

Toward an European Legislation in Administrating Forensic Probation

V. Beliș

Honorary President of the Romanian Society of Forensic Medicine

In 1994 I began working together with Prof. Scripcaru on elaborating new regulations regarding the expertise activity in Romania and we succeeded within the year to accomplish what we called „Law for the management of forensic institutes”. After presenting it in front of the Romanian Parliament, this became an effectual law that has been adjusted since by the Law 459/2001, G.O. no. 57/2001 and the Law no. 271/2004.

While framing the law, we took into account the following aspects:

- The expertise activity in Romania could not ignore the past administration of the forensic probation;
- We believed to be necessary to ascertain several means of controlling the forensic acts (by Advisory and Control Committees and the High Committee as the paramount advisory authority), considering the level of training of our specialists (professional degree-wise at least – specialist, MD);
- We somewhat likened the organization of the forensic institutes with the justice structure, which is hierarchically organized from court-houses, courts of law, courts of appeal to the High Court of Cassation and Justice;
- Same reason dictated the creating of the Superior Council as a methodological forum

of patronage for the forensic activities, in a way comparable to the Superior Council of Magistracy;

- Taking into account also the poor training of both magistrates in forensic medicine, which is an optional session in many law schools (including Bucharest University) and criminologists, we considered that the magistrates cannot elaborate an informed opinion regarding the forensic conclusions emerging in various civil or criminal cases, reason why the approval of these committees – but mainly the High Forensic Committee – remains, as we see it, essentially.
- It is to be mentioned that neither during the entire process of elaborating the current legislation that steers the forensic activities in Romania, nor when this legislation was promulgated, Romania had not been part of the European Union.
- However, major changes occurred lately in Europe and in our country, and Europe itself faced new challenges – obviously not only within judicial field – that are not restricted by country borders, challenges that we need to consider as well since Romania has become part of EU in 2007.
- Accordingly, the norms of the co-operation between countries needed to be amended.

That was the goal of the Treaty of Lisbon on December 13th, 2007, which was the result of the negotiations between the member states during an inter-governmental conference. All the member states ratified „The Treaty of Lisbon”, that became effectual on December 1st, 2009. The treaty grants the member states full access to modern institutions and optimized working methods and strengthens democracy and the capability of the countries to promote their citizens' interests.

One of the most important documents emerged as a result of the Treaty of Lisbon and written by the European Parliament is „The Charter of Fundamental Rights of the EU”, which became the foundation of the jurisprudence in the Court of Justice of EU and in the European Court of Human Rights (ECHR).

The Charter of Fundamental Rights of the EU explicitly stipulates in art. 47 (“the right of an efficient appeal and a fair trial”) the following:

- Any person whose Rights and Freedoms certified by the Union rights are violated is entitled to an efficient appeal in any court, in accordance to the conditions stated in this article;
- Any person is entitled to a fair, public and reasonably timed trial, in any independent and impartial court, previously established by law;
- Any person has the right of being advised, defended and represented.

As we all historically know, the laws display certain inertia, being unable to perfectly mirror the social, economic and democratic progress. Therefore, the necessity of amending the legislation for the management of Romanian forensic institutes is to be heeded.

As held by the current ECHR jurisprudence, the organization and functioning of the Romanian forensic institutional system contradict various articles, such as art. 6 regarding the right of a fair trial, each party being able to have a reasonable opportunity to exhibit due in court in conditions that are not significantly disadvantageous relative to the adverse side, according to the principle of equality of arms. This article also defines the principle of contradictory, which stipulates the potential for the parties to acknowledge all the pieces and observations presented to the judge.

Obviously, according to the discretion of evidence, the Romanian authorities can dismiss any piece of evidence that seems unreliable or inconclusive, but

this possibility remains only theoretical, since it is forbidden for the judicial courts to order an expertise outside forensic institutes authorized by law, which are the only ones whose approvals are admissible as evidence within criminal trials. Based on the current legislation, judicial authorities are not allowed to require the reappraisal of conclusions that look incomplete or insufficiently clear, in order to decide the probative value of some – often contradictory – forensic works.

The inability of Romanian judicial bodies to obtain pieces of evidence or scientific advice outside those issued by the public forensic network deprives them of the right to ask independent experts for scientifically reasoned opinion, situation that negates the principle of contradictory, along with discretion of evidence and equality of arms.

The recent amends of legislation in protecting human rights grant increased protection in trials, regarding the right to defense and access to an independent medical expert, who can confute the conclusions of the prosecutor's expert. At present, the organization of the Romanian forensic expertise system (that allows only official forensic experts) is not compliant with EU legislation. The procedure of finding and the forensic expertise enable the direct involvement of an expert only for certain types of forensic expertise – reduced in number and importance – without granting equal rights to both category of experts (official and of side-party). Romania's integration in EU implies the development and enactment the activity of independent forensic experts (even a professional group of certified experts for the cases of infringement ECHR legislation), whose work should be self-budgeted and should cover the extra-judicial component of forensic expertise, medical malpractice, and life and health insurances.

The hierarchical structure of the official forensic expertise contravenes the principle of independence of justice and experts, overruling the independence of the expert and the value of his report as piece of evidence; even if the experts of Advisory Committees and High Committee have same professional degree with the experts whose acts they analyze, these committees are hierarchically superior and have precedence over law, although they do not in fact run an expertise; besides these committees are not even mentioned in the Codes of Criminal and Civil Procedures. All forensic acts are analyzed by an Advisory Committee with fixed staff, which contravenes both the independence of the expert and the

rules in regard to the expert incompatibility.

This subordination of the forensic medical expertise to an Advisory Committee violates the principle of contradictory and represents an administrative control upon forensics, hence repealing the independence of the forensic expert, being, in fact, a system of controlling not the quality of forensic acts, but their content, which further violates also the principle of independence of justice and experts.

The inability of a party to ask and have an independent forensic expertise performed by an authorized forensic expert outside territorial forensic service – while for other expertise categories (technical, bookkeeping etc.), this right exists and is effectual – violates the Article 124 of the Constitution which stipulates that justice is unique, impartial and fair.

As a conclusion, I consider that the forensic expertise system displays profound contradictions between Romania, where it is exclusively official, and EU countries, where a body of independent

forensic experts is mandatory (in some countries, such as Great Britain, there are no "official" forensic experts). These contradictions practically represent the difference between college expertise system, where the only act that can be called Forensic Expertise Report is the one presented by the official expert (and all forensic experts are official and subordinated to the authorities) and plural expertise system that operates in EU countries, US, Canada, Australia etc., where each of the assigned experts on a case elaborates his own expertise report, that is to be analyzed together with all the reports alike by the court or the judicial body, which then will order the proper solution, after each party benefited from all constitutional rights to exhibit and defend cause.

Therefore, the contradictions between the Romanian forensic expertise, which is exclusively official, and the EU forensic expertise, which is mandatory independent, compel the development of a new legislative framework to stipulate the liberalization for the forensic expertise.