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Marion Vorms

This is an extended synopsis of a book in preparation, which will be drawn from my MA thesis available here :

<https://assasrecherche.u-paris2.fr/ori-oai-search/notice/view/univ-pantheon-assas-ori-17401>

Summary:

Proof, doubt and the fear of miscarriages of justice are at the heart of the popular imagery of trials, which features judges and juries trying to assemble the pieces of a veritable jigsaw puzzle to arrive at the truth. Finding the facts before any legal qualification seems paramount since a decision based on factual errors cannot be right. However, the way in which judges must form their opinions on questions of fact is a topic remarkably absent from French law (both positive law and legal scholarship). A blind spot in the law, judges' reasoning on facts and evidence has not been the subject of in-depth epistemological analysis either. Although the norms of correct reasoning are a privileged subject for philosophy, they are generally studied with reference to logic and the scientific method. This book, at the crossroads of epistemology and legal scholarship, aims to fill this double gap between law and philosophy, by proposing a philosophy of evidential reasoning rooted in a critical reading of French law and fed by a comparative approach.

OVERALL PRESENTATION OF THE BOOK

Purpose and approach

Judges must base their decisions on established facts, whether settling a legal dispute in a civil case or declaring guilt in a criminal one. When some factual claims are contested, it is up to the judges to form an opinion about them based on a larger or smaller and more or less coherent body of evidence: testimonies, documents, recordings, expert reports, etc. The judges must assess the probative value of each of these elements and combine them to disentangle the true from the false and arrive at the most plausible factual conclusion, despite the sometimes unsurpassable uncertainty. This evidentiary work of establishing the facts, quite distinct from applying them a legal qualification, is an essential part of the judges' task, given that a decision based on an erroneous or inaccurate description of the facts cannot be right.

However, French law is remarkably silent on the evidential reasoning of judges, i.e. the way in which they reach factual conclusions on the basis of the evidence available. Admittedly, there is a 'law of evidence' (*droit de la preuve*), consisting of various rules about the burden of proof, the modes of so-called 'legal' evidence (*preuve légale*), and the procedural arrangements for gathering and producing evidence. But the law of evidence thus conceived says nothing about the mental process by which judges form their conviction about the facts.

This process is highly complex and raises some difficult questions. How assess the credibility of testimony? How reconcile conflicting expert reports? How measure the relevance of information about, for example, the family history of a person accused of acts of violence? What should be done with a police report attesting to the accused's unusual behaviour, but with no apparent link to the acts of which he is accused? Finally, how bring all the available evidence together to arrive at a factual conclusion that is sufficiently solid to form the basis of a legal decision?

On this subject, French law says just one thing: except in certain very specific cases in civil matters, evidence is 'free', which means that the judge has full discretion to assess the probative value of the elements in the case file. In practice, he does not have to give an account of the way in which he has formed his conviction: this being 'innermost' (*intime conviction*), the paths that lead to it do not have to be justified, and no rules of any kind can be imposed. Neither are there any standards of proof like in common law systems. In the absence of binding legal provisions, the requirements for ascertaining the truth are therefore left entirely to the discretion of the judges.

How can we interpret this silence of the law? Does it mean that, in matters of fact, there is nothing to distinguish correct from faulty reasoning? Epistemologists are well aware that assertions about the world are irreducibly uncertain and that the inferences that lead to them do not have the implacable necessity of logical and mathematical deductions. These inferences are almost always based on more or less implicit and more or less well-founded assumptions drawn from our past experience, background knowledge or representations of the world. We conclude from the noise of the lift that a neighbour must have called it, because that is usually the cause of the noise; we consider it plausible that a man suffering from alcoholism hit his partner because people suffering from alcoholism are, in general, likely to behave violently. Sometimes these empirical generalisations lead us in the right direction; sometimes, they mislead us. But recognising that there is no 'recipe' for mechanical access to the truth does not mean that we should abandon all ambitions for rationality when dealing with facts. It is precisely one of the central purposes of epistemology to clarify certain standards for uncertain reasoning. It is by

virtue of such standards, for example, that randomised clinical trials are considered to constitute more solid (though never conclusive) evidence in favour of the efficacy of drugs than patients' testimonies. As this example suggests, epistemological analysis has largely focused on scientific reasoning; however, this reflection is intended to apply to all areas where questions of fact arise. For example, it seeks to understand why, and to what extent, the convergent accounts of two perfectly independent witnesses are generally better than a larger number of accounts from witnesses who may have consulted each other. In this way, epistemological reflection seeks to clarify what can be considered as good reasons in favour of a conclusion – but these reasons never guarantee with certainty the correctness of this conclusion, nor do they point to one and only one 'right' path.

This book aims to build bridges between epistemological reflection on uncertain reasoning and the law of evidence. How can we help judges in the arduous task of finding facts without regimenting and automating what cannot be regimented and automated? What can and should the law prescribe in this area?

These questions, which concern both epistemology and law, including in its most practical dimension, are given a profoundly interdisciplinary treatment here. Using the analytical tools of epistemology, themselves enriched by a comparative approach – in particular by insights into evidence in common law countries – and by certain contributions from cognitive psychology, the book offers a critical reading of what French law says – and does not say – about facts and evidence. It clarifies notions such as 'probative value', 'presumption', 'legal fact' (*fait juridique*), relevance and credibility, as well as innermost conviction and freedom of evidence. What emerges from this analysis is a new conception of evidence and facts in court, the originality of which also lies in its attention to practice.

Main theses

The book defends three main theses. The first concerns the lack of interest in French legislation and legal scholarship in the place of facts and evidence in trials. In contrast to the common law and the law of other continental countries such as Spain and Italy, French law seems to consider that facts are not within its remit. In seeking to understand this rejection of facts outside the legal sphere, the book shows that it cannot be justified by the distinction between factual and juridical matter and highlights a number of common conceptual confusions in legal texts (positive law and scholarship) around this distinction. Similarly, through an in-depth examination of the principle of freedom of evidence, it shows that this well-understood principle does not justify the law's silence on evidence. In contrast to the subjectivist interpretation of the freedom of evidence often found in French scholarship, the book defends a rationalist conception of it. According to this view, freedom of evidence, far from giving judges complete freedom in their assessment of evidence, actually obliges them to make reasoned decisions. It thus calls for reflection on the requirements of correct reasoning and on good practice (this reflection constitutes the practical side of the book).

The second thesis is that judges' reasoning on the facts is not a species apart but rather a remarkable example of that extremely common – and yet very complex – mental activity known as 'evidential reasoning'. Evidential reasoning is a type of activity that is often at work in scientific inquiry, but it is also one that we engage in on a daily basis, for example, when we are trying to find out where the water that clogged the living room wall came from, or why the bathroom light suddenly went out. This thesis of the fundamental unity of evidential reasoning comes with the need to build a framework for evidential reasoning in the highly specific context of the courtroom, and is linked to a philosophy of the trial and of justice. Contrary to certain more conventionalist conceptions of legal proof that are common in French scholarship (though

they may appear exotic to the non-French world), the book defends the idea that legal certainty and the legitimacy of legal decisions require that they be based on the best evidential effort, i.e. on the attempt to arrive at the most accurate representation of factual reality. Contrary to an idea that is widely accepted in the French legal world, the philosophy of evidential reasoning defended here refuses to make 'judicial truth' a separate 'regime' of truth, distinct in particular from 'material' or even 'scientific' truth. In court, as elsewhere, evidential reasoning is by nature uncertain and decision-oriented. Admittedly, the judge's factual conclusions are only one stage in the judicial decision-making process – the judge's ultimate function is to dispense justice, not to tell the truth. But from the point of view of establishing the facts, the situation of the judge, forced to make a decision within a reasonable time and on the basis of incomplete, sometimes dubious and often contradictory information, is not a case apart but rather a paradigm of decision-making under uncertainty.

Finally, the third thesis deals with the relationship between doubt, uncertainty, plausibility, likelihood and decision and sheds new light on the notion of innermost conviction. Through a comparison with the system of standards of proof in common law, the book emphasises a distinction left aside by French legal thought and masked by the notion of innermost conviction: the distinction between the evaluation of the plausibility of hypotheses, which is a matter of degrees and cannot overcome uncertainty, and the decision consisting in accepting a hypothesis, i.e. acting as if it were true. This distinction makes it possible, for example, to understand that it is perfectly possible and legitimate for a judge to believe that an accused person is guilty of the charges against him (because it seems very plausible) and yet to consider that the evidence is not sufficient to accept such a conclusion and convict him (because a reasonable doubt remains). This perspective makes it possible to dissolve a number of debates and false problems surrounding the notion of innermost conviction and the tension between plausibility and certainty.

Practical side

The philosophy of evidential reasoning and the concept of evidence in court thus developed and defended also have a practical side: the development of this conceptual apparatus leads to the proposal of analytical tools and categories to enlighten and assist the reasoning of judges and legal practitioners in their work of finding facts. The originality of the approach adopted in this book also lies in its focus on practice and the way in which those involved in the legal world see evidence and facts. Its analyses are thus informed by examples drawn from actual court decisions and case law, as well as interviews with lawyers and judges.

Finally, this practical perspective offers food for thought on the desirability of training magistrates in evidential reasoning and the ways in which this might be done. It also opens the way to the possibility of tightening up the requirements for reasons to be given when establishing the facts and makes it possible to rethink the limits of the concept of 'insufficient reason' (*insuffisance de motivation*) as enshrined in the practice of the *Cour de cassation*.

Intended audience

This book, at the crossroads of epistemology and legal scholarship, aims to fill a twofold gap in law and philosophy by building bridges between the epistemological analysis of evidential reasoning and the law of evidence. In doing so, the book is aimed at both lawyers and philosophers. For lawyers, practitioners and academics interested in the practice of law, it aims to provide tools for rethinking the place of facts and assisting the practice of evidence, by breaking through the 'glass floor' that French legislation and legal scholarship have placed under what it calls the *fait juridique*. For philosophers interested in the epistemology of evidence and the method of justifying knowledge, whose analysis has focused almost exclusively on the figure of the scientist, it offers a wealth of material by drawing their attention to the figure of

the judge, a remarkable study model for the epistemologist, while offering a critical picture of the current legal treatment of evidence in France.

Written in a style accessible to non-specialists, the book draws on examples from real cases to flesh out the conceptual analyses. It is therefore likely to be of interest to anyone intrigued not only by the place of facts and evidence in legal decisions, but also, more broadly, in the reasoning we apply at every moment and which determines our most day-to-day as well as our most important decisions.

OUTLINE OF THE BOOK

After a general introduction which, using simple examples, will show the importance of the part of a judge's reasoning on facts and evidence, the book will be divided into seven chapters. Each chapter will be written in such a way that it can be read independently. The first four, which are the most theoretical, will set out the foundations and epistemological framework for the analysis of judges' evidential reasoning and will offer a critical reading of positive law, thus defending the main theses mentioned above. The next three sections will be devoted to more concrete considerations and the application of the principles thus identified to practice. In so doing, they will propose a toolbox for evidential reasoning, drawing on philosophical analysis, an examination of examples of actual court decisions, and the resources of comparative law and, in particular, common law thinking. Finally, the conclusion will return to the prospects opened up by the book with regard to possible reforms of judicial training and the obligation to state reasons.

General introduction. Towards an epistemology of evidential reasoning in court

Chapter 1. Facts and evidence

Chapter 2: What is judicial truth?

Chapter 3. Freedom of proof and its limitations

Chapter 4: Innermost conviction and reasonable doubt

Chapter 5. The different types of evidence: an impossible cartography

Chapter 6. Analysis of probative value: credibility and relevance

Chapter 7. In (good) practice: examples and prospects

General conclusion. 'Taking facts seriously'