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# Contents

# THE KEY ISSUES OF THE CRIMINAL PROCEDURE GROUNDS FOR THE FORENSIC EXPERTISE

**Vahe Yengibaryan**[1]

The expert activity is closely related to the criminal evidence proceedings. Accordingly, to the legal regulation of forensic expertise issues, it should be noted that the draft of the new Criminal Procedure Code of the Republic of Armenia (hereinafter referred to as "Draft") elaborated and put into circulation within the framework of judicial reforms in the Republic of Armenia, unlike the current CPC of RA, has adopted new, substantially different approaches from existing legal regulations in the case of forensic expertise.

Thus, unlike the current CPC of RA, the Draft by highlighting the role and importance of the Forensic Experts Institution, fairly does not consider the examination assignment to be an investigative action, but rather an evidentiary motion as a separate institution of the criminal proceedings. As a separate evindentiary motion, the issues relating to the expertise are being regulated by a separate Chapter 32 of the Draft, entitled "The Expertise".

Therewith, the RA CPC's Chapter 35 was entitled as *"Conducting the Examination"*, which was subsequently fairly changed to the *"Appointment and Conducting of the Examination"*, albeit in the 2nd point of the paragraph 4 of RA CPC's Article 55, 2nd point of the paragraph 2 of Article 57, as well as in the 2nd paragraph of Article 180 only the expression "to appoint the expert examination" is being used.

It is also remarkable that with the abovementioned Article 254 the Draft also regulates the order of obtaining the samples for examination and their types, while the RA CPC considers obtaining the samples for examination as a separate investigative action, to

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which a separate Chapter is dedicated (Chapter 36).

It should be emphasized that albeit the Draft does not envisage the obtaining of the samples for examination as a separate investigative action, nevertheless it does not exclude the possibility of obtaining the samples for examination during the execution of other investigative actions. Videlicet, despite the circumstance that according to the Draft no separate investigative action is required for the sampling for research or examination, however the investigator shall have the right to obtain samples for examination in any investigative act, with the exception of human samples. Albeit it is not directly defined in the Draft, but it's being assumed that the investigator may receive human samples only in the presence of the expert or only the expert may obtain the human samples, otherwise the obtaining of human samples would also be allowed during the investigative actions.

It should be noted that the current RA CPC lists the knowledge areas in which the scientific data can be used to identify circumstances relevant to the case, by means of appointing and conducting the expertise, as well as by providing other professional assistance to the proceedings. Those areas are *science, technology, craft and art*.

The study of different countries legislation shows that the approaches of the states on the listing of the specific knowledge areas to be used in the forensic expertise process are different. For example, in Germany those areas include science, art and trade; in the French criminal proceedings the matter concerns the technical issues only; the Swiss Criminal Procedure Code does not specifically state the affiliation to the specific knowledge area or the areas of their origin. In the United States of America the area of specific knowledge origin is defined by a non-exhaustive list (special

knowledge of science, technology or other field)[1].

In this regard, the 1st part of the Article 252 of the Draft provides: *"An examination is carried out when there is a need for special knowledge in the areas of science, technology, art, craft or other area, including specific knowledge in the relevant research methods in order to clarify circumstances relevant to the proceedings."*

As we shall notice, unlike the 1st paragraph of Article 243 of the existing RA CPC, which defines the exhaustive scope of special knowledge necessary for the expertise, i.e. *"..... special knowledge in the areas of science, technology, art, including special knowledge in the field of relevant research methods",* the Draft has not limited the areas of special knowledge by using the expression "*or other area*".

We believe that the exhaustive listing of the areas of special knowledge in the Armenian legislation is not fair. The point is that for the disclosure of certain circumstances criminal procedure relations may require the application of such knowledge that does not refer to the areas of science, technology, craft or art, but, as such, those may be the special knowledge by virtue of their non-publicity and by virtue of a specific person possessing the particular profession, qualification, experience or skills, and may be subject to application in a particular case. Moreover, the exhaustive listing of special knowledge areas can be a barrier to the application of other

[1] For details on this refer to ***Ենգիբարյան Վ. Գ.*** Դատական փորձաքննությունների արդի հիմնախնդիրները: Մենագրություն: Երևան, ԵՊՀ հրատ., 2007 (Yengibaryan V.G. Current Problems of Forensics. Yerevan, 2007); ***Ենգիբարյան Վ., Դավթյան Լ., Չախոյան Ա.*** Դատական փորձագիտության տեսություն (Ծագումնաբանությունը, արդի հիմնախնդիրները և կատարելագործման հեռանկարները ). Գիտական ձեռնարկ: Խմբ. ***Վ. Գ. Ենգիբարյան***: Երևան: Անտարես, 2012 (Yengibaryan V. G., Davtyan L., Chakohoyan A., Theory of Judicial Forensics(origins, current problems and outlook for development), Manual. Yengibaryan V. Ed.) p. pages 36-43.

special knowledge outside those areas in judicial practice, which is incorrect.

The 2nd paragraph of Article 252 of the Draft provides that the examination is subject to the existence of special knowledge of other persons participating in the independent proceedings. A similar provision is also enshrined in the Article 243 of current RA CPC. Consequently, in terms of initiating the expertise, the definition as well as the scope of specific knowledge is a direct necessity. In this regard, it should be noted that the issue of the concept and content of special knowledge for a long time both in domestic and foreign professional literature has been a subject to separate discussion, wherein there is still no unified approach formed by the scientists around the subject matter[1].

[1] For more on the definition of the concept of special knowledge see ***Белкин Р. С.*** Криминалистическая энциклопедия. М., 2000 (Belkin R. S. Forensic encyclopedia. M., 2000); ***Додин Е. В.*** Доказивание и доказательства в правоприменительной деятельности органов советского государственного управления. Киев; Одесса, 1976; Энциклопедия судебной экспертизы/ Под ред**.** ***Т. В. Аверьянова и Е. Р. Россинской***. М., 1999 (Dodin E.V. Proof and Evidence in Law Enforcement Activities of the Bodies of the Soviet Public Administration. Kiev; Odessa, 1976; Encyclopedia of Forensic Examination / Eds. T.V. Averyanova and E. R. Rossinskaya. M., 1999); ***Надгорный Г. М.*** Гнесеологические аспекты понятия ,специальные знания//Криминалистика и судебная экспертиза. Вып. 21, Киев, 1980 (Nadgorny G. M. Gneseological aspects of the concept, special knowledge // Forensic Science and Legal Expertise. Issue 21, Kiev, 1980), page 37; ***Махов В. Н***. Использование знаний сведущих лиц при расследовании преступлений. М., 2000 (Makhov VN Use of knowledge of knowledgeable persons in the investigation of crimes. M., 2000), pages 38-39; ***Сахнова Т. В.*** Судебная экспертиза. М., 2000 (Sakhanova T.V> Judicial Forensics. Moscow, 2000), pp. 9-10; ***Корухов Ю. Г.*** Правовые основания применения научно-технических средств при расследовании преступлений, М., 1974 (Korkhunov U.G. Legal Basics of Application of Scientific and Technical means in Investigation of Crimes. Moscow, 1974), pp. 17-78; ***Эксархопуло А. А.*** Специальные знания и их применение в исследовании материалов уголовного дела. СПБ, 2005 (Eskarhopulo A. A. Special knowledge and their application in the study of the materials of the criminal case. SPB, 2005), pages 62-92; ***Россинская Е. Р.*** Судебная экспертиза в гражданском, арбитражном, административном и уголовном процессе. М., 2005 (Rossinskaya E. R. Forensic examination in civil, arbitration, administrative and criminal proceedings. M., 2005), pages 17;

In particular, the 1st paragraph of Article 59 of the Draft provides that *„The expert is the person, not concerned by the subject of proceedings, who, being involved by the body conducting the proceedings or the private participant of the proceedings, supports the proceedings while using special knowledge or skills……..".*

Moreover, in accordance with the third paragraph of the same article, an expert shall have ***sufficient*** special knowledge of science, technology, art, craft or other field.

We believe that the sufficiency of special knowledge is expressly conditioned by the skills in the given area, that is, the possession of certain expertise, work experience, specialization and other achievements.

In this context, it should be noted that as a result of the general analysis of the RA Criminal Procedure Code, it becomes clear that special knowledge is a non-legal knowledge, as the 3rd paragraphs of RA CPC Articles 84 and 85, respectively, define: *"A legal expert is not being involved in the criminal proceedings...", "An expert in legal matters is not being involved in the criminal proceedings".* However, pursuant to the paragraph 4 of Article 59 of the Draft: *"The Republic of Armenia's law or international law expert is not being involved in the criminal proceedings".*

Certainly, the professional literatire is controversial of some legal knowledge being attributed to the special knowledge, but over the past few years, the legal literature has been dominated by the

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***Россинская Е. Р.*** Специальные познания и современные проблемы их использования в судопроизводстве// Журнал Российского права. № 5, 2001, pages 5-7 (Rossinskaya E. R. Special Knowledge and Current Problems of Using It in Legal Proceedings // Russian Law Journal); ***Нестеров А. В.*** Концептуальные основы использования специальных познаний в раскрытии и расследовании преступлений. Автореф. дисс. М., 2001 (A. V. Nesterov. Conceptual foundations for the use of special knowledge in the detection and investigation of crimes. Author. diss. M., 2001), pp. 15-16; ***Махов В. Н.*** Использование знаний сведущих лиц при расследовании преступлений. М., 2000 (Makhov V.N. Use of knowledge of knowledgeable persons in the investigation of crimes. M., 2000), pp. 46-4.

viewpoints on the attribution of jurisprudence knowledge during the investigation of crimes to that of the special one[1].

There are opinions in the legal literature on the permissibility for the experts of suggesting the legal issues[2] and it is recommended that during the investigation of the certain types of crime there is a permission to appoint "a legal expertise", although the use of the legal knowledge should not be mentioned in the expert's conclusion[3].

Thus, for example, the legislation of the Federal Republic of Germany, without limiting the scope of the special knowledge in any way, allows for an expertise also in the interpretation of legal matters, when the judge does not possess sufficient knowledge of the given

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[1] See ***Эксархопуло А. А.*** Специальные знания и их применение в исследовании материалов уголовного дела. СПБ, 2005 (Eskarhopulo A. A. Special knowledge and their application in the study of the materials of the criminal case. Saint Petersburg, 2005), pp. 62-92; ***Россинская Е. Р.*** Судебная экспертиза в гражданском, арбитражном, административном и уголовном процессе. М., 2005 (Rossinskaya E. R. Special Knowledge and Current Problems of Using It in Legal Proceedings // Russian Law Journal), page 17; ***Россинская Е. Р.*** Специальные познания и современные проблемы их использования в судопроизводстве// Журнал Российского права (Rossinskaya E. R. Special Knowledge and Current Problems of Using It in Legal Proceedings // Russian Law Journal). № 5, 2001, pages 5-7; ***Չախոյան Ա. Ս.*** Հատուկ գիտելիքների հասկացությունը և նշանակությունը քրեական դատավարությունում//Պետություն և իրավունք, № 2, (28), Երևան, 2005 (Chakhoyan A.S., The notion and meaning of special knowledge in criminal proceedings// State and Law, # 2 (28), Yerevan, 2005), pp. 76-77.

[2] See ***Арсеньев В. Д., Заболоцкий В. Г.*** Использование специальных знаний при установлений фактических обстоятельств уголовного дела. Красноярск (Arsenyev V.D., Zabolotsky V.G. Use of special knowledge in determining the actual circumstances of a criminal case. Krasnoyarsk, 1986), 1986, pp. 1-5; ***Грамович Г. И.*** Тактика испоьзования специальных знаний в раскрытии и расследовании преступлений. МВШ МВД СССР (Gramovich G.I. Tactics of Using Special Knowledge in the Detection and Investigation of Crimes. Moscow 1987), 1987, pp. 10-11.

[3] See ***Нестеров А. В.*** Концептуальные основы использования специальных познаний в раскрытии и расследовании преступлений. Автореф. дисс. М., 2001, (Nesterov A.V. Conceptual bases of utilization of the specialized knowledge in the disclosure and investigation of crima. Ph.D. Dissertation, Moscow 2001) pages 15-16.

legal area[1]. Such an approach is justified by the simple reason that a judge cannot master all sources of the domestic and foreign law, and in such cases it will be more effective to provide legal assistance to a judge, rather than to let the latter clarify per se, for example, any unfamiliar legal act of foreign law.

In our view, during the investigation and solving of crimes the investigators and judges should be able to solve their legal issues independently and the concept of "special knowledge" should be allowed only in relation to separate legal knowledge.

In the basis of this approach lies the principle of *jura (iura) novit curia* (presumption), traditionally practiced both in the Romano-Germanic and Anglo-Saxon legal systems, which literally means *"the judges know the law", "the law is known to the court"*. At the same time, the principle of *jura novit curia* allows some exceptions, in particular, the determination of constitutionality of the law by the specialized courts or the justification of the application of international law by the international legal disputes, and etc.

Under our jurisdiction, the *jura novit curia* presumption is also functioning, that is why for understanding and interpretation of law issues the trial does not envisage the possibility of appointing a legal examination or engaging an expert.

We believe that the possibility of appointing and holding the expertise on legal matters in criminal, civil or administrative proceedings in modern circumstances needs to be revised, especially if we take into account that *jura novit curia* principle allows a number of exceptions. In this regard, it should be noted that, for example, in England in 1972, according to the Article 4 of the "Law on Evidence", a person who has the appropriate qualifications in accordance with his/her knowledge or experience, has the right to

[1] See ***Давтян А. Г.*** Гражданский процесс в Германии и странах СНГ. Ереван, 2000, (Davtyan A.G. Civil Procedure in Germany and the Countries of CIS. Yerevan, 2000) P. 168.

give an expert opinion on the law of foreign state. In other words, in England, it is allowed to obtain an expert (specialist) conclusion in foreign law matters, which is one of the exceptions for *jura novit curia* principle[1]. Let us also add that the issue of the appointment of expertise in foreign law and the permissibility of such an expert conclusion are typical for common law countries like Australia, New Zealand, South Africa and so on[2].

In our opinion, the body that implements the proceedings as per Criminal Procedure Code of the RA dealing with the legal issues arising out of the proceedings in the framework of international legal assistance, especially in criminal matters, should have the authority to engage an expert on such issues to approve the circumstances relevant to the case by the relevant expert conclusion or opinion. The need of such regulation is conditioned by the rates of the international crime development, as well as by the circumstance that foreign and international law, the provisions of its content and international legal terminology constitute the specific areas of special knowledge, which can be well mastered by the lawyers, specialized (qualified) in that area. Albeit that knowledge relates to the law matters and it is juridical in its nature, nevertheless, it is not expedient to limit the right of the body conducting the proceedings to appoint an expertise on these issues or to engage an expert in any other way. The need to determine the competence of engaging a foreign law expert is also in the interest of a just investigation of the case and carrying out the quality justice within a reasonable timeframe.

Thus, we think it would be expedient to set an exception from

[1] One of the exceptions to the *Jura novit curia* principle is, for example, the determination of the constitutionality of the law by specialized courts or the justification of the application of international law through international legal disputes and so on.

[2] ***Freckelton I*** . ***Selby H.*** Expert evidence. Holmes Beach, Florida, 1993, pages 1/1558-1/1560.

the *jura novit curia* principle in paragraph 4 of Article 59 of the Draft, allowing the body conducting the proceedings to engage an expert on foreign law, by defining as follows: „An expert in legal matters is not being involved in the criminal proceedings, *except for the cases involving the foreign a foreign law expert*."

In the 1st paragraph of Article 86 of the Draft among the evidence types available in criminal proceedings, as an independent evidence, in addition to the others, the expert's conclusion, the expert opinion and the expert's testimony are also provided, which is conditioned by a certain change of the expert's criminal role and status as the subject of criminal proceedings.

As we shall notice, in the Draft, the expert's participation in the proceedings is summarized in such procedural documents as *the expert's conclusion, opinion and testimony*. Such an approach is peculiar because the complete list of such types of evidence is not found in the criminal law of different countries.

The legal regulations for the type of evidence obtained as a result of the expert's engagement vary in different legal systems. For example, in the USA the conclusion of an expert is not known in the continental legal sense of that word. There it is accepted to call the expert conclusion an expert testimony[1], in Great Britain, Australia and countries of the common law it is called an expert report or an expert opinion[2]. In order to emphasize the evidentiary meaning of the expert's conclusions, foreign countries also use the terms like expert evidence, forensic evidence or scientific evidence [3]. In any case, no matter what the experts' conclusion is called in this or that country, it is used as evidence in during the criminal proceedings both in the

[1] See ***Henderson C.*** Expert witness. In ***Siegel J.A., Saukko P.J., Knupfer G.C. (Eds.)*** Encyclopedia of Forensic Sciences. New York, 2000, Volume 2, pages 724-729.
[2] See ***Freckelton I*** . ***Selby H.*** Expert evidence. Holmes Beach, Florida, 1993, pages 1/5021-1/5026.
[3] See***Giannelli P.C., Imwinkelried E.J.*** Scientific evidence, Virginia, 1986, pages 149-174.

Romance-Germanic or Anglo-Saxon legal systems.

Thus, summing up, we can assure that in terms of improving the legal framework of the criminal-judicial institute of forensic experts, the Draft, unlike the existing criminal law, has made a significant progress, however, we believe that for the full implementation of the Draft provisions, as well as to ensure criminal-procedural reliability of the results of expert activity in practice it is still necessary to elaborate and adopt an expert activity regulatory framework in the Republic of Armenia that will regulate the state control mechanisms, the principles and criteria for organizing this type of acivity, the requirements for the certain types and so on.