UR & NPC - School of law
Huye & Musanze Campus

EVIDENCE LAW Module (10 credits)

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Faculty of Law – LLB. II – Academic Year 2019- 2020

Description of the course

- The *Law of evidence* is a course regarded as being of central importance to judicial law.
- It governs evidence used both in civil and criminal matter litigations. The course is divided into three (3) broad topics :
  - ✓ Guiding principles of producing evidence;
  - ✓ Evidence in civil and private law;
  - ✓ Evidence in criminal matters;
- The module of 10 credits shall count as for 100 hours, which include a teaching load, that of course works as well as a number of approximate hours for outwork. As for class meetings, we will have a total of around 9, an average of 3 meetings per topic.
- Readings will be required on average for each meeting. One expects that students read documents allocated for each meeting before this one takes place, and should be prepared to discuss about it in class.

Objectives of the course

- To make a classification of evidence in private & public laws
- To allow students to recognize prohibited evidence in criminal procedure
- To interpret a court decision and solve any procedural problem raised
- To propose legal aid related to evidence law
- To be able to assess a court order

Teaching & evaluation Methods

- Lecture based on concrete examples
- Discussion of the subject by students
- Mainly exercises posing problems to be solved by students.
- 3 ways of evaluation:
  - ✓ Class works (In-class & Collaborative assignments): 50%
  - ✓ Exam.: 50%

Necessary readings

a. Books

1. Williams J. CRAIG, *How to Get Sued: An Instructional Guide*, Kaplan Trade, 2008, 254 pages, (ISBN: 978-1427797711)

2. *Legal Review of the Bars*, February - June 1999, N° 55/56, Paris, Dalloz.

3. Alex STEIN, *Foundations of evidence law*, Oxford university Press, 2005, 264 pages, (ISBN: 978-0198257363)

4. H.L. HO, A *philosophy of evidence law: Justice in the search for truth*, Oxford University Press, 2008, 300 pages (ISBN: 978-0199228300)

5. Philip HAMBURGER, *Law and Judicial Duty*, 1st edition, Harvard University Press, 2008, 704 pages, (ISBN: 978-0674031319)

6. Daniel ROUX, Jean Pierre SCARANO et Françoise SERRAS-BERAUD, *Les institutions Juridictionnelles en Qcm*, 3e édition, Ellipses Marketing, 2008, 157 pages, (ISBN: 978-2729840914)

7. Patricia VANNIER, *Procès et institutions juridictionnelles*, Ellipses Marketing, 2008, 143 pages, (ISBN: 978-2729836795)

8. P BOUZAT, « La loyauté dans la recherche des preuves » *Mélanges Hugueney*, 1964, p. 155

b. Judicial laws

- Constitution
- Law n° 15/2004 (12/06/2004) establishing evidence legislation
- New Penal Code
- New Law determining *civil*, *commercial*, *labour* and *administrative procedure*;
- Law establishing *Criminal procedure* .

Plan of the course

Part 1. Guiding principles of producing evidence:

- ✓ Neutrality of the Court
- ✓ Contradictory character of evidence
- ✓ Right of litigants to communicate to court full information

Part 2. Evidence in civil and private law

- ✓ Object of the evidence
- ✓ Burden of proof
- ✓ Modes of proof
- ✓ Evolution of evidence law in private matters

Part 3. Evidence in criminal matters

- ✓ Presumption of innocence and Burden of proof
- ✓ Objet of evidence in criminal matters
- ✓ Means of evidence in criminal matters

PART I. GUIDING PRINCIPLES OF PRODUCING EVIDENCE[1]

A. NEUTRALITY OF THE COURT

- It is the judge's duty to come to a conclusion at the same time on the facts and the legal rules which apply to those facts.
- He/she must abstain from taking an active part in the research of evidence's elements – he/she will merely be appreciating proof shown by litigants

1. Role of litigants as for producing evidence

- In accordance with the accusatory system, the initiative to seek elements of evidence is on litigants' responsibility. In other words, it is up to them …
  - ✓ … to seek and present evidence (for example witnesses who are favourable for them);
  - ✓ … to delimit the judicial debate by their allegations;
- Each litigant has the right …
  - ✓ to cross-examine witnesses of the opposing party (art. 68, 11° CCALP)
  - ✓ to be heard and to put forward his/her evidence

2. Role of the judge in producing evidence

a. Power of control

- It is up to the judge to maintain the debate in its strict bounds
  - ✓ He/she can, by own initiative, refuse evidence of pled facts which are not relevant – i.e. facts which don't refer to the substance of the issue (art. 66 EVID).
  - ✓ He/she can limit the scope of a cross-examination to ensure the progress of a lawsuit;
- He/she can allow the questioning of other witnesses not suggested by litigants

b. Power of intervention

- The judge can, by own initiative, decide to carry out an inspection on site
- The judge can ask any question (which he/she believes useful) to the witness

[1] We'll use the word '*proof*' to mean any fact or piece of information which shows that something exists or is true. For the word '*evidence*', we'll be mainly talking of all means or kinds of proof on the whole.

- The judge can draw attention to litigants about any gap in the shown evidence and make it possible to fill that gap in the conditions which he/she determines

B. CONTRADICTORY CHARACTER OF EVIDENCE

- The judge can't decide about any petition without the party against which it is filled being heard or was summoned
  - ✓ Each litigant has the right to be notified,
  - ✓ … to be present at the audience,
  - ✓ … to cross-examine witnesses produced by the opposing party,
  - ✓ … to submit to the court any relevant proof, provided that it is not declared unacceptable by the law (see art. 66 EVID).
  - ✓ However, there can be, if necessary, a restriction on the right to attend the questioning of a witness (for example a minor in a rape case): the judge can question the minor out of the defendant's presence, after the latter having been notified about it.
- In cases by default, evidence is unilateral and non contradictory:
  - ✓ The missing defendant gave up his/her right to be heard

C. PUBLIC CHARACTER OF PROCEEDINGS AND EXCEPTIONS

1. The principle

- The fact that debates in court are held in public is one of the fundamental features of justice
- It is the best safeguard against dishonesty:
  - ✓ It makes so that the one who is judging (the judge) is him/herself judged
- The principle extends to all civil and criminal proceedings.

2. Exceptions to the public character of proceedings (art. 131 Crim.Proc.)

- An audience can be prevented to attend a judicial hearing: proceedings are held in camera; this is done …
  - ✓ … on court's order
  - ✓ … in the ethical interest (protection of accepted standards – *'bonnes mœurs'*)
  - ✓ or for public order (for example, protection of trade secret, private life etc.)
- It can be prohibited to disclose information:
  - ✓ In theory the press has the right to reveal information related to judicial proceedings.

- ✓ However, when proceedings are held in camera, the press is also affected by the measure.
  - ❖ It is necessary to wonder whether, apart from his/her decision on proceedings in camera, the judge can issue an injunction aiming at excluding the press; quid in Rwanda?

D. RIGHT OF LITIGANTS TO COMMUNICATE TO COURT FULL INFORMATION

1. Power of constraint of the court

- ➢ Litigants can count on the court to force witnesses to appear (subpoena) before the judge, testify or show documents (see art. 73, al. 1 EVID.)
- ➢ The subpoena (≠ summons)
  - ✓ In theory, any person likely to testify can be forced to do it
  - ✓ A witness who refuses to appear can be subpoenaed (‘*mandat d’amener’*) (art. 31 Crim.P.)
  - ✓ Witness is entitled to certain allowances in particular for transport and attendance.
- ➢ The statement of the witnesses
  - ✓ Any person sent for as a witness has obligation to answer straight out to questions
  - ✓ The person who refuses without valid reason, is made guilty of insult to the court (art. 260 Pen. C – see especially al. 1)
- ➢ Production of documents
  - ✓ When a litigant knows that the opponent party or a third person is in possession of a document useful for the litigation, he/she can force him/her to bring it by issuing a writ against him/her.
  - ✓ When a court orders to a witness to produce a document and that this one refuses, art. 259, al. 1 Pen. C. can apply.

2. Limits with the court’s power of constraint

- ➢ In some cases, the law can, for the higher interest, prohibit the disclosure in justice of certain facts
  - ✓ Immunity of disclosure in justice of family communications (art. 73 al. 3 EVID)
  - ✓ Immunity of public interest (information connected with international relations, defense or national security)

- ✓ Secrecy relating to the police informer, quid?
- ✓ Professional confidence (see art. 73 al. 2 & 3 EVID.)

➢ Professional confidence; quid?: it is the exception to the obligation of the witness to reveal, when it is required, all that he/she knows concerning facts in litigation

- ✓ A double dimension:
  - ❖ *Discretion*: not to reveal information obtained within a professional relationship – this aims primarily the right to the private life protection
  - ❖ An *immunity of disclosure in justice*: one cannot, even in justice reveal the confidential information, except if the concerned litigant gives up or if there is an explicit provision of the law (see art. 214 Pen. C.).
- ✓ People concerned (see art. 214 al.1 Pen.C.):
  - ❖ Priests and other ministers of religion
  - ❖ Members of professional corporations
    - ◊ Whose law imposes an obligation on silence (see art. 21, al. 2 Crim.P.)
    - ◊ And whose obligation takes its source in a relation of assistance (for ex. Ministers of religion)
- ✓ Extent of this immunity (see art. 73 al. 2 EVID; see also art. 358 Pen. C. on capital market in Rwanda):
  - ❖ It is mainly limited to facts revealed within the framework of a relation customer-professional
  - ❖ And confidentially
- ✓ The effect: Professional confidence applies
  - ❖ such with regard to testimonies
  - ❖ and production of documents
- ✓ Limits:
  - ❖ Renunciation of the concerned individual (for example with the secrecy of lawyer, the medical secrecy)
  - ❖ When the law orders it (for example bank secrecy or for the public health protection)
  - ❖ When the consultation took place with a fraudulent aim: communications between a litigant and a lawyer made at illicit, illegal or criminal purpose do not profit from the privilege of confidentiality.

PART II. EVIDENCE IN CIVIL & PRIVATE LAW

- Evidence in civil and private law (even in criminal matters) holds in three questions:
  - ✓ What does one have to prove? It is about the object of evidence.
  - ✓ Who has to prove? It is a burden of proof issue.
  - ✓ How does one have to prove? It is about means of the proof.

A. OBJECT OF THE EVIDENCE

- A right exists when a legal provision recognizes it …
- … and when an event (a legal act or fact) causes the application of the aforementioned rule.

1. Legal acts and facts

- *The legal act* originates in the will of one or more people
  - ✓ Its objective is to produce legal effects (for example, the contract of employment results from the will of an employer and an employee who commit themselves with a series of obligations on both sides)
  - ✓ As a manifestation of the will, it does not require in theory any material support to exist;
    - ❖ The assent of each part is enough (the drafting of a writing is only intended to arrange a means of evidence)
    - ❖ Except for some particular contracts (formal contracts whose validity is subjected to the drafting of a written act: deed of partnership, real sale contract…)
- *The legal fact* produces legal consequences but which are not desired

  A death without will transmits an inheritance to the heirs

  An accident involves the payment of damages

2. Evidence of the legal provision, the fact and the act

- Litigants are exempted to prove legal provisions …
  - ✓ … each time the Rwandan legal system is concerned (according to art. 201, al.2 of the Constitution, no one – including the judge – is supposed to be unaware of a promulgated law)

- ✓ However, when it is about a custom[2], a practice [3] or a foreign law, proof must be shown.

➢ The proof of an event (legal act or fact) must on the other hand be always produced.

B. BURDEN OF PROOF

It shall in theory lie with the plaintiff / claimant; but there are exceptions.

1. The principle (Article 3 al. 1 EVID. & article 9 CCLAP)

- ➢ Anyone who claims (the plaintiff) the execution of an obligation must prove it.
- ➢ Conversely, anyone claiming to be released must justify the fact which produced the extinction of the obligation

2. Exceptions: presumption

- ➢ The simple presumption:
  - ✓ It reverses the burden of proof (the defendant has to prove that the claim of the plaintiff is not founded)
  - ✓ For example: the parents' liability because of acts attributable to their children, except proving the victim's fault
- ➢ The irrebuttable presumption (uncommon):
  - ✓ It forbids the plaintiff to bring the contrary proof
  - ✓ For example: a court ruling having acquired the irrevocability of the *res judicata* (become unimpeachable).

C. EVIDENCE (Or Modes of proof)

- ➢ In civil law, all the claims are not proven in the same way: it is necessary to distinguish *legal acts* from *legal facts*
- ➢ In theory, *legal acts* are proven, in the event of litigation, by a pre-established proof: a *writing* which can be:
  - ✓ An *authentic act/writing*:
    - ❖ It is written by a qualified public officer
    - ❖ It is a quasi absolute means of proof (exceptionally disputed)
  - ✓ or an *act under private writing:*

[2] Rules not enacted in the form of command by the authorities but resulting from a general and prolonged use and belief in the existence of a sanction in its observation.
[3] Rules that private individuals usually follow in their judicial/legal acts and to which they are supposed tacitly to have referred.

- ❖ it is freely written by parties
- ❖ it can be contradicted only by another writing (for example: the authentic act – an oral testimony is not allowed)

➢ When the writing could not be established…

- ✓ (either it was destroyed by fortuitous occurrence –see case of *beginning of written proof*;
- ✓ maybe there is material impossibility – for example: the necessary deposit envisaged by art. 512 CCLIII
- ✓ or moral impossibility – majority of *legal facts*)

➢ … the law admits 4 other modes of proof:

- ✓ *Testimony*: statement made under oath before the court and which reports a fact directly perceived
- ✓ The *consent*: statement made by a litigant and which produces legal consequences against him/herself
- ✓ The *presumption*: deduction drawn from a whole of facts
- ✓ The *oath*: solemn assertion (before the court) of the veracity of ones allegations

➢ In commercial law, the speed and the necessary flexibility of transactions make that average civil law modes of proof are not fully adapted: testimony is allowed (Article 64 Al. 3 EVID.)

We distinguish modes which are known as *perfect* from those which are *imperfect*.

1. Perfect modes of evidence

➢ They are those for the majority which are valid in the system of the legal evidence (allowing in theory to prove *legal acts* or *deeds*)

➢ What makes them *perfect* is however the absence of the judge's appreciation capacity

a. Authentic acts/deeds (Article 11 to 13 EVID.)

➢ *The authentic act/deed* is defined by art. 11 EVID.: the one which has been received

- ✓ … in accordance with required formalities by a public officer,
- ✓ … authorized to officiate in the place where the deed was drawn.

➢ Its convincing value (Article 13 EVID.) gives credence towards everybody (*erga omnes*), for observations that the public officer had mission to make…

➢ … until inscription out of forgery (i.e. challenge to the validity of the deed):

- ✓ Procedure aiming at checking if the deed shown with the court is a forgery
- ✓ If procedure doesn't succeeded, the litigant who brought it risks payment of damages and fine (see CCLAP)

b. Act under private writing/ private deed (Article 14 to 32 EVID.)

- ➢ They are writings meeting a certain number of formal conditions (see art. 19 EVID.)…
  - ✓ (of which that demanding that there are as many originals as parties having a distinct interest)
  - ✓ … and which is signed by all the parties (instead of the public officer) (see art. 14 al. 1 EVID.)
- ➢ The convincing value of the act under private writing is limited: it gives credence only towards those who endorsed it (Article 14 al. 2 EVID.)
  - ✓ An act under private writing which would not meet all the formal conditions (for example: missing signature) will not have any more the same value
  - ✓ It will become a beginning of written proof (that we will see in imperfect modes)

c. The confession / admission by a party (Article 109 to 111 EVID.)

- ➢ It is about a declaration…
  - ✓ … where a person holds for truth a fact (and not a point of law)
  - ✓ … which can produce against him legal consequences,
  - ✓ … which is *indivisible*, *irrevocable* (except in event of constraint or error in fact) and *relative* (it cannot bind the interdependent joint-debtors – "codébiteurs solidaires")
- ➢ It is a *judicial* confession (Article 110 EVID.), when the statement is made in justice
  - ✓ It can be made in any event
  - ✓ It binds the judge (i.e.: it gives credence against its author)
  - ✓ It is inoperative if the contrary evidence is impossible (for example: irrefragable/indisputable presumption)
- ➢ It can also be an *extra-judicial* confession (Article 109 EVID.), when it is made apart from the presence of the judge who appreciates it freely:
  - ✓ This one belongs to the imperfect modes
  - ✓ When the consent is written: rules of the beginning of written proof apply
  - ✓ When it is verbal: it becomes valid where the testimonial evidence is allowed

d. The decisive oath (Article 112 EVID.)

- A litigant requires from the other to solemnly attest before a court the veracity of his/her assertions (for example: a debtor unable to prove that he/she refunded well, can ask his creditor to state on oath that he/she never had been refunded)
- This mode is very seldom used
- The party to whom the oath *is submitted* has 3 possibilities:
  - ✓ … either he/she takes oath and wins the case;
  - ✓ … or he/she refuses and loses the case
  - ✓ … or finally he/she *refers* the oath to the opposing party and puts his/her fate between the hands of that one
- The *decisive* oath differs
  - ✓ … from that known as *suppletory* (see imperfect modes) – but the two are called as *probatory* oaths, which must be separated from
  - ✓ … the oath known as *promissory* (taken by witnesses and experts)

2. Imperfect modes of evidence

- The judge is free with respect to those modes' appreciation: their conclusive force (convincing/probative value) is limited.
- They are used only in free mode of evidence, i.e.:
  - ✓ When the legal act is not subjected to the *perfect evidence*
  - ✓ When a beginning of written proof was provided
  - ✓ Or to prove legal facts.

a. Testimony

- It is about the act by which a person attests in justice the existence of a fact of which he/she was informed personally: seen or heard by him/herself (see art. 62 EVID.)
  - ✓ It differs from *hearsay* (indirect testimony): the depositor reports what he knew from someone else
  - ✓ … and from *the rumour:* public whispers holding for truth, facts of which there is not any direct evidence (exceptionally allowed if confirmed by other established evidence)
- Its convincing value:

- ✓ It is retained as evidence only when the drafting of a writing cannot be legally necessary: i.e., for sums and values lower or equal to 50.000 frw (see art. 64, al. 1 EVID.)
- ✓ Even for sums and values lower or equal to 50.000 frw, testimony cannot be considered each time that a writing is available (see art. 64, al. 2 EVID.)
- ✓ For higher sums and values, testimony is not allowed, except in case:
  - ❖ … of beginning of written proof (Article 33 EVID.):
    - ◊ any written act emanating from the litigant against whom the request is formed
    - ◊ … and which makes probable the pled fact
  - ❖ … or of impossibility of presenting a documentary evidence (see art. 224 CCLIII):
    - ◊ the writing could not be drawn up (obligations being born from quasi contracts, tort (délit & quasi-délit), necessary deposit and deposit done in a hotel)
    - ◊ … or was lost (following a fortuitous occurrence resulting from a cause beyond control)

b. Presumptions

- ➢ These are consequences that the law or the judge draws from a fact known to an unknown fact (Article 104 EVID.); in other words:
  - ✓ … they are indices on which the judge bases his/her arguments, to deduce,
  - ✓ … or a mode of induction/deduction used on the base of material indices
- ➢ The law distinguishes *legal* presumptions:
  - ✓ … those attached by the law to certain facts;
  - ✓ … for example (see art. 105 EVID.): acts declared null by the law – the lawsuit allotted to the *res judicata* by the law
  - ✓ … and which can be:
    - ❖ … *simple*: they admit the contrary evidence
    - ❖ … or *irrebuttable*: cannot be contradicted (or discussed)
- ➢ … from *human* presumptions:
  - ✓ Those which are freely inspired to the seized judge
  - ✓ In accordance with art. 108 EVID., the presumption must be serious, precise and consistent.

c. The suppletory oath

- *The suppletory* oath is that submitted by the judge to the party appearing worthier of confidence, in order to mitigate insufficiency of other evidence.
- Effects:
  - ✓ It cannot *be referred*
  - ✓ It doesn't bind the judge

d. Evidence of certain material facts (Material evidence)

- Site's Inspection / Visit to site (Article 100 to 102 EVID.)
  - ✓ The judge can try to realize by himself, facts relating to the case in lawsuit
  - ✓ He appreciates the measure's advisability and the results' relevance.
- Expert opinion (Article 76 to 96 EVID.)
  - ✓ The court requires information from a specialist, about aspects of a lawsuit which need technical knowledge
  - ✓ This mode is in theory optional but sometimes compulsory (for example: the checking of writing)
  - ✓ Value of the expert report: it is an opinion which is not binding to the judge
- Various recordings (telephone, audio, etc.)
  - ✓ They should not be allowed if the opposing party were not informed of their realization
  - ✓ To record a conversation without the knowledge of somebody can be turned over against the person who did it (See more details in criminal matters).

D. EVOLUTION OF EVIDENCE LAW IN PRIVATE MATTERS: THE DOCUMENTARY EVIDENCE

- Law n° 18/2010 of May 12, 2010 on electronic transactions made extensive the definition of the written evidence:
  - ✓ Under the terms of its art. 4, what should be essential is that this writing is equipped with an understandable significance: [… provided that information within an electronic message] is accessible" to be consulted.
  - ✓ Information carrier/medium (paper, tape, CD, digital network, etc.) as well as methods of transmission (mail, Internet, etc.), don't matter much
- According to art. 6, the electronic writing has the same convincing/probative value as a writing on paper medium provided that it is established and preserved under conditions likely to guarantee its integrity (Article 6 al. 2 EVID.).

- The law also specifies the range of the electronic signature (Article 2, 15°):
  - ✓ It is initially defined in a neutral way: "given in electronic form contained, joined or logically associated an electronic message…"
  - ✓ … and fulfills 2 basic legal functions:
    - ❖ Identification of its author: "… being able to be used to identify the signatory…"
    - ❖ The demonstration of his/her will and the approval of the act's contents: "… and to indicate that it approves the information which is contained there"

PART III. EVIDENCE IN CRIMINAL MATTERS

- Let us note initially that, contrary to evidence in civil law, evidence in criminal matters is not, strictly speaking, regulated: on 130 articles of the law n° 15/2004 of June 12, 2004 related to evidence …
  - ✓ … only 8 are earmarked for criminal matters,
  - ✓ … contrary to more than 100 articles for evidence in civil matters.
- It is during the preliminary investigations that the case file in criminal matters is settled and should be submitted to the court. – To settle a case file…
  - ✓ … is to record the offence,
  - ✓ … check information, and clues (‘*indices*’) which could help to characterize facts and convict someone of the crime (the object of preliminary investigations is thus initially the evidence – see point B.) [4]
- The evidence in criminal matters is built throughout the procedure, it is…
  - ✓ … initially an accumulation of "clues" for the criminal investigation service (RIB),
  - ✓ … then "serious suspicions" for the Prosecution
  - ✓ … and finally a "proof/evidence made up" for the court which alone will be able to state on the truth (here is raised the issue of the means of evidence used during various phases of the penal procedure – see point C.)
- In addition, the principle of the presumption of innocence is determining: it is on it that evidence in criminal matters is built:
  - ✓ As parallel to the civil procedure, it is the plaintiff (the Prosecutor) who provides evidence
  - ✓ However, the principle is not rigid:
    - ❖ There are presumptions of guilt (for example: procuring – *‘proxénétisme’*)
    - ❖ The criminal procedure can also call in question this presumption of innocence in order to allow a search for easier proof (police custody, provisional detention, etc.)

[4] The evidence in criminal matters consists in showing the existence of an offence and identifying who is the author; the whole penal procedure aims at the essential problem of evidence. (R. MERLE and A. VITU). According to art. 122 EVID., the litigant who wishes to produce evidence must establish its source in order to connect it to the defendant.

A. PRESUMPTION Of INNOCENCE & BURDEN OF PROOF

1. Definition & applications of the presumption of innocence

- The presumption of innocence is a principle in criminal matters according to which any prosecuted person is regarded as innocent from charges/facts against him/her, as long as he/she was not yet declared guilty by a court.
  - ✓ Registered in the *Declaration of human rights* like in *the Constitution* of Rwanda (art. 19 al. 1), the achievement of this presumption is in particular to make the defendant profit from the doubt.
  - ✓ This principle is fundamental: the whole society admits thus that it prefers a guilty person to be free/at large rather than an innocent person to be sent to jail.
- Guarantees with the application of this principle can arise in 2 forms:
  - ✓ To prevent from violation of the presumption of innocence:
    - ❖ The infringement in question is the fact of being presented publicly like a guilty party at the stage of preliminary investigations and prosecution: it is in theory not allowed at this stage to be biased against the person blamed;
    - ❖ … except in a number of listed cases: for example art. 66 al. 1 Crim. Proc. considers a violation of the presumption of innocence by accepting that for needs for an investigation, an individual who is likely to escape can be put in police custody.
  - ✓ To punish violations of the presumption of innocence:

    proceedings from the prosecutor may, in accordance with art. 21 al. 2 Crim. Proc. be-taken against any person who contributed to investigation and violated the secrecy of investigation.
  - ✓ To repair violation of the presumption of innocence: quid? This is not yet regulated by the Rwandan law.

2. Burden of proof

- The presumption of innocence has a great influence on the burden of proof: it's the prosecutor's responsibility to prove the guilt.
- However exceptions exist.

a. Principle: The burden of proof is the prosecutor's responsibility (art. 24 Crim. Proc.)

- From a positive point of view, the prosecutor or even the private party must prove that the person blamed is guilty.
- From a negative point of view, the person blamed does not have to prove his/her innocence.
  - ✓ This person has the right to keep quiet and not to take part in his/her own accusation: under art 107 al.2 Crim. Proc. as a long as his/her guilt is not established, the defendant is not held to provide the proof of his/her innocence.
  - ✓ The lack of serious suspicions makes it possible to draw aside his/her guilt: in other words, any doubts benefit to the defendant *(In dubio pro reo)* (art. 111 Crim. Proc.)

b. Exception: some presumptions of guilt

- Vis-a-vis probatory difficulties, the judge has sometimes a tendency to deduce offence's constituents from some already known facts or clues.
  - ✓ This deduction can be provided for by law;
  - ✓ … as it can result from factual elements appreciated by the judge and which let suppose a criminal intent.
- A *de jure* presumption, in connection with the procuring:
  - ✓ Under art. ~~370~~ 206 - Pen. Code, whoever being in usual relationship with anyone engaged in prostitution, is regarded as supporting or benefitting from the prostitute, since he/she cannot prove resources corresponding to his/her way of life.
  - ✓ This provision sets up a form of presumption of concealment against the defendant and consequently forces on him to prove the licit character of the origin of his/her incomes: it is about a simple presumption (i.e. which can be reversed by a contrary proof)
- A *de facto* presumption:
  - ✓ For offences like murder, intent to kill must be proven. However this one is particularly delicate to produce if the person blamed refuses to confess. The judge can thus deduce the intent…
    - ❖ … from means used to reach the victim (weapon for example or not)
    - ❖ … or from the part of the body aimed at (was it vital or not?)
  - ✓ Again, the issue of the burden of proof comes across when the defendant put the case for a defence concerned with causes of irresponsibility:

- ❖ Art. 100-109 Pen. C. exclude any penal responsibility when the defendant was in a state of dementia, or when he/she was constrained by a force to which he/she could not resist, or when the fact was ordered by the law and demanded by authorities.
- ❖ Thus, it is the defendant's responsibility to produce the proof of the cause of irresponsibility (in other words, the defendant who raises the exception of irresponsibility becomes a petitioner: *reus in excipiendo fit actor*).

B. OBJECT OF EVIDENCE IN CRIMINAL MATTERS

- ➢ The evidence in criminal matters relates to elements which constitute the offence;
- ➢ … but the act concerned must initially be qualified as criminal.

1. Qualification of the offence

- ➢ Vis-a-vis a committed act, one must check if a penal law can justify the starting of preliminary investigations and the actuation of the prosecution.
  - ✓ There is checking of the criminal character of the act blamed,
  - ✓ … indication of the legal reference which punishes the act
  - ✓ … and information as fast as possible about the person blamed (see art. 45 Crim. Proc.).
- ➢ The qualification can change during all the judicial process.

2. Constituents/elements of the offence

- ➢ The evidence in criminal matters relates to 2 constituents of the offence: the material element and the moral element; the legal element is not concerned.
- ➢ For the material element…
  - ✓ … it is a question of proving the action/omission constitutive of the offence on one hand;
  - ✓ … and imputation of this fact to the person blamed, on the other hand.
- ➢ For the moral element, we distinguish…
  - ✓ … intentional offences: here the proof of the existence of a fraud must be provided, i.e. the psychological attitude of the offender which consists in having wanted to commit the offence: *the offence's author acted with full knowledge of the facts, whatever the motive (respectable or not)*.
  - ✓ … from non intentional offences:

- ❖ here must be established the nature of the fault[5] made (we distinguish the simple fault from qualified faults:
  - ◊ … the *simple* fault: which consists in careless acts or negligence, if it is established that the author of the facts did not achieve haste (*'diligence'*) normally required;
  - ◊ … the *deliberate/wilful* fault: an obviously voluntary violation of a particular obligation of carefulness or safety provided by for the law;
  - ◊ … and the *blatant* fault: fault having exposed others at the risk of a particular severity and which could not be ignored)
- ❖ … and the causal relation between this fault and damage:
  - ◊ Causality can be *direct* or…
  - ◊ … *indirect*: the defendant created or contributed to create the situation having allowed realization of the damage or did not take steps to avoid it.

C. MEANS OF EVIDENCE IN CRIMINAL MATTERS

- ➢ Offences can be established by any mode of proof…
- ➢ … provided that it is in accordance with the Law: in particular with respect of various fundamental legal principles.

1. Freedom to produce evidence in criminal matters

- ➢ Under art. 108 Crim. Proc. and 119 EVID., offences can be established by any mode of proof (see subparagraph 1) …
- ➢ … and the judge decides according to his/her strong conviction (see subparagraph 2).

a. The principle

- ➢ As already reminded, art. 108 Crim. Proc. and 119 EVID. state the principle of *freedom to produce evidence* in criminal matters, which is different from the principle of *legality of evidence* applicable in civil matters.[6]
  - ✓ In criminal matters, any mode of proof, without hierarchy and without binding the judge, is in theory admissible:

[5] In criminal law, the *fault* is the moral element of non intentional offences; it is either ordinary (imprudence, negligence), or deliberated or characterized .
[6] The law organizes an hierarchy between modes of proof in civil matters; and this hierarchy binds the judge (see *Evidence in Civil Matters* above).

- ❖ clues;
- ❖ … confession;
- ❖ … documentary evidence (writings are sometimes the only weighty modes of proof; for example: as regards contract – see breach of trust – '*abus de confiance*')
- ❖ … testimony, etc.

✓ The freedom to produce evidence in criminal matters is thus:

- ❖ … the freedom to seek all elements necessary for truth-telling issues (there cannot in theory be pre-established evidence);
- ❖ … also the freedom to produce them before the judge (they are produced during debates and must be discussed contradictorily in court).

➢ Exception: for the *drink driving* offence ('*conduite en état d'ivresse*'), particular methods of producing evidence are necessary: the breathalyser test ('*alcootest*') or the blood analysis in a laboratory – see articles 10 to 14 of law n^{r} 34/1987 relating to the road traffic.

b. Strong & personal conviction of the penal judge

➢ The freedom of evidence in criminal matters leads us to examine its consequence which is the principle of personal conviction of the penal judge.

1^{o} Concept

➢ Subparagraph 2 of art. 108 Crim. Proc. and 119 EVID. provide that the court appreciates with sovereign power, admissibility and relevance of any evidence coming from both parties (the prosecutor and the offender).

✓ The law does not ask the penal judge for an explanation of the means by which he/she was convinced;

✓ It orders him/her to wonder, according to sincerity of his/her own conscience, about which impression the modes of proof submitted by litigants made on his/her reason.

➢ On the other hand, inward conviction does not have to be heard like the exercise of arbitrariness:

✓ The judge develops his/her decision in a justified way, by taking account of the evidence produced by litigants.

✓ Indeed, art. 139, 8^{o} to 11^{o} Crim. Proc. expects that any judgement must contain reasons/grounds and a sentence.

✓ In comparative law, the insufficiency or the contradiction of grounds can be considered as if they were missing/lacking (see for example French jurisprudence).

2° Limits with the judge's personal conviction

➢ The principle of judge's personal conviction is analyzed like leading to the establishment of a moral proof, in so far as the judge builds up his/her own opinion.

➢ Legal evidence can exceptionally be binding to the judge: it is the case for some official reports – *'procès-verbaux'* (of which the conclusive force is more or less strengthened and can neutralize strong conviction of the judge) which …

✓ … either are worth until contrary proof;

❖ i.e. the judge is obliged to admit the conclusive force of the official report which records the offence, since no other proof comes to dispute its contents.

❖ And that is the case for offences against labour legislation: art. 161, al. 2 Labour Legisl. expects that the labour inspector takes care of recording by official report all offences which violate the labour legislation and directly communicates all necessary information to the competent court.

✓ … or are worth until challenge to the validity of an authentic document – *'inscription de faux'*;

❖ i.e. to dispute the convincing value of an official report is in this case more difficult since it is necessary to prosecute for forgery, within the framework of the very heavy procedure of challenge to the validity of an authentic document, provided for by art. 13, and 46 to 61 EVID.

❖ For example customs offences.

2. Legality in producing criminal matters' evidence (see art. 126, 5º Crim. Proc.)

➢ The freedom of evidence in criminal matters is not without limits; otherwise it would be an opening to any kind of abuse, especially by the prosecution.

✓ Our Constitution does not come to a conclusion about the admissibility of the elements of proof; its control is exerted rather on the equity of the judicial procedure as a whole.

✓ Under the terms of its article 85, any person charged with an offence is presumed innocent until his/her guilt is legally and for good established at the end of a public and fair lawsuit …: to ascertain if the procedure were fair, it is necessary in particular:

- … to wonder whether it was possible for the defendant to question the authenticity of evidence produced against him/her and be opposed to its use;
- … and especially to wonder about circumstances in which elements of proof were collected.

➢ In other words, even though producing evidence in criminal matters is free, it doesn't have to violate principles which protect basic human rights.

a. Application of the fundamental principles

1° Principle of dignity

➢ This principle is called upon here to prevent the use of bodily or psychological violence to obtain evidence.

- ✓ It is about a general principle having constitutional value and leading the production of the evidence: under art. 15, al. 1 and 2 Constitution, any human being is entitled to physical and mental integrity. No one cannot be the target of torture, ill-treatment, inhuman or degrading treatment.
- ✓ In this way, cannot be valid…
  - … a confession obtained by violence or ill-treatment during a police custody, since this inhuman treatment involves *pain* and *suffering* and is likely to create feelings of fear and anxiety, appropriate *to humiliate* and break physical and moral resistance;
  - … the use of some scientific processes, insofar as they *force the will of the individual*, who is thus not free:
    - ◊ Polygraph (or lie detector)
    - ◊ Narcosis (narco-interrogation after injection of the penthotal known as ` serum of truth)
- ✓ This does not call into question the validity of a "narco-diagnostic", i.e. the use of narcosis within the framework of an expert opinion (a doctor) to get to the bottom of an offender's personality (see for example the medico-psychological examination provided for by art. 147 al. 2 Crim. Proc.).

➢ However processes intended to prove the reality of an offence or the offender's identity are allowed:

- ✓ Identification of the offender by a picture, (art.121 al. 2 EVID.)
- ✓ … evidence by genetic analysis to prove involvement of an offender,

- ✓ ... phone harassment established by the use of apparatus allowing to record the telephone numbers involved (art. 121, Al. 3 EVID.),
- ✓ … proof of speeding by radar speed trap,
- ✓ … proof of drunkenness by analysis of alcohol level in the blood (see articles 10 to 14 of law n^{r} 34/1987 relating to road traffic).

2^{O} Principle of honesty

- ➢ Honesty is not the subject of any precise definition; however we can state that respecting the fair lawsuit and private life principles required by the Constitution (see articles 19 and 22) should be premised upon this principle.
- ➢ It is often easier to define honesty by its opposite: disloyalty.

i) Honesty of evidence provided by public authorities

- ➢ Can be regarded as unfair, the use of trick or stratagems by the prosecution in order to put together elements of proof against the defendant:
  - ✓ for example, to telephone a suspect to obtain elements of proof without mentioning one's position;
  - ✓ … the fact for a police officer of organizing a phone talk, by dictating questions and answers for a witness, etc.
  - ✓ … to make an intrusion into the relationship between a defendant and his/her lawyer, to know the truth about an offence:
    - ❖ … for example by listening to discussion between them, without their knowledge.
    - ❖ However the prohibition falls if it is a question of providing evidence of the lawyer's participation in the offence.[7]
- ➢ Case of the police provocation: quid? The Rwandan legislator does not say anything about it. In comparative law, one makes a distinction between the *provocation to commit an offence* (in theory contrary to honesty and punished by the criminal law) and *provocation with aim to provide evidence of an offence* (this can be allowed to facilitate police investigations):
  - ✓ recourse to infiltration can be authorized…

[7] Particularly, when it is about a search for evidence of *offences against national security*, a law which came into effect in September 2008 and its recent ministerial decree, in force since December 2010, make it possible to intercept communications between people involved in this crime.

- ❖ … if the method is justified by the offence's nature (traffic of narcotics, terrorism, organized crime, offence against national security, human being traffic, procuring, minors prostitution, etc.)
- ❖ … and if the infiltrated policeman/woman does not cause him/herself the commission of the offence (using an assumed identity, he/she only keeps watch for example, on narcotics' shipment within an infiltrated network).

✓ Would be on the other hand a *provocation to commit an offence*, and thus against honesty, an incitement, at police officers' instigation, to connect on a pedo-pornographic Internet site and exchange files containing minors' images with pornographic character (Crim. May 11, 2006, Bull. 132; Crim. February 7, 2007, Bull. 37).

ii) Honesty of evidence provided by private individuals and private parties in a penal lawsuit

➢ The evidence provided by a private party in a penal lawsuit (for example in the case of an adultery) should be moved away if it was obtained in an illicit way.

✓ In comparative law, the recording of a private phone talk, carried out and preserved without the knowledge of the author's words put forward, is an unfair process making inadmissible in court, such an evidence. (Civ. 2, October 7, 2004. Bull. II, n^{r} 447).

✓ But video recording is not unfair if images taken from the camera show illicit behaviours in public places (for example: a supermarket, common parts of a building, etc.) because recording in such situation is not carried out without the knowledge of individuals (Civ. 1, September 24, 2009, appeal n^{r} 08-19482)

➢ SMS (Short Message Service): quid?

✓ This is a wireless system of communication allowing users to send and receive alphanumeric messages from their mobile telephone.

✓ The use of an SMS by its addressee in court, as a mode of evidence was not considered to be unfair since the author could not be unaware of the fact that this type of message is automatically recorded by the receiving device.[8]

3^{O} Principle of necessity

➢ This principle means quite simply that "the end does not always justify the means":

[8] It is about a case in which SMS messages were addressed to a female employee by her boss and were used to establish that she had been subjected to a sexual harassment on behalf of this boss (Labour Sect. May 23, 2007, Bull. V, n^{r} 85).

- ✓ Research of evidence about an offence and its imputation to an individual, cannot justify a serious violation of basic human rights.
- ✓ In other words, the prosecutor, while searching for evidence, should undermine basic human rights, only if that is necessary to prevent further offences or to protect national security, law and order.

➢ It is why, for example, …

- ✓ … the ministerial decree taken to enforce the law on the interception of communications provides for in article 13, 3° & 4° that …
  - ❖ … copies of any communication are limited to *the minimum number necessary* to achieve the goals;
  - ❖ … the copy of any communication is preserved in total safety as a long as keeping it is necessary and *destroyed as soon as* it is *anymore necessary*;
- ✓ … the criminal procedure code provides for …
  - ❖ … in art. 66 that the defendant can, *for investigation requirements*, be put into police custody; …
  - ❖ … just like art. 68 specifies that an accused can, *for prosecution needs*, be remanded in custody according to legal rules and conditions, etc.

b. Supervisory role of the Criminal procedure law

➢ Collecting evidence in criminal matters can, as just noted above, particularly violate individuals' privacy and freedom:

- ✓ … some actions affect their private life (interception of written correspondences, of communications, searching....)
- ✓ … others affect their physical integrity (DNA test, medical examination, etc.)

➢ The criminal procedure code consequently provides for a list of authorized acts and conditions under which they could be carried out.

- ✓ Thus some acts are binding to public officers during the preliminary investigation stage of a penal lawsuit (example: for house search, see art. 55, al. 3 & 5 to art. 64; for body search, see art. 56; for witnesses' examination, see art. 33 to 34; etc.)
- ✓ Failure to respect these provisions by the investigators involves the nullity of the act carried out.

TABLE OF CONTENT