

The Importance of Forensic Psychiatry and Psychiatric Examination in Criminal Proceedings

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Abstract

Forensic examination, as part of the criminal process, is a complex activity in which the diagnostic moment is abnormally integrated, as the diagnosis is not intended for treatment or cure.

It is understandable that the influence exerted by psychiatric examination on court decisions (it is mostly about psychiatry in general), cannot be separated from the historical relationship between psychiatry and law.

In countries where the assessment of irresponsibility is based on a psychopathological-normative method, it is necessary not only to recognize the mental disorder, but also to assess how this disorder interacts psychologically in compromising the ability to understand actions and desire the advent of consequences.

Reflecting on the above arguments, this paper focuses on the importance of forensic psychiatry and psychiatric examination in criminal proceedings as a legal and medical study, as well as identifying critical aspects of the inseparable relationship between psychiatry and law, until the moment when the judge will decide whether the mental disorder under the Criminal Code prevented the perpetrator from understanding the act committed, as well as whether or not he wished the consequences that came from this act.

Keywords: forensic examination, psychiatric expertise, criminal proceedings, relationship law-psychiatry, specialized psychiatric institution

Introduction

Forensic expertise as evidence in criminal proceedings aims to integrate the expert's knowledge in court decisions. The examination is decided by the court when it is necessary to give an assessment that requires specialized technical, scientific or artistic knowledge.

Psychiatric examination, as part of the criminal proceedings is not intended to help the person

undergoing the examination, because it is not addressed to the patient, but is intended to provide a response to the social request expressed by the judge. Thus a generally accepted approach is that psychiatric examination does not and cannot have therapeutic purposes.

The psychiatrist enjoys a privileged position in a judicial process compared to other experts who can be summoned by the court. This is due to the delicate nature of the concept of irresponsibility and lack of field knowledge.

In a criminal process that has in focus the irresponsibility due to the mental state of the subject, summoning of an expert from the court is essential and in the same time obligatory to shed light on the

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existence or not of the ability to understand at the time of the commission of the offense or even to determine the placement in a specialized psychiatric institution. This is one of the common points of criminal proceedings for both the common law and the Romano-Germanic schools.

The relationship between psychiatry and law

The impact exerted by psychiatric examination on court decisions cannot be separated from the historical relationship between psychiatry and law. In order to understand the evolution of this interrelation, the relationship in question can be analyzed from 1928, the year in which the Criminal Code was adopted. In the past there was a real coexistence between psychiatry and the law. Both of these disciplines followed common social protection perspectives and the control system was rigid and stereotypically based.¹

The psychiatric examination was performed only in the case of obvious abnormalities, and if one of the diseases determined through nosography, the systematic classification or description of mental illness² was ascertained, it could be the case of a mental disorder.³

Furthermore the examination was not required from the accused, because if the mental illness was ascertained, they were automatically sent to the “madhouse” according to a prejudiced mechanism.

Mental illness was considered equal to other organic diseases and in terms of therapeutic strategy, the mentally ill were placed in a psychiatric hospital, where they had to stay until they recovered from the illness, which led to a very low efficiency of curative care that meant staying in such a hospital for life.⁴ Also the justice system became one with the concept of psychiatry, that the madman was incapable of understanding and appreciating and consequently acquitted him and sent him to a psychiatric hospital, where he was forgotten until the end of his days. The harmony that lasted for at least a century, between

psychiatry and justice, went to ruin in recent decades.

The change in the perception of mental illness also brought about the concept of irresponsibility due to mental state. The prejudices that characterized the old psychiatry were no longer acceptable. There has even been an anti-ethical view of the positivist thinking, namely anti-psychiatry, which denies the existence of mental illness and always holds the mentally ill persons responsible and therefore they should be treated by law like any other person, not to be sent to a psychiatric hospital as irresponsible, but suffer criminal punishment. It should be said that these settings are understandable in those countries where the assessment of irresponsibility is based simply on the psychopathological criterion, which means irresponsibility automatically at the time of ascertaining a mental illness at the time of the commission of a crime.

In countries where the assessment of irresponsibility is based on a psychopathological-normative method, it is necessary not only to recognize the mental disorder, but also to assess how this disorder interacts psychologically in compromising the ability to understand actions and desire the advent of consequences.

The role of psychiatry in the criminal process can be understood in many perspectives; beyond its institutional role in identifying the perpetrator of a crime with the possible presence of a mental illness, the forensic psychiatrist is asked to suggest the measures to be applied⁵ and to take care of the re-socialization of prisoners.

The expert should not be manipulated nor should he approve the solutions suggested by the demands of justice.⁶ Here then we come to the second role of expert, that of translator. It is the psychiatrist who must inform the judge and the judiciary of new psychiatric knowledge, including the right to reduce the sphere of irresponsibility, as not necessarily every mental disorder is equivalent to the loss of the ability to understand and consequently insanity on trial.

Taking into account that the perception of the mentally ill has changed, the judge must understand that beyond the rare cases of irresponsibility, certain behavioral deficiencies must be taken into account, while maintaining such a degree of self-determination that allows them to choose between right and wrong, lawful and unlawful, and consequently be able to answer to society for their choices.

Psychopathological condition and its impact on criminal behavior.

Of a particular importance is the problem of assessing the relationship between psycho-pathology and criminal behavior, and consequently the method to be used to establish irresponsibility. There are three known methods for assessing criminal responsibility:⁷

1. Psychological - normative method consists in assessing the existence of diseases or mental disorders, as well as assessing their impact on the ability to understand actions and omissions and to desire the consequences. The law does not always give the definition of psychopathological factors, but simply refers to very general concepts, which are further widely interpreted. In terms of two capacities, understanding and desire, in most criminal justice systems that follow this method of evaluation, it is sufficient the absence of even just one of them so that the subject is not considered punishable. According to this method, it is not only necessary to identify the pathological condition, but also to verify the compatibility of this condition with the disorder;

2. The purely psychopathological method considers impunable the subjects suffering from certain mental illnesses, without assessing their impact on the ability to understand actions and omissions and to desire the consequences. (Norway and Sweden follow this method). Referring to the Swedish example the mentally ill facing the criminal justice system cannot be subject to punitive criminal sentences, but must be subject to psychiatric treatment measures;

3. The normative method does not consider

psychopathological problems, but only assesses whether at the time of the commission of the offense there was the ability to understand the actions and omissions and to wish for the consequences. This method has not been followed in any of the European countries (at least from none of EU members).

Despite the critical efforts of lawyers, the link between mental disorder and criminal behavior is still debated today, especially with regard to violent crimes. Although there is no mechanism by which a mentally ill person should be exempted from criminal liability for that fact alone, a causal connection is required between the pathological condition and the offense.

In fact it cannot be accepted that crime is a symptom of disease, as criminal act or omission is not necessarily a symptom of disease.⁸

Thus the person who suffers from the 'delusion of jealousy' and who commits femicide, as well as the person who commits murder for reasons of jealousy and who is not delirious, is affected by passionate and emotional state,⁹ which neither exclude nor reduce criminal liability. Such situations are not provided by any provision of the Albanian Criminal Code, but only from the Italian Criminal Code.¹⁰

For many researchers, experts should limit themselves to the clinical-phenomenological understanding of the disorder, as well as to the development of treatment programs for re-socialization. In other words, the role of the expert is limited in determining the disorder and not giving his opinion on issues of which he has no knowledge, such as the offense.¹¹

The scientific concept of psychiatric examination

It is important that the psychiatric examination be seen from another point of view, specifically from the natural or scientific-medical one. Psychiatric examination is a specific action, which is integrated in criminal proceedings, while the forensic psychiatrist,

maintains at all times an attitude of the clinician, which does not aim to deepen into the disease and its treatment for the purpose of cure, but on the impact that the latter has had on the ability of the person examined to understand. In other words, the act of examination does not provide a medical treatment based on the diagnosis of mental illness.

There are some peculiarities of the situation that require forensic examination compared to the clinical situation:

1. It is not a therapeutic activity on the individual, as the patient referring to the psychiatrist is the judge, prosecutor or party;
2. The psychiatric evaluation of the patient should cover both the time of the commission of crime and the social risk assessment related to the future;
3. The assessment is placed in the context in which the sentence is discussed;
4. This context can influence the opinion of the expert, but on the other hand the rules do not depend on the expert and cannot be manipulated by him, as the standards are provided by law and jurisprudence;
5. The questions are formulated in legal terms, as well as the concepts of irresponsibility and those of total disruption or partial reduction of mental balance.¹²

Psychiatric examination is a complex activity in which the diagnostic moment integrates abnormally, as the diagnosis is not intended for treatment or cure, it is not intended to provide assistance to the person who undergoes examination because it does not address the patient, but aims to provide a response to the social request expressed by the judge.¹³

Psychiatric examination is a medical procedure because it is performed by a doctor, based on clinical examinations, laboratory, psychiatric interview, but it is also true that it is necessary for the expert to make a diagnosis, which is not a proper diagnosis, as the

person who undergoes examination is not a patient who has a psychic pain that may result in a therapy.¹⁴

Examination is a hybrid, something that serves someone else and that more than doing good and curing the person undergoing the examination, will determine the assignment of the most appropriate medical measure.¹⁵

There are other opinions that consider psychiatric examination an irreplaceable instrument if it is limited to reviewing responsibility. However, it is imperative that psychiatric examination, like any other medical procedure, be performed in order to respect human rights.

It has been suggested the appointment of a panel of experts composed of experts from the forensic psychiatry sector and neurologists, hoping for an interdisciplinary approach that allows the most correct contact with the accused or that examination should not be entrusted to healthcare workers who will take care for treatment in the future. This is thought to prevent that the clinician, who is responsible for the treatment, give assessments that could lead to benefits compared to the sentence. It is generally better if the clinician performing the expert duty is not involved in the expert treatment activities, as the dual role can lead to difficulties and errors easily understood.

The role and influence of psychiatric examination in jurisprudence and treatment programs

We can distinguish two different areas of impact of psychiatric examination:

- 1) court decisions;
- 2) treatment of the mentally ill author.

Regarding the impact of psychiatric examination on court decisions, we can say that initially there was a general belief that psychiatry could provide security and answers to the questions posed by judges.¹⁶ Anyway during the interrogation of the person undergoing the examination, the risk of simulation is

always present and the expert must take this fact into account.

Exemption from criminal liability, in general and for each of the reasons or causes provided by law, of a person belonging to any age group, may be decided by the court during the preliminary investigation or during the trial.

If irresponsibility due to mental state is found during the main trial, it will lead to a decision of suspension of the proceedings in accordance with the provisions of the Code of Criminal Procedure.¹⁷ The Italian Code of Criminal Procedure in 2017 also underwent a profound reform¹⁸ regarding the irresponsibility of the defendant. If, as a result of the examinations carried out, it turns out that the mental state of the defendant is such that it does not allow conscientious participation in the proceedings, the judge revokes the suspension of the proceedings¹⁹ according to the procedural provision that the criminal prosecution should not continue. At this point there are many discussions regarding the introduction of the proceedings to a vicious circle whether in the Italian procedural practice or even in the Albanian one.

The Albanian Criminal Code defines mental disorder as general and partial.²⁰ If the disorder is general and the defendant is considered dangerous, the security measure of hospitalization in a psychiatric hospital is applied.²¹ If the defect is partial and has greatly reduced the ability to understand and judge, the defendant is sentenced to a reduced sentence. Regarding the determination of social risk, there have been relative assumptions, which have been interpreted by the Albanian High Court.²²

In the Albanian criminal justice system, but also in those of most European countries, the conclusions of experts exert a minimal influence on the planning of the treatment of the mentally ill, such as compulsory hospitalization in a psychiatric medical institution or outpatient treatment. Besides, psychiatric experts are not even asked about the treatment plan. The psychiatrist is asked for his opinion on issues that are

purely legal: irresponsibility and social danger. In the sense of social danger, the information of interest to the court is only that in the content of which the expert can answer the question whether the patient during the treatment period can commit other criminal offenses and pose a risk to the doctor. In some countries this question is regularly asked, for example in the case of Switzerland.

In conclusion we can say that what seems to characterize psychiatry today is the stance between narrow and static, legal and judicial frameworks. We also saw that there are two opposing ideological positions: on one hand, positivist thought, which would like a greater involvement of the social sciences in the criminal process and the transformation of punishment into a process of treatment and rehabilitation, and on the other, the opposite trend that focuses the criminal process on the criminal offense by taking less consideration of the perpetrator. According to this latter approach, the ascertainment of mental illness should have a very small space within the criminal process.

There have been proposals to abolish the provisions on irresponsibility and to shift psychiatric examination at the time of execution of the sentence²³ in order to reduce the severity of the sanction, that among other things, may lead to the risk of emphasizing and simulating mental disorders.

For many, the proposal to remove the rules regarding irresponsibility is unthinkable, while it is required to provide concrete solutions to situations which, although not related to mental illness, can occur in some cases, for long or short periods of time. We think that in ordinary penitentiary institutions²⁴ it is very difficult to provide adequate care to a socially dangerous patient.

It is necessary to establish special institutions for their treatment and only in that case the examination could help determine whether the person who committed the crime was mentally ill and dangerous enough to seek the treatment in question.

But there is another argument in favor of the provisions on irresponsibility: The purpose of these rules is to protect persons who were not fully or entirely responsible for their actions at the time the offense was committed.

Psychiatric examination is an important step and at the same time it makes an essential contribution, not being a necessary act in the formal sense. The request for an expert examination is made by the prosecutor or the judge also to guarantee the accused, or in other cases to better assess the dynamics of the criminal offense. So examination is required by judges not because it has an obligation but because the concrete situation requires it. We can therefore say that forensic psychiatry is likely to change radically, but certainly not disappear.

The role of psychiatric examination in the Albanian criminal process

Legal concept

Determining the limits within which psychiatric assessment takes place in a criminal proceeding requires knowledge of a legal nature, as well as knowledge of the purposes of conducting the examination in its broadest sense.

Examination relates to three functions that require specific knowledge:

1. conducting investigations to obtain evidence data;
2. obtaining the same data through selection and interpretation;
3. evaluation of the data obtained.²⁵

Article 178 of the Code of Criminal Procedure stipulates that the opinion of an expert is sought and accepted when ‘investigations are necessary’.²⁶ The doctrine has interpreted this expression differently from what was previously provided for when talking about the ‘necessity of examination’, thus limiting the right, in the sense that the court is obliged to accept the

examination, if it is unable to conduct investigations or assessments only on the basis of its competencies.²⁷

The judge’s decision to conduct the examination is discretionary, both in the case when the investigative process leads to a certain opinion, and also in the case when it is directed to the creation of reliable data.²⁸ Returning to the legal nature of the examination, the code classifies it as one of the types of evidence, together with testimony, recognition, forensic experiments, etc.,²⁹ thus psychiatric examination provides in this way elements that can be used directly for decision making.

Examination in itself is more than evidence; it is distinguished for its character as an evaluative component.³⁰ Through this examination, the psychiatric expert provides the court with the technical skills it lacks.³¹

Regarding the selection of the expert, there has been a lot of debate about the criteria to be used for his appointment. The selection of the expert constitutes a critical task of a comparative nature, as the judge chooses among several subjects what is most appropriate for this purpose.³² The appointment of the expert in a discretionary manner only by the judge, without considering it necessary to consult with the parties, is considered by some scholars to be contrary to the procedural independence of the trial, but on the other hand, the selection of the expert by the parties would raise many concerns regarding the influence that can be made to the experts either from the defense or from the accusation to direct the resolution of the case.

The appointment of the expert is a choice related to the object of the investigation; it is a free choice from the approved list of experts or even outside of it.

Article 179 of the Code of Criminal Procedure, requesting as the main criterion the competence and qualification of the expert, to whom the examination will be entrusted, has determined the selection of the expert from the approved list of experts or the institute

of forensic medicine,³³ identifying with the inclusion in this list the guarantee of the professionalism of the expert. It is also accepted, the need to call ‘experts with specialized knowledge’, and if ‘the assessments to be performed are very complex or require different knowledge in different disciplines’, the court may order examination from several experts or otherwise examination by a commission of experts.³⁴ Finally, if the expert cannot perform the task, article 186 of the Code of Criminal Procedure provides that it is possible that this ‘task should be entrusted to another expert’.

The appointment of the expert is made through a decision,³⁵ which must set the date for conducting the examination and the completion of a certain deadline.³⁶ The appointment is notified to the expert in the presence of the prosecutor and the defense counselor of the parties.³⁷ The expert provides personal data and the court verifies the absence of the causes of incompatibility or incompetence, and further warns him of the obligations and responsibilities he has under criminal law. Articles 180 and 181 of the Code of Criminal Procedure define the causes of incompetence, incompatibility of the expert and those of non-acceptance and dismissal; it is about the mentioned reasons that bring about the invalidity of the examination. The court, after hearing the experts, the prosecutor and the defense counselor, at the end of a collective assessment, determines how it should act regarding the evidence gained or otherwise assigns tasks.

Regarding the answer to the questions addressed to the expert, article 185 of the Code of Criminal Procedure provides that the expert must give his written opinion,³⁸ which is recorded in the report of the hearing. The answer of the expert to the questions addressed to him is immediate, unless the expert is given a period of time not exceeding 60 days within which he must give his assessments. The right to read the act of examination comes only after expert’s oath in court.

Both experts and technical consultants are heard as witnesses in criminal proceedings, according to Article 153 of the Code of Criminal Procedure, and must also take the oath to tell the truth. Unlike witnesses, experts and technical consultants, may use only texts, newspapers or other written materials which will be included in the judicial file.

Moments of psychiatric examination

It is clear that the institutional role of psychiatric examination in criminal proceedings, even in forensic psychiatry, is to determine the mental conditions of the person undergoing the examination.

The examination is addressed not only to the defendants, convicts but also to the victims of a crime;³⁹ these persons are carriers of specific problems in terms of specific recovery therapies, therefore psychiatrists are specifically trained compared to clinicians, although they often perform their activity as clinical psychiatrists. However this part of the article will deal only with the examination performed on the defendant.

Psychiatric examination in criminal proceedings may be required for the following purposes:

1. assessment of the accused’s procedural capacity or ability to knowingly participate in the proceedings;
2. ascertainment of the mental state every 6 months in the case of suspension of the process due to the impossibility of the accused;
3. preliminary determination of the security measures provided by article 46 of the Criminal Code and article 232/(e) of the Code of Criminal Procedure;
4. assessment regarding the existence of a complete or partial mental disorder at the time of the commission of the offense, the current condition of the accused, as well as the social danger.⁴⁰

The Albanian Code of Criminal Procedure has defined not only the cases in which examination should be requested, but also the cases for which examination cannot be ordered;⁴¹ if we exclude the rules of juvenile proceedings as well as those related to the execution phase of the sentence, examinations related to the character and personality of the accused, qualified forms of social danger and in general psychiatric qualities independent of pathological causes are prohibited.⁴²

While the investigation of the accused or the defendant is conducted in order to ascertain three different situations, procedural capacity, social risk and responsibility, the mental state examination is intended to ascertain only the latter. The expert is usually asked to answer the questions: What were the mental conditions of the person undergoing the examination when the event took place and especially whether the ability to understand actions and to desire the consequences is excluded or it is significantly reduced due to some mental disorder?

Although the psychiatric examination ascertains the responsibility or not of the person undergoing examination, it also helps in assessing the social risk of the person in the case of ascertaining a mental disorder, as well as determining whether or not the person is able to consciously participate in the process, referring to the current conditions of the mental state. Here it is best displayed the role of the expert in the position of a technical consultant.⁴³

Conclusions

The way in which the examination is conducted today and the conclusions of the expert put into question the legal process in the true sense of the word. The issue if the defendant understands that he has committed a criminal offense can no longer be addressed to the expert. The expert is not a lawyer and does not know the definition of a criminal offense; he must answer the question within his professional framework: Did he suffer from a disorder or not and to what extent was this disorder? How much the

disorder has affected his ability to understand is a question that the court has to answer and not the act of examination. If the act of examination will continue to be drafted in the way it is drafted today, in essence the one who makes the final decision is the expert and not the court.

The act of examination is the same as all other evidence in the process. In fact it cannot take on a predetermined value as this would compromise the process by violating all constitutional guarantees for a fair legal process. However we can say that forensic examination constitutes the strongest evidence in a process and it can be viewed with precedence by the court only in those cases where it constitutes the only evidence at trial and is the only circumstance that can shed light on the truth.

The Albanian penitentiary system needs a profound reform and restructuring of institutions that house mentally ill subjects who have committed criminal offenses. Currently in Albania there is no institution of the type of forensic psychiatric hospital, leaving the treatment of this category in the prison hospital or in the hospital of Kruja, based on social risk. These two institutions are conceived as penitentiary institutions and the accommodation of these subjects constitutes another constitutional violation. These subjects are not considered convicted and in the conditions of the impossibility of the state to provide treatment by law, they have the right to request outpatient cure. This cannot happen, as many of them have committed extremely serious crimes such as those against life, health or sexual freedom.

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