

Subjects of using of special knowledge in criminal proceedings

Abstract: Participant of criminal process should be recognized any physical person taking part in it, under determination and normative fixation its legal status.

Under participation in criminal process should be understood any actions or inactions of a person (if under this might be understood a presence and passive observation) in investigative and other procedural actions, and also organizational measures carrying out on the criminal case.

According to main provisions of criminal procedure legislation (article 7 of the CPC) a legal representative of a witness (article 104 of the CPC), representative of a witness (article 105 of the CPC) and legal successor of a victim (article 106 of the CPC) are not the participants of criminal process. This seems to be wrong and subject to be corrected.

The CPC must be supplemented with provisions in respect of a person status, presence under production of procedural actions and mandatory signing of a record by all participants of it.

Keywords: special knowledge; subject; participants; criminal proceedings; participation; presence.

There is no a unit opinion in procedural and criminalistical literature on a matter of the subjects of special knowledge using in criminal proceedings. Though, due to the fact that consideration of existed points is out of our research, we will only consider of interested us problems.

In general, discussions on this matter had concerned only the problems of special knowledge using of experienced persons (specialists and experts) with investigators and other representatives of the bodies, carrying out a criminal process

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at different stages of it, though the matters of using of special knowledge by other participants of a process were considered superficially and incompletely.

Meanwhile, a combination of the subjects of special knowledge using in criminal proceedings also forms a complex system, in which we may distinguish interconnected and interdependent elements as the subsystems of other levels.

Main of them are the subjects using own special knowledge, to which should be related the experts and specialists. Further, there is followed the subjects, using a special knowledge of the experts and specialists in purposes of: a) carrying out of criminal prosecution; b) defence; c) for resolution of administration of justice.

We should especially distinguish of the groups of subjects using special knowledge (his/her, experts and specialists) for confirmation or refutation of the positions of proceedings' parties, and also the results of actions made by them. We are talking about witnesses and attesting witnesses.

According to article 96 of the CPC, a specialist –a person, who has no personal interest in criminal process and with his/her consent is assigned by a body, carrying out criminal process, to assist under production of investigative and other procedural actions with using of his/her special knowledge and abilities in branch of science, art, crafts and technique. Pedagogue is considered to be a specialist, while he/she is taking part in questioning of a minor as a victim, suspected or accused and witness. Specialist might be assigned from the persons suggested by the participants of a process.

Specialist should have sufficient knowledge and abilities to assist to a body, carrying out of criminal process, though the person might not be assigned or brought as specialist on legal issues of criminal process. An opinion expressed by the specialist did not replace an expert's report.

Specialist has the following duties: to appear at a body, carrying out criminal process, to lend necessary help; to present to a body, carrying out criminal process, documents testifying his/her special qualification; to evaluate accurately his/her ability to lend a necessary help; to inform a body, carrying out criminal process, about his/her professional experience and about relationships with the persons, who

participate in criminal process; to be at place of production of investigative and other procedural actions during the term, when is needed his/her assistance, and do not leave a place of production of indicated actions without permission of a responsible person, and from a court session – without permission of chairman; using his/her abilities and knowledge to explain a person producing investigative or other procedural actions, to a body carrying out criminal process, to the parties of criminal process taking part in a court session, the issues and actions related to his/her profession in order to find, fix and seize the documents and items, to use technical means and computer programmes, to examine materials of a case, to put questions to an expert; to subordinate to the instructions of an inquiry officer, investigator, prosecutor or a judge in a court session; keep an order in a court session; to confirm with his/her signature a completeness and accurately of reflected materials in a record, its content and results of actions made with his/her participation; not to divulge without permission of a body carrying out criminal process information about investigative or other procedural actions made with his/her participation, about detected circumstances and information of closed court session; not to disclose known him/her information about circumstances touching the secrets, which protected by the law, such as inviolability of person, family, public, professional, commercial etc.; to fulfill other duties that provided by the present CPC.

Specialist has the following rights: with permission of a body carrying out criminal process and for the best execution his/her duties to familiarize to materials of a case, to ask questions to the participants of a criminal process; to attract attention of the participants of criminal process at detection, fixation and seizure of the documents and items, to use technical means and computer programmes, to examine the materials of a case, to put the questions before an expert, and also on a content of the matters concerning his/her profession; to make the notes in a record in connection with detection, fixation and seizure of the items and materials, using of technical means and computer programmes, examination of the materials of a case and putting the questions before an expert; to familiarize with a record of investigative and other procedural actions, in which he/she participated, and also with a record of a court

session at appropriate part, to make the notes on completeness and accuracy of reflection in a record concerning a course, content and results of these actions; to compensate the losses caused with illegal actions of a body carrying out criminal process; to receive fees for work done; to have other rights provided with the CPC [6, p. 110-113].

From stated provisions of a specialist's status is seen that it is talking only about one kind of the experienced persons brought to a process for decision of concrete matters, and other specialists are not covered of it.

In particular, there are no included the specialists of inquiry bodies, who (not investigators) take a photo of a scene, produce a video record, collect the traces of hands, feet etc., receive the samples for comparative examination, arrange lightning, using of service dogs etc. These specialists have indirect interest in result of criminal process, to participation of which they are assigned without any consent and desire. If we are talking about craft, then employees of a cemetery, who brought to exhumation, might be related to these specialists.

In addition, it seems that accentuating by a specialist of attention of a process' participants at circumstances, which have a significance for the right course of a process, is his/her duty, and not the right. In our opinion, in connection with stated, the provisions of the article 96 of CPC in this part should be changed.

According to article 97 of CPC, an expert is a person, who is able to give a conclusion with using of his/her special knowledge in branch of science, technique, art or craft, has no personal interest in criminal process, with his/her consent assigned by a body carrying out criminal process or at its request with administration of expert institution for examination of materials. Expert might be assigned from the persons suggested by the participants of a criminal process or invited by the defence party.

Expert should have special knowledge in branch of science, technique, art or craft, sufficient for giving of a conclusion on the questions put before him/her. Though, a person might not be assigned or brought to other form as the expert on legal matters of criminal process.

Expert has the following duties: to give a motivated and objective report on the questions put before him/his; to distinguish clearly in a report his/her personal conclusions, made at basis of examination of the materials of a case, reliability of which are not checked by him/her, and the conclusions, which received by him/her with using of computer programmes and informational materials; to refuse on giving a report, if the questions put go out of the frames his/her special knowledge or if the materials provided are not enough for giving an answer at questions asked; to refuse from expert examination continuous, if he/she will not come to conclusion on impossibility to give a report due to above indicated circumstances; to notify in written a person, who authorize his/her to conduct an expert examination, about his/her refusal in report giving and in production of expert examination with substantiation of this refusal; upon request of a body carrying out criminal process to present an estimate of expenditures on conducting of expert examination and report about expenses made; to present the written report to participants of criminal process, to clarify its content, and also answer at their questions; to appear at a body carrying out criminal process, for giving verbal conclusion on clarification of written report; to provide a body, carrying out criminal process, and a person, who invited him/her, a document testifying his/her special qualification; evaluate accurately his/her ability to give answers on the issues put on demand of indicated body or a person, and in a court session – to the parties of criminal process; on demand of a body, carrying out criminal process, and the parties of criminal process to inform in court session about his/her professional experience and about relationships to the persons participated in production of appropriate criminal case; being participated at production of investigative and other actions, not to leave without permission of a person, who produces these actions, and in a court session - without permission of a judge; to subordinate to instructions of an inquiry officer, investigator, prosecutor or a judge; to keep an order in a court session; without a body, carrying out criminal process, not to divulge information about investigative or other procedural actions made with his/her participation and on established circumstances, and also information of closed court session; not to disclose known him/her information about circumstances

touching the secrets, which protected by the law, such as inviolability of person, family, public, professional, commercial etc.; to fulfill other duties that provided by the present CPC.

Expert has the following rights: in order to give a report he/she receives necessary for conducting of comparative examination objects and samples; requires providing additional objects and other materials; with permission of a body, carrying out criminal process, he/she familiarizes with necessary materials for giving a report, copies necessary information from a case's materials; for the best execution of his/her duties asks questions to a suspected, accused person, victim and witnesses; takes part in production of investigative or other procedural actions, which are related to an object of expert examination and necessary for giving of a report; gives a report on the questions put before him/her, and also other ones in frames of the expertise object, circumstances detected during examination of a case's materials, relating to his/her competence; pays attention of a court or participants of criminal process at circumstances connected with the object of expertise and the questions, which will be asked at appropriate expert; familiarizes with a record of investigatory and other procedural actions, in which he took part, and also with a record of court session at appropriate part; makes the notes in a record concerning to completeness and accuracy of reflection these actions in it and his verbal report; to compensate the losses caused with illegal actions of a body carrying out criminal process; to receive fees for work done; to have other rights provided with the CPC and others [6, p. 113-115].

According to article 99 Of the CPC, an interpreter is a person, who has no personal interest in criminal process, with his/her consent assigned by a body carrying out criminal process for translation of the materials of production, and also all conversations during a court session and conducting of investigative or other procedural actions. Interpreter might be assigned from the person suggested by the participants of criminal process.

Interpreter should be fluent in language, at which carrying out proceedings, and also in language from which translates. Being commanded with translated languages,

judge, jurors, prosecutor, investigator, inquiry officer, defender, representative and other participants of a process, assisting witnesses, secretary of a court session, expert and witness should not take themselves the duties of an interpreter. A person, who is familiarized with conversation of dumb and deaf persons and is able to communicate with signs' assistance, is also recognized as an interpreter.

Interpreter has the following duties: to appear at call in a body, carrying out criminal process, for translation; to submit to a body, carrying out criminal process, a document, testifying his/her command with languages, from which are translated; to evaluate rightly his/her ability to translate completeness and accurately; upon demand of a body carrying out a criminal process, and also the participants of parties of criminal process in a court session to inform about his/her professional experience and relationships to the persons taking part in criminal process; to be at place of production of investigative and other procedural actions during the term, when is needed his/her translation, not to leave a place of conducting these actions without permission of those, who are doing these actions, and a court session – without permission of a judge; to translate completely, accurately and at time; to subordinate to the instructions of an inquiry officer, investigator, prosecutor or chairman judge in a court session; put his/her signature in a record of investigative and other procedural actions in order to confirm a completeness and accuracy of interpretation, in which he/she took part, and accuracy of translation in the documents, which are provided the persons of criminal process; without a body, carrying out criminal process, not to divulge information about investigative or other procedural actions made with his/her participation and on established circumstances, and also information of closed court session; not to disclose known him/her information about circumstances touching the secrets, which protected by the law, such as inviolability of person, family, public, professional, commercial etc.

An interpreter has the following rights: during interpretation asks questions to participants in order to make interpretation correct; familiarizes with a record of investigatory and other procedural actions, in which he took part, and also with a record of court session at appropriate part; makes the notes in a record concerning to

completeness and accuracy of interpretation in it; to compensate the losses caused with illegal actions of a body carrying out criminal process; to receive fees for work done; to have other rights provided with the CPC and others [6, p. 117-119].

Prosecutor (art. 84 of CPC), investigator ((art. 85 of CPC), inquiry officer (art. 86 of CPC), victim (art. 87 of CPC), private prosecutor 9art. 88 of CPC0 and civil plaintiff (art. 89 of CPC) are related to representatives of the prosecution party, who using directly or indirectly special knowledge.

Suspected (art. 91 of CPC), accused (art. 91 of CPC), defender (art. 92 of CPC) and civil defendant (art. 93 of CPC) are related to the representatives of defence party, who using of special knowledge.

Thus, there may be considered that all persons, who take part in criminal proceedings, are the subjects of special knowledge. Though this is not so.

Notion of a participant of criminal proceedings (process) is also discussable. Number of scientists recognizes all participated in criminal process subjects as the participants of a process [1, p. 11], other ones believe that they are only those who have common rights [2, p. 12], third – those to whom the public bodies are obliged to clarify and explain their rights etc. [5, p. 41].

According to design of the CPC, Second Chapter “Court and persons, participating in criminal process” consists on the heads “Court”, “Prosecution party”, “Defence party”, “Other persons participating in criminal process” and “Representatives and assignees”, that allows asserting that a lawmaker pertains the subjects in listed notions to the participants of criminal process.

According to article 7.0.18, an inquiry officer, investigator, prosecutor, victim, private prosecutor, civil plaintiff, their legal representatives and representatives, suspected, accused person, their legal representatives, civil defendant, his/her legal representatives and representatives are related to the participants of criminal process.

According to article 7.0.29 of the CPC, an attesting witness, specialist, expert, secretary of court session and interpreter are related to other persons participating in criminal process [6, p. 7-13].

Thus, according to the main notions of the criminal procedure legislation (art. 7 of the CPC), legal representative of a witness (art. 104 of the CPC) and assignee of a witness (art. 106 of the CPC) were not included in the list of the participants of criminal process. It seems this is a wrong and should be corrected.

In our view, under determination and normative fixation of a legal status an individual, any physical person, who takes part in criminal process, should be recognized as a participant of it.

Under participation in criminal process should be understood any actions or inactions of a person (if under this might be understood a presence and passive watching) in investigative and other procedural actions, and also in organizational measures, which are conducted on criminal case.

Analysis of criminalistical recommendations on the tactics of conducting of investigative actions and organization of tactical combinations and their comparison with the provisions of the CPC, concerning to the participants of criminal process, allow asserting on presence of contradictions, gaps and sufficient errors, which make difficult, and sometimes, exclude a participation of certain persons in criminal proceedings, and correspondingly using of special knowledge.

So, according to article 236 of the CPC, an investigator and two attesting witnesses are mandatory participants of an inspection, and a defender, specialist, an owner of home or premises, a representative of housing office or local authority, military base are alternative ones. Meanwhile, a status of an owner of home (premises) and representatives of institutions, organizations etc. are not determined with the CPC. This is excluded using special knowledge by them.

There are the recommendations in criminalistical literature concerning to involving to inspections the cynologists, photographers, policemen (for a scene guarding), suspected, accused persons, witnesses, victims, lighting men, drivers etc. [3, p. 475-477].

The cynologists, photographers, lighting men, drivers etc. might be conditionally related to the specialists, whose status are not determined with article 96 of the CPC. Though, this is a wrong. A matter with policemen involved in scene

guarding or conveying of suspected or accused to a scene, and with persons escorting old or wounded victims (though, they are not representatives of them) are more complex. In our view, policemen might not be related to inquiry specialists though they might be fixed with signature their participation in procedural actions.

It seems that an issue about signing of a record of procedural action is a stumbling block in the CPC, as it is resolved incompletely and ambiguously.

So, according to article 236.7 of the CPC, "... an inspection record is signed by an investigator and all other participants of investigative action, who have the right to demand an inclusion their notes in it. If a record is done at few pages then each page of the record should be signed by all participants of investigative action".

The same provisions contain the article of the CPC, which regulate an order of recording of exhumation (art. 237.5 of the CPC), examination (art. 238.7 of the CPC), identification (art. 241.2 of the CPC), search and seizure (art. 247.2 of the CPC), property arrest (art. 252.2 of the CPC), arrest of correspondence (art. 258.2 of the CPC), checking of testimonies at scene (art. 261.2 of the CPC), investigative experiment (art. 263.2 of the CPC), seizure of the samples (art. 276.2 of the CPC).

If to proceed from the first part of the article 236.7 of the CPC and other listed articles, then a record of investigative action should be signed only by those participants, who have the right to demand inclusion of their notes in the record. They are the following: a victim, civil plaintiff, suspected, accused, witness, an interpreter and others, that is everybody, excepting a representative of a witness and assignee of a victim.

According to the second part of the listed articles, each page of a record should be signed by all participants of investigative action.

The CPC stipulates participation in exhumation (art. 237 of the CPC) of the relatives; in examination (art. 238 of the CPC) – a doctor or specialist of forensic medicine; in identification of a person (art. 239 of the CPC) – not less than three statist; under search and seizure (art. 244 of the CPC) – a person, in respect of whom is produced a search; in property arrest (art. 251 of the CPC) – an owner of a property or the members of their families, specialist – commodity expert, guarding employees;

in arrest of correspondence (art. 257 of the CPC) – a chief and employees of post office; in voice intercept (art. 259 of the CPC) - an authorized person; under checking of testimonies at scene (art. 260 of the CPC), investigative experiment (art. 262 of the CPC) and seizure of the samples for examination (art. 275 of the CPC) – a specialist, pedagogue, doctor and other persons.

In addition, criminalistics recommends involving of the specialists in art, jewelry, numismatics, philatelists, biologists, physicians and other in participation at search, property arrest, seizure of the samples and other actions [4, p.p. 363, 380, 381, 395].

It seems that the CPC should be supplemented with provisions about a status of a person, who takes part under production of procedural action and mandatory signing of a record by all participants of it.

There are no excluded situations, when a person, not being a participant of criminal process, though taking part in production of procedural action will watch, remember and reproduce a dynamics and results of the action more completely and objectively than the latter. In addition, an absence of information in a record concerning to all direct and indirect participants of procedural actions is testified about incompleteness, and consequently, illegality of it.

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