

REQUIEM FOR THE BURDEN OF PROOF

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ABSTRACT: The burden of proof, a notion specific to the medieval Roman-canonical process but alien to the four Roman procedural systems, ought to have become obsolete with the introduction of the free assessment of evidence. However, doctrinal and jurisprudential inertia in the use of traditional concepts, as well as the conservation of biphasic processes in legal systems of Anglo-Saxon origin, including the Roman-canonical process, have favoured the persistence of a notion that, when observed objectively, has ceased to have any legitimate practical value in current judicial processes.

KEYWORDS: Free assessment, summary judgment, standards of proof, formulary system, Roman canonical process.

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1. INTRODUCTION

Four years ago, with overwhelming fear and respect, I first suggested¹ that the institution of the burden of proof should be abandoned in both its objective and subjective versions. This was by no means an original conclusion; more than a century ago, Kohler² and Bar³, among others, had already pointed in that direction, an unavoidable consequence of introducing the free

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¹ Nieva Fenoll, J., “La carga de la prueba: una reliquia histórica que debiera ser abolida”, *Revista Ítalo-española de Derecho Procesal*, 2018, n. 1, p. 129, also published in Nieva Fenoll / Ferrer Beltrán / Giannini, *Contra la carga de la prueba*, Madrid 2019, p. 23. I came back to the issue in Nieva Fenoll, “Carga de la prueba y estándares de prueba: dos reminiscencias del pasado”, *InDret* 3/2020, p. 406.

² Kohler, J. (con Holtzendorff), *Encyclopädie der Rechtswissenschaft*, vol. 3, Leipzig 1904, p. 315.

³ Bar, L., *Recht und Beweis im Zivilprozesse*, Leipzig 1867, p. 46.

assessment of evidence. Even Rosenberg⁴ came to this conclusion about subjective and—eventually—objective burden, although the latter was alien to his intentions⁵. These abolitionists were not lacking arguments; as we shall see later, the burden of proof was indeed incompatible with the system of free assessment of evidence⁶.

It was perhaps due to the influence of Wach's⁷ erroneous but forceful and harshly formulated opinions of the time, and most probably due to the simple linguistic and behavioural inertia of professors, lawyers and judges, that the "burden of proof" has survived, rather surprisingly, as an institution—or perhaps rather as an expression—in case law and procedural law manuals. Although the doctrine continues to refer for the most part to the burden of proof in its most primitive sense, the subjective, or, if objective, the "subjectivisation" of it through a very confusing expression—"risk sharing"—⁸, what is being used in the courts is not really the burden of proof. However frequently mentioned, its genuine content is not being applied in this same judicial praxis. Instead, guidelines on the assessment of evidence are being used, covered under the solemn mantle of "the burden of proof"⁹. Remarkably, this kind of ghost expression has remained with us, erroneously referring to something that no longer exists, a phantom in the attic. Whether for the sake of convenience or tradition, it serves no purpose.

In the following lines, I will try again to defend this forceful appraisal, although this has already undergone full written confirmation by Michele Taruffo¹⁰, and on the subjective side only by Jordi Ferrer¹¹, as well as—years before I formulated it—by Barbosa Moreira¹², though only in a minimal way,

⁴ Rosenberg, L. *Die Beweislast*, Berlin 1923, p. 30.

⁵ Rosenberg, *Die Beweislast*, p. 55.

⁶ Rosenberg, *Die Beweislast*, p. 30.

⁷ Wach, A., "Der Entwurf einer deutschen Civilprozeßordnung", *Kritische Vierteljahresschrift*, 14, 1872, p. 357: „Eine der größten Thorheiten der Reformjurisprudenz ist die Behauptung, die freie Beweis-theorie führe zur Beseitigung der Grundsätze über Vertheilung der Beweislast. Sie beruht auf einer groben Verwechslung des inquisitorischen Princips des Strafprocesses, der Pflicht des Richters zur selbstthätigen Beschaffung der Beweise und der Emancipation von Beweisregeln bei Beurtheilung des von der Parteien gelieferten Materials. Die vielgehörte Erwägung, weil der Richter aus dem Ergebnis der ganzen Verhandlung unter Würdigung aller Umstände sich seine Ueberzeugung zu bilden habe, so kann nur noch darauf ankommen, ob bewiesen ist, nicht wer zu beweisen und beweisen habe, ist ein Trugschluss. Dem Richter kann es allerdings gleich sein, wer bewiesen hat, wenn bewiesen ist, aber nicht wer zu beweisen hatte, wenn nicht bewiesen ist. Die Sätze *actore non probante reus absolvitur* und *reus excipiendo actor fit* bleiben unerschüttert (...“.

⁸ Barbosa Moreira, J.C., "Julgamento e Ônus da prova", *Temas de direito processual*, segunda série, São Paulo 1988, p. 75. Cf. Laumen, H-W., „Grundbegriffe der Beweislast“, in Baumgärtel / Laumen / Prütting, *Handbuch der Beweislast*, München 2009, p. 27.

⁹ Cf. Laumen, H-W., „Grundbegriffe der Beweislast“, in Baumgärtel / Laumen / Prütting, *Handbuch der Beweislast*, München 2009, p. 102.

¹⁰ Taruffo, M., "Casi una introducción", in Nieva Fenoll, Ferrer Beltrán, Giannini, *Contra la carga de la prueba*, Madrid 2019, p. 18-21.

¹¹ Ferrer Beltrán, J., "La carga dinámica de la prueba. Entre la confusión y lo innecesario", in Nieva Fenoll, Ferrer Beltrán, Giannini, *Contra la carga de la prueba*, Madrid 2019, p. 73.

¹² Barbosa Moreira, J.C., "Julgamento e Ônus da prova", p. 75: "Conforme bem se percebe, o primeiro aspecto (la carga subjetiva) desse conjunto de fenômenos tem relevância mais psicológica do que jurídica."

and by Luca Passanante¹³, among others, on the objective aspect. But the publications that have emerged so far on this abolitionist issue, writings that still defend the validity of the concept, have been extraordinarily cautious¹⁴.

Although it may be the simplest and most commonplace thing to do, it is impossible to support the existence of an institution simply by resorting to arguments *ad antiquitatem*, *ad populum* and *ad verecundiam*, three fallacies that claim to confirm that a conclusion is true simply because “since ancient times” it has been defended by “everyone”, including “authors of recognised prestige”. Things are not that easy. A conclusion is scientifically sound when its correctness can be epistemically defended, and when empirical data corroborating its presence appears, making that first step obvious. For example, *res judicata* exists because legal systems prohibit the repetition of judgments, which is perfectly tangible in practice, and not because doctrine or case law speak of it. On the contrary, many legal systems speak of the burden of proof, but the empirical significance of their words is null, beyond a simple indicative orientation, as we will see later. In any case, a legal institution cannot be sustained on faith. It must be apprehensible. Otherwise, it becomes a Russell’s teapot¹⁵, a surprising analogy that can even be formulated through the traditional logic of the burden of proof, although it has nothing to do with it: the existence of a concept must be proven by the one who affirms its existence, not by the one who denies it. Thus, when one tries to prove that the burden of proof exists, it is shown to be an unnecessary concept. However, it is also possible, at least in this case, to prove the non-existence of the notion in a system of free assessment of evidence, suggesting that the logic of the burden of proof itself is merely apparent.

2. THE SUBJECTIVE BURDEN: A LIVING CORPSE

The distinction between the objective and the subjective burden of proof is alien to Roman-canonical process¹⁶. However, the subjective burden of proof is the only aspect of this institution which, despite having been scientifically isolated in the 19th century in a somewhat artificial way¹⁷, coincides with its original meaning. It starts from a very rudimentary basis: every litigant in the process must provide evidence of what they claim, otherwise they will lose. So rudimentary was the idea—not the institution—that it can even be found

¹³ Passanante, L., “Per la difesa dell’onere della prova”, in Saccoccio; Cacace (ed.), *Europa e America Latina. Due continenti, un solo diritto*, Torino y Milano 2020, p. 798.

¹⁴ Mitidiero, D., *O ónus da prova e seus inimigos*, Revista de processo, n. 306, 2020, p. 17. Ramos, V. P., *La carga de la prueba en el proceso civil*, Madrid 2020 and again Passanante, “Per la difesa dell’onere della prova”, p. 798.

¹⁵ Russell, B., “Is There a God? [1952]”, in Slater, (ed.). *The Collected Papers of Bertrand Russell*, Vol. 11: Last Philosophical Testament, 1943–68 Routledge, p. 542.

¹⁶ Nörr, *Romanisch- kanonisches Prozessrecht*, p. 127.

¹⁷ Glaser, J., *Beiträge zur Lehre vom Beweis im Strafprozeß*, Leipzig 1883, p. 85.

before the history of Rome in the Code of Hammurabi¹⁸, which served nothing less than the death penalty for those who did not bring their evidence to the trial¹⁹. It is curious that even with such a radical provision, no one seems to have claimed that the burden of proof was born in Hammurabi's time. On the same basis, albeit heavily influenced by medieval doctrine, the classical authors²⁰ closest to our times affirmed that the plaintiff had to prove the facts constituting the claim, and the defendant the impeditive, extinguishing and excluding facts²¹.

Contrary to what has been said, the notion of the burden of proof does not come from the Roman process in any of its four historical phases. Kaser²², though he cites the institution, tiptoes over it. He practically excludes it in the process of the *legis actiones*²³, and mentions it for the first time in the period of the formal process, though not as an institution applied by any *iudex* in the *apud iudicem* phase, nor even by any *praetor* in the *in iure* phase, but simply as an expression of a basic idea: the logical thing is that each party proves what it asserts. This does not exclude—as Kaser explicitly states—that the *iudex*, or the *iudices*, could take advantage of the evidence of the opposing party to support the opposing party's position²⁴, as was logical in this process, something that was usually decided by juries²⁵ without any control over a supposed application of the burden of proof, since such control simply did not exist. This is a curious first reference to the so-called principle of acquisition²⁶.

One only begins to detect something similar to the institution—created only during medieval times in my opinion—in the Roman classical process of cognition, or *cognitio extra ordinem*. Kaser²⁷ refers to the *interlocutio* which would have dealt—again, according to the author—in that process with the

¹⁸ §§ 1, 7, 10, 11 o 13 of the Code of Hammurabi:

§1. If any one ensnare another, putting a ban upon him, but he can not prove it, then he that ensnared him shall be put to death.

§7. If any one buy from the son or the slave of another man, without witnesses or a contract, silver or gold, a male or female slave, an ox or a sheep, an ass or anything, or if he take it in charge, he is considered a thief and shall be put to death.

§10. If the purchaser does not bring the merchant and the witnesses before whom he bought the article, but its owner bring witnesses who identify it, then the buyer is the thief and shall be put to death, and the owner receives the lost article.

§11. If the owner does not bring witnesses to identify the lost article, he is an evil-doer, he has traduced, and shall be put to death.

§13. If the witnesses be not at hand, then shall the judge set a limit, at the expiration of six months. If his witnesses have not appeared within the six months, he is an evil-doer, and shall bear the fine of the pending case.

¹⁹ See Lara Peinado, *Código de Hammurabi*, Sassoon, J., *Ancient Laws and Modern Problems: The Balance Between Justice and a Legal System*, London 2001, p. 40.

²⁰ Cf. Pothier, R. J., *Traité des obligations*, in *Ouvres de Pothier*, T.I, Paris 1827, p. 436.

²¹ See, among many other authors, Leipold, *Comentario al §286 ZPO*, p. 527.

²² Kaser / Hackl, *Das römische Zivilprozessrecht*, München 1996, p. 363.

²³ Kaser / Hackl, *Das römische Zivilprozessrecht*, p. 118.

²⁴ Kaser / Hackl, *Das römische Zivilprozessrecht*, p. 364.

²⁵ Kaser / Hackl, *Das römische Zivilprozessrecht*, p. 151.

²⁶ Chiovenda, G., *Principi di Diritto Processuale*, Napoli 1923, p. 748.

²⁷ See also Passanante, "Per la difesa dell'onere della prova", p. 803.

question of the burden of proof. However, it is difficult to say whether the fleeting *interlocutio* to which Kaser²⁸ refers was concerned with the admission of evidence—as it seems to be²⁹—or with a supposed application of the burden of proof, which is perhaps less likely, as I will explain below. Finally, in the post-classical process, which is already directly inspired by the Roman-canonical process, Kaser³⁰ recognises that the institution becomes blurred.

Kaser's account is surprising: the institution is barely glanced over, suddenly appearing and then almost vanishing. However, there may be a good explanation for this kind of "burden of proof" escapism. In my opinion, it is not that a so-called institution called "the burden of proof" ceased to be used. If one reads the whole of Title III of Book XXII of the Digest, they will see that these passages speak of its title, *probationibus et praesumptionibus*, that is, of proof and presumptions, and not the burden of proof. To put it more simply, it speaks of the free assessment of evidence, which was the system of assessment of evidence in force at that time in Rome. The text merely establishes a series of guiding rules for free assessment in specific cases, citing the most typical clues to be found in some of the most frequent processes of the time, as it does with regard to documents in Title IV of Book XXII, and even with witnesses in Title V. Some of these indicative statements in fact served as a basis—or pretext—in the late Middle Ages to create the legal rules of evidence³¹, but originally they were not at all legal rules of evidence; in Rome, at least in classical times, the system of free assessment always prevailed.

Although it may seem otherwise in a more hurried or excessively literal reading, the Roman jurists did not actually state in these paragraphs *who* has to provide proof. This was a conclusion that was drawn in medieval times with what in my view was an ultra-literal interpretation, something very typical of that period of scholasticism. In reality, what those jurists were doing was merely setting out the most characteristic indications of the most difficult processes, applying the essential basic logic already mentioned to them, and thus concluding that whoever affirms something must prove it. Consequently, Title III together with IV and V of Book XXII of the Digest is not a small monograph on the burden of proof. It is a simple treatise providing guidelines on evidence, like many other more extensive ones that were written later³². This tradition has survived to the present day³³.

²⁸ Kaser / Hackl, *Das römische Zivilprozessrecht*, p. 493.

²⁹ See again Passanante, "Per la difesa dell'onere della prova", p. 803: "*In sostanza, la discrezionalità del giudice nella valutazione probatoria era anticipata nella fase anteriore alla pronuncia della Beweisinterlocut, nella quale venivano fissate le prove e distribuiti i relativi oneri. Successivamente la parte, portando nel processo la prova di cui era stata onerata, determinava direttamente il contenuto della sentenza del giudice*".

³⁰ Kaser / Hackl, *Das römische Zivilprozessrecht*, p. 593.

³¹ See one of the best-known medieval *probationes plenae*: the two-witness rule: D. 22.5.12: *Ubi numerus testium non adicitur, etiam duo sufficient; pluralis enim elocutio duorum numero contenta est*.

³² See, among others, Bruni, F., *Tractatus de indiciis, et tortura*, Lyon 1546. Hossfeld, F. *De indiciorum materia*, Altdorf 1665. Struve, G.A., *De indiciis*, Jena 1666. Hall, C. C., *De indiciis, eorumque vi, ad probationem in causis poenalibus efficiendam*, Copenhagen 1840.

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What Kaser said had become blurred was not the burden of proof. Instead, with the occurrence of many different cases over several centuries, the indicative rules guiding the judge contained in Book XXII of the Digest, which simply guided the judge on what evidence to use in each process as well as who was most likely to have that evidence, became a constant question of nuance.

These are precisely the rules—always admonitory in Roman times as free assessment was in force—that in the late Middle Ages were turned into rules of legal assessment by employing the scholastic method. They were often based, to be clear, on the literality of authoritative texts³⁴. In fact, when Kaser³⁵ claims that only Justinian tried to return to the tradition of classical period in this matter by supposedly recovering the burden of proof, what the emperor actually did was recall the basic mnemonic rule that went back, as we have seen, to at least the time of Hammurabi: he who asserts something must prove it³⁶: *quia semper necessitas probandi incumbit illi, qui agit*, or, as Celsus wrote at the beginning of the second century, *quod qui excipit, probare debeat*³⁷. Notably, the first passage reproduced above does not speak of *onus*, but of something quite different, and certainly not an obligation: *necessitas*.

Therefore, proof of the existence of the institution we know today as the burden of proof is missing in the Roman sources. In fact, the notion was doctrinally created in the medieval process of the *solemnis ordo iudiciarius*³⁸. In that process, it was the result of the gloss and commentary of the *Corpus Iuris Civilis*, a procedure that was conceived after a very cumbersome preliminary phase (*praeparatoria iudicii*)³⁹ that attempted to verify the subsistence of the dispute and the inexistence of procedural defects, *exceptiones dilatoriae*. A second phase began with the *litis contestatio*⁴⁰, i.e., the beginning of the *cum testes* process, or in other words, the proposition and practice of evidence.

The fact is that this second phase began with a brief claim and an even briefer reply in which the plaintiff's request was simply denied⁴¹. After both parties had taken the oath of slander—something that could end the proceedings unfavourably for the party who did not take the oath⁴²—the most important phase of the proceedings began. The plaintiff had to formulate his *positiones*, that is to say, their assertions of fact, to which the defendant

³³ Döhring, E., *La prueba, su práctica y apreciación*, Buenos Aires 1964. Muñoz Sabaté, Ll., *Técnica probatoria*, Barcelona 1967. *Tratado de probática judicial*, Barcelona 1992. Muñoz Sabaté, Ll., *Summa de probática civil. Cómo probar los hechos en el proceso civil*, Madrid 2008.

³⁴ Colish, M. L., *Medieval foundations of the western intellectual tradition, 400–1400*, London 1999, p. 25, 265–266, 319.

³⁵ Kaser / Hackl, *Das römische Zivilprozessrecht*, p. 598.

³⁶ D. 22, 3, 21.

³⁷ D. 22, 3, 9.

³⁸ Additionally, Nörr, K. W., *Romanisch-kanonisches Prozessrecht*, Berlin 2012, *passim*.

³⁹ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 59.

⁴⁰ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 109.

⁴¹ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 110–111.

⁴² Nörr, *Romanisch-kanonisches Prozessrecht*, p. 112.

replied with their *responsiones*, which were also assertions of fact formulated in their defence⁴³.

The list of *positiones* and *responsiones* formed the roadmap for the subsequent course of the proceedings⁴⁴, namely, the taking of evidence from those *positiones* and *responsiones*. Once they had both been formulated without any solution of continuity or express judicial decision—*interlocutio probationis* only occurred at a very early stage of the Roman-canonical process before disappearing⁴⁵—each litigant had to offer proof of each of the facts on their list⁴⁶ and the burden of proof was thus shared⁴⁷. If the plaintiff did not do so from the outset, the process had to be concluded⁴⁸ unless, to cover their evidentiary deficiency, they requested the oath of the opposing party, who usually had to take it in order not to lose the process. The oath is a nonsensical remnant of old ordeals⁴⁹ that is surprisingly still present in several countries⁵⁰. If, on the other hand, the plaintiff offered proof but the defendant did not offer their own, they were considered to have confessed and the proceedings were also concluded. Thus, the burden of proof, the *onus probandi*, was born, and it was taken into consideration, as can be seen, before the taking of evidence. Therefore, if the question is whether at this stage a litigant could lose the case because they did not meet the burden of proof of the facts they allege, the answer is undoubtedly yes.

At that point, the role of the burden of proof—in a clearly subjective version—had almost disappeared, but it still had a mission at the end of the process, something that has probably misled the doctrine by mixing up the burden of proof with the assessment of evidence in that same medieval process. At that time, let us remember, lawyers defended themselves in proceedings in the aforementioned preliminary phase (*praeparatoria iudicii*), formulating, above all, those dilatory exceptions with the aim of finding some procedural defect that would paralyse the plaintiff's claim. They also analysed whether both parties agreed, which could favour not only acquiescence or waivers, but also settlements. Once this phase had been overcome and the *litis contestatio* had been reached, the lawyers' task consisted of either complaining that the *positiones* had been formulated in an unclear manner⁵¹—the antecedent of the exception of defect in the way of proposing the claim⁵²—or that the *responsiones* were in fact *confessiones*⁵³, which made the proof unnecessary.

⁴³ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 116.

⁴⁴ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 118.

⁴⁵ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 122.

⁴⁶ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 117, 122.

⁴⁷ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 123.

⁴⁸ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 175.

⁴⁹ See Patetta, F., *Le ordalie*, Torino 1890, p. 14-15.

⁵⁰ See for example arts. 2736 ff. of the Italian *Codice Civile* and 233 ff. of the Italian *Codice di Procedura Civile*.

⁵¹ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 119.

⁵² See art. 424 of the Spanish Procedural Code.

⁵³ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 121.

But once both lists of facts had been established, the litigants, as already mentioned, offered their proof, thus complying with the *onus probandi*. At the same time, in that precise moment, efforts were also focused on objecting to witnesses and documents.

The reason for these objections was very clear. At that time, judges did not listen to witnesses⁵⁴ and sometimes did not even read documents as they were often relatively illiterate⁵⁵. Instead, perhaps because of the influence of Germanic law and its very frequent use of witnesses to confirm—or attest to—legal acts⁵⁶, their credibility was not assessed by listening to them, but simply by ascertaining that they were willing to confirm under oath what the plaintiff or defendant said, which was entirely logical from a purely religious point of view. The same thing happened with public documents: a notary was willing to confirm their veracity with his faith, another way of taking an oath.

However, as I have said, the effort in this phase also lay in objecting to witnesses and documents, given that neither one nor the other could be freely assessed. There was no way of doing so since the oath was imposed; the proof that had remained for each party was simply added up, and the litigant who obtained the greatest amount won the process⁵⁷. In other words, the winner was they who had better fulfilled their burden of proof by placing a greater weight of evidence on their respective plate in an imaginary procedural scale of justice⁵⁸. The distinction between *plena probatio* and *semitplena probatio* (also called *probatio summaria*) was of great importance in this situation since the former had greater legal value than the latter⁵⁹. *Plena probatio* was usually fulfilled with a pair of witnesses, a public document or an *iuramentum veritatis*⁶⁰—much more infrequent than slander oath, which was systematic and did not have full probative value—so that someone with 10 witnesses

⁵⁴ Nörr, *Romanisch- kanonisches Prozessrecht*, p. 123.

⁵⁵ See Partida III, Ley III, o NR, Libro XII, Título XXXII, Ley III D. Fernando and D^a Isabel, in Instrucción de Corregidores de 1500, Ch. 36. See also Montero Aroca, J., *La justicia municipal*, in *Estudios de Derecho Procesal*, Barcelona 1981, p. 91.

⁵⁶ See Eckhardt, Karl August, *Lex Salica*, 100 Titel-Text, Weimar 1953: “1. Si quis ad mallum venire contempserit aut quod ei a rachineburgiis fuerit iudicatum adimplere distulerit, si nec de compositione nec in eo nec de ulla legem fidem facere voluerit, tunc ad regis praesentia ipso manire debet. Et ibi duodecim testes erunt qui per singulas vices tres jurati dicant, quod ibi fuerunt ubi rachineburgius iudicavit, ut aut ad in eo ambulet aut fidem de compositione faceret et ille dispexerit. Iterum alii tres jurare debent ut ibi fuissent illa die quando rachineburgii iudicaverunt, ut aut per in eo aut per compositione se educeret, hoc est de illa die in XL noctis in mallobergo iterum ei solem collocaverit et nullatenus legem voluerit adimplere. 2. Tunc eum debet manire ante regem hoc est in noctes XIV et tria testimonia jurare debent, quod ibi fuerunt ubi eum manivit et solem collocavit. Si nec tunc venit, ista novem testimonia jurati sicut superius diximus dicant. Similiter illa die si non venerit, collocet ei solem et illa tria testimonia qui ibi fuerunt ubi collocavit solem, iterum jurare debent. Tunc si ille qui admallat, ista omnia impleverit et qui admallatus est, ad nullum placitum venire voluerit, tunc rex ad quem manitus est, extra sermonem suum ponat eum. Tunc ipse culpabilis et omnes res suas erunt. Et quicumque eum aut paverit aut hospitalem dederit, etiam si uxor sua proxima, hoc est DC dinarios qui faciunt solidos XV culpabilis iudicetur, donec omnia que imputatur componat.”

⁵⁷ Nörr, *Romanisch- kanonisches Prozessrecht*, p. 190.

⁵⁸ See Jaumar and Carrera, J., *Práctica forense*, Barcelona 1840, p. 48.

⁵⁹ Nörr, *Romanisch- kanonisches Prozessrecht*, p. 129.

⁶⁰ Nörr, *Romanisch- kanonisches Prozessrecht*, p. 115.

and one public document possessed six *plena probaciones*. A single witness or a non-public document was reduced to the value of semi-full proof, though this was variable⁶¹, about half. Thus, a litigant with 10 witnesses, one public document and one private document had six full items of proof and one 0.5 half-full proof, thus totalling 6.5. If their opponent had managed to add 12 witnesses and two private documents, he had six full items of proof and two (0.5+0.5) half-full proofs, i.e., a result of 7. In the production of evidence, the judge naturally did not have any role whatsoever, except in the *iuramentum veritatis*, which could be ordered by the judge in spiritual and matrimonial proceedings⁶². They always judged *secundum allegata et probata (partium)*⁶³ in a full adversarial manner. Although judges could assess the evidence in a reasonably free manner⁶⁴, this was not the norm, and instead the mathematical system already described was applied. This absurdity at the time was not only the result of the aforementioned influence of Germanic law but also most likely because of mistrust in the role of judges: they were not independent, being appointed by nobility or royalty⁶⁵, and were often poorly educated in law, as already mentioned.

All of the above ceased with the reintroduction of the free assessment of evidence in the 19th century, a true procedural enlightenment and a return to the Roman past in which the burden of proof no longer existed as a mere mnemonic description of something that was simply logical—whoever asserts something must prove it⁶⁶—for the simple reason that it is not possible to initiate, maintain or win proceedings in a vacuum.

Before continuing, reference must be made again to an important statement in the Digest: *ei incumbit probatio qui dicit, non qui negat*⁶⁷. The phrase in question must be put into context in order to be properly interpreted. First, note that the Digest in that passage does not speak of *onus probandi*, as has sometimes been said in quoting the same sentence, but simply of *probatio*. This is already a remarkable fact. It is not until a few numbers further on, in the title itself, that Paulus, who was also the author of the first sentence, pronounces the words *onus probationis*⁶⁸, though it does not seem that he is referring to any institution, or even creating one. The word *onus* is very frequently used in the Digest, referring to many different obligations, respon-

⁶¹ See again Jaumar and Carrera, *Práctica forense*, p. 48.

⁶² Nörr, *Romanisch-kanonisches Prozessrecht*, p. 115.

⁶³ See Nieva Fenoll, “El mal nombre del principio inquisitivo”, *Justicia*, 2014, n. 1, p. 131, also published in Italian as “la cattiva reputazione del principio inquisitorio”, *Rivista Trimestrale di Diritto e Procedura Civile*, vol. 68, n. 3, 2014, p. 943.

⁶⁴ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 191.

⁶⁵ Azzone, *Brocardica (aurea)*, rúbrica XX, p. 235-236: “*Maiores iudex de his quae ad sui subditi iurisdictionem spectant, se intromittere non debet: nisi negligens fuerit, vel aliqui ante eum appellati*”. Nieva Fenoll, “La actuación de oficio del juez nacional europeo”, *Justicia*, n. 1, 2017, p. 181, also in *Rivista Trimestrale di Diritto e Procedura Civile*, n. 4, 2019, p. 1223.

⁶⁶ Cf. Passanante, “Per la difesa dell’onere della prova”, p. 810.

⁶⁷ D. 22.3.2.

⁶⁸ D. 22.3.25.3: *In omnibus autem visionibus quas praeponimus licentia concedenda est ei, cui onus probationis incumbit, adversario suo rei veritate iusiurandum ferre...*

sibilities and even missions. But if one examines the whole of Title III of Book XXII, one sees that what these passages do is simply establish, as already mentioned, a list of indications for different processes, stating who is most likely to have proof, all with the intention of helping the judge by providing them with a guide, albeit with admonition. It does not give birth to an entire institution that would supposedly have been important for a Roman jurist. For example, when the Digest constantly refers to *res iudicata*⁶⁹, *actio, exceptio*⁷⁰, *interdictum*⁷¹ or *appellatio*⁷², it devotes whole passages to them that are absent in the case of the burden of proof.

All this contrasts extraordinarily with works of medieval law in which *onus probandi* is not only very present⁷³, but also not infrequently dealt with at the beginning of the explanations on proof⁷⁴, coinciding with the temporal place reserved for it during the process at the beginning of the *litis contestatio*. It seems that medieval jurists, relying on a scholastic reading that was always exaggeratedly literal of the *Corpus Iuris Civilis*, created an institution that made sense in their time, but which had not really existed in Rome. This influenced more modern doctrine. People often try to identify fact or logic in the present by looking for them in the past, ignoring the fact that the past must be interpreted in its own context, without help from the future, which is completely alien to it. It is possible to make the history of law travel forward in time to the present day, but trying to do so in the other direction, though highly evocative, is like trying to identify European legal institutions in traditional Amazonian law; there will always be elements that resemble each other, but they will not usually be common.

We arrive in the 18th century with *onus probandi*, an institution that existed in the evidentiary system of the time: the legal system. Suddenly, precisely to break with the legal system, someone suggested copying the English jury, giving rise to the struggle for the reconquest of the free assessment of evidence, which had been cornered in the late Middle Ages by the scholars of Bologna. That someone, as is well known, was Jeremy Bentham⁷⁵.

⁶⁹ D. 42.1; D. 44.2.

⁷⁰ D. 44.1.

⁷¹ D. 43.1.

⁷² D. 49.1.

⁷³ Bartolo de Saxoferrato frequently used the expression "*onus probandi*". See Bartolo, *Bartoli a Saxoferrato Commentaria, in II. partem infortiati*, Basel 1588, tit. IV, L. V, p. 468.

⁷⁴ Azo, *Summa Azonis*, Venecia 1610, Rubrica XV, p. 42. Duranti, G., *Speculum iuris*, p. II, Venecia 1585, *De probationibus* and *Qui et qualiter debent probare*, p. 618, 619. Bulgari, *Summa de iudiciis*, Tit. 53, p. 91, in Wunderlich, A., *Anecdota quae processum civilem spectant*, Göttingen 1841.

⁷⁵ Bentham, J., *Traité des preuves judiciaires*, Paris 1823, t. II, p. 9. "...on remonte à l'origine de ces règles si gênantes et si peu raisonnables, de cette variété de tribunaux qui ont chacun leur système et qui multiplient si étrangement les questions de compétence, de ces fictions puériles qui mêlent sans cesse l'œuvre du mensonge à la recherche de la vérité. L'histoire de cette jurisprudence est le contraire de celle des autres sciences : dans les sciences, on va toujours en simplifiant les procédés de ses prédécesseurs ; dans la jurisprudence, on va toujours en les compliquant davantage. Les arts se perfectionnent en produisant plus d'effets par des moyens plus faciles ; la jurisprudence s'est détériorée en multipliant les moyens et en diminuant les effets."

Bentham, in a similar vein to Beccaria⁷⁶, had suggested that judges should see and hear the witnesses⁷⁷ and judge according to their *intime conviction*⁷⁸, as that was the way juries did in his country. Bentham was first heeded in France⁷⁹. Consequently, it was no longer necessary to add up witnesses, but rather to listen to them. It was no longer necessary to add up documents, but rather to read them. Thus, what two witnesses said could no longer be worth more than what one witness said because it was now dependent on the credibility that the judge attributed to them. As the evidence was freely assessed, it was no longer possible to decide the case by looking at which party had met its burden of proof; the evidence provided by both litigants was no longer simply added up separately, taking for granted that what was provided by each party undoubtedly benefited them. It was now possible that evidence provided by one of the parties could benefit the other, which not only inaugurated the presence of Chiovenda's⁸⁰ so-called principle of acquisition, but also rendered the application of the logic of the burden of proof useless, at least in its subjective aspect. Evidence was to be freely assessed, irrespective of who had provided it. The absurd assumptions as to the fulfilment of the burden at the beginning of the trial were no longer established. Evidence was to be assessed as a whole (§286 ZPO)⁸¹ and facts that a judge was able to establish as true in the light of evidence were considered proven. It was the same thing the English juries did, but it motivated the judgment, and did not

⁷⁶ Beccaria, C., *Dei delitti e delle pene*, reed. de Acquarelli de Bussolengo 1996, in the 1764 edition, p. 45. "Se nel cercare le prove di un delitto richiedesi abilità e destrezza, se nel presentarne il risultato è necessaria chiarezza e precisione, per giudicarne dal risultato medesimo non vi si richiede che un semplice ed ordinario buon senso, meno fallace che il sapere di un giudice assuefatto a voler trovar rei e che tutto riduce ad un sistema fattizio impreato da' suoi studi."

⁷⁷ Bentham, *Traité*, p. 13-14: "Voyons maintenant quels sont les traits les plus éminents de cette procédure domestique ou naturelle. Le père de famille, dès qu'il s'élève une contestation entre les personnes qui dépendent de lui, ou qu'il est dans le cas de prononcer sur quelque contravention à ses ordres, appelle les parties intéressées à paraître devant lui ; il les admet à témoigner en leur propre faveur ; il exige une réponse à toutes ses questions, même à leur désavantage ; et il considère leur silence comme un aveu, à moins qu'il n'entrevoie des motifs qui peuvent engager l'innocent même à se taire. Il fait son interrogatoire sur le lieu même ; la réponse est donnée immédiatement après chaque question, sans qu'on connaisse celle qui doit suivre. Il n'exclut aucun témoin : il écoute tout, en se réservant d'apprécier chaque témoignage ; et ce n'est pas d'après le nombre, mais d'après la valeur des témoins, qu'il prononce. Il permet à chacun d'eux de faire son narré de suite, à sa manière, et avec les circonstances nécessaires pour la liaison du tout. S'il y en a qui se contredisent, il les confronte immédiatement, il les met aux prises l'un avec l'autre, et c'est de ce conflit que la vérité jaillira. Il cherche à arriver à une conclusion prompte, pour ne pas fomentier des germes de dissension dans sa famille ; et parce que des faits récents sont plus aisément connus et prouvés, il n'accordera de délais que pour des raisons spéciales."

⁷⁸ Bentham, *Traité*, p. 5: "Qu'est-ce qu'une fausse règle en matière de procédure ? C'est une règle qui tend à mettre en contradiction la décision du juge et la loi ; qui entraîne le juge à prononcer contre sa persuasion intime, à sacrifier le fond à la forme..."

⁷⁹ Spanish Law of September 16-21, 1791.

⁸⁰ Chiovenda, G., *Principi di Diritto Processuale*, 3^a ed. Napoli 1923, p. 748.

⁸¹ § 286 Freie Beweiswürdigung. (1) Das Gericht hat unter Berücksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Überzeugung zu entscheiden, ob eine tatsächliche Behauptung für wahr oder für nicht wahr zu erachten sei. In dem Urteil sind die Gründe anzugeben, die für die richterliche Überzeugung leitend gewesen sind. (2) An gesetzliche Beweisregeln ist das Gericht nur in den durch dieses Gesetz bezeichneten Fällen gebunden.

leave everything to the best of their knowledge⁸², or *intime conviction*, as the French translated it.

All this rendered the “inversions” of the burden of proof, the “lightening” of that same burden⁸³ and the “evidential facility”⁸⁴ absurd. This, by the way, was the initial basis for the classic distribution of the burden of proof as well as, of course, that nostalgic modern formulation, the so-called “dynamic” burden of proof⁸⁵, all of which are reactions of doctrine and case law that tried in vain to preserve the validity of an institution that had ceased to make sense, completely altering its original approach. Such notions—inversions, lightening, ease, dynamic burden—are nothing more than situations identified by the majority of case law in which it is foreseen that one of the parties, usually—although not always—a vulnerable party who finds it difficult to defend themselves in the proceedings because of a lack of easy access to the evidence. Thus, their version is given initial credibility, even if it is supported by little to no evidence, and the opposing party is warned that they must make a greater effort than usual to prove what they say or disclose evidence available to them. If they do not do so, even if it is not said in such an icy or unpleasant way, the process will be decided against them as it will be understood that they are hiding evidence because it would favour their opponent. In other words, the evidentiary deficiency of a litigant who could easily obtain such evidence is interpreted as manipulation of reality to procedural advantage, or hiding evidence. Consequently, they are condemned on the basis of what is a simple indication of concealment. All this is not about burden of proof, however, but rather the assessment of a *prima facie* case. It is clearly about the free assessment of evidence.

In conclusion, the free assessment of evidence, with its inherent principle of acquisition, renders the study of the subjective burden of proof obsolete. It must therefore be considered doctrinally superseded. Let us now explore whether the other meaning of the burden of proof, the objective, can retain some validity.

⁸² Blackstone, *Commentaries*, p. 290-291.

⁸³ Rosenberg / Schwab / Gottwald, *Zivilprozessrecht*, p. 770.

⁸⁴ Bentham, J., *Traité des preuves judiciaires*, t. II, Lib. VII, cap. XVI, p. 163. See also De Fano, M., *Negativa qualiter probanda*, in AAVV, *Tractatus illustrium in utraque tum Pontificii, tum Caesarei iuris facultate Iurisconsultorum, De Probationibus*, T. IV, Venecia 1584, p. 12, n. 3. Serra Domínguez, M., “Comentario al art. 1252 del Código Civil”, in *Comentarios al Código Civil y compilaciones forales* (dirigidos por Albaladejo), Madrid 1991, tomo XVI, vol. 2, p. 66-68. Besso-Marcheis, “La vicinanza della prova”, *Revista Eletrônica de Direito Processual*, v. 16, 2015, p. 93. In: <http://www.e-publicacoes.uerj.br/index.php/redp/article/view/19962/14303>

⁸⁵ Peyrano, J. W. (ed.), *Cargas probatorias dinámicas*, Buenos Aires 2008, p. 13, 19 and 75.

3. THE OBJECTIVE BURDEN: A JUDICIAL ACTIVITY WITH AN IMPROPER NAME

In the judicial process of the *solemnis ordo iudiciarius*, as we have seen in the above, considerations of assessment and distribution of the burden of proof were mixed in at least two moments. At the beginning of the process, when those who did not offer proof, or all the proof they offered had been objected to, they were made to lose the process. It occurred at the end of the process, when the contribution of each party was “weighed” using the oldest known evidential standards: *probatio plena* and *semiplena probatio*. This activity of weighing the evidence, which was typical of the legal evidence regime, replaced the free assessment of evidence. In fact, it could be said that this “weighing of evidence”, or “legal assessment of evidence”, was not really an assessment at all, but rather a simple application of the burden of proof. Each party had met or failed to meet its burden to a greater or lesser extent. Depending on the arithmetical result, a decision was made. While quite absurd, as we know, this was very simple to apply in practice, and that is why it was successful. In the end, the courts, as a pure and logical defence against their workload, look for the simplest solutions that involve the least amount of effort, as long as they are, at the same time, apparent.

With this explanation, it is understandable for confusion to arise between concepts and the emergence of the objective burden of proof. It appeared in the doctrine in criminal proceedings⁸⁶ with the obvious realisation that the subjective burden of proof cannot be applied in such proceedings since the defendant is not obligated to prove anything and in fact the public prosecutor does not even have to prove the accusation. Contrary to popular belief, public prosecutors simply contribute to the clarification of the facts by ascertaining the prosecution's, and also the defence's, evidence related to the crime that is the object of the proceedings. In this way, the work of the public prosecutor is alien to the institution of the subjective burden of proof. Their mission is simply to collaborate in establishing the truth. As has long been peacefully asserted in German doctrine, public prosecutors are not a party to the proceedings⁸⁷.

Glaser⁸⁸ considered that another variety of the burden of proof persisted, however: consideration of the old standards for ascertaining which facts were proven and which were not. Reaching those evidential levels in order to establish guilt in criminal proceedings achieved a new standard, the *probatio plenissima*⁸⁹, superior to *probatio plena*, which, in part, tried to reflect in Eng-

⁸⁶ Glaser, J., *Handbuch des Strafprozesses*, vol. I, 1883, p. 364.

⁸⁷ Peters, K., *Strafprozeß*, München 1985, p. 164, Kleinknecht, T. / Meyer, K. / Meyer-Goßner, L., *Strafprozeßordnung*, München 1995, p. 1440.

⁸⁸ Glaser, *Handbuch des Strafprozesses*, p. 364.

⁸⁹ Nörr, *Romanisch-kanonisches Prozessrecht*, p. 129.

land the standard of beyond any reasonable doubt⁹⁰. It is very complex to put into practice, however, and in fact was probably the first sign of judicial liberation from the ties of the legal system of proof in favour of the free assessment of evidence, at least in part. Glaser⁹¹ called this consideration of the determination of evidentiary levels or standards the objective burden of proof. It was, after all, the final stage of consideration of the medieval *onus probandi* in the legal system of proof. When the litigant provided evidence, thus meeting the subjective burden, it determined whether they had done so sufficiently.

In the legal system, this question was answered by adding up and weighing, so it would have been easy to confuse it with the subjective burden of proof, given that both were oriented towards the same objective: to decide the winner of the trial automatically. But when we move from the legal system to the system of free assessment, everything changes. It is no longer weighed, but balanced. The judge must evaluate the clues offered by the evidence without being bound by comfortable automatisms or prejudices in order to search for material that will allow them to justify why they believe an evidential result to be credible. However, this is no longer burden of proof, but the assessment of evidence itself. It is simply the assessment of that evidence that a judge will carry out simultaneously while perceiving the results of the evidence. It is not possible to perceive without assessing, and what is not assessed is overlooked, as cognitive psychology confirms⁹².

Calling this process the “burden of proof”, although it has an obvious historical explanation, is currently misleading and, above all, highly disorienting. For those unfamiliar with the functioning of the old medieval process, it is very easy to become confused about the content of the notion.

A different question is whether assessment should be guided by the guard rails of evidential standards—*sempierna probatio*, *plena probatio*, *probatio plenissima*—as the system of legal evidence did, or whether it should be left completely to the discretion of the judge, as the system of free assessment dictates. In this sense, the attempts to redirect this matter to a logic of standards⁹³ have either been very polemical⁹⁴ or simply refer to phrases that attempt to guide mostly judicial bodies that do not motivate: the jury⁹⁵. The guiding effectiveness of these fine phrases in conveying their content—*probable cause*,

⁹⁰ Whitman, J. Q., *The origins of reasonable doubt*, New Haven and London 2005, p. 193 and 202. Mueller, C. B. / Kirkpatrick, L. C., *Evidence*, New York 2003, p. 130.

⁹¹ Glaser, *Handbuch des Strafprozesses*, p. 364.

⁹² See Manzanero, A. L., *Psicología del testimonio*, Madrid 2008, p. 31.

⁹³ Ferrer Beltrán, J., *Prueba sin convicción*, Madrid 2021, p. 109.

⁹⁴ González Lagier, D., “¿Es posible formular un estándar de prueba preciso y objetivo? Algunas dudas desde un enfoque argumentativo de la prueba”, *Revista telemática de filosofía del derecho*, n. 23, 2020, p. 79. Dei Vecchi, D., *Los confines pragmáticos del razonamiento probatorio*, Lima 2020. Fernández López, M., “La valoración de las pruebas personales y el estándar de la duda razonable”, *Cuadernos Electrónicos de Filosofía del Derecho*, núm. 15, 2007. Gascón Abellán, M., “Sobre la posibilidad de alcanzar estándares de prueba objetivos”, *Doxa*, 2005, n. 28, p. 127.

⁹⁵ Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, §2497, p. 3543-3544.

preponderance of evidence, clear and convincing evidence, beyond any reasonable doubt—is more than debatable and, in the case of the jury, impossible to analyse *a posteriori* in the absence of motivation in the jurors⁹⁶.

However, it may be useful to apply the method on which the configuration of these standards is based, which is fundamentally inductive probability⁹⁷. It is an excellent way of assessing evidence by not focusing all activity on a single hypothesis, but also on the other hypotheses that have emerged in order to rule them out. All of this entails an inevitable subjectivity in the formulation of the hypotheses and even in the evaluation of the result. Having this subjectivity channelled through a method is not something to be rejected, but rather desirable. A second question would be how to reach evidential thresholds based on this method. Given its inherent subjectivity, the calculation of these thresholds is either radically objectified, as in the regime of legal proof, or it becomes nothing more than an impossible desire. It is not really feasible to soundly defend that one event of the past being investigated in the process, a fact subject to proof, is with total exactitude more or less probable than another. Since the judge has not witnessed those events or knows all the circumstances, the conclusions are no more than hypotheses. It is not like proving the existence of a black hole or the efficacy of a drug. In the process, we can only reconstruct traces of reality but never confirm them *beyond a reasonable doubt*, no matter how often the phrase is repeated. What we can do is try to minimise these doubts, and this is what this standard asks of us. Reconstructing reality to this very fine point is not really feasible, however. In the process, we will always have a version that has been proven as if we were walking on hot coals. We will be able to explain how we have cornered the inevitable doubts about a version of events, but like a historian⁹⁸, we will never be able to claim that this, and only this, is what happened. While disappointing, as humans we have limitations, and this is one of them. Perhaps in the future we will find a way to confirm legal facts with the same efficiency as corroborating the existence of the Higgs boson. For the moment, it is science fiction.

4. THE BURDEN OF PRODUCTION: A USEFUL INSTITUTION IN AN ANACHRONISTIC PROCESS

It comes as a great surprise that when we look at the Anglo-Saxon systems, which are different from each other but with much in common, we

⁹⁶ Ginther, M.; Cheng, E.K., "Surprise vs. Probability as a Metric for Proof", *Seton Hall Law Review* 48, n. 4, 2018, p. 1081. Pardo, M. S., "Epistemology, psychology, and standards of proof: An essay on Risinger's surprise theory", *Seton Hall Law Review*, 48(4), 2018, p. 1039. Risinger, D., "Leveraging surprise: What standards of proof imply that we want from jurors, and what we should say to them to get it", *Seton Hall Law Review*, 48(4), 2018, p. 965. Kagehiro, D. K. / Stanton, C., "Legal vs. Quantified Definitions of Standards of Proof", *Law and Human Behavior*, vol. 9, n. 2, 1985, p. 160.

⁹⁷ Cohen, L. J., *The probable and the provable*, Oxford 1977, p. 121.

⁹⁸ See Calamandrei, "Il giudice e lo storico", in *Rivista di diritto processuale civile*, XVII, 1939, p. 105.

again come across the burden of proof. There are two varieties: the burden of production and the burden of persuasion, in addition to the burden of allegation, which evokes the old system of *positiones* and *responsiones*, something we will leave aside for the moment. It is also surprising to see how the burden of production coincides with the subjective burden of proof⁹⁹ in the version influenced by the principle of evidential facility/*vicinanza probatoria*¹⁰⁰, while the burden of persuasion coincides with the objective burden¹⁰¹. What happened here?

It is a simple but little-acknowledged fact that not only did English jurists study Roman law in depth as a priority, at least until the end of the 18th century¹⁰², but English law also considered the Roman-canonical process of the *solemnis ordo iudicarius*¹⁰³. Although it followed partly different paths, above all as a consequence of the trial phase before juries, in reality the procedural structure of the Anglo-Saxon systems divided into two phases, pretrial and trial, are strongly reminiscent not only of the *praeparatoria iudicii* and the *litis contestatio* of the medieval process shaped by glossators and commentators of Bologna, where Englishmen also studied in the Middle Ages¹⁰⁴, but also of the phases *in iure* and *apud iudicem* of the old Roman formulary system. In fact, the *in iure* phase was held before a *praetor*, and the *apud iudicem* was usually held before juries¹⁰⁵, not unlike the pretrial (before a judge) and the trial (before a jury) in the US. The difference between barrister and solicitor is also much more faithful to the *procurator/advocatus* model in the English system, though this is a different issue.

The current Anglo-Saxon-inspired process has an extraordinarily old structure that its users seem to find useful, if not highly debatable. It all begins with a very long¹⁰⁶ pre-trial phase—just as *praeparatoria iudicii* were also very long—in which the aim is above all to negotiate. In the *solemnis ordo iudicarius* the aim was likewise to check whether the dispute still existed. But in this phase, there is also something of the old preliminary phase of the *litis contestatio*: the *positiones* and the *responsiones*, that is, the claim and the defence, that the judge tries to understand requires the parties to comply, naturally, with the burden of production, or in other words, with the subjective burden of proof. And indeed they do, otherwise it is possible for the judge to say that the case has no prospects of success for the party who has not

⁹⁹ Redmayne, M., "Standards of Proof in Civil Litigation", *Modern Law Review* 62, n. 2, March 1999, p. 172. Dennis, *The Law of Evidence*, London 2013, p. 442.

¹⁰⁰ Besso-Marcheis, "La vicinanza della prova", *Revista Eletrônica de Direito Processual*, v. 16, 2015, p. 93. In: <http://www.e-publicacoes.uerj.br/index.php/redp/article/view/19962/14303>

¹⁰¹ Dennis, *The Law of Evidence*, p. 441.

¹⁰² See Blackstone, W., *Commentaries on the Laws of England*, Lib. I, London 1768, p. 3.

¹⁰³ See Bracton, H., *DeLegibus et Consuetudinibus Angliae*, London 1569, Lib. III, Cap. VIII. Gordon, W., "A Comparison of the Influence of Roman Law in England and Scotland", in *Roman Law, Scots Law and Legal History: Selected Essays*, Edinburgh 2007.

¹⁰⁴ See again Bracton, *DeLegibus et Consuetudinibus Angliae*, London 1569, Lib. III, Cap. VIII.

¹⁰⁵ Kaser / Hackl, *Das römische Zivilprozessrecht*, p. 192-197.

¹⁰⁶ Andrews, N., *English Civil Justice*, Cambridge 2009-2010, p. 21.

fulfilled their burden, according at all times to the judge¹⁰⁷. They can issue a summary judgement against the non-compliant party to avoid the trial¹⁰⁸. Thus, parties go on and on, producing more and more documents, summoning witnesses and making them sign affidavits in the purest medieval style of ratifying witnesses without seeing or hearing them. In this system, therefore, *onus probandi*, the subjective burden of proof, or the burden of production, makes perfect sense. Or does it?

We find ourselves with a system that theoretically uses the free assessment of evidence, but has retained absolute inquisitorial judicial powers in the pre-trial in a supposedly adversarial process. What is the explanation for all this? It would take a long time to specify, and merits further research, but of course fear of the unpredictability of the jury¹⁰⁹, and of course of summary judgment¹¹⁰, have played an important role. However, there is a much more contemporary logic to the way the process has been configured. Judicial process is a public service that does not fit well with neo-liberal logic, which aims to privatise everything, including litigation, so that the most powerful do not get placed on an equal footing with others in the eyes of a judge. The least powerful would end up suffering a terrifying inequality in an area where no one is looking out for them: alternative means of conflict resolution. Thus, ineffective mediations arise, their sole purpose being to wear down the weak with time and money, with arbitration in the hands of arbitration institutions influenced by major economic powers, or negotiations in general in which the vulnerable have everything to lose. In short, the judicial process becomes one more victim of neoliberalism, the process having maintained medieval procedural instruments so that, far from the liberal schemes of the 19th century, a court of law is once again a place that is alien to the vast majority of the population.

5. THE BURDEN OF PERSUASION: AN IMPOSSIBLE DESIRE

What about the burden of persuasion?¹¹¹ It is little more than a matter of faith. A chimera. An establishment of evidentiary thresholds: probable cause¹¹², preponderance of evidence¹¹³, clear and convincing evidence¹¹⁴, and beyond any reasonable doubt¹¹⁵, which are identical respectively to *semi-ple-*

¹⁰⁷ Civil Procedure Rules. Part. 24. Summary Judgment.

¹⁰⁸ See Rule 56, Summary Judgment, Federal Rules of Civil Procedure.

¹⁰⁹ Hans, V. P. / Eisenberg, T., "The Predictability of Juries", *DePaul Law Review*, 2011, 60, p. 375.

¹¹⁰ Robertson, "The Right to Appeal", 91, *The North Carolina Law Review*, 2012-2013, p. 1219.

¹¹¹ Dennis, *The Law of Evidence*, p. 441.

¹¹² IV Amendment of the US Constitution.

¹¹³ Redmayne, M., "Standards of Proof in Civil Litigation", *Modern Law Review* 62, no. 2, March 1999, p. 167.

¹¹⁴ Redmayne, M., "Standards of Proof in Civil Litigation", p. 187.

¹¹⁵ Laudan, *Truth, error and Criminal Law*, p. 29.

na probatio, *probatio summaria* or *probatio prima facie* broken down onto two levels, *plena probatio* and *probatio plenissima*. In short, a simple imitation of old realities in the system of legal evidence that fortunately no longer exist.

Such copying has not really been conscious, and so almost all the old medieval evidentiary standards from which they derive have been forgotten in the Anglo-Saxon sphere. They are not even cited, except for *probatio prima facie*¹¹⁶, with exactly the same meaning it had in the Roman-canonical process, i.e., the initial sufficiency of proof, observed at first sight.

The question to be elucidated behind these phrases, and others like them, is whether there can be anything scientific that escapes simple intuition. There undoubtedly was when, as we have seen, *plena probatio* and *semiplena probatio* were determined precisely. But when we look beyond simply fossilised schemes to achieve epistemic categories, it is extremely difficult, if not impossible. We can attempt to construct these levels on the basis of the plural formulation of hypotheses inherent to probability¹¹⁷, but this formulation will be more or less complete depending on effort, creativity or even the will of the person doing the work. This implies an element of maximum insecurity that is simply unacceptable. We already know that when it comes to reconstructing past events, we cannot draw conclusions as we would in the world of physics or chemistry because we cannot contrast it with other similar hypotheses. Thus, Bayes' theorem¹¹⁸ fails in this context.

This creative formulation of hypotheses is what police, prosecutors and judges have done throughout history. Drawing on their personal and professional experience, they try to put together the pieces at their disposal to create a puzzle that corresponds to that previous experience. They do this mainly by using representativeness heuristic¹¹⁹, i.e., making a rough statistical calculation that can be quite imprecise or even crude as it simply depends on their intuition governed by the use of the heuristic, in other words, their experience. This has given human beings a sense of justice on many occasions over the millennia. The time has come to find something better without insisting on the initial model or even passing it through the sieve of epistemology.

There are situations where data can completely confirm a fact without the need to go into further complexities. They are more frequent than it would seem, especially in civil proceedings, where documentary evidence is king, not only thanks to written documents, but also the ease with which we can access communications by e-mail, text messages or even recordings from se-

¹¹⁶ Herlitz, G. N., "The Meaning of the Term Prima Facie", *Louisiana Law Review* 55, no. 2, 1994-1995, p. 391.

¹¹⁷ See Ferrer Beltran, *Prueba sin convicción*, *passim*.

¹¹⁸ Cf. Edwards, W. / Lindman, H. / Savage, L. J., *Bayesian Statistical Inference for Psychological Research*, Psychological Review, 1963, 70, p. 193. Finkelstein, Michael O., *Basic concepts of probability and statistics in the Law*, New York 2009, p. 11. See, in a broad sense, Taruffo, *La prueba*, p. 200.

¹¹⁹ Kahneman, D. / Tversky, A., *Subjective probability: A judgment of representativeness*, in: "Kahneman / Slovic / Tversky (ed.), *Judgment under Uncertainty: Heuristics and Biases*. Cambridge 1982, p. 33.

curity cameras, and the simplicity of corroborating an alibi with the presence of our electronic devices at a certain place. Such data was inconceivable only 40 years ago, but today we have it, and therefore we can no longer ignore it and continue to rely predominantly on intuition, as the case has been traditionally.

Moreover, scientific evidence, especially biological evidence, has now allowed materials that were once useless to tell us a great deal about the participants in the places where the evidence is found. DNA fingerprints are relatively easy to obtain in a criminal context and can confirm the presence of a person who could only conceivably have been there if they were involved in the event.

We no longer have to rely on the intuitive assessment of the gestures or tone of voice of witnesses¹²⁰, and in the vast majority of cases, we can even dismiss these witnesses. Their testimony is always a blurred recollection often prepared by lawyers, removing any credibility, not to mention the intrinsic precariousness of their memory. Without documents or scientific evidence, we could only rely on whether someone had seen something. Today, this is no longer necessary. Documents and expert opinions are the best notaries of reality. Never in history has it been more attainable to judge with the greatest empirical, not intuitive, possibilities of justice.

Consequently, the future of evidence in the process must not depend on precarious standards that are little more than a working method, and which cannot create evidentiary thresholds. On the contrary: the process, and, more specifically, the evidence, must embrace science. The participation of economists, biologists, doctors and psychologists must be much more frequent in our trials, to the point that we cannot do without them, even when it comes to assessing intentionality in criminal proceedings or the basic facts of the subject matter of the trial. Their presence must be formalised, normalised, and not made dependent on the pleadings of the prosecutor or the parties.

After this, the judge will no longer be an omniscient being inspired by divinity, which is what he has tried to be since the times of ancient Egypt¹²¹. They will simply be a manager of the scientific evidence that is accumulating, a guarantor of fundamental rights and an applicator of the law to facts that are determined with increasing certainty by science. Their personal assessment, so often intuitive, will no longer depend on their intimate sense of conviction, to the best of their knowledge, but rather on the ability to correctly compile data from experts with whom they cannot enter into conflict as they do not have the scientific competence to do so.

¹²⁰ See Loftus, E. *Eyewitness testimony*, Harvard 1996. Mazzoni, G., *Psicologia della testimonianza*, Roma 2015, p. 108. Manzanero, J.A., *Psicología del testimonio*, Madrid 2008, p. 141-143.

¹²¹ Decoeur, H., «Maat, entre Cosmologie et Mythe: Le Principe Constitutionnel d'un Etat de Racine Chthonienne en Ancienne Egypte.» *Revue Juridique Themis*, vol. 45, n. 2, 2011, p. 343.

All this will illuminate a new process, *non secundum conscientiam, sed secundum probata peritorum*. In the field of evidence, it will only be possible to exercise the defence by discrediting these opinions with other scientific data.

6. BIBLIOGRAPHY

- ANDREWS, N., 2013: *Andrews on Civil Processes*, Cambridge: Intersentia, vol. 1.
- AZO, 1567: *Brocardica (aurea)*, rúbrica XX, Basilea
- AZO, 1610: *Summa Azonis*, Venecia
- BAR, L, 1867: *Recht und Beweis im Zivilprozesse*, Leipzig.
- BARBOSA MOREIRA, J.C., 1988: "Julgamento e Ônus da prova", in *Temas de direito processual*, segunda série, Sao Paulo: Saraiva, p. 75.
- BARTOLO, 1588: *Bartoli a Saxoferrato Commentaria*, in *II. partem infortiati*, Basilea, tít. IV, L. V, p. 468.
- BECCARIA, C., 1764: *Dei delitti e delle pene*, reed. de Acquarelli de Bussolengo 1996.
- BENTHAM, J., 1823: *Traité des preuves judiciaires*, Paris : Bossange Frères, t. II
- BESSE-MARCHEIS, 2015: "La vicinanza della prova", *Revista Eletrônica de Direito Processual*, v. 16, p. 93. <http://www.e-publicacoes.uerj.br/index.php/redp/article/view/19962/14303>
- BLACKSTONE, W., 1768, *Commentaries on the Laws of England*, Lib. I, London: Clarendon Press.
- BLACKSTONE, W., 1768, *Commentaries on the Laws of England*, Lib. III, London: Clarendon Press.
- BRACON, H., 1569: *De Legibus et Consuetudinibus Angliae*, London, Lib. III, Cap. VIII.
- BRUNI, F., 1546: *Tractatus de indiciis, et tortura*, Lyon.
- BULGARI, *Summa de iudiciis*, Tit. 53, p. 91, in WUNDERLICH, A., 1841: *Anecdota quae processum civilem spectant*, Göttingen.
- CALAMANDREI, P., 1939: "Il giudice e lo storico", *Rivista di diritto processuale civile*, XVII, p. 105 .
- CHIOVENDA, G., 1923, *Principi di Diritto Processuale*, 3ª ed. Napoli: Jovene.
- COHEN, L. J., 1977: *The probable and the provable*, Oxford.
- COLISH, M. L., 1999: *Medieval foundations of the western intellectual tradition, 400–1400*, London: Yale University Press, p. 25, 265-266, 319 .
- DE FANO, M., 1584 : *Negativa qualiter probanda*, in: AAVV, "Tractatus illustrium in utraque tum Pontificii, tum Caesaris iuris facultate Iurisconsultorum, De Probationibus", T. IV, Venecia, p. 12, n. 3.
- DECOEUR, H., 2011 : «Maat, entre Cosmologie et Mythe: Le Principe Constitutionnel d'un Etat de Racine Chthonienne en Ancienne Egypte.» *Revue Juridique Themis*, vol. 45, n. 2, p. 343 .
- DEI VECCHI, D., 2020: *Los confines pragmáticos del razonamiento probatorio*, Lima: Zela 2020.
- DENNIS, I.H., 2013: *The Law of Evidence*, Mytholmroyd: Sweet & Maxwell.
- DÖHRING, E., 1964: *La prueba, su práctica y apreciación*, Buenos Aires: Ediciones Jurídicas Europa-América.
- DURANTI, G., 1585: *Speculum iuris*, p. II, Veneci
- ECKHARDT, K.A., 1953: *Lex Salica, 100 Titel-Text*, Weimar: Hermann Böhlaus Nachfolger
- EDWARDS, W. / LINDMAN, H. / SAVAGE, L. J., 1963: "Bayesian Statistical Inference for Psychological Research", *Psychological Review*, 70, p. 193.
- FERNÁNDEZ LÓPEZ, M., 2007: "La valoración de las pruebas personales y el estándar

- de la duda razonable”, Cuadernos Electrónicos de Filosofía del Derecho, núm. 15.
- FERRER BELTRAN, J., 2019: “La carga dinámica de la prueba. Entre la confusión y lo innecesario”, in NIEVA FENOLL, FERRER BELTRÁN, GIANNINI, *Contra la carga de la prueba*, Madrid: Marcial Pons, p. 73.
- FERRER BELTRÁN, J., 2021: *Prueba sin convicción*, Madrid: Marcial Pons.
- FINKELSTEIN, M. O., 2009: *Basic concepts of probability and statistics in the Law*, New York: Springer, p. 11.
- GASCÓN ABELLÁN, M., 2005 “Sobre la posibilidad de alcanzar estándares de prueba objetivos”, *Doxa*, n. 28, p. 127 .
- GINTHER, M.; CHENG, E.K., 2018: “Surprise vs. Probability as a Metric for Proof”, *Seton Hall Law Review* 48, n. 4, p. 1081 .
- GLASER, J., 1883: *Beiträge zur Lehre vom Beweis im Strafprozeß*, Leipzig: Duncker & Humblot, p. 85.
- GLASER, J., 1883: *Handbuch des Strafprozesses*, vol. I, Leipzig, Dunker & Humblot.
- GONZÁLEZ LAGIER, D., 2020: “¿Es posible formular un estándar de prueba preciso y objetivo? Algunas dudas desde un enfoque argumentativo de la prueba”, *Revista telemática de filosofía del derecho*, n. 23, p. 79.
- GORDON, W., 2007: “A Comparison of the Influence of Roman Law in England and Scotland”, in *Roman Law, Scots Law and Legal History: Selected Essays*, Edinburgh: Edinburgh University Press.
- HALL, C. C., 1840: *De indiciiis, eurumque vi, ad probationem in causis poenalibus efficiendam*, Copenhagen.
- HANS, V. P. / EISENBERG, T., 2011: “The Predictability of Juries”, *DePaul Law Review*, 60, p. 375.
- HERLITZ, G. N., 1994-1995: “The Meaning of the Term Prima Facie”, *Louisiana Law Review* 55, no. 2, p. 391.
- HOSSFELD, F., 1665: *De indiciorum materia*, Altdorf.
- JAUMAR Y CARRERA, J., 1840: *Práctica forense*, Barcelona: Boet y cía.
- KAGEHIRO, D. K. / STANTON, C., 1985: “Legal vs. Quantified Definitions of Standards of Proof”, *Law and Human Behavior*, vol. 9, n. 2, p. 160.
- KAHNEMAN, D. / TVERSKY, A., 1982: *Subjective probability: A judgment of representativeness*, in: “KAHNEMAN / SLOVIC / TVERSKY (ed.), *Judgment under Uncertainty: Heuristics and Biases*. Cambridge: Cambridge University Press, p. 33.
- KASER, M. / HACKL, K., 1996: *Das römische Zivilprozessrecht*, München: C.H. Beck.
- KLEINKNECHT, T. / MEYER, K. / MEYER-GOSSNER, L., 1995: *Strafprozeßordnung*, München: C.H. Beck.
- KOHLER, J. (CON HOLTZENDORFF), 1904: *Encyclopädie der Rechtswissenschaft*, vol. 3, Leipzig: Duncker & Humblot, p. 315.
- LARA PEINADO, F., 1997: *Código de Hammurabi*, Madrid: Tecnos.
- LAUDAN, L., 2012: *Truth, error and Criminal Law*, Cambridge University Press.
- LAUMEN, H-W., 2009, „Grundbegriffe der Beweislast“, in BAUMGÄRTEL / LAUMEN / PRÜTTING, *Handbuch der Beweislast*, München: Heymanns, p. 27.
- LEIPOLD, D., 1997: *Comentario al §286 ZPO*, in: “STEIN/JONAS, *Kommentar zur ZPO*, Tübingen: Mohr Siebeck, p. 527.
- LOFTUS, E., 1996: *Eyewitness testimony*, Harvard: Harvard University Press.
- MANZANERO, A. L., 2008: *Psicología del testimonio*, Madrid: Pirámide.
- MAZZONI, G., 2015: *Psicologia della testimonianza*, Roma: Carocci, p. 108 .
- MITIDIERO, D., 2020: *O ônus da prova e seus inimigos*, *Revista de processo*, n. 306, p. 17.
- MONTERO AROCA, J., 1981: *La justicia municipal*, in: “Estudios de Derecho Procesal”, Barcelona: Bosch, p. 91.
- MUELLER, C. B. / KIRKPATRICK, L. C., 2003: *Evidence*, New York: Wolters Kluwer.

- MUÑOZ SABATÉ, LL., 1967: *Técnica probatoria*, Barcelona: Praxis.
- MUÑOZ SABATÉ, LL., 1992: *Tratado de probática judicial*, Barcelona: Bosch.
- MUÑOZ SABATÉ, LL., 2008: *Summa de probática civil. Cómo probar los hechos en el proceso civil*, Madrid: Wolters Kluwer.
- NEWTON, E.F. (ed.), 1909: *Fallos de la Cámara Federal de Apelación de La Plata*, t. XV, La Plata, p. 275.
- NIEVA FENOLL, J. / FERRER BELTRÁN, J. / GIANNINI, L., 2019: *Contra la carga de la prueba*, Madrid: Marcial Pons.
- NIEVA FENOLL J., 2014: “El mal nombre del principio inquisitivo”, *Justicia*, n. 1, p. 131.
- NIEVA FENOLL, J. 2014: “la cattiva reputazione del principio inquisitorio”, *Rivista Trimestrale di Diritto e Procedura Civile*, vol. 68, n. 3, p. 943.
- NIEVA FENOLL, J. 2017: “La actuación de oficio del juez nacional europeo, *Justicia*, n. 1, p. 181.
- NIEVA FENOLL, J. 2020: “Carga de la prueba y estándares de prueba: dos reminiscencias del pasado”, *InDret* 3, p. 406.
- NIEVA FENOLL, J., 2018: “La carga de la prueba: una reliquia histórica que debiera ser abolida”, *Revista Ítalo-española de Derecho Procesal*, n. 1, p. 129.
- NÖRR, K. W., 2012: *Romanisch- kanonisches Prozessrecht*, Berlin: Springer, p. 127.
- PARDO, M. S., 2018: “Epistemology, psychology, and standards of proof: An essay on risinger’s surprise theory”, *Seton Hall Law Review*, 48(4), p. 1039.
- PASSANANTE, L., 2020: “Per la difesa dell’onere della prova”, in Saccoccio; Cacace (ed.), *Europa e America Latina. Due continenti, un solo diritto*, Torino y Milano: Giappichelli, p. 798.
- PATETTA, F., 1890: *Le ordalie*, Torino: Bocca.
- PETERS, K., 1985: *Strafprozeß*, München: C.F. Müller.
- PEYRANO, J. W. (dir. y coautor), 2008: *Cargas probatorias dinámicas*, Buenos aires: Rubinzal-Culzoni.
- POTHIER, R. J., 1827, *Traité des obligations*, in *Ouvres de Pothier*, T.I, Paris.
- RAMOS, V. P., *La carga de la prueba en el proceso civil*, Madrid 2020.
- REDMAYNE, M., 1999: “Standards of Proof in Civil Litigation”, *Modern Law Review* 62, n. 2, marzo, p. 172.
- REDMAYNE, M., 1999: “Standards of Proof in Civil Litigation”, *Modern Law Review* 62, no. 2, Marzo, p. 167 .
- RISINGER, D., 2018: “Leveraging surprise: What standards of proof imply that we want from jurors, and what we should say to them to get it”, *Seton Hall Law Review*, 48(4), p. 965.
- ROBERTSON, C. B., 2012-2013: “The Right to Appeal”, 91 *The North Carolina Law Review*, p. 1219.
- ROSENBERG, 1923: L. *Die Beweislast*, Berlin: Otto Liebman.
- ROSENBERG, L. / SCHWAB, K.H. / GOTTWALD, P., 2011: *Zivilprozessrecht*, München, Beck.
- RUSSELL, B., 1952: “Is There a God?”, in SLATER, (ed.). *The Collected Papers of Bertrand Russell*, Vol. 11: Last Philosophical Testament, 1943–68 Routledge, p. 542.
- SASSOON, J., 2001: *Ancient Laws And Modern Problems: The Balance Between Justice and a Legal System*, London, p. 40.
- SERRA DOMÍNGUEZ, M., 1991: Comentario al art. 1252 del Código Civil, in: “Comentarios al Código Civil y compilaciones forales” (dir. Albaladejo), Madrid: Edersa, tomo XVI, vol. 2, p. 66.
- STRUVE, G.A., 1666: *De indiciis*, Jena.
- TARUFFO, M., 2005: *La prueba de los hechos*, Madrid: Trotta.
- TARUFFO, M., 2019: “Casi una introducción”, in NIEVA FENOLL, FERRER BELTRÁN, GIANNINI, *Contra la carga de la prueba*, Madrid: Marcial Pons, p. 18-21.
- WACH, A., 1872: “Der Entwurf einer deutschen Civilprozeßordnung”, *Kritische Viertel-*

- jahresschrift, 14, p. 357.
- WHITMAN, J. Q., 2005: *The origins of reasonable doubt*, New Haven y London: Yale University Press.
- WIGMORE, J. H., 1904: *A Treatise on the System of Evidence in Trials at Common Law*, Boston: Little, Brown.

