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Forensic expertise and the law of evidence in France

Abstract

The law of evidence in France is based on three principles which answer the three questions implicit in every problem of evidence: Who must bear the burden of proof? By what means can a fact be proven? How much evidence is needed to prove a fact? To those three questions of procedural law, the French penal process offers responses in the form of three principles. Each of these three golden rules of evidence, however, has implications which are inevitably subject to exceptions.

Physical or circumstantial evidence is an indirect form of proof which never carries, by itself, clear information. It is often necessary to engage technicians who are able to interpret the evidence. This presents a problem of forensic expertise. The proper organisation of a system of penal forensic expertise has been one of the most controversial problems in French penal procedure for fifty years. Since 1958 (French *Code de Procédure Pénale),* four new enactments (of 1960, 1972, 1975 and 1985) have changed aspects of the system of varying degrees of importance. Nowadays the French system of penal forensic expertise does not strictly adhere to any one of the four alternatives proposed by academics to regulate the system, but is a mixed one incorporating parts of each of the options.

The law of evidence in France

Evidence can be defined as all the means which can support assertions or denials of the reality of a situation or the correctness of a proposition.

The entire problem of evidence, in whatever judicial context it may be situated, inevitably poses three questions: who bears the burden of proof?; by what means may one prove a fact? How much proof is necessary? To these three questions of procedural law, the french penal process offers responses in the form of three principles.

To answer the question 'who bears the burden of proof?', French penal procedure follows the principle of the presumption of innocence: the accused must be presumed innocent until the moment he is effectively condemned. It follows that the public prosecutor and the magistrates are obliged to prove the alleged guilt of the defendant.

To answer the question 'By what means may one prove a fact?' the penal process adheres to the principle of freedom of evidence. There is no limitation on admissibility of evidence. Any sort of proof may be used, no matter its nature and its weight.

To answer the question 'How much evidence is needed to prove a fact?' the penal process follows the principle of the judge's discretion. There is neither supreme nor absolute proof. The magistrates decide the outcome of the case before them on the balance of probabilities as they see it.

It is important to note, however, that, although the three major principles are widely affirmed and acknowledged, none of these has ever been expressed in a French text on legal process.

We will now see that each of these three golden rules of evidence has implications which are subject to exceptions.

The burden of proof

The allocation of the burden of proof follows from the principle of presumption of innoc-

ence. Consequently, the defendant need not prove anything. He may remain silent and abstain from cooperation in investigation. The burden of evidence is held both by the public prosecutor and the judges.

1. In every case the public prosecutor and the judges must gather their evidence

a) The public prosecutor must investigate all elements of evidence which will together characterise the offence.

The public prosecutor must initially allege that an offence has been committed and cite the legal authority on which the prosecution is based. Then he must demonstrate that the trial is indeed viable (for instance that the wrongdoer is not dead, the crime is not subject to amnesty, the time limit to prosecute has not passed, etc.).

Later, he must present proof of the existence of the facts, the part the accused took in, the mens rea which defines the offense, and any events and circumstances that can affect the seriousness of the offence (for example, age of the victim, relationship between the accused and the victim or whether the accused committed the offence during the night or while using weapons). The public prosecutor must establish such facts against both principal participants and their accomplices, if any.

In certain cases, the law reduces the burden of proof placed on the director of public prosecutions by creating presumptions, either in relation to the actus reus or the mens rea of the crime. Such presumptions are permissable when the crime is relatively serious or difficult to establish, for example, in case of crimes against state security, customs law, pimping or drug dealing.

The public prosecutor must also prove that the defendant committed the acts alleged and show the defendant's prior records where it may affect punishment.

These principles apply in all ordinary trials. Their effect, however, is uncertain in atypical cases. For example, legally cognizable claims of self defence raise one of the most controversial points amongst French legal academics. Some believe that the presumption of innocence obliges the public prosecutor to prove all elements of the case without distinguishing between those which are habitual or unusual, positive or negative. In our example, these scholars would contend that the director of public prosecution must always demonstrate that the accused dit not commit the acts alleged as a result of legitimate self defence. Others believe that the public prosecutor needs to establish the elements of a stereotypical crime alleged and that it is for the accused to establish the exceptional circumstances that may make up the defence. In that view, the defence itself must prove a legitimate case against the prosecution. Further there are those who maintain that there is a distinction between alleging an exceptional fact and proving it. In that theory, the public prosecutor need not take the initiative of establishing that there is no legitimate defence as long as the accused has claimed no defense. However, as soon as the defence pleads a legitimate excuse, the prosecution must disprove the defense. As far as the positive system is concerned, one can note a difference between what *the Cour de Cassation* says in theory and what it does in practice. The *Cour de Cassation* repeats a verbal formula which appears to place the entire burden of proof on the public prosecutor (the first system explained above): 'The prosecution must establish all the constituent elements of the crime and the absence of all elements which could lead to an acquittal'. In practice, however, except in particular cases, the burden passes to the accused whenever he alleges exceptional circumstances.

The public prosecutor must establish clear proof of the elements invariably necessary to show guilt, but need not disprove any exceptional circumstances that might lead to the accused's acquittal or reduce his punishment. So the defendant must, for example, bear the burden of proving self defense. He is not, however, alone in this task, there are several judges to help him.

b) The courts and judges must involve themselves in the investigative process in every case. That is the main difference between an adversarial procedure and the continental model which France follows.

The presiding magistrate directs a considerable portion of the proceedings and takes an important personal role in the gathering of evidence. First, the magistrate must examine the accused. Then the court hears the witnesses, who initially give their testimony without interruption; thereafter the presiding judge may ask questions. If other people (director of public prosecutions, accused, victim, lawyers) want to question the accused or a witness, they may only do so with he president's permission.

If the court unanimously concludes that there is insufficient evidence, it can postpone its resolution until a later hearing and assign one of its members to compile during that interval the required evidence that the public prosecutor has been unable to produce.

2. In the case of indictable offences, the machinery for collecting evidence is more complicated

First, the process begins with a judicial inquiry headed by an examining magistrate. The examining magistrate must investigate and collect all relevant evidence. He can, independently or through police officers he has commissioned, go to the scene of the offence, search all related buildings, seize all significant exhibits and documents, and examine all persons who seem to be connected with the offence. He can also deliver warrants of arrest and commit the defendant to pre-trial detention. The examining magistrate orders forensic tests whenever useful in the case and takes charge of the investigation.

After the investigation, the procedure in the assize court gives the presiding judge great power to seek further evidence.

Before the hearing the appointed presiding magistrate must review the inquiry to see if the case is ready for trial. If he does not think so, he can remand the accused for trial into another term in order to allow completion of the record.

During the hearing the presiding judge conducts the proceedings. Throughout the trial, the president of the court of assize directs the arguments, determines the order in which the evidence should be presented and rules out the use of evidence which was obtained in violation of human rights, the evidence is contrary to dignity or superfluous. The president also has 'the discretionary power of the president of the assize' which allows him to permit the discussion of evidence even if it has not been obtained through formal procedure.

After hearing the arguments of both sides, the president draws up the list of questions which both the court and jury must answer and then directs the court and jury during their joint deliberation.

The means of proof

It is often said that the critical evidence was in the past the confession, is presently testimony and will in the future be the physical or circumstantial evidence. Some people say that, for the law of evidence, the future has arrived. They see the superiority of physical or circumstantial evidence in the fact that these types of proof do not lie, while defendants and witnesses can lie. The reality seems to be different. If physical and circumstantial evidence does not lie, it is because it is unable to speak. To understand what such evidence means, it is frequently necessary to call upon a forensic expert, which in turn raises even more problems. It is probably better to think that all kinds of evidence can be useful and to augment one with the other. That is one of the main principles of the law of evidence in France.

The principle of liberty and equality of evidence governs the availability of the means of proof. Liberty means that all data which can prove a relevant fact are admissible in evidence. The French law of evidence allows, for example, hearsay testimony in which a person says that somebody else has

said that somebody else had seen, etc. Equality means, as we have seen, that there is no gradation of proofs in the French law of evidence. This principle is subject to a few exceptions:

One exception to the principle of liberty of evidence is that French law prohibits some means of proof. We do not permit certain means used in the past such as judicial combat or oath of innocence by the accused. Also prohibited are means of proof often called 'modern' or 'scientific' such as lie-detector or narco-analysis, which other legal systems sometimes admit. The French law of evidence prohibits these means of proof for two reasons. First, these means, which do not require the subject's consent, are not consistent with human rights. Second, the same means are not really reliable. A lie-detector, for example, records certain emotional reactions, but one can be excitable without being guilty of an offence and *vice versa*.

As to exceptions to the principle of equality of proof: the law specifies the nature of proof required for conviction of some particular offences. Such offenses are always technical offences, for example, cases involving bonded goods or customs offences.

Even when all evidence is admissible, evidence must still be collected and presented in accordance with certain formalities. French law excludes some proof not because of their lack of value, but because the evidence was discovered, or offered to the tribunal contrary to applicable rules.

For each type of proof there is a normal procedure of collection to which one must adhere: it is legitimate for the authorities to obtain statements from the accused but they may not obtain confessions through the exercise of violence. Any physically coerced confession is naturally barred from the court. An exhibit procured through illegitimate means of search and removal could be similarly inadmissible.

Violations of rules governing the production of proof at trial can lead to exclusion of evidence. The first rule is that all the judges must attend all the hearings. Hence, it is necessary to retry a case if a judge is unable to continue with the trial (as a result of illness, for example). A new judge, who has not been present for a part of the presentation of evidence, cannot replace the incapacitated judge. The second rule is that all parties (judges, jurors, lawyers and the public prosecutor) must have equal access to the assembled evidence and have an equal opportunity to discuss it.

The probative force of evidence

The principle that the judge is free to evaluate the evidence, applies to questions of the probative force of evidence. French law does not ask the judge to adhere to a system of pre-established weights of evidence. He need only say he is convinced and avoid stating incompatible propositions in his findings. An accused may be acquitted despite his confession. Of course, the court may convict an accused even if he denies the offence. The judge must evaluate the strength of the evidence, a task for which there are no general rules.

This third principle carries two consequences, one favourable to the accused and the other unfavourable. The unfavourable consequence is that permitting the judge to evaluate the evidence freely calls the presumption of innocence into question. This third principle, thus, limits the bounds of the first. According to the principle of the presumption of innocence, the defendant need not cooperate in the discovery of evidence. But, because the basis for fact-finding is the judge's deep-seated conviction, it is best for the accused to try to shape the judge's state of mind in a favourable way. So it may be better for the accused to cooperate (or to appear to cooperate) in the discovery of evidence rather than remaining silent.

The favourable consequence is that any uncertainty in the evaluation of evidence works in favour of the accused. If conclusions from the evidence are uncertain, and if the judges are unable to form an opinion, they are obliged to acquit the

accused. This obligation applies either in the case of insufficient evidence on the facts or in the situation where the magistrates have doubts about the meaning of the law.

The principle of free evaluation is subject to one principal exception. In certain technical domains where evidence is difficult to obtain, the testimony of specialised witnesses (specialized police officers, for example) carries a particular conclusive force which may only be contested by stipulated means of evidence. Cases in such domains are, however, rare.

Forensic expertise in French penal law

Evaluation of physical or circumstantial evidence requires the fact-finder to make inferences from certain observations of facts. Examples of such evidence are physical evidence found at the scene of the crime or in other related places, or evidence found on the victim's body (for instance indications of physical abuse or traces of blood or sperm which may be observed on, or collected from, the victim). Such evidence may also be found on either the suspect or a third party. The behaviour of a person before or after the crime may also provide circumstantial evidence.

Physical or circumstantial evidence is always an indirect form of proof, because that evidence never entails an *a priori* conclusion about the defendant's conduct. Most of the time (particularly in relation to physical clues) it is necessary to engage technicians who are able to interpret the evidence. This presents a problem of forensic expertise.

Questions about the proper selection and use of forensic experts have been among the most discussed problems in French penal procedure for fifty years.

The French Parliament chose a system which is called plural expertise (multiplicity of experts in the *Code de Procédure Pénale).* During the interim between its adoption and its effective date, this first system, was changed entirely. Then, since 1958, four new enactments in 1960, 1972, 1975 and 1985 changed aspects of the system of varying degrees of importance.

This shows the great uncertainty which prevails in France about the wisdom of its law of forensic penal expertise.

Before examining the rules which actually govern the use of forensic penal experts in France, I would like to summarise the debate among French academic writers about the proper employment of forensic expertise.

Theory of forensic expertise in France

The real problem of expertise in France arose a few years before the drafting of our actual *Code de Procédure Pénale.*

1. History

The *Code d'Instruction Criminelle,* passed by Napoleon in 1810 governed the penal process before the *Code de Procédure Pénale* of 1958. The 1810 text did not say a single word about expertise. It is easy to understand why. The use of forensic expertise implies that scientific research is reliable. This, in turn, requires a certain degree of excellence in scientific research. But scientific research was just beginning in 1810. So the writers of the *Code d'Instruction Criminelle* preferred not to enact regulations in the face of such uncertainty. When scientific findings became more reliable, the usefulness of recourse to technicians for gathering evidence from medical, chemical, ballistic, graphological and all other disciplines was apparent. The Code, nevertheless, contained no special procedure for gathering that kind of evidence, which always creates a serious problem in a civilian system. Hence, the magistrates could only treat experts as ordinary witnesses, which created many difficulties. There were no rules to regulate either the appointment or the duties of the experts. The magistrates were free to choose whether to have recourse to an expert; they could choose the experts they wanted without numerical or educational limitation; the

parties (defence, victim, public prosecutor) could only request that the examining magistrate in charge of the inquiry would take action relating to the forensic experts or refrain from it. Even then, the magistrate was not obliged to reply to them; there were no rules at all to specify the expert's duties, nor the period of time in which the expert had to perform those duties, and so on. The worst flaw was the circumscription of the official experts' role under the provisions of the Code relating to witnesses. The experts were heard as witnesses, that is to say there were not permitted to read or to have a paper in their hands. They nevertheless had to explain research and findings which might be complicated or date from several months, sometimes several years prior. On the other hand, parties who could not affect judicial decisions about the use of an official expert, acquired the habit of calling other scientific authorities as witnesses at the trial to discuss the official experts' findings. These defence expert witnesses were in a better strategic situation than the official experts, because the defense experts knew the content of the official experts' reports, which were in the case file. The official expert did not know the defence's scientific experts' opinion before the hearing. Dramatic battles often followed in which some highly reputed scientific authorities felt they were portrayed as ridiculous. In a famous case, the Marie Besnard case, a woman was accused of poisoning several members of her family in order to inherit. Arsenic was found in the corpses, some of which had been buried for a long time. The question was 'Is it possible that the corpses absorbed arsenic naturally from the earth of the graveyard?'. A terrible scene took place at the hearing between the most famous specialists in toxicology of the time who stated opinions on the question. They demeaned themselves. Several of them took some test-tubes from their pockets to demonstrate chemical reactions in front of the court notwithstanding the obvious inappropriateness of that behaviour. Marie Besnard was acquitted as a result of uncertainty in the evidence. Her case was of great importance even after her acquittal. First it had popular importance because many people thought that Marie Besnard was not really innocent, which led to a perception of injustice. Second it was important for specialists, because this case made the urgent need for better regulations governing choice and use of forensic experts obvious. There was a real risk that magistrates would not be able to find serious scientists willing to serve as experts in light of the then prevailing standards at trial.

2. Debate

At that moment a great debate arose among French legal commentators. They suggested four systems to govern forensic expertise. They are known in France by particular names. I shall try to translate them, although I am not sure they will remain as expressive as they are in French.

The first system is called: 'non adversarial' expertise. It is, to a certain extent, the system used under the *Code d'Instruction Criminelle* that we have just discussed. Some commentators thought that it was unnecessary to upset the system. Instead French law should limit the examining magistrate's discretionary power, for example enacting requirements concerning experts' education or the time afforded for their work.

The second system is called 'adversarial' expertise. In that system the judge appoints an expert and the defence another. Once that takes place, there are two alternatives. First: the experts may work separately and write separate reports which are given to the judge. Second: the expert of the judge and the expert of the defence may conduct their research together, and compile only one report which contains the dissenting opinion, if any. The first version of the *Code de Procédure Pénale* chose an 'adversarial expertise' system, but as we know, that system was abolished before becoming effective.

The third system is called 'controlled' expertise. In that system, the judge appoints

only one expert, but the defence can choose a person of the same scientific qualifications and speciality who can supervise the expert throughout the performance of his duties in order to scrutinize his work. Some academic writers think the controller should have the power to suggest further researches to the official expert. Others think he should only be able to note his comments about the fulfilment of the appointment in a special report.

The fourth system is called 'plural' expertise. As in the first system the judge has sole power to choose experts, but he is obliged to nominate two or more experts. Again we here see the judge's further power to decide whether to require the experts to engage in separate research and reports or to compile a single report containing comments of each expert who wants to do so. The *Code de Procédure Pénal* of 1958 put this system in practice, but it was amended in 1985.

French system of expertise

As things stand, French courts employ forensic experts in the following manner:

1. The role of the experts

As we have seen, France has often amended, to a greater or lesser extent, its regulations on the employment of forensic experts. Nowadays the French system does not exclusively follow one of the four alternatives above, but incorporates parts of each of the options. Only one point has been consistent throughout the changes. That is the role of the expert in the penal process. French penal law recognises a unique role for the forensic expert as neither a witness nor a judge, but as a technician.

The expert is not a witness. He takes an oath which differs from that of ordinary witnesses. Moreover, he can use papers or exhibits to assist him in testifying.

The expert is not a judge. The judge must precisely define the expert's mission, which cannot involve duties committed to judges as, for example, the interrogation of the accused (except, naturally for medical or mental experts).

The expert is only a technician who must reply to questions uniquely connected with his speciality and cannot do more. An example will illustrate that. Suppose a judge appointed a ballistic expert to investigate whether the accused's weapon could have caused the victim's wound. During the expert's meeting with the accused, the accused confesses to the expert that he murdered the victim. The expert is not allowed to report the confession to the judge. The expert can only say whether, in his opinion, the accused's weapon could have caused the victim's wound.

2. The choice of having recourse to a forensic expertise

A. The decision to seek expert advice

Only the public authorities (police officers, examining magistrates, courts) who are in charge of the inquiry at a given moment may decide to seek expert advice. The private parties (the accused, the victim) and even when the matter is brought before a judicial body, the director of public prosecutions cannot themselves compel the use of an expert in the investigation or trial. They can only ask the police or the judge to call an expert, and, if these public authorities refuse, the private parties can appeal that decision.

While police inquiries are taking place, either the director of public prosecutions or the police officers, make the decision to call in an expert. Their power to do so is limited, however, to urgent situations which rarely occur. If particular expertise is useful in a case, the expert's work will generally be done during the preparatory inquiry. This is evident from the fact that the regulation of forensic expertise is formalised in the *Code de Procédure Pénale* in the chapter concerning preparatory inquiry. Once the preparatory inquiry has begun, the examining

magistrate has the power to decide whether to take recourse to professional opinion. At the trial stage the tribunal may decide that the casefiles contain insufficient information. If the tribunal so decides, it can elect one of its members to make a complete inquiry and this member can decide whether the efforts of an expert would be useful.

B. The choice of the expert

The public authority empowered to call upon expert advice appoints the experts. But although this authority is free to decide to consider an expert's evidence it is not free to chose any expert it wants.

In principle, the only persons qualified to serve as forensic experts are those who appear on official lists established by the judicial authority. There is a national list consisting of the most reputable experts, established by the *Cour de Cassation.* Any jurisdiction in French territory may nominate these experts. Each court of appeal also establishes a list. The experts who are only on the lists of the courts of appeal are able to practice only within the scope of the court of appeal which has designated them as experts. People wanting to serve as experts must satisfy certain conditions which are both general (age, honourability, etc.) and specific according to the speciality (the possession of titles or degrees). They must also apply for candidature, by which application they are obligated to accept any judicial requests for their services. Experts take an oath at the moment of their acceptance onto the list.

On rare occasions magistrates and courts can call someone as an expert who does not appear on a list. This occurs either when there is an emergency and an official expert cannot be found, or when the question to be resolved is a very technical one and there is no official expert within the appropriate speciality. When an authority employs an unlisted expert, it must justify its choice in its order appointing the expert. The lack of such a justification will make the inquiry null and void.

C. The number of experts

This is one of the points on which French law has varied the most in the last thirty years. The *Code de Procédure Pénale* (1958) required two experts, one chosen by the public authority and the other by the defence. This requirement, however, never took effect. The Code was amended to provide that the examining magistrate could appoint one or two experts according to the nature of the question which was being posed. If the question concerned the very foundation of the case (for example whether the crime had indeed been committed or if the accused is mentally responsible) the Code required the employment of two experts. If the problem concerned a secondary issue (for example, whether the accused's poor health precluded imprisonment) one expert was deemed sufficient. Those provisions, however, as said were amended again in 1985. Today, the judge is obligated to appoint one expert to deal with an issue. But he may choose several more experts without any precise legal limit. Furthermore if the parties want to protest the magistrate's decision to use a single expert, they can appeal that decision, but only after the single expert has delivered his written report.

The development of expertise

A. The obligations of the expert

An appointed expert must take an oath. A listed expert takes the oath only one time, upon acceptance onto the list. An exceptional expert, i.e., one appointed in the absence of an expert on a judicial list, should take the oath before commencing his task. Appointed experts have a legal obligation to serve as experts, which runs from the moment of their application to be official experts or from the moment of their special appointment.

The obligation to serve as experts implies that the expert will do so personally using all necessary measures to accomplish his duties.

The task cannot be delegated to a third person. If the appointed expert should find a problem he is not qualified to deal with in the course of his research, he can request the authority to authorise him to resort to the assistance of one or more other technicians. If the judge agrees, these other technicians must confine their work to the relevant points of expertise within their own speciality; they do not have the same status as those formally appointed as experts. Their opinions will appear as an appendix to the principal report.

Each appointment of an expert is subject to a time limit within which the report must be submitted. The expert must respect the time limit that the judge established for his task. If, however, the expert finds it impossible to meet the time limit, he may apply for an extension. Whenever the judge feels that the expert is tardy in fulfilling the task, the judge can relieve the expert of his duty in that case. The expert must thereupon submit any elements of his report completed as of that moment, and give a partial indication of where the remainder of the research stands. That expert will then be replaced by another, and may incur supplementary sanctions (removal from the list of experts and pecuniary sanctions).

B. The powers of the experts

These powers of the expert naturally vary with the expert's speciality and the question posed. In principle the expert's role is to reply to the questions precisely as in the judge's order. The result is that the expert's powers are limited to the investigation of those particular matters. With the exception of medical experts, an expert cannot speak to an accused or interrogate him or her on the expert's initiative. If it is necessary for the expert to ask a witness questions, he may do so, but he must demonstrate this necessity in the report, and he has no power to compel the witness to testify. As far as the accused is concerned, the principle is that the expert is unable to interrogate the accused unless a magistrate is present. If the accused must provide certain information for the expert's purposes, the expert solicits the magistrates to interrogate the accused in the expert's presence. When frequent questions are necessary (for example in the area of accountancy) the judge can authorise the expert to see the accused without a magistrate. The defence attorney must, however, be present, unless the accused has expressly refused to have the attorney present (and he must do so each time). In any case, the expert is only allowed to ask the accused questions. The expert cannot conduct a formal interrogation.

The expert's role

When an expert has finished all research necessary, he must submit a written report. If called before the court, the expert will also make an oral report. The expert's testimony is not, however, obligatory.

A. The written report

The expert must submit the written report to the judge who appointed the expert as soon as the work has been completed. The report must follow a specific format. When several experts are involved, they must compile a single report at the end of which the points of disagreement must be noted.

The judge notifies all the parties of the contents of the report. He allows the parties a specified time limit in which they must formulate their responses. If the parties contest the findings in the expert's report, they may request either a second opinion or further investigations. If the judge refuses such a request he must deliver an opinion justifying his position, which may be subject to appeal.

B. The statement at the hearing

The expert can be called before the court in order to give an oral explanation of his findings. This occurs frequently before the court of assize but rarely before other judi-

cial bodies. To avoid esoteric technical discussions, the lawyers are not permitted to base their line of questioning on technical grounds. If they should contest the report's conclusions, the court may listen to their arguments. If it agrees, it will then decide to set the case for another hearing, for which a second opinion will be sought.

C. The value of the expert report

The expert's report can be very useful in enlightening the court on technical questions that it does not understand. However, as with all types of proof subject to the rules of liberty and equality of evidence, this report has no particular authority. The court is perfectly within its rights to reach a conclusion contrary to the expert's professional opinion. (For example to deem the accused mentally capable despite psychiatric evidence to the contrary). Courts, however, rarely reach conclusions opposed to the expert's findings.