Reform Of Use Of Expert Witnesses As A Mean Of Evidence In Macedonian Court procedures

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Abstract

This paper examines the possibility of efficient application of the new rules concerning the use of expert witnesses in criminal and civil cases for ascertaining the truth in present arrangement of relations between the actors involved. Having in mind that Republic of Macedonia has recently commenced a drastic reformation process in both criminal and civil procedure, we examine pros and cons of the different ways that are design to improve the efficiency in use of the new concept of expert knowledge as independent mean of evidence in the criminal and civil procedure. Though much research examines the role of expert witness especially in criminal procedure, not many of them examine the transition of this form of evidence from continental type of procedure to one with adversarial physiognomy, which is the most essential landmark of the mentioned reform. Therefore, with combination of normative, historical and comparative method we will try to ascertain whether the new normative solutions adhere to required effects of the reforms, especially to the principle of equality of arms. Much of our paper is focused on criminal procedure, because of the inherent characteristics of the procedure itself and fact that the characteristics of the new concept of expert knowledge are more visible, but nevertheless what is said about criminal procedure and it’s relation to the expert witness applies to the civil one.

Keywords: expertise, reform, rules of evidence, procedural equality

Introduction

The main objective of criminal proceedings established by the new Macedonian Law on Criminal Procedure(LCP) in article 1 is to determine the rules set to guarantee fair criminal proceedings so no one who is innocent is to be convicted and to the offender to impose criminal sanctions under the conditions provided the Criminal Code and on the basis of the legally prearranged procedure. On the other hand, Law on Civil Procedure defines the civil procedure as a set of rules on the basis of which the court makes rulings on the rights and obligations of citizens in disputes of personal and family relations, from working relations, as well as from property and other civil legal relations.

Based on this basic postulate, both procedural Laws, in the framework of real life settings that are conditioned by the social circumstances, are trying to create a form of procedure that is the most appropriate way to achieve afore mentioned goals. On the other hand, the protection of human rights and fundamental freedoms that are base of all modern legal systems, whether in the form of a formal proclamation or genuine humanistic orientation, significantly, formally or in fact, reduces the scope for discovery, clarification and confirmation especially in dealings with criminal offenses. Therefore, it is necessary to determine the suitability and adequacy of any means of evidence that can contribute to greater efficiency and confidence in the justice system, both, in terms of interest in discovering the truth, on the one hand, and compliance with the requirements of current standards of human rights and freedom, on the other hand.
The importance of establishing the truth in court proceedings is enormous. Basically, the deliverance of verdict and the imposed legal consequences arises from the belief of the court in the existence of certain material facts and circumstances discovered through their proving. It is the first and most important task from whose enactment depends on the correct application of law and legality of the court's decision. Verdicts based on incorrect determination of the factual situation are not simply judgments without benefit; on the contrary, there are a direct injury to the goal of criminal procedure which causes damage to the whole community, and especially on the rights and interests of the individual to whom it relates.

Thus, important place of proving especially in criminal cases stems out the real difficulties that stand in the way of proper process of determining and establishing the relevant facts. Although in civil cases, where a civil contracts even from the start provide the evidence that will later can be used in case of any disputes, sometimes, ascertaining the truth may require deeper examination of relevant facts and therefore usage of means of evidence, similar to the ones used in criminal procedure, is on the agenda of the trier of facts even in civil litigations. Nevertheless, crime happens suddenly, often unexpectedly even for perpetrator itself (Moenssens, Henderson and Portwood, 2007). Therefore, the existence of evidence is usually an accident per se having in mind that a perpetrator is additionally motivated by the urge to protect itself and regularly seeks to destroy, conceal or alter existing leads for solving the crime (Angeleski, 2008). Evidence, scarce as it is, in criminal proceedings, as well as in civil ones, as a rule, is still unreliable and usually derives from unreliable and subjective sources (statements of witnesses, victims, defendants and involved parties) (Ibid.). Establishing facts in criminal proceedings is significantly more difficult than the facts in civil procedure because of the increased volume and variety of facts that are established (for example, facts related to the personality of the accused, which are not usually established in civil litigations), as well as because of the criminal proceedings, the parties guided by their individual interests, which often differ from the interests of the whole process, do not cooperate with the court, or even more so, against the proper determination of the actual situation.

2. Expertise as evidence

As a result of almost axiomatic processes of differentiation and integration in the sphere of science, especially the hectic development of natural and technical sciences, which at the beginning of the XXI century enabled the rapid economic development and prosperity of people around the world, have caused more and more prominent role and importance of the invention, improvement and application of scientific methods and technical equipment in almost all areas of social life. Thus, the continuous development of science and technology significantly affects the forms and methods of preventive and repressive crime fighting (Kambovski, 1998). As in everyday practice, this means creating opportunities to find and use such evidence, which, in the course of some twenty years ago, it was impossible even to imagine (Buckleton, 2005). This way of reasoning, found its influence in the criminal proceedings as well as in civil ones, which necessarily raises questions about the need for inclusion of non-legal expert knowledge of specific scientific - technical areas as a means of discovering and ascertaining the truth (Berger & Solan, 2008). In fact, the use of professional, scientific and technical knowledge and skills in criminal proceedings in a way is conditioning the evolutionary path of the criminal procedure (Matovski N., Buzarovska L. G., Kalajdziev G., 2011).

Usually, we define the expertise as a means of evidencethata professional expert performs and has been entrusted by the court or other competent authority to perform in accordance with the rules of the respective specialty and the provisions of the Laws on Criminal and Civil Procedure, under which the expert prepares expert findings and opinion on important facts that is vital for the court rulings (Ibid). Therefore, the experts report in criminal and civil proceedings is evidence by which the court finds the existence or non-existence of facts that can be determined uniquely by specialized knowledge or skills. The differentia specifica compared to other participants in the criminal and civil proceedings, is his expert knowledge in a non-legal field (Brewer, 1998). In order of usage of expertise in criminal and civil proceedings, first, the trier of facts establishes the need and area of knowledge for the expertise. Then in legally specified procedure trier of facts orders the expertise and appoints a person to
conducted the expertise. In doing so, it is not always necessary to appoint expert that holds specific scientific position; the assessment of whether a person is an expert on a specific area is usually based on a direct work experience in the field and achieved personal results, and it is decision only reached by the trier of facts.

3. The reform of the Macedonian procedural legislation

Aforementioned way of thinking was finding its way into the provisions concerning expertise in Macedonian criminal and civil procedure for almost 60 years. In that way expertise was one of the most constant institutes in Macedonian Laws on criminal and civil procedure without even theoretical considerations for redesigning it and bringing up to speed with the needs of modern criminal procedure.

Then, as a shock to the system comes the ruling of the European Court of Human Rights (ECHR) in the case Stoimenov v. Macedonia. The application concerned Mr Stoimenov’s conviction on drug-related offences in March 2000 for which he was sentenced to four years’ imprisonment. Relying, in particular, on Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights and Basic Freedoms (the Convention), the applicant complained that the principle of equality of arms had been breached as the national courts had convicted him on the basis of expert reports produced by the same ministry which had brought criminal charges against him. The Court held unanimously that there had been a violation of Article 6 § 1 of the Convention concerning the principle of equality of arms. The very foundations on which use of expertise in criminal proceedings as well in civil ones, depended for sixty years were found in contravene with the standard set out by the Convention. Unfortunately, Macedonian legislators and judges failed to read the signs of infringement. There were several ECHR rulings in this direction and cases like Neumeister v. Austria, Bönisch v. Austria and Brandstetter v. Austria that set judicial precedents that should have raised the alarm about the provisions and practice concerning the use of expertise as mean of proving in Macedonian court proceedings.

The comprehensive reform of the Macedonian criminal procedural legislation must be observed as an attempt to establish a model of criminal procedure that will address the tendency for a greater guarantee of human rights and freedoms on the one hand, and establishing more effective protection of society from most dangerous forms of attacks, on the other hand. Coming into force of the new LPC is the starting point of a new line of development of the Macedonian criminal - procedural law. The LPC establishes a new type of procedure, which is based on principles set out in the Strategy for the reform of criminal law, such as the expansion of the application of the principle of opportunity in crime persecution, extrajudicial settlements, plea bargaining and simplified procedures. Also, the new LCP is based on making distance from the judicial paternalism and placing the burden of proof on the interested parties; providing an active and leading role of public prosecution in the pre-trial proceedings with effective control of police; abolition of the judicial investigation, providing major role in the investigation for the public prosecutor; introduction of the preclusion of certain procedural actions and measures against the abuse of procedural powers by the parties; strict deadlines; rationalization of the system of legal remedies; implementation of the recommendations of the European Union and the Council of Europe on the criminal proceedings; creating more efficient public prosecution through the establishment of a new operative management bodies as well as leadership and cooperation with the police and other agencies involved in law enforcement. (Krapacet al., 2007)

As to the changes related to the expertise, they are in the direction of systematization, concretizing certain aspects and subsequent refinements of conditions connected with the use of this mean of evidence. The most important and most essential novelty concerning expertise is an effort in the new LPC to incorporate all the requirements arising from international standards for human rights, especially the right to a fair trial. Having in mind the standards that are established by the provisions of Article 6 of the Convention, especially if one takes into account the content of the concept of a fair trial, it was necessary to find a solution in the new LCP for expertise that will respond accordingly especially to the demand for so-called “equality of arms”. The right to equality of arms is jurisprudential principle and means that all involved parties in the criminal procedure must have the opportunity to present his or her case in front of the court under conditions that do not place him/her at
a substantial disadvantage in spite of his opponent. (Jaksic, 2006) In an attempt to elude mentioned shortcomings of the former LCP, especially the indisposed position of defended, the LCP in article 244, in cases where the expertise is ordered, provides the right to the public prosecutor, the accused and the defence counsel to appoint their own technical advisers from the list of registered expert witnesses, to help them when collecting data or for evaluating or challenging opponents expertise.

The situation concerning the use of expert witnesses in civil litigation passed through similar stages in relation to the LCP. Although the Law on Civil procedure was passed almost a decade later than the old Macedonian LCP, it basically copy-pasted the solutions concerning the usage of expert witnesses from the criminal procedure into the civil one. So, the same type of objections mentioned for the criminal procedure, applied to the civil procedure. Having this in mind, simultaneously with the reform of the legal solutions concerning expert witnesses in criminal procedure, a substantial reform occurred in Law on civil procedure. With the amendments pass in 2010, the use of expert witnesses falls on discretion and initiative of the litigating parties, and no longer on the discretion of trier of facts which has factual effect of equalization of the involved parties in the civil procedure and impartial position of the judge and waiver of judicial paternalism.

4. Technical advisers as a way of achieving standards of equality of arms under Article 6 of the Convention

The introduction of technical advisers as a form of application non-legal expert knowledge in criminal proceedings is a direct result of reforms of the Macedonian accepted model of criminal procedure. One of the main features of that reform was complete waiver of judicial paternalism. Judicial paternalism was based on a traditional understanding that only the court can determine the substantive truth and the belief that in exercising these functions, only the court will be successful and equitable, and it is the only competent authority that can take into account interest of the state efficiency and the rights of the accused in a balanced way (Kessler, 2005,).

Equality of the parties or their equality in the use of process resources, as a logical consequence of waiver of judicial paternalism, is one of the fundamental principles of fair trial, and therefore, in accordance with the provisions of Article 6 of the Convention as well as jurisprudence of the ECHR, set primarily in the case Neumeister v. Austria(Series A, no. 8/1968). In this sense, equality means that the court must give each party a reasonable opportunity to exercise its procedural powers in a way that does not lead to a substantially worse position than the opposite side. Such procedural principle aims to establish the equilibrium position of the parties, and that they establish and maintain an equal position in each stage of the process, and thus appear as a necessary condition for the full realization of the principle of contradiction an adversarial type of criminal procedure.

By default, breach of the principle of equality of arms would be found in cases where the national court, in the same circumstances adopts evidentiary motions from one and rejected motions of the other party (Albert and Le Compte v. Belgium, Series A., no.58/1983); when the court simply doesn’t take into account evidentiary motions from one of the parties (Dombo Beeher v. Netherlands Series A, no.274/1993); when doesn’t submit the findings and expert opinions that have already been delivered to the other partyRuiz Mateos v. Spain, Series A, no. 262/1993); as well as when only one of the parties is allowed to directly examine witnesses and experts, and the other is not(Hentrich v. France, Series A, no. 296A/1994).

Although the Court of Human Rights in apstractodoes not consider that in continental legal systems there is a violation of the principle of equality of arms per se, however, if the manner of appointment of experts, as well as its main characteristics (in particular, membership of a particular state agency, indicating that the de facto that the expert is a witness for the prosecution in the process), represents a violation of the principle of equality, but only if the national court does not balance the process so that the imbalance, especially in criminal proceedings, of the public prosecutor and the defendant isbalanced by allowing the defence to present evidence by examination expert on its own motion (Ibid).

Such a cumulative effect of the aforementioned new solution has made it necessary to find a solution that will ensure that equal role, position and adequate funding for the defence of the accused,
especially if one bears in mind that true implementation and the establishment of a new model of adversarial procedure actually depends on real implementation of standards for equality of arms in subsequent proceedings. This is caused by the fact that there is a evident tendency to keep the defendant as much as possible out of pre-trial investigations, which actually is the main motive to take aim at the models, tools and solutions, which will allow the defence an adequate way to compete with the dominant role of the public prosecutor, especially in the area where inherent subordination of the defence comes to expression at most, which is in front of all is the use of expertise as mean of evidence (Kalajdziev, 2009).

As an additional argument in favour of innovating the status, manner and form of application non-legal expert knowledge in criminal proceedings is to emphasize the need, despite the fact that the ECHR officially does not oppose or see proving with the help of impartial, court appointed, expert witnesses, as a violation of the principles of a fair trial and due process rights per se (Wasek – Wiaderk, 2000), however, when such expert reports are the basis of the prosecution act, the defence, as was actually adjudicated in the case Stojmenov v. Macedonia, must receive fair and adequate opportunity to contest official expertise report, that is, when official expertise report comes to doubt, the defence (or the opposing party in civil litigations) must be given an opportunity to create and present alternative expert opinion in its favour.

In the new LCP, solution for these situations is that it accepts technical advisors as balance model presented by the Italian criminal procedure legislation, which specifies that the technical advisors are professional people from the register of experts that the parties hire if they are in need of expert assistance in a particular area in order to help with the collection of data for technical issues or challenging the opponent expert opinion and findings.

What distinguishes technical advisers from other form of application expertise is the fact, that the technical advisors are determined as process entity with the position, status and authority that are similar with the rights and obligations that define the procedural position of the expert, respectively, in contrast to the role of experts - specialists, whose role is limited providing advisory opinions, which are not a source of evidence basis; a statement of the technical advisor is equated with the findings and opinion of an expert. The introduction of technical advisors in criminal and civil proceedings means implementation of a kind of legal as well as scientific contradictions, particularly through providing the opportunity for the advisors to participate in the formulation of the expertise questions (Article 230 of the Codice di procedure penale); or they can be present on the forensic investigations; the advisor can make suggestions to the experts and advisor’s remarks are also incorporated in the report. If technical advisors were appointed by the completion of the expertise, they can see the findings and opinions or seek the authority conducting the proceedings to be allowed to visit and examine the subjects or objects that are the subject of expert testimony. The intent to equalize the status and position of technical advisors to the status and position of the expert is easily observable from the fact that just like the experts and technical advisors are selected from the register of experts and to both apply same provisions for disqualification. Also, same provisions are applied for experts and technical advisers for summoning on the trial and provisions for presenting evidence through direct and crossinterrogation of experts and technical advisor.

The importance of this new institute, which is provided in the provisions of the new LCP can be observed from the possibility that the defendant and his counsel could use the help of technical advisers even when you do not have enough funds to hire a technical advisor. Specifically, in this regard, legislations that have provisions that regulate this institute, aware that the real establishment and effective use of this mechanism is necessarily associated with a significant material costs, anticipate possibility of hiring a technical consultant for the defence needs to be at the expense of the state budget and that, as this issue is resolved in the case of the Macedonian LCP, most often associated with meeting the requirements, which are intended for implementation of the request for defence of the poor.
Conclusion

In today world where science and technology are playing more and more important part in everyday life, proving fact in criminal cases relies more and more on expertise as a mean of evidence. Therefore, each national legislation must find the perfectly balanced individual solution to appropriately integrate expertise in its legal system. The difficulty in finding the balance comes from the fact that expertise, on the one hand, must be effective mean for establishing the facts that are critical for the criminal or civil case and, on the other hand, the benefits from its usage must be equally shared by the involved parties in the criminal or civil proceedings.

By doing so, national legislation must be aware that there are international standards, like the article 6 of European Convention on Human Rights and Fundamental Freedoms that promotes due process rights. Concerning the expertise, in short this means expertise must be equally accessible to the both parties, or giving each part, the reasonable possibility to present its cause, in those conditions that will not put this part in disadvantage against its opponent. Hence, the parties must have the possibility to present, in an equal manner, all the evidence they hold.

Republic of Macedonia undertook serious steps to reform the criminal and civil procedure. In it, it is trying to establish means that are more effective in ascertaining the truth. The procedure in whole is getting more adversarial physiognomy with main accent put on effectiveness. In this circumstances expertise is getting a radical new design, where the effort to meet the standards of the Article 6 of the Convention are clearly visible, mainly by the provisions concerning the technical advisors, foreseen as a sort of check and balance to expert witnesses used by the prosecution.

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