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Alternative expert examination: illusions and reality

Abstract: Expert activity is monopolized in Azerbaijan that is violated the rights of an individual, conditions and principles of the court proceedings.

It is considered the procedural and organizational issues of establishing and functioning of the alternative expert institutions.

The suggestions on changing and supplementing of the legislation are given.

Keywords: an alternative expert examination; an expert; monopolization; rights of an individual; the right to choice; competitiveness.

A concept of the modern democracy is based on the right to choice, entrenched in daily use and in scientific works as an alternative. Though, an essence of the last is in a necessity, but not in a possibility (13, p. 23).

An opportunity to the choice is a basis of all legal systems and constructions pretending to be considered democratic and therefore declared this rule as one of the main principles and conditions its functioning.

Sometimes, good intentions are remained only on a paper, is obtained a nature of declarative in the second meaning of this word (pure verbal, external) (13, p. 158). Unfortunately, in the Criminal Procedural Code (CPC) of Azerbaijan Republic that is obliged to ensure the rights and freedoms of an individual, we find the provisions, which have declarative nature, as they are far from practical realities.

Made researches are allowed to assert that the CPC of Azerbaijan does not

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ensure in whole the declared goals and tasks of the criminal proceedings. The reason of which are contradictoriness, incompleteness, subjectivism and a lack of system of the norms constituting of this construction. On its core, there is no construction, and just the words without any real guarantees.

Parameters of this article do not allow considering all or the most problems in this part. In connection with this, we will consider only separate aspects of usage of the special knowledge in criminal proceedings in which they are accumulated and stood out in relief.

We are speaking about the actual and consequently exaggerated issue on monopolization of expert activity, which became "the talk of the town" and its way of a stamp-visiting card of the presence being.

Having placed a summary on the foreground, we may ascertain that due to appearance of the users of the exclusive rights in criminal process an expert activity in Azerbaijan has lost its role including declared. Instead of participation in establishing of the truth (even relative one) it turned out in an instrument of accusation, frequently subjective, a tool of reaching of personal aims. It deprived the people the right to choice and faith in justice. In addition with a word "lost" might be used word combination "did not acquire" since in the soviet time the expert activity was always on the service to the accusation party and had been an instrument of prosecutor's office in spite of declared independence. Unfortunately, in the modern Azerbaijani society the legal thinking and perception of expert examination has not changed.

In practice, there are hundreds examples of the deliberately falsified reports of the experts, which were taken as basis of criminal prosecution only on reason of absence of the real (not declarative) mechanism of their appeal, an opportunity of the contest these "investigations" in the real independent expert institutions and the independent experts, which are not tied with the problems of the public financing and subordination.

There are a lot of cases when using the reports of the experts were insolently trampled the right of victims deprived of the alternative sources of the justice since so

named preliminary, additional, repeated and commission legal examinations had been issued with permission of a head of an expert institution who had once sinned against the truth and unable to repent, and that is why trying by hook or by crook to uphold his deliberately falsified initial decision.

In the last years the functioning expert institutions are involved in “business”, according of which “the customers” of the forensic examinations even are interested in the objective results need to pay to the experts, and often to the heads of the medium section for the production of the expert examination and receiving of completed reports as they are blackmailed with impossibility to obtain of the concrete conclusions.

Due to absence of alternative ones, the state expert institutions are overworked; they unable to be through established period or they have formal grounds to delay examinations. This is the next corruption loop-hole in the monopoly system of existence.

The problem of degradation of the institute of forensic examination in Azerbaijan has the two interconnected aspects, which might be conditionally determined as procedural and organizational ones.

An essence of the procedural aspect consists in that a contradictoriness, incompleteness and declarative of a number of provisions of the criminal-procedural legislation excludes an equal usage by the parties of trial process of the special knowledge in form of the appointment and production of the expert examinations that contradicts of the adversarial principle and other mandatory terms of the criminal proceedings.

We are speaking about the rights of a defence in the time of appointment and implementation of the examinations, and the main, about opportunity to choose an expert institution and the experts accordingly.

According to the CPC, in certain situations, the party of defence (a suspected, accused, defender and others) has the right independently to seek the services of an expert and to use the record received as evidence. On this it has a proviso, just in the

second meaning of this word (involuntary statement), in the articles 92.9.9, 264.3, 264.5, 264.6, 264.7, 268.1.4, 269.2 and 270.3 of the CPC (13, p. 444).

We do not exaggerate. Just the provisos since an indistinctness, vagueness, contradictoriness and phantom character of the stated in the articles assertions do not allow considering them by the provisions of the law, admissible for observance.

Thus, in the articles 92.9.9, 264.3, 264.5, 264.6, 264.7, 269.2 and 270.3 of the CPC are specified that if a criminal prosecution is carried out in order of a private accusation then on a base of a contract a defender has the right to receive a report of an expert and hear an opinion of the specialist (17, p. 93, 271, 272, 274, 275, 276).

On this, five years later after issuing, in the Law of Azerbaijan Republic "On activity of the state forensic examination" was included the article 22-1, which on opinion of the monopolists has to bury the hopes on creation of the alternative expert institutions (8, p. 7).

As it known, a private accusation is carried out only on the complaint of a victim on the crimes provided with the articles 147 (libel), 148 (insult), 165.1 (violation of author's and adjoining rights without aggravating circumstances) and 166.1 (violation of inventor's and patent rights without aggravating circumstances) of the CC, i.e. total on the four corpus delicti from the 250 provided by the Criminal Code.

The logic of a lawmaker is difficult to be explained, contradictory and doubtful, but it is obvious monopolistic aspirations of the users of exclusive rights.

Thus, simplified criminal proceedings on the obvious crimes which do not present a great social danger (15 corpus delicti, chapter 39 of the CPC) are also carried out only on the complaint of a victim. But during the proceedings a defence party does not have the right to conclude a contract on production of examination.

Is it a defence of the honor and dignity, author and inventor's rights of the citizens less important than, for instance, theft of other property with cost 31 manat or it damage on carelessness, since it is trusted non-governmental experts?

Or may it be the matter is in above mentioned declarative nature?

The right to choice is not forgotten and 15 cases are not missed.

According to article 195 of the CPC, for the work done in order of service instruction and on demand on an investigator (an inquirer), an expert receives a money reward within his salary from the public budget, and for execution of instruction of a defense – in a sum provided by a contract.

As rule, a sum of the contract is considerably more than his wage.

In both cases, the sums of money rewards paid to an expert are included in the law-costs, which can be exacted from a convicted person and transferred to the state income or an account of physical persons incurred appropriate expenditures (articles 197-198 of the CPC) (17, p. 202-203).

The logic shows that the expert institutions and the experts themselves should be interested in increasing of a number of examinations producing on the contracts with defense party as this improves their financial security.

But this is the logic of human, and according to logic of a monopolist-corruption person, the income is in a direct dependence on the deficit: the less competitors are the high prices on the products.

Thus, in the procedural aspect is came into view a picture allowing to assert that the provisions of the law in a part of the right to choice of alternative sources of the expert information, on malicious intention or due to incompetence, and probably for both reasons, are made up such way that they for arranging show to the foreign observers contained declarative statements on ensuring of the democratic principles and conditions of functioning, but at the same time excluded real opportunity their application.

A typical example of the stated is existence of the article 268 of the CPC “The rights of a suspected or accused when assignment and production of the expert examination”.

The text of this “provision” of the law contains an abracadabra, according to which when allocation and production of the expert examination carrying out on the resolution of an investigator, a suspect or accused person has the right to make an alternative expert examination on his own initiative and at his expenses and to submit an appeal on attaching of the report to the criminal case (17, p. 274).

More then obviously that the stated is presented itself the senseless and illogical set of obvious unfeasible illegal instructions, the value of which is only mentioning about existence of an alternative expert examination.

The first, the right to production of expert examination is a prerogative of an expert, and a suspected or accused person has an opportunity only to appeal about it implementation.

The second, if expert examination has been already assigned and is made on a resolution of an investigator then a defense party cannot disturb of this process.

The third, under existence of the provisos in the articles 92.9.9, 264.3, 264.5, 264.6, 264.7, 268.1.4, 269.2 and 270.3 of the CPC on the cases of private accusation, it would be honest to point out them in the article 268 of the CPC and indicate that mentioned abracadabra is related to only the four corpus delicti, and it is not the right to an alternative expert examination.

And now, due to absence in the country any specific prerequisites for alternative expert examination, for example, forensic examination, such statement in the CPC looks cynically.

In addition, according to the article 143 of the CPC, collection of the evidences during pre-trial and judicial investigation is carried out through interrogation, confrontation, search, seizure, inspection, presentation for the recognition and other procedural actions, which a suspected, accused and defender are incompetence to make.

According to this article of the CPC, a defense party has the right to present the evidences and to collect information, obtain the explanations from individuals, reclaim from the organizations and associations the references, characteristic and other documents, submit the documents and items which can be accepted as evidences (17, p. 157).

But it is nothing said in the law about the right of a defence to assign and make an expert examination during collection of the evidences that violates of an objective adversarial in the court production putting a defense party in unequal conditions with prosecution one.

According to 125 of the CPC, information, documents and items received in result of production of investigative or other procedural actions by the unauthorized subjects cannot be accepted as admissible evidences (17, p. 144).

According to the article 264.3 of the CPC, an examination is carried out on resolution of an investigator or if a criminal prosecution implements in order of private accusation, on a written applying of a defense (17, p. 271).

It is arisen a vicious circle dismissing a real participation of a defense in using of the special knowledge in criminal proceedings in a form of assignment and production of the expert examinations that in principle differ our court production from democratic countries.

If examination carries out only on resolution of an investigator (except of the four corpus delicti of a private accusation) then an expert report obtained under the criminal prosecution in order of public-private and public accusation on a base of the appeals of a defense will be inadmissible evidence.

Thus, about existence of what a phantom right on alternative examination is spoken if it cannot be applied to the 99% of corpus delicti provided by the Criminal Code?

In December 2010 in Azerbaijan took effect the Constitutional Law "On normative legal acts", according to which at time of appearance of the clash between common and special norms of the one normative act (in our case, the CPC) are applied the special norms (11).

Consequently, from one side, the article 268 of the CPC as a special norm (upon dismissing from it unintelligible statements) has the right to exist and can be used for the alternative expert examinations in the alternative expert institutions.

But, it is not so simple. The provisions limiting the right to alternative expert examination only with the cases of a private accusation contain also other special norms of the CPC that is caused the collision between them.

It looks like a deadlock requiring the drastic measures under the great expenses of the forces and means.

But, this all only the first sight, and how noted above, artificially exaggerated.

On our opinion, under existence of the real complicated issue – a problem of degradation of the expert activity, its reasons considering as the aspects in whole have artificial and superficial nature; they are the result of a momentary voluntaristic corporative-corruption interests and goals that are caused by the essence of monopoly. (This statement is for the possible opponents believing that the creating of alternative expert institutions is a complicated, practically impossible and very expensive matter).

Procedural and organizational components of monopoly on the forensic expert activity are interlinked and interdependent, and consequently elimination of the reasons will cause of disappearance of other ones. It is naturally, under small spending of the forces and means, but under mandatory presence of honest and big desire.

It seems that procedural side of the problem of alternative expert examination can be solved with a way of insignificant, bur sufficient changes and amendments in the CPC, which remove the collisions and turn out the declarative right into the real.

In particular, if exclude from the articles 92.9.9, 264.3, 264.5, 264.6, 264.7, 269.2 and 270.3 of the CPC the proviso "…if criminal prosecution carries out in order of a private accusation" then a defense (under appropriate additions of the articles 90 and 91 of the CPC) will obtain the right on appeal on performance of an alternative expert examination in an alternative expert institution on all cases the more that a production of expert examination out of state expert institution is specified in the law (see please art. 270 of the CPC).

In addition, it is necessary to amend the article 7.0.41 of the CPC and to state it as follows: "an appeal-complaint of a participant of criminal process addressed to the body carrying out the criminal process of individuals or legal entities".

The article 143.3 of the CPC should be amended with words "to collect" and "to appeal on performance of expert examination" as result it will be stated as follows: "A defender admitted to participation in a criminal process in the cases and the order provided by the present Code has the right to collect and submit the evidences and other information for rendering of legal assistance including to receive the

explanations from individuals, and also to demand the references, characteristics and other documents from various organizations; to appeal on performance of an expert examination".

At last, from the article 268.1 of the CPC should be removed the words "carrying out on the resolution of an investigator", and the article 268.1.4 of the CPC to state as follows: "to appeal on performance of an alternative expert examination for his expense and attaching it report to the criminal case or to other materials connected with the criminal prosecution".

Under presence of the good will of all participants of proceedings, the alternative expert examination can be produced by the independent experts in various places including in the prisons, offices of the state expert institutions, and also in other agreed with the investigative body and court places; it only access there would be opened in legal order, and depend on caprice of the monopolists.

It should note that from our point of view, the more vulnerable spot in the problem of assignment and production of the alternative expert examinations is an issue about participation in them the imprisoned individuals.

However, according to the article 97.6 of the CPC, an expert has the right to manage with the objects of examination (in our case, with alive persons – suspected and accused persons), and according to the article 268 of the CPC, the last ones to be present when an expert examination is produced. Article 270 of the CPC reads that "… if necessary to examine a body or psychical condition of a suspected, accused, victim and witness an investigator should provide deliver of mentioned individuals to the expert". The stated provisions of the law are distributed to all experts, and not only state that is confirmed partially with name of article 270 of the CPC "Production of expert examination out of expert institution".

The main is that an alternative expert examination is integral attribute of adversarial process; it provides its existence, resolution of the tasks and ensuring the fundamental principles of court proceedings.

These tasks and principles are served to achievement of the goals, which are common as for state so and for alternative expert institutions that are caused necessity of their co-existing.

Consequently, the right to alternative expert examination should be confirmed by the guarantees, according to which under necessity to produce expert examination out of the state expert institutions, the prosecution will be obliged to provide a presence and guarding of the arrested suspected and accused individuals or at least, to permit of the experts free access to the arrested persons in a custody. If it does not take into account in-patient department; an issue of which is required the detailed consideration.

Now, let's try to consider an organizational aspect of the problem that interlinked with it.

As it known, the CPC is provided a production of an expert examination in an expert institution (art. 269) and out of an expert institution (art. 270), when as expert acts a person not connected with the Law "On activity of the state forensic examination". This is a specialist in a wide meaning of the word, possessing with special knowledge in sphere of science, techniques, art or craft, sufficient to give report on considered issues.

Activity of the expert institutions financing from the state budget is regulated by the Law of Azerbaijan Republic "On activity of the state forensic examination" dated on 18.11.1999. According to the article 12 of this Law, the experts of the state expert institutions are prohibited to carry out an expert activity as an employee of other institution and a private expert. Since the Law from 18.11.1999 is just on activity of the state forensic examination then it means that for the experts of alternative (non-state) expert institutions it is not obligatory, and they need to be guided only with the CPC. It is not bad in principle, and on the contrary it is even good (8, p. 6).

Absence of the procedural prohibitions on function alternative expert institutions and legislative permission on using their potential capabilities is opened the direct way to establishment and existence of the cherished attributes of the democratic legal state.

Consequently, it is remained only organizational and administrative issues, which, from our point of view, are also not difficult to resolve, applied to the existing legislation or slightly changed and amended it.

Thus, according to the Decree of the President of Azerbaijan Republic "On regulation of an order of issue of special permissions (licenses) to do some kind of activity" dated on 02.09.2002, and also supplements and amendments to it, an expert activity is not subjected to licensing (16). It is not prohibited – means it is allowed. It seems that it would not be a big problem for the citizens of our state who became skilled in the bureaucratic stadium. Of course, if it is not a special command. Let's address to the practice of other countries.

The current CPC of Russian Federation in edition of Federal Laws from 2003 and 2004 "On inserting of changes and additions in Criminal-procedural Code of Russian Federation" is provided of the participants of a process with the right to appeal on enlisting of the indicated by them individuals as the experts or about production of the forensic examination in a specific expert institution (art. 189 of CPC) (19, p. 57).

Currently, there are a chain of non-state expert institutions in Russia, counteragents of which are not only the lawyers and legal firms, but the state institutions including the judges, the bodies of inquiry, investigation and prosecutor' office (4).

On a state of the end of 2012 an activity of the alternative expert institutions and the right to assignment and performance of the alternative expert examinations in the various interpretations is provided by the procedural legislation practically the all developed countries in the world. Even, it is those countries, which were earlier in the Commonwealth, for example Russia, Georgia, and Estonia.

Thus, according to the article 356 of the CPC of Georgia, "…the parties on their initiatives and their expenses have the right to make an expert examination for establishing of the circumstances, which, on their opinion, can aid a defense of their interests. They should immediately inform an inquirer, investigator or prosecutor in production of which is the criminal case, about the produced expert examination and

the task, which an expert should elucidate. The expert institutions are obliged to produce the expert examinations, which have assigned and paid by the parties. The expert reports on demand on the parties in obligatory order should be attached to the criminal case and they are subject to assessment together with other evidences" (18, p. 205).

According to the article 95 of the CPC of Estonia, "under assignment of an expert the person carrying out the production, prefers to have forensic expert and an expert who has state status; but an expert can be assigned also other person who possesses with appropriate knowledge.

… If the expert examination is executed out of an expert institution then a person carrying out the production should ascertain impartiality of the assigned expert in respect of this criminal case and his consent to produce an expert examination. He will be explained his rights and obligations that are stated in the article 98 of this Code. If an expert is a person not being under oath, he is notified about criminal punishment for giving deliberately falsified expert report.

With consent of an expert a person, carrying out the production, is appointed the date of expert examination" (20, p. 91).

Unlike from Azerbaijan, for the most part of the developed countries an issue of alternative expert examination is a passed stage. Currently, they are engaged with the complicated issues of organization of the production of the forensic examinations, presentation of the expert reports having a legal force in the countries with different legal systems, theoretical and practical problems of evaluation of the results of the forensic examinations, preparation of the expert staffs, professionalism and ethics of the experts.

On September, 2010 in Riga was held a conference of the EU on the certification problems of the forensic experts and recognition of equality of the forensic examinations in different jurisdictions. Scholars from Denmark, Iceland, Latvia, Lithuania, Norway, Finland, Sweden and Estonia took part in the work of this conference (5).

Annually in the USA upon supporting of the government is held international conference of the American Academy of forensic science. The conferences are considered the problems of professionalism and ethics of forensic experts, the issues of necessity of unified methods of performance of the expert examinations and unified system of preparation of the expert staffs in frame of developed integration and international cooperation of the countries.

In response on appeared demand on the professional experts, the foreign high schools began widely to offer the new courses in a sphere of the forensic examinations; and the laboratories of the forensic examinations carry out a preparation of the expert staffs. Expert institutions are accredited in the leading international expert organizations.

Unfortunately, Azerbaijan lags behind global trends in this sphere. In our country none expert laboratory has international accreditation. Thus, our citizens deprived the right to qualified forensic examination and as result to fair court proceedings.

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