CRITICISM OF THE PRACTICE OF OBTAINING AND USAGE OF EXPERT EVIDENCE

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Annotation

The author points to a very low level of judicial and investigative practice, with very low social credibility. He considers and states possible causes, despite the quality training of judicial and security practitioners. He sees the reason for the change in the quality of training of investigators as well as judicial staff, those who ultimately decide in the preparation and implementation of the judicial proceedings. Democratization processes have had a negative impact not only in the wider society, but, unfortunately, also among prosecutors and judges, and investigators are no exception. Most errors occur in the evaluation of expert opinions, the quality and expertise of which is at a low professional and moral level. However, there is a related problem for judges, who are often unable to interpret expert opinions and monitor the qualifications and specialization of experts. The recruitment of experts is formal and their activities are not sufficiently controlled. Nor does formal attention is given to the assessment of the legal correctness, probative value, or credibility of an expert opinion. The author points out the failure of the state in the organization, provision and control of expert activities and shows by examples that its scope is so high that there must be a change in the structure and provision of expert institutions.

Keywords: evidence, expert testimony/expert opinion, criminology, forensic science, law, means of proof/evidence

Introduction

The investigation and activity of the judicial authorities reach a high degree of social danger. Citizens are dissatisfied with the resolution of their lawsuits, but also with accusations based on the unprofessional approach of the police and the ineffective control work of the prosecutor's office. Our aim is to inform each other about the situation in the area and to gradually prepare proposals for a significant change in the intolerable justice system. The most effective method turns out to provide judges and prosecutors with objective expert opinions and ensure their objective evaluation. International cooperation in a specified area

is an indispensable alternative to resolving an intolerable situation.

Content of the article

Recently, I have been thinking about how it is possible that both the judiciary and the investigation are getting to the stage where practically the whole society will not say a nice word to this address. It is an open secret that achieving justice is more of a coincidence than a reasonable argument. The scientific approach to the taking of evidence, expert examination and the qualified approach of the judicial panels, where most of its chairmen and other participants sit in the absentee legal norm of justice, all this is probably irretrievably a thing of the past. What frightens me the most is that the 40-year effort, which we dedicated to the training of experts in university specialization of security and protection, was completely useless. Criminalistics, forensics, expert activity, based on expertise slowly disappears and today no one needs them – they do not respect them and almost do not know anything about them. No, I am not mistaken if I talk about criminalistics as a problem. In the end, no science ceased to be a problem, and even if it "solved everything" – it would cease to exist as a science after all. I began to regret that I put myself on the path of security science and practically devoted almost my entire life to something that today has almost no value.

After the democratization process in Europe, we could look closer into the "Criminalistics" of the "West", but we realized that it is not surprising that Russian (Soviet) criminalistics has its unsurpassed attributes. In other words, the elaboration of its subject, system and, even methods do not lag behind in anything and has considerable scientific potential on a global scale.

In the past, contacts between Russian and Czechoslovak criminalistics were interrupted; therefore, I dare not evaluate the development and progress of criminalistics in Russia, but based on the newly established contacts, I found that criminalistics in Russia did not succumb to various reform political reversals.

But my intention is not writing about Russian criminalistics. I would like to dedicate to your Jubilee a few of my thoughts and observations on the development of Criminalistics in Czechoslovakia, which, by the way, I have not published anywhere yet, but also a few thoughts on the issues of Criminalistics and forensic science, which we are currently dealing with here.

First of all, it should be noted that criminalistics, like everything, was subject to certain political influences. It is true that, indeed, it was not a systemic influence. Politics were not destroying criminalistics, but rather people who were the creators of the development of criminalistics.

I will only name the mister Jan Pjescak[1], a close collaborator of Professor R. S. Belkin. Prof. J. Pjescak passed the development of criminalistics into the hands of his students, so to speak, and I consider myself one of them. I had a long personal conversation with him, the result of which was his commission to pay my attention primarily to the theoretical basis of criminalistics, as I see in your theses according to which your professional life flowed and flows. I am sincerely glad that, despite everything, there is still someone to discuss, but also to learn from each other. My interview with J. Pjescak took place during the period when my first textbook of criminalistics was published, in which I allowed myself to creatively intervene in the system of criminalistics that had been built up for years. It was a change in the system that Jan Pjescak introduced, defended and fought for, but he acknowledged that everything goes with time and development cannot be stopped. That is why today I consider him as a person whose opinions correspond to the current trends in the development of science and practice. The political culture perfectly reflected the last period that time – it was the first period of the democratization process when he fought great obstacles and the time was not on his side at all.

Criminalistics gave up crime as its subject of science in favor of criminology. The crime, as a result of undesirable social conduct, fell to criminalistics and became its new subject of investigation, which practically meant the subject of investigation. However, the jurisprudence, which "owned" the methods of interrogation, and all other current methods of criminalistics tactics, in addition to recognition and reconstruction, had "priority" to the investigation. Criminalistics thus had an auxiliary task that dealt with the methodological side of the investigation and was identified as a criminalistics methodology. This erroneous "logical technique" began to have its cracks when even Soviet criminalistics also subscribed to the modern criminalistics of Hans Gross, whose "modernity" consisted primarily in the fact that the crime manifests itself through material traces. The process of separating investigation from criminalistics took several decades and culminates mainly in the recognition of interrogation, confrontation, inspection, on-the-spot examination of the testimony, criminalistic experiment, recognition, reconstruction, and criminalistic versions as methods of examining traces. Since modern criminalistics by Hans Gross[2] classified material traces of a crime as traces of criminalistics, the process of investigation, the operation of the prosecutor's office and the operation of the courts remained

1 Pješčak, J., Bělkin, R. S. *a kol. (1984). Kriminalistika I*. 382.
2 Gross, H. (1901). *Encyklopädie der kriminalistik. Verlag von F. C. W. Fogel.*

to the juridical science. These components stubbornly assert jurisprudence as the only one and do not allow any interdisciplinarity in the given areas.

Neither criminalistics nor forensic sciences, or even developed ad hoc expert opinions, are taken as serious arguments in the evidence. The principle of "free evaluation of evidence" is abused and it is forgotten that it is conditioned by the precise justification of why the argument applies, as well as a justification why I will not put that argument into evidence. The objective truth that is the meaning of all evidence has become an unacknowledged principle that leads to the right to a fair trial being enshrined in law, but the right to a fair verdict is unrealistic[3].

A special problem is the expert activity, not only in the field of Forensic Sciences, and developed ad hoc opinions, but also, unfortunately, in the field of criminalistics. It is really reprehensible who is giving expert opinions today. There are often people who do not even have a basic knowledge of the field in which they "expertly" evaluate the asked questions, they are not familiar with the principles of evidence and so very often interfere and evaluate the juridical facts. It is not even possible to talk about the moral and ethical side of some experts. Very often they formulate their conclusions as required by the investigator, prosecutor, or judge. The expert opinion is to be understood as a type of means of evidence that results in facts which the competent authority must take into account and, if it refuses to do so, must duly justify it. The expert may not be an assistant to the judge or any of the parties to the proceedings. However, the reality is different. Experts very quickly lose their self-confidence, do not realize the seriousness of their words and, like witnesses, express themselves on issues that do not belong to them or deduce the interest of a judge or prosecutor and direct their testimony according to the interests of these authorities. It is very often almost a rule that judges or prosecutors have their own experts selected, whom they regularly entrust with the preparation of expert opinions. These false attitudes of experts are becoming more widespread[4].

A rather specific issue of expert examination is the unqualified and biased nature of the questions that are posed to the expert. Often these are questions that at the same time force the expert to express his opinion on legal issues and issues that are unsolvable neither professionally nor logically the so-called, phantasmagorisms.

3 Uhlíř, D. (2019). Právo na spravedlivý proces, právo na spravedlivý rozsudek. *Právni Prostor. Atlas consulting spol. s r.o.*

4 Musil, J. *Hodnocení znaleckého posudku:* http://www.mvcr.cz/clanek/hodnoceni-znaleckeho-posudku.aspx

A very special case is the expert opinions, which the litigants reject for some reason. It is a situation that happens, it is real, and there is nothing unusual about it. Courts often proceed unusually in the situation when they have another one expert's opinion marked as "supervised" and this opinion is entered in the court file. This procedure is not objective and arbitrary by the court. The expert opinion may be rejected and replaced by a new opinion, but this must be strictly done in a procedural way, which consists in the fact that the new and rejected opinion must be compared by a special judicial procedure and officially pointed out the shortcomings of the rejected opinion.

However, the fact that an expert opinion is only a means of evidence, does not mean that it has a minor function. Evidence is an essential part of the criminal process; it depends on whether the main aim of the criminal proceedings will be met – to know the objective truth. The uncritical attitude towards expert opinions, the boundless trust of law enforcement authorities, often combined with an effort to pass on a solution to an ever-widening range of issues, even those of a legal nature or those for which "common sense" is sufficient, lead to delimitation power function and "an expert process" is created instead of a judicial trial.

Judicial practice shows that even the evidence of expert opinion is not flawless and that judicial errors can be made through it. The expert opinion has no privileged position. It is evidence like any other, all the usual principles of evidence apply to it, especially the principle of free evaluation of evidence. At the same time, expert evidence has a several of specifics, most of which relate to the evaluation of expert evidence. The main problem is that the lawyer is required to consider professional issues from the field of science, technology and other areas in which he does not have professional qualifications.

However, the judge is obliged to evaluate the expert opinion in all aspects, not only its professional accuracy. He must evaluate not only the final written opinion but also the entire process of its creation. He must assess the regularity of the collection of traces and comparative material, his own preparation for the examination, the assignment to prepare an expert opinion, his own course and methods, as well as the method of forming the expert's conclusions. This is another sore point of the process, where very often the judge is interested only in the final statement and in that case when it fits into the concept of arbitrating.

The assessment of the legal correctness of the evidence does not cause special problems for judges – lawyers, by their nature they are close to them, transparent and recognizable by the usual procedures of legal interpretation. However, special attention must be paid to whether the expert has not exceeded

the limits of his professional competence, in particular by resolving legal issues, evaluating evidence, collecting evidence himself, using expertise and methods in a specialization other than that in which he is qualified, solving issues other than those assigned to him. The legal requirements of expert evidence are quite variable, their treatment is different in various countries. Not every legal error result in a complete devaluation of the expert evidence, some mistakes are additionally removable, but gross legal errors can constitute a violation of the right to a fair trial.

In assessing *the evidentiary significance* of an expert's opinion, it is assessed whether any knowledge of the subject matter of the evidence can be deduced from the content at all, and – how the expert's opinion contributes to establishing the factual status.

The legal relevance of the expert's opinion must be considered by the law enforcement authority already at the moment when it wants to recruit an expert and when it formulates questions for experts to avoid an inefficient procedure. The evaluation of the evidentiary significance of the expert opinion does not show any significant differences from the evaluation of other evidence. However, it cannot be ruled out that the expert opinion was unnecessary.

The evaluation of the *credibility* of an expert opinion leads through the evaluation of its veracity. The Slovak criminal process is controlled by the principle of material truth (objective truth). We consider the result of knowledge to be true if it is in accordance with reality.

The law enforcement authority itself cannot (and must not) ascertain the veracity of the expert opinion by conducting an expert examination in parallel.

However, it is also possible to find out the *veracity* of the conclusions of the expert opinion indirectly, by examining its *credibility*. The credibility is spoken of when the truth of knowledge is judged from the method, from the process by which we have come to knowledge. The path of knowledge is credible, which by its conditions guarantees the true result of knowledge. In the first place, the expert person must be able to provide credible opinions. This is primarily due to his *professional qualifications*, civic qualities and impartiality. This, of course, must be taken into account when commissioning an expert opinion, but respect for these qualities must be taken into account when enrolling in the list and appointment.

An evaluation of the expert´s degree of professional qualification only on the basis of formal aspects is not sufficient to conclude on the credibility or unreliability of the submitted expert opinion. In addition, the objective characteristics of the expert opinion, its justification, persuasiveness, completeness

and indisputability must always be taken into account.

Another factor in the credibility of the expert opinion is the *flawlessness of the base materials*. These objects are most often traces and other factual evidence, documents, comparative material, and protocols. In addition to assessing whether these objects were provided in a legal way, it is necessary to assess their actual relationship to the criminal case, the manner of their discovery and seizure, the integrity of their condition, the technical conditions of their fixation and delivery to the expert. Very important are cases in which the expert's conclusions are to be based on various subjective data or on background materials that are contradictory or mutually exclusive. The conclusion about the reliability of the source materials *and the selection of one of the solution variants must be made by a law enforcement authority, not an expert*. I see the incorrect approach in cases where the expert is required to conclude for all possible variants of the solution. I think that a law enforcement authority has an obligation to order a separate expert examination for different cases, not to require all possible variants of the solution.

The professional justification of the expert opinion contributes significantly *to the credibility of the expert opinion.*

The prosecuting authority cannot itself replace the expert's professional conclusions with its lay opinions. Nevertheless, it is necessary to insist on the obligations of law enforcement authorities to evaluate *the expert opinion also in terms of its professional correctness.*

A necessary condition for a law enforcement authority to be able to carry out such an assessment is the transparency of the expert opinion, in other words, its comprehensibility even for the layman. Often, experts do not realize that their opinion has a specific function: It is intended to convey expertise not to scientists, but to lawyers, as well as to litigants.

First of all, the accused must have a real opportunity to be fully involved in the process of proving and evaluating the evidence, which, of course, presupposes that they are understandable to him. If this condition is not met, *then the conditions of a fair trial are not observed.*

Not all of the above procedures used by the law enforcement authority in the evaluation of the expert testimony may be sufficient to establish in themselves the incorrectness of the conclusions of the expert opinion. However, they should be fundamentally enough at least to raise doubts about the correctness. These doubts may be reinforced by the fact that the expert's conclusions are contradicted by other evidence gathered in the case.

During my tenure as Chairman of the Scientific Council of the Criminalistics

and Expertise Institute of the Slovak Republic, I met intensively and to this day I meet expert opinions from various areas of criminalistics, forensic sciences and ad hoc opinions from various areas of expert disciplines. I am not a fan of bombastic statements, but here I will make an exception and say that the most dangerous place in judicial practice is experts.

The recently deceased Czech ombudsman Otakar Motejl[5], who enjoys undisputed moral and professional authority in professional circles and in the public, did not hesitate in a press statement from 2007 and declared: "Forensic experts destroy human lives! Cases where forensic experts have made mistakes often result in a messed up human life, but they are not responsible for them <...>. All this needs to be solved urgently. <...> The trend is that judges will hardly decide without an expert opinion. And the result is such an absurdity that, in fact, it is not the judge who judges, but the expert oneself."

The chairwoman of the University Accreditation Commission, Professor Vladimira Dvorakova[6], took a very critical position on the activities of some experts and expert institutes. "If I get the opinion necessary <…> from the expert workplaces that has the authority to provide expert opinions to the courts, I assume that this is a truly expert opinion, but this may not be the case at all. Can we even imagine that the same person will ask for the opinion of the "scientific office", write it there and then submit it as an argument in court with the signature of the director? Or that she argues in court on the basis of "professional" texts that she wrote under other names? Or that the institution can provide expert opinions without having the appropriate laboratories and permanent staff? At the same time, you will find that in all such institutions, which otherwise operate by standard, there is the same circle of people who have a business, partnership and other relationships with certain groups of people in politics?"[7].

The state fails in its responsibility for the organization and, in particular, the control of the forensic-expert service. The legislation is outdated and requires strict reform. The preliminary proposals will finally and perhaps definitively end the superiority of the criminal-procedural side over the forensic side. Many activities are to be excluded from procedural acts and included in the expert examination "examination and autopsy of the corpse blood sample" but some, on the contrary, will strengthen the criminal trial "the examination

5 Public Defender of Rights and Minister of Justice of the Czech Republic (1998–2000).

6 In an interview she gave to the Outsider Media internet portal on April 16, 2010.

7 Musil, J. *Hodnocení znaleckého posudku*: http://www.mvcr.cz/clanek/hodnoceni-znaleckeho-posudku.aspx

of the processor of the expert opinion should be modified as the examination of the expert witness".

It is planned to create a so-called forensic expert "so far only experts" who will be subject to special qualification requirements and will be appointed on a permanent basis. An expert entered in the list will also be entitled to submit an opinion at the request of a natural or legal person on the basis of a civil law agreement. What is new, however, is that they will bear legal responsibility for the accuracy of the expert opinion. However, these innovative intentions do not sufficiently address the issues of strict control of expert activity and the status of experts.

A special problem of the current expert activity is the expert activity of the institutes. The problem lies in the diverse quality of expert opinions, which has its roots in the existing system of organization of expert activities, wherein a country of 10 million there are 440 institutes can submit expert opinions! Maintaining a high standard of these institutions is practically impossible if we are talking about the permanent improvement of staff qualifications, exchange of scientific information inside and outside the institutions, publishing activities, participation in scientific activities, international contacts. Both types of expert institutes are a priori assumed to be of exceptionally high professional level, providing guarantees of high credibility of expert opinions.

An interesting factor that affects the quality of expert activity is the monopolization of the expert branch. On the one hand, we are talking about a huge number of expert institutions in a relatively small country, but on the other hand, their number needs to be optimized. A necessary condition for the development of scientific disciplines is the possibility of critical discussion and mutual controllability of the results of scientific knowledge. This presupposes, first of all, that more subjects operate in a given field, so that the results of one researcher could be polemically assessed and verified by another. If there is only one subject in the field, there is a high risk of error and stagnation.

If this statement applies to science at all, then even more so to expert fields. The principle of free assessment of evidence conceptually requires "careful consideration of all the circumstances of the case, both individually and in their entirety". All procedural parties are involved in the course of the taking of evidence and in the evaluation of the evidence; this requires that in case of doubt about the correctness of the evidence, the parties have a real opportunity to propose other evidence that can challenge, confirm or refute other evidence – for example, propose a repeat of the expertise to another expert.

If we talk critically about the practice of proving, the cardinal problem of

its theory cannot be omitted in the part of the evaluation of evidence. During all the professional exams, the students recited me without any problems. But so far, I have not met with anyone who would explain this evaluation to me, to state what the evaluation means individually and what the evaluation is in connection and especially where and when it will be interconnected. I do not feel myself to be aware of this serious professional activity to conclude it satisfactorily. But I think that the verbal justification of any such evaluation by the system "therefore – because" would force many judges to start building their future by constantly studying and keeping in scientific condition.

If we summarize and realize the differences between executive, legislative and judicial power – we assume that the President usually has a five-year "or more" term of office, the government has an average two-year life, some ministers have a shorter lifespan than the life of kamikaze pilots. In the case of legislative power, it is similar for the deputies. But there are about 3,000 judges of the ordinary court, who will judge us, our children, our grandchildren, and, in the case of the guardianship agenda, our great-grandchildren. It is necessary almost immediately to seriously work on the fact that people with more professional experience become judges, who have behind them something other than ordinary "assisting" in court.

It is necessary to do this, also knowing that it is a more difficult and less convenient way. An Anglo-Saxon way, in which a candidate for the position of the judge does not apply for the competition, but it is offered as a generally recognized expert. It is a procedure that characterizes a judge as an expert who is interested in society, not only for its benefits. In contrast, it is necessary to mention the speech of the president of a Specialized Criminal Court, who explains the misconduct of a judge as a mistake of any person who also has a judge's right. At first glance, this problem has its own logic, but in reality, the judge will punish "every person", but the judge, who did a mistake, will not be punished by no one. And, well, finally, it turns into the question of – what is more? – The freedom of the wrong person that the wrong judge will treat him or the health that the doctor "operates" to the wrong judge "who also has the right to do a mistake?"

Conclusions

The situation in the investigation, the judiciary and the prosecution must be taken very seriously as an unbearable situation. There is an urgent need to take active measures in the selection of judges and prosecutors, and also to require professionally trained investigators. It is necessary to introduce demanding and

strict controls and personal accountability for police officers, judges, and prosecutors. Expert workplaces outside criminalistics institutes need to be checked, they are unreliable, work according to their own methods and they do not have a secure control. It is also needed to strictly control the experts working by them self – experts of specialists. It is also necessary to significantly tighten the enrolment in the function of experts and introduce that each workplace in the expert activity had a solid organizational structure with the provision of all necessary attributes – continual education, internal control, technical equipment. It is required to transfer the issue to the relevant ministries and to prepare effective changes also on a political basis.

MOKSLINIŲ ĮRODYMŲ GAVIMO IR NAUDOJIMO KRITIKA

Vaclav Krajnik

Santrauka

Autorius, diskusijos su jubiliatu prof. V. E. Kurapka forma atskleidžia labai žemą teisminės ir tyrimo praktikos lygį, kurio socialinis patikimumas yra labai žemas. Jis svarsto ir nurodo galimas priežastis, neišskiriant ir nekokybiško teismų ir teisėsaugos specialistų mokymo. Jis mato priežastį, kodėl pasikeitė tyrėjų ir teismų darbuotojų – tų, kurie galiausiai sprendžia rengiant ir vykdant teisminį procesą – mokymo kokybė. Demokratizacijos procesai neigiamai atsiliepė ne tik plačiajai visuomenei, bet, deja, ir prokurorams bei teisėjams, ne išimtis ir tyrėjai. Daugiausia klaidų pasitaiko vertinant ekspertų išvadas, kurių kokybė ir kompetencija yra žemo profesinio ir moralinio lygio. Tačiau su tuo susijusi problema kyla teisėjams, kurie dažnai negali interpretuoti ekspertų išvadų ir tinkamai įvertinti ekspertų kvalifikacijos bei specializacijos. Ekspertų samdymas yra formalus, jų veikla nėra pakankamai kontroliuojama. Taip pat formalus dėmesys nekreipiamas į eksperto išvados teisinio teisingumo, įrodomosios galios ar patikimumo vertinimą. Autorius atkreipia dėmesį į valstybės nesėkmę organizuojant, teikiant ir kontroliuojant ekspertinę veiklą ir pavyzdžiais parodo, kad jos apimtis yra tokia didelė, kad turi pasikeisti ekspertinių institucijų struktūra ir aprūpinimas.

Raktiniai žodžiai: įrodymai, eksperto išvados, eksperto liudijimas, kriminalistika, teismo ekspertizė.