



Research Article

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Expertise act as evidence, accessibility and practical issues according to the Albanian legislation

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Abstract

One of the most important pieces of evidence provided by the Criminal Procedure Code (hereinafter: CPC), is evidence with an expert, which is taken in cases when the proceeding body for resolving a specific case needs special technical, scientific or cultural knowledge. The lawmaker, as for any evidence provided in the CPC, provides for the notification of the receipt of this evidence to the subject's party to the criminal proceeding. Even in this case, the evidence with an expert, namely the decision to appoint an expert, will be notified to the subjects of criminal proceedings of the defendant or his defense counsel.

The problem encountered in practice regarding this decision is related to the fact that this decision is notified only to the person who holds the status of defendant and is not notified to the person under investigation or the person to whom the criminal offense is attributed. In fact, this attitude taken by the prosecution practice is not in line with the provisions and purpose of the CPC, which provides that the rights of the person under investigation and the person to whom the criminal offense is attributed are equated with the rights of the defendant. In relation to this fact, the Court of General Jurisdiction has taken a different position from the Court of Special Jurisdiction. The Court of General Jurisdiction always notifies the decision to perform the act of expertise to the person under investigation and a completely different position is held by the Court of Special Jurisdiction which notifies the decision to appoint the expert upon receipt of the status of the defendant. Another problematic related precisely to the decision on the notification for the assignment of the expert is his recklessness in the trial process, since the opinions held in practice are different. If we refer to the position of the Court of Special Jurisdiction, it does not declare the act of expertise unnecessary in those cases when the decision to appoint the expert has not been notified to the person under investigation.

Following this manuscript, I will also consider extensively the evidence with an expert and the provisions of the CPC on this evidence, together with some concrete cases on the positions held by the jurisdictions of the courts to notify the decision to appoint an expert as subject of criminal proceedings.

Keywords: Material, procedural criminal law, Albania.

1. Introduction

Evidence with an expert in the probation process is considered important evidence in the criminal process, this is due to the fact that the proceeding for cases that require special knowledge can be obtained precisely through the act of expertise. What is also important to implement when taking evidence with an expert is compliance with the provisions of the CPC on the assignment of the expert, the notification of his appointment, his duties and the content of the act of expertise, as the violation of these rules follows the sanction of the non-use of this evidence in the criminal process, which we will analyse extensively following this paper.

Expert evidence involves engaging licensed individuals in various fields, such as forensics, ballistics, and forensic sciences, to offer their professional opinion about the evidence presented to the court. These experts help judges and lawyers to better understand technical evidence, contributing to the formation of a fair verdict. The importance of expert evidence in the criminal process is also emphasized in its role in protecting the rights of the parties involved. Specialised expert knowledge is essential to ensure that the evidence presented is interpreted correctly, preventing misunderstandings that may affect judicial decision-making. This is especially important in cases where the evidence is complex and requires detailed analysis, thus guaranteeing a fair and transparent process.

However, the involvement of experts in the criminal process brings some challenges. Issues such as standardization of methodology, reliability of reporting, and cost of expertise can affect the efficiency of the expert trial. These problems often put at risk the integrity of the judicial process, emphasizing the need for clear rules and an oversight system that guarantees objectivity and transparency in the use of expert evidence. Thus, expert trials not only increase the chances of reaching a fair decision, but also require constant attention to address the challenges that arise in practice.

2. The meaning and object of the test with the expert

The Albanian lawmaker in the Criminal Procedure Code has provided general provisions on the definition of what will be considered evidence which is a very important element since only with the analysis of the cumulative conditions of what constitutes evidence it can be used in the criminal process. Pursuant to Article 149 of the CPC, the evidence is defined as:

- 1. Shall be considered as evidence the information on the facts and circumstances related to the criminal offence, which are obtained from sources provided for by the criminal procedural law, as well as in compliance with the rules defined by it, and serve to prove whether the criminal offence was committed or not, its ensuing consequences, the guilt or innocence of the defendant the level of his/her accountability.*
- 2. If evidence is requested and it is not regulated by law, the court may introduce it if it is*

deemed suitable to determine the facts and does not compromise the moral freedom of the person. After hearing the parties on the methods for gathering evidence, the court shall decide on the admission of evidence.

The above provision aims to prove the facts subject to proof as follows:

- *committing or not a criminal offense*; first of all, it must be proved whether a criminal fact has occurred, that is, an act or omission, committed through fault, which is defined as a criminal offense by a provision of the special part of the Criminal Code.
- *the consequences derived from it*; in the criminal process must be proved the consequences caused by the criminal offense, the damage caused by it, which, in addition to the impact on the type and extent of the criminal penalty, can pass the civil liability of the perpetrator, in case the victim files a civil lawsuit. Therefore, determining the consequences caused by the offense also dictates the need to identify the victim of the criminal offense.
- *the guilt or innocence of the defendant*; after determining the elements of the criminal fact and the consequences derived from it, an equally important fact subject to proof is the identification of the suspected perpetrator and the provability of his guilt (criminal act, subjective element, causal link, liability, form of guilt, personality of the perpetrator, etc.). In compliance with the principles of legality and objectivity, the facts that affect the justification of the defendant are also subject to proof.
- *the degree of responsibility of the defendant*; in cases when the fault of the defendant is proven, the facts from which his role and contribution to the outcome and the degree of criminal responsibility are determined, on which his treatment in the punishment plan will depend.

In this sense, the purpose of taking evidence with an expert is to prove every fact that is a subject of evidence. And the facts that constitute the subject of evidence are those facts related to the accusation, the guilt of the defendant, the imposition of security measures, the sentence and civil liability, as well as the facts on which the application of procedural norms depends (code of criminal procedure).¹

Evidence with an expert as mentioned and above is required by the proceeding body in those cases when it is necessary to conduct research or to obtain data that require specific technical, scientific or cultural knowledge which constitute the object of expertise.² Regarding the evidence with an expert, the doctrine has developed definitions on the expert considering him as a natural person who possesses special knowledge or certain experience in the fields of science, technique, art and who on the basis of this knowledge, have the opportunity to make before the court a true description of a state of facts or to draw the correct conclusion that the consequences derive from a certain state of facts. Of course, in practice there are different types of experiences ranging from medical expertise, psychiatric expertise, chemical expertise, technical expertise, document expertise, accounting expertise, etc (Peppo, 2023).

¹ Article 151 of the CPC.

² Article 178 of the CPC.

3. Appointment of the expert according to the provisions of the Criminal Procedure Code

The assignment of the expert is made from a list of persons who are licensed and have special knowledge that the proceeding body needs in different branches and are registered in the book of experts. The expert in the performance of his duties must not be incompatible with his duty.³ This implies that a person who according to the provisions of the CPC is a minor, who has a legal prohibition or whose legal capacity is limited or suffers from a mental illness; one who has been suspended, even temporarily, from public duties or from the exercise of a profession; one against whom personal security measures have been taken; one who cannot be questioned by a witness or an interpreter or who has the right not to make a testimony or translation, conditions under which the lawmaker has provided to ensure a fair and regular process, since an expert act performed by an expert who is incompatible with his duty cannot be used in the trial process.⁴

After taking the decision to appoint the expert, the court should notify this decision to the subjects of criminal proceedings. The problem encountered in practice is related to the legal provision of Article 179, paragraph 2 of the CPC, which states that:

"The decision of the proceeding body to appoint the expert is notified to the defendant or his defense counsel, informing him that he has the right to request the expulsion of the expert, to propose other experts, to participate in the expert himself, where possible, and to ask questions to the expert."

This provision of the law is applied differently from judicial jurisdictions and as a rule this decision should be notified not only to the defendant but also to the person under investigation or to the person to whom the criminal offense is attributed. This attitude is in accordance with the legal provision made by the CPC in its Article 34/a, which expressly states: *"The rights and guarantees provided for the defendant are also applied to the person under investigation and the person to whom the criminal offense is attributed, except in cases when this Code provides otherwise"*, as this guarantees a fair and regular legal process whereby the subjects of the criminal proceeding are given the opportunity, such as the defendant, the person under investigation and the person to whom the criminal offense is attributed as subjects with a probable cause of the proceeding, to defend and to exercise their rights in the criminal process.⁵

Also, this legal provision that the legislature has made on the notification of the decision only to the defendant or his defense counsel is a provision that contradicts the legal regulation on the notification of the accusation. The person assumes the

³ Article 180 I CPC.

⁴ Article 151/3 CPC.

⁵ Article 1 of the Criminal Procedure Code stipulates that the procedural criminal legislation is tasked with ensuring a fair, equal, and lawful process, protecting personal freedoms and the legitimate rights and interests of citizens, and assisting in strengthening the legal order and the implementation of the Constitution and state laws."

capacity of the defendant with the notification of the accusation,⁶ an act which is issued after the act of completing the investigations. The proceeding body takes evidence with an expert during the preliminary investigation phase and as evidence taken during this phase the proceeding body has not notified the act of expertise to the defendant whether it will implement the provisions of Article 179/2 (Miha, 2024). This is a problem of Article 179/2, a provision which should be amended by stipulating that the decision on the assignment of the expert and the results of the examination act should be notified not only to the defendant but also to the person under investigation. The results of the act of expertise should be notified immediately to the person under investigation, the person to whom the criminal offense is attributed without considering these acts as investigative secrets in order to be able to ask additional questions on the expert and to have claims on the uselessness of this act. Clearly, this provision provided by the lawmaker contradicts the investigation itself and its purpose, since the quality as a defendant is taken at the end of the preliminary investigations and where all investigative actions have been carried out, including the act of expertise. It can be said that this provision contradicts the purpose of the investigation because the moment of notification of the accusation as an action implies the termination of the investigation

4. Assignment of duties and actions of the expert

The proceeding body, after assigning the expert disposes of the expertise and determines a summary of the case and also indicates the day, time and place set for the expert's presentation.⁷ With regard to the submission and summons of persons who will be subject to the expertise, the proceeding body shall take all necessary measures for their submission. The assignment of the duty of the expert follows a specific procedure provided by Article 183 of the CPC. Initially, the proceeding body is assured of the identity of the expert and ensures that there are no grounds for exclusion from the duty of the expert and warns about the obligations and responsibilities provided by criminal law.⁸ The purpose of the legislator in this legal provision was precisely to meet the needs of expertise to give a fair solution to the case and to ensure the principle of due process of law. This is the reason why the CPC has provided specific rules and procedures for the actions performed by the expert, assigning his duties in order to ensure the right to a due process of law to the subjects of criminal proceedings.

Also, in the framework of the implementation of the right to a fair legal process comes the right that the subjects of criminal proceedings have to request the expulsion of the expert in a criminal process.⁹ This is due to the existence of several cases that the lawmaker has treated as prohibitive conditions that the act of expertise should

⁶ Article 34 I CPC.

⁷ Article 182 CPC.

⁸ To be held criminally liable for false expertise foreseen by Article 309 of the Criminal Code.

⁹ Article 181 I CPC.

not be used as evidence in the criminal process. The conditions that the CPC has provided for the expulsion of the expert are the same as the cases for the expulsion of the judge.¹⁰ Of course, the expert is also obliged to declare whether he has any cause of exclusion and at the moment when he is assigned the duty by the court, he is informed of the responsibility he bears from the criminal law regarding the non-fulfillment of the obligations arising from the criminal procedural legislation. Like every right guaranteed by law and the right to demand the expulsion of an expert, there is a decadent time limit. If the reason for the exclusion is declared by the expert himself or by the subjects of the criminal proceeding, this request may be submitted until the assignment has been determined and when the cause has arisen immediately or have been subsequently recognized, before the expert has given his opinion. Upon this request of the parties or of the expert himself shall be decided by the proceeding body that has appointed the expert (Miha, Pekmazi, 2024).

5. The act of expertise and intransigence in the criminal process

The expert, after drafting the act of expertise, submits his opinion to the court in writing. When the designated experts are more than one and have different opinions, each submits by special act his own opinion. When the facts are complex and the expert cannot give an answer immediately, the proceeding body gives him a term not longer than sixty days. Where there is a need for particularly complex verification, this period may be extended more than once for periods not exceeding thirty days, but without exceeding the maximum period of six months.¹¹

Another important aspect of the act of exposure is its appreciation and appreciation in the trial process. The Albanian High Court of Justice (2002) has ruled that:

“Regarding the principle of appraisal and evaluation of evidence, the College emphasizes the importance that the implementation of this principle has in giving a fair and objective decision in accordance with the public interest of the criminal proceeding and the guarantees and rights of the accused during the criminal process. Evidence assessment provides the basis for the final decision on the facts. It implies a complex reasoning by which the judge examines the hypotheses on the facts, determines the degree of rational confirmation that each hypothesis receives on the basis of the available evidence the court has the obligation to give reasons when assessing and using the evidence and the reasoning for the evidence it does not consider.”

The value as evidence is taken in the judicial review, when what is offered as such by the parties is verified and finally accepted as such. The process of evaluating evidence is a process of perceiving and protecting the professional opinion of the judge on

¹⁰ Article 18 of the CPC states that: The parties may request the exclusion of the judge: a) in the cases provided for by Articles 15, 16 and 17; b) when during the exercise of functions and before the decision has been rendered, he has expressed his opinion on the facts or circumstances subject to the proceeding. A judge may not render or participate in the award of a decision until a decision declaring it inadmissible has been rendered or dismissing the application for expulsion.

¹¹ Article 185 I CPC.

everything that results from the process. For a test to be valid in the trial process it must cumulatively meet the following conditions:

1. to prove or not the commission of the criminal offense, the consequences derived from it, the guilt or innocence of the defendant and the degree of his responsibility;
2. it is obtained from the resources provided for in the criminal procedural law;

Regarding this condition, the High Court has also expressed itself in the unifying decision No. 6, dated 11.10.2002, which states that: "*They should not only contain notifications on the facts and circumstances related to the criminal offense, for which the person has pleaded guilty and convicted, but also have been taken from one of the sources provided for in the criminal procedural law, in accordance with the rules set by him and which serve to prove his non-performance of the criminal offense, requirements that do not meet the declarations...*"

3. have been obtained in accordance with the rules laid down by him.

Therefore, in order for the evidence in the criminal process to be useful, it must not be obtained contrary to the prohibitive conditions provided by the CPC for obtaining evidence. The lawmaker under Article 151/3, when using the term in violation of the prohibitions of the law, it translates into guarantees for the defendant which are provided not only in the criminal procedural law but also in the Albanian Constitution, namely in Article 32/2 thereof, it is stated that: "*No one can plead guilty on the basis of data collected illegally.*"

In this sense, the lawmaker has not foreseen any time limitation for raising the claim of non-use of evidence either during the preliminary investigations, or in the High Court, since the court, based on the principle of disposition, considers mainly the non-use in the process. In itself, non-use is related to non-compliance with a rule established by law, the violation of which entails the non-use of the act or evidence in the probationary process. Impotence is a kind of invalidity which does not strike the act in itself, but its probative value, it is a procedural sanction of a special character as it strikes only those acts that have a probative value. Article 151 of the CPC provides for the process of obtaining evidence in which it is expressly stated that it is the proceeding body who, according to the rules defined in this Code, obtains the evidence during preliminary investigations or during the trial at the request of the parties. The evidence with an expert as mentioned above is taken when the proceeding body needs to have special knowledge for the resolution of the case and for this it appoints an expert and receives from him the act of expertise either during the preliminary investigations or during the trial at the request of the parties respecting the legal obligations on the assignment of the expert, notification of receipt of this evidence to the subjects of criminal proceedings, etc., which are important for the evidence with an expert to be useful during the trial process. The Court, as the competent organ assesses the evidence on the expert evidence and has a decision on its receipt and may revoke it at any stage of the judicial review. As mentioned above, the positions that judicial jurisdictions have taken in relation to the notification of the decision to appoint the expert of the defendant or his defense counsel have been different.

Following the amendments of the CPC with the law nr.35/2017, the principle of

taxability of the invalidity of criminal procedural acts has been established and consequently the courts cannot declare invalid the acts of expertise in case the concrete provision does not provide for its violation to be accompanied by the invalidity of the procedural act. Provisions that regulate evidence with experts, namely Articles 178-186 of the CPC, do not provide for the relative invalidity of the violation of any provision. Consequently, the proceeding body, even if these provisions are violated, cannot conclude with the declaration of invalidity of the act of expertise or the decision to appoint the expert.

Taking into account the provisions of Article 151 of the CPC, the invalidity of the act of expertise may be required when violating the ordinance provisions of the Criminal Procedure Code, the practice of the courts has been a little rigid as the court has not declared the act of expertise irrevocable in those cases when the notification of the decision to appoint the expert has been notified only to the defendant, thus interpreting the provisions of the Criminal Procedure Code in a narrow manner, unlike the correct interpretation made by the General Jurisdiction Prosecution Office which in any case notifies the decision to appoint the expert not only to the defendant but also to the person under investigation or the person to whom the criminal offense is attributed. This is an improper legal regulation of this provision which I am of the opinion that should be amended and provide for the possibility that the decision to appoint an expert be notified to all subjects of criminal proceedings in accordance with the purpose and spirit of criminal procedural legislation to guarantee a fair process which protects and secures the rights of either the defendant or the person under investigation or the person to whom the criminal offense is attributed.

6. Conclusion

The analysis of this manuscript showed that the position held in practice should be unified and this decision in the implementation and the provisions of Article 34/a of the CPC is notified not only to the defendant but also to the person under investigation or to the person who is attributed to the criminal offense in order to ensure participation and affective knowledge in the criminal process. The position taken by the Prosecution on the notification of this decision not only to the defendant but also to the person under investigation is a regular and positive attitude which should be applied uniformly in all other judicial jurisdictions.

Firstly, in accordance with the purpose of the legislator for a fair and equitable process, this provision should change and provide for the possibility for this decision to be notified to all subjects of criminal proceedings¹² in accordance with the constitutional provisions and the ECHR provisions on due process of law.

Secondly, we would also suggest, because of the problematic application of this provision in practice, the necessity arises as mentioned above, the unification of this practice with decisions of the High Court.

¹² Subjects of criminal proceedings refer to the defendant, the person under investigation and the person to whom the criminal offense is attributed.

References

- Code of criminal procedure. (n.d.). Albania.
- Court, H. (2002). *High Court*. Retrieved from High Court decision of Criminal College of HC 66/2002: <https://www.gjykataelarte.gov.al/sq/>
- High Court, D. n. (2002). *www.gjykataelartw.gov.al*. Retrieved from Decision no (60 dated 22.02.2022): <https://www.gjykataelarte.gov.al/sq/>
- Laska vs Lika, 12315/04 (ECHR 04 20, 2010).
- Magistrates, S. (n.d.). *School of Magistrates electronic commentary*. Retrieved from <http://komentariielektronik.magjistratura.edu.al/>
- Parlament, A. (1995, 03 21). *Law "Code of Criminal Procedure"*. Retrieved from qbz.gov.al
- Parlament, A. (1998, 10 21). *qbz.gov.l*. Retrieved from Kushtetuta : <https://qbz.gov.al/preview/635d44bd-96ee-4bc5-8d93-d928cf6f2abd>
- Parlament, A. (2017). *Law no. 35/2017 on amending Criminal Procedure Code*. Retrieved from qbz.gov.al
- Miha, E. Pekmazi, I. (2024). Elecgtronic evidence in the criminal process. *Academic Journal of Business, Administration, Law and Social Sciences*, Vol. 10. No. 2.
DOI: <https://doi.org/10.2478/ajbals-2024-0010>
- Miha, E. (2024). Legal changes of the decision not to initiate a proceeding in the Albanian criminal procedure code, their implementation in practice. *Balkan Journal of Interdisciplinary Research*, Vol. 10. No. 1.
DOI: <https://doi.org/10.2478/bjir-2024-0008>
- Peppo, E. (2023). A comprehensive review of the diversion of children in conflict with law from judicial proceedings in Albania: Assessing alternatives to traditional justice. *European Journal of Economics, Law and Social Sciences*, Vol. 7. No. 3.
DOI: <https://doi.org/10.2478/ejels-2023-0011>