



Forensic mental health assessment in France: Recommendations for quality improvement



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ABSTRACT

The quality of forensic mental health assessment has been a growing concern in various countries on both sides of the Atlantic, but the legal systems are not always comparable and some aspects of forensic assessment are specific to a given country. This paper describes the legal context of forensic psychological assessment in France (i.e. pre-trial investigation phase entrusted to a judge, with mental health assessment performed by preselected professionals called “experts” in French), its advantages and its pitfalls. Forensic psychiatric or psychological assessment is often an essential and decisive element in criminal cases, but since a judiciary scandal which was made public in 2005 (the Outreau case) there has been increasing criticism from the public and the legal profession regarding the reliability of clinical conclusions. Several academic studies and a parliamentary report have highlighted various faulty aspects in both the judiciary process and the mental health assessments. The heterogeneity of expert practices in France appears to be mainly related to a lack of consensus on several core notions such as mental health diagnosis or assessment methods, poor working conditions, lack of specialized training, and insufficient familiarity with the Code of Ethics. In this article we describe and analyze the French practice of forensic psychologists and psychiatrists in criminal cases and propose steps that could be taken to improve its quality, such as setting up specialized training courses, enforcing the Code of Ethics for psychologists, and calling for consensus on diagnostic and assessment methods.

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1. Introduction

In countries where Common Law applies, penal procedures are adversarial from the start, whereas countries which follow Roman Law usually entrust the investigation phase to a single judge whose mission is to gather all the evidence supporting both the prosecution and the defense and decide whether there is enough evidence to proceed with the trial, which is then adversarial and entirely oral. It is in the first investigative phase of the procedure that psychological and psychiatric forensic reports are requested. Within this particular legal framework, professionals who are called upon for an assessment have to take an oath as “experts” in their field, pledging to assist the Courts in good faith. It is important here to understand that, in France, experts are hired by the Courts and not by either the prosecution or the defense. Consequently, they are assumed to remain neutral, not to be concerned

by facts and evidence, and not to take defensive or accusatory stances. In spite of, or due to this, the conclusions drawn by psychiatrists and/or psychologists carry considerable weight on the decisions of the Criminal Court.

In recent years, as a consequence of the purported role played by psychiatric and psychological reports in several high profile mismanaged criminal cases (e.g. the Outreau trial in 2005), the quality and reliability of forensic mental health reports have been increasingly challenged both by the general public and by the judiciary. This concern is apparently shared in many different countries, including those where Common Law applies. Several authors have underlined the need to improve the quality of forensic mental health assessments and reports (Borum & Grisso, 1995, 1996; Conroy, 2006; Lander & Heilbrun, 2009; Rodway, Norrington-Moore, Appleby, & Shaw, 2011; Wettstein, 2005, 2010) or have made suggestions for improving the quality of reports (Duits, Van Der Hoorn, Wiznitzer, Wettstein, & de Beurs, 2012; Giorgi-Guarnieri et al., 2002; Robinson & Acklin, 2010). In France, various studies have shown that there is a wide disparity in the quality of both psychological and psychiatric reports (Combalbert & Andronikof, 2007; Combalbert, Bazex, & Andronikof, 2011).

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Nevertheless, at the international level, there are very few studies in this field of research. We hope to contribute to the international scientific debate on this issue by presenting the French situation regarding forensic mental health assessment based on our clinical experience as forensic experts.

For offenders, the forensic mental health assessment consists mainly of an evaluation of their personality and mental disorders, of the risk that they will reoffend, and of their potential social rehabilitation. For victims, the forensic mental health assessment consists mainly of an evaluation of their personality and of the psychological impact of the offense. These assessments are drawn up in a detailed report which is submitted to the court by the expert (psychiatrist or psychologist) during the pre-trial.

Through a review of the scientific literature and parliamentary reports, we investigate the reasons for the poor quality of mental forensic health assessments and reports. We also highlight the factors which contribute to poor quality and disparity between experts in forensic assessment. Finally, we put forward recommendations to improve their quality.

2. Description of pre-trial forensic assessment in France

French law introduced the concept of insanity in 1810 with Article 64 of the Napoleonic Penal Code: “there is no crime or offense if the defendant was insane at the time of the action, or if he was constrained by a force which he could not resist”. Thus, psychiatric assessment was officially introduced in the criminal field, with a gradual shift from a judgment of the act to a judgment of the person (Villerbu & Lameyre, 2009). (Notions of the perpetrator's criminal responsibility and discernment are now the subject of Article 122-1 of the new penal code adopted in 1994.)

Until the late 1960s, psychologists could not have one-on-one interviews with the defendant and could not appear in the Criminal Court. The Code of Penal Procedures required collaboration between a physician and a psychologist, the psychologist thus having no autonomy.

With the reform of the Code of Procedures in 1994, psychological assessment was finally enshrined in law in Article 81: “In accordance with the law, the investigating judge makes inquiries he considers relevant to the truth”, and in this context, “may order a medical examination, a psychological examination or any other necessary measure”.

The French system requires that “experts” be chosen by the investigating judge from an official list of qualified specialists (exceptions to the rule are authorized but reasons must be given). Since February 11, 2004 (Act No. 2004-130), magistrates are provided with lists of experts, common to both civil and criminal courts. In order to be recognized as an expert by the Courts (i.e. be on a list of experts), professionals must apply to the Public Prosecutor at the High Court, enclosing their curriculum vitae, a criminal record certificate, and documentation certifying their skills. If approved by a panel of peer experts, the professional takes an oath before the Court of Appeal of the jurisdiction to which he/she belongs. There is a three-year probationary period after which the expert's activity is assessed by an as-yet undetermined commission. If successful, she/he may then apply for a renewable five-year term (Decree No 2004-1463 of 23 December, 2004).

The decision to call for an assessment and the choice of expert are at the discretion of the investigating judge, but both parties can challenge the decision and ask for a second opinion (not always granted by the judge). In the case of disagreement between experts, the judge is bound to order a third assessment by a new team of forensic experts.

A mandated expert is obliged to answer all the questions listed by the judge, and only those. For the psychological assessment of potential criminal offenders, judges rely on an all-purpose list of questions (dating back to 1958), often worded as follows:

1. Analyze the defendant's personality in the fields of intelligence, affectivity and sociability and evaluate possible pathological aspects.

2. Highlight personal, family and social factors that may have influenced the development of the subject's personality.
3. Determine the degree of intelligence, manual dexterity and attention.
4. Indicate whether the predispositions of personality or mental abnormalities could be involved in the commission of the offense.
5. In general, give all relevant information to understand the motives of the alleged offense, provide treatment recommendations if relevant.
6. Indicate the potential for the rehabilitation of the person and the means to achieve it.
7. Provide all observations deemed useful to establish the truth (open question).

In essence, expert psychologists should study the psychological profile of the alleged offender, understand the situation in relation to his/her personality, and situate him/her in the environmental context while taking intrinsic factors into account. Finally, through analysis of all these elements, the future of the person can be considered in terms of rehabilitation and/or treatment. Requests to evaluate the risk of recidivism and/or the dangerousness of the alleged offender are now frequently included.

The questions that expert psychiatrists are asked refer to the Insanity Law (Article 122-1 of the Penal Code), as follows:

1. Does the examination reveal a mental or psychological disorder? When appropriate, give a description of the disorder and related details.
2. Is the offense related to this disorder?
3. Does the person present a danger?
4. Is a penal sanction possible for such a person?
5. Can the person be treated or rehabilitated?
6. Did the person suffer from a mental or neuro-psychological disorder that prevented or impaired his/her discernment, prevented or impeded the control of his/her actions at the time of the offense?
7. Provide information about the appropriateness of a treatment injunction as part of a socio-judicial order, as defined by Article 28 of Law 98-468 of 17 June 1998.
8. Provide any observation deemed useful to establish the truth (open question).

The main purpose of the psychiatric expert's mission is therefore to establish the degree of responsibility of alleged offenders and to determine their dangerousness.

3. A complex mission

The pre-trial assessment missions of forensic psychologists and psychiatrists are particularly difficult and involve numerous risks of misunderstanding. As mentioned above, they are regularly asked to “provide all observations deemed useful to establish the truth”. “Truth” in this context is an ambiguous term, as it may mean the truth of the alleged facts and is often interpreted as such. If so, the request is inconsistent with the competence and role of mental health experts, as psychological science and psychiatric science do not deal with forensic evidence (Andronikof, 2000).

This issue of “truth” is of particular concern for judges in the case of sexual offenders who deny the allegations. In these cases, and insofar as psychoanalytic theory remains the principal reference of clinical psychologists in France, psychologists and psychiatrists are naturally inclined to study the person's sexual history and describe the offender's “psychosexual development” (resolution of the Oedipal complex, choice of sexual object, etc.).

When phrased in those terms, expert reports on the personality of potential sexual offenders can carry considerable weight on the opinion of the Court. Indeed, how can the jury doubt the guilt of a man accused of pedophilia when “experts” assert that he has a personality disorder, was himself a victim of sexual abuse in childhood, and is not sufficiently mature to have a sexual relationship with adults?

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