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COMPARATIVE METHODOLOGICAL STUDY  
BETWEEN SWITZERLAND AND ROMANIA**

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# Forensic Psychiatric Assessment. Comparative Methodological Study between Switzerland and Romania

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## Abstract

Forensic psychiatry is a branch of psychiatry, which encompasses the interface between psychiatry and law, and involves knowledge from both fields. Although there are undeniable methodological differences among the forensic psychiatry systems of various countries worldwide, its principles and purposes are mainly the same. They consist of: determining an existing mental illness, describing before a court of law its impact on that person's mental capacity, competence and responsibility, and recommending therapeutic approaches of dangerous and/or delinquent mental patients in order to prevent mental illness relapses and to prevent them from repeating their antisocial deeds. Our research focuses on comparing the specific features of this type of assessment in Romania and in Switzerland, and its purpose is to share the expertise acquired by the two systems. We found differences as concerns the terms employed in the forensic psychiatric assessment reports and in the legal codes, objectives set by the court of law, medical actions taken and, partly, the actual manner in which these assessments are done. We laid an emphasis on our country's adoption of the latest international terminology.

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*Keywords:* forensic psychiatry; assessment; mental capacity; competence; assessment reports; mental illness.

## Introduction

The last few decades witnessed the tendency of an increasing number of countries to consider forensic psychiatry as a subspecialty of psychiatry, despite its traditional inclusion in the forensic specialty (Rosner, 2003; AAPL, 2005). Moreover, the data provided by the history of medicine shows that clinical psychiatry and forensic psychiatry have known a parallel development and they are actually two sides of psychiatry. The most eloquent of the definitions of forensic or legal psychiatry reported in literature seems to be the one proposed by AAPL, according to which “forensic psychiatry is a subspecialty of psychiatry in which scientific and clinical expertise is applied to legal issues in legal contexts embracing civil, criminal, correctional or legislative matters” (AAPL, 2005). We prefer this definition as it underlines the fact that legal psychiatry is not a mere application of psychiatry to solving legal cases, but “it also considers all the issues that exist on the border between psychiatry and law”. According to the Gent Group (Gunn, & Nedopil, 2005), forensic psychiatry is a “medical specialty involving knowledge of legal regulations and of the criminal and civil legal systems”.

Although legal psychiatry was meant to be a unitary subspecialty, there are however inherent differences among countries resulting from the particular historical development and legislative specificity of each country. Nevertheless, its principles and purposes are the same and they consist of diagnosing a mental illness, describing before a court of law its impact on that person’s mental capacity, competence and responsibility, assessing and managing any risk of offence repetition, and recommending therapeutic approaches of dangerous and/or delinquent mental patients in order to prevent mental illness relapses and to prevent them from repeating their antisocial deeds (Eastman et al., 2012a; Eastman et al., 2012b; Nedopil, Gunn, & Thomson, 2012; Taylor, Gunn, Goethals, & Nedopil, 2012).

In their turn, the use and interpretation of legal terms such as mental capacity, competence and responsibility differ depending on legislation. We have witnessed lately a tendency to restrict the use of the term mental capacity only to homicidal cases and to prefer the term competence for both criminal and civil matters (Weinstock, Leong, & Silva, 2003; Miller, 2003a; Miller, 2003b; Ciccone, 2003). Competence refers to one’s ability to function in specific situations or actions (Weinstock, Leong, & Silva, 2003). The type of competence depends on the area explored and on specific legal assessment criteria. When most of one’s mental abilities are lost, we speak of total incompetence, which supports the application of a restriction of competence. The advantage of the use of this term resides in the

fact that no psychiatric diagnosis involves the setting of a state of incompetence, as only the manner in which one's mental illness interferes with one's ability to function in a given context is relevant (Weinstock, Leong, & Silva, 2003).

Our paper draws a comparison between the specific characteristics of this type of assessment in Romania and Switzerland, which we consider relevant to our intent of sharing some of the expertise acquired by the Swiss psychiatric medical system. In our opinion, the Swiss psychiatric system is a complex one from the viewpoint of forensic psychiatric assessment approach and settlement, as it implies legal, human, educational and prophylactic components.

### **Material and Method**

This research was conducted by comparing the actual performance of forensic psychiatric assessments in the Psychiatric Assessment Center of the Legal Psychiatry Institute of the Psychiatry Department in Lausanne, Switzerland, and in the Institute of Legal Medicine of Iași, Romania. The comparison also dwelt on the criminal and civil codes of the two countries (Romanian Civil Code, Romanian Criminal Code, Swiss Civil Code, Swiss Criminal Code) and on the laws passed to apply the new Romanian Civil Code (Law no. 287, 2009), on the Mental Health Law in Romania (Law 487, 2002), as amended in 2012, as well as on the related Procedure Codes (Romanian Code of Criminal Procedure, Swiss Code of Criminal Procedure). We also analyzed the standards regulating forensic psychiatry in the two countries (provided in Romania by the Procedural Standards Regulating the Performance of Forensic Assessments, Findings and Other Actions, and in Switzerland by the specific methodology of the Institute of Legal Psychiatry of Lausanne) (Law no. 1134, 2000; Niveau & Dang, 2008; Gasser & Gravier, 2007).

### **Results and Discussions**

Our comparative study revealed a series of differences and similarities regarding forensic psychiatric assessment in the two countries, which we will describe here under. As shown in table 1, in the two countries, forensic psychiatric assessments are conducted in a different organizational framework, namely: in Romania they are carried out by a committee including a forensic pathologist and two psychiatrists (Dragomirescu, Hanganu, & Preliceanu, 1990), whereas in Switzerland the committee includes only psychiatrists. There are also differences as concerns the institutions that request such assessments; thus, in our country, the forensic psychiatric assessment requests come from the courts of law, public ministries, the Ministry of Home Affairs or from the person concerned, whereas in the Swiss

Confederation, most of the requests come from the Court of Justice and more rarely from the person concerned (*Table 1*).

Despite the fact that the situations when forensic psychiatric assessments are requested are often similar, we also found some differences: in Switzerland, a psychiatric assessment is also required for guardianship institution (in our country, only for wardship); in Switzerland, this type of assessment is also required for patients who are not legally involved but who cannot care for themselves or who threaten the security of others. Mandatory psychiatric therapy measures may also be taken in such cases. In Romania, the role of the assessment committee is to endorse the non-voluntary hospitalization decision on the request of the patient and of his/her legal or conventional representative, or otherwise to recommend therapy in an outpatient facility (if necessary); the court of law actually decides on the medical action to be taken (*Table 1*).

*Table 1. Differences and similarities concerning the organizational framework, requesting institutions and situations when a forensic psychiatric assessment is required*

DIFFERENCES AND SIMILARITIES	
Romania	Switzerland
1. Organizational framework	
The committee includes a forensic pathologist, who is also the chairman of the committee, and two psychiatrists.  A psychological examination is requested for each case.	This task is given to the Assessment Center.  The assessment is done by a resident and a specialist psychiatrist having psychiatric assessment competence. In some cases, they also order a psychological examination performed by a psychologist.
2. Requesting institutions	
Courts of law, public ministries, Ministry of Home Affairs or the person concerned	Criminal and civil courts of law and rarely the person concerned
3. Situations when a forensic psychiatric assessment is requested	
3.1. Determination of one's criminal responsibility	
It is the duty of the forensic psychiatric committee.	It is the duty of the Forensic Psychiatric Center.
3.2. Application of a restriction of competence	
Only for wardship.	For guardianship and wardship
3.3. In cases with no legal involvement	
The endorsement of the non-voluntary hospitalization decision at the request of the patient or his/her legal or conventional representative may be requested.	Mandatory psychiatric therapy measures (in a hospital, outpatient facility or in a specialized institution) may be taken against patients who are unable to care for themselves, who need permanent care or who threaten the security of others.
3.4. Documents authenticated by notaries	
Frequently in people aged 70 or over, or who have a history of mental illness.	Only in litigious situations

Sources: Niveau & Dang, 2008 ; Gasser & Gravier, 2007; Scripcaru, Chiriță, & Chiriță, 2012 ; Scripcaru et al., 2002 ; Costea & Astarastoea, 2013.

As for the objectives set by the ordinance requesting an assessment (called a mandate in Switzerland), they are expressed in a variety of manners, being set by the court sending the ordinance, in Romania, and mandatory and provided (or recommended) by law, depending on the type of assessment, in Switzerland (*Table 2*).

In Romania, when an application of a restriction of competence is requested in a civil case, according to the new Civil Code, the mental capacity of the person concerned needs to be set, in order to determine whether he/she is able to care for his/her own interests and whether this ability is destroyed by mental alienation, as well as the medical actions that need to be taken; in Switzerland, the objectives of the same type of assessment set by the court of law are as follows: whether the patients are able to care for themselves, whether they need permanent care or whether they are a threat to the security of others due to their psychiatric pathology and how the latter influences the capacity of the person involved to manage his/her property, to have an autonomous life, and not to compromise the material and moral status of his/her family. The assessment should also determine whether there are possibilities of treatment and whether the person concerned is able to cooperate for the necessary therapy. The expert is also supposed to report whether there are means of following up the therapeutic measures proposed.

In Switzerland, the questions asked by the Swiss court, as well as the experts' answers only refer to the terms provided in legal codes, namely to mental capacity in civil cases and to responsibility in criminal ones, the latter resulting from the analysis of the assessed person's faculty to become aware of the illicit nature of his/her deeds and of their consequences (mental capacity), as well as of his/her self-control capacity. In Romania, although the civil cause objectives refer to mental capacity, according to the provisions of the New Civil Code, and in accordance with art. 211 of the Law 71/2011 regarding the Law of Enactment of the New Civil Code (Miller, 2003b; Swiss Civil Code), the experts' answers should adopt the term of mental competence. According to the Mental Health Law as amended in 2012, the term "mental capacity" will only be used in criminal cases, as it "represents a person's capacity to critically judge the content and social-negative consequences of the deed committed" (see *Table 2*). Notwithstanding the above, the current legislative framework in our country limits the use of the term competence by the conditions raised by particular legal situations. For instance, as concerns documents authenticated by notaries public, the Civil Code provides for the assessment of one's mental capacity, which leads to its approximation, just like in Switzerland (one's mental capacity may be present or absent) and it is only then that the competence to conclude notary documents may be established (*Table 2*).

Table 2. Objectives set by the ordinance requesting an assessment, terminology used in the assessment reports and terminology provided by Legal Codes

<b>DIFFERENCES AND SIMILARITIES</b>	
<b>Romania</b>	<b>Switzerland</b>
<b>1. Objectives set by the ordinance requesting an assessment</b>	
Expressed variedly, set by the institution sending the ordinance	Mandatory, specified in the mandate sent to the expert
1.1. Civil	
Mental capacity setting is requested	Clear answers to the following questions are requested: what the influence of the condition is on that person's ability to manage his/her property, to have an autonomous life, not to compromise his/her family's material and moral status
Medical actions to be taken	Whether there are possible therapies and whether that person is able to cooperate for the necessary therapy, whether there are means of following up the therapeutic measures proposed
1.2. Criminal	
Mental capacity setting is requested	Mental capacity, self-control and responsibility setting is requested
Risk of offence repetition - not assessed	The expert is supposed to determine the risk of re-offense and to propose therapeutic measures designed to diminish that risk
Psycho-pathological motivation - sometimes	The psycho-pathological motivation is always referred to in the assessment report
2. Terminology used in the assessment reports	
2.1. Civil	
Mental competence Mental capacity	Mental capacity
2.2. Criminal	
Mental capacity	Mental capacity Responsibility Self-control
3. Terminology provided by legal codes	
3.1. Civil	
Mental capacity*	Mental capacity
3.2. Criminal	
Mental capacity (present, diminished or absent)	Responsibility set based on mental capacity (present, mild, moderate or much diminished and absent) and on self-control

\* *Mental capacity - according to art. 211 of the Law 71/2011 regarding the Law of Enactment of the New Civil Code, opinions on the term mental competence will be expressed.*

Similarly, in criminal cases, both legal systems accept several degrees of mental capacity (in Romania) and of responsibility (in Switzerland). In addition to it being present or absent, mental capacity may also be diminished, in our country, whereas responsibility may be mildly, moderately or considerably diminished in the other country (*Table 2*) (Law no. 1134, 2000). In Romania, the psycho-pathological motivation of the deed is mandatory, especially in first degree murder cases, whereas in Switzerland, the psycho-pathological motivation is constantly required, regardless of the seriousness of the offense, and it consists of very thorough discussions related to the case (*Table 2*). In Switzerland, much attention is paid to the diminution of the mental disorder relapse risks, even when they are related to alcohol and other psychotropic substance abuse, by drug therapy and vocational retraining (*Table 2*).

If a patient who has an obligation of undergoing treatment in an outpatient facility refuses to obey the medical safety measure providing it, that patient's imprisonment and therapy in prison are preferred in Switzerland, whereas in Romania the replacement of the medical action provided by art. 113 of the Criminal Code by the action provided by article 114 of the Criminal Code are usually requested, which leads to the overcrowding of psychiatric hospitals and to safety maintenance or enhancement measures (*Table 3*). In Switzerland, psychiatric examination is extremely thorough, which leads to a comprehensive report, in which psycho-pathological motivation plays a very important role, which may be a model that is worth implementing (*Table 3*).

In the criminal field, young offenders are considered to suffer from a lack of psychological maturity and at the same time have, at least theoretically, an evolution potential. When it comes to young offenders, judges generally prefer measures designed to prevent these persons from becoming social misfits. Therefore, they need to know whether professional or medical measures may prevent such disastrous evolutions for both the individual and the society as a whole from happening. These assumptions ground different attitudes towards young and adult offenders, respectively. Therefore, judges always ask the expert to express an opinion on the adequacy of the application of psycho-social rehabilitation measures such as, for instance, vocational training (*Table 3*).

Table 3. Assessment performance means, and medical safety and work education measures

<b>DIFFERENCES AND SIMILARITIES</b>	
<b>Romania</b>	<b>Switzerland</b>
<b>1. Assessment performance means</b>	
After having received the ordinance and having studied the civil or legal file The medical file is usually drafted progressively	After having received the ordinance and having studied the civil or legal file
Forensic interview of 45-60 minutes, in addition to psychiatric examination while the patient is hospitalized, or the interview is repeated when the patient is not hospitalized	Forensic interview – generally several meetings totaling between 4 and 10 hours
Additional information is only obtained through official notifications	A Swiss psychiatrist may request information from the patient’s attending physician or family doctor
<b>2. Measures considered for young offenders; work education measure</b>	
Not requested	It is only in criminal cases that the specialist is supposed to decide whether that person has had insufficient basic schooling and whether he/she has the capacity or will to acquire vocational training and what those measures are
<b>3. Measures considered when the patient refuses his/her mandatory therapy in an outpatient facility</b>	
The only possibility is the application of article 114, which provides forced hospitalization in a specialized institution	Imprisonment and application of mandatory therapy in prison
<b>4. Duration of forced hospitalization as a medical safety measure provided by criminal codes</b>	
No specific duration of forced hospitalization is regulated, as this may be decided on by the committee in charge of the periodic reassessment of the case	The duration of forced hospitalization is three years at the most for less serious offenses and it may be for life for violent delinquents or dangerous pedophiles for whom there is no hope of improvement
<b>5. Duration of an assessment</b>	
Not more than 30 days	The requesting institution sets an assessment completion deadline, which is generally three months. The expert may request the extension of this deadline by 1 to 6 months, depending on the complexity of the case
<b>6. Drafting conditions</b>	
There is no minimum number of pages	This is not regulated by law, yet in current practice these reports usually have 20 pages in the French-speaking part of the country

## Conclusions

Both countries accept several degrees of mental capacity, which confirms once again that judging mental capacity considering only its two extremes (present or absent) is a rigid approach. Self-control should be assessed at the same time as mental capacity in order to enable the legal advisor to determine responsibility. Extending the need to express a psycho-pathological motivation to all the cases assessed and not only to first degree murder cases may help the legal advisor have more objective views on the case. Assessing the relapse risks and proposing medical actions meant to diminish this risk are a major assessment objective in Switzerland and, at the same time, an important prophylactic measure. The need to comply with the therapy recommended by a forensic psychiatric assessment is vital for the subsequent evolution of the patient and for preventing him/her from repeating his/her antisocial deeds, which determines the Swiss court to find methods to follow up its application. It is imperative for Romania to implement a patient approach that is not limited to legal matters, but that also considers medical matters, in close connection with the evolution of his/her condition and with re-education measures designed to allow his/her adequate social and family re-insertion.

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