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The Use of Experts in Criminal Proceedings in Romania. Inquisitorial Background and Future Trends

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ABSTRACT: This paper aims to study and expose by comparing the institution of scientific evidence and the use of the expert in criminal proceedings, starting from the structural differences in evidence legal framework between the adversarial system and the continental system, to comparing procedural details on the disposition, conduct or assessment of an expert report. A comparative analysis of different legal systems, pointing out their advantages and disadvantages, should not lead necessary to a legal transplant, but could generate new visions that can materialize in certain proposals to improve criminal proceedings legislation through innovative legislative solutions that are inspired both from adversarial and continental systems and taking into consideration all the rules of criminal procedure at Romanian internal level.

KEYWORDS: expert evidence, criminal proceedings, evidence law, scientific evidence

Introduction

Irrespective of the system of criminal procedural law, evidence is indisputably the central element of any criminal trial, as invariably the legality, reliability and the merits of the evidence are the only characteristics that can lead courts to substantiate any conviction or acquittal. Due to the importance of the institution of Evidence in criminal proceedings, there are often legal debates, especially in the doctrine of *common law* systems, about a so-called Law of Evidence.

In all states (with a continental or *common law* systems), problems arising from the legal regime of evidence and debates surrounding the institution of evidence in criminal proceedings are an endless hot topic.

From a global perspective, it can be stated that the differences between the two classic types of criminal proceedings, the inquisitorial and the adversarial, invariably affect the principles of evidence gathering, admissibility and evaluation.

Starting from these two classical systems of criminal procedural law, the criminal justice laws of certain states have developed and acquired their own defining characteristics.

In this sense, before presenting the differences of vision between the scientific evidence and the use of experts in criminal proceedings, starting from the two types of procedural law systems, we consider it useful to briefly present the Romanian criminal procedural legislation on expertise in criminal proceedings.

According to art. 172 Criminal procedure Code: "(1) An expert report is ordered when the opinion of an expert is also required for the ascertaining, clarification or assessment of facts or circumstances that have importance for finding the truth in a case. (2) An expert report shall be ordered under the terms of Art. 100, upon request or ex officio, by criminal investigation bodies, through a reasoned order, while during the trial, this is ordered by the court, through a reasoned court resolution. (3) An application for the development of an expert report has to be filed in writing, indicating the facts and circumstances subject to assessment and the objectives that need to be clarified by the expert. (4) An expert report can be conducted by official experts from specialist laboratories or institutions or by independent authorized experts from the country or from abroad, under the law. (5) A forensic medical

examination and expert report shall be conducted within forensic medical institutions. (6) An order of the criminal investigation bodies or a court resolution ordering the development of an expert report has to indicate the facts or circumstances that need to be confirmed, clarified and assessed by the expert, the objectives they have to meet, the time frame within which they have to develop the expert report, as well as the appointed institution or experts. (7) In strictly specialized areas, if specific knowledge or other such knowledge is necessary for the understanding of evidence, the court or criminal investigation bodies may request the opinion of specialists working within judicial bodies or of external ones. The provisions referring to the hearing of witnesses shall apply accordingly. (8) During the conducting of an expert report, independent authorized experts, appointed upon request by the parties or main trial subjects, may also participate. (9) When there is a danger related to the disappearance of evidence or to the change of a factual situation, or when the urgent clarification of facts or circumstances of the case is necessary, criminal investigation bodies may order, through a prosecutorial order, the conducting of a finding of fact. (10) Such fact finding is conducted by a specialist working with the judicial bodies or by an external one. (11) A forensic medical report has the value of a fact-finding report. (12) Following completion of a fact-finding report, when judicial bodies believe that an expert opinion is necessary or when the conclusions of the fact-finding report are challenged, the development of an expert report is ordered." Regarding the appointment of the expert, this is done according to art. 173 para. (1) Criminal Procedure Code of Romania that states: "*Experts are appointed by prosecutorial order or by court resolution*."

Expert evidence in both adversarial and inquisitorial systems

In continental law systems such as France, Germany and Italy, the court has a more active and leading role in the criminal process. The expert is a court-ordered assistant. The expert carries out his activity coordinated by the court and has a special legal statute. This statute is established to ensure that experts are neutral, as a battle of experts can be difficult to establish for a judge who does not have the necessary technical expertise to respond a factual question essential to the case. However, these systems require a mechanism to ensure the quality and swiftness of the expert report are working.

The inquisitorial criminal procedure is initiated and conducted by non-partisan officials. The parties have no role or at least no decisive role in this model of investigation and trial. On the contrary, the parties may not choose, even by consensus, to waive criminal proceedings.

The inquisitorial approach means that an expert is appointed by the court and that expert must meet requirements similar to those required of a judge in legal procedure. The contradictory approach, on the other hand, conceptually implies that the expert does not serve a common, objective purpose, but works according to a partisan logic. Terminologically, one could distinguish between the `expert appointed by the inquisitorial court` and a contradictory 'partisan expert.' The inquisitorial criminal procedure consists of a single investigation that is supposed to be objective, while the adversarial criminal procedure is based on two (or more) preliminary investigations conducted by the parties. Applying this theory to the gathering of expert information, the contradictory context requires each party to be able to obtain and produce its own expert opinions.

In the Bonisch case of 1985, the ECtHR found, as the Austrian Government pointed out, that the expert in the inquisitorial criminal case had been appointed by a court and was therefore 'formally conferred with the function of neutral and impartial assistant court' (ECtHR Bonisch 1985). The ECtHR immediately emphasizes the consequence of this finding: "for this reason, his statements must have had a greater weight than those of an 'expert witness' called (...) by the accused."

The confrontational approach in adversarial cases has the advantage of a full debate in public. However, it has been shown that two disadvantages are intrinsically linked to this system. The first is that an alternative expertise is not possible in all cases (Decaigny 2014, 165).

The other, which is another advantage of the inquisitorial system over the common law system, is that there may be situations such as when the material to be examined by the institutional expert is no longer available or is adequate for a second (or third) examination, or the person subject to the expert report may no longer be willing to cooperate. Secondly, the clash of ideas based on reports by partisan experts is a polarized debate, led and resolved by lawyers. The technical field of expert examination refers, by definition, to knowledge outside the familiarity of courts. In this way, it is very difficult for these professional and judges to assess the quality and reliability of the arguments and evidence that are presented by the expert (Decaigny 2014, 165).

Instead, in the inquisitorial system, the rule of participation of the defense in the expert procedure offers the possibility of a more constructive discussion, led by the expert appointed by the court and joined by partisan experts. In a pragmatic approach, it could be said that such a finding limited to a technical field is separate from the classic judicial finding, as research and debate between experts take place at the stage of drafting the expert report. In this type of expertise, the right to defense is respected if the defense is allowed to intervene at the moment of fact finding, i.e. during the procedure of the expertise.

The expert. Between witness and auxiliary of justice. Comparative analysis between adversarial and continental systems

As we have already shown, in the modern states there are two different systems of investing a court with the information or opinions of a legal expert, generated by the structural differences between the types of criminal proceedings between different states.

On the one hand, there is the system of conflicting expert witnesses adopted by the common law systems (ie, inter alia, the United Kingdom and the United States of America). Here the prosecutor and the accused each choose and appoint an expert. These experts perform their task not under the control and guidance of the court, but under the coordination of the party that appointed them. According to the legislation of these states, experts in criminal proceedings do not have a special statute and are treated, in principle, as witnesses. This is why, in UK and US, the expert is named expert witnesses (World Bank 2010, 25).

On the other hand, the second system is that of the expert appointed by the official court (expert or technical consultant in Italy, judicial expert or technician in France and *Sachverstaendiger* in Germany), a system that exists throughout the European continent (including, among many others) in the procedural laws of Italy, France and Germany. In continental European jurisprudence - strongly influenced by French jurisprudence, experts are commonly referred to as court assistants. In essence, this is just another word for 'assistant' (in German the term is Richtergehilfe) and therefore experts have their own special statute (in French doctrine, for example, it is argued that 'experts are not witnesses') (Pradel 2006, 178).

Since the experts are appointed by the court (or by the investigating judge, insofar as such a judge is responsible for the preliminary phase of the trial, in Romania they are appointed by the prosecutor before sending the case to court), it is argued that they must to carry out their mission under the leadership of the court and to respect the field of research in which the court has specifically required them, usually through a set of questions addressed to the expert, to carry out their work.

Although the systems influenced by French law have mainly chosen the official expert and the common law systems are based on expert witnesses, in fact things are more complicated. On the one hand, there are very specific cases in French law where a rule

provides for a system of conflicting experts: for fraud and forgery. On the other hand, a fact too little discussed by lawyers in the US, that the US Federal Evidence Rules explicitly provide for the possibility of appointing experts directly to court under FRE 706. For example, in US criminal cases, once the guilt of the accused has been established, the court frequently requests to obtain information about his mental or physical health before handing down the sentence. For this matter an expert is called to examine the defendant and this expert is generally appointed and paid by the court (World Bank 2010, 26).

The rol of the judicial expert in criminal proceedings in Romania

Article 34 Criminal Procedure Code of Romania states that `*In addition to the participants listed under Art. 33, the following are litigants: witnesses, experts, interpreters, procedural agents, specialized fact-finding bodies, as well as any other persons or bodies set by the law as having specific rights, obligations and prerogatives in criminal judicial proceedings*`. Therefore, the expert is in the category of procedural subjects together with the witness, interpreter or other persons selected by law, not being included in a special category.

The absence of a special statute of the expert in criminal proceedings may be attributed to the principle of free evaluation of evidence. Given that the evidence in the criminal process does not have a pre-established value, neither the expert report nor the expert does not seem to occupy a special statute in the legal framework of evidence. However, as already mentioned, the role of the expert is a major one, especially in the case of economic crimes in which it has the role of clarifying essential factual elements in relation to the constituent elements of the investigated crimes.

As we have shown in this paper, the legal status of the expert is different in criminal proceedings, depending on the *common law* or continental influences that have an impact on the criminal procedural regulations in a particular state. If in common law systems the expert has the status of a mere witness, in the continental states it has been ruled that the expert has a more official status, that of auxiliary justice.

Regarding the regulations in Romania, it can be deduced from the content of art. 172 para. (4) Criminal Procedure Code of Romania that the expertise procedure may be performed only by official experts from laboratories or specialized institutions or by independent experts authorized in the country or abroad, under the law, which shows that the lack of authorization of a specialist is an incapacity for this in carrying out an expertise in the criminal process. In retrospect, similar to the old regulation, the scope of persons who can perform expertise is restricted only to official and authorized experts under the law.

There is a difference regarding the technical-scientific finding made by a specialist working within or outside the judiciary, and it is not necessary to obtain an authorization, as in the case of the expert. This differentiation is providential especially in the situation of investigating economic crimes, such as tax fraud, in which often the damage to the state budget is established by reports of technical and scientific findings.

According to a definition stated by certain accounting authors, "*The concept of expertise is a thorough research, with a technical character, made by an expert, high class specialist, in a certain field. Expertise is an attribute of science, and the expert was, is and will be the scientist*" (Oncioiu, Oncioiu and Chiriță 2017, 5).

It was also stated that "*despite their specialization and professional experience, neither the expert nor the specialist can receive (by entrustment or acquisition) specific attributions to the subjects exercising judicial functions - judicial bodies*" (Zarafiu 2015, 205).

Regarding the quality of the civil servant expert, it was established by the High Court of Cassation and Justice (HCCJ, Decision no. 20/2014 regarding the examination of the notification formulated by the Craiova Court of Appeal - Criminal Section and for cases with minors in File no. / 95/2014 by which, based on Article 475 of the Code of Criminal

Procedure, the High Court of Cassation and Justice is requested to issue a preliminary ruling to resolve in principle the interpretation of the provisions of Article 175 para. (1) and (2) of the Criminal Code on civil servants, respectively if the judicial expert is a civil servant within the meaning of paragraph (1) or paragraph (2), published in the Official Gazette, Part I No. 766 of October 22, 2014) that the technical judicial expert is civil servant in accordance with the provisions of art. 175 para. (2) first sentence C. pen.

In the criminal procedure doctrine of Romania, several conceptions have emerged regarding the procedural position of the expert (Mateuț 2019, 645).

As a preliminary point, we note that the expert is regarded as a scientific witness, a statement based on jurisprudence (ECtHR Bonisch 1985) ECtHR which includes the expert under the broader vault of the witness in criminal proceedings, thus applying to the expert all the rights and obligations of the witness, even if the expert does not report what he saw or felt *ex propriis sensibus*, his role being only to clarify certain scientific issues regarding the specific issue in which his opinion is requested.

In addition, the expert is also considered an auxiliary of justice, as he conducts investigations specific to the judiciary, but in order to clarify circumstances that require expertise, although he cannot become an investigator or receive specific powers of the judiciary (Mateuț 2019, 645).

It has also been shown that the expert is in fact a judge of the circumstances he is required to clarify in the process, through the scientific information he has, but the expert's judgment does not in any way oblige the judiciary to make a decision, as the evidence has no pre-established value (Mateuț 2019, 645).

According to another point of view, it is argued that the expert has his own procedural position, *sui generis*, being rather an occasional procedural subject, when the clarification of some essential aspects of the case requires the opinion of a person who has specialized knowledge in a particular field. In the matter of economic crimes, the fields of accounting, tax or even digitalization are taken into account (Mateuț 2019, 645).

In Romania, the Code of Criminal Procedure is completed with Ordinance no. 2/2000 regarding the organization of the activity of judicial and extrajudicial technical expertise that orders the way of acquiring the quality of expert and the activity of judicial and extrajudicial technical expertise.

Compared to the officiality of the expertise procedure, as well as to the possibility of appointing an expert party, it is found that in Romania regarding the disposition of an expert report has both *common law* influences (considering the appointment of the partisan expert of the party together with the institutional expert) and mainly influences of type continental in view of the conditions of the authorization which a person must hold in order to be an expert in a particular case.

We consider that the expert-party must effectively participate in conducting a forensic examination, ordered in a criminal case, and his point of view in relation to the expert report represents a proof in criminal proceeding.

Conclusions

The criminal process in Romania, being strongly influenced at historical level by the continental type systems, presents structural differences compared to the criminal procedural systems in the *common law*. However, one can say that there are certain provisions or practices that, passed through the filter of harmonization with Romanian legislation that could lead to proposals to improve legislation. When we say this, we are referring in particular to the contradiction in gathering evidence throughout expertise procedure or the possibility to effectively challenge certain evidence in criminal proceedings.

Our view is that the entire institution of appointing an expert in criminal proceedings in Romania should be reformed. The legislator must consider expanding by law means the number of people that can have the capacity of expert in a criminal trial, given the accelerated technological developments in society, while respecting certain guarantees and continental requirements.

Furthermore, the system for evaluating an expert report should be reformed by adapting from the *common law* system the oral and contradictory nature by which an expert's opinion is assessed in a criminal trial. Beyond the technical language of expert reports in criminal proceedings, the hearing of the expert should be the rule in every criminal trial and his conclusions should be expressed in the least technical way so that they can be understood by the parties.

In addition, we believe that the role of the expert-party should be better defined by the Romanian legislator, given that the criminal procedure law does not mention what happens to the expert-party in making the supplement and it would be normal for him to actually participate in this activity.

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