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## Forensic Psychology Expertise in Legislation and Case Law of Estonia: Based on Physiological Affect

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### Abstract

Expertise is the study and solution of a professional issue or the expression of an opinion on it by an expert. In procedural law, expertise means examination of materials to establish factual information. Expert examination is performed by an expert and the research results are formalised in an expert report. Circumstances established in the course of expert examination, which have been fixed in accordance with the procedure prescribed by procedural law, are the evidence in the preliminary investigation and in court resolution procedures.

*Keywords:* affective state, expertise, forensic psychology examination, forensic psychology examination management, killing in a state of mental agitation.

### Introduction

It is the goal and task of each country to ensure that behaviour of people is within the framework defined by social norms, so that social anomalies, including offenses and crimes, are kept to a minimum. In order to achieve this general goal, it is important to take into account the peculiarities of the human psyche, both in legislation and legal proceedings. Forensic psychology is one of the fields used here. It examines the psyche of

a mentally healthy person. In the case of persons with borderline conditions and, when a complex examination is required, in addition to the psychologist, a psychiatrist-expert should also participate. Psychological expertise is based not only on people but also groups of people and normative acts, involving their legal consciousness and law as a system of norms. This article deals with the organisation, appointment and performance of forensic psychological examination in Estonia. Development of the concept and treatment of physiological state of affect in its historical continuity is viewed retrospectively in Soviet/era Estonian criminal law and criminal proceedings. Research methods include concept of forensic psychological expertise based on professional literature and analysis of its practical development. Analysis of legislation and psychological expertise of the USSR and the Republic of Estonia has been included as well. The empirical aspect is based on analysis of the case law. The purpose of this article is to show that management of psychological expertise at a state level is deficient.

## 1 Examination Bodies and Experts in Estonia

In the Republic of Estonia, forensic examinations are performed on the basis of the Forensic Examination Act (Forensic Examination Act, 2002), the current wording of which was adopted on March 15, 2019. In individual areas of proceedings, expertise is specified in the relevant procedural laws: 1) Sections 95–109 of the Code of Criminal Procedure (Code of Criminal Procedure, 2004) (current version adopted on December 2, 2017) regulate the examination; 2) Sections 293–306 of the Code of Civil Procedure (Code of Civil Procedure, 2006) (current version adopted on June 30, 2020) deal with expert examinations.

Pursuant to the Forensic Science Act, forensic science is a professional activity of a person appointed as an expert in a procedural matter, the purpose of which is to examine the submitted material and provide a scientifically substantiated expert opinion based on the expert task. An expert opinion is a categorical or probable expert conclusion made on an important fact to be proved and expressed in the expert report. An expert is a person who uses non-legal expertise in performing forensic examinations, and in the case provided by law, also legal expertise. The expert may be a forensic expert, a state-recognised expert or another person appointed by the person conducting the proceedings.

A forensic expert is a person working in a state expert institution whose task is to perform expert examinations. It is a person who has active legal capacity, speaks Estonian to the extent established by law, or on the basis of law has acquired the required higher education in the field of expertise at a higher education institution of Estonia, or has worked at an expert or research institution or other workplace in the defined field of expertise for at least two years immediately before employment as a forensic expert. A person who has acquired a foreign professional qualification may also work as a forensic expert if his or her professional qualification has been recognised in accordance with the Foreign Professional Qualifications Recognition Act.

A person may not work as a forensic expert if:

- 1) they have been convicted of an intentionally committed criminal offense;
- 2) they have been punished for violating the anti-corruption law by misdemeanor proceedings;
- 3) they have a close relative (grandparent, parent, brother, sister, child or grandchild) or a relative (spouse, parent of the spouse, brothers, sisters or children of the spouse) with an employee directly supervising the workplace or an immediate superior;
- 4) they, due to health, cannot work as a forensic expert. In case of doubt, the medical condition of the person shall be determined by a medical commission.

Upon entering into an employment contract, a forensic expert shall take an oath to the employer:

"I, (name), promise to perform the duties of a forensic expert honestly and give an expert opinion impartially, in accordance with my special knowledge and conscience. I am aware that knowingly giving an incorrect expert opinion is punishable in accordance with paragraph 321 of the Penal Code."

The forensic expert will sign and date the oath. The text signed by the oath shall be attached to the copy of the employment contract held by the employer.

A national expert body is a state body whose main purpose is to perform expert examinations. The statutes of an expert body shall be established by a regulation of the minister responsible for the field. In the Republic of Estonia, the central state expert institution is the Estonian Forensic Science Institute, which is administrated by the Ministry of Justice (List of national expert bodies, 2002).

In carrying out its tasks, the Institute represents the state. The institute is located in Tallinn, the capital of Estonia.

The main activity of the institute is to conduct forensic examinations and research. In addition, the institute carries out research and development activities supporting expert activities, organises training and performs other tasks related to the fields of expertise.

The institute conducts many types of research and various expertise. The examinations performed at the institute are named forensic examinations; forensic biology expertise; forensic chemistry expertise; forensic psychiatric examination; forensic expertise. Nevertheless, the institute does not provide for forensic psychological examinations, and psychologists are not considered as assistants in these examinations (Auväärt & Engalichev, 2018).

## 2 Physiological Affect in Soviet Criminal Law

It is known that social sciences such as sociology, psychology and paedology ceased to exist in the Soviet Union. The problems included in the research subject of psychology merged with the object of research in psychiatry. Psychology as an independent science began to develop again in the Soviet Union in the middle of last century. Legal psychology emerged as an independent branch of psychology.

A. Ratinov's "Researcher of Forensic Psychology", published in 1967, can probably be considered a groundbreaking work. Psychological expertise emerged as a branch of independent forensics. One of the founders of this direction is M. M. Kotšenov with his seminal work "Introduction to Forensic Psychological Expertise" published in 1980. In 1991, he defended his Thesis in legal psychology.

I. Kudryavtsev presented a comparative analysis of legal psychiatry and legal psychology in 1988 and defended his doctoral dissertation on the same topic in 1992.

Works of O. Sitkovskaya "Forensic Psychological Expertise" in 1983 and "Psychology of Criminal Liability" in 1998 must also be mentioned. Noteworthy are also works of V. Engalichev, especially his and Shipshsin's "Forensic Psychological Expertise" (Kaluga, 1997).

The Criminal Code of the Estonian SSR was adopted on January 6, 1961. Paragraph 131 provided for killing in a state of mental agitation: "Deliberate killing in a state of sudden severe emotional agitation caused by violence or severe insult by the victim is punishable by up to five-year imprisonment or up to one year in correctional work" (Criminal Code of the Estonian SSR, 1980). Ilmar Rebane, one of Estonia's best-known and most recognised criminal law specialists at the time, has commented on this code. Following revised and supplemented edition of the comments have been used.

This crime is a less dangerous type of killing. It is important that this condition is caused by the victim's own unlawful conduct. It qualifies as a murder under this section if the offender committed the crime in a state of sudden agitation – a physiological affect. This section refers only to a physiological state of affect caused by the victim himself, either through violence or serious insult. Violence or severe insult by the victim can be directed not only against the offender themselves but also against their relatives.

Under this section, intentional killing means that violence or serious insult directly (suddenly) causes strong emotional arousal to the offender and results in an intention to kill the victim and the crime is committed immediately. Killing carried out after a long break cannot be qualified as intentional according to this section. From a subjective point of view, the crime in question presupposes intent.

The author of the comments was also the initiator in identifying the physiological affect through psychological examination. Several dissertations written under his supervision have been also dedicated to it.

This article emphasises that Rebane was of the firm opinion that a physiological state of affect can be identified by means of psychological, not psychiatric, examination. The described comments were based on works of legal psychology of the USSR.

### 3 Analysis of Physiological Affect by Estonian Researchers

In the independent Republic of Estonia, legal psychology developed independently. The following authors and works should be mentioned:

- August Kuks “Ideals of Estonian school youth” published in 1922. This book was later formatted by the author into a doctoral dissertation;
- Hans Madisson’s doctoral dissertation in 1924 “Sexuality and Juvenile Delinquency in Estonia”, the combination of research methods used of which is unique and has not been repeated (Auväärt & Maripuu, 1994);
- Bjerre “Zur Psychologie des Mordes” published in Tartu in 1925;
- J. Tork’s doctoral dissertation “Estonian children’s intelligence” published in Tartu in 1939. Based on his dissertation, Tork also compiled a monograph of the same name which was published in 1940. It was this work that provoked special anger of the occupying Russian forces, and an attempt was made to completely destroy the work by burning and cutting it to pieces. There was still the view in Soviet science that intellect does not depend on innate qualities, but is formed in the process of socialisation.

At the beginning of the occupation, however, these studies were suppressed, and psychology ceased to exist in Estonia as in entire Soviet Union. Rebirth of Estonian psychology could be considered to start in the sixties of previous century.

Under the guidance of I. Rebane, forensic psychological expertise was studied and practiced by his students in the late 1970s.

Under the supervision of Professor Rebane, R. Maruste defended his candidate dissertation in law. On the basis of this dissertation, he published the brochure “Use of Psychological Expertise in Criminal Proceedings”. According to R. Maruste, the expert’s study must include the following:

- 1) analysis of a crime situation;
- 2) analysis of permanent characteristics of the personality of the offender;
- 3) mental state of the subject before and during the commission of the crime;
- 4) analysis of the subject’s behavior at the time of crime;
- 5) analysis of behavior after the act was committed;
- 6) the subject’s attitude towards the event that took place (Maruste, 1982).

There is just one question to diagnose affect whether the accused was in a state of physiological (anger, rage, fear) affect at the time of the crime(s) (indicating which ones).

Maruste was later the Chief Justice of the Supreme Court of the Republic of Estonia, a judge of the European Court of Human Rights and a member of the Parliament (Riigikogu) of the Republic of Estonia. While working in these positions, his interest in psychological expertise waned, and many of the views expressed in this decor have been forgotten.

As a student of Professor I. Rebane, Lembit Auväärt defended his candidate’s dissertation “Role of Family and Friends in the Legal Socialisation of Young People”

in 1982; “Communication in Legal Proceedings” published in Tartu in 2002. L. Auväärt has also published numerous publications on psychological examinations and conducted numerous psychological examinations, including examinations of emotional states (Auväärt, 2008). He has also addressed identification of mental characteristics in testimonies (Auväärt, 2002).

In 1986, the last all-union congress of legal psychologists of the USSR was held in Tartu. In 1992, P. Pruks’s brochure “Criminal Procedure: False Scientific Detection Using a False Editor” was published. He also successfully defended his doctoral dissertation on the same topic. Hans Raudsik has written about circumstances causing false statements based on V. Kudryavtsev’s treatment (Raudsik, 2001).

#### **4 Physiological Affect in Criminal Law of the Republic of Estonia**

The Estonian Penal Code was passed by the Parliament (in Estonia: Riigikogu) on January 6, 2002 and entered into force on September 1, 2002. The current version has been adopted on July 7, 2020. Compared to the so-called Soviet legislation, there are several changes in both the text of the law and its interpretations. Paragraph 57 of the Penal Code, which provides a list of mitigating circumstances, is more related to the topic. Of particular importance are paragraphs 1 (4) (commission of an offense under the influence of a difficult personal situation) and 6 (commission of an offense under the influence of strong agitation caused by unlawful conduct).

In 2015, comments prepared by well-known Estonian lawyers J. Sootak and P. Pikamäe appeared on the Penal Code. According to these comments, the impact of a difficult personal situation means a situation or condition due to economic, family, personal reasons (such as illness) or other similar circumstances that have influenced the person to commit the offense. These circumstances do not have to be the direct cause of the offense (Penal Code: executive edition, 2015).

To exemplify, paragraph 115 of the Penal Code has been chosen:

***Paragraph 115. Provoked killing***

Killing, if committed in a state of sudden severe emotional arousal caused by violence or insult by the victim against the killer or a person close to him, is punishable by 1- to 5-year imprisonment.

Commentators stress that provoked killing is a lighter composition of killing. It is a privileging fact that the victim themselves has clearly killed the perpetrator with their grievous assault on the person and provoked them. Therefore, the perpetrator’s anger and counterattack are to some extent justified, more humanly understandable.

In addition, the reason for reduction of punishment is the fact that in a state of mental or emotional arousal, a person’s ability to control their behavior has decreased (Penal Code: executive edition, 2015).

A strong state of agitation is a constituent characteristic of the offender's mental state, which must be proven by forensic psychiatric examination. If the killing has been committed as a result of violence or insult, but the perpetrator's state of agitation is not identified, this section cannot be applied (Penal Code: executive edition, 2015).

Development of a state of strong mental isolation for the offender is causally related to the victim's violence or insult. If there is no such connection, i.e., if the excitement of the offender is caused by something else, this section cannot be applied.

To define a killing as killing in the state of emotional arousal, the effect of violence or insult on the perpetrator should be immediate. The state of emotional arousal and the consequent desire to kill must have arisen suddenly, i.e., immediately after an act of violence or insult (Penal Code: executive edition, 2015).

According to J. Sootak, the issue with the state of affect is that it raises the question of terminology, making it questionable in legal language, at least in this context. It was common in the literature to describe the state of arousal with the term "affect", more precisely "physiological affect", opposed to a pathological affect (temporary severe mental disorder). To date, the Estonian Supreme Court has relied on the complex examination of forensic psychiatry-forensic psychology that the definition "physiological affect" is not a psychological term describing a specific emotional state, and therefore the examination cannot answer the question whether the accused had such a condition. Reference is made to the decision of the Supreme Court of the Republic of Estonia 3-1-1-46-11 (Sootak, 2017). However, this article avids being so categorical in interpreting this Supreme Court decision (Auvaart & Kaugia, 2000). There, a committee of psychologists and psychiatrists found that they were unable to determine a physiological effect, but that did not mean that there was no physiological affect nor that it could not be determined.

The discussion about emotional states has led to the publication of several interesting articles in Estonian professional literature. The article "Assessment of emotional states by psychological examination" by Tiina Kompus, a long-term psychology expert, should be mentioned; article by Paavo Randma, Supreme Judge of the Republic of Estonia, "Affect as a state of agitation and temporary severe mental disorder"; article by *Ph.D.* in Legal Psychology Jüri Saar and Priit Pikamäe "State of Spiritual Excitement"; Jüri Saar is the Professor Emeritus of the University of Tartu and Priit Pikamäe is a lawyer at the European Court of Justice.

In the discussion, Tiina Kompus suggests that lawyers consider the term "state of agitation" to be broader than the term "physiological affect". Detection of a physiological affect during an examination does not automatically lead to reclassification of the act, but other legally important features must be taken into account (Kompus, 2000).

J. Sootak notes that affect itself as a psychic phenomenon describing a strong state of agitation within the meaning of paragraph 57 (1) (6) and paragraph 115 of the Penal Code is still used in the literature and may displace the notion of "heightened mental state" without scientific content. The bases for such assumption is the book "Psychology: a book for lawyers" by Talis Bachmann (Bachmann, 2015), a well-known Estonian psychologist.

## 5 Physiological Affect in the Case Law of Estonia

### Supreme Court of the Republic of Estonia May 2, 1995.

#### Decision No III-1/1-26/95

The Supreme Court of Estonia is considering the decision of the Criminal Chamber of the Tallinn Circuit Court, according to which R.N. killed his wife in a state of sudden agitation by violence or serious insult by the victim. By serious insult, the Criminal Chamber of the Circuit Court meant O.N.'s ethnicity-related insult to the defendant. Whether the insult was serious or not, remains a question of fact and any court hearing the substance of the matter has jurisdiction to decide. Simultaneously, in classifying the crime, the circuit court has relied solely on the hypothetical opinion contained in the forensic psychological examination report regarding the physiological affect in the defendant and the inconsistent statements of the defendant himself. The assessment of other evidence in the criminal case is not reflected in the decision of the circuit court, nor is it provided with a legal assessment of the analysis of this evidence in the decision of the city court. By violating the requirement of a comprehensive and complete review of the facts and basing the judgment on the hypothetical opinion of an expert in forensic psychology conducted on the basis of an illegal regulation, the violation of procedural law has led to incorrect application of criminal law by the District Court Criminal Chamber.

In order to carry out a comprehensive, complete and objective examination of the facts of a criminal case, it is necessary to order a complex forensic psychiatric and forensic psychological examination of R.N. Based on the above, the Supreme Court of Estonia annulled the decision of this circuit court. This decision of the Supreme Court of Estonia became the basis for hearing other similar cases.

In Estonia, it is possible to find court decisions using keywords. One such keyword is physiological affect. Following are the decisions traced based on the keyword.

### Tallinn Circuit Court of 23.02.2010.

#### Decision No 1-09-1603/18

The appellant considers that M.K. acted in a state of sudden strong agitation caused by violence on the part of the victim. It is clear from the forensic expert's opinion that M.K.'s attack caused a concussion and numerous injuries to the head. The Forensic Psychiatric and Psychological Complex Examination Act states that M.K. was in a state of emotional tension that was not pathological in its extent and strength (physiological state of affect). Contrary to the positions set out in the judgment of the Supreme Court 3-1-1-63-08, it is not possible to observe in the expert report what data and methods were used by experts in order to reach such a conclusion. Physiological affect and state of strong agitation are not overlapping concepts, no position has been taken on the occurrence of such a state. The expert did not provide clear answers to the questions asked during the hearing. What has been overlooked by M.K. due to the activity of his partner before the trip to Tallinn and the nervous tension that caused the trip, an unexpected aggressive

attack by L.K., which caused him to have concussion and led to further uncontrolled actions. M.K. was unable to adequately describe his activities during the pre-trial investigation or at the hearing, which in turn indicates that he acted in a heightened mental state. In this case, it was a complex forensic psychiatric and psychological examination, where a physiological affect was identified, but the court did not consider the views of the experts.

**Harju County Court of March 12, 2013.**

**Decision No 1-12-11410/14**

As described in the expert opinion in the outpatient forensic psychological examination report, O. did not have a state of physiological affect at the time of the crime on the basis of the available information. He was intoxicated then, i.e., he was able to understand that his actions were illegal and to direct his behavior according to that understanding. As a rule, intoxicants preclude a mental state in which the so-called physiological affect belongs.

**Harju County Court May 3, 2013.**

**Decision No 1-13-1833/38**

It is clear from the expert's statements that he maintains the opinion reflected in the expert's report. He rules out the possibility that there was a physiological affect or any other affect, let alone a pathological affect at the time when the criminal offense was committed. The subject was certainly irritated, but this does not constitute a physiological affect. When there is conflict between people, emotionality and irritability are heightened. The subject is extremely sensitive to critical assessments, overreacts. These are long-lasting feelings, which shows the rigidity of the subject's attitudes. The subject is characterised by emotional inflexibility as well as low critical thinking skills. The empathic abilities of the subject are not sufficient and he tends to solve situations with violence. The subject suggested that they could record this as an affective memory loss and then he would receive a lighter punishment. He was completely calm. He also stated that he did not regret the killing.

**Pärnu Country Court November 5, 2013.**

**Decision No 1-13-1300/76**

According to the report of the forensic psychological examination, the perpetrator was not in a state of physiological or pathological affect. The expert found that irritability, including stress, are conditions inherent in human nature that do not deprive him of the opportunity to behave and act purposefully. The expert was of the opinion that at the time of committing crime, N.T. did not show the characteristics of a strong state of agitation (the so-called physiological affect), which would have partially limited his ability to understand that his actions were illegal and would conduct his behavior accordingly. N.T. admitted on August 27, 2013 shooting A.M. (judgment 1-13-1300 21 (26)) with

excitement and aggression. The subject's reaction was due to his personality. N.T. did not show any disturbances of consciousness, symptoms of psychotic state or any other pathological state of mind (pathological affect) at the time of the commission of the alleged crime. The mental and physical violence perpetrated against N.T. by A.M. over several years caused irritation and stress in the subject.

**Tartu Circuit Court June 19, 2014.**

**Decision No 1-13-5033/65**

According to court, classification of killing under the provoked killing section is not justified, because A.S. was not in a state of heightened mental state at the time of the killing, which limits the person's ability to understand and control his actions. It appears from the forensic report of forensic psychiatry-psychology that on December 15, 2012 A.S. did not have such a special emotional state that would have prevented or limited understanding the nature of his actions, including understanding that his actions were illegal and directing his behavior. After the killing, the accused started to change his pants and stuff things in his bag.

**Tartu County Court of October 12, 2015.**

**Decision No 1-12-438/56**

According to the complex examination of forensic psychiatry-psychology, A.J. has no mental disorders. At the time of the act, A.J. was in a state of intoxication, he did not have any mental disorders which would have prevented him from understanding that his actions were illegal nor from controlling his conduct in accordance with that understanding. According to the expert's report, A.J. is also able to participate in the proceedings and serve the sentence due to his mental condition.

**Tallinn Circuit Court November 4, 2015.**

**Decision No 1-15-2168/42**

Experts have given a similar opinion in act No 299 of the complex examination of outpatient forensic psychiatry-psychology performed on June 9, 2015, as a result of which he was unable to understand the prohibition of his act and direct his conduct in accordance with that understanding, or which would have significantly limited his ability to understand that his actions were illegal and direct his conduct in accordance with that understanding.

**Supreme Court of the Republic of Estonia December 14, 2020.**

**Decision No 1-19-8038**

The victim R.R. has had a tense relationship with his ex-wife P.R. for quite some time. They were divorced, but the living area in the joint property was not divided. Communication with their shared children, who lived with P.R., also caused tensions. Communication between R.R. and P.R. became particularly problematic when

R.R. received information about P.R.'s close contact with K.S. in April of 2018. Criminal proceedings had been instituted against R.R. on the basis of threats and physical abuse. K.S. also knew this. R.R. told the witness that "he goes and kicks the man out, beating so hard that he sprays blood". R.R. arrived at midnight on July 18, 2018 unexpectedly to a shared property where P.R., K.S. and three children spent the night. R.R. entered the house with an iron bar.

First, he hit P.R., who was the first to stand up, with an iron bar, then he started beating K.S., P.R., in his underwear and with a bleeding head injury, managed to escape the house. R.R. began to force K.S. out of the house and continued to constantly threaten and insult him: "if you keep coming back here, next time you leave, it'll be feet first". K.S. asked R.R. to bring him his clothes and the cell phone from the house. R.R. handed the items over to K.S., forced him in the car from the driver's side, forced him to sit behind the wheel and slammed the door shut.

He threw K.S.'s cell phone at the car. R.R. started walking towards the house, but then turned and went in front of the car, waving his hands and shouting at K.S. The car lights went on, the engine started, the car started moving; then there was a loud bang and silence. R.R. died of his injuries.

Chamber of the Court found that the run-off was intentional; the murder committed with intent had been carried out by K.S. in a heightened mental state caused by the victim's own conduct.

Chamber of the Court found that agitation is not a purely medical concept that can be identified in the course of an examination, but that all evidence needs to be analysed. K.S. drove towards R.R. not only because R.R. used physical violence against him, but had previously used intense physical violence against P.R. in their prior relationship. K.S. was in a state of emergency because he also wanted to protect P.R.

Based on the above, the Criminal Chamber of the Supreme Court of the Republic of Estonia acquitted K.S. A psychologist also took part in this process; the list of evidence also includes the act of complex examination of psychiatry-psychology. However, the decision of the Supreme Court does not set this out separately. In the court decision search system this court decision cannot be found under the keyword "physiological affect". The search system needs to be improved so that all things related to physiological affect can be found.

## Conclusions

Analysis of the judgments shows that:

- 1) during the last 10 years, 10 physiological affect examinations have been ordered in the courts of the Republic of Estonia. No such expertise has been assigned in the last five years;
- 2) most assigned examinations are complex examinations of psychiatry-psychology. As early as 1982, R. Maruste stressed that administration of justice is primarily interested in how affect affects a person's consciousness and behaviour. While

pathological affect leads a person's consciousness into deep obscurity and the person loses the ability to understand the meaning of their actions and control them, physiological affect causes changes in a person's consciousness, but they are not so profound that the person loses complete control over themselves. While in physiological affect, a person retains the capacity to understand the meaning of their actions and control them, but this capacity is limited, incomplete. However, the authors argue that this status should be considered in administration of justice;

- 3) in the case of assigned examinations, the experts never found evidence of physiological affect.

According to the author's observations, there are still crimes committed due to sudden heightened mental state, but they have been solved without the opinion of psychological experts.

The authors agree with T. Bachmann, a renowned Estonian psychologist, that there are problems in every branch of psychology for which it is possible and necessary to use psychological expertise. The range of questions that can be asked of a psychologist is practically inexhaustible. To name a few: analysing and assessing human behaviour, assessing credibility of witness testimony, diagnosing affect, analysing aggression, analysing motivation, etc. However, there is no national expertise institute in Estonia that conducts forensic psychology expertise. There are also no normative acts regulating performance of forensic psychology expertise. As a result, many problems have to be solved creatively by courts, even at the Supreme Court level.

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