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The Report of Expertise in the Criminal Process, between Reality and Possibility

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Abstract: In judicial processes, the task of judicial experts (hereinafter – expert) is to contribute to the explanation of some issues indispensable to the solution of the case. The expert has an important role, and in numerous cases, the forensic expert report is a decisive means of evidence when formulating the elements of the court decision. Therefore, the activity of the expert must comply with the general principles that underpin any judicial procedure and, first, the fairness of the process. As in the administration of other means of evidence, both in civil matters and in criminal matters, the states are obliged to organize the expertise in such a way that they respect the principles of adversity and equality of arms. The exact ignorance of the object of the judicial expertise leads to the incorrect orientation of the criminal investigation bodies and the court if an expertise is ordered, since the object of each type of judicial expertise is not always known (technical, forensic, medico-legal, accounting) or of each type of forensic expertise (chemical, trajectory, ballistic, etc.). Also, not knowing the object of the judicial expertise also leads to the confusion of the expertise with various purely procedural actions (for example, the experiment within the investigation), the unfounded disposition or rejection of the expertise, its replacement with other ways of knowing the opinion of some specialists - for example, requesting a technical-scientific finding or a simple technical opinion.

Keywords: judicial experts, legal principles, judicial practice, expertise, proceedings

1. Introduction

In judicial practice, sometimes judicial bodies are faced with problems that they cannot solve by themselves, thus requiring the knowledge of specialists in the fields of science, art, technology, etc. In such cases, the law allows and sometimes even obliges them to resort to the help of specialists. Therefore, whenever, to clarify some circumstances necessary to elucidate the case, the judicial bodies need the opinion of people who have specialized knowledge, they appoint one or more experts, also establishing the problems that need to be solved, on which they are to be they pronounce. Normative acts refer to these activities carried out by specialists by the term 'expertise'. Since they take place within a process, they are regulated by the legislator under the name of 'judicial expertise'.

Expertise is an evidentiary procedure, i.e., a way to obtain evidence. The means of proof are limitedly listed in art. 64 para. 1 Romanian Criminal Procedure Code and are: the statements of the accused or the defendant, the statements of the injured party, the civil party and the civilly responsible party, witness statements, inscriptions, audio or video recordings, photographs, material evidence, technical-scientific

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findings, medico-legal findings, and expertise, only through these means of evidence can the evidence be obtained in the criminal process (Chirița, 2008).

2. Body of Paper

Expertise can be defined as the activity of researching some factual circumstances, necessary to establish the objective truth in the case subject to resolution by an expert, through knowledge specific to each specialty, activity carried out at the request of the judicial body in the situation where it cannot find out on its own that factual circumstance (Constantin, 2000).

The term object of the expertise has several meanings, these being: the object of the expertise in its meaning, the actual, material object of the expertise and the object of the expertise report, i.e., the objectives of a concrete case of the expertise, the questions to which the expert must answer. Knowing the object of judicial expertise is of particular importance both theoretically and practically.

The generic object of judicial expertise is shown in the Criminal Procedure Code, which, in art. 116, stipulates: "when in order to clarify some facts or circumstances of the case, in order to find out the truth, the knowledge of an expert is necessary, the criminal investigation body or the court orders, upon request or ex officio, the performance of an expertise". Therefore, the object of the expertise claims a certain scientific, technical, or other competence, apart from the legal one which belongs exclusively to the judicial bodies (Dragomirescu, 2003).

Each expertise has a specific object that makes it possible to delimit the type of expertise requested and which is to be carried out by a specific category of specialists to clarify the factual circumstances of the case. The specific object of the expertise refers to the expertized objects, carrying information, in relation to which the problem of establishing some background facts and circumstances arises, for example, in the case of medico-legal expertise, the material object is mainly the human body of the examination of which allows the establishment of the state of mental health, the examination of biological secretions, etc., in the case of forensic expertise, the material objects are those on which there are traces, objects used in the commission of the crime, firearms and ammunition, drugs, etc.

Through an ordinance in the criminal investigation phase or through a conclusion in the trial phase, the subject matter is made known to the expert, on which occasion the questions to which he is going to answer are brought to his attention (art. 118 paragraph 1 and art. 113 paragraph 1 of Romanian Criminal Procedure Code - RCPC.). The questions formulated by the judicial bodies must consider the existing technical-scientific possibilities. Also, certain substantive and formal conditions for formulating the questions must be taken into account, such as: they must be formulated in a clear and precise language, they must have a logical connection between them, the terms used must not be ambiguous or inappropriate, the form of formulation to oblige a definite answer, positive or negative, not to oblige the expert to draw conclusions that do not belong to his specialty, not to request the solution of problems that are the competence of the judicial bodies, not to request the expert to make assessments with regarding the legal framework or the form of guilt.

According to art. 116 RCPC., "To clarify some facts or circumstances of the case, in order to find out the truth, the knowledge of an expert is necessary, the criminal investigation body or the court orders, upon request or ex officio, the performance of an expertise. "Therefore, the expertise can be ordered during the criminal prosecution by the criminal prosecution body, by reasoned resolution before the initiation of the criminal action and by the reasoned ordinance after the initiation of the criminal action,

according to the majority opinion of the doctrine, or in the phase by the judgment, by the court, through a conclusion.

The use of expertise is limited, in the sense that recourse to it is usually optional, its administration being left to the discretion of the judicial bodies. In the criminal process, the parties can also have their say regarding the necessity and object of the expertise. The judicial body can freely assess whether an expert opinion is admissible and conclusive in a specific case (Hecser & Hadareanu, 1999). But this freedom must be exercised with great discernment, the judicial bodies being obliged to judiciously assess the usefulness of this evidentiary procedure. Thus, its use should not be abused in the sense of being admitted with great ease when it is not necessary, but also not being removed in the wrong way.

However, there are cases in which the expertise is mandatory, so that the judicial body must resort to this evidentiary procedure, without having the right of appreciation regarding its necessity. Thus, art. 117 RCPC. provides that the expertise is mandatory in the following situations:

- in the case of the particularly serious crime of murder.
- when the criminal investigation body or the court has doubts about the mental state of the accused or the defendant (Stancu, 2014); if the causes of death have not been established through a previous medico-legal finding.

In the first two cases, a mandatory psychiatric examination is performed in a specialized unit. The internment of the expert person is ordered by the research bodies, with the approval of the prosecutor or by the court. The provision of internment is mandatory and in case of opposition, it is enforced by the police.

In the case of mandatory expertise, the court must also analyze the requests of the parties regarding the performance of the expertise and order the internment of the defendant in a specialized health unit, for his examination by a competent commission. In the case of the mandatory psychiatric examination, both the first examination and the additional ones must be carried out, according to art. 117 para. 2 RCPC., in specialized health institutions, under conditions of internment of the accused or the defendant, by psychiatrists.

Apart from the situations provided by art. 117 of the Code of Criminal Procedure, the expertise is also mandatory in the case of some procedural institutions, for example the suspension of the criminal prosecution or the postponement or interruption of the execution of the sentence (Stancu, 2017). Thus, art. 239 RCPC. stipulates the obligation to carry out a medical examination if the accused or the defendant accuses a serious illness during the criminal investigation or trial, and which prevents him from taking part in the trial. For this purpose, the criminal investigation body submits the file to the prosecutor, with the proposal to suspend the criminal prosecution, following which he will issue an ordinance. According to art. 453 para. 1 of the Penal Code, in the case of a person sentenced to prison or life imprisonment, it is established through a medico-legal examination that he suffers from an illness that makes it impossible for him to serve the sentence, it can be postponed. Also, to postpone or interrupt the execution of the measure of internment in a re-education center, a medico-legal expertise will be compulsorily carried out, according to the provisions of art. 491' of RCPC.

The cases of mandatory expertise from articles 239, 453, 455 and 491 of the RCPC. presents a special content, representing a condition for the implementation of some procedural institutions, such as the suspension of the criminal prosecution or the postponement of the execution of the sentence, unlike the mandatory expertise provided by art. 117 of the Penal Code, which are means of evidence that prove a

fact or circumstance that is part of the probation for the respective case, helping to establish the truth and the proper resolution of the case.

Article 99 paragraph 2 of the Criminal Code provides another case of mandatory expertise, stipulating that "the minor who is between 14-16 years old is criminally responsible, only if it is proven that he committed the act with discernment". Thus, there is the obligation of the judicial bodies to order the performance of a psychiatric expertise by the specialized medical units and to propose the appropriate legal measures, depending on the conclusions of the expertise (Stancu, Measuring Crime, 2019).

Contradiction is a fundamental principle of criminal procedural law, based on this principle the parties can formulate requests, propose, and administer evidence and make conclusions regarding all factual and legal issues on which the correct resolution of the trial depends. Thus, adversity allows the parties in litigation to actively participate in the presentation, argumentation and proof of their rights or defenses during the trial, having the right to discuss and combat the claims made by each of them, as well as to present their point of view. view on the reasons of the court for the purpose of establishing the truth and pronouncing a legal and thorough decision.

In matters of expertise, especially in criminal matters, the Court imposes on the states the obligation that the accused can request the judge to debate the contradictory report of the expertise (Ionescu, 2007), including through the possibility of obtaining the hearing as a witness of a person, likely to challenge the expert's assessment (Ionescu, 1999). Thus, the ECHR concluded, in the case of Bonisch v. Austria (May 6, 1985), a violation of Article 6(1), because the expert summoned by the defense did not benefit from the same prerogatives as the expert appointed by the prosecution. It should be noted that the Romanian system of forensic expertise is in a similar situation, in the sense that the expert cited by the defense must be approved/approved/appointed by the judicial bodies, in some situations by the prosecution/prosecutor (see the provisions art.7 OG 75/2000 and L488/2002), does not benefit from the same prerogatives as the official forensic expert (see the provisions of art.7 OG 75/2000 and L488/2002), having only the right to formulate observations regarding objectives, the examined materials, the method of carrying out the expertise and objections regarding the expertise report, the results, the conclusions. In this case, if the prosecutor presents a forensic expert report drawn up by an official forensic expert, then the party must also have the right to an independent forensic expert and present a forensic expert report drawn up by him, which has the same prerogatives as the first. Currently, this is not possible in Romania.

Art. 124 para. (2) provides that "when it is considered necessary, the expert is asked for additional clarifications in writing, or he is ordered to be called to give verbal explanations on the expert report. In this case, the hearing of the expert is done according to the provisions regarding the hearing of witnesses". Thus, the experts are heard when they must give additional clarifications in front of the written expert report submitted to the file (Lazar, 2009).

Depending on the execution procedure, a distinction is made between:

1. the apparently non-contradictory expertise, such as the case of medico-legal and forensic expertise, in which case the criminal investigation body or the court that orders the expertise to be carried out by means of the order or conclusion communicates to the specialized institute by addressing the act of disposition that also includes the formulation of the objectives and the term of execution, together with the case file. The management of the specialized institute appoints the expert, and each of the parties has the right to request that an expert recommended by it participate in the performance of the expertise.

Contradictory expertise, such as, for example, technical or accounting expertise, in the situation where, according to art. 120 RCPC., the criminal investigation body or the court, when it orders the performance of the expertise, sets a deadline to which the parties and the expert are called. At this term, the parties and the expert are informed about the object of the expertise and the questions to which the expert must answer, and they are informed that they have the right to make observations regarding these questions and that they can request their modification or completion. The parties are also informed that they have the right to request the appointment of an expert recommended by each of them to participate in the expert examination. After examining the requests and objections of the parties and the expert, the criminal investigation body or the court will give the expert the term in which he must carry out the expertise, informing him at the same time if the parties will also participate in its performance. Thus, the adversarial nature of the expertise is ensured by the rights provided in art. 120. The expert report is subject to the contradictory discussion of the parties, which represents an application of the principle of adversariality.

A special problem can arise if the criminal prosecution is started in rem. According to art. 116 RCPC., the performance of an expertise, of whatever nature it may be, can only be ordered by the court, during the trial, or by the criminal investigation body, which implicitly assumes that the criminal investigation has previously been started in that case, as it appears from art. 201 para. 1 RCPC ("Criminal prosecution is carried out by prosecutors and by criminal investigation bodies").

The situation in which the criminal investigation was started in person does not present difficulties, since, by definition, the identity of the accused or the defendant is known, and then the rules presented above will apply. On the contrary, if the criminal prosecution was started in consideration of the fact provided by the criminal law, that is in rem, although there is no accused or defendant in the case, there may be injured parties. The civil party or the civilly responsible party cannot be talked about yet, in this phase of the criminal process, since the accused or the defendant in the case is missing, since, according to the provisions of art. 15 para. 1 RCPC, the injured person can be a civil party against the accused or the defendant and the civilly responsible person, and the latter, according to art. 24 para. 3 RCPC., is called to answer only for the damages caused by the act of the accused or the defendant. However, even in this case, an expertise can be ordered by the criminal investigation body, since the condition implicitly provided by art. 116 RCPC., namely that the criminal prosecution in the case should already be started, even only in rem.

In this last case, namely that of starting the criminal prosecution in rem, to comply with the requirements provided by art. 120 para. 1 RCPC., the criminal investigation body, when setting the term, will have to call, for the review of the procedural rights provided by art. 120 para. 2-3 RCPC., only the injured party, there being no accused or defendant in the case and therefore not being able to speak of the establishment of a civil party or a civilly responsible party.

There is the question of the objectionability of the expertise under these conditions, the legality of carrying out such an expertise. We consider that the order by the criminal investigation bodies to carry out an expertise under these conditions is legal, as it will produce full procedural effects, in the face of all persons, therefore including the face of those who will later acquire the status of accused or defendant in the process. The opposability of the expertise before these persons is also deduced from the obligation of the accused or the defendant to take the procedure from the stage in which it was at the time of acquiring the procedural qualities shown above.

It could be argued that this violates the rights of the accused or the defendant provided in art. 120 RCPC., but this apparent violation can be removed on the occasion of the presentation of the criminal

prosecution material, because they have, according to art. 250-252 RCPC., the right to make new requests, including the administration of new evidence, for example the performance of an expertise supplement according to art. 124 RCPC., or, if necessary, even a new expertise, according to art. 125 RCPC (Mateuț, 2004).

There are situations when experts, although they meet all the legal conditions to be called experts, become incompatible due to a functional quality or their position in the process. They are incompatible with being experts, due to their functional qualities, those persons who perform in the respective case work related to their official function, according to art. 54 RCPC. namely: the judge, the prosecutor who presents conclusions in court and the defense attorney. Due to their procedural position, the defendant, the injured party, the witness, or any other parties who would be interested in the respective case are incompatible to be experts.

In accordance with Art. 11 of the Romanian Government Ordinance no. 65/1994, accounting experts cannot perform work for economic agents or institutions where they are employees, nor for those with whom they are in contractual relations or are in competition.

According to art. 54 para. 2 RCPC, "the quality of an expert is incompatible with that of a witness in the same case; the quality of witness has priority", so that if the appointed expert personally knows certain factual circumstances of the case, so in the situation where he can be heard as a witness, he can no longer be appointed as an expert in the same case. This limitation of the general capacity to be an expert is justified by the presumption of the lack of objectivity due to those considered incompatible (Mateuț, 2004).

In RCPC the modalities for solving situations of incompatibility of experts are established, art. 54 RCPC stipulating that the rules regarding cases of incompatibility, abstention and recusal also apply to experts. Therefore, there are two ways to remove the incompatibility: abstaining, this being the way by which the person who knows that he is in any of the cases of incompatibility communicates the fact that he understands not to participate in the criminal process and recusal, the way by which, in in the absence of a declaration of abstention, any part of the criminal process requires that the person in any of the cases of incompatibility be stopped from participating in the criminal process (Neagu, 1992)

At the European level, there are several types of experts who are called upon to resolve cases. They either belong to specialized laboratories, or they are independent experts registered or not on national lists and subject to periodic evaluations, or they are only qualified persons and not experts in the strict sense.

In Great Britain, private laboratories are used exclusively, and in Sweden, public laboratories are used exclusively. In many countries, such as Spain, Belgium, Romania, etc., a middle solution is resorted to, calling on both public laboratories and private experts.

According to the existing regulations at the national level, the laboratories must obtain a series of accreditations. Thus, in the case of France and Great Britain, the certification of laboratories by a specially qualified commission is mandatory so that they can carry out genetic analyses.

Regarding the contestation of scientific evidence by the defense, in some countries it can be contested from the investigation stage, or the probative value of the services provided by a certain expert can be contested (the case of Slovakia). The results of the expertise can also be disputed (the example of Romania, Spain, Denmark) or a new expertise or additional examinations can be requested (the example of Romania).

Accreditation of laboratories and institutes providing expertise services is a guarantee of their quality. To define the status of the expert, a common definition of the expert must first be established, since the criteria that must be met to obtain this status differ from one legal system to another.

In some countries, the status of an expert is defined at the legislative level, while in others it is determined by belonging to a professional category or to a specialized institution. At the same time, there is the possibility of using the services of qualified people and not necessarily experts.

European states differ from the point of view of the method of granting expert status in a certain field. It can be granted either by an independent institution, or by recognition by the judicial authorities, or by fulfilling certain criteria or by being registered on an official list.

In Germany there are lists of experts, but they are informal and are created at the local level. In the civil field, there is a list of experts made up by the Chamber of Commerce and Industry. In this country, nor in France, as in the UK, there are no special councils for the accreditation of experts or very strict professional rules, in the UK the status of an expert being granted following the evaluation carried out by a specialized commission.

In Great Britain, for nine years, there has been a list of experts accredited to provide expert services to the Police. There are 26 fields for which experts can be listed, such as DNA, fiber analysis, etc. Once on the list, there are no geographical limits for those experts. in Great Britain, the status of an expert is granted following the evaluation carried out by a specialized commission.

In the United States of America, the principle of certification is that of professional experience, but also of professional training. For example, for the forensic expertise of documents, prior training in physics and chemistry is necessary and, in principle, affiliation to one of the professional associations. Experts can work alongside different judicial bodies (e.g. expert alongside the Chief Constable of the South District). There is a tendency not to expressly require additional studies, but there has been, however, a concentration of experts on specialized fields, in Professional Associations, so that in most American states, the appointment as an expert can be made at the proposal of the parties, but in general the actual participation is conditioned by the so-called credentials - which attest to the professional experience, the professional past, the quality of membership in one of the specialized associations. In certain fields, specialized studies are not required, but only proof of sufficient knowledge acquired through experience in the respective field is required. On the other hand, in certain states, expert opinions are subject to specific standards in their assessment, the most common being the Frye standard and the Daubert standard. Even if currently the use of the Daubert standard is the rule in the Federal Court and in more than half of the American states, the Frye standard is used in some states such as Arizona, California, Florida, Illinois, New York, Pennsylvania, and Washington.

The expert's report is a set of written notes and a conclusion that are submitted to the case file and that will constitute the support for cross examining. During this procedure, both the technical and methodological arguments, as well as the scientific justification of the solution adopted by the expert to obtain the conclusion, will be discussed. The difference with the Romanian system can be observed, which does not require the presence of the expert in court and in which the expert does not generally participate in the meeting, the objections of the parties being communicated in writing to answer them in the same way. However, as I mentioned above, the expert can be heard according to the rules provided for witnesses, in case additional clarifications are needed, according to art. 124 RCPC.

Also in the United States, the admissibility or inadmissibility of certain findings of the expert is the attribute of the judge, but the correlation of the conclusions with the rest of the case takes place only through the parties and is an attribute left to the appreciation of the jurors, the judge being only the

"scientific gatekeeper of the conclusions", in the sense that a certain reasonableness, accessibility and scientific credibility of the expertise is required (Groza & Mixich, 2003, pp. 41-42).

The creation of a European expert status implies the definition of criteria for its establishment. If an expert has to provide expertise before a court in another country, following other procedures, problems may arise.

In France, the status of judicial expert is not regulated, this status being assessed on a case-by-case basis, depending on the specialized field. The common elements are the rules of morality and independence that must be respected. According to art. 157 RCPC. French, experts are natural or legal persons who appear on the national list of the Court of Cassation or on the lists of the Courts of Appeal. As an exception, by reasoned decision, judicial bodies can appoint experts who are not on these lists.

Regarding the Anglo-Saxon system (USA, England, and Wales), unlike the continental system adopted in most of Europe, including Romania, the report written by the expert cannot be used as evidence, it only expresses a point of the opinion of the expert regarding a certain specialized issue, is considered hearsay evidence, the indirect evidence, which is inadmissible, being incidental to the rule of prohibition of hearsay evidence. In order for the expert report to become a means of evidence, the expert must give a direct statement before the court, as a witness, being subject to a procedure called cross-examination, cross-examining (interrogation of the witness proposed by the opposing party), after it is subjected to a direct-examination procedure (known as examination-in-chief in England, Australia, Canada, India and Pakistan) (formulation of questions by the party who proposed the witness), which are techniques of listening to witnesses, being able to questions are asked directly to the expert, by all parties involved in the process. Regarding cross-examination, in the United States of America only questions related to the facts revealed during the direct examination (direct examination) can be formulated, while in England, Australia and Canada this rule does not apply, being able formulate any questions relevant to the issues discussed in the process (Vaduva, 2005, pp. 159-161)

Also, in Anglo-Saxon law there is no limitation of experts. In the case of inquisitorial systems, the entire file is coordinated by the investigating judge, but imbalances may appear caused by the parties' access to expertise.

Within the French legal system, the expert's report can be subjected to the examination of another expert, thus providing a new guarantee of its correctness.

In the criminal process, the analysis provided by the expert should not be considered an absolute truth but should be subject to the evaluation of the competent authorities. From a legal point of view, scientific evidence does not have a higher probative value than other means of evidence.

Article 6 of the European Convention on Human Rights enshrines the right to a fair trial, art. 6 § 1 of the Convention providing that: "Every person has the right to be tried fairly", and Article 6 § 3 (d) of the Convention providing that "The party has the following minimum rights: (d) to interrogate or contribute to the interrogation of the prosecution witnesses and to obtain the summons and interrogation of the defense witnesses under the same conditions as the prosecution witnesses". Thus, the right to a fair trial requires, among other things, the observance of the principle of adversarial and ensuring the right of the accused to question the witnesses in the trial.

Regarding adversarial, in matters of expertise, especially in criminal matters, the Court imposes on the states the obligation that the accused can request the judge to debate the adversarial nature of the expert report, including through the possibility of obtaining the hearing as a witness of a person, likely to fight expert assessment (Bullier & Pansier, 8 July 1993, p. 886).

Another indispensable condition for a fair trial is ensuring the right of the accused to question the witnesses in the trial. In art. 6 para. 3 lit. d of the Convention, the notion of "witnesses" is used without any specification being made regarding the "persons who can be included in this notion", if it should be interpreted "*stricto sensu*" or, on the contrary, it should be given a more meaningful meaning wide, integrating here not only actual witnesses (*stricto sensu*) but also other categories of people, such as experts. The European Court of Human Rights chose, motivated, the path of extensive interpretation of the notion of "witness", used by art. 6 para. 3 lit. d of the Convention, considering that the right written in this text consists in the possibility that must be granted to the accused to contest a testimony made against him and to be able to ask to be heard witnesses to exonerate him, under the same conditions as the prosecution's witnesses are heard. So, this right constitutes an application of the "principle of adversarial" in the criminal process and, at the same time, an important component of the right to a fair trial. The same was decided regarding the "experts", especially when, for example, a public action is taken following the report that he (the expert) drew up. The legal justification for this solution (relating to experts) stated that the expert "approaches the legal position of a prosecution witness". And it was further emphasized that the hearing of the expert does not contravene the provisions of the Convention, and the principle of "equality of arms" requires a "balance" between this hearing and that of the persons who, in any form, can be heard. See, in this sense, ECtHR, decision of June 2, 1986, in the case of Bonisch v. Austria (Stancu A. I., 21-23 Nov 2013). This does not mean, however, that the parties to a trial have the right to obtain the administration of any evidence, the Court and the Commission leaving a wide margin of appreciation to the national judge to verify the appropriateness and necessity of an evidence, going as far as admitting the prohibition to try to prove some facts.

Regarding the relevant ECHR case law in terms of expertise, we will try to give a summary of some cases. Thus, in the case of Bonisch v. Austria (May 6, 1985), the accused's request for an expert opinion formulated during the criminal investigation was rejected, thus violating his right to a fair trial provided by art. 6 para. 1 of Convention as well as the right to defense, since the technical-scientific findings constituted evidence against the accused, without him having been given the opportunity to administer contrary evidence. However, by rejecting the request, the provisions of article 66 paragraph 2 of the Code of Criminal Procedure were violated, according to which if there is evidence of guilt, the accused or the defendant has the right to prove their lack of foundation, which the accused was not allowed to do. In this case, the Court ruled that "the fact that the plaintiff did not have the opportunity to propose an expert to contradict the conclusions presented by the expert proposed by the prosecutor" represents a violation of art. 6 para. (1) of the Convention (Decision of 6.05.1985, paragraphs 33-35).

In the case of Mirilashvili v. Russia no. 6293/04, December 11, 1998), the Strasbourg Court reiterated that ``it is the judge's freedom to decide on the competence of an expert witness appointed by the party'' and found that the party's expert was only allowed to express opinions regarding the conclusions of the experts appointed by the prosecutor to carry out the audio expertise (similar to the system in Romania, art. 1 and 7 of the Government Ordinance no. 75 / 2000 and Law no. 488/2002 in which the forensic expertise is carried out only by official experts, in state institutes, and the authorized forensic expert can only make observations on the expert report) and was not allowed to participate directly in its performance. It is noticeable that it is inadmissible for the State to take and expertise evidence, investigate, judge, and condemn a person in a criminal trial without the latter having the opportunity to properly defend himself according to the principle of equality of arms in the Convention (art. 6).

The Court decided the absence of a violation of art. 6 in an extremely interesting case, Vernon v. Great Britain case no. 38753/97 of September 14, 1999. In fact, because of a serious traffic accident, the

plaintiff suffered serious mental problems that led, among other things, to his divorce. The plaintiff brought an action for damages against the driver responsible for the accident, and during the trial produced as evidence a psychiatric examination, which revealed complex and serious mental health problems, obtaining the sum of 1.3 million pounds as compensation. To be able to use the doctor's report, the plaintiff was forced, according to the precepts of British law, to waive the client's privilege, which made that report secret. Later, during the divorce process of the plaintiff, in connection with the attribution of raising the children, the defendant brought as evidence another psychiatric report, for which he also renounced his secret character, in which it is stated that his state of health has improved significant. Coming into possession of this document, through unknown means, the driver guilty of the traffic accident obtained the reopening of the first trial, after which he obtained the reduction of the amount owed to "only" 600,000 pounds. The plaintiff complained to the Court about the fact that the national judge used the second psychiatric expert report, violating the client's privilege and without his consent. However, the Court rejected the complaint, on the grounds that the national court did not exceed the limits of the margin of appreciation, to determine the usefulness and the equality of evidence, under the conditions in which the plaintiff waived the respective privilege in both procedures.

In the Mantovanelli v. France case (no. 21497/93, of March 18, 1997), the Court recalls that one of the elements of a fair procedure is its contradictory nature. Each party has the right not only to be aware of all the elements necessary to support their claims, but also to be aware of and discuss any act of the file in the presence of the judge, with the aim of helping or influencing him to decide. From this point of view, the Court considers that the respect for adversarial does not necessarily impose the right for the parties to participate with an expert in carrying out the expertise, but it imposes the possibility of contesting his conclusions before the court. The Court emphasizes that the field of expertise is a technical one, unknown to the judge who will naturally lean towards giving credence to the expert report, so the possibility to discuss it adversarial is essential for the fairness of the procedure (Stancu, 2013).

In the case of Ubach Mortes v. Andora (no. 46253/99, of May 4, 2000), the Court decided that the only fact that the opposing party had a longer period than the accused to produce an expertise to submit before the court is not enough to reach the conclusion of a violation of the right to equality of arms in a procedure. This is even more so when the accused presents his own expertise in front of the judge, despite the shorter time frame he benefited from.

Currently, before the ECHR there is a case regarding the legality of the mandatory opinion that must be given by the Superior Medico-Legal Commission in case of contradictory conclusions of different medico-legal experts. Thus, the question arises whether the obligation of this opinion does not somehow contravene the principle of the separation of powers in the state, the opinion having an administrative nature and being binding for the courts, which belong to the judicial power, or the principle of equality. The Higher Medico-Legal Commission operates alongside the National Institute of Forensic Medicine 'Prof. Mina Minovici' Bucharest and constitutes the supreme scientific authority in the field of legal medicine, which verifies, evaluates, analyzes and approves from a scientific point of view, at the request of the legal authorities, the content and conclusions of various medico-legal acts (Stancu, 2021).

The opinion of the Superior Medico-Legal Commission can be requested exclusively by the authorized judicial bodies (Police, Prosecutor's Office, courts of law). According to art. 24 of O. G. no. 1/2000, the Commission has the exclusive competence to rule on the contradictory conclusions of the expertise, the Commissions for approval and control of medico-legal documents within the institutes of legal medicine having, pursuant to art. 25 of the same ordinance, competent to approve the expertise reports and the documents of the new expertise, and not the one to rule on their possible contradictory conclusions. In case of contradictory conclusions of some expertise with those of a new medico-legal expertise or of

other medico-legal acts, the Superior Medico-Legal Commission can fully or partially approve the conclusions of one of them, making certain clarifications or additions. If the conclusions of the medico-legal acts cannot be approved, the Superior Medico-Legal Commission can formulate its own conclusions.

3. Conclusions

The expert report is a means of evidence that does not have a superior probative force compared to other means of evidence. However, due to its scientific nature, the conclusions of the expert report place this sample in a higher position in the evidentiary ensemble. Given that it is ordered by the court and carried out by specialists who enjoy recognition for the scientific nature of their analyses, the forensic expert report enjoys a privileged position, as long as it is not contested by other evidence.

Considering that the probative force of the forensic expert report is based on the scientific reputation of the expert, fighting the forensic expert report can only be done in two ways:

- proving that the expert report contains conclusions irrelevant to the case, and therefore will not be considered by the court;
- obtaining an extrajudicial expert report, expert opinions (Ștefanescu & Sporea, 2005) or witness statements that enjoy superior scientific appreciation.

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