Expertise as evidence in criminal proceedings from the Communist period until nowadays

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Abstract

During their procedural activity, investigative and judicial bodies have the pressing need to make use of special knowledge in different scientific fields of technique and science in order to resolve outstanding issues related to the subject of verification, which the law has defined as subject of expertise in criminal trial. Experts' opinion is conceived and implemented as a particular means of verification; experts help in discovering the facts that are important to finding out the truth in criminal proceedings. In addition, they ascertain the facts and give an opinion on them, as a result of specific skills they have in the field of technique, science or culture. Experts and the process conducted by them were given importance in the legislation of the Communist era particularly with the drafting of the Code of Criminal Procedure of 1979 which provides in considerable detail both the functions and the importance of expertise to resolve a criminal case. Furthermore, nowadays expertise as evidence in criminal proceedings is becoming increasingly important and is emerging, especially in view of developments in the field of Technique and Science since many criminals are very good at using innovations as a priority means for escaping detection and punishment. But on the other hand, scientific developments are increasingly cooperating with law and justice institutions to resolve the events and to provide assistance for achieving quality results in a shorter time, something that probably was unthinkable before.

***Keywords**: Expert, the process of expertise, the Communist period, expertise today, the criminal justice process.*

Introduction

The entire activity of the criminal proceedings authorities is governed by the principle of legality, by strictly adhering to the legal order and by meeting the requirements according to which a judicial decision must respond to the truth, ascertain the facts and the specific circumstances of the case. This task can be implemented only by means of the types of evidence and with the tools of evidence research that the legislator has set out in Articles 153-226 of the Code of Criminal Procedure (Code of Criminal Procedure of the Republic of Albania, article 153 – 226).

During their procedural activity, investigative and judicial bodies have the pressing need to make use of specific knowledge in different scientific fields of technique and science in order to resolve outstanding issues related to the subject of verification, which the law has defined as subject of expertise in criminal trials. Every crime or criminal event leaves behind traces that are varied; in many cases they are invisible and difficult to find and manage due to the preliminary measures taken by perpetrators. Opinions of experts from various fields constitute an important condition in the criminal proceedings, from the

preliminary investigation to judicial review, since they clarify the information and facts provided and obtained from the statements of witnesses, the explanations of the defendants and of private parties, from confrontations, knowledge, experiments, documents, material evidence, insights, controls, seizures and interceptions. So, experts 'opinion is conceived and implemented as a particular means of verification; experts help in discovering the facts that are important to finding out the truth in criminal proceedings. In addition, they ascertain the facts and give an opinion on them, as a result of specific skills they have in the field of technique, science or culture (Code of Criminal Procedure of the Republic of Albania, article 178).

Conclusions of experts as evidence in criminal trials were known since the beginning of the last century, in the aftermath of technologic and scientific developments in general and in particular with the establishment and development of the science of Criminology. Due to the extraordinary development of technique and science in general, now parties and the court require and obtain the results of expertise as evidence in criminal trials in almost every criminal proceeding.

Expertise during the Communist Era (C.Pr.C. 1979)

The person having a special knowledge in one of the branches of science, art or technique, and being appointed by the investigator or the court to ascertain certain circumstances that are important for solving a criminal case, is called expert. Expert's activity is oriented at clarifying the circumstances according to the request submitted by the justice authorities. Presentation of the conclusions of the experts, as provided for by law, concerning cases submitted for solution to the expert by the investigator or the court, are called opinion of the expert. The expert's opinion is one of the sources of evidence referred to in Article 16 of the Criminal Procedure Code (Article 16 of the C.C.Pr. of the People Socialist Republic of Albania - PSRA of 1979).

The expert is required to appear and take charge of the expertise. If the specialist summoned as an expert fails to appear or refuses to take charge of the expertise or to provide his opinion without cause, or if he provides false opinion, he has criminal liability under the relevant provisions of the Criminal Code. Unlike the witness who cannot be replaced, the expert can be replaced by another specialist provided that there is a just cause. In addition, in the trial the expert has a different role from that of the witness. The witness is asked about information of which he may be aware, while the expert has an active role. He has the right to ask questions to the defendant or witness, if the information requested is necessary for him (the expert) to solve the cases that have been submitted by the court. The expert receives his attributes by the investigator or the court. He takes this quality only on the basis of the decision of these bodies. The expertise is carried out in state institutions by one or more specialists, as well as by other specialists appointed by the court, the sole judge or the investigator (Article 25/2 of the C.C.Pr. of the PSRA of 1979).

The decision of the court, of the sole judge or of the investigators that carries out the expertise is notified by the defendant, explaining that he is entitled to request the exclusion of an expert, appoint other experts, take part himself in the expertise when applicable

and submit additional questions. These actions, as well as the acceptance or rejection of the requests submitted by the defendant, are recorded in the minutes of questioning the defendant (Article 82 of the C.C.Pr. of the PSRA of 1979). The expert reflects the conclusions on a particular act which indicates the person performing the expertise, their tasks, materials that have been subject to review, questions to be solved, the methods used for the expertise and the expert's opinion. When more than one expert has been appointed and their opinions differ, each of them sets out their opinion in a separate act (Article 83 of the C.C.Pr. of the PSRA of 1979).

Expertise is essential and it must be always ordered every time special knowledge is required for the clarification of issues arising during the investigation and the trial. The expert must also be summoned if the investigator of the case or those who are part of the panel of judges are qualified specialists, hence are able to respond to issues requiring scientific knowledge. Probative facts are established with the help of specialists, who observe certain objects on the basis of special knowledge. This feature justifies the special requirements by the law, special conditions and procedural forms for receiving, establishing, verifying and, generally, the administration of this evidence, but in no way do they show that the normal opinion of experts as evidence has any essential predetermined value.

Like every other evidence, the expert's opinion as well is added to the review and assessment by the investigator and the court according to those principles that are applicable for all evidence without exception. The personal conviction of the investigator or of the judge based on socialist legal consciousness and created after reviewing the circumstances of the case as a whole constitutes the basic guarantees for a critical approach to this evidence.

There are all possibilities for verifying and assessing the probative force of the expert's opinion, and that it is unfounded from a theoretic standpoint and practically harmful and contrary to the guiding principles of our criminal procedure; the expert's opinion is not binding for the court and the investigator, but when they do not agree with the opinion of experts they should submit reasons either in a particular decision, or in a final decision, an indictment or in a decision terminating the investigation. The special decision is necessary if the investigator or the court consider that there is room to set a new expertise. Some of the main reasons that lead the investigator or the court to not agree with the expert are as follows:

- Organization and development of the expertise must be done in full compliance with procedural norms, which are a milestone for the probative value of the expert's opinion.
- The material given to the expert by the investigator or the judge should be both sufficient to draw the necessary data on which the expert will base his opinion, and of good quality as well.
- A logical connection should be between the reasoning of the act of expertise and the final opinion. Scientific theses submitted by experts, who were led by them to solve the case, must agree with the experts' conclusions.
- One of the conditions in order to give a just opinion regarding the matters submitted to experts for solution is scientific accuracy of the thesis which led the experts. Opinions that are based on unreliable scientific method cannot be considered as evidence to support the court's decision.
- Expertise should be conducted by persons who are specialists in the field of science,

art and technique, and who use their knowledge to solve problems that relate to specific criminal matters.

• Experts should give advice only on matters for the solution of which scientific knowledge is required in their field of specialty. The investigator or the court should not ask questions if such knowledge is not required for answering to these questions.

• The court is obliged to collect all necessary evidence, including those that refer to the points submitted to experts, in order to enable comparison and a just resolution of the case.

One of the issues broadly discussed is in which form should the opinion of experts be presented. Some are of the opinion that the findings should be formulated explicitly, others think that they can also be expressed in the form of probable trials. Differences among these views and their importance lie not in the very form of expression, but rather in the core, in the very content of thought (Penal Procedure of the PSRA, 263, Tirana 1988).

When the expertise is not clear or complete, and when there are different opinions among experts, the investigators or the judge have the right to set a new expertise. Given the particular nature of the experts' opinion as evidence, the investigator or the judge should not use every means and methods allowed for verifying its accuracy; only if the conclusion is still questionable even after a strict verification, it cannot be considered as evidence, but by no means can the experts' conclusions be replaced with the opinion of the investigator or of the judge. This would be an impermissible mixing of the functions of the investigator or of the judge with those of the expert (Penal Procedure of the PSRA, 265). The expert's opinion should be either accepted as correct proof or should be rejected as suspicious. There is no other way.

The reasons for which the investigator or the judge may not agree with the opinion of experts will determine further investigative actions. In these cases, a new or additional expertise must be done according to Article 26/2 of the C.Pr.C. If the reason for refusal is because the conclusions of the experts are not clearly formulated, if the answer is not well defined or additional answers are required by the experts, then an additional expertise must be ordered, and it can be carried out either by the same experts or by other experts (Article 26/2 of the C.Pr.C. of the PSRA of 1979). If experts' conclusions are not scientifically based, because of the unfair methods implemented during the performance etc. or, when their opinion is questionable, the expertise should be repeated to answer the same questions. This expertise should be charged to other experts with higher qualification.

Expertise according to today's legilslation (C.Pr.C.2010, updated)

Legislator has defined in point "1" of Article 179 the circle of persons with special technical knowledge, the specialists, who may be appointed by the prosecuting authorities to perform expertise in criminal trials" (Article 179/1 of C.Pr. C. 2010).

This paragraph has also recognized the right of the proceeding authorities to order a new expertise, when the expertise has been declared invalid; as a rule, the new expertise should be entrusted to another expert. To obtain data or assessments by specialists of

technique and science, proceeding authorities should possess at every stage of the process the specific decision to perform expertise. This decision must be notified to the expert, the defendant and his lawyer. Non-compliance with this obligation brings relative invalidity under Article 129 of the Criminal Procedure Code (Article 129 of C. Pr. C. 2010).

a. Notice to perform the expertise

According to Article 179/2 of the Criminal Procedure Code, the proceeding authorities notify the defendant and his lawyer that they have the right to request the exclusion of the expert, the participation of other experts, to take part in the performance of the expertise (if applicable) or even to ask questions other than those specified in the decision. Failure to respect this obligation brings relative invalidity of the expertise and its results cannot be used as evidence in criminal trials. Issues and unknown facts that need to be detected, resolved and proved in the criminal process through expertise are, in certain cases, difficult and complex. Based on Article 179/3 of the Criminal Procedure Code, the proceeding authorities may appoint in these cases several experts with knowledge in various fields of technique and science, who are entrusted with complex expertise (Article 179/3 of C.Pr. C 2010).

The incompatibility of the expert is provided for in Article 180 of the Criminal Procedure Code, which has defined the circle of persons who cannot be appointed and cannot perform the task of the expert in a criminal process (although they have special technical and scientific knowledge) and more specifically; a) The juveniles, those who have no legal capacity to act, mentally ill persons and any person having legal ban; b) Any person who is suspended from carrying out a public office or profession; c) Persons against whom security measures have been taken pursuant the Article 232 and 240 of the Criminal Procedure Code on coercion and prohibitive precautionary measures; d) Persons against whom there are legal requirements to not testify, translate or who are not obliged to testify or translate; e) People who are incompatible according to the cases provided for in Articles 15, 16 and 17 of the Criminal Procedure Code for the judge in the trial of the criminal case (Article 180 of C. Pr.C. 2010).

b. Exclusion of the expert

The exclusion of the expert can be done on request of the parties or mainly by the proceeding authority when a case of incompatibility is found as set out in the above requirements. The proceeding authority takes the necessary measures by notifying and asking the expert about the existence or not of reasons relating to the incompatibility with the task of the expert, as the expert himself is obliged to declare it pursuant to the Article 181/2 of C. Pr. C. The reason for the exclusion of the expert by the parties or the expert must be done before his appointment, or when the reason for exclusion has emerged after the appointment and before the expert states his conclusions (Article 181/2 of C. Pr. C. 2010). Based on Article 182/4 of the Code, the proceeding authority decides with reasoned order on the exclusion or not of the appointed expert (Article 182/4 of C. Pr. C. 2010). If the exclusion of the expert is decided, another expert is assigned to carry out the expertise. Under the sections 182, 183, 184 and 185 of the Code of Criminal Procedure and pursuant to requirements in general of procedural provisions, the process of expertise

takes place and follows the following stages:
1) Appointment of an expert or experts with special knowledge in the field of technique and science to perform the expertise. The procedural act in this case is the decision to appoint the expert; it summarizes clearly the circumstances of the fact and the need of the proceeding authority to use the data as well as the scientific and technical knowledge, the questions and specific issues to which the experts will answer and will solve, acts and materials made available to perform the expertise, the name of the expert and the type of expertise, the date, time, the place where the expert will present to get his assignment, and other measures necessary to carry out the expertise etc. To ensure compliance with the procedural rights of the parties in the process, the decision on the appointment of the expert is notified to the defendant and to his lawyer, who can make their objections and claims about the expertise.
2) In the second stage, the proceeding authority summons the expert and verifies his identity; the expert takes the task and is notified and asked whether there is a reason of incompatibility or lack of obligation to perform the task; in addition he is warned about the criminal responsibility in carrying out the expertise and issues a written statement according to the provisions of Article 183/1 of the Criminal Procedure Code. At this stage the expert obtains the acts or required materials made available by the proceeding authority. The expert gets aquatinted with the acts. He can and has the right to be present at the performance of certain procedural actions related to the expertise assigned. In cases where people will be subject to the expertise, the proceeding authority shall take measures to ensure that they will appear and that obligations relating to the actions of the expert will be met (Article 184 of C.Pr.C. 2010).
3) Performance of the scientific and technical activity by experts, drawing of conclusions and their formalization in the act of expertise. This stage is regulated by Articles 184 and 185 of the Criminal Procedure Code, which provides for the actions of the expert and the drawing of the conclusions of the experts in the act of expertise. This phase represents the scientific and technical actions carried out by experts to answer and solve the cases assigned to him by the proceeding authority. The legislator has envisaged the right of the experts to become acquainted with every act available by the proceeding authority, for the purposes of performing the expertise.
4) The presentation of the act of expertise, the acquaintance with its results by the parties in the process and the questioning of experts about the opinion and the conclusions drawn from the expertise, or other circumstances are considered necessary and useful for the assessment and the verification of the results of the expertise. In many cases research, obtaining technical and scientific data and assessments should be carried out by several experts with scientific knowledge in several areas of technique and science. The legislator has envisaged in Article 179/3 of the Criminal Procedure Code the right of the proceeding authority to appoint in such cases experts with knowledge in various fields of technique and science, who are entrusted with the performance of complex expertise (Article 179/3 of C.P.Pr 2010).

c. Assessing the findings of the expert as evidence
Although the opinion of experts is scientific, and the verification of the facts (the existence

or not of a fact and circumstance) is generally categorical, this evidence cannot have in any case a greater value or a value predetermined in relation to other evidences. Results and conclusions of the expertise provided by experts should be complete, categorical and not probable, possible. Due to the difficulties that certain expertise may have, the legislator has provided for the term of the performance and completion of the expertise to be up to 60 days, and in particularly complex cases not more than 6 months. However, it must be said that in many cases and for many different reasons, experts give their conclusions in the act of expertise with no categorical possibility. Such a conclusion is given between the obligation of the expert to carry out the expertise and the possibility that he has, based on the object of expert, the questions asked, technical tools available, etc. In general, referring to the judicial practice, the proceeding authority assesses objectively the categorical conclusions given by the experts and in relation to other evidences, but sometimes they are given predetermined value. Or the opposite, when possible conclusions with probability are not assessed, not even to set versions of the existence or not of specific facts or circumstances, it must be assessed carefully, always in relation and strictly connected with notifications by other filed evidences. In article 316 / d of the Criminal Procedure Code, among other things, the legislator has recognized the right of the prosecutor and of the defendant to ask the court to perform the expertise, although the case is at the stage of preliminary investigation (Article 316/d of C.Pr. C. 2010). There have been many cases when, in the investigative practice, a certain evidence, an object, and item, etc, have undergone changes or evolved inevitably as a result of objective reasons, to the extent that it was impossible for specialists of specific fields of science to perform technical expertise, or to provide accurate technical and scientific conclusions. In addition, the legislator has also envisaged the cases related to complex and difficult expertise, the results of which are given by the experts for a period of not less than 6 months. This necessary time would bring delays and procrastinations in the trial of the criminal case. Such expertise is related to the provisions of Article 185/3 of the C. Pr. Code (Article 185/3 of C. Pr. C. 2010).
The results of expertise conducted during the preliminary investigation stage also have the value of judicial proof, when for the case the judicial authority proceeded with abbreviated trial procedure under the articles 404 and 405 of the Criminal Procedure Code (Article 404, 405 of C. Pr. C. 2010).

In this case conclusions given by experts during the investigation, and any other investigative evidence, take the value of judicial proof. The judicial practice in this regard has already been consolidated; it has been unified with the decision of the Joint Colleges of the High Court, where among others it has been argued that, "essentially, the abbreviated trial accepts acts collected during the preliminary investigation stage and prevents the taking of evidences in the hearing as well as the debate related to them, it avoids the judicial investigation stage ... differently from the common trial, it lacks the stage of obtaining the evidences and the requirements regarding their invalidity".

d. Carrying out expertise during the trial of the case

Procedural rules for administering the evidence during the trial of the case are provided for in Articles 363, 364, 366, 367, 371, 368 of the Criminal Procedure Code. Like any other evidence, for the opinion and the conclusion of experts to be considered as criminal

judicial evidence, it must necessarily be received, reviewed and verified by the court in the trial. The legislator has devoted particular attention not only to the procedural moment of the submission of request for getting the evidence requested by the parties, but also to the moment in which the court decides to get them by special decision under Article 179/2, 182 and 357 C. Pr. Code; this fact is directly connected with the process of proving, the compliance with the obligations deriving from the articles 149, 150 and 151 of this code. Conclusions of the experts are taken as evidence according to the requests of the parties, while the carrying out of the expertise in the trial may also be decided mainly by the court. Experts to perform the technical expertise during the trial of the case are appointed according to the general provisions as well as according to those provided for by Article 366 of the Criminal Procedure Code, while experts are questioned pursuant to article 363 of this code. This provision refers to the law on the interrogation of witnesses in the trial.

e. Requesting a new expertise

If the proceeding authority is not convinced by the conclusions of the experts appointed to carry out the expertise, it has the right to decide by a duly substantiated decision to carry out a new expertise, viewing it always in relation to other evidences administered in the trial folder. The new expertise is ordered even when the previous expertise is replaced in application of Article 186 of the Criminal Procedure Code, "when his opinion is not given in due time, or when the request for prorogation has not been accepted, or when the performance or the duty is underestimated" (Article 186 of C.P.Pr 2010). The expertise is a procedural document of a performed legal action. The grounds of the opinion and the carrying out of a new expertise cannot motivate the destruction of the first act of expertise. It should always join other materials administered in the case under review. The expert's opinion is evidence like all other evidence, and its review by the proceeding authority is not an obligation to take it as it is presented by an expert. When the proceeding authority is not satisfied with the conclusions provided by the expert, pursuant to article 115/1 of the C. Pr. C. according to which "every evidence is subject to review and has not predetermined value", the proceeding authority has the right to assess it based on its opinion and when it not satisfied, it carries out additional or new expertise, and will eventually asses or not his opinion as evidence in relation to every evidence collected in criminal proceedings, in the decision that will be taken at the end of the preliminary investigations or of the judicial investigation (Article 115/1 of C.Pr. C. 2010).

Conclusions and Recommendations

When preliminary investigation and court bodies encounter serious obstacles to find out the truth, they should use scientific evidence as an effective means to justify and support their decisions, as well as to comply with the rights and interests of participants in the criminal process. In the criminal-procedural activity, special importance is given to the appointment of the expert when scientific, technical or cultural knowledge is required. The theory of the criminal process generally defends the view that the expertise forms primary evidence. But there are some authors who accept that the opinion of the expert, based on other evidence, does always represent derivative evidence. It is true that, to

some extent, the facts found by the expert remain derived from the material, subject to review and in this sense the expert cannot observe a new fact out of the material that he is administering. Taking this into account, it cannot be said that the expert's opinion remains derivative evidence. On the contrary, in my opinion, in all cases it forms direct, primary evidence. This is the conclusion reached taking into account that the expert does not take the facts from the probative material made available to him, but finds them during his independent examination. An important assistance in the criminal proceedings is the technical advice of the party. Including the technical consultant in the C.Pr.C. would better complete the expertise and would help for a more effective protection of the rights of persons under criminal proceedings, and it would raise the level of provision of justice by the court. Additional expertise is not provided for in the C. Pr. C. It is carried out when the proceeding authority needs to clarify the specific conclusions of the expert, or to provide an opinion on new problems. In addition, the questioning of the expert is not reflected in the C. Pr. C. It is necessary to establish the questioning of the expert because the decision is conditioned by the explanation or the completion of the expert's opinion. He actualizes specific aspects which are unclear to the proceeding authority in relation to the opinion provided. Importance should be given to the compensation of the expert, adding that it should be determined by order of the body that has ordered the expertise, according to special laws and regulations. Additions and improvements are made for the image of the expert, the easier the clarification of events and crime scenes will be, the more reliable the collected facts will be.

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