Standard of Proof in Europe

Edited by
LUBOŠ TICHÝ

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Preface

The idea for this book arose from a conference on the fundamental issue of standard of proof which took place on 26–27 October 2017 at the Faculty of Law of the Charles University in Prague. The book now gives an overview of different national concepts concerning standards of proof in the Germanic legal family (H.-J. Ahrens and Chr. Althammer and M. Tolani for Germany, W. Rechberger for Austria), two jurisdictions of Romanic legal tradition (E. Jeuland for France and R. Poli for Italy), a common law (J. Sorabji for England) as well as the Scandinavian jurisdictions (M. Strandberg), and, finally, the Czech republic (J. Balarin), as a representative of the Central European post-communist legal culture. Moreover, the book contains four contributions analysing national approaches on specific issues in context. P. Holländer focuses on the issue of the truthfulness and purpose of proceedings from a Czech perspective; M. Schweizer deals with the key issue of the standard of proof as a threshold of decision-making in Swiss law; Chr. Kern deals with probability as an element of standard of proof in Germany; and M. Strandberg develops a somewhat provocative concept of prevailing probability from a Scandinavian perspective. In addition, M. Stürner presents the ELI/UNIDROIT project in relation to the evaluation of evidence and the standard of proof. In the final contribution the editor then attempts to compare individual approaches to solving the standard of proof issue and presents his own solution.

The aim of this book is to analyse the key questions of assessment of proof, namely the standard of proof which is to be applied. Evaluation of evidence requires a though process in which the evaluator reconstructs the past based on information available to them. But since the past cannot be repeated, the evaluator can only attempt to get as close as possible to reality. Interestingly, it is possible to identify two extreme approaches. The first is one which be described as hypothetical or speculative, and stems from the conviction or belief of the judge. It employs terms such as "truth", "certainty" or "beyond reasonable doubts". The result of this approach is an "all or nothing" outcome. The second approach is, at least at first glance, somewhat more scientific, since it measures the extent of credibility of the reconstruction by a degree of probability. If, for example, the degree of probability exceeds 51 %, the fact is considered as proved.

Therefore, the main purpose of the book is to examine the different approaches in key European jurisdictions and where they are placed between these extremes. A secondary purpose is to assess and evaluate these different approaches, perhaps, and find which the appropriate standard should be.

Finally, some words of thanks. The editor owes a great debt of gratitude to Alexander von Humboldt Stiftung for generously funding both the conference in Prague and this book. Thanks are also due to the Faculty of Law of the Charles University which founded this project from its program Progres Q 03 "Private law and challenges of today".

The editor is also very grateful to the publisher, Mohr Siebeck, for the very pleasant cooperation, and to his secretary Mrs. Ludmila Nováčková for continuous hard work for this project.

But an editor's greatest debt is to the authors – this book is really theirs.

Prague, February 2019 Luboš Tichý

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Fundamentals

Proof and Changing Idea of Truth in Legal Thinking

Reflection on Postmodernism

Pavel Holländer

I. Postmodern standard of proof: change indication

Legal science is currently focusing on new, modern evidence-based technologies (DNA identification, advanced technology for people tracking, for example eavesdropping, video identification, voice-based identification, etc.) and related issues (for example on the discussion of the theory of the fruit of the poisonous tree, the admissibility of the buckwheat in identifying DNA with respect to the violation of the principle of *nemo tenetur se ipsum prodere*, etc.), or the questions of the growing role of the expert witness as indirect judges. In contrast to the excited controversies in legal science in the 19th century and in the first half of the 20th century, less or no attention is paid to the basic aim of evidence, the necessary extent or scope of evidence, the relationship of proof and truth. However, a number of indications suggest that this neglect ignores significant changes in the perception of the category of truth.

I will try to outline some of these indications.

The institute of second appeals in the Civil and Criminal Proceedings in the Czech Republic is conceived in the sense of a substantive review of the decision of the Appeal and Finding Court, not in the context of a review of factual findings. The Constitutional Court, however, has interpreted both these statutory provisions under its framework and the review of the factual finding. The Court proceeds in three ways. The first is based on the thesis of the inseparability of the factual and substantive review (for example judgments of file number I. ÚS 4/04 and I. ÚS 729/17). The second argumentation is based on violation of the *in dubio pro reo* principle, and this principle has been inferred from the constitutional principle of the presumption of innocence (see the judgments of file number II. ÚS 4266/16, I ÚS 1501/16 and others). Finally, the third is based on the plea of inadmissibility of the extreme contradiction between the evidence and the facts-finding (from recent times, for example judgment of file number I. ÚS 34/17).

It is possible to talk about a ten-to-twelve-year trend, a tendency to increase the criticism of the truthfulness of facts-finding of ordinary courts by the Constitutional Court, a trend which includes an extensive interpretation of the in-

stitute of second appeal in criminal as well as civil proceedings. The result is the construction of two reviews, one before the ordinary courts and one before the constitutional court. It is about a scepticism or about a distrust of judiciary, it is about increase in postmodern relativisation of the truth of human cognition.

Both the Czech Code of Criminal Procedure and the Czech Civil Code lay down different levels of standard of proof for the adoption of different types of decisions in terms of their purposes (this may be to reduce or increase the standard of proof). In general, law enforcement authorities are obliged to proceed "to ascertain the facts of the case for which there is no reasonable doubt, to the extent that is necessary for their decision". However, in the case of remand (detention) the measure of standard of proof is justified by reasonable suspicion.

The Czech Constitutional Court has increased its claims in the case of the review of court decision on remand (detention): an illustration is a judgment in which the court moves the value of standard of proof in remand to the level required in the decision on the merits (I. ÚS 2652/16) and argues in a similar way as the novelist hero of Joseph Heller in the book Good as Gold, who in the second half of the statement regularly denies the first half of the statement: "In the case of remand (detention) courts are not required to deal individually with each argument put forward by the accused or his attorney, but they should respond adequately to all claims."

Thus, we are seeing an increase in scepticism about the outcome of judicial evidence, an increase in the complexity of the procedural law, an increase in the number of judicial review courts in the field of reviewing evidence, moreover, we are seeing an increase in evidence-based requirements in cases where the legal procedure does not provide a condition for finding the facts without any reasonable doubt, but merely provides for a reasonable suspicion or reasoned concern. Thus, there are two tendencies: the institutional development of procedural law and the levelling of evidence-based requirements.

II. Historical transformations in the understanding of truthfulness and the standard of proof in law

In the following considerations I will build on the thesis of Alasdair MacIntyre, an excellent and in the second half of the 20th century an extraordinarily thoughtful Scottish moral and social philosopher, one of the founders of the philosophy of communitarianism, from the thesis of the inseparability of theoretical and historical knowledge:

"There ought not to be two histories, one of political and moral action and one of political and moral theorizing, because there were not two pasts, one populated only by actions, the other only by theories. Every action is the bearer and ex-pression of more or less theory-laden beliefs and concepts; every piece of theorizing and every expression of

belief is a political and moral action. Thus the transition into modernity was a transition both in theory and in practice and a single transition at that. It is because the habits of mind engendered by our modern academic curriculum separate out the history of political and social change (studied under one set of rubrics in history departments by one set of scholars) from the history of philosophy (studied under quite a different set of rubrics in philosophy departments by quite another set of scholars) that ideas are endowed with a falsely independent life of their own on the one hand and political and social action is presented as peculiarly mindless on the other. This academic dualism is of course itself the expression of an idea at home almost everywhere in the modern world."[1]

The basic question of the relationship of proof and truth is the degree of recognition of past events (standard of proof), in other words, the question of whether or not to be aware of these events in their completeness that would justify the truthful evaluation of the results of that knowledge. But let's go deeper into European legal history. The basis of the Czech legal-mediavalistic exploration of the medieval understanding of the rules of evidence, in particular the understanding of the legal theory of the evidence, represents the four excellent studies of Jiří Kejř.[2] According to Jiří Kejř

"a fundamental interpretation … to the foundations of the theory of judicial evidence … filed by Saint Thomas Aquinas in the top work of medieval scholarship *Summa theologica*. His argument follows this approach: It is better to modify everything by a legal regulation than to leave the judge's consideration for three main reasons. First of all, it is easier to find a few wise men who would compose laws than a large number of wise men who would be able to fairly decide on individual matters. Furthermore, when making laws, it is usual to think long enough about what is to be done, while judges must decide without delay. Finally, the legislature decides in general and for the future, the judge, on the other hand, only individual things and for the present, and may still be influenced differently. Therefore, it is imperative that, wherever possible, laws are laid down, what is to be judged, and only as little as possible the decision-making of the people. Judges can only be left to the discretion of what can not be regulated by law, such as the finding facts. Throughout medieval literature, hardly a place can be found that would emphatically and more clearly justify the need for a bound evaluation of evidence theory."[3]

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[1] *Macintyre*, After Virtue. A Study in Moral Theory. London 1981, 3rd ed., Notre Dame, Indiana 2007, p. 61.

[2] Pojem soudního důkazu ve středověkých právních naukách (The concept of judicial evidence in medieval legal teachings), Stát a právo, 13, 1967, p. 169–187; republished in *Kejř*, Výbor rozprav a studií z kodikologie a právních dějin (Debates and studies of codicology and legal history), Praha 2012, p. 115–133; Teorie soudních důkazů ve středověkých právních a teologických naukách (The theory of judicial evidence in medieval legal and theological doctrines), Právnické studie, 40, 2009, p. 95–112; Husitská kritika soudobé teorie soudních důkazů (Hussite critique of the contemporary theory of court evidence), in *Kejř*, Dvě studie o husitském právnictví. Praha 1954; Ke zdrojům husitských názorů na teorii soudních důkazů (The sources of Hussite views on the theory of judicial evidence), Právněhistorické studie, 11 (1965), p. 9–15.

[3] *Kejř,* Teorie soudních důkazů ve středověkých právních a teologických naukách (The theory of judicial evidence in medieval legal and theological doctrines), Právnické studie, 40, 2009, p. 101.

Kejř shows that the high Middle Ages were well aware of the possible tension between the "own knowledge" of the judge and "the resulting basis for decision-making, as evidenced by the evidence provided". In spite of the exceptions, the idea of "binding evidence for judging the judiciary", which benefits the most important authorities of the Middle Ages, "such as one of the greatest Pontifical lawyers, Sinibaldus Fliscus, later Pope Innocent IV, … or the famous Speculator – Guglielmus Durantis in a huge work on the procedural law *Speculum iudicale*."[4]

Requirements for the standard of proof, understanding of the meaning and purpose of evidence, including the perception of truth, in the Middle Ages were determined by a theological view of the world and of human existence. "Truth" is an expression of "God's revelation", "God's will", not the potency of human reason.

The connection between the idea of truth and the theological understanding of the world can be brought closer to the ideas of Thomas Aquinas. According to him, "God belongs to judge by his own power", that it is only for God that he judges "according to the truth which he himself knows, and not according to what he receives from others".[5] However, "other judges do not judge by their own power", that is, "judges are to judge the truth according to what is to be presented to them".[6]

The theological argument and argument based on the value of justice created the theoretical justification of bound evaluation of evidence whose application is closely related to the installation of the Inquisition process, primarily for the purpose of conducting trials against heretics during the pontificate of Inocence III. (1198–1216), and in particular, it relates to the results of the Fourth Lateran Council (1215).

During the eighteenth century, an outstanding German lawyer, statesman, literary and historian Justus Möser (1720–1794), due to the transposition of Germanic law into Roman law, whose ideas are linked to the current German legal system,[7] expresses the belief that only the formalities of the bound evaluation of evidence ensure legal peace and protect against Judge's arbitrariness. While he finds it regrettable that formal and real truths are not always in agreement, however, this shortcoming must in any case be regarded as less than the shortcoming that would arise if every judge could simply consider the truth of his opinion.[8]

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[4] *Kejř,* Teorie soudních důkazů ve středověkých právních a teologických naukách (The theory of judicial evidence in medieval legal and theological doctrines), Právnické studie, 40, 2009, p. 101–102.

[5] *Aquinas,* Summa theologica. II, II. Quoted by: *Bahounek,* Politické myšlení sv. Tomáše (Political Thought of St. Thomas), Brno 1995, p. 166.

[6] *Ibidem,* p. 166.

[7] See: *Möser,* Gesellschaft und Staat. Eine Auswahl aus seinen Schriften, Herausgegeben und eingeleitet von Prof. Dr. R. Brandl, München 1921.

[8] *Möser,* Patriotische Phantasien, Bd. IV, Berlin 1786, p. 116–117.

At the time of Enlightenment, the image of man changes dramatically: "Instead of tradition and authority, knowledge should be found in the use of one's own reason."[9] At the same time, however, the fear of a possible judge's arbitrariness has led the most important enlightened personalities, such as Charles-Luis Montesquieu and Gaetano Filangieri, to a critical perception of the role of a judge.[10]

A contradiction, the solution of which was a challenge for thinkers of the Enlightenment, the contradiction between the idea of a free and rational individual (which is reflected in the principle of free evaluation of evidence) and the fear of arbitrariness of the judges stemming from the experience of the *ancien régime* era required solution. Its starting point was the inspiration of the English jury courts[11] and the faith of the enlighteners "in the sound judgment of the people".[12] The breakthrough was the parliamentary debate that took place in December 1790 and January 1791 in the French constitutional assembly on the subject of the judge's inner conviction. Adrien Duport (1759–1798), a politician and lawyer who was instrumental in the implementation of judicial reforms that prompted the establishment of jury courts and a cassation court, and who advocated the abolition of the death penalty, advocated the introduction of jury courts in the debate. He saw the guarantee of an independent, rational evaluation of evidence by a number of independent and impartial individuals, who are only guided by their own reason and their conscience and who "are not forced to observe the wrong and absurd probability rules".[13] The French Criminal Procedure Code of October 1791 introduced the jury and, in the provision of Article 427, instructed the jurors before the final meeting to establish the famous formula of *conviction intime*: "Criminal offenses can be proved by any means of proof and the judge decides according to their internal convictions." (*Les infractions peuvent être établies par tout mode de preuve, et le juge décide d'après son intime conviction.*) The institute of *conviction intime* was also preserved by the 1808 Criminal Procedure Code. Mark Schweizer notes: "The introduction of free evaluation of evidence and the establishment of jury courts are inextricably linked."[14]

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[9] *Schweizer,* Beweiswürdigung und Beweismaß. Tübingen 2015, p. 51.

[10] *Montesquieu,* Esprit des lois. Czech translation: O duchu zákonů. Praha 2010, p. 185; *Filangieri,* La scienza de la legislazione. Milano 1780–1785. German translation: System der Gesetzgebung. Bd. III, 2nd ed., Ansbach 1788–1791, pp. 328 f.

[11] See *Baker,* An Introduction to English Legal History (4th ed.). London 1972, p. 72–73; *Whitman,* The Origns of Reasonable Doubt. Theological Roots of the Criminal Trial. New Haven-London 2008, p. 126–127.

[12] See *Nobili,* Die freie richterliche Überzeugungsbildung. Reformdiskussion und Gesetzgebung in Italien, Frankreich und Deutschland set dem Ausgang des 18 Jahrhunderts. Baden-Baden 2001, pp. 116 f.

[13] *Ibidem,* p. 129.

[14] *Schweizer,* Beweiswürdigung und Beweismaß, note number 9, p. 57. See also *Küper,* Die

The overwhelming majority of German lawyers refused the French conception of *conviction intime*. Paul Johann Anselm Ritter von Feuerbach (1775–1833), one of the founders of the modern German criminal law science, became the leader of this thought direction.[15] Another emerging generation of German lawyers is starting to think differently. Carl Ernst Jarcke (1801–1852), a professor of criminal law at the University of Berlin, later in Vienna as an associate of Chancellor Metternich – in agreement with Kant, defines truthfulness by correspondence theory of truth as "the congruence of a person making judgments with a cognizant object".[16]

Finally, the assertion of the idea of free evaluation of evidence is then associated with the most famous name, with the name of Friedrich Carl von Savigny (1779–1861), and in 1846 anonymously published book *Die Prinzipienfrage in Beziehung auf eine neue Strafprozessordnung.*[17] Savigny did not connect judges' arbitrariness with the abandonment of the principle of the bound evaluation of evidence and according to him the judge is bound by the rules of evidence based on "general laws of thought, experience and human knowledge." He also recommended the cancellation of the jury and, according to the French model, the free evaluation of the evidence.[18] He saw the guarantee against the arbitrariness in a clear written justification of the judgment, which could be reviewed by a higher court instance.[19]

Unlike the criminal procedure, in civil procedural law, the principle of free evaluation of evidence enforced the generation later: "In the civil procedural law free evaluation of evidence compared to procedural criminal law has been introduced with a delay of about three decades."[20] The first half of the 19th century in German and Austrian civil law is connected with several waves of debates on the merits and deficits of the bound evaluation of evidence and the principles of free evaluation of evidence, debates in which a number of outstanding personalities, including F.B. Busch, government council, chairman of the Arnstadt Regional Court, vice president of the Court of Appeal at Eisenach, Carl Josef Anton Mittermaier, liberal, politician, chairman of the the *Vorparlament* 1848,

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Richteridee der Strafprozessordnung und ihre geschichtlichen Grundlagen. Berlin 1967, pp. 174 f.

[15] *Feuerbach, Ritter von,* Betrachtungen über das Geschworenengericht. Landshut 1813, p. 121 f.

[16] *Jarcke,* Bemerkungen über die Lehre vom unvollständigen Beweis, vornehmlich in Bezug auf die ausserordentlichen Strafen. Neues Archiv für Criminalrechts, 1826, p. 98.

[17] *Savigny,* Die Prinzipienfrage in Beziehung auf eine neue Strafprozessordnung. Berlin 1846.

[18] *Ibidem,* p. 65.

[19] *Ibidem,* p. 66. A detailed outline of the application of the principle of free evaluation of evidence in German criminal proceedings see: *Krieter,* Historische Entwicklung des „Prinzips der freien Beweiswürdigung" im Strafprozeß. Göttingen 1926.

[20] *Schweizer,* Beweiswürdigung und Beweismaß, note number 9, p. 61.

university professor in Landshut, Bonn and Heidelberg and others.[21] A key figure linked to the enforcement of the principle of free evaluation of evidence in a civil procedure is Wilhelm Endemann (1825–1899), a professor at the universities of Jena and Bonn, who since 1867 also worked in the Commission of the North German Civil Litigation Association.[22] His breakthrough article from 1858[23] is based on the theory of liberalism and rationalism. According to him, the traditional rules of evidence "limit the autonomy of judge's opinion", the factual finding without their use guarantees a higher degree of "certainty and independence of judge's opinion". Further, the barrier of judge's arbitrariness is the fact that the judge "has to follow the principles of logical conviction", which is subject to review and, further, is bound by the observance of the principle of public hearing.[24] On the Assembly of Association of German lawyers (*Deutscher Juristentag*) in 1861, a statement was made according to which the association "fully supports the principle according to which the judge must determine the truth of the facts, if they are disputed between the parties, according to the internal conviction".[25] As the famous German lawyer, one of the most important theorists of the concept of the rule of law, the Berlin university professor, Rudolf von Gneist (1816–1895) noted, "the consultation on the German Civil Procedure Order of 1877 for the *Reichsta*g Commission was not a strenuous work, the Association of German lawyers in the previous years has prepared and discussed everything that was essential in its negotiations".[26]

The German and Austrian legal thinking in the second half of the 19th century were closely interconnected, the Austrian, i.e. the Cisleithania, the development of law was then directed analogously in the same direction. A key role in this direction was played by Franz Klein (1854–1925), the Viennese professor of civil procedural law, the Cisleithanian minister of justice, the author of the current Austrian Civil Procedure Code of 1895. In his famous work *Pro futuro*, in which he formulated the principles of a new civil procedure law, the principle of free evaluation of evidence, in addition to the principle of the verbal hearing and the public hearing, is considered to be the key principles of the new Code.[27]

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[21] An extremely precise description of this development see: *Patermann,* Die Entwicklung des Prinzips der freien Beweiswürdigung im ordentlichen deutschen Zivilprozess in Gesetzgebung und Lehre. Bonn 1970.

[22] See his most significant works: *Endemann,* Die freie Beweisprüfung in Zivilprozesse. Archiv für die zivilistische Praxis, n. 41, 1858, p. 92–129; *Endemann,* Die Beweislehre des Zivilprozesses. Heidelberg 1860.

[23] *Endeman,* Die freie Beweisprüfung im Zivilprozesse. Archiv für zivilistische Praxis, Bd. 41, 1858, p. 92–129.

[24] *Ibidem,* p. 116–117.

[25] See *Patermann,* Die Entwicklung des Prinzips der freien Beweiswürdigung im ordentlichen deutschen Zivilprozess in Gesetzgebung und Lehre, note number 21, p. 135.

[26] *Ibidem*, p. 137.

[27] *Klein,* Pro futuro: Betrachtungen über Probleme der Zivilproceßreform in Österreich. Leipzig-Wien 1891, p. 5.

The most prominent personalities of the Czech civil procedural law of the second half of the 19th century and the 20th century, Emil Ott and František Štajgr, were aware the connection between the new understanding of man as a free and reasonable person and changes in the procedural principles determining the degree of standard of proof. In this context, Emil Ott points out not only the change of these paradigms, but also the gradual transition of law of evidence into partial legal adjustments and ultimately resulting in the adoption of a new procedural code.[28] In this context, František Štajgr focuses on the historical context:

"Ideas of the 19th Century, in particular, begin to take more account of individuality … the principle of the free evaluation of evidence, which at present applies to all kinds of judicial procedures and in all cultural states, and which applies almost to all means of proof … is the institution which, in seeking the truth in the procedure, allows respect for the individuality of events, but does not affect the requirement of objectivity of truth."[29]

III. Postmodern uncertainty in finding the standard of proof, or "wandering" between material truth, probability, inner conviction and practical certainty, between subjective and objective theory of proof

In the 20th century, as well as in the 21st century, there is still a debate about the relationship between truth and probability, truth, and the inner conviction of the judge, truthfulness and practical certainty. Josef Macur, a key figure in the Czech civil procedure law of the second half of the 20th century, describes this debate as follows:

"The rejection of the bond evaluation of evidence does not end the eternal dispute over the solution of the dilemma if the emphasis is on the subjective conviction of the judge or on the objective finding of the probability of the facts … The nature of this dispute has become more subtle and subtle, and its forms have taken on a different character. In the current theory and practice of the civil procedure, it is above all a dispute between the supporters of subjective and objective theory of standard of proof … Differences, however, are manifested in a different understanding of the principle of free evaluation of evidence."[30]

Philosophical discourse led in the 20th century to develop a series of concepts of truthfulness, especially the theory of correspondence (and its modification

[28] *Ott,* Soustavný úvod nového řízení soudního. Díl II. (Systematic introduction of new law of procedure), Praha 1898, p. 88–90.

[29] *Štajgr,* Zásady civilního soudního řízení. Praha 1946 (Principles of civil procedural law), p. 68–69.

[30] *Macur,* Postmodernismus a zjišťování skutkového stavu v civilním soudním řízení. (Postmodernism and determination of the facts in civil procedural law), Brno 2001, p. 111.

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