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**ЖАЗЫК ПРОЦЕССИНЕ КАТЫШКАН БАШКА АДАМДАР
ИНСТИТУТУНУН АЙРЫМ МАСЕЛЕЛЕРИ
(чет өлкөлүк мыйзамдарга мониторинг)**

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**НЕКОТОРЫЕ ВОПРОСЫ ИНСТИТУТА ИНЫХ ЛИЦ,
УЧАСТВУЮЩИХ В УГОЛОВНОМ ПРОЦЕССЕ
(мониторинг зарубежного законодательства)**

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**SOME ISSUES OF THE INSTITUTION OF OTHER PERSONS
INVOLVED IN CRIMINAL PROCEEDINGS
(monitoring of foreign legislation)**

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Макалада жазык процессине катышкан башка адамдардын институту каралган. Жазык-процесстик укук жазык сот өндүрүшүнүн «негизги» субъекттеринен тышкары: прокурор (мамлекеттик айыптоочу), тергөөчү, алгачкы текшерүү органы, иликтөөчү, шектүү, коргоого укугу бар күбө, айыпталуучу, алардын мыйзамдуу өкүлдөрү, жактоочу, жарандык жоопкер, жабырлануучу, жеке айыптоочу, жарандык доогер, алардын мыйзамдуу өкүлдөрү жана өкүлдөрү башка адамдарды да бөлүп көрсөтөт. Казакстандык мыйзам чыгаруучу мындай адамдарга: сот отурумунун катчысы, котормочу, күбө, калыс-күбө, эксперт, адис, сот приставы, медиатор кирет. Кыргызстанда бул категорияга күбө, эксперт, адис, котормочу, медиатор, сот отурумунун катчысы, сот приставы кирди. Россия Федерациясынын Жазык-процесстик кодексинде Жазык сот өндүрүшүнүн башка катышуучулары: күбө; ага карата жазык иши сотко чейинки кызматташуу жөнүндө макулдашуунун түзүлүшүнө байланыштуу өзүнчө өндүрүшкө бөлүнгөн адам; эксперт; адис, котормочу, калыс-күбө. Жогоруда белгиленгендей, жазык процессине катышкан башка адамдардын институту көптөгөн субъекттерден турат. Бул изилдөөнүн алкагында каралып жаткан институтка кирген бардык адамдарды ачыкка чыгаруу мүмкүн эмес, ошондуктан мындай процессуалдык катышуучуга – адис катары гана токтололу.

Негизги сөздөр: адис, котормочу, катчы, укук коргоо органдары, прокуратура, полиция, кылмыш иши, эксперт, Жазык-процесстик кодекс.

В статье рассмотрен институт иных лиц, участвующих в уголовном процессе. Уголовно-процессуальное право помимо «основных» субъектов уголовного судопроизводства: прокурор (государственный обвинитель), следователь, орган дознания, дознаватель, подозреваемый, свидетель, имеющий право на защиту, обвиняемый, их законные представители, защитник, гражданский ответчик, потерпевший, частный обвинитель, гражданский истец, их законные представители и представители, выделяет и иных лиц. Казахский законодатель к таким лицам относит: секретаря судебного заседания, переводчика, свидетеля, понятого, эксперта, специалиста, судебного пристава, медиатора. В Кыргызстане в данную категорию вошли: свидетель, эксперт, специалист, переводчик, медиатор, секретарь судебного заседания, судебный пристав. В УПК Российской Федерации иные участники уголовного судопроизводства представлены: свидетелем; лицом, в отношении которого уголовное дело выделено в отдельное производство в

связи с заключением с ним досудебного соглашения о сотрудничестве; экспертом; специалистом, переводчиком, понятым. Как было указано выше, то институт иных лиц, участвующих в уголовном процессе представлен немалым количеством субъектов. Всех лиц, входящих в рассматриваемый институт в рамках данного исследования, невозможно раскрыть, поэтому остановимся лишь на таком процессуальном участнике – как специалист.

Ключевые слова: специалист, переводчик, секретарь, правоохранительные органы, прокуратура, полиция, уголовное дело, эксперт, Уголовно-процессуальный кодекс.

The article considers the institution of other persons involved in criminal proceedings. Criminal procedural law in addition to the «main» subjects of criminal proceedings: prosecutor (public prosecutor), investigator, body of inquiry, investigator, suspect, witness entitled to defense, accused, their legal representatives, defender, civil defendant, victim, private prosecutor, civil plaintiff, their legal representatives and representatives, identifies and other persons. The Kazakh legislator refers to such persons: the secretary of the court session, the interpreter, the witness, the understood, the expert, the specialist, the bailiff, the mediator. In Kyrgyzstan, this category includes: witness, expert, specialist, translator, mediator; secretary of the court session, bailiff. In the Code of Criminal Procedure of the Russian Federation, other participants in criminal proceedings are represented by: a witness; a person in respect of whom a criminal case has been separated into separate proceedings in connection with the conclusion of a pre-trial cooperation agreement with him; an expert; a specialist, translator, witness. As mentioned above, the institution of other persons involved in the criminal process is represented by a considerable number of subjects. It is impossible to disclose all the persons included in the institute under consideration within the framework of this study, therefore we will focus only on such a procedural participant – as a specialist.

Key words: specialist, translator, secretary, law enforcement agencies, prosecutor's office, police, criminal case, expert, Criminal Procedure Code.

Introduction. As legal scholars correctly note, «When developing new criminal procedure codes of the CIS countries, their developers and legislators tried to take as a basis the best international legal acts and traditions that could, from their point of view, contribute to improving the effectiveness of criminal proceedings» [1, pp. 9-15].

Studying the experience of foreign countries of the Anglo-Saxon or continental model of legal proceedings, it should be noted that in most countries there is no concept of a specialist, only an expert acts as such.

So, in the United States of America, the parties find an expert themselves, prepare and submit to the court the results of their own expertise, since everyone recognizes that in areas where "ordinary" facts appear, there will always be more than one answer to the same question. Therefore, all facets of the issue should be investigated in court, if possible.

Officials of many states have the right to apply to the Attorney General of the state with a request for his official opinion on legal issues. These opinions are published in a series, which in many states is called the "Attorney General's Opinion". They are cited as references and are used by courts and lawyers as secondary sources to substantiate decisions and conclusions. Secondary sources are intended to complement the first (written and case law). They also include monographs, one-volume textbooks on the basics of law, collections of legal norms in an updated edition, legal reviews and other periodicals in which the norms of law are summarized, presented in a new edition, analyzed and interpreted. Secondary sources are only doctrinal in nature and affect the decision-making process by the court only to the extent that they can convince the court of the correctness of the proposed argument [2, pp. 157, 210].

The criminal proceedings of the Federal Republic of Germany use only one term – an expert who gives an opinion on issues requiring special knowledge in science, art or craft (§75 of the Criminal Procedure Code of Germany).

The competence to select and appoint an expert at a preliminary investigation belongs to the prosecutor, and in court proceedings – to the court. This situation is explained by the presence in German legal proceedings of two types of evidence: strict and free. Strict proof is carried out only at the stage of judicial proceedings (paragraph 4 § 244 of the Criminal Procedure Code of Germany). The main difference between free proof and strict proof is that it is not regulated by law, is not bound by a procedural form. Therefore, in the process of free proof, as a rule, the evidence provided by law is not applied and compliance with the rules of their application is not required (at the free discretion of the criminal prosecution authorities and the court). It can be carried out in any arbitrary way to establish the reliability of the facts, and in many cases their simple probability is sufficient. On the basis of free evidence, a preliminary investigation of criminal cases is conducted. The court's lack of special knowledge is recognized as the basis for the appointment of an expert examination. If the court has special knowledge, then it acts as an expert. Thus, the court combines the performance of judicial and expert functions, evalua-

tes its own expert opinion itself (§§ 244-256 of the Criminal Procedure Code of Germany). The above explains why there are no problems associated with the involvement of specialists in the judicial proceedings of these countries. Since only experts whose participation is provided by the parties or the court and whose opinion can be taken into account when making the final decision are considered as such [3, pp. 25-26, 37, 39-40].

In French legislation, entities conducting the investigation and consideration of a criminal case have the right to involve knowledgeable persons with special knowledge. This happens only when special knowledge is required to establish the circumstances of the crime, which these subjects do not possess. The French Code of Criminal Procedure of 1958 (as amended on 05.10.2015) establishes that special knowledge has a "technical" or "scientific" character.

In the criminal process of the Netherlands, this concept is associated not only with science or academic education, but also with information obtained as a result of experience [4, p. 94].

In France, as a general rule, legal issues do not belong to special ones in the framework of criminal proceedings. In the criminal process of the Netherlands, on the contrary, the participation of lawyers as experts is considered possible.

In the French criminal process, there are various forms of using special knowledge.

The current French Criminal Procedure Code of 1958 provides for expertise as one of the forms of using special knowledge. As in the domestic criminal process, the examination in France is the conduct of a study by an expert, the results of which draw up a conclusion.

In addition, it is possible to attract specialists who assist the judicial police and the investigating judge in carrying out the investigation.

For example, according to articles 60 and 77.1 of the Code of Criminal Procedure of France, if at the stage of inquiry there is an urgent need to carry out technical or scientific research, the judicial police officer has the right to attract specialists (*personnes qualifiées*) to conduct technical and scientific research.

As a third form of using special knowledge in the criminal process of France, it is possible to designate the involvement of a knowledgeable person for advisory assistance.

Thus, according to article 169 of the Code of Criminal Procedure of France, a specialist may be invited to the court to refute the results of an officially appointed examination or to report new information of a technical nature.

Another form of using special knowledge in criminal proceedings.

France is the involvement of a specialist by an investigating judge at the request of a party to provide an offi-

cial expert with information that requires special knowledge.

In the Netherlands, an expert is involved in the production of expertise, as well as on issues requiring special knowledge. The expert involved in the implementation of these types of activities draws up an appropriate conclusion.

As another form of using special knowledge, the participation of knowledgeable witnesses (*deskundige getuige*) in the process of investigating a criminal case should be called. These may be police officers or medical professionals.

In the Netherlands, at the request of the accused, a knowledgeable person with supervisory functions can participate in the examination and giving recommendations to an officially appointed expert (Part 4 of Article 228 of the Criminal Procedure Code of the Netherlands) or to analyze the expert's opinion received (Part 2 of Article 230 of the Criminal Procedure Code of the Netherlands) [5, pp. 32-35].

According to Article 71 of the Criminal Procedure Code of Ukraine, a specialist in criminal proceedings is a person with special knowledge and skills, and can provide advice, explanations, certificates and conclusions during pre-trial investigation and trial on issues requiring appropriate special knowledge and skills [6].

There is a similar practice in the Criminal Procedure Code of Estonia, where, according to Article 109, an individual is recognized as a specialist who has special knowledge that he applies in cases and in accordance with the procedure established by the Criminal Procedure Code, but is not involved in criminal proceedings as an expert [7].

At the same time, as well as in Ukraine, Estonia does not provide for a ban on the involvement of employees of an authorized unit of a law enforcement or special state body as a specialist.

The CPC of the Republic of Uzbekistan does not operate with the concepts of "expert" or "specialist", limiting itself only to the definition of persons who can be involved as an expert or specialist [8].

Thus, according to the Code of Criminal Procedure of the Republic of Uzbekistan, any individual with special knowledge in the field of science, technology, art or craft necessary to give an opinion can be called as an expert. According to article 10 of the Law "On Forensic Examination", a state forensic expert, an employee of another organization or another individual can act as a forensic expert. An employee of another organization performs a forensic examination in the order of execution of the order given to this organization by the body (person) who appointed it. Another individual brought to participate in the case as a forensic expert is not a member of the staff of any state forensic expert institution and performs a forensic examination in order to fulfill the instructions of the

body (person) who appointed it.

In turn, a specialist is called in to assist the inquirer, investigator, prosecutor and court in detecting and securing evidence during the investigation and trial. A doctor, a teacher and other persons with the necessary knowledge and skills can be called as a specialist.

It is impossible to determine in advance the level of special knowledge for a specialist and an expert. Meanwhile, the role and significance of the expert's expertise and conclusion, the scientific nature of their research and the motivation and validity of the conclusions set out in the conclusion ensure the priority of the conclusion compared to the opinion of a specialist [4, p.94].

In the criminal procedure legislation of the Republic of Kazakhstan, the institute of "specialist" in the criminal procedure legislation was present in 1997, and also in the Criminal Procedure Code of 2014.

Controversial and creating some legal problems is the second part of Article 80 of the Code of Criminal Procedure of the Republic of Kazakhstan, which fixes the provision that "An employee of an authorized subdivision of a law enforcement or special state body of the Republic of Kazakhstan may be involved as a specialist for conducting research and giving an opinion" [9].

This part was transferred from the Criminal Procedure Code of 1997, however, in a slightly modified form "1-1. If it is necessary to conduct research and obtain a conclusion in pre-trial proceedings, an employee of the authorized division of the internal affairs bodies of the Republic of Kazakhstan may be involved as a specialist. If the parties disagree with the expert's conclusion, the body conducting the criminal process appoints an expert examination" (part 1-1 of Article 84 of the CPC).

It should be noted that for all the time since the adoption of the current CPC, no changes and additions have been made to this article.

If we compare the Criminal Procedure Code of 1997 and 2014, then the current article 80 details the rights and obligations of a specialist.

Regarding the provisions of the second part of Article 80 of the CPC, we consider it necessary to note that the requirements for involving employees of an authorized law enforcement or special state body of the Republic of Kazakhstan as a specialist for conducting research and giving an opinion do not apply to the prosecutor's office and these employees are understood to be employees of the relevant departments of other law enforcement and special state bodies.

The prosecutor, like all other participants in the trial, is endowed with procedural rights by the current legislation.

Thus, the first part of Article 80 of the Code of Criminal Procedure of the Republic of Kazakhstan provides that a person who is not interested in the case, who has special knowledge necessary to assist in the collection,

research and evaluation of evidence by explaining to the participants of the criminal process the issues within his special competence, and also the use of scientific and technical means. Specialists are also a teacher, a psychologist involved in investigative and other procedural actions with the participation of a minor, as well as a doctor involved in investigative and other procedural actions, except in cases of appointment as an expert.

It should be noted that a specialist is not an expert, but an employee in a certain field of activity, a carrier of special knowledge.

According to Article 7 of the Code of Criminal Procedure of the Republic of Kazakhstan, the concept of "special knowledge" means knowledge that is not generally known in the criminal process, acquired by a person during professional training or practical activity, used to solve the tasks of criminal proceedings.

It follows from this that it should only be about the availability of special (industry) knowledge not related to jurisprudence, since all practicing lawyers are required to possess them.

Thus, only compliance with the totality of all the signs listed in the first part of Article 80 of the Code of Criminal Procedure of the Republic of Kazakhstan allows a specialist to legally participate in the production of investigative or judicial actions.

A number of scientific researches of Kyrgyz and Kazakh researchers are also talking about certain topical issues [10, pp. 243-248]

Conclusion. According to article 7 of the Universal Declaration of Human Rights, "All people are equal before the law and have the right, without any distinction, to equal protection of the law. All people have the right to equal protection from any discrimination that violates this Declaration and from any incitement to such discrimination."

The principle of equality of all (everyone) before the law is as follows: the criminal law must ensure equal protection of objects of equal social significance; within the framework of criminal law relations, all subjects of the same type must have equal status; the law assumes equality of grounds for criminal liability of all persons who have committed crimes and equality of criteria for individualization of applied criminal law measures.

The involvement of an expert/specialist and obtaining conclusions from them is necessary in accordance

with the principles of admissibility of evidence, which relates to the scope of regulation of domestic legislation.

The analysis shows that the possibility of attracting employees of an authorized law enforcement unit or a special state body as specialists does not contradict either international standards or domestic legislation.

Meanwhile, involvement is permissible if the functional purpose of such a unit is to carry out research based on the special knowledge and special competence of its employees. The activities of such a unit cannot be related to the implementation of supreme supervision over the observance of legality, pre-trial investigation and the maintenance of public prosecution in court.

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