

### **Problems of applying the special knowledge in criminal proceedings**

**Abstract:** The system of applying the special knowledge is formed in criminal proceedings, its elements, interrelations and interdependences are reviewed.

A comparative analysis of legislation in a number of foreign countries was produced in terms of applying the special knowledge in criminal proceedings.

The proposals for changes and amendments of legislation were provided.

**Keywords:** litigation, knowledge, expertise, system, criteria, limits, application

The system of applying of special knowledge in criminal proceedings should be distinguished from the system of problems existing in this field. As these problems are not solved, it is too early to talk about the system of applying the special knowledge in criminal proceedings. According to the abovementioned, in our point of view, the present system should not be considered as such does not exist, but a construction to be built by means of solving the problems of applying the special knowledge in criminal proceedings as a real system.

Systematic resolution of problems will allow putting in order (organize) existing data (information) about application of special knowledge in criminal proceedings – create the system.

Problems of applying the special knowledge in criminal proceedings represent a system which, in our point of view, consists of the following interrelated elements: a) the essence and concept of special knowledge; b) media (sources) and users of special knowledge; c) the essence, concept and forms of applying (transferring) the special knowledge. In its turn the mentioned elements represent systems consisting of subsystems (elements) to be solved as well.

In general, in order for the system of applying the special knowledge to function in criminal proceedings all the mentioned problems need to be solved (or reflected) in the code of criminal procedure because otherwise it's difficult and in some cases

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excludes activity of this institute.

Meanwhile, S.D. Shiraliyeva fairly observes, legal science and practice contain conflicting, at times diametrically opposite points of view about the concepts, nature and applying the special knowledge in criminal proceedings, which is respectively reflected in the criminal procedure law used for science discussions and conclusions from them, thus forming a vicious circle (18, pages 121-122).

Consider the basic provisions of the Criminal Procedure Code of Azerbaijan Republic concerning the special knowledge in relation to legislation of Georgia, Russia and Estonia that, in our point of view, contains a number of statements representing a great interest.

Article 7, “Basic concepts of criminal procedure” of the CPC of Azerbaijan Republic (hereinafter the CPC) does not contain definitions of the special knowledge. The phrase “special knowledge” is used in the CPC in article 96 “The Specialist”, article 97 “The Expert”, article 127 “The experts conclusion”, article 264 “Justification for expertise”, article 265 “One-person and commissioning expertise” and article 271 “Conclusion of the expert”. Besides, applying the special knowledge considers articles of the CPC related to evidence and proof as well as production of all the investigative activities. Article 96 of the CPC also refers to skills (abilities), which will be discussed separately.

The CPC of Azerbaijan SSR of 1960 did not contain any definition of the special knowledge by 1.10.1987 as well. Article 74 “The Expert” of the CPC said that the expert can be a person having necessary knowledge on special issues arose during the criminal proceedings (12, page 47).

Article 77-1 “Participation of the Specialist” stated: “The Specialist must: appear on a call; participate in investigatory actions using his special knowledge and skills in order to assist the investigator in locating, securing and seizure of evidences...” (12, page 50).

According to article 95 “The Expert” of CPC of Estonian Republic, “the expert – is a person applying non-legal special knowledge in cases and order prescribed by the present Code during the expertise” (15, page 38).

The CPC of Estonian Republic does not contain provisions about the concept and status of the specialist, however considers withdrawal and participation of the specialist in a number of investigative actions.

Article 93 “Investigation experiment” of the CPC of Estonian Republic states that “...conclusions based on the special knowledge are not allowed when identifying results of the investigation experiment” (15, page 38).

Article 5 of the CPC of the Russian Federation does not contain a definition of special knowledge. Article 57 “The Expert” of the CPC of the RF states that “... the

expert – is a person with special knowledge and appointed in order prescribed by the present Code for production of forensic and to give a conclusion” (14, page 33).

Article 44 “Definition of terms used in the present Code” of the CPC of Georgia does not contain a definition of special knowledge. Article 96 “The Expert” of the CPC of Georgia states “... the Expert is a person with special knowledge in science, technology, arts and crafts, and appointed by the investigator, prosecutor or court to conduct special investigation and preparation of conclusion about the circumstances to be established in a criminal case.

... Any person with special knowledge working in expertise institution or having a license can be assigned as the Expert.” (13, pages 45-46).

Article 98 “The Specialist” of the CPC of Georgia states: “... The Specialist makes all the necessary assistance to the investigator, prosecutor and the court to find, secure and demonstration of evidences. Criminologist, physician, psychologist, teacher and any other persons having special knowledge and skills can be called as a specialist.

... The specialist – operator – can be called for use in the manufacture of inquiry, preliminary investigation and litigation of technical equipment (tape recorder, VCR, photography, filming and other devices)” (13, page 47).

According to article 99 “The rights and obligations of the Specialist” of the CPC of Georgia, application of the special knowledge and skills is obligation of the specialist (13, page 47).

Article 356 “Justification for expertise” of the CPC of Georgia says: “... the expertise is performed by decision of an investigator or prosecutor if conclusion of specialists of corresponding fields of science, technology, arts or any other crafts is necessary to determine the facts relevant to the case. Presence of special knowledge of the investigator, prosecutor, the specialist and the witnesses does not exclude necessity to appoint the expertise” (13, page 140).

Article 359 “Persons appointed as the experts” of the CPC of Georgia states that “... the expertise is performed by specialists of expertise or any other institutions, agencies, organizations and other knowledgeable persons appointed by the investigator or prosecutor, or other invited sides for a fee” (13, page 141).

According to the “Explanatory Dictionary of Russian language” by S.I. Ojegov and N.Y. Shvedova, knowledge – is a result of cognition, scientific information; a set of information in some areas; availability of information about someone or something, and cognition – acquisition of knowledge, comprehension of the patterns of objective world; comprehension, acquisition of knowledge about someone or something. In the plural, knowledge – totality of knowledge in some area (8, pages 231-232). Thus, cognition is a process, and knowledge, its result, and cognition are synonyms.

According to philosophical understanding, the knowledge in general sense – “a product of social, material and spiritual activity of people; ideal expression in symbolic form of objective properties and relations of the world, natural and human” (16, page 146).

T.V. Averyanova writes, “... that the special is the knowledge acquired by the subject in the process of practical activity by means of special preparation or professional skills based on the system of theoretical knowledge in the field of concrete science, technology, arts or crafts. When we say about cognition in the field of crafts we mean certain scientific knowledge in the relevant applied science, i.e., for example, not literally in the craft of tailoring but in technology of garment production etc.” (5, page 326).

B.T. Bezlepkin states in this regard: “Special knowledge which might be required in criminal proceedings may apply to any field of science, technology, arts and crafts from modern nuclear physics to hand-made shoes. Only a specialist in the field of law or lawyer cannot be called as an expert to participate in a criminal case. Summarized that the one who produces the criminal case (judge, prosecutor, investigator, inquirer) himself is a qualified lawyer and cannot share his responsibilities with anybody else for resolution of legal issues...” (2, page 89).

N.I. Porubov writes: “Criminal and procedural laws governing activity of expert and specialist use terms like “special cognition” and “special knowledge”. The legislator does not distinguish them. We will use the term “special knowledge” considering special knowledge and skills acquired as a result of focused professional training and work experience which are used to gather information about a crime, contribute to the development of tools and techniques of working with evidences” (9, page 282).

E.R. Rossinskaya notes that special knowledge “... usually is meant to be knowledge acquainted during special education or in the process of practical work on the specialty” (6, page 317).

R.S. Belkin used the term “special knowledge” under which he meant “... professional knowledge and skills in the field of science, technology, arts or crafts required to solve questions arose during investigation and review of concrete cases in the court” (3, page 217).

In opinion of A.A. Eisman, special – is “the knowledge not generally known, not public, non-mass distribution; shortly it is knowledge that has a limited circle of specialists, and it’s obvious that a profound knowledge in the field of physics, for example, would be special for biologist and vice versa” (19, page 91).

Z.M. Sokolovskiy opposing to A.A.Eisman stated “... an attempt to define special knowledge only by opposing them to social, commonly understood and well known would be unsuccessful... The special knowledge should only be understood as

a set of information acquainted as a result of professional special training giving their holder an opportunity to solve questions in some field” (10, page 116-117).

V.I. Shikanov points that “... knowledge and practical experience that became necessary for the full, complete and objective clarification of circumstances within the subject of proof in a criminal case in the criminal proceeding referred to as the special cognition” (17, pages 5-11).

In opinion of G.A. Elenyuk, P.P. Ishenko and Y.Y. Yaroslav “... the special cognition is not just knowledge and information acquainted by means of special education in different fields of science, technology, arts or crafts, but a complex of cognition synthesized on the basis of corresponding “mother” sciences and filtered by criminalistics, used with aim to get proofing information” (4, page 4).

Analyzing the present points of views V.N. Makhov concludes that “... the special knowledge in a criminal process... – is knowledge inherent in various kinds of professional activity, except for knowledge being professional for the investigator and the judge, used during investigation of crimes and review of criminal cases in court and in order to facilitate establishment of truth on the case in order defined by criminal procedural law” (7, page 57).

Thus, the following systematic elements can be described in the problem about essence and concept of the special knowledge in criminal proceeding:

1. Concept and structure of information constituting the special knowledge (cognition);
2. Source (method) of acquainting the special knowledge and their basis;
3. Criteria of the special knowledge;
4. Limits of the special knowledge.

It seems that the confusion in the definition and maintenance of the special knowledge in criminal process is also due to the simultaneous solution of all the structural elements of the problem in one plane.

From the point of view of A.M. Abasov, a mixture of accents, mechanical borrowing and the use of conceptual tools of different sciences, their transfer from one field to another is methodologically unsound (1, pages 4-12).

Paraphrasing the words of A.A. Eisman that the term “special knowledge” is definite for all sciences, we can say that legal knowledge is special for natural and technical sciences and vice versa, knowledge of other sciences is special for legal sciences, including the criminal process.

Volume of knowledge (deep – surface) and its other features (publicity, accessibility, prevalence, etc.), from our point of view, do not matter: knowledge is special in nature as well as for science, which are not their sources and their depths or availability are criteria of other levels.

However, not all the knowledge is the results of scientific knowledge. Information (data) being their constituents can be acquired as a result of other human activities, experience of going on trial and errors, not a professional but personal interest.

History has doctors that rival professional knowledge on art; painters deeply versed in mathematics and physics; lawyers – numismatics and cooks; physics – nutritionists and writers. Legal practice is rich with examples when these criteria were used to involve people as professionals, but not by their diplomas or work experience.

Therefore, we can say that no matter how paradoxical it may sound but the scientific basis is not required for special knowledge, although this can be explained from the scientific standpoint.

The essence of involuntary pun is that the process of obtaining and analyzing the information (data) being the basis of knowledge (learning), including those not targeted, can always be explained in terms of several sciences.

The structure of data constituting the special knowledge is associated with the concept of totality, however, from our point of view, is not fundamental. Information cannot be measured in units and that is why knowledge is always presented by its population.

As for the limits and criteria of the special knowledge they are, as well as all elements of the system investigated, are interrelated and interdependent.

Speaking of limits we mean threshold beyond which the special knowledge cease to be such, which is particularly important forensic items. Criteria of the special knowledge are subject to special investigation with the Criminal Procedure positions.

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