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Forensic Psychiatry and Psychiatrists in Criminal Justice in Europe. A Comparative Study of England, Spain, Rumania, Sweden and France

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For the contemporary criminal justice system, the judicial truth concerning an offence is not established merely by finding the offender and applying a legal sanction, it also involves understanding the motives and circumstances surrounding the act, so as to deal with the offender more adequately. Recourse to psychiatry and psychology now enables specialists in these fields to provide information that is henceforth considered essential for understanding the defendant's personality, accounting for the acts and handling the legal case. Forensic psychiatrists have therefore become an all-important part of the penal and judicial process in Europe.

However, these trends have resonated diversely in the construction and organisation of forensic psychiatric expertise within the criminal justice system in different countries.

Our investigation of a number of countries (England, France, Spain, Rumania and Sweden) has brought to light enormous disparities in forensic psychiatrists' status and in the "institutional" organisation of forensic psychiatric expertise.

Observation of the dynamics of the construction of expertise provides a good understanding of the stakes connected with the forensic psychiatrist's role in criminal justice and the judicial process in Europe at each stage in the procedure (from investigation up to trial, from assignment to the task up to use of the forensic report).

The hybrid status of forensic psychiatrists in Europe, ranging from "simple" occasional partners providing expertise as a complementary activity (in England, Spain, and France) to public employees for whom this is full-time work (in Sweden and Rumania), affects the way the person is examined. The resources and methods used to draft a report differ, depending on whether the expertise is "public", collegiate and multidisciplinary (in Sweden and Rumania) or "private" and individual (in England, Spain and France).

The content of reports is much the same, however: the "typical bare bones" of criminal psychiatric expertise revolve around the issues of evaluation of the person's responsibility (liability), dangerousness and risk of recidivism. This convergence indicates a degree of homogeneity regarding the conception of the forensic psychiatrist's task in the five countries studied.

Methodology

"Expert" in forensic psychiatry can mean a number of things. In France, the notion of *expert judiciaire* (judicial expert) is a *sui generis* notion, its status and organisation being specifically French. For this reason, a study approaching psychiatrists in charge of drafting forensic psychiatric reports through an *a priori* search for "the" "French-type" of forensic psychiatrist would not be very fruitful. In our attempt to account for the many types of *expert psychiatrists* in Europe, we used an *a posteriori* approach, starting from the forensic psychiatric report and then seeking its writers. We therefore focused on the task of psychiatrists commissioned to draft forensic psychiatric reports on defendants during the judicial process. What is meant here by such reports are the documents accounting for examination by one or several psychiatrists (private or public judicial experts) at the request of a judge or of one of the parties, and aiming primarily at determining the degree of the person's discernment at the time the offence was committed, establishing whether they suffer from any psychiatric pathology or mental disorder, assessing their personality, and their dangerousness and risk of recidivism.

Field work was punctuated by four several-month-long research trips to countries other than France which afforded genuine immersion in the specialist's working world.

The methodology (semi-structured interviews, observation of hearings, consultation of legal case files and of forensic psychiatric reports) was applied uniformly to the five countries studied¹. 65 interviews (43 with forensic psychiatrists, 22 with judges) and 106 observations (20 of hearings, 10 of expertise operations, 76 consultations of written reports) were conducted.

Forensic psychiatrists in Europe: sociology of a split personality

Before the contours of forensic psychiatry in Europe can be traced, two seemingly simple questions, essential for any understanding of the stakes of expertise, must be answered: who are those "forensic psychiatrists"? How is the "*profession*"² organised? Indeed, the legal status and structure of expertise orient the way in which experts and judges interact during the judicial process. Knowledge thereof enables us subsequently to understand how

¹We wish to thank the universities and research laboratories for their help in establishing academic partnerships and financing our stays abroad: the *Centre de Recherches Sociologiques sur le Droit et les Institutions Pénales (CESDIP)*, the *Agence Universitaire de la Francophonie (AUF)*, the *Groupe Européen de Recherche sur les Normativités (GERN)* and the *European Expertise and Expert Institute (EEEI)*, which has supported by grants this doctoral thesis.

²Professionals are in fact split on the issue of whether « judicial expert » is actually a « profession ». In the case of forensic psychiatric expertise, however, this activity does constitute a full-fledged profession in Sweden and Rumania, as will be seen below. We have retained the term, for this reason, but in *italics* to underline the reservations surrounding it.

the law structures these relations to ensure the independence of the various actors.

Status of the expert and institutional organisation of psychiatric expertise within the criminal justice system: harmonious divergence

Whereas university training to become a physician specialising in psychiatry is apparently quite homogeneous, access to the status of expert in forensic psychiatry differs enormously among the countries studied.

Two types of statutory and institutional organisation are observed: expertise is “private” in England, Spain and France, “public” or “state-run” in Rumania and Sweden.

The former model (“private expertise”) corresponds to the “simple” expert psychiatrist, an “occasional assistant” to the Justice department³, practicing forensic psychiatry as a sideline along with his main profession (private psychiatrist or paid employee of a public or private medical facility). In England, Spain and France, practitioners charged with an expertise mission are paid a lump sum rather than wages. In other words, in these three countries the expert’s contribution to the judicial process does not constitute a *profession*.

In France, practitioners desiring to receive the status of *judicial expert* must request their registration on a list of judicial experts serving the Court of Appeals and/or the Court of Cassation. This is a deliberate, optional move, then, aimed at obtaining recognition of specific skills susceptible of serving the justice system.

In England, as in Spain, there is no such thing as a “judicial experts card”, or a list established by any national courts. In what is known as an adversarial procedural system, any practicing psychiatrist in England can perform a forensic psychiatric evaluation at the request of either of the parties (the defendant’s counsel or the Crown Prosecutor). These parties are free to choose any expert and it is up to them to provide evidence, including expertise, and therefore to pay for it.

The fact that there are no lists of experts in these countries raises not only some practical problems regarding how to actually find a practitioner familiar with this type of work, but some theoretical ones as well, regarding the principle of “free access to justice”, a “fair trial” and “equality of arms”. However, to obviate the absence of such a list, companies of judicial experts and professional groups are trying to organise the *profession* by devising their own lists.

The second model (“public experts”) is more institutionalised. The State centralises forensic psychiatric procedures within public agencies and plays a major role in recruiting, training and paying experts. In these two countries the psychiatric expert is a civil servant of sorts, practicing that activity full time (in Sweden) or part time⁴ (in Rumania). Here, expertise constitutes a full-fledged profession.

In Sweden as in Rumania, forensic psychiatric examinations are a state monopoly. In other words, when a judge requests an expert report he turns to these authorised agencies. Sweden had three such authorised centres (in Stockholm, Göteborg and Umea) in 2011, all directly attached to the *Rättsmedicinálverket* (the National Board of Forensic Medicine). Rumania has a tighter territorial network, with six Forensic Institutes producing completing examinations and reports under the supervision of the National Institute of Forensic Medicine of Bucharest.

Access to the function of expert psychiatrist is exclusively controlled by the State.

- In Rumania, psychiatrists charged with expertise operations must have received specialised training in forensic psychiatry, a curriculum offered at the end of medical school.

- In Sweden, psychiatrists wishing to work in centres specialising in expertise must follow a specific two-year training course at the end of medical school (one year in a treatment-oriented forensic psychiatry ward of a psychiatric hospital, and a second year in one of the specialised centres, where they must conduct at least twenty extensive forensic psychiatric evaluations and twenty shorter consultations)⁵. At the conclusion of this training the psychiatrist receives the title of Forensic Psychiatrist and the capacitation to work in these institutes.

The status of “expert” and the institutional organisation of expertise: state monopoly and guarantees of independence

Government control of the organisation of expertise in Sweden and Rumania is presented by the judges and experts we met as a guarantee of independence for both the justice system and for experts, as it serves as a rampart against any possible bribery of actors in the criminal justice process.

In this system, there are hardly any relations between judges and experts during a judicial procedure. When demanding an expert evaluation, the judge addresses a forensic institute, rather than a specialist of his choosing. It is up to that agency to name a psychiatrist who will be in charge of conducting the evaluation in accordance with the centre’s specific organisational rules.

Further, our observations and interviews show that experts are rarely summoned to hearings in Sweden and Rumania. Perhaps the collegiate, multidisciplinary nature of expertise operations in these two countries may account for the physical absence of a specialist from the Board at trials. The forensic conclusions are debated beforehand by various practitioners when drafting the report, and are read at the hearing⁶.

State monopoly, distance in the choice of the expert and distance from the oral debates during the trial are the factors forming a struc-

ture believed to safeguard independence.

This, in any case, is the analysis put forward by the judges of the Constitutional Court of Rumania when a preliminary question of constitutionality was submitted to them in February 2011⁷. The Court rejected the appeal on the grounds that the state monopoly of forensic expertise activities, and of forensic psychiatry in particular, ensures all parties of equitable access to Justice: this monopoly guarantees the independence of the expert, the quality of the expert evaluations conducted and the possibility of challenging the conclusions within independent Forensic Institutes.

The question of how experts are remunerated is consonant with that of their independence, and is a corollary, in some respects. In the private practice system (England, France, Spain), forensic expertise is performed as an activity complementary to the main profession. The legal and statutory independence of the “private” expert may be compromised by his or her financial dependency on the commissioning party. French, English and Spanish professionals refute this argument, alleging that probity is one of the main qualities demanded of an expert. According to those professionals, the real risk lies elsewhere, in the “state system”: practitioners whose *profession* is expertise are cut off from the technical and scientific developments in their field, and thus tend to lose their competency.

Given these widely diverging conceptions within the five countries studied – and more generally, in Europe – the search for a system offering the best guarantees and susceptible of generating a consensus turns out to be a complex enterprise. With the Europeanization of judicial procedures, the pursuit of harmonisation through uniformity would be attempting the impossible.

The experts’ mission in Europe: while formally diverging, conceptions that substantially converge

Variations in the status of psychiatric experts and in the institutional organisation of expertise affect the way expertise procedures are conducted. However, in spite of these diverging forms, there is substantial agreement on the ultimate goal of the expert’s mission.

Distinct expertise procedures but similar contents

Forensic psychiatrists have at their disposal a number of instruments and types of examination. The two forms of organisation described above (public/private) condition differently conducted expertise operations.

In England, Spain and France a single expert is designated (with some exceptions prescribed by law). The psychiatrist performs a clinical examination in the form of a one-to-one talk in his office or in a correctional facility if the person is in pretrial detention. The forensic report (a few pages long) is written at the outcome of the talk.

In Sweden and Rumania a collegiate, multidisciplinary procedure prevails. The defendant is taken to one of the centres specialising

³ There is no clear description of the legal status of judicial experts in France: “*auxiliaire de justice*” or “occasional assistant to the public service of Justice”? The latter seems to have prevailed so far.

⁴ In Rumania psychiatric experts work alternately, part-time, as psychiatrists in hospitals and as forensic psychiatrists.

⁵ There are two distinct procedures: one leads to a “forensic psychiatric report” following a four-week observation period, whereas the second, known as « §7 », consists of a one-hour consultation aimed at producing an advisory opinion on the defendant’s mental state and does not constitute a full forensic report.

⁶ In conformity with adversarial principles, both parties are informed, during the procedure, of the conclusions of the report and may request a counter-expertise and/or, if necessary, request that the court summon the specialist to appear at a hearing as expert witness.

⁷ Constitutional Court of Rumania, 8 February 2011, n° 146, published in the « *Monitorul Oficial* » n° 314, 6 May 2011.

Table 1. Profiles of forensic psychiatrists in the different countries

Type of organisation	"Private system"			"Government-controlled" ("public expertise")	
Country	England	Spain	France	Rumania	Sweden
Profile of experts					
Status	complementary, occasional activity	complementary, occasional activity	complementary, occasional activity	civil servant, part time	civil servant, full time
How status is attained	- ⁸	-	registration on lists for Court of Appeal/Court of Cassation	recruited by forensic institutes	recruited by centres (national board)
Specific training	not compulsory	not compulsory	not compulsory	yes, a compulsory prerequisite	yes, a compulsory prerequisite
Ongoing training	not compulsory	not compulsory	not compulsory	compulsory	compulsory

Source: Jennifer Boirot (thesis)

Table 2. The forensic psychiatric process in different countries

Country	England	Spain	France	Rumania	Sweden
Expertise					
Place	- psychiatrist's office (private office or university hospital) - correctional facilities	- psychiatrist's office (private office or university hospital) - correctional facilities	- psychiatrist's office (private office or university hospital) - correctional facilities	medico-legal institutes	specialised centers
Length	1 to 2 hours (on the average)	1 to 2 hours (on the average)	1 to 2 hours (on the average)	4 days ⁹ (hospital stay)	- 4 weeks (hospital stay) 1 to 2 hours (for "§7 expertise")
Examinations performed	- clinical interview (individual talk, possibility of personality and psychotechnical testing, IQ tests, etc.) - "criminological" examination use of actuarial instruments, optional (under debate)	- clinical interview - use of statistical tools, optional (under debate)	- clinical interview - use of statistical tools, optional (under debate)	- clinical interview - "criminological" examination - medical examinations (possibly physical examination, blood tests, electroencephalogram)	- clinical interview - "criminological" examination - medical examinations (possibly physical examination, blood tests, electroencephalogram, scan/RMI if needed)
Practitioners involved or authors of the forensic investigations	a single psychiatrist	a single psychiatrist	a single psychiatrist ¹⁰	- 2 psychiatrists - 2 forensic doctors - 1 psychologist	- psychiatrists - psychologists - forensic doctors - nurses & social workers
Writing of the report	specially assigned psychiatrist	specially assigned psychiatrist	specially assigned psychiatrist	The highest-ranking psychiatrist (the report is written following collegiate discussion with the above-mentioned actors)	- a pre-report for each type of professional - final report by the psychiatrist previously placed "in charge of the team"

in this activity for a period of four days (Rumania) to four weeks (Sweden). In addition to the regular clinical examination, a number of other examinations are performed. Under the supervision of a forensic psychiatrist placed "in charge of the team", several psychiatrists, psychologists, nurses and social workers participate in the forensic expertise and contribute to the final report. Workers in each "discipline" write a "pre-report" and it is up to the head of the team psychiatrist to put together a synthesis in a document of some twenty-odd pages known as the "forensic psychiatric court report" which is then transmitted to the court.

Table 2 provides a more concise, synthet-

⁸In England and Spain, practitioners are assigned a judicial mission through a judge's order or a mandate by the parties requesting an expert evaluation: there is no such thing as a "judicial expert status" as in the French system.

ic view of the various procedures, tools and actors involved.

In spite of these differing procedures, forensic psychiatric reports are structured rather homogeneously. As a rule, four or five sub-headings may be found:

- the defendant's personality (biography, schooling and work, medical history, contacts with the justice system);
- assessment of the person's mental state and discernment (diagnosis of any possible psychiatric pathology or mental disorder during the examination and/or at the time the offence was committed);

⁹This period may be extended to up to two weeks when required by the circumstances (complexity of the psychiatric diagnosis, for example).

¹⁰England, Spain and France call in a single expert unless special legal clauses stipulate the need for collegiate expertise.

- evaluation of the person's dangerousness (for himself and for others);
- evaluation of the risk of recidivism;
- treatment recommendations and/or opinion on socio-judicial probation¹¹.

This general frame characterizing the form and content of reports shows that over and beyond procedural differences there is an underlying convergence of expectations as to expertise work.

From diagnosis to "prognosis": stakes and debates about the expert's mission

Whereas the person's biography is hardly

¹¹In France this is compulsory when the offender is liable to a sentence entailing socio-judicial probation and an obligation to seek treatment; in the other countries these elements are often specified in the reports although the law does not specifically prescribe them.

open to diverging interpretations (be they conceptual or practical), the assessment of their dangerousness and the risk of recidivism elicit much debate among professionals. Indeed, the expectations of judges, and hence the expert's mission, have changed on this point. Previously, it was the subject's *psychiatric dangerousness* that was estimated, while there is now a tendency to estimate their *criminological dangerousness*.¹² Whereas forensic psychiatrists (who are trained physicians and psychiatrists) are directly competent to deal with the "medical" aspect of this sort of evaluation, the issue of the assessment of "societal" rather than medical dangerousness is a controversial subject in France, as in the rest of Europe.

Many psychiatrists warn against the danger of having their mission abusively used for predictive purposes. Is evaluation a prediction? Certainly not. Being a man of science does not make an expert a man of prescience. "We aren't reading in a crystal ball", said one French expert. He went on to say, "We can estimate a person's dangerousness, and possibly detect criminogenic situations, but it would be illusory to claim any ability to predict whether the person will commit a crime." Nonetheless, the question of whether there is a risk of recidivism is often posed as such.

Given these new evaluation missions (criminological dangerousness and risk of recidivism), some practitioners resort to new tools, in the form of "actuarial scales". Recourse to these statistical instruments is very frequent in Sweden and has developed in recent years in England, Spain, France and Rumania. The subject is quite controversial among the professionals we met, including in Sweden. A more in-depth explanation of the issue would be required; we will simply point up some aspects mentioned during our interviews.

The presumed objectivity of actuarial scales, used in response to the suspected subjectivity of classical clinical examination, should not lead to neglect of the specific limits of all statistics. Beyond criticism of the representativeness of the panels on which these scales are based, the probabilistic nature of the findings demands that caution be used in interpreting them, as well. For example, actuarial analysis shows whether the characteristics of a given individual place him among the 10% of backsliders within the panel, but it does not say whether the person will actually be one of the 10% of recidivists or the 90% of non-recidivists. Further, in the guise of neutral, objective statistical data, the information collected is in fact decontextualized, even to the point of being "subjectless". Although

¹² These two notions are often differentiated by the practitioners we met and in academic writings. They are often debated, and may be summarised as follows: 1) *Psychiatric dangerousness* is defined as the risk of acting out, of attacking another person, in an individual suffering from a mental disorder; 2) *Criminological dangerousness* estimates potential recidivism, or in other words the probability that an individual will commit another offence (attacking property or people). For greater detail, see J. L. Senon, *Dangerosité criminologique : données contextuelles, enjeux cliniques et experts*, *L'Information Psychiatrique*, 2009, 85, pp. 719-725.

some predictive variables may be established, detailed consideration of the criminogenic factors – endogenous and exogenous, human and environmental – involved in each illegal act is all-important. Clinical examination can counter-balance statistical data, with the latter providing a valuable supplement. Complementary use of these two methods can lead the forensic psychiatric report to more perceptive conclusions. For forensic psychiatrists, this would provide a way to fulfil their new missions, thus corresponding to "the inescapable triptych in which the expert's legitimacy is grounded: competence, objectivity and pedagogy".¹³

As a result of this trend in the expert's mission, the same in the five countries studied, the question of responsibility (liability) is relegated to the background. At the outset, psychiatrists were called in to protect the mentally ill, whereas they are now expected to estimate dangerousness and the risk of recidivism. Thus, practitioners are assigned the role of "social control wardens". Michel Foucault had already exposed the obsolescence of the issue of the person's responsibility and its replacement by expertise oriented toward these new considerations: *What, then, is the role of the psychiatrist in penal matters? He is not an expert in responsibility, but an adviser on punishment*.¹⁴

And yet, the question of responsibility remains an essential one, as it guides the decision on the outcome of the judicial procedure. In France, article 122-1, of the Criminal Code¹⁵ states that a person whose discernment was destroyed when the act was committed *should not* be considered criminally liable and the case should be dismissed; when discernment is present or reduced a trial is appropriate.

In Sweden, the defendant is sent to court irrespective of whether discernment is present. The absence of discernment affects the nature of the sentence pronounced: a person who has committed a crime while suffering from severe mental disorder may not be sentenced to imprisonment but should be interned in a specialised facility.

In France, the introduction of the concept of reduced discernment as conditioning attenuated liability further complicates analysis. When discernment is reduced rather than destroyed, individuals are diagnosed not sufficiently ill as not to be liable, and not sufficiently mentally healthy to be fully liable.

It may be extremely intricate for a psychiatrist to decide whether the person's discernment was destroyed or merely reduced when the act was committed, especially when the

¹³ Vincent Vigneau, First Vice President of the Nanterre Court of Justice, Overall résumé of the symposium "The future of civil judicial expertise in the European Union", Brussels, March 16-17, 2012, organized by the European Expertise and Expert Institute.

¹⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York, Vintage Books, 1977, p. 22).

¹⁵ « A person is not criminally liable who, when the act was committed, was suffering from a psychological or neuropsychological disorder which destroyed his discernment or his ability to control his actions. A person who, at the time he acted, was suffering from a psychological or neuropsychological disorder which reduced his discernment or impeded his ability to control his actions, remains punishable; however, the court shall take this into account when it decides the penalty and determines its regime. »

examination is conducted several weeks (or even several months) after the facts.

The question of liability is even more delicate for judges, who must decide between the "half-mad and half-liable".¹⁶ The intention of the law is to alleviate the sentence in case of altered mental faculties, but in practice this may generate stiffer punishment in case of a criminal (*assises*) court trial¹⁷. This is echoed, paradoxically, by jury members whose more or less conscious reaction to reduced discernment tends to be: "He is guilty, and in addition, he's mad". Instead of attenuating the sentence, reduced discernment often leads to a harsher sentence.

Conclusion: towards the harmonisation of expertise in Europe?

In the context of increasing debate on the Europeanization of judicial procedures – and therefore of expertise – this comparative study offers an overview of forensic psychiatrists in Europe. Following the paradoxical finding that "the forms diverge" (status, institutional organisation, expertise procedures) while "the substance converges" (content of the mission and stakes), the data collected here shed light on the possibility of going beyond the dichotomy (national differences/European homogeneity) so as to achieve harmonisation among procedures.

Several initiatives have been developed in Europe, such as the work by the European Expert and Expertise Institute on the future of judicial expertise in Europe, but conceptual disagreements point up the difficulty in going beyond national frameworks to design a "Europeanization" of existing procedures. European harmonisation presupposes the mutual recognition of expert evaluations conducted in other member countries, since court decisions are – partially – based on these expert reports. How can expertise be accepted if nothing is known of the way it was established and of the author's qualifications? For this reason European harmonisation requires better knowledge of how evaluation by experts is performed and what national procedures exist, an exchange of information and the definition of shared objectives by practitioners and judges throughout Europe.

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