appropriate skills and knowledge for conducting effective investigation are important. In our

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judgement, in case of investigation of a similar type of crimes the following facts should be considered:

- crimes in the sphere of information technologies are committed by persons having special knowledge in the field of information and related communication technologies;

- for effective detection and fixing of traces of a computer crime, it is required to involve experts with knowledge and skills that are not less than the criminal's;

- taking into consideration modern level and rates of development of the computer equipment, knowledge of the investigator in this area, for the objective reasons, can not correspond to the above mentioned requirements.

Seeing this, it is possible to draw a conclusion that investigator's knowledge in the field in most cases will be insufficient for an independent research of the computer equipment. But it is impossible to deny that this knowledge can be applied in case of promotion of versions, planning and organization of investigation of crimes, searching of proofs and their assessment.

For example, if the investigator has an information containing special data, it is necessary to make the decision about involvement of an expert or specialist. It should be always kept in mind that the scope of knowledge in the sphere of information and communication technologies is very wide, and presence of basic knowledge of the investigator will be useful for the correct determination of a circle of experts or specialists whose knowledge is required for solution of specific questions. So, for example, in case of exception of the computer equipment the specialist in the hardware device is necessary; for establishment of the facts of penetration from the outside the expert shall have knowledge in information security field, etc. That means that involvement of expert is necessary. Unfortunately, in present practice of judicial

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expertise there is no computer technical expertise object of which is computer equipment and computer information media, and experts aren't competent for giving the inference.

But law-enforcement practice has chosen the line of least resistance, i.e. investigation bodies involve experts in the field of science, the equipment, art or craft to making the conclusion. In one, rather rare and being of great importance cases, the procedural law allows involvement of specialists in criminal case as experts (Art. 67, Code of Criminal Procedure RUZ, Art. 10 of the “Law on judicial expertise”). But existence of special knowledge of state judicial experts is presumed. According to the “Law on judicial expertise”, the expert is a person having knowledge, special for making the conclusion, in the field of science, the equipment, art or craft, appointed in accordance with the established procedure as the judicial expert. In the legislation, it isn't specified what knowledge should be referred to special, because of it there is a double interpretation of provisions of the procedural law which leads to distortion of meaning of article.

In our opinion before starting a solution of the problem of involvement of the specialist as the expert, we should understand the term "expertise". Expertise (from lat.expertus – skilled, expert) – the research conducted by the person, expert in science, the equipment, art or craft attracted at the request of interested persons I order to answer to the questions demanding special knowledge. According to the “Law on judicial expertise” judicial expertise is the procedural action in civil, economic, criminal and administrative legal proceedings directed to establishment of the facts of the case and consisting in carrying out judicial and expert researches and making the conclusion by the judicial expert on the basis of special knowledge in the field of science, the equipment, art or

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craft. From the above given definitions on legal status, judicial and extrajudicial expertise can be distinguished. These researches are identical by a technique and quality of carrying out. The judicial prefix which means that this research is conducted for legal proceedings and within established by normative legal acts distinguishes only them.

The Judicial prefix allocates expertise with the special procedural status which, in turn, defines, a special order of its appointment, the strict list of bodies which can appoint and carry it out, and also their rights, duties and responsibility. So, judicial expertise is appointed only by court (personally, or according to the petition of the claimant, defendant, defender or prosecutor (according to stages of judicial proceedings)), the judge, the body of inquiry, the person making inquiry or the investigator (at a stage of preliminary investigation); it can be appointed at the stage of preliminary investigation on criminal cases or at the stage of judicial proceedings within criminal, civil, administrative and arbitration legal proceedings. Judicial expertise is not just a research, it is also a procedural action regulated by laws (the Code of Criminal Procedure, Administrative liability Code, Economic PC, Civil PC, "Law on judicial expertise") and other regulations. The judicial expert bears criminal liability for making notorious and false conclusion, and the expert opinion can be the proof on business.

Extrajudicial expertise is a research conducted by the person expert in science, the equipment, art or craft for permission of the questions arising in legal relationship between legal entities for the purpose of permission of disputable situations, establishments of the interesting facts. Extrajudicial expertise isn't connected with legal proceedings, the sphere of its application is civil legal relationship. However, it can be the basis for judicial

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proceedings or initiation of legal proceedings if during its carrying out the facts sufficient for this purpose are established. This expertise has no special legal status therefore any natural or legal entity can be its initiator, and the order of its carrying out has free character. As a rule, production of extrajudicial expertise is carried out on a paid basis, the independent expert organizations or non-state experts specializing in it. Unlike judicial expertise, the person who is carrying out extrajudicial expertise doesn't bear criminal liability for making obviously false conclusion. In case of a mistake in conclusions of extrajudicial expertise, the person (faces) making it bear the civil responsibility which is expressed in compensation of material and moral harm, to the persons which were injured from this mistake.

From above stated it is visible that difference judicial from extrajudicial expertise is as follows:

- different procedural status;
- different order of appointment and conducting expertise;
- different circle of people able to appoint expertise;
- different rights, duties and responsibility.

In view of that, investigators appoint not judicial, but extrajudicial expertise, there is a problem of an assessment of reliability of the expert opinion as the procedural status of the expert radically differs from the judicial expert.

By rules of the Code of Criminal Procedure, each proof is subject to assessment from the point of view of relevancy, admissibility and reliability. Admissibility of the proof assumes compliance of process of its collecting and a research to requirements of the law. At the same time, as R. S. Belkin notes, the specified elements - admissibility and relevancy of the proof - are closely interconnected. The question of admissibility rises only by consideration of the

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given proofs, and **only admissible proofs can be recognized given** [1, p.65].

In legal literature, the general elements of an assessment of the expert opinion are:

1. Analysis of observance of a procedural order of preparation, appointment and conducting judicial expertise.

2. Definition of completeness of the conclusion.

3. assessment of scientific validity of the conclusion, reliability of conclusions and definition of their place in system of proofs [6, p. 102].

According to S.F.Bychkova, observance of the requirements established by the law at pronouncement of the resolution on purpose of expertise, respect for the rights of the suspect, the defendant who was injured at appointment and production of expertise, and acquaintance with her results during preliminary investigation is exposed to the analysis in the process of assessment of a procedural order of appointment and production of judicial expertise. In addition, the procedural order of an explanation to the expert of his rights and duties, and also correctness of execution of the expert opinion is established [2, p.43].

Besides, for an assessment of completeness and objectivity of the conclusions, the expert has to be qualified and competent for the solution of the questions raised before him. So, according to article 11 of the Law on Judicial expertise, the position of the state judicial expert can be taken by a citizen of the Republic of Uzbekistan having the highest, and in exceptional cases – special secondary, professional education, having had the subsequent training on definite judicial and expert specialty and certified as the state judicial expert in the order established by the Cabinet of Ministers of the Republic of Uzbekistan.

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The employee of other organization or other person attracted as the judicial expert have to have the highest, and in exceptional cases – special secondary or professional education.

It can be concluded that there is essential distinction between a judicial expert and an employee of other organization or other person, which suggests an idea that the specified other persons are specialists who draw the conclusion. The reason for the put-forward position is that they have necessary knowledge and skills in science or technology. Besides, distinction is expressed by the level of special knowledge, specialization and length of service, existence of an academic degree or rank, passing of a cycle of professional development, and also order of appointment. It should be noted that in the Code of Criminal Procedure the concept of "the conclusion of the specialist" is absent that raises a question of admissibility of results of a research as the proof.

As for the conclusion of the specialist, there are still disputes over this type of proofs in scientific literature [9, p.8]. The main aspect to which almost all foreign experts of criminal procedure pay attention is the fact that the specialist shouldn't and has no right to conduct a research when making answers to questions and formulation of the conclusion, otherwise, the border between the expert opinion and the conclusion of the specialist is washed away. However, it seems that this distinction can't be drawn by criterion of existence or lack of carrying out a research. As O. Temirayev truly notes "it must be kept in mind that survey, even the simplest and superficial is already research activity" [11, p. 39]. S. Zaytseva sees the distinction the conclusion of the specialist and the conclusion of an expert in the fact that the conclusion of a specialist shouldn't have a research part [3, p.18]. A. V. Kudryavtseva oppositely believes that at the conclusion of

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a specialist has to have a research part in the form of a logical reasoning that will allow to provide checkability of the data stated by the specialist [5, p. 488-489]. I. Ovsyannikov also believes that "existence of descriptions of researches in the conclusion of the specialist, after all, is desirable since it will facilitate an assessment of its validity and correctness, will promote acceleration of criminal trial" [8, p. 35].

Based on the above stated analysis of the legislation and opinions of experts of criminal procedure we believe, that in case when the investigator has decided to appoint expertise by a person who is not to be in the staff of the Republican center of judicial expertise of H.Sulaymanova at the Ministry of Justice of the Republic of Uzbekistan, its results should be recognizes as the conclusion of the specialist, but not the expert. Thus, the carried-out analysis, shows that the legislator, hasn't defined accurately the procedural position of the expert and specialist that causes various interpretation of standards of the criminal procedure legislation. For streamlining of legal regulation of the considered types of proofs, it is necessary to reconsider radically the norms of the Criminal Procedure Code of RUZ regulating procedural position of the expert and specialist.