

Part 2

An independent professional status

Since the Middle Ages, the bailiffs' profession has been independent.

Under the Monarchy, during the revolutionary period in 1792 and even under the First Empire, the profession always benefited from an independent status, undoubtedly because the bailiff's activities usually required the payment of taxes, which have always been an important source of revenue for the Treasury.

The status of bailiffs is highly complex for those unaware of the administrative organization of France.

The bailiff, as a self employed member of a 'liberal profession', is also a public and ministerial officer while at the same time being a legal officer.

2.1/ The Bailiff as a member of a 'liberal profession'

In France and in many other civil law jurisdictions, the civil service does not, as is the case in some countries, have all the prerogative powers generally attributed to the State. This feature can be particularly illustrated by the power transferred to bailiffs to enforce orders made in civil cases by the courts.

Enforcement, which in many countries is a role traditionally belonging to the civil service, is, in France, given to bailiffs, although this role is shared with a category of civil servant entrusted with the task of recovering unpaid tax.

Nevertheless, the principle remains that court orders are enforced by bailiffs, who, in this capacity have a monopoly on their enforcement, except for the recovery of unpaid taxes where the bailiff works in tandem with certain Treasury civil servants.

The 'liberal' aspect of the profession gives the bailiff total independence in the enforcement of judgments. The bailiff is not subject to any hierarchy or higher authority, other than potential sanctions professional misconduct.

Bailiffs, who are nominated by the Ministry of Justice, are self employed professionals in the strictest sense of the word. They manage and run their own business in the same way that a director runs a company, employing a large number of qualified staff and using up to date office, computer and communication equipment.

2.2/ The Bailiff as a legal officer

The bailiff is a legal officer holding an "office".

To get a better understanding of the notion of "office", we need to go back to the 15th century.

At that time monarchs, who were involved in interminable wars, found themselves forced into spending in excess of the budget of the kingdom. As a result, and in order to finance these ruinous campaigns, the king granted offices, in exchange for large sums of money.

Other offices which were created by the King at that time included regimental captain and magistrate. Both of these offices have since disappeared.

Throughout the centuries, the ownership of the offices has survived in different forms to such an extent that it is now considered as a part of the property of its holder.

As such it is a possession which can be transferred and sold in the same way as a business.

This right to sell the office, which is given to the bailiff, has led to the expression "the venality of office".

The bailiff as a legal officer has the right to choose, in exchange for the payment of a fee, a successor. The successor must have the qualifications and other conditions necessary to carry out the office of bailiff.

2.3/ The Bailiff as a public officer

When bailiffs are acting as enforcement agents while carrying out seizures or evictions, by representation they are performing an act on behalf of the State.



Because the bailiff is acting as a public officer, s/he may request the assistance of the police should the circumstances demand it. Force may be required in some cases to overcome either the obstruction or the resistance of a debtor.

Only a limited number of "liberal" professionals are public officers: bailiffs, *notaires*, auctioneers and Clerks of the Commercial Court.

2.4/ The Bailiff as a legal representative

The bailiffs' duties are not limited to the power of enforcement of civil judgments.

- Bailiffs have a monopoly on the service of legal documents.
- Bailiffs and auctioneers have a monopoly on sales of movable property at public auction.

- Bailiffs recover private debts.
- Bailiffs draw up reports or statements of facts at the request of the court or private individuals.
- Bailiffs can also represent the parties in some courts.

In addition, bailiffs are responsible for the organization and running of hearings in court and, under the authority of the judge, ensure good order in the courtroom.

During a hearing the judge may appoint a bailiff for consultative duties or to prepare a statement of facts in order to clarify the judge's understanding on a particular point.

In both cases above, the bailiff is acting as a legal representative which is another duty performed by bailiffs in their role as public and legal officers.

Part 3

The activities of the bailiff

The bailiff's special legal status offers a wide variety of professional activities, some are monopolistic in nature while others are in direct competition with other professions.

As well as these 'traditional' activities, the bailiff may also carry out ancillary activities which have no direct connection with legal services.

Over the years, bailiffs have widened their areas of activity and in so doing have expanded their fields of competence. The bailiff may now draft and deliver orders to pay in matters concerning dishonoured cheques.

In this way the bailiff may, in the same capacity as a *notaire*, draft a range of legal documents which fall within the category of enforcement orders.

3.1/ Main traditional activities

These either fall within or outside the scope of the bailiff's monopoly.

Monopolistic activities

The two main monopolistic activities are:

1. The service of documents.
2. The enforcement of Court orders.

As such, the bailiff plays an essential role in the French judicial system, participating in the enforcement of justice before and after the Court decision has been made.

Service of documents

The objective is to bring documents, mainly judicial in nature, to the attention of an answerable person. Either the bailiff or their clerk acting under oath will go to the domicile of the answerable person to hand over a copy of the document(s).

The bailiff authenticates the contents of the document. In this way the document may, then, only be challenged if

there is evidence that it is false. This is a rare and unusual procedure.

The bailiff drafts the documents and assumes responsibility for them.

In this capacity, the bailiff must verify the quality of the documents and their contents with reference to the legislation in force and the procedures which are being considered.

The serving of a document in person is always the preferred method, although alternative methods exist to ensure that the system is not paralyzed.

In the event that the document cannot be served on a person, the bailiff may hand it over to either a person present at the address of the interested person, their place of work or even keep it at the bailiff's office. In this way the interested person may collect it once they have been made aware of it by the bailiff.

Some of these documents are issued by the court while others are extra-judicial in nature.

Judicial documents

These are documents which are directly connected to court proceedings eg. a summons relating to proceedings in a court.

These documents are subject to strict rules of service which the judge will ensure are followed.

Any breaches of service may lead to a judge declaring nullity of process which may result in the bailiff incurring personal liability.

Extra-judicial documents

In this category may be included documents such as a notice given to terminate a lease eg. where the owner of a property informs the tenant of their decision not to renew a lease.

We also have orders to do (something), or, not to do (something), or orders to pay. In these circumstances, the



aggrieved party or the creditor will prepare the order eg a final demand for payment which the bailiff will serve on the debtor or are issued to force a person either to fulfill an obligation or to restrain that person from performing certain actions.

Very often this is a method used to avoid court action, though it is also often the starting point of a dispute.

Enforcement of court orders

Only bailiffs may enforce court orders. When doing so they have a duty to advise both parties (the debtor and the creditor).

The bailiff is responsible for the enforcement procedure, and, with the agreement of the creditor, chooses the most appropriate procedure. They are then fully responsible for its enforcement.

If the bailiff considers it is necessary, and if the law allows it, the bailiff may request any authorizations which they believe necessary.

The bailiff then presents to the judge the measures required for enforcement to be performed. In the event of difficulty, particularly when dealing with any force required to enter into a private home, the bailiff may ask to be accompanied by preferential witnesses (police officer, *gendarmes* [military police officer] etc.), and in the event of resistance, may then ask the police to intervene.

Enforcement is a process which starts by the drafting of an enforcement document and is completed, if necessary, by the sale of the debtor's assets.

Before any enforcement measures are taken, the bailiff may, either through a court order or by the terms of a private contract such as a lease, carry out protective measures, mainly relating to the confiscation of movable property, the freezing of bank accounts or the immobilization of vehicles.

In the event of a dispute, the bailiff may submit a case to a judge (*juge de l'exécution*) and appear in court in person in order to obtain a judgment to resolve the dispute.

3.2/ Activities outside the monopoly

The bailiff is one of a number of professionals authorized by law to give legal consultations and to draft private agreements.

These activities, which are outside the bailiff's monopoly, may be categorized as follows:

1. The drafting of documents.
2. The recovery of debts by private agreement.
3. Filing claims and representation of clients in court.
4. Sale by auction

The drafting of documents

This refers to the drafting of private agreements, statement of facts and consultations rather than to authenticated instruments of a judicial nature.

Private agreements (*acte sous seing privé*)

The bailiff is authorized to draft any type of private agreement and as such frequently draws up leases for private, commercial and rural property.

This type of work also allows the bailiff to participate in business as well as private matters.

Statement of facts (*constats*)

This aspect of a bailiff's work is very intensive. These statements of facts enable evidence to be preserved in later proceedings. Consequently, it takes place generally before litigation has commenced. The advisory capacity of the bailiff is very important on these occasions.

The bailiff drafts a description of a situation at a given moment in time. This description is objective and impartial. One of the benefits of using a bailiff is that their recorded statement of facts is drafted professionally and is based on the bailiff's independence, neutrality and professionalism.

A bailiff can draw up statements of facts at the request of either individuals or judges. In the latter case, the bailiff may also provide the judge with additional information which the judge can use in order to decide the case. For the judge, the statement of facts is now (since December 2010) considered as acceptable evidence unless refuted by more persuasive evidence to the contrary.

The statement of facts may be drawn up jointly by both sides; this is preferable however there is no obligation to do this.

Consultations

The bailiffs' consultations with clients may be either written or verbal and relate to a wide range of subjects.

The recovery of debts by private agreement

The recovery of debts may be negotiated between the creditor and the debtor by private agreement using methods which are left to the bailiff's discretion, while at the same time fully respecting the profession's code of ethics.

Filing claims and representation of clients in court

For several years now bailiffs have been authorized to represent their clients before the Commercial Court in order (a) to obtain judgment and (b) to file petitions before certain judges.

Representation before the Commercial Court

This form of representation has existed for several years and allows the bailiff to act on behalf of one of the parties to litigation.

Claims before the courts

This option is open to the bailiff before any court other than those where representation is the monopoly of the lawyers (*avocats*). Such is the case in the High Court (*Tribunal de Grande Instance*).

This is also the case for simplified injunction proceedings resulting in payments being made (*injonction de payer*). In such cases, the bailiff is authorized to file claims for debts up to 10.000 € in the civil courts.

In order to avoid a situation where, for example, the debtor attempts to transfer assets outside the jurisdiction, protective measures may be taken to protect them on the authorization of the enforcement judge or the President of the Commercial Court.

Sale by auction

The bailiff may sell movable property by auction. These sales take place either voluntarily or by judicial enforcement.

3.3/ Ancillary activities

Apart from the main activities, many bailiffs also offer certain ancillary activities in order to generate more income for the office.

Ancillary activities may be justified by the need to find a financial balance in the management of an office and are generally found when the level of principal activities of the bailiff's office is low.

By carrying out these ancillary activities, bailiffs are guaranteed sufficient income.

These ancillary activities include:

- Real estate administration
- Insurance agency and offering mediation services

Part 4

The bailiff's duties

In order to consider the bailiffs' duties, we need to make a brief analysis of the fundamental concepts which govern the status of "legal officer". By doing so, we will be able to define the role as well as determine the privileges.

Both a structured, professional organization (the law of 1945) and the observation of strict codes of ethics are needed in order that these privileges can be legally guaranteed. Indeed, a profession which is invested by law with prerogatives of public power must be equipped with disciplinary measures which can be used against members in breach of the code of conduct.

In addition to the legal qualifications, a bailiff must either acquire an office (*etude*), or a shareholding in the office.

This is one of the special features of the practice of a 'liberal' profession in accordance with French law.

However, it is now possible, since the law of 2010, for the bailiff to exercise the profession as an employee, rather than being self employed.

Although the roots of the profession can be found in the distant past, the modern structure of the organization dates from the law of 2nd November 1945.

4.1/ Privileges granted to the bailiff by law

In exchange for the privilege of monopoly which is granted for the service of court documents and the enforcement of court orders, bailiffs are required to offer their assistance when requested, either by judges or individuals.

Rights of office

Without being the owner of the office in the legal sense of the term, bailiffs have the right to propose a successor with the agreement of the Ministry of Justice. This right is called the 'right of representation'.

The right of representation exercised by bailiffs enables them to dispose of their office by sale.

The *numerus clausus*

The *numerus clausus* rule means that a strict control is imposed on the number of offices situated in a given area by the Ministry of Justice in order to ensure that the local population is adequately provided for by the optimum number of bailiffs.

The *numerus clausus* also relates to the status of the bailiff, who, as the possessor of a small part of public power is subject to the direct authority of the State.

Furthermore, because of the *numerus clausus* rule, bailiffs (except in special cases), are tied to a local jurisdiction which is part of a system known as "territorial competence". In etymological terms, the expression "*numerus clausus*" takes on a discriminatory connotation which implies the need to limit the number of bailiffs. In order to find the origins of the *numerus clausus* we have to go back to the *Ancien Régime* when offices were first created.

At that time, the number of constables or bailiffs able to hold the office of 'enforcement agent' was already limited, with examples of instances where the appointment of new constables or bailiffs beyond the fixed quota was annulled.

Under Napoleon I, the decree of 14th June 1813 re-introduced the status of bailiff. Nevertheless, certain revolutionary laws passed in 1792 were retained, in particular those concerning the obligation to exercise the profession in a specific territorial 'jurisdiction'.

The number of bailiffs required was initially calculated at Imperial Court level, based on the needs and the size of the territorial 'jurisdiction'.

Today the situation is more or less the same, however the number of bailiffs required is now decided by the Ministry of Justice after consulting the bailiff's professional body (CNHJ).



The law of 29th November 1966 allowed bailiffs to form non commercial professional companies without calling into question the existence of the *numerus clausus*. This law encourages the appointment of new bailiffs who today number approximately 3,100.

Authenticity of legal documents

Legal documents drafted by bailiffs within the scope of their legal authority are considered to be authenticated deeds which cannot be disputed without persuasive evidence to the contrary.

The right to request the assistance of the Police

Court enforcement orders give bailiffs the right to request the assistance of the Police if necessary.

Protection of the bailiff

The bailiff, by law, is protected against aggression by third parties to a greater degree than ordinary citizens

by virtue of their status as "*officier ministériel*". Article 258 of the Penal Code forbids any interference by a third party while bailiffs are carrying out their public duties.

During the performance of their duties, bailiffs are protected by law against any insults, violence or aggression from the public.

4.2/ General duties and Professional code of Ethics

The duties invested in bailiffs ensure that they are beyond reproach in their private and professional lives. These duties relate to the bailiffs' dealings with judges, colleagues and third parties.

Dealings with judges

The bailiff must show respect towards judges, offer well-informed legal advice to clients while remaining independent when dealing with debtors or adversaries. Furthermore the bailiff must recognize the client's legitimate interests and enforce their rights against debtors or adversaries. The bailiff must also be able to balance the need for enforcement measures and the overriding interest in maintaining public order.

Dealings with colleagues

Bailiffs must, with regard to their colleagues, refrain from any reprehensible practices and observe, on all occasions, the rules and regulations of fellowship.

The bailiff's interaction with members of the various professional chambers must be respectful, particularly in complying with the discipline of the office and in accepting decisions made by the profession's representative bodies.

Dealings with third parties

Bailiffs are obliged to provide support when requested to do so by judges or members of the public.

Any bailiff who refuses to draft a formal document or refuses to carry out a required service, may, on the instigation of the public prosecutor, be sanctioned and/or disciplined without prejudice to any further claim for damages.

This obligation is a logical consequence of the monopoly the bailiff enjoys as a legal and public officer. For

example, if bailiffs do not provide services ordered by the Court, it could bring the Court system to a standstill.

Two exceptions to this implied rule:

- The refusal by bailiffs to lend their support on certain very specific occasions (e.g. because of illness or for important family reasons, which are left to the discretion of the Courts),
- In a situation where the bailiff is requested to draft a formal document for friends or family.

In either of the above cases, refusal by the bailiff would be considered legitimate.

4.3/ Limits to the bailiff's office

Bailiffs are required to draft formal documents within the limits of the geographical jurisdiction of their office. These geographical limits result from legislation and may be extended to a wider geographical area by Court order.

Finally, in their capacity as legal officers, bailiffs are subject to various duties

Residence obligation

The number of bailiffs in a geographical jurisdiction and their office address is fixed by decree.

For reasons of convenience, their place of residence should preferably be as close as possible to their office address.

Professional confidentiality

Bailiffs are bound by confidentiality rules, particularly concerning the contents of legal documents which they serve. Any breach of these rules may lead to disciplinary action and criminal sanctions.

4.4/ Restrictive legislation: Courts of First Instance

In cases brought before the common law Courts (Court of First Instance), it is strictly forbidden for the bailiff either to assist as an adviser, or to represent the parties. The bailiff could be sanctioned for doing this.

Bailiffs may however advise and represent clients in the Commercial Court and in some specialized Courts e.g. for disputes over lands or for attachment of earnings orders).

Part 5

Liabilities of bailiffs

The liability of bailiffs covers three main areas, civil liability, criminal liability, and professional and ethical liability in compliance with regulations concerning third-party liability for losses of the victim.

Civil liability refers to the regulations of the Order of bailiffs. Bailiffs are agents for their clients, and as such are answerable to their clients for any liability.

Criminal liability refers to any negligent activities of bailiffs in the performance of their duties relating to the delegation of public power.

5.1/ Civil liability

The concept of "fault" is the main source of civil liability.

The civil liability of the bailiff may be defined as the breach or non-performance of a duty.

In this way, the judge may sanction acts of non-performance and/or positive/deliberate acts.

Bailiffs are subject to the duties set out in the bailiff's code of conduct. These duties are inspired by both social considerations and the duties and obligations arising from contract law.

As representative agents, subject to contract, they are liable for any damage suffered by their clients.

This applies both to bailiffs exercising individually and in professional non-commercial bailiff companies.

5.2/ Criminal liability

Current case law tends to transfer all criminal acts to the bailiff.

As an officially nominated legal officer, the bailiff may be severely sanctioned for a criminal act.

Falsifying of public documents by bailiffs while performing their duties is a criminal offence and can result in prosecution in the Criminal Court (*Cour d'assises*).

The same is true for the fraudulent misuse of public or private funds being held by a bailiff e.g. funds which are held on behalf of a client as part of an action for recovery by mutual agreement or court order.

Any prejudicial consequences of civil or criminal liability committed by bailiff are covered by an indemnity fund (*caisse de garantie*) managed by the profession (*CNHJ*), which assumes collective responsibility for the whole profession.

5.3/ Professional and ethical liability

Professional and ethical liability are dealt with by "disciplinary sanctions", which are set out by law.

Bailiffs are subjected to disciplinary hearings, organized between the regional and the departmental chambers in which they practice and are composed of their elected peers.

The departmental chamber is responsible for collecting the evidence and the regional chamber imposes the sanctions.

Depending on the seriousness of the offence committed, the following statutory penalties may legally be applied:

- a call to order
- simple censure
- censure before the assembled chamber
- warning not to repeat the same offence again
- suspension
- striking off

Ineligibility to stand for future elections may also be added to the above.

Part 6

Fees

Although bailiffs are a self employed liberal profession, they nevertheless exercise prerogatives of public power.

In this respect, their activities, especially those which result from a monopoly activity, are controlled as public service commissions (see below).

However, public service duties are, generally speaking, subject to tariff setting irrespective of who is the provider of the service (bailiff, *notaires*, etc.). In such cases, rates of fees are fixed by the State and, as a result, tariff agreements vary according to the type of service provided by the bailiff. When the service falls into the public service category (the serving of writs, seizures, sales at public auctions etc.), the legal tariff is fixed by law.

However, the setting of tariffs is unrestricted if the service results from an activity outside of those identified as monopoly activities such as statement of facts, consultations, drafting of private agreements, etc. Unless the activity concerns the recovery of a debt in which case the system of fee calculation employed may result from an agreement between the bailiff and the client and the fee may be based on a percentage of the recovered amount.

However the services provided under the monopoly activity category, and which are therefore subject to a fixed fee, may also be subject to an additional fee within the strict application of the tariff in certain circumstances e.g. an emergency.

However if bailiffs can show that they have conducted procedures 'outside the norm', e.g. to serve a writ they may request a special or supplementary fee on top of the fees specified in the tariff. In the event of a dispute between the bailiff and the client over the amount of the additional fee, a special judge called a *juge taxateur* (taxing judge) is used to arbitrate the claim.

In general, the bailiff's fees resulting from professional activities may be classified into four categories:



- If a court document has been served as part of the enforcement of a judgment, the cost falls to the debtor;
- If it concerns recovery, the bailiff's costs are paid by the creditor, unless the recovery takes place through an enforcement order, in which costs are paid by the debtor;
- If the bailiff's services are part of a non-monopolistic activity (statements of facts, consultation, drafting private agreements), the party requesting the service pays the bailiff;
- If the bailiff is acting as a legal representative in the performing of an assignment ordered by a judge (consulting, observing), the judge will fix the amount to be paid to the bailiff and name the party who must pay the fee in advance.

When a bailiff is nominated to assist in a case in which the parties are receiving legal aid, the fees due are reimbursed by the State directly.

In accordance with the code of ethics, it is prohibited for bailiffs to overcharge for their actions, or to agree to a reduction or waiving of fees if these have been fixed by law.

Departmental Chambers, which are responsible for discipline and State Prosecutors have the responsibility for making sure that bailiffs follow these codes.