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Standard of Proof in Late Medieval Legal Theory – A Conceptual Journey

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Abstract

For the first time in legal history, the system of proof was developed in late medieval learned law. Legal historians have long debated the role of the judge within this system. Some scholars argue that the idea of legal evidence existed in Roman or canon law, suggesting that the judge's role in evidentiary proceedings was confined to determining whether the presented evidence met specific, rigid standards. Conversely, other researchers propose that this system operated under different assumptions, asserting that judges possessed greater discretion in evaluating evidence, and that legal doctrine provided a framework for shaping the judge's conviction. Both perspectives offer a range of arguments supporting them.

In this paper, I aim to briefly review selected scholarly positions on this issue, present my own interpretation and propose research directions for further inquiry. Upon reflecting on the meaning of the ordo iudiciarius procedure, I contend that, at least in the context of canon law, there is significant alignment with the concept of legal evidence.

Keywords

historiography – legal history – Roman law – canon law – law of proof

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The inclusion of such a broad topic in a volume dedicated to medieval arbitration may initially appear unexpected. However, its relevance is justifiable. In medieval legal doctrine, no specific rules of evidence were developed exclusively for arbitration; rather, the general evidentiary rules applied in ordinary legal proceedings also governed arbitration.[1] Yet, somewhat paradoxically, the theory of arbitration itself offers valuable insights into the issue of the standard of proof referenced in the title.

Ius commune, i.e. Roman, canonical, and feudal law, was taught at European universities between the 11th and 16th centuries. However, the sophisticated jurisprudence that emerged on this basis was not limited to purely academic theory. Canon and feudal law were directly applied in legal practice, and all three laws had an indirect impact on every European legal system. Educated jurists were the means of transferring the values, norms and terminology of *Ius commune* to national legal systems. To illustrate this process, Manlio Bellomo evoked an astral metaphor in which the sun is the *Ius commune*, while the *iura propria* are the planets.[2] The efforts of legal historians over the last few decades have reinforced the belief that this metaphor is apt; as Kenneth Pennington summarised:

> *"The Ius commune was not bookish law, was not the law of the greats, to be read, savored, and returned to the shelf, was not learned law in contrast to real law. It was the cauldron from which much of the precious metal of all European legal systems emerged."*[3]

This conclusion highlights several research imperatives. In addition to the ongoing need to investigate the influence of *Ius commune* on specific legal systems, there is also a pressing need to address issues related to its content. One such issue is the standard of proof, which refers to the level of certainty and the amount of evidence required to establish proof in legal proceedings.[4] The central question is how we should interpret the concept of the standard of proof as presented in the writings of late medieval jurists. Does it represent a system of legal evidence that restricts the judge's role to determining whether the evidence meets established criteria? Or is it merely a guideline intended to shape the judge's conviction? This issue deserves careful consideration for several reasons. First, it can enhance our understanding of how canonists and legists viewed evidentiary proceedings, offering more than just a static point of reference for comparative analysis. Understanding the underlying principles of the evidentiary system – specifically how a judge's belief, and consequently the decision, is formed – opens up avenues for systematic research on judicial practice more broadly. Furthermore, this topic is central to ongoing debates among legal historians. As will be demonstrated, interpretations of this fundamental issue vary significantly.

Collectively, these factors highlight the primary research problem that underpins this paper. Uncertainty remains regarding how rigidly the nature of norms pertaining to

1 Wojciechowski (2010), pp. 170–171.

2 Bellomo (1995), p. 193.

3 Pennington (1994), p. 215.

4 Merriam-Webster's Dictionary of Law (1996).

evidence was understood in late medieval legal theory. Consequently, we are unable to ascertain the accuracy of contemporary theories that attempt to synthesise this issue. The extent to which these theories are valid, or conversely flawed, remains unclear. This concern is inherently connected to the role of the judge during legal proceedings.

In light of the extensive efforts of numerous generations of researchers, the aforementioned problem may seem surprising. However, anyone who has engaged with the law of proof in learned legal theory recognises its significance. The assessment of the nature of *Ius commune* norms related to evidence and the role of the judge within the judicial process remains a contentious issue. The foundation for these uncertainties lies in the diverse catalogue of evidence and evidentiary requirements found in the works of legalists and canonists, despite the generally high degree of order and relative stability characteristic of learned law during the late medieval period.

This variability engenders doubts regarding the validity of theoretical frameworks that attempt to synthesize the nature of late medieval proceedings based on *Ius commune*. Consequently, various scholars have interpreted the *Ius commune* evidentiary system in differing ways. Some view it as an embodiment of a strict legal evidentiary theory, wherein evidentiary proceedings are subordinated to rigid rules characterised by a hierarchy of evidence and a limited role for the judge. Conversely, others perceive this system as fostering an environment for the free evaluation of evidence, akin to the legal practices of ancient Rome. Moreover, proposals have emerged to strike a balance along a continuum defined by these opposing concepts within the legal landscape.

In light of the preceding discussion, this paper pursues three interconnected objectives. The first objective is to provide a concise overview of the concepts and their argumentative foundations that have addressed the issue of evidence assessment in late medieval learned law from the 19th century to the present day. The second objective is to present my own observations and critiques regarding the conclusions drawn from these prior approaches. The third objective is to formulate research postulates for future inquiry. These three goals are systematically addressed through the organisation of the paper, which is divided into three sections, each corresponding to one of the specified objectives.

Theories and disputes

The concept of the legal theory of evidence, derived from 19th-century jurisprudence, was developed as a means of contrasting with the contemporary reality of modern legal codes, which embraced the principle of free evaluation of evidence. Within this framework, the legal theory of evidence was intended to reflect the formalism and rigorism characteristic of previous legal eras. According to this conception, the judge's role in evidentiary proceedings was confined to verifying whether the collected evidence met the criteria established by stringent rules.[5]

5 Wojciechowski (2010), p. 172.

This perspective on the standard of proof influenced the 20th-century scholarship, particularly in the work of Jean-Philippe Lévy regarding the hierarchy of evidence in medieval learned law. The French legal historian characterised the evidentiary system in *Ius commune* as highly schematic and fully aligned with the legal theory of evidence. Lévy supported his position by highlighting the detailed nature of the norms governing the establishment of evidence, the diversity of evidence based on its strength and the categorisation of certain types of evidence as either recommended or discouraged. Collectively, these elements were posited to establish a clear hierarchy of evidence, which Lévy elaborated upon in his work.[6]

In light of subsequent critiques of Lévy's work, his perspective on the legal theory of evidence has also been called into question. Notably, Franca Sinatti d'Amico advanced three significant arguments against Lévy's conclusions. Firstly, she approached the issue from the standpoint of the concept's essence. Sinatti d'Amico argued that if legal evidence is understood as that which is defined and structurally governed by a legal norm, then not only the views of medieval jurists but also any statutory-based evidence system should be classified as legal. Secondly, she pointed out that the texts of legalists and canonists do not reference a hierarchy of evidence; rather, the distinction made is simply between what constitutes evidence and what does not. Thirdly, she asserted that the early glossators had already identified the aspects of Roman law pertaining to evidentiary rules. It was subsequent jurists who aimed to adopt and systematically present all the rules of late Roman law concerning evidence.[7]

Three decades later, Edward Szymoszek authored a work focused on the role of the judge within the context of 12th and 13th century *Ius commune* procedural literature. In this publication, he expressed scepticism towards both previously mentioned proposals and sought to identify a "third way". Szymoszek referenced the recommendations of Justinian law, which state that a judge should decide a case *causa perfectissime cognita*, and argued that this principle retained its significance in medieval law. His assertion was supported by a relatively narrow examination of 12th and 13th century summas, particularly Azon's *Summa*, which reiterated the notion that judges should endeavour to uncover the truth by all available means.[8]

Some of Szymoszek's findings were accepted by Wiesław Litewski, the author of a widely known work on the Roman canonical process.[9] Litewski concluded that some of the earliest *ordines iudiciarii* included recommendations for judges to consider various factors when interrogating witnesses, such as the social and economic status of the witnesses and their reputation. This indicates that, at this juncture, judges were not bound by rigid criteria. However, Litewski also critiques Szymoszek for neglecting the increasing significance of evidentiary rules and the diversity of evidence concerning its value. He notes that evidence in *Ius commune* was commonly categorised into sufficient

6 Lévy (1939), pp. 7–9, 22–31.

7 Sinatti d'Amico (1966), pp. 159–165, 182.

8 Szymoszek (1992), pp. 12 –125.

9 Litewski (1999).

evidence for reaching a verdict and supporting evidence that was inadequate on its own. Additionally, the concept of full proof (*probatio plena*) was contrasted with that of half-proof (*probatio semiplena*). Furthermore, the *ordines iudiciarii* clearly articulated numerous detailed evidentiary rules, such as the principle of *testis unus, testis nullus*. Litewski concludes his findings by asserting that the constraints on a judge's discretion are incomparably greater than those that existed in ancient Rome.[10]

Overall, the latter views appear to be more balanced than earlier concepts. Nevertheless, most researchers of the *ordo iudiciarius*, led by Knut Wolfgang Nörr, refrain from endorsing any of the proposals. They tend to avoid conceptualising their findings while simultaneously acknowledging the existence of two extreme perspectives: the free evaluation of evidence and the legal theory of evidence. However, they do not determine which of these approaches, or to what extent, is appropriate in relation to the standards of proof in late medieval legal practice.[11] Consequently, the issue remains unresolved.

An attempt at a compromise

The issue is broad and complex, as evidenced by the various disputes that have emerged within this field. A brief paper resulting from a conference presentation does not provide the appropriate format for an extensive exploration of the myriad questions and perspectives involved. Nonetheless, it is possible to highlight several key issues that will enhance our understanding of the approach to the standard of proof in late medieval legal theory. Given the existing distinctions in the thoughts of legalists and canonists, I will confine my remarks to the latter.

The *ordines iudiciarii*, which are treatises intended not only for law students but also for judges, facilitated an understanding and implementation of court procedures. This fact is particularly significant. This argument has occasionally emerged in discussions regarding the rigidity of evidentiary rules. However, its value appears contingent upon how the *ordo iudiciarius* itself is understood – that is as a procedural framework for which the *ordines iudiciarii* serve as a sort of instructional manual. The very concept of *ordo* deliberately underscores the canonist's notion that nothing is deemed a valid judgment unless it is organized according to established legal rules. As Ulrike Müßig demonstrates, in the decretist commentaries, the terms *ordinabiliter* and *rationabiliter* are used synonymously to denote a procedurally correct judgment.[12] This has further consequences; as the same author explains:

> *"(...) judicial competence was the core idea behind procedural correctness (...). Different from the legistic understanding of judicial competences in the sense of territorial limits of jurisdiction, the canonists alluded to the protective function of the ordo iudiciarius and elaborated the judicial competence as procedural*

10 Litewski (1997), pp. 536–538.

11 Nörr (2012), p. 123.

12 Müssig (2019), pp. 42–43.

guarantee. The parties could stop the proceedings at any stage by the claim of lacking procedural requirements. The ordo iudiciarius was also seen as a safeguard for the parties against a judgement unjust in substance."[13]

The above is reflected in the canons.[14] The scholarly judge exemplified the complementarity of procedural justness (*iustitia ex ordine*) and substantive justness (*iustitia ex animo*). The judge must adhere to procedural rules, including the rules of evidence, and cannot render decisions solely based on personal conviction.[15]

This assertion is reinforced by the terminology employed within the doctrine, which has been noted by scholars for some time. Specifically, the distinction between *probatio plena* and *probatio semiplena* implies the existence of a hierarchy of evidence, as it differentiates between sufficient evidence and that which alone is inadequate for resolving a case.[16] Additionally, the extensive number of detailed provisions concerning the establishment of evidence further supports this argument. As Julien Théry noted, the *jeu de subdivisions* was not merely an intellectual exercise in scholasticism; it served a specific purpose that becomes evident in light of Ulrike Müßig's findings.[17] The formalisation of the system through structured rules aimed to ensure *rationabiliter* proceedings in court. It is indeed difficult to accept that all late medieval procedural literature merely reiterated concepts solely within the realm of academic theories, as this notion contradicts the very nature of the *ordines iudiciarii*.

Confirmation that the rules of evidence were integral to the *rationabiliter* procedure can be found in the debates among jurists regarding evidence in criminal cases. During

13 Müssig (2019), p. 65.

14 Decretum Gratiani, C. 2 q. 1 c.7 § 9, Friedberg (ed.) (1959), vol. 1, col. 442: *"(...) Quia ergo episcopus alieni concilii iudices habuit omnino suspectos, sententia non a suo iudice dicta nichil firmitatis obtineat."*; X. 2.1.4, Friedberg (ed.) (1959), vol. 2, col. 230: *"At si clerici coram saeculari iudice convicti fuerint vel confessi de crimine, non sunt propter hoc a suo episcopo aliquatenus condemnandi. Sicut enim sententia a non suo iudice lata non tenet, ita nec facta confessio coram ipso. Si vero coram episcopo de criminibus in iure confessi sunt, seu legitima probatione convicti, dummodo sint talia crimina, propter quae suspendi debeant vel deponi, non immerito suspendendi sunt a suis ordinibus vel ab altaris ministerio perpetuo removendi. (...)"*; X 1.4.3, Friedberg (ed.) (1959), vol. 2, col. 36–37: *"Ad nostram audientiam noveris pervenisse, quo in tua dioecesi etiam in causis ecclesiasticis consuetudo minus rationabilis habeatur, quo quum aliqua causa tractatur ibidem, et allegationibus et querelis utriusque partis auditis, a praesentibus literatis et illiteratis sapientibus et insipientibus, quid iuris sit quaeritur, et quo illi dictaverint vel aliquis eorum, praesentium consilio requisito pro sententia teneatur. Nos igitur attendentes, quo consuetudo, quae canonicis obviat institutis, nullius debeat esse momenti, quum sententia a non suo iudice lata nullam obtineat firmitatem, ut in causis ecclesiasticis subiectorum quorum, postquam tibi de meritis larum constiterit, sententiam proferre valeas, sicut ordo postulat rationis, auctoritate tibi praesentium, praemissa consuetudine non obstante, concedimus facultatem."* More on the topic of judical competence in Canon law see: Müssig (2019), pp. 41–66.

15 Decretum Gratiani, C. 2 q. 1 c. 17, Friedberg (ed.) (1959), vol. 1, col. 446: *"Sed sciendum est, quod eorum, que manifesta sunt, alia sunt nota iudici, et incognita aliis; alia sunt occulta iudici et manifesta aliis; quedam vero sunt nota iudici, et aliis. Que iudici tantum nota sunt, sine examinatione feriri non possunt, quia, dum accusatoris persona assumitur, iudiciaria potestas amittitur. In una enim eademque causa nullus simul potest esse accusator et iudex."* From the literature compare Endemann (1860), p. 75: *"Was der Richter nur als Mensch wusste, konnte unter allen Umständen iuristisch nicht verwerthet werden."* See footnote 6 where he provides many sources to support this claim. See also: Lévy (1939), p. 8; Brundage (2010), p. 386.

16 See Brundage (2007), pp. 58–71.

17 Théry (2003), p. 143.

the thirteenth and fourteenth centuries, canonists and legists engaged in a vigorous discussion about the role of discretion in the administration of criminal law. This conflict mirrors a familiar dilemma faced by modern jurists: on one hand, efficiency necessitates increasing judicial discretion to safeguard society from criminal behaviour, while on the other hand, individualised justice demands strict adherence to established legal principles that ensure *ordo*. Ultimately, the latter perspective not only prevailed but also evolved into a framework characterised by the most stringent rules, predicated on the belief that evidence in criminal cases must be "as clear as the light of day".[18] Thus, the outcome of this debate aligns with the notion that the more severe the consequences of a legal proceeding, the more substantial the grounds for the verdict must be. These grounds, importantly, do not pertain to the strength of the judge's subjective conviction but rather to a specific standard of proof that is higher than that required in civil cases.

A significant illustration of the implications of this assumption is the prohibition against using *probationes semiplenae* in criminal cases to achieve *probatio plena*. Tancred explicitly rejected any relaxation of the principle of *testis unus, testis nullus*, asserting that the presence of one witness, along with common belief or other circumstantial factors, was insufficient to establish full proof.[19] Subsequent writers echoed this belief.[20] Likewise, notoriety – a concept originating in canon law – did not override the established rules of evidence, even though such a solution had already been indicated by Gratian.[21] *Notorium* was defined as an act that was known (...) *per confessionem vel probationem* (...) *aut evidentia rei, quae nulla possit tergiversatione celari*.[22] This new concept could enhance the effectiveness of the principle that *rei publicae interest, ne crimina remaneant impunita.*[23] Instead, Johannes Teutonicus delineated the specific requirements that needed to be met to establish notoriety, and these criteria were subsequently adopted by later canonists.[24] As a result, judicial discretion was consequently constrained.

The role of an *arbitrator*, specifically one who decides based on principles of equity rather than strict legal standards, represents a fundamentally different scenario. In these instances, since this function did not involve *iudicium*, the proceedings were considered extrajudicial. Unlike an *arbiter*, who is expected to adhere to the *ordo iuris*, an *arbitrator* does not establish a definitive framework for conducting evidentiary proceedings. Instead, these proceedings are informal, which aligns with the intrinsic nature

18 Fraher (1989), pp. 24, 61. See also: Asser (1994), pp. 209–223.

19 Fraher (ed.) (1979), p. 29; Bergmann (ed.) (1965), pp. 151–152.

20 See Brundage (2007), p. 66.

21 Decretum Gratiani C. 4 q. 4 c. 2, Friedberg (ed.) (1959), vol. 1, col. 541–542.

22 X 5.40.24, Friedberg (ed.) (1959), vol. 2, col. 921. See also: X 3.2.10, Friedberg (ed.) (1959), vol. 2, col. 457.

23 X 5.39.35, Friedberg (ed.) (1959), vol. 2, col. 904. On this principle, see: Pennington (2000), pp. 352–353; Fraher (1984), p. 581.

24 Johannes Teutonicus, Decretum mit der Glossa ordinaria, Venedig 1485. Available from https:// opacplus.bsb-muenchen.de/title/BV035665778, D 2.1.15f; Enrico Segusio, Summa aurea, Venetiis 1570. Available from https://opacplus.bsb-muenchen. de/title/BV011946596, 1.3.2.6g; Guillaume Durand, Speculum iudiciale, Mit Additiones von Johannes Andreae und Baldus de Ubaldis. Mit Inventarium von Berengarius Fredoli, Bd. 1–4, Lyon 1498–1500. Available from https:// opacplus.bsb-muenchen.de/title/ BV035783789, pars 1, De notoriis criminibus, §8. On that see Maćkowiak (2022), pp. 9–10.

of arbitration courts. Parties typically opted for arbitration primarily to circumvent the burdens and formalities associated with the ordinary judicial process.[25]

What is crucial in this context is that the arbitrator was not bound by the *ordo iuris*, meaning he was not obligated to follow its rules, including those pertaining to evidence. Thus, ordo implies a commitment to the established rules of evidence. The assurance of fair treatment in arbitration stems from the parties' selection of the arbitrator. In contrast, parties do not choose the judge in an ordinary trial; therefore, the equivalent guarantees in that context must consist of rules that ensure fair proceedings – among which, the rules of evidence are essential. In this regard, the existence of systematic rules would serve as a natural response to the parties' lack of agency in selecting who conducts the proceedings. However, it is significant to note that, unlike in the case of an arbiter, the arbitrator's ruling could be appealed. Since there was no Roman precedent for such a mechanism, it can be inferred that an appeal to an ordinary court served as a form of protection for the parties against a judgment that was not grounded in the ordo. If this is the case, it becomes evident that the rules of evidence were an integral component of the ordo. Such a conclusion has important implications for the broader discourse on legal proceedings and the nature of arbitration.

Does this imply that the assumption of a legal theory of evidence is valid?

Theories are indeed useful, but they do not always fully capture the complexities of the realities they aim to explain. This is particularly true in the case of the legal theory of evidence. Based on the findings presented thus far, as well as the observations made, it is clear that the standard of proof required by late-medieval jurists necessitated a certain level of evidence. This requirement effectively bound the judge to adhere to specific rules. Consequently, it may be appropriate to characterise this as legal evidence. However, such a portrayal would be overly simplistic. The judge's role in evidentiary proceedings extended beyond merely verifying whether the collected evidence complied with established rigid rules. This is evidenced by instances that fall outside the structured framework of the *ordines iudiciarii*. Notably, in cases involving disputed witness testimony, the judge was tasked with assessing the credibility of that testimony.[26] He could also limit the number of witnesses, which necessitated intellectual activities beyond those prescribed by the rules of evidence.

Challenges

In the preceding discussion, I have attempted to articulate my observations within the context of existing opinions on the matter. However, the topic is undoubtedly more intricate and merits a comprehensive examination. Here, I would like to outline the relevant issues and the research postulates that arise from them, which should be considered to develop a more complete understanding of the subject.

25 Wojciechowski (2010), pp. 74–79.

26 See Sinatti d'Amico (1966), pp. 182–183.

Certainly, the fundamental issue at the forefront is the relationship between judicial practice and the established rules. Not everything appears to support the notion of a rigid adherence to these rules, at least when considering the entirety of the system. A counterargument that has not yet been addressed is the technical challenge associated with influencing the comprehensive theory of evidence. Within this evidentiary system, concepts were often developed in a scholastic manner, characterised by their division into categories and subcategories. A pertinent example of this is the concept of notoriety. A notorious act, let's remind, was defined as one that was known [...] *per confessionem vel probationem* (...) *aut evidentia rei, quae nulla possit tergiversatione celari*. The condition for invoking notoriety was the general transparency of the facts, which could not be denied in any way. Since various types of facts could fit into these requirements, several types of notoriety were distinguished. The division was proposed by the decretist Johannes Teutonicus based on his famous *Glossa ordinaria* in which he defined its three types: *notorium facti*, *notorium iuris* and *notorium praesumptionis*. The first one was to refer to facts known to everyone, observable and, therefore, undeniable. The second could be based on a previously passed sentence, a confession of guilt or something already proven but not yet judged. The third one corresponded to the effect of legal presumption and, as such, became the basis of another institution. Then the same decretist distinguished three types of *notorium facti*: *notorium facti continui sive permanentis*, *notorium facti actu transeuntis seu momentanei* and *notorium facti interpolati*. Each of them had its own rules because each corresponded to a different type of knowledge. The first of these was the most powerful – not only did it not require proof, but it also did not allow contrary evidence. It included facts endowed with publicity as well as lasting existence, i.e. those that are observable. The second category could refer to acts known to everyone but isolated (single) acts. Finally, the third type concerned cyclical or repetitive, but not continuous, events or patterns. The evidentiary value assigned to notorious status required the creation of strict conditions for its use.[27] Going beyond the sources of scholarly law for a moment, it should be noted that the use of individual categories is virtually unheard of in practice, despite the existence of generally accepted rules.[28] The challenge for future research is to investigate the extent and specificity of the gap between the law as it is written and the law as it is applied in practice.

Another issue worth highlighting is the apparent divergence in the approaches to evidence taken by legalists and canonists. While it can be asserted that they utilised common legal institutions, their foundations were rooted in distinct procedural traditions. The canonists' approach was informed not only by Roman law but also by the legacy of

27 Maćkowiak (2022), pp. 9–10.

28 Seraphim (ed.) (1912), pp. XXVIII–XXIX: there are compiled statements of witnesses interrogated during the inquisitorial trial against the Teutonic Order, regarding the meaning of the concepts of *publica vox et fama*, *manifestum*, *notorium*. For example, one of the witnesses, Henryk Languemann, a canon of the cathedral of the Ösel diocese, when asked about the difference between *notorium* and *fama*, replied *quod nesciebat distinguere inter illa, quia non erat iurista*, Seraphim (ed.) (1912), p. 24; see also: Vitiello (2016), p. 96: there is an example of a doctor *utriumque Iris* (!), who also was unable to distinguish the difference between *fama* and *notorium*.

the jurisdictional practices of ecclesiastical courts, which were significantly influenced by patristic thought.

A compelling problem is locating the evidence in the broader context of the public dimension of a trial. As Franca Sinatti d'Amico rightly reminded: *storia del processo possa essere storia di idee*.[29] The same researcher provided an example that aligns seamlessly with the themes explored in this volume. The requests made by Lombard communes to Emperor Frederick Barbarossa for the authority to resolve court cases through arbitration serve as a clear expression of their pursuit of autonomy. This inclination appeared to be motivated by political considerations. By circumventing the imperial magistrate and entrusting disputes to fellow citizens — who were knowledgeable in common law and local customs — these communes sought to prioritise private autonomy over the public functions of the Empire. Indeed, arbitration continued to be employed in this context for an extended period, often overshadowing ordinary adjudication.[30] This single example invites multi-faceted and in-depth reflection. An inherent aspect of this situation is the role of evidence and the conflict of its concepts at both the legal and political levels.

Finally, a challenge that extends beyond those previously discussed is the question of conceptualisation. Based on the findings presented, it appears more appropriate to lean towards a legal theory of evidence. However, the specific form this theory should take, along with the necessary qualifications, remains an open question.

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Důkazní standard v pozdně středověké právní teorii – konceptuální cesta

Jedním z problémů v oblasti výzkumu *ius commune* je otázka, jak bychom měli chápat důkazní standard, který se objevuje v textech pozdně středověkých právníků. Jedná se o hierarchii důkazů, která omezuje roli soudce v rámci hodnocení, zda předložené důkazy tomuto standardu odpovídají? Nebo jde pouze o vodítko, na jehož základě se má úsudek soudce teprve utvářet?

Právní historikové vedou debaty o roli soudce v této rovině několik desítek let. Někteří z nich, jako Jean-Philippe Lévy, věří, že důkazní standard představuje ekvivalent k systému důkazů známých z římského nebo kanonického práva. Na druhou stranu někteří badatelé, jako je Franca Sinatti d'Amico, vnímají podstatu důkazní teorie zcela odlišně. Oba podporují svá tvrzení řadou argumentů. Další badatelé, mezi něž patří Edward Szymoszek a Wiesław Litewski, se snaží nalézt mezi těmito názory kompromis.

Vzhledem k výše uvedeným argumentům a k inherentní povaze *ordo iudiciarius* se zdá, že koncept důkazu vychází z pramenů. To ovšem neznamená, že bychom jej měli přijmout v podobě, v jaké byl rozpracován právní vědou 19. století. Krátká úvaha, jež je předmětem tohoto příspěvku, odhaluje aspekty, které se vymykají tradičnímu pojetí důkazního standardu. Budoucí výzkum je podmíněn zodpovězením dalších otázek, mezi něž patří nesoulad mezi právní úpravou a praxí, rozdílné názory legistů a kanonistů a poměr důkazu k dalším aspektům, jež plynou z veřejné povahy soudního řízení.