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«INTIME CONVICTION» IN GERMANY. CONCEPTUAL FOUNDATIONS, HISTORICAL DEVELOPMENT AND CURRENT MEANING

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ABSTRACT: The paper analyses the concept of «intime conviction» from the perspective of the German reformed inquisitorial criminal procedure. It starts off with the discussion of the foundations of the concept and explains how it—in essence, a flexible method to assess the available evidence—is integrated in the larger topic of the law of evidence, especially its production and evaluation (infra 1). One key issue in this regard is how much freedom is given to the adjudicator to carry out the evidentiary evaluation and how this freedom relates to the applicable standard of proof (*Beweismaßstab*, *estándar probatorio*), being «beyond any reasonable doubt» (BARD) the most popular one. At any rate, in a (reformed) inquisitorial system all persons involved in the evidentiary process should be guided by the search for truth. To fully understand «intime conviction» and how it operates in the reformed inquisitorial procedure it is necessary to take a look at the historical development and the different factors influencing this development (section 2). Here again the importance of the fact-finding authority (professional judges vs. laypersons, especially jury) co-

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mes to light and its dependence or at least relationship with the system of evidentiary evaluation. It will be seen that while the current system is based on the historical precedents the historical development has not been linear. This current system is then analyzed in the following section (3). It will be shown that it moves somewhere between the former system of legal proof and free evaluation. An expansive appeals jurisprudence has increasingly turned the «free conviction» into a sort of *«conviction raisonnée»*, the lack of remaining (reasonable) doubts as a basis for a conviction makes clear that it is the BARD standard which effectively informs the intime conviction method in substantive terms. The paper closes with some further considerations on the justification of the (high) standard and the (formally not necessary) proof of defenses (section 4).

KEYWORDS: intime conviction, beyond reasonable doubt, legal proof, evidentiary rules, free evaluation.

1. CONCEPTUAL FOUNDATIONS

Intime conviction *(conviction intime)* is, in essence, a flexible method to assess the available evidence, based on the conviction of the adjudicator, in contrast to a rigid system of rules of evidence *(preuve légale, prueba legal/tasada, gesetzlicher Beweis)* to which we will return below. So understood, intime conviction is *not* a standard of proof *(Beweismaßstab, estándar probatorio)*—as the most popular, common law «beyond any reasonable doubt» (BARD) standard—although the requirement of a «conviction» seems to refer to the aim of the assessment exercise, namely to reach such a conviction[1]. Yet only a proper standard of proof like BARD provides for criteria to come to a conviction (namely lacking any reasonable doubts).

The phase of the evaluation/assessment of the evidence must be distinguished from the preceding phase of obtaining/collecting/gathering evidence[2]. In other words, the evaluation of evidence presupposes that this evidence has been collected in the first place. This collection usually takes place in line with certain rules which determine the lawfulness of the evidence which, in turn, may entail certain prohibitions of use *(Beweisverbote)* or exclusionary rules (Thaman and Brodowski, 2020, p. 428-458). Also, the rules on evidence collection determine who is responsible for the collection of the evidence marking an important difference between adversarial and inquisitorial systems (understood as ideal types), with the former leaving

[1] Stuckenberg (2013, p. 17): distinguishing between the method («intime», «free») and the aim («conviction»).

[2] See from a German perspective Küper (1967, p. 292); Arzt (1974, p. 223-237); Walter (1979, p. 284 ff., 323-324).

this responsibility to the parties and the latter to the official adjudicator/fact-finder, imposing on her a duty to inquire or clarify exhaustively *(Aufklärungspflicht)*[3]. This duty, in turn, is intimately linked to the (in)famous concept of material truth giving rise to many misunderstandings, not least the idea that truth-seeking has no role to play in adversarial systems[4]. In fact, the opposite is true and at the core of the traditional adversarial-inquisitorial dispute does not lie so much a conceptual question (what kind of truth) but a procedural one as to the (right) *way to achieve or get to the truth*. This is the central issue of this paper.

While it is clear that any limitation in evidence gathering and use is in tension with a right or even duty to the (material) truth[5]—sometimes even translated in a right to proof (*diritto alla prova*)[6]—, it is generally accepted that there are legitimate (rule of law/rights-based) reasons to impose such limitations. Indeed, the history of criminal procedure reform on the European continent was predicated on the assumption that any evidence presented to a court had been obtained in a lawful manner, *i. e.*, in accordance with the laws of the time (Nobili, 2001, p. 79, p. 81; Damaška, 2019, p. 92 ff.)[7]. The question is of course what are legitimate reasons to impose limitations on evidence gathering. In a criminal procedure system which operates within the confines of the rule of law such reasons mostly derive from rights limitations, starting with human dignity as its *Grundnorm*. Other limitations, for example the German rule that only certain means of proof (documents, visual inspection, witnesses and experts, *Strengbeweis*) are admitted to prove guilt or innocence, are difficult to understand from this perspective and indeed are unreasonable from a common law or any perspective which champions judicial freedom in the evaluation of evidence[8]. In fact, free evaluation undermines a strict production rule like the *Strengbeweis,* since it allows for evidence not obtained by the *Strengbeweis* to be considered (Arzt, 1974, p. 224, 230, 234-235).

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[3] *Cf.* German Criminal Procedure Act (Strafprozessordnung), § 244(2): «*Das Gericht hat zur Erforschung der Wahrheit die Beweisaufnahme von Amts wegen auf alle Tatsachen und Beweismittel zu erstrecken, die für die Entscheidung von Bedeutung sind*».

[4] From the perspective of civil procedure *cf.* Clermont and Sherwin (2002, p. 243-275, at 269-271). With the equally misleading proposition however that civil law countries, taking France as the only example, prefer dispute resolution over truth; *contra* insofar Taruffo (2003, p. 659-677, at 673-677). Crit. however Damaška (1997, p. 94 ff.), concluding that «the Anglo-American method of collecting and presenting evidence […] strikes discordant notes with […] a model of inquiry aimed at obtaining only accurate, trustworthy knowledge» (p. 101).

[5] From a historical perspective on the equation of the principle of «material truth» with an unlimited freedom of the judge to inquire the facts, see Nobili (2001, p. 27 ff.).

[6] *Cf.* Walter (1979, p. 302 ff.).

[7] Damaška (2019, p. 95): discussing the rejection of inadmissible, albeit persuasive evidence and stressing that fact-finding was limited with regard to incriminating evidence given that it was accepted that «certain rules responsive to defense interested are rooted in natural law and constitute the indispensable elements of the just judicial order».

[8] See also Damaška (2019, p. 122). Correctly arguing that such rules directly affect judicial freedom.

Once evidence has been (lawfully) collected the question arises how it should be assessed or evaluated. From a continental (civil law/inquisitorial) perspective the key issue insofar is *how much freedom is given to the adjudicator*. The scale runs from none (positive theory of legal proof) to full freedom (principle of free evaluation)—«between the Scylla of rigid normativity and the Charybdis of uncontrollable decision-making freedom» (Damaška, 2019, p. 116)—with negative formal rules (negative theory of legal proof) as a compromise formula allowing for a smooth transition from the strict rule-based system of the traditional inquisitorial process[9] to the free evaluation of the enlightened postrevolutionary reformed process. A system of legal proof consists of formal (Roman-canon) (Damaška, 2019, p. 1) rules of evidence which instruct the adjudicator to take a certain fact as evidence only if this finding is in compliance with the respective rules[10]. There may be (exclusive) positive rules, for example the two witnesses' requirement for a conviction of the *Carolina*[11], or negative rules which, while accepting the judge's conviction in principle, operate as a kind of back up of this conviction or a minimum standard so that a conviction is only possible if the relevant formal rule, *e. g.* the existence of a confession[12], is complied with[13]; these are also called mixed theories since they combine the judge's conviction with formal rules of evidence[14].

While on a conceptual basis there seems to be a strict—sort of ideal-type—distinction between a system of legal proof and one of free evaluation, it would be incorrect to assume that the pre-revolutionary, rules-based process of the *ancién regime* did not allow for judicial discretion. In fact, formal rules of evidence have been developed over centuries, largely in a highly complex and confusing manner[15] which for this very fact already contained inroads of judicial discretion, the so-called *arbitrium iudicis*[16], albeit within the framework of the very system of legal proof and there-

[9] See, as a prominent example, *Die Peinliche Halsgerichtsordnung Karls V.* ("Constitutio Criminalis Carolina") of 1532. For an analysis, see Ignor (2002, p. 60 ff.).

[10] For a more elaborate definition, see Sarstedt (1968, p. 186); Frisch (2016, p. 707-714, at p. 708).

[11] *Cf.* Art. 67 of the Carolina, the medieval German text is for example available at http://ra.smixx.de/media/files/Constitutio-Criminalis-Carolina-1532.pdf. In detail on the two-eyewitnesses rule: Damaška (2019, p. 59 ff.).

[12] On the importance of (courtroom) confessions in the medieval process, see Damaška (2019, p. 37 ff., 69 ff.).

[13] This was already proposed in the context of the French revolution by Robbespiere and in Italy by Filangieri and others (Nobili, 2001, p. 126-127, with references also p. 155; Walter, 1979, p. 65-66) and taken up, inter alia, by Feuerbach (1813, p. 132 ff.) and Mittermaier (1834, p. 83): «*… innere Ueberzeugung genügt nicht, wenn nicht zugleich durch ein, im Gesetz als genügend erklärtes Beweismittel die Schuld hergestellt ist*». See also Küper (1967, p. 230-231); *id.*, Küper (1984, p. 23-46 at 23 ff.); Schmitt (1992, p. 152 ff.); Ignor (2002, p. 251); Frisch (2016, p. 708); Damaška (2019, p. 81 ff., 113-114, 136).

[14] This terminology is for example used by Nobili (2001, p. 126 and passim).

[15] On the «hugely varied legal landscape» of Roman-canon evidence law (Damaška, 2019, p. 5-6); see also Nieva Fenoll (2021, p. 41-65, at 52 ff.).

[16] See Nobili (2001, p. 81 ff., 85, 91 ff.); Jerouschek (1992, p. 493-515): free evaluation in general inquisition (p. 500-501); legal proof never totally unfree (p. 502); Damaška (2019): judicial discretion

fore not to be confused with free evaluation in an absolute (original French) sense (Damaška, 2019)[17]. At any rate, judicial freedom of any sort is difficult to reconcile with a system of legal proof. Indeed, the adjudicator's freedom consists of her freedom to come to a conviction/persuasion irrespective of any formal rule[18]. But how relates this freedom to the standard/degree of proof *(Beweismaß/-grad)* mentioned at the beginning of this paper? And what importance does the adjudicatory organ play in relation to the freedom of the evidentiary evaluation? Arguably, a free evaluation can only be directed at finding the truth, that is, that the decision for a certain (free) way to evaluate the evidence predetermines the standard of proof as something close to truth[19]. We will return to some of these questions.

2. HISTORICAL DEVELOPMENT

The situation on the European continent is difficult to understand without a brief reference to the historical development. While the formal turn to the free evaluation system was brought about by the French revolution in 1789, it must not be overlooked that already the old system contained discretionary elements in the form of the already mentioned *arbitrium iudicis* and calls for the abolishment of legal proof have predated the French revolution[20]. At any rate, the intime conviction standard has been introduced officially by way of the famous 1791 instruction giving full discretion to the then created jury[21] and it has survived until our

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as «mediating the tension» between too rigid rules and necessary flexibility for their implementation (p. 11, 18, 24); even free evaluation as «tenet of medieval legal scholars and court practice» (p. 48-49); but see next fn., freedom to decide cases of amourous rivalry «by relying on logic and common sense» (p. 76); «judicial discretion» (p. 114); «great importance in the judge's belief in the probative value of evidence» (p. 136).

[17] Whether there was free evaluation depends on the understanding of the concept (p. 64); concluding that free evaluation «in its pristine French sense […] was neither professed nor practiced in […] Roman-canon fact-finding evidence law» (p. 120).

[18] For other interpretations of «free», *cf.* Nobili (2001, p. 231).

[19] *Cf.* Walter (1979, p. 163-164).

[20] One of the most important writings was Von Justi (1760, p. 350-400), available at Google Books. On Justi and other authors, see Küper (1967, p. 132-133, 233 ff.); Schmitt (1992, p. 145-146); Nobili (2001, p. 110-111).

[21] *Cf.* the Decree of 29 September/21 October 1791 of the Constitutional Assembly as later incorporated in Art. 342 of the Code d'Instruction Criminelle (CIC) of 1808 (Code Napoleon), available at https://ledroitcriminel.fr/la_legislation_criminelle/anciens_textes/code_instruction_criminelle_1808/code_instruction_criminelle_2.htm:

[La] loi ne demande pas compte des moyens par lesquels ils se sont convaincus : elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve : elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite sur leur raison les preuves rapportées contre l'accusé, et les moyens de sa défense.

[La] loi ne leur dit point: Vous tiendrez pour vrai tout fait attesté par tel ou tel nombre de témoins; elle ne leur dit pas non plus: Vous ne regarderez pas connue suffisamment établie, toute preuve qui ne sera

days[22]. The radical break with the inquisitorial procedure was heavily influenced by the English adversarial system which was largely considered as the most progressive model by the liberal and enlightened thinkers of the time (Nobili, 2001; Damaška, 2019)[23]. The revolutionary legislator had an extreme trust in the jury (the 1792 *Tribunal révolutionnaire* was itself a jury!) and considered it as the guarantor of a truly independent judiciary (given the monarchy's control of the professional judges) and thus a symbol of freedom and democracy[24]. Even a strictly accusatorial investigation has been introduced with a jury for the confirmation of the charges (Nobili, 2001, p. 122-124). Yet, the reform was not sustainable and the rollback started as early as 1795 with the reintroduction of old inquisitorial elements, especially the secret and written preliminary investigation, culminating in the already mentioned mixed Code d'Instruction Criminelle of 1808[25]. The result has been a tension between an inquisitorial (preliminary) investigation and an accusatorial, adversarial trial with a free evaluation of the evidence—a tension which persists until today (Nobili, 2001, p. 140 and passim).

The failure of the English procedural model in France (and thus in Germany and Italy, influenced by French approach) had its main technical reason in the lack of a proper understanding of the deeper structures of this model, in particular, the party-driven procedure (including the investigation) and the dialectical art of argumentation *(ars disputandi)* which is a key feature of common law systems until today. This stands in stark contrast to the continental approach of an inquisitorial investigation and the a priori, mechanical rationalism, detached from the adversarial debate of parties (Nobili, 2001, p. 9 ff., 18-19, 46, 77, 131). On a metalevel, it was mistakenly assumed that the mere (Watson-like) transplant (Watson, 1974, p. 21-30) of some elements of the English model, especially the jury, would guarantee a sustainable radical change. Instead, the successful counter reform mentioned above confirms the general insight that the law of evidence, as indeed any other legal subsystem, cannot be transplanted in an isolated way in a new system without translating them[26] and taking due account of the general procedural framework of the system from which it is borrowed. Thus, in essence, the intimate relationship between the procedural model and the way how evidence is evaluated (either pursuant to formal rules or freely)

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pas formée de tel procès-verbal, de telles pièces, de tant de témoins ou de tant d'indices; elle ne leur fait que cette seule question, qui renferme toute la mesure de leur devoir: Avez-vous une intime conviction? (emphasis in the original).

See also Nobili (2001, p. 124 ff.), with a summary of the debate in the Constitutional Assembly where subjectivists won the day; Walter (1979, p. 68-69); Ignor (2002, p. 250-251).

[22] *Cf.* Art. 353 Code de Procédure Pénale (with a shortened version).

[23] 1791 decree as radical reform modelled on English procedure (Nobili, 2001, p. 122, 131). Damaška (2019, p. 118): «… copy the English machinery of justice and introduce the jury trial».

[24] *Cf.* Ignor (2002, p. 249-250).

[25] *Cf.* Nobili (2001, p. 130 ff., 138 ff.). In this process of counterreform even the fate of the jury was at stake, but it was ultimately maintained (Nobili, 2001, p. 141-142, 143 ff.).

[26] *Cf.* Langer (2004, p. 1-64, at 1, 5, 29 ff.).

has been overlooked or at least neglected[27] and the new system was not sufficiently, if at all, adjusted to the dialectical argumentation so typical for the English model (Nobili, 2001, p. 222 ff.).

On a more concrete level, the perception of the jury has been negatively influenced by certain excesses of the French jury (especially of the Revolutionary Tribunal[28]) and its originally unlimited discretion. Thus, the jury was largely seen as a purely emotional and intuitive fact-finder, operating pursuant to a *«Totaleindruck ohne Reflexion»* (Walter, 1979, p. 70-71)[29], as opposed to professional judges taking their decisions rationally. Yet, while the choice of the adjudicatory organ should not be underestimated[30], the juxtaposition jury/professional judges was clearly an overstatement[31] if only for the fact that even the pre-revolutionary judge, albeit within a system of legal proof, disposed of a considerable discretion, as already mentioned above[32]. More importantly, most scholars overlooked the jury instructions as part of a complex law of evidence (Küper, 1967, p. 176-177; Schmitt, 1992, p. 149 with fn. 566; Damaška, 2019, p. 130-131)[33] and understated the jury's process of deliberation.

Carl Joseph Anton Mittermaier (1851), one of the most influential German scholars of the 19th century, was one of the few authors who took a more nuanced approach distinguishing between the English jurors who decide «on the basis of a bunch of precise rules of evidence» (p. 47)[34] and the French ones who are so-

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[27] *Cf.* Nobili (2001, p. 81 ff.): Überzeugungsbildung.

[28] Ignor (2002, p. 214, 249-250): discussing the skepticism in Germany because of the jury's reputation as a political institution.

[29] See also Feuerbach (1813, p. 119-120): *«Die Geschworenen mit ihrem Instinct erscheinen hier nicht anders, denn als ein Methodisten– oder Quäkerverein, der in dumpfer Gedankenlosigkeit auf den Lichtstrahl der natürlichen Offenbarung harrt, so wie die letzten auf eine Erleuchtung von oben»*.

[30] See *e. g.* Damaška (2019, p. 130): «In England, the resolution of testimonial conflict was in the hands of amateurs […], while on the continent it was in the hands of case-hardened professionals…».

[31] *Cf.* Nobili (2001, p. 41 ff., 60) discussing the two extremes of an either irrational, emotional or mechanically rational fact-finding process by either jury or professional judges. See also Damaška (2019, p. 131) stressing that the jury achieved «its present-day fact-finding freedom [,] only from the middle of the eighteenth and across the nineteenth century».

[32] Damaška (2019, p. 131) therefore stresses that «the actual contrast» between the jury and the Roman-canon judges «is not so pronounced».

[33] Damaška (2019, p. 130-131) arguing however that the jury instructions themselves resembled rules developed five centuries earlier by Roman-canon jurists; «… instructions of this kind function like Roman-canon negative legal proof in that they aspire to influence the fact-finders' commonsense reasoning…» (p. 134).

[34] *«Quelli per antica consuetudine hanno l'obligo di decider (1), non già dietro una teoria di prove legali, come nel processo germanico, ma in base* ad un complesso d'accurate regole probatiore [of evidence] [emphasis added] *convalidate dai giudicati emessi nella pratica, i quali si trasmettono per tradizione, dagli scrittori (2) vengono raccolti e scientificamente trattari, e di cui poi il giudice delle assise ne informa il giuri* » (Mittermaier, 1851, p. 47); praising the «moral and political traits of the English» *(specialità morali e sociali degli Inglesi)* which explain the superiority of their jury and the century old experience of techniques of argumentation which are summarized in the rule of evidence) (p. 571-572). In the (previous)

mewhat left alone with the «imprecise and confusing» concept of intime conviction (p. 480)[35]. In fact, this author changed his earlier view (in favour of professional judges with a mixed system of formal rules of evidence and personal conviction) around 1846—on the basis of impressions of a trip throughout Europe—and acknowledged that a radical reform introducing the jury and a full accusatorial trial was necessary (p. 475, 553, 564-565)[36]. Mittermaier (1832, p. 488-518)[37], as well as his tutor Paul Johann Anselm Feuerbach (1825, p. 460-461)[38], has been profoundly influenced by the Louisiana legislator and reformer Livingstone and his (legislative) «Code of Evidence», apparently more than by English jurists[39]. In fact, Mittermaier (1833) wanted to subject the jury to a Livingstone-like set of (flexible) rules of evidence[40], thus implying, as previously Feuerbach (1825)[41], that the existence of a jury does not necessarily preclude a theory of legal proof.

At any rate, these reformist positions prepared the ground for the abolishment of legal proof in the German states—after having «stubbornly» persisted for centuries (Damaška, 2019, p. 5-6) (and resurfacing later mainly in its negative form as we will see below)—, first in Prussia by the Law of 17 July 1846[42], intellectually prepared by

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German version of this text Mittermaier does not explicitly refer to the English rules of evidence, *cf.* Mittermaier (1845, p. 27); on the additional considerations in the Italian version, see also editor's note (Mittermaier, 1845, p. 12-13). See also Mittermaier (1858, p. 36-37, 86-87, 92-93, 132-133, 140-141); Mittermaier (1834, p. 37, 83, 110-111). On Mittermaier in this regard, see also Küper (1967, p. 224); «Historische Bemerkungen» (1984, fn. 58); Nobili (2001, p. 152-153).

[35] *«La così detta intime conviction, alla quale sono rimessi i giurati francesi, è cosa sì indeterminata e confusa (1), che sopra non vi si può far capitale…»*

[36] See also Mittermaier (1858, p. 109-110, p. 139-140); on this, see also Nobili (2001, p. 161-162); Ignor (2002, p. 260 ff.).

[37] Summarizing Livingstone's Code at p. 508-518; *id.*, Mittermaier (1833, p. 120-140 and p. 280-303 at 284); Also Mittermaier (1834, p. 112 ff.).

[38] Referring to Livingstone and his proposal of a «Code of Evidence» (*«fünftes Buch»*) for the jury trial.

[39] On this (regarding Mittermaier), see Landau (1987, p. 241-304, at 248 ff.), noting however that Livingstone's Code was never adopted.

[40] Concluding that «legal rules of evidence should also be given in a criminal justice system built upon the jury» (*«… auch in einer auf Geschwornengerichte gebauten Criminalordnung gesetzliche Beweisvorschriften gegeben arden sollen»*) (Mittermaier, 1833, p. 298) and calling for a «legal instruction on evidence» (*«gesetzliche Instruction für die Geschwornen»*) (p. 300).

[41] *«Allein eine Beweislehre, welche, nach den allgemeinen Regeln der Erfahrung über geschichtliche Wahrheit, unsichere, trügliche Mittel der Ueberzeugung von den sicheren und ächten sondert, nur diese zuläßt, den Gebrauch jener verwirft; welche in Hinsicht der von ihr überhaupt zugelassenen Beweismittel bestimmt, unter welchen Bedingungen ihnen im Besondern Beweiskraft zukomme oder nicht; welche festsetzt, welche und wie starke Beweismittel wenigstens vorhanden seyn müssen, wenn entweder überhaupt, oder bei diesem und jenem Verbrechen, der Angeklagte für überwiesen gesprochen werden darf; welche neben diesen gesetzlich verpflichtenden Bestimmungen, zugleich Regeln aufstellt, die, ohne das Urtheil zu binden, demselben wenigstens als Richtschnur zur Auffindung des Wahren dienen: eine solche Beweistheorie ist nicht nur mit einem Geschornengerichte (sic!) vereinbar, sondern selbst nothwendig, wenn nicht das Urtheil der Jury einer Wetterfahne gleichen soll…»* (Feuerbach, 1825, p. 461-462).

[42] See on this Law (which in § 2 also introduced the first German Office of the Prosecutor) for example Abegg (1847, p. 103-135, 155-187). On the historical development, including other German

von Savigny's memorandum on the principles of the new criminal procedure[43]. While the Prussian Law did introduce the free evaluation principle[44] as a rule, referring to the (professional) judge's conviction derived from the totality of the trial[45]—a formulation almost identically copied to the current § 261 of the *Strafprozessordnung* (stop)[46]—, it maintained the former system of legal proof for cases of a possible death penalty or life imprisonment where the defendant could only be convicted in line with the formal evidentiary rules of the former (1805) Code[47]. Interestingly, the jury was introduced in the wake of the French Revolution in the German states left of the Rhine already at the end of the 18th century[48] and later, from 1848 on, in other German states[49]; this was a further consequence of the adoption of the free evaluation principle[50]. Last but not least, the *in dubio pro reo* principle acquired full force with the abolishment of the evidentiary rules in that the suspect/defendant had to be considered (completely) innocent if his/her guilt could not be demonstrated beyond reasonable doubt[51].

The historical development makes clear that the move from the system of legal proof to free evaluation was intimately linked to the *question of the fact-finding*

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reform laws, see Ignor (2002, p. 259-260, 263 ff., 280 ff.). Note that the Criminal Procedure Code of Baden was prepared before but entered into force later and maintained negative rules of proof, *cf.* Ignor (2002, p. 251, 259, 280, 282).

[43] Extracts of the memorandum have only been published more than ten years later in Archiv des Preussischen Criminal Rechts (ArchPrCrimR) 6 (1858, p. 469-491). The full version is now available as a book version edited by Werner: Von Savigny (2011). While von Savigny also had an important political role being Minister for Legislation in Prussia since 28 February 1842, he has been largely sidestepped in the legislative process by other Ministers which were apparently closer to King Friedrich Wilhelm IV, *cf.* Ignor (2002, p. 266 ff.).

[44] Ignor (2002, p. 252 ff.) considers the abolishment of torture and the (simultaneous) recognition of circumstantial evidence (indicia) as necessary forerunners of this principle in the German context.

[45] § 19 of the 1846 Law (*«nach seiner freien, aus dem Inbegriff der vor ihm erfolgten Verhandlungen geschöpften Ueberzeugung zu entscheiden …»*); see on the *travaux* on this point, Ignor (2002, p. 275, p. 278).

[46] § 261 StPO: *«… freien, aus dem Inbegriff der Verhandlung geschöpften Überzeugung…»*.

[47] The court could then convert the death sentence in life imprisonment and the latter in a temporal imprisonment, § 20, see Ignor (2002, p. 282-283).

[48] *Cf.* Landau (1987, p. 266-267): «since 1789 normal part of the judicial organization» (*«normaler Bestandteil der Gerichtsverfassung»*); also Schmitt (1992, p. 149-150).

[49] *Cf.* Gneist (1987, p. 254 ff.): summarizing the debate in Bavaria, Baden, Württemberg and Hessen-Darmstadt; on organisation, procedure, including free evaluation of evidence, and competence (Gneist 1987, p. 268 ff.); Jänicke and Peters (2016, p. 17-25, at p. 21); for the Kingdom of Bavaria, see Löhnig (2016, p. 153-161). In Switzerland the process started already at the end of the 18th century and the first juries have been introduced at the beginning of the 19th century in western cantons, *cf.* Gschwend (2016, p. 137-152).

[50] *Cf.* Küper (1967, p. 170 ff.); Nobili (2001, p. 161 ff.); Ignor (2002, p. 249 ff.).

[51] *Cf.* Zopfs (1999, p. 237 ff.) arguing that the principle was already recognized in the *ius commune* but only acquired full force with the abolishment of legal proof. See also Hoyer (1993, p. 526-527) arguing that the principle was only introduced with the recognition of free evaluation since the latter made its circumvention possible.

authority. In France, this move was triggered, if not predetermined by the introduction of the jury[52], and while the change of the adjudicatory organ did not have the same importance in Germany and Italy, the introduction of the jury clearly pushed for intime conviction and free evaluation with the—overstated—juxtaposition of «jury/free evaluation» and «professional judges/legal proof» dominating the discussion quite some time (Schmitt, 1992, p. 155-156; Walter, 1979, p. 69-70; Nobili, 2001, p. 74 ff.). This juxtaposition was only loosened with the attempts to rationalise the jury's process of deliberation and evaluation—moving away from the intime conviction's *«Totaleindruck»*—and the ensuing assimilation of the fact-finding process, either by way of legal proof/free evaluation or by laypeople/professional judges (Schmitt, 1992, p. 157; Küper, 1984, p. 34; Walter, 1979, p. 72-73). In fact, even the French intime conviction had its element of rationality or reasoning by way of the English doctrine of «common sense» as expressed in the concept of «reasoned conviction» *(conviction raisonnée)* (Nobili, 2001, p. 116; Schulz, 1988, p. 139-148, at 140-141)[53]. In Germany, rationalization was sought by taking recourse to Kant (how could it be otherwise?) with Jarcke (1826, p. 97-144) arguing as early as 1825 that truth can only be achieved if the adjudicator's subjective conviction/persuasion finds an objective basis in the object it seeks to recognize, in other words, if the subjective conviction can be objectively rationalized or is supported by reasons *(Gründe)* going beyond the adjudicator's subjective intuition[54]. This was taken up by other authors, especially Mittermaier (1834, p. 63 ff.)[55]. It laid the foundation of the just mentioned assimilation or approximation of the (new) free evaluation and the (old) legal proof with the respective adjudicatory authorities.

Ultimately, judicial conviction, either by laypeople or professional judges, can only be formed/established/achieved on the basis of intersubjective validity or articulation as a result of reasons or reasoning which themselves must be able to be communicated/communicable *(mitteilbar)*[56]. Thus, any judicial decision appears as the result of an intellectual, rational process of cognition, notwithstanding the adjudicator's professional or social background. Against this background the traditional criticism levelled against the jury, *i. e.*, that it produces mere intuitive decisions without any reflection and is a sort of black box for lack of giving reasons[57] seems

[52] Nobili (2001, p. 78, p.116): jury as one of main reasons and «vehicle» of free evaluation; but more cautious at 18: *«Nebenprodukt»*); Jerouschek (1992, p. 495-496).

[53] For this reason, Nobili (2001, p. 151) considers the German critique of the intime conviction as partly exaggerated. See also Damaška (2019, p. 120).

[54] Jarcke (1826, p. 97 ff.): *Übereinstimmung des Fürwahrhalten mit dem Erkenntnisobjekt*; for a good summary, see Küper (1967, 222-223), with references to the underlying Kantian ideas, and Küper (1984, p. 34 ff.); briefly also Nobili (2001, p. 158-159).

[55] See further Küper (1967, p. 224 ff.).

[56] *Cf.* Walter (1979, p. 72 ff.); Schulz (1988, p. 146 ff.). *Mitteilbarkeit* (p. 148); also Schmitt (1992, p. 157); Fezer (1995, p. 95-96, 100): *«intersubjektive Nachvollziehbarkeit bzw. Vermittelbarkeit»*; Frisch (2016, p. 713): *«Gründe* […] *intersubjektiv nachvollziehbar»*.

[57] For this common criticism, see *e. g.* Kunz (2009, p. 582-583).

to overlook that there is no such thing as mere intuitive decisions without prior reflection, especially after an intense process of deliberation guided by evidentiary instructions. Equally one must not confuse the lack of giving reasons with the lack of actual reasoning, the latter being part of any deliberative decision-making process. The reverse of the jury criticism is the extreme trust in the professional judge as an intellectual authority only guided by logic and reason (Küper, 1967, p. 243 ff., 303), an understanding which also informs the reading of the current § 261 stop (p. 300-301) (which, as we have seen, is based on the 1846 Prussian Law quoted above).

Once the adjudicator's conviction, either purely subjective or *raisonnée* (intersubjectively articulated), was recognized as the relevant factor in the process of evaluation of evidence the positive theory of legal proof could no longer be maintained for it may force the judge to decide against his conviction (Küper, 1967, p. 132, 229-230; Schmitt, 1992, p. 151; Damaška, 2019)[58]—in line with the Roman-canon maxim that the judge should adjudicate in line with the proof instead of his conscience[59]. In fact, already the old system provided for alternative ways of imposing more lenient sanctions or the so-called extraordinary punishments on the basis of indicia or mere suspicion *(Verdachtsstrafe)* if the judge was convinced of guilt but the necessary legal proof did not exist (Jerouschek, 1999, p. 498-499, 501; Schmitt, 1992, p. 144-145; Hoyer, 1993, p. 526; Kunz, 2009, p. 579; Damaška, 2019, p. 105 ff., 114)[60]. At any rate, any evidentiary system relying on the adjudicator's conviction cannot set aside this conviction by formal rules of evidence; at best, it may admit such rules *besides* the conviction as long as the latter prevails. While this was the core idea of the negative/mixed theory of proof, as shown above[61], this approach too lacks an explanation as to *how personal conviction and formal rules should be reconciled*[62]. Another compelling argument against any theory of legal proof was submitted by von Savigny in his already mentioned memorandum[63]. In essence, he argued that the complex process of forming a persuasion with regard to a certain fact is informed by a mixture of rules of human experience, nature and logic, and depends on so many elements, not least the circumstances of the individual case, that it cannot be captured by general

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[58] Damaška (2019, p. 49 ff.): «Convicting the innocent and acquitting the guilty»; but see also: recapitulating that the judge was not forced «to impose punishment on defendants he believed were innocent», «both objective legal proof and the judge's belief in its probative value» was required (p. 113).

[59] *Cf.* Damaška (2019, p. 55): «*Iudex iudicat secundum allegata et probata, non secundum conscientiam*».

[60] On the French law in this regard, see Westhoff (1955, p. 110); on the use of circumstantial evidence (indicia) and extraordinary punishments in the context of the abolishment of torture in the 18th century, Ignor (2002, p. 165 ff., 254-255).

[61] This is true for those variations of the theory which accepted the prevalence of the adjudicator's conviction in case of conflict with the formal rules of evidence.

[62] *Cf.* Walter (1979, p. 66-67); crit. also Schulz (1988, p. 144): either redundant if the relevant object itself produces the truth and thus is self-explanatory or harmful if it imposes a—wrong—decision against the personal conviction of the judge.

[63] Supra note 43.

and abstract rules (Von Savigny, 1858, p. 469-491)[64]. In other words, the process of forming a persuasion is too complex as to be forced into the straight jacket of any theory of legal proof, be it positive or negative.

This does not mean, of course, that the assessment of evidence would/should follow no rules at all. In fact, one of the key features of the reform process was the limited trust or even distrust in professional judges, their lack of independence vis-à-vis the executive power and the ensuing risk of an arbitrary assessment of the evidence[65]. Indeed, it is a common pattern of authoritarian regimes to use the judiciary in their repression of any dissident voices (Nobili, 2001; Nieva Fenoll, 2021)[66] and any formal rules guiding judicial evaluation of evidence or their work in general only pose obstacles in that regard[67]. It is for this reason that the theory of legal proof was long considered as the only efficient protection against judicial arbitrariness (Küper, 1967, p. 134-135; Damaška, 2019, p. 20)[68] and, from this perspective, the introduction of free evaluation as its extreme and dangerous reverse (Schmitt, 1992, p. 171). Thus, most scholars never understood the abolishment of legal proof as entailing a completely free evaluation, devoid of any rules, but rather that these rules continued to exist in an unwritten form, as product of the «general laws of thought, experience and knowledge of human nature» and as such had to be applied by the judges «themselves» (Von Savigny, 1858)[69]. Some scholars even tried to develop a proper «scientific» law of evidence with its own rules of thought, logic and experience, heavily inspired by the English model[70]. In addition, the reformed inquisitorial procedure offered

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[64] Von Savigny (1858, p. 486): «*Das, was wir Gewissheit einer Thatsache nennen, beruht auf so vielen einzelnen, in ihrer Zusammenwirkung nur dem einzelnen Fall angehörenden Elementen, dass sich dafür gar keine wissenschaftlichen allgemeinen Gesetze geben lassen*». For a discussion, see Küper (1967, p. 236 ff.); briefly Schmitt (1992, p. 158); in the same vein, Frisch (2016, p. 709).

[65] Nobili (2001, p.102 ff.) stressing the importance of legal bounds by way of the legality principle. Nieva Fenoll (2021, p. 62-63) points out that rules of legal proof were introduced in the 12th and 13th century because of the lacking quality of the judges at that time who—as delegates (and often friends) of the nobility—were neither independent nor equipped with the necessary expertise since they only had a rudimentary legal education and were wholly unfamiliar with trade dispute.

[66] On the judiciary's role during the NS-regime, see Ambos (2019, p. 127 ff.).

[67] See for example on the positivist, fascist school of the 19/20th century which called for unlimited power of the judge to better use criminal law as an instrument of repression and considered formal rules *(Justizförmigkeit)* as an obstacle in that regard, Nobili (2001, p. 193 ff., 203 ff.). The social defense movement *(defence social)* also called for a new «rational» interpretation of free evaluation as basis for the unlimited truth-seeking power of the inquisitorial judge, free from the dialectical contest of the parties, *cf.* Nobili (2001, p. 205 ff., 208 ff.).

[68] Damaška (2019, p. 20): «Roman-canon legal proof rules emanated from concerns about the unchecked exercise of judicial powers…».

[69] «*Der Unterschied zwischen Richtern mit und ohne Beweistheorie besteht lediglich und allein darin, daß in letzterem Fall dem Richter selbst die Auffindung und Anwendung der Beweisregeln, welche die allgemeinen Denkgesetze, Erfahrung und Menschenkenntnis an die Hand geben, überlassen wird*» (p. 484).

[70] *Cf.* Küper (1967, p. 240 ff.) and Schmitt (1992, p. 169 ff.) in particular referring to the unsuccessful attempts by Arnold and Ortloff modeled on the English law.

other means of control by way of the principles of publicity and orality applicable at trial which produced the evidence which served as the basis of verdict[71].

3. THE CURRENT SYSTEM, ESPECIALLY THE STANDARD OF PROOF

While it is true that the current system is based on the historical precedents, it is equally true that the historical development has not been linear. There seems to be no authentic, clear meaning of the (free) judicial decision-making process in historical terms (Nobili, 2001, p. 20); rather, there was a back and forth of freeing the adjudicator from any constraints—moving from legal proof to free evaluation—but on the whole no system was pure in the sense of either rule-bound or absolutely free[72]. Arguably, «no sharp-edged contrast» existed between the pre- and postrevolutionary adjudicator in terms of his «freedom from normative interference» (Damaška, 2019, p. 138). While the historically most important continental systems follow the common pattern of free and, arguably, reasoned evaluation of evidence, the key provisions are not identical[73]. If the current German law speaks, under the heading of the «principle of the free judicial evaluation of the evidence», of a «free conviction derived from the totality of the trial»[74], it already follows from the historical precedents that the process forming this conviction has never been (totally) free, *i. e.* the freedom has always been rule-bound, if only by the rule of reason (Jerouschek, 1992, p. 497; Fezer, 1995, p. 95-96, 100-101). While the precise boundaries of this freedom are difficult to draw and perhaps even more difficult to explain, it can fairly be said that the current model moves somewhere between the former legal proof and the free evaluation principles.

First of all, there is the formal legal framework which, apart from substantive criminal law rules[75] and the prohibitions to use certain evidence (belonging to the level

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[71] See *e. g.* Von Savigny (1858, p. 486) possible protection by legal proof unnecessary in case of a public and oral trial; also Schmitt (1992, p. 157-158).

[72] *Cf.* Damaška (2019, p. 126): «… both schemes produced fact-finding arrangements in which the evaluation of evidence is neither entirely bound by rules nor entirely free from them».

[73] *Cf.* Art. 353 CPC; see also Art. 427:

Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son intime conviction.

Le juge ne peut fonder sa décision que sur des preuves qui lui sont apportées au cours des débats et contradictoirement discutées devant lui.

For Germany, see § 261 StPO. In Italy the free evaluation has been recognized by the case law and the Codice di Procedura Penale allows for a guilty verdict if there is no more reasonable doubt (Art. 533 [1] CPP: *«… l'imputato risulta colpevole del reato contestatogli al di là di ogni ragionevole dubio»)* and gives some guidance for the evaluation of evidence in Art. 187 ff., with Art. 192 (1) requiring *«motivazione dei risultati acquisiti e dei criteri adottati»*.

[74] Supra note 45.

[75] Some offence descriptions *(Tatbestände)* limit or regulate the free evaluation of the judge, *e. g.* § 231 StGB where the aggravated result (death or serious injury) as a consequence of a brawl does not

of the production of evidence and therefore, as already said above, not included in this little inquiry), may still provide for (mostly negative) legal proof rules, see for example the (German) rule on the evidentiary force of the trial record[76] or the *testis unus testis nullus* rule[77]. This rule is perhaps the most important example of a negative rule with inquisitorial origins[78] which continues to exist not only in domestic systems[79] but is also discussed by the European Court of Human Rights in the context of Article 6 of the Convention[80]. Indeed, negative legal proof as defined above—a kind of minimum standard for conviction—still has a role to play in modern criminal justice systems and it has recently been forcefully argued that «well-chosen negative proof rules could be useful in contemporary procedural systems» (Damaška, 2019, p. 5)[81]. In addition, the official (judicial) duty to inquire/clarify, mentioned at the beginning of this paper[82], limits the free evaluation in that the judge may only evaluate the complete (exhaustively inquired) evidence, *i. e.*, s/he must not prematurely start with the evaluation before having established the complete (evidentiary) picture (Fezer, 1995, p. 97).

More importantly there are *unwritten rules* developed by an expansive appeals jurisprudence which turn the «free conviction» into a sort of *«conviction raisonnée»*, quite like the one we know from the historical precedents. Trial judges are supposed to follow rules of reason as expressed by the laws of thought, logic and experience, as

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need to be attributed to a concrete participant in the brawl; *cf.* Baur (2019, p. 123-124) with more examples; see also Bülte (2014, p. 603-612, at 603 ff.).

[76] § 274 StPO: *«Die Beobachtung der für die Hauptverhandlung vorgeschriebenen Förmlichkeiten kann nur durch das Protokoll bewiesen werden. Gegen den diese Förmlichkeiten betreffenden Inhalt des Protokolls ist nur der Nachweis der Fälschung zulässig»*.

[77] For other procedural rules, *cf.* Baur (2019, p. 124-126): referring, inter alia, to the actual trial as the basis of judicial conviction (§ 261 StPO: *«Inbegriff der Hauptverhandlung»*) and the rights to tender evidence according to §§ 244 II-VI, 257, 258 StPO).

[78] See *e. g.* Law XXXII of title XVI of the Third Partida of the *Siete Partidas*, issued by Alfonso X in the 13th century (English edition by Robert I. Burns and Samuel Parsons Scott, University of Pennsylvania Press [2001]). It can also be traced to the two-witness rule of the Carolina, supra n. 14 with main text.

[79] See *e. g.* sect. 342, § 2 Dutch Criminal Procedure Code («The court may not find there is evidence that the defendant committed the offence […] exclusively on the basis of the statement of one witness.»).

[80] In the current Application no. 1618/18 (*cf.* Statement of Facts of 21 November 2021) the Court refers to earlier decisions in *L.N. v. Netherlands* and *Adamčo v. Slovakia* where the question is posed of whether «a hearing [can] be qualified as fair if it results in a conviction which relies on […] uncorroborated testimony of a single accomplice witness who has been granted immunity from prosecution (see *Adamčo v. Slovakia*, no. 45084/14, §§ 53-71, 12 November 2019)?». From Adamčo it can be inferred that a single (decisive) witness alone does not suffice for a conviction but only if his/her testimony has been «accompanied by appropriate safeguards» (para. 71).

In contrast, in international criminal procedure the rule is generally rejected with a view to the free evaluation principle, see Ambos (2016, p. 473).

[81] Damaška (2019): «Bright future» of negative legal proof (p. 145) and calling for such rules «based on scientific insight…» (p. 146-147) which «should be treated as small steps in the direction of the true […] ideal of the rule of law in the sphere of forensic fact-finding» (p. 147).

[82] Supra note 3 and main text.

once espoused by von Savigny, when evaluating «freely» the evidence and explaining their findings in the judgment (Schmitt, 1992, p. 173 ff.; Küper, 1967, p. 293 ff.; Sarstedt, 1968, p. 176 ff.; Jerouschek, 1992, p. 505 ff.; Fezer, 1995, p. 97-98; Kunz, 2009, p. 576-577). These rules have been elaborated and refined by a highly sophisticated case law of the German Supreme Court (*Bundesgerichtshof*, BGH) within the framework of its extended appellate control *(erweiterte Revision, Darstellungsrüge)*[83]. While one may still characterize the process of evidentiary evaluation as an «act of personality» *(Persönlichkeitsakt)* (Peters, according to Küper, 1967, p. 297), an «experience of certainty» *(Gewißheitserlebnis)* (Fezer, 1995, p. 99) or a creative «value based act» *(Bewertungsakt)* (Nobili, 2001, p. 52)[84] it has been rationalized, *i. e.*, the former mainly subjective approach to judicial conviction, albeit not fully displaced, has been complemented by objective criteria[85], indeed, by a sort of judge made (negative) rules of evidence *(richterrechtliche Beweisregeln)* (Jerouschek, 1992, p. 513-514)[86]. Clearly, while the personal, intuitive conviction of the judge is the starting point of any evaluation—for the simple fact that it is the concrete person in his/her role as adjudicator who has to assess the evidence—, it is not enough but must be complemented by convincing reasons to pass the test of appellate control. Thus, the evaluation of the evidence must be intersubjectively plausible[87] and convincing for an external observer which may, in exceptional cases, be an appellate court *(Drittkontrollmodell)* (Walter, 1979, p. 147-148, 165 ff.)[88]. While the BGH being this court in the German context, had in the early days of its existence advocated a subjective approach relying on the personal conviction of the judge alone[89], a few years later

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[83] See *e. g.* Roxin and Schünemann (2017, § 55, mn. 26 ff., p. 32). Contrary to the earlier, more restrictive position where the *Revision* was limited to legal errors, *cf.* Küper (1967, p. 301-302); Schmitt (1992, p. 168-169); Walter (1979, p. 316 ff.). Crit. on the (extended) scope of appellate control Baur (2019, p. 126-128).

[84] *«"Feinsinnig kreativer" Bewertungsakt.»*

[85] Walter (1979, p. 136 ff., 165-166) speaks of a neonegative theory where the subjective conviction is complemented with objective criteria; Jerouschek (1992, p. 514) speaks of a *«Entsubjektivierung der freien Beweiswürdigung»; Fezer (1995, p. 99) speaks of a «Gegenseitigkeitsverhältnis»* between the «objective, rational act of cognition and the subjective-individual experience of certainty». See also Sander (2021, § 261 mn. 1, 4, 7, 13-14, 44 ff.): duty to rational evidence assessment. Critical of the possibility of an objectification of the assessment of evidence in a system of free evaluation Frister (1999, p. 169): concluding that the evidentiary assessment «always amounts to a personal judgment» (*«stets ein persönliches Urteil»*, [p. 180]) and one needs to be aware of the «necessarily personal nature of the formation of a conviction» (p. 187); similarly Velten (2016, mn. 6).

[86] More recently Geipel (2021, p. 27): *«Tatsächlich bestehen auch aktuell eine Fülle an "Beweisregeln", die allerdings nicht so genannt werden. Beispielsweise ist für eine freie Beweiswürdigung kein Platz mehr, wenn eine Blutalkoholkonzentration von 1,1 Promille besteht und die Frage geklärt werden soll, ob eine absolute Fahruntüchtigkeit bestand»*.

[87] Supra note 55. From a current perspective, see Sander (2021, mn. 1, 4, 14): *«intersubjektiv nachvollziehbar»*.

[88] Walter (1979) distinguishing between a neonegative and neopositive variation and arguing that both forms are in contradiction with the law (p. 172).

[89] BGH, Judg. Of 21 May 1953, 3 StR 9/53, mn. 6 (*«Für die Verurteilung ist notwendig, aber auch genügend, daß der Sachverhalt für den Tatrichter zweifelsfrei feststeht; diese persönliche Gewißheit ist allein*

it established a minimum standard of reasoning to be able to review trial judgments asking the trial judge to «seamlessly connect» the relevant pieces of (circumstantial) evidence and «assess [them] taking into account all relevant aspects»[90]. In the last decades then the case law has increasingly rationalized the process of evaluation of evidence whereby the personal (internal) conviction of the judge must find support in objective (external) criteria or circumstances[91].

As to the *degree of conviction*—the standard of proof informing the intime (free) conviction of the adjudicator—one must start from the assumption that the human mind can never fully capture the truth of things and, more concretely with regard to our topic, that the material (absolute) truth, understood as certainty (positive knowledge), can never be achieved with the available means of evidence[92]. Indeed, already the medieval jurists were aware of the impossibility to establish objective truth by way of legal proof (Damaška, 2019, p. 28)[93] and the conversion of «truth» to some sort of high «probability» in the postrevolutionary, Enlightenment period prepared the ground for the move from legal proof to free evaluation and the admission of circumstantial evidence (Ignor, 2002, p. 167 ff., 185 ff.). Thus, the adjudicator may only find, if at all, the procedural (relative) truth, *i. e.*, the truth s/he is able to reconstruct with the available means of proof[94] and s/he is ultimately convinced of *(Wahrheitsüberzeugung)* notwithstanding certain remaining—insofar irrelevant—doubts (Walter, 1979, p. 134-135, 147-148; Fezer, 1995, p. 99)[95]. In the words of the German Civil Procedure Code, the adjudicator may consider a certain factual affirmation as true or false[96]. Thus, the standard of proof is some degree of probability as to the truth *(Wahrheitswahrscheinlichkeit)* of a certain fact (Kunz, 2009)[97],

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entscheidend. Denn das Wesen der freien Beweiswürdigung besteht nicht nur in der Freiheit von gesetzlichen Beweisregeln, sondern auch in der Freiheit der Entschließung bei der Beantwortung der Schuldfrage gegenüber objektiv an sich möglichen Zweifeln» [emphasis mine.].); in the same vein Judg. Of 9 February 1957, 2 StR 508/56, in BGHSt. 10, 208, at 209. Crit. Fezer (1995, p. 96).

[90] BGH, Judgment of 18 Dec. 1958 – 4 StR 399/58, in BGHSt. 12, 311, at 312 (Second guiding principle/headnote: *«Gibt der Tatrichter die für seine Überzeugungsbildung verwerteten Beweisanzeichen in den Urteilsgründen an, so muss er sie im Urteil lückenlos zusammenfügen und unter allen für ihre Beurteilung maßgeblichen Gesichtspunkten würdigen»*.).

[91] *Cf.* Hoyer (1993, p. 532 ff.). Quoting case law since the 1980s.

[92] *Cf.* Reichsgericht, Judg of 15 February 1927 - I 2/27, in RGSt. 61, 202, at 206 (*«Ein absolut sicheres Wissen … ist der menschlichen Erkenntnis bei ihrer Unvollkommenheit überhaupt verschlossen»*); in the same vein BGH, supra note 88. See also Walter (1979, p. 134-135, 147); Hoyer (1993, p. 534).

[93] Damaška (2019): yet, they wrongly believed that truth can be established by «direct sensory apprehension» ignoring that it entails «a degree of inferential elaboration» (p. 30).

[94] On the concept of procedural truth see Kunz (2009, p. 577-578): arguing that the agency is not scientifically established but normatively ascribed (*«normativ zugeschrieben»*).

[95] Fezer (1995, p. 99): overcoming of doubts. Baur (2019, p. 121) speaks of a lowering of the threshold of conviction to a practicable level (*«die Absenkung der für eine Verurteilung notwendigen Überzeugungs- und Verurteilungsschwelle auf ein praktikables Maß.»*).

[96] See § 286 (1) ZPO: *«Tatsächliche Behauptung für wahr oder für nicht wahr zu erachten sei»*.

[97] Kunz (2009): «Subjektive *Ausrichtung* […] *am* Ziel *der objektiven Wahrheit…»* (emphasis in the original) (p. 576); *«die von einer genügenden objektiven Wahrheitswahrscheinlichkeit getragene Wahr-*

with criminal procedure requiring a higher probability than a mere preponderance of evidence, coming close to certainty (Kunz, 2009; Frisch, 2016; Sander, 2021)[98]. This is nothing else than the degrees of probability already discussed in the postrevolutionary period, influenced by the concept of «moral certainty» and informed by the idea of a specific legal certainty *(fides iuridica)* entailing a high degree of probability *(summa verisimilitude)* (Ignor, 2002)[99]. While the concept of moral certainty is no longer in use by current writers but at best be attributed to historical sources[100], it corresponds in essence to the nowadays required personal (intuitive, emotional) certainty of the judge[101].

Unsurprisingly then the German Supreme Court of the Empire *(Reichsgericht)* spoke of a «probability bordering on certainty»[102] and the BGH (only) requires a «personal certainty» of the judge, a «subjective considering-for-true»[103]. But, as already said above, this originally highly subjective standard has been complemented

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heitsüberzeugung» (p. 592); Walter (1979, p. 190, 351). Nieva Fenoll (2021) argues that one should abandon (even today's) standards of proof (p. 61) since they are not scientific (*«mit den Standards hat es nichts wirklich Wissenschaftliches auf sich, denn sie beschreiben insoweit nicht die Wirklichkeit sondern nur eine psychologische Überzeugung [der Wirklichkeit]»* (p. 58) and too subjective (p. 59 ff.); instead, he suggests to treat the evaluation of evidence merely as a decision based on reason (*«Beweiswürdigung als Begründung der Vernunft zu behandeln»* [p. 62]), *i. e.* the judge should build hypotheses and exclude the ones that seem unreasonable (which, at any rate, would be a strategy but not a standard since it could not be explained as precisely as it would be necessary for a standard (p. 61).

[98] Kunz (2009, p. 594): *«An Sicherheit grenzende Wahrscheinlichkeit»*; Frisch (2016, p. 710-711): although critical of the concept of probability; Sander (2021, p. 7, 14): objective high probability.

[99] Referring to *Boehmer, v. Leyser*, Beccaria and Mittermaier (p. 167 ff.); referring to Filangieri, Globig, Huster, von Soden (p.185 ff.).

[100] See *e. g.* the reference to v. Leyser by Ignor (2002, p. 167-168): *«Ad corpus delicti certitudo moralis, qualis in rebus humanis haberi potest, non mathematica et absoluta, requiritur»*; see also Baur (2019, p. 122 with fn. 38).

[101] *Cf.* Paulus (2008, 243-65) dominant opinion concurs in substance with moral certainty (p. 246-247); Frister (1999, p. 169) referring to Beccaria talking of «moral certainty» (p. 175 with fn. 28) and stating: *«Aussicht auf eine überzeugende Begründung der Verurteilungsvoraussetzung persönlicher Gewißheit besteht deshalb nur dann, wenn man die persönliche Gewißheit im Anschluß an die von Beccaria begründete Tradition als "gefühlsmäßige" oder – m.E. treffender –"intuitive" Erkenntnis interpretiert»* (p. 176); in the same vein Taruffo (2003, p. 667): «moral certainty» as expression of emotional, personal belief embodied in intime conviction. See also Sander (2021, mn. 8) with a statement very similar to the one of v. Leyer quoted in the previous fn. (*«Die richterliche Überzeugung setzt keine mathematische, jede theoretische Möglichkeit eines Zweifels ausschließende objektive Gewissheit,* […] *insbesondere auch keinen "zwingenden Beweis" voraus. Ein ausreichendes Maß an Sicherheit, demgegenüber vernünftige Zweifel nicht mehr laut werden können, genügt als Grundlage der Überzeugung.»*); in a similar vein Miebach (2016, mn. 59-60); Eisenberg (2017, mn. 89-90).

[102] Reichsgericht, Judg of 20 Dec. 1886 - Rep. 2779/86, in RGSt 15, 151, at 153 («an Gewißheit angrenzender Grad von Wahrscheinlichkeit»); Judg of 14 March 1932 - III 52/32, in RGSt 66, 163, at 164 («an Sicherheit grenzende Wahrscheinlichkeit»); in the same vein BGH, Judg. of 9 February 1957, supra note 88, 210.

[103] BGH, supra note 88 (*«persönliche Gewißheit»*); Judg of 3 Febr. 1983 - 1 StR 823/82, in *NStZ*, 1983, 277 (*«es kommt darauf an, ob das Gericht nach der gesamten Beweislage einen bestimmten Sachverhalt für wahr hält»).*

by objective elements, bringing the reasoning and reasonability to the fore and expanding appellate control by a set of highly sophisticated rules based on the laws of logic, experience and scientific findings[104]. Thus, one may speak of a personal conviction with a rational, objective substructure (Sander, 2021, mn. 14), a «considering-for-true based on or pursuant to reasons» (Frisch, 2016, p. 711)[105]. Attempts to define the standard more precisely, especially by taking recourse to mathematical or statistical methods (Hoyer, 1993, p. 537 ff.)[106], have never found much support. While the recourse to these methods is admissible[107], they are not necessary since mathematical certainty is not required[108]. In addition, they face serious objections, not only for their underlying decisionist rationale[109] and the ensuing limitations of judicial discretion (Kunz, 2009, p. 603), but mainly because they cannot substitute the intersubjectively valid and discursive reasoning which should underlie any trial judgment[110].

To exclude the judge's conviction, *remaining doubts* have to be real and relevant, *i. e. reasonable*, not merely personal[111]. Thus, the actual standard of proof corresponds, in essence, to the above-mentioned BARD standard[112]. This is also confirmed by the case law's repeated reference to «reasonable doubts» which entail the negation of the necessary high probability as to an alleged fact[113]. Where the adjudicator cannot

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[104] For a more detailed analysis of this case law the reader may consult any of the standard *StPO* commentaries, see *e. g.* Sander (2021, mn. 47 ff.); Franke (2013, mn. 94 ff., 138 ff.); Miebach (2016, mn. 61 ff.); Knauer and Kudlich (2019, mn. 102 ff.).

[105] *«Für-wahr-Halten aus Gründen.»*

[106] Hoyer (1993): at least 96% of probability of guilt (p. 541), 96% of agreement by respective experts with regard to a certain evidential proposition (p. 543), 96% conviction of judge (p. 546]; Kunz (2009): referring to mathematical and probabilistic reasoning in both civil and common law of the 19th century (p. 573); discussing the Bayes theorem (p. 596 ff.); discussing numerical fixations (p. 600 ff.).

[107] BGH, Judg of 21 March 2013 - 3 StR 247/12, in BGHSt. 58, 212, at 214.

[108] BGH, Judg of 21 March 2013 - 3 StR 247/12, 215; Judg. of 6 August 2013 - 1 StR 201/13, mn. 27.

[109] *Cf.* Frisch (2016, p. 710) determination of a certain degree of sufficient certainty—90%, 95% or 98%—appears arbitrary and amounts to pure decisionism.

[110] See also Kunz (2009, p. 603 ff.) while dismissing concerns of a fear of «mathematization» ultimately advocating a discursive reasoning; crit. also from a comparative perspective Taruffo (2003, p. 663-664, 669-670).

[111] *Cf.* Damaška (2019, p. 136); also Frisch (2016, p. 712): serious/reasonable doubts as to a hypothesis to be proven; Walter (2006, p. 340-349): concrete and practical, not merely abstract and theoretical possibility of another factual course of events (p. 347-348); Sander (2021, mn. 8): *«Reale, d.h. rational hergeleitete Zweifel»*.

[112] See also Kunz (2009, p. 572). Considering that the concept is also familiar in civil law systems and makes «reason as the prerequisite of penal justice» (*«Vernunft als Voraussetzung der Strafgerechtigkeit»*) (p. 595-596).

[113] See *e. g.* BGH, in Holtz (1979, p. 637): *«Ausreichendes Maß an Sicherheit* […] *demgegenüber vernünftige Zweifel nicht mehr laut werden…»*; Judg of 4 April 1990 – 2 StR 466/89, in *NJW* 1990, 2073, at 2074 (no high probability where «reasonable doubts» remain). See also Sander (2021, mn. 8). Crit. Hoyer (1993, p. 535 ff.): arguing from the perspective of a «scientific doctrine of probability» that high probability cannot be defined by taking recourse to different degrees of doubt but that rather, to

overcome these doubts, the ensuing situation of a *non liquet* is resolved by the *in dubio* principle, to be understood as a mere decision rule[114]. As a result, the difference between civil and common law seems to be reduced to the sort of the adjudicatory organ (jury vs. professional judge or mixed panel) and the lack/obligation of reasoning which in turn determines the possibility of appellate control[115].

4. OTHER CONSIDERATIONS

4.1. Justification of the Standard

As we have seen the standard required for a conviction is high. Indeed, it has already been stressed in the reform debate of the early 19th century that the decision on guilt or innocence is of such importance—not only for the person concerned but also for society at large—that everything must be done to avoid or at least reduce to the maximum extent possible erroneous convictions of the innocent[116]. This view continues to be valid today with contemporary writers stressing the need to reduce the serious risk of miscarriages of justice (Frister, 1999, p. 169 ff.)[117] and the judge's responsibility to make sure that the judgment would also be acceptable if rendered against him- or herself (Velten, 2016)[118].

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the contrary, a reasonable doubt is to be determined by way of a probability standard (*«orientiert sich vielmehr an der objektiven Wahrscheinlichkeit»* [emphasis in the original]).

[114] *Cf.* Zopfs (1999, p. 328 ff., 330-331, p. 334) considering *in dubio* as an autonomous decision rule (*«Entscheidungsregel»*) based on Roman Law and the *ius commune* and an expression of a principle of justice supported by the century-old idea that it is more just not to inflict harm (even if it were right/justified) than to inflict harm without right/justification. See also Stuckenberg (2006, p. 345).

[115] Similarly Kunz (2009, p. 592): *«… Vorgaben für eine möglichst rationale, auf Missbräuche überprüfbare Tatsachenermittlung in kontinentaleuropäischen und angelsächsischen Rechtskreisen auf ähnliche Weise gestaltet sind.* […] *Jedenfalls in der westlichen Welt die Gerichtspraxis in ihrer professionellen Routine auch jenseits der normativen Vorgaben ähnliche oder zumindest vergleichbare Beurteilungsstandards wählt.»*; Damaška (2019, p. 141-142).

[116] *Cf.* Feuerbach (1813): *«Entscheidung über Schuld und Nichtschuld* […] *eine der folgenreichsten Handlungen; wenn sie sich auf Wahrheit gründet, eine heilige Handlung der Gerechtigkeit, wenn sie auf Irrthum ruht, ein unendlicher durch nichts zu vergütender Frevel»* (p. 131); calling for rules of evidence in order to eliminate *«die Gefahr der irrigen Ueberzeugung»* (p. 132). Mittermaier (1834, p. 76): «effectiveness *(Wirksamkeit)* of […] sentence depends on the general trust that only the truly guilty will be convicted» (*«allgemeinen Vertrauen, dass nur der wahrhaft Schuldige verurtheilt werde»*).

[117] Frister (1999): reduction of risk of error (*«Fehlverurteilungsrisiko»*), avoid conviction of innocent (p. 186)

[118] Velten (2016, mn. 6): court must *«Urteil* […] *nicht nur gegen den Angeklagten, sondern auch gegen sich gelten lassen…»*; Stuckenberg (2013, mn. 22-23): judge must assume responsibility re decision and risk of error.

4.2. Proof of Defenses?

As explained at the beginning of this paper the adjudicator in an inquisitorial system has the obligation to inquire/clarify all the relevant facts to find the truth. This does not only refer to the elements of an offence but also to grounds excluding responsibility («defenses»), especially causes of justification and excuse. Thus, there is no burden on the defense to prove (affirmative) defenses as known in adversarial systems. For example, a defendant who killed the victim in self-defense did not act unlawfully and thus must be acquitted. It is the responsibility of the State (prosecutor, judge) to make sure that such an exclusionary ground does not exist. I note in passing that the abandonment of the burden of proof regarding defenses was another consequence of the abolishment of the legal proof. Mittermaier still discussed the issue in 1834[119], but with the introduction of the free evaluation based on the judge's personal conviction and his duty to inquire, it was now the court which had to prove «itself» (Bennecke and Beling, 1900)[120].

Thus, there is no formal burden of proof on the defense. However, it would certainly be recommendable for the defense to present the facts indicating a possible exclusionary ground since the prosecutor/judge may not fully comply with its obligation to inquire. Indeed, s/he may not be able to do so since s/he does not know of any facts or circumstances which point in the direction of such a ground. Thus, one may speak, as a factual matter, of a burden of presentation/allegation of the defense *(Behauptungslast)* (Walter, 2006, p. 340) based on what already Glaser (1883) identified as a «factual interest» *(sachliches Interesse)* resulting in a «factual burden» *(factische Beweislast)* to produce certain evidence, *i. e.* a sort of «evidentiary interest» *(Beweisinteresse)* (p. 102)[121]; one could also call this a strategic or tactical burden. Indeed, the BGH requires «real indicia» for events favorable to the accused[122] and s/

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[119] *«In wie ferne kann von einer Beweislast im Strafprocesse die Rede sein?»* (Mittermaier, 1984, p. 141).

[120] § 84 I, 329-30: *«Im Strafprozess "beweist" also das Gericht sich selbst* […] *Demgemäss giebt es im Strafprozess keine Behauptungslast und keine (formelle) Beweislast, derzufolge die Rollen von Beweisführer und Beweisgegner unter die Parteien verteilt wären, und folgerecht auch keine "Beweisfälligkeit".* [...] *Die Unterscheidung von "klagebegründenden Thatsachen", "Einredethatsachen" u.s.w. hat in (sic!) Strafprozess keine Stätte».*

[121] *«Denn es kann keine Thatsache im Strafprozess zur Sprache kommen, bezüglich deren nicht ein sachliches Interesse einer Partei in einer bestimmten Richtung und eine Gefährdung dieses Interesse durch einen etwaigen Missgriff des Richters anzunehmen ist; und insofern von der Annahme oder Nichtannahme einer bestimmten Thatsache die eine oder andere Partei eine Gefährdung zu besorgen hat, erscheint bezüglich einer jeden solchen Thatsache die eine Partei als Beweis-Interessent…»*

[122] BGH, Judg of 3 July 2014 - 4 StR 137/14 (*«Für ihn vorteilhafte Geschehensabläufe sind vielmehr erst dann bedeutsam, wenn für ihr Vorliegen reale Anhaltspunkte erbracht sind und sie deshalb nach den gesamten Umständen als möglich in Betracht kommen»*); BGH, judgement of 11 April 2002 – 4 StR 585/01, in *NStZ RR* 2002, 243 (*«Vielmehr berechtigen nur vernünftige Zweifel, die reale Anknüpfungspunkte haben, den Tatrichter zu Unterstellungen zu Gunsten des Angeklagten.»*); BGH, judgement of 13 December 2012 – 4 StR 177/12, in *NStZ-RR* 2013, 117 (*«Alternative, für den Angeklagten günstige Ges-*

he acts in his/her «own responsibility» to make a possible exclusionary ground a live issue in the criminal process[123].

5. CONCLUSIONS

It has been demonstrated that «intime conviction», constituting a method to assess the evidence, entails a concept of conviction which comes close to certainty, leaving no reasonable doubts. In other words, the best possible explanation of certain facts is good enough to be considered as true (Kunz, 2009, p. 590)[124]. Thus, the necessary conviction is informed by the BARD standard.

This standard exists independent of whether the adjudicator is a professional judge or a jury. The traditional criticism against a jury (also voiced in its traditional rejection in Germany), namely its lack of giving reasons and therefore operating as a sort of blackbox is overstated in relation to the supposed reasoning of a professional judge. Surely, not giving reasons is not the same as a lack of reasoning. Quite to the contrary, the process of deliberation between the (12) jurors cannot take part without reflection and reasoning. One could even argue that it is a better guarantee to find the truth as the limited process of deliberation between professional judges, part of a mixed panel (composed of lay people and professionals), of an exclusively professional panel or—even worse—acting in their single capacity as single judges. In the latter case they can only deliberate/discuss with colleagues not sitting on the case.

As to possible rules of evidence it is clear that they never have been completely abolished. While such rules usually do not exist as formal written (Roman canonic) rules in the sense of the old inquisitorial process, they exist at least as judge made rules. In this sense, the (completely) free evaluation can be considered as only second-best solution (Damaška, 2019, p. 146) with a set of (unwritten and/or negative) rules

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chehensabläufe sind erst dann bedeutsam, wenn für ihr Vorliegen konkrete Anhaltspunkte erbracht sind und sie deshalb nach den gesamten Umständen als möglich in Betracht kommen. 3. Unterstellungen zum Vorliegen einer Notwehrsituation sind ebenfalls nur gerechtfertigt, wenn es dafür reale Anknüpfungspunkte gibt»).

[123] BGH, judgement of 10 November 1961 – 4 StR 407/61, in BGHSt. 16, 389 at 391 («*Macht der Angeklagte von allen diesen Möglichkeiten keinen Gebrauch, etwa dadurch, daß er – wie hier – einen Teil seines Verteidigungsvorbringens im ersten Rechtszuge vorsätzlich zurückhält, so tut er das auf seine Gefahr und darf sich deshalb nicht darüber beschweren, daß er im folgenden Rechtszuge etwa keine Beweisanträge mehr stellen kann. Wer in der letzten Tatsacheninstanz versäumt hat, mögliche Beweisanträge zu stellen, kann diesen Fehler grundsätzlich auch nicht in der Revisionsinstanz durch Erhebung der Aufklärungsrüge gutmachen, es sei denn, daß sich dem Tatrichter eine entsprechende Beweiserhebung unabhängig von dem Vorbringen des Angeklagten aufdrängen mußte.*»).

[124] «*Welche Ermittlungsprozeduren in welcher Intensität nötig sind, damit die unter Leistung dieses Aufwandes zu findende bestmögliche Erklärung gut genug ist, um jenseits eines vernünftigen Zweifels als wahr zu gelten.*»

as a necessary framework to control judicial arbitrariness[125]. I note in passing that this is another area where the difference between a jury and professional judges seems to be overstated since, as has been shown above[126], already 19th century scholars acknowledged that a jury does not necessarily preclude any theory of proof.

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[125] On the argument in favour of negative rules, see already supra note 80.

[126] Supra note 39 and main text.

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