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The Burden of Proof as a Basis for Fact-Finding and Confidentiality Management in Civil Procedure

La carga de la prueba como fundamento del esclarecimiento de los hechos y del manejo de la confidencialidad en el proceso civil

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Abstract

In the Spanish-speaking legal community, influential voices have called for the eradication of the burden of proof. This article aims to expose the blind spots of that position and demonstrate the indispensable role that this concept plays in contemporary civil proceedings. It will show that the burden of proof is essential for ensuring legitimate judicial decisions in contexts of factual uncertainty (objective burden of proof) and for safeguarding the parties' private autonomy within the framework of procedural fact-finding (subjective burden of proof). Furthermore, the article will explain the importance of the burden of proof in its relationship with procedural duties and its role in resolving confidentiality issues, particularly when the public nature of civil proceedings poses a risk to legitimate confidentiality interests.

Keywords: *Law of Evidence; Civil Procedure; Burden of Proof; Procedural Cooperation; Procedural Confidentiality.*

Resumen

En el medio hispanoparlante han surgido influyentes voces exigiendo erradicar la figura de la carga de la prueba. Este artículo busca revelar los puntos ciegos de esa postura y mostrar la indispensable función que la figura cumple en los procesos civiles contemporáneos. Se mostrará que es una institución indispensable para asegurar decisiones judiciales legítimas en contextos de incertidumbre fáctica (carga de la prueba objetiva) y para asegurar la autonomía privada de las partes en el marco del esclarecimiento procesal de los hechos (carga de la prueba subjetiva). A la vez se explicará la importancia de la carga de la prueba en su relación con deberes procesales de esclarecimiento y con el manejo del incidente de confidencialidad en caso de que la publicidad del proceso civil ponga en riesgo un legítimo interés de confidencialidad. Si bien se hace referencia al derecho y a la doctrina de Chile y de otros países, las reflexiones de este artículo buscan aclarar el rol de la carga de la prueba a nivel teórico y no respecto de una legislación en particular.

Palabras clave: *Derecho probatorio; Proceso civil; Carga de la prueba; Cooperación procesal; Confidencialidad procesal.*

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I. INTRODUCTION

The burden of proof is "one of the most complicated issues in procedural law".[1] At the same time, it is an indispensable institution for modern law. As I will set out in this paper, it enables the transparent and reviewable exercise of jurisdiction in cases of definitive uncertainty regarding legally relevant facts (objective burden of proof). In patrimonial civil matters, moreover, it delineates the scope of the parties' autonomy in managing their dispute (subjective burden of proof). The influential calls to abolish the rules on the burden of proof—whether in their entirety[2] or only in their subjective dimension[3]—misunderstand or ignore these functions, further complicating the comprehension of the concept. Its defenders, in turn, fail to convey the value of the institution, instead focusing their defense on legal certainty or on its usefulness as a mechanism for generating incentives.

This article aims to set out the function and justification of the burden of proof in modern civil procedure and its relation to the increasingly significant duties of disclosure and claims of confidentiality.[4] I will begin by presenting the positions of the "abolitionists" and of important defenders of the burden of proof (II). I will then show the function and justification of the rules on the objective (III) and subjective (IV) burden of proof. This will make clear their importance for understanding the parties' duties of disclosure and their resistance to cooperate on grounds of confidentiality (V), before concluding with the final remarks (VI).

It should be made clear that I do not intend to address (much less defend) the so-called "dynamic burdens of proof." This notion rests on a serious confusion between the risk-allocation function, which belongs to the subjective burden of proof, and the parties' duties to cooperate in the face of an evidentiary deficit. As will be seen (*infra*, 4.3), that distinction—between burden and duty—is essential for understanding contemporary civil proceedings, which increasingly sharpen the tension between procedural fact-finding subject to publicity requirements, on the one hand, and legitimate confidentiality interests that oppose such fact-finding, on the other.[5] Within that framework, the theory of allocating the burden of proof by judicial decision according to the circumstances of the case is misplaced and must be rejected. On this point, I fully adhere to the "abolitionist" thesis. My critique is directed exclusively at the further claim to eradicate the legal rules on the allocation of the burden of proof.

As a methodological caveat, it should be noted that this work has a theoretical rather than a dogmatic aim. This means that it seeks to clarify the role of the burden of proof for any modern civil procedure governed by the principles of inexcusability, party disposition, party presentation of evidence, freedom of proof, and so forth. It does not intend to provide interpretations for any particular legislation. References to Chilean law and doctrine, as well as

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[1] Original text: "una de las problemáticas más complicadas en el derecho procesal" HUNTER (2020), p. 421.
[2] NIEVA (2019), pp. 23-52 (specially, pp. 35-43), convincing TARUFFO (2019), pp. 11-21 (specially, pp. 19 f.).
[3] FERRER (2019), pp. 53-87 (specially, pp. 69-74); GIANNINI (2019), pp. 89-115; DE PAULA (2020), pp. 95-99, 149.
[4] See article 6 of Directive 2004/48/CE, article 5 of Directive 2014/104/UE and article 9 of Directive (UE) 2016/943.
[5] This problem is already noted by DE PAULA (2020), pp. 134-139. A theory of procedural confidentiality in public trials can be found in VOGT (2025), especially pp. 19-31.

to other legal systems, are adduced solely to illustrate or to contrast with certain aspects developed at the theoretical level.

II. Attacks Against the Burden of Proof and its Defense

2.1. Common Concepts

In very general terms, and prior to any differentiation, the rules referred to as those regulating "the burden of proof" determine who is prejudiced by the failure to prove a fact at trial. Not much more can be said without drawing distinctions. From this point, procedural doctrine makes a distinction: on the one hand, the objective burden of proof, as a rule of judgment addressed to the judge, indicating how to decide in the event that the evidence fails (*non liquet*). On the other hand, the subjective burden of proof, which governs the conduct of the parties by attaching a procedural disadvantage to the party who does not exercise certain powers to allege and present evidence.[6]

2.2. Abolitionist Proposals

The work *"Contra la carga de la prueba"* (*"Against the Burden of Proof"*) is one of the most widely circulated law books among Spanish-speaking readers during 2019.[7] It brings together the views of four prominent jurists—Jordi NIEVA, Michele TARUFFO, Jordi FERRER, and Leandro GIANNINI—who call for dispensing with the institution of the burden of proof, whether in all its forms (a) or only in its subjective dimension (b).

a) Proposal for the Total Abolition of the Rules on the Burden of Proof

NIEVA calls for eliminating the burden of proof.[8] This position would be an unavoidable result of his study of the history of the institution. He employs a method that can be described as retrospective functionalism: he identifies the function that the burden of proof has historically served, observes that in modern procedure this function no longer has a place, notes that the institution continues to operate merely out of inertia, and argues that we must summon the courage to acknowledge its obsolescence[9] and abolition.[10] I am not interested in evaluating this historical characterization, which I consider accurate and well-founded. What I am interested in is presenting his arguments for declaring the burden of proof useless in contemporary proceedings.

According to the author, in the system of legal evaluation, the burden of proof had the function of clarifying who had to prove which fact,[11] since the evaluation consisted of applying

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[6] See, among others, SCHILKEN/BRINKMANN (2022), pp. 172 ff.; in Chilean doctrine, DEL RÍO (2021), pp. 157-160.

[7] It was the best-selling law book at the Marcial Pons bookstore in 2019, https://www.catedradeculturajuridica.com/es/1743/noticias-contra-al-carga-de-la-prueba-%C2%A1el-libro-de-derecho-mas-vendido-del-2019!.html [last accessed December 23, 2024]

[8] In addition to the aforementioned work, see variations of the arguments in NIEVA (2020), pp. 406-407; NIEVA (2024), pp. 118-122.

[9] NIEVA (2024), pp. 26 s.: "Actualmente la carga de la prueba es solamente una pieza de museo" (*"At present, the burden of proof is nothing more than a museum piece"*).

[10] NIEVA (2024), p. 25: "No es fácil decir adiós a aquello que siempre nos acompañó" (*"It is not easy to say goodbye to that which has always accompanied us"*).

[11] NIEVA (2024), p. 35.

the rules of legal evidence that required adding probative results according to who provided them.[12] Everything would have changed with the transition to the system of free evaluation of evidence.[13]

> "[I]t no longer properly matters who must prove which fact, but rather the aim is to determine reality in general, that is, the ascertainment of the fact, regardless of who provides the evidence" and therefore, "all usefulness that the burden of proof had hitherto possessed disappears".[14]

He dismisses in a few lines the opinion of the great liberal proceduralist Adolf Wach, who held that the principle of party presentation requires maintaining the subjective burden of proof—an argument he attributes to an irrational fear of the inquisitorial principle.[15] Regarding the objective notion of the burden of proof as a rule of judgment, he comments that it is nothing more than an attempt by a desperate doctrine to "save the life of the institution,"[16] reformulating it as a rule to resolve evidentiary insufficiency at the end of the proceedings. Once this is established, he takes the boldest step in his line of argument: he accuses the burden of proof of being founded on an irrational distrust of people's honesty.

"Ultimately, the burden of proof is nothing more than a poorly constructed presumption that allows one to infer that whoever lacks evidence of a fact is asserting a false fact".[17]

To think that it is "logical and fair that the party who did not have evidence to prove what they asserted should lose the case"[18] would be the (mistaken) "guiding idea"[19] of the burden of proof. Since this idea is erroneous, the objective burden of proof would be unnecessary to "avoid a *non liquet* that would create greater social conflict." And why would a rule for evidentiary insufficiency regarding a fact be unnecessary? Here he maintains the thesis that the logic of applying substantive law rules automatically overcomes the *non liquet*:

> "...what must be done is simply not to consider it proven. ... It is not that the fact did not occur; what happens is that an attempt was made to prove it and it has not been possible to demonstrate whether it exists or does not exist. And in this situation, *the legal rule that presumes its existence cannot be applied*" (italics added).[20]

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[12] NIEVA (2024), pp. 33-35.
[13] NIEVA (2024), p 37.
[14] Original text: *"[Y]a no importa propiamente quién debe probar qué hecho, sino que lo que se pretende es determinar la realidad en general, es decir, la averiguación del hecho, con independencia de quién aporte la prueba"* (...) *"decae toda utilidad que hasta entonces había tenido la carga de la prueba"*. NIEVA (2024), p. 37.
[15] NIEVA (2024), pp. 37 ff. He also dismisses Rosenberg's arguments on the principle of party presentation, NIEVA (2024), pp. 40 ff.
[16] Original text: *"salvar la vida de la institución"*, NIEVA (2024), p. 39.
[17] Original text: *"En el fondo, la carga de la prueba no es más que una presunción mal construida que permite inferir que quien no tiene prueba de un hecho está alegando un hecho falso"*, NIEVA (2024), p. 44.
[18] Original text: *"lógico y justo que debiere perder el proceso quien no disponía de pruebas para demostrar lo que afirmaba"*, NIEVA (2024), p. 43.
[19] Original text: *"Idea rectora"*, Section title in NIEVA (2024), p. 42.
[20] Original text: *"...lo que hay que hacer es simplemente no darlo por probado. ... No es que no haya sucedido el hecho; lo que sucede es que se ha intentado probar y no ha sido posible demostrar que existe y que no existe. Y ante esta situación, no se puede aplicar la norma jurídica que parte de su existencia."* NIEVA (2024), p. 45.

In sum, NIEVA'S abolitionist claim is built on two points: (1) in systems of free evaluation of evidence aimed at ascertaining the truth, the idea of allocating subjective burdens at the outset of the trial is unnecessary; and (2) an objective burden of proof is unnecessary because it follows from the logic of applying substantive law rules, that if the relevant facts cannot be proven, the rule does not apply. We will see that both theses are mistaken.

Nonetheless, TARUFFO is persuaded by both. Regarding the uselessness of a prior allocation of burdens:

> "... the rule on the burden of proof does not find effective application *during the course* of the proceedings and does not actually affect the parties' initiatives to present evidence. The consequence is that one can speak of the burden of proof only in an objective sense, since the burden applies only in the final decision ...".[21]

And, with more caution, he also adheres to the thesis of the uselessness of the burden of proof as a rule of judgment:

> "... there are reasons to doubt that the rule of judgment based on the allocation of evidentiary burdens actually has autonomous relevance. ... [T]he fundamental function of the proceedings and of the decision concluding them consists above all in the correct application of the law to the facts of the specific case. ... with it [this conception of the proceedings], the burden of proof, even if understood in an objective sense, has no necessary connection. ... *[I]f there is evidence of the fact constitutive of the right asserted by the plaintiff, the claim is upheld, whereas if this fact is not proven, the request must be rejected because the substantive right constituting its object does not exist.* ... in essence, the decision that would be correctly made without regard to the evidentiary burdens, referring only to the evidence or lack thereof concerning the facts relevant under the applicable substantive law, ends up coinciding exactly with that which results from the use of a rule that provided for such burdens" (italics added).[22]

TARUFFO does not call for the elimination of the objective burden of proof with the same fervor as NIEVA, but he closes the paragraph with a difficulty in resisting the temptation to apply Occam's razor.[23] Perhaps he intuited that, as we shall see, there are good reasons why German legal doctrine, which has reflected on these concepts for over 200 years, has never considered promoting their abolition; and why the burden of proof still heads, with considerable vitality, Article 25 ("Evidence") of the 2021 European Model Rules of Civil

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[21] Original text: *"... la regla sobre la carga de la prueba no encuentra una aplicación efectiva* en el curso *del proceso y no afecta realmente a las iniciativas probatorias de las partes. De ello se deriva la consecuencia de que únicamente se puede hablar de carga de la prueba en sentido objetivo ya que la carga sólo encuentra aplicación en la decisión final ..."* .TARUFFO (2019), p. 17.

[22] Original text: *"... hay razones para dudar que la regla de juicio basada en la distribución de las cargas probatorias realmente tenga una relevancia autónoma. ... [L]a función fundamental del proceso y de la decisión que lo concluye consiste sobre todo en la correcta aplicación del derecho a los hechos del caso específico. ...con ella [esta concepción del proceso] la carga de la prueba, incluso si se entiende en un sentido objetivo, no tiene ninguna conexión necesaria.* ...[S]i hay prueba del hecho constitutivo del derecho afirmado por el actor, se acoge su demanda, mientras que, si este hecho no resulta probado, la solicitud debe ser rechazada porque no resulta existente el derecho sustancial que constituía su objeto. *... en esencia, la decisión que se tomaría correctamente sin tener en cuenta las cargas probatorias, refiriéndose sólo a la prueba o a la falta de ella sobre los hechos que son relevantes en virtud del derecho sustantivo aplicable, termina coincidiendo exactamente con la que se deriva de la utilización de una regla que previese tales cargas."* (italics added) TARUFFO (2019), pp. 19 ff.

[23] TARUFFO (2019), p. 20.

Procedure, rules that represent a consensus among the most prominent procedural law scholars in Europe. But before revealing the error of this radical abolitionist position, let us review the more moderate abolitionist stances, which are limited to proposing the elimination of the subjective burden of proof, thus adhering only to the thesis of the uselessness of allocating burdens at the outset of the proceedings.

b) Proposal to Abolish the Subjective Burden of Proof

FERRER refuses to endorse the thesis of the obsolescence of the objective burden of proof.[24] His abolitionist zeal is limited to the subjective dimension of the institution, that is, the idea of a rule governing the parties' conduct in presenting evidence.

Central to FERRER'S position is his own characterization of the rules on the subjective burden of proof. He considers the subjective burden of proof to be a reflex effect of the objective burden of proof,[25] and that its nature as a "burden" should be understood as a technical rule establishing an anankastic condition[26]—that is, that the presentation of evidence by one party is regarded as a necessary condition to obtain a favorable decision. Having made this characterization—and after declaring it the "classical doctrine of the burden of proof"[27]—he proceeds to dismantle it: while it could be observed that the rule on the objective burden of proof—addressed to the court—produces certain incentives for the parties, it does not give rise to a duty or burden to present evidence.[28] The idea of a "duty" to present evidence would be a historical leftover from legally assessed evidence[29-30]; the connection between evidentiary contribution and each of the parties would have ended with the principle of procedural acquisition.[31] Since a probative result could be produced by the evidentiary contributions of other parties or of the judge, the notion of a duty or technical rule of the subjective burden of proof "collapses like a house of cards," and must be dispensed with.[32]

GIANNINI, by contrast, eliminates the subjective burden more subtly. Apparently, he only changes the terminology, calling it the "burden to produce evidence,"[33] which he understands as a concretization of the principle of party cooperation. It would be a conduct requirement in the interest of another (the party prejudiced by the rule on the objective burden of proof) whose breach, moreover, requires imputability for a sanction to be applicable. In my view, this conduct requirement cannot properly be called a "burden" in any of its senses. What he is describing is a duty to contribute to fact-finding (see *infra*, 4.3). It is a conceptually and functionally distinct category from the subjective burden of proof, which, as we shall see, is a tool for risk allocation. For this reason, GIANNINI'S redefinition amounts to abolishing the subjective burden of proof.

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[24] FERRER (2019), pp. 73 ff., note 44.
[25] FERRER (2019), p. 59 f.
[26] FERRER (2019), pp. 61 ff., 69.
[27] Original text: "doctrina clásica de la carga de la prueba", FERRER (2019), p. 69.
[28] FERRER (2019), p. 70.
[29] Note of the translator: "*prueba legal o tasada*" in the original.
[30] FERRER (2019), p. 71.
[31] FERRER (2019), pp. 71 ff. A similar opinion can be found in DE PAULA (2020), p. 96.
[32] Original text: "se derrumba[n] como un castillo de naipes", FERRER (2019), p. 73.
[33] Note of the translator: "*carga de producir evidencia*" in the original.

2.3. Attempts at Defending the Institution

These positions provoked reactions of protest from two fronts. From legal theory came the criticism of BENFELD,[34] from procedural law that of CALVINHO.[35]

BENFELD frames his critique in the terminology of Anglo-Saxon legal theory, especially that of Frederick Schauer, presenting a cryptic text for those not initiated in these schools of thought. The reader is confronted with "generalizations," "instantiations," and "entrenched reasons," etc. Whoever manages to overcome that difficulty realizes that the author's main interest does not lie in explaining the function of the burden of proof, but rather in employing Schauer's distinction between *opaque generalizations to their underlying reasons (legal norms) and those not opaque to their underlying reasons (technical-instrumental rules)*.[36] This distinction allows BENFELD to make the point that NIEVA and FERRER are mistaken in assuming that the rules of the burden of proof are instrumental in character to an outcome—in service of finding the truth—and therefore dispensable if they do not fulfill that purpose.[37] In contrast, he argues that they are of a "legal-imperative nature" and therefore perform an important function. Once that theoretical point is clarified, it remains unclear why the burden of proof is indispensable, except that it is a norm whose "underlying reason" is the safeguarding of legal certainty and predictability of the applicable substantive law (and not epistemological reasons),[38] and that the subjective burden is justified by establishing an incentive for the parties.[39] With this, however, a deeper explanation is left wanting: why is a special safeguard of legal certainty necessary in this area, and why is it valuable to acknowledge the interest of the parties?

CALVINHO'S elaborations are more transparent. He defends the burden of proof as a rule of conduct, that is, as the subjective burden of proof, pointing out that it has an impact on the gathering of information prior to the trial by assigning to each party the interest in proving a given fact. Thus, it serves as an "efficient incentive for the parties to gather evidence in advance and provide more sources to the trial."[40] He adds that it "organizes more efficiently the evidentiary activity regarding the facts that require proof, distributing responsibilities" in relation to the disputed facts.[41] This is a valuable point that, however, is not fully reflected upon. The question is why such a distribution of responsibility is desirable.

2.4. Need to Reveal the Meaning of the Burden of Proof

The plausibility of the abolitionist theses only holds in the shadows surrounding the justification of the burden of proof. Their defenders do not provide greater clarity in this regard. In what follows, I will reveal the blind spots of the abolitionist theses, first with respect

[34] BENFELD (2020).
[35] CALVINHO (2020).
[36] BENFELD (2020), pp. 55-56.
[37] BENFELD (2020) pp. 50, 53, 58 note 12.
[38] BENFELD (2020), pp. 57, 60 ff.
[39] BENFELD (2020), pp. 61 ff.
[40] Original text: "eficiente estímulo para que las partes recaben previamente pruebas y aporten más fuentes al proceso" CALVINHO (2020), pp. 192 ff, 196.
[41] Original text: "organiza de manera más eficiente la actividad probatoria sobre los hechos necesitados de prueba, repartiendo responsabilidades" CALVINHO (2020), pp. 195 ff.

to the objective burden of proof (II) and then with respect to the subjective burden (III) of proof.

III. THE OBJECTIVE BURDEN OF PROOF AS A REQUIREMENT OF THE JUDGE'S SUBJECTION TO THE LAW

In its objective dimension—as a rule of judgment—the norm that distributes the burden of proof is indeed not a "burden." Its condition of application is not a behavior but rather a state of affairs: the *non liquet* ("it is not clear"), which is the *definitive uncertainty* regarding a fact to be proven (3.1). Its legal consequence, in turn, is not the sanction of a party, but the emergence of the court's duty to apply a fiction of a favorable or unfavorable evidentiary result concerning the definitively uncertain facts (3.2). Thus, as will be explained, it is indispensable for ensuring the subjection of the judicial body to the law (3.3), which highlights the error in assuming its uselessness.

3.1. The Definitive Uncertainty (*non liquet*) as a Condition of Application

Definitive uncertainty regarding a fact in trial is not a state of affairs in reality, but an institutional circumstance that depends on other procedural rules, specifically the standard of proof and the rules of preclusion: On one hand, it arises when the elements of judgment do not allow surpassing the threshold of sufficiency regarding a fact submitted to proof. In that sense, the higher the requirement of the evidentiary sufficiency threshold, the broader the scope of application of the *non liquet* and of the rules on the objective burden of proof. On the other hand, it depends on the preclusion regime, which will determine at what point the factual basis to be evaluated and applied under the standard of proof should be considered definitive. Its scope of application only opens at the decision phase, once all legally provided possibilities for the establishment of the facts have been exhausted (whether they have been initiated *ex officio* or by the parties). This demonstrates the error of believing that the burden of proof aims to *overcome* the *non liquet*.[42] The opposite is true: its application openly acknowledges uncertainty. It has no epistemic function whatsoever,[43] and even less the character of a "poorly constructed presumption."[44] Quite on the contrary, it is a norm that allows a decision *despite* a definitive epistemic failure, which is a risk affecting every judicial process (even the "epistemically" most perfect)."

3.2. The Fiction of an Evidentiary Result as Legal Consequence

The legal consequence of the (objective) burden of proof is the duty of the court to apply a fiction, either of a fact being proven or of a fact being unproven. For example, when the Chilean Civil Code (CC) states: "It is incumbent upon the party alleging obligations or their extinction to prove them"[45] (1698 I CC), it is also saying: "in the case of definitive uncertainty

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[42] NIEVA (2024), p. 27: "... la carga de la prueba, tal y como se emplea hoy en día, no despeja las incógnitas sobre los hechos, sino que simplemente las arrincona ..." (*"... the burden of proof, as it is used today, does not clarify the uncertainties about the facts, but simply corners them ..."*) The burden of proof does not aim to resolve uncertainties, but rather to make it possible to exercise jurisdiction *despite* them.

[43] A very accurate observation regarding this in BENFELD (2020), p. 57.

[44] NIEVA (2024), p. 44.

[45] Original text of Article 1698 of the Chilean Civil Code: "Incumbe probar las obligaciones o su extinción al que alega aquéllas o ésta"

regarding facts that give rise to the creation or extinction of an obligation, the judge must deem that those facts did not occur." Applied, for example, to a claim for non-contractual damages, Article 1698 I CC in relation to Article 2314 I CC tells us: "in the case of definitive uncertainty regarding the facts constituting a delict or quasi-delict that has caused harm to another, the judge must deem that these facts did not occur and, therefore, deny the legal effect provided for their occurrence, that is, declare that no compensatory obligation arose and dismiss the claim".

3.3. The Objective Burden of Proof as Necessary Complement to the Principle of Inexcusability

Why is it necessary—and even possible—to extract from the rules on the burden of proof and from substantive law legal instructions for the court to apply a fiction treating facts as either having occurred or not occurred? Why can one not simply say, with NIEVA and TARUFFO, that in the previous example, the dismissal of the damages claim flows naturally and automatically from the fact that the facts constituting the basis of the action have not been proven?

As shown by the most recent doctrinal development on the burden of proof, this normative structure is a requirement of the prohibition of self-help[46] and a guarantee of effective judicial protection within the Rule of Law. It is a structure that makes transparent the method a judicial decision must follow when facing definitive factual uncertainty, ensuring its legitimacy *despite* evidentiary failure. What follows is a brief reconstruction of this development, beginning with an influential error by Leo Rosenberg.

a) Rosenberg's Error and the Shift Toward Inexcusability

At the origin of the doctrinal treatment of the burden of proof lies an *error of logical thought*. And none other than Leo Rosenberg originated it in his work "The Burden of Proof" " (*Die Beweislast*, fifth and final edition 1965) and broadcast it widely, reaching the Spanish-speaking world through the translation by Ernesto Krotoschin.[47] In German doctrine, this error was soon discovered and corrected (in 1966, almost 60 years ago). Ibero-American scholars, however, seem not to have noticed it—at least the abolitionists are unaware of it and reproduce it.

What does this error consist of? It is simple: ROSENBERG believed, like NIEVA and TARUFFO, that the non-application of the norm is the logical consequence of definitive uncertainty regarding the facts that make up its conditions. In his words:

> "The judge can only apply a legal provision, that is, declare that its effect has occurred, when he has convinced himself of the *existence* of the circumstances that constitute the conditions of the provision. It follows from it, that the legal norm ceases to apply not only when the judge is convinced of the *non-existence* of these conditions, **but also when doubts remain about their existence.**"[48]

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[46] Note of the translator: *"autotutela"* in the original Spanish version.

[47] Which is a translation of the third German edition of 1951, the latest reprint of the second edition of the translation, 2019.

[48] Original texto of the Spanish translation: "El juez sólo puede aplicar un precepto jurídico, esto es, declarar que se haya producido su efecto, cuando ha logrado convencerse de la *existencia* de las circunstancias que constituyen los presupuestos del precepto. De ello resulta que la norma jurídica deja de aplicarse, no sólo cuando el juez está

In his 1966 doctoral thesis, LEIPOLD demonstrated that this is not the case. The logic of legal norms does not allow one to conclude, by itself, the non-application of a norm in case of doubt about its conditions. Logic only tells us: if the conditions of a norm are satisfied, the norm applies, and if the conditions of a norm are not satisfied, the norm does not apply. And what can logic tell us about the case in which the verification of the conditions is doubtful? Only that the applicability of the norm is likewise doubtful. Nothing more.[49]

The conclusion is not trivial. It means that substantive law norms do NOT authorize the court to make a decision in the face of definitive uncertainty. In principle, the judge should *refrain from judging*, since they are not in a position to exercise jurisdiction if they do not know whether the conditions of the applicable norms have been met in the specific case. Indeed, that was the original function of recognizing a *non liquet*: to authorize the judge to free themselves from the duty to adjudicate the dispute, which was acceptable in premodern proceedings.[50]

Not so in the modern state. The principle of inexcusability implies that the competent court cannot deny a decision to a citizen seeking protection. We know that it cannot be denied on the pretext of a "lack of law" (as expressly stated in Article 76 II of the Chilean Constitution)[51]. In its lesser-known aspect, the principle of inexcusability also prohibits denying a decision on the pretext of uncertainty about the facts.[52] If the procedural rules regulating the court's decision on the factual issue do not allow the facts to be considered as established (or not established), inexcusability prevents the solution that the *non liquet* offered to the premodern judge. The court cannot abstain from deciding.

Thus, the requirements of the Rule of Law prevent factual uncertainty, which causes the syllogism to fail, from also meaning a failure of the judicial function.[53] At the same time, the court must remain subject to the law in its decision-making. Therefore, the system must provide the judge with *additional* norms, *distinct* from substantive law norms, on which they can base their decision in the face of a *non liquet*. That is the function and justification of the rules on the burden of proof (in the objective sense). They provide the court with a basis for resolving the dispute—not by overcoming, but by relying on the uncertainty of the facts—making the exercise of jurisdiction controllable when what actually happened remains unclear. As such, they are indispensable norms.

b) The Decision Based on the Burden of Proof

This view from inexcusability makes the decision a court takes in cases of uncertainty transparent and controllable in the following ways:

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convencido de la *no-existencia* de estos presupuestos, **sino también cuando le han quedado *dudas* acerca de su existencia**." ROSENBERG (2018), p. 12 [original italics, own bold].

[49] LEIPOLD (1966), pp. 22 ff.; this stance became the dominant doctrine (if not unanimous): REINECKE (1976), pp. 25 ff.; PRÜTTING (1983), pp. 124 ff.; ROSENBERG/SCHWAB/GOTTWALD (2018), p. 698.

[50] Thus, in the Roman formulary procedure, KASER (1996), p. 270; in the national literature: CARVAJAL (2012), p. 603.

[51] Note of the translator: *"a falta de ley"* in the text of Article 76 II of the Chilean Constitution.

[52] PRÜTTING (1983), pp. 124 ff.

[53] This consequence is independent of whether one adheres to the traditional concept of inexcusability (as a prohibition against departing from the duty to adjudicate) or, as MARTÍNEZ (2012), pp. 137-139, extends it to a duty of judicial response in accordance with effective judicial protection.

First, it clarifies that a decision in accordance with the burden of proof is not justified based on the behavior or evidentiary outcome of the specific trial, but rather on the substantive law norm (for example, Article 2314 CC) together with the rule distributing the burden of proof (for example, Article 1698 CC). Its application does not involve a judgment about the evidentiary difficulties during the proceedings. What occurs during the trial must be irrelevant to the application of the objective burden, which is precisely based on its open failure. To overcome evidentiary difficulties, other types of rules must operate and be exhausted beforehand (such as the parties' duties to disclose, the court's powers of inquiry, sanctions for frustrated evidence, prima facie proof, etc.). For this reason, the objective burden of proof does not oppose a process committed to the ascertainment of truth. Definitive uncertainty can arise in all judicial proceedings, even when the court and the parties have very broad powers to promote fact-finding.

Second, refuting the belief that a *non liquet* necessarily leads, by mandate of logic, to the non-application of the invoked norm allows us to recognize that the distribution of the burden of proof is not neutral, but serves specific legal-policy purposes. It opens our eyes, for example, to see that the rule of distribution according to which the party invoking a norm in their favor will be disadvantaged in the face of uncertainty about its conditions aims at preserving the status quo. It reflects a function of private law aimed at maintaining the existing distribution of property. The burden to prove the lack of fault of a party breaching a contract, in turn, reinforces confidence in the commitment of one who promises a result; the presumption of employer fault in cases of liability for acts of subordinates strengthens the position of the victim vis-à-vis the risks of economic activity organized in enterprises. It is not relevant here to discuss whether these interpretations are correct. The point is that in the objective burden, a subsidiary adjudication order is revealed, based not on the merits of the facts of the specific case, but on general guidelines established by the legislator to promote certain purposes of substantive civil law. Therefore, if the court must make a decision in the face of a *non liquet* and there are interpretative difficulties regarding the distribution of the burden of proof (that is, regarding whether it must apply a fiction of a positive or negative result concerning the uncertain fact), it must interpret based on the *ratio* of the applicable substantive law norms.[54]

3.4. So, Should the Objective Burden of Proof Be Abolished?

We saw that NIEVA and TARUFFO believe that the objective burden is dispensable because the non-application of the norm flows automatically from uncertainty about its conditions. As has just been explained, this is false. Uncertainty about the facts only results in uncertainty about the applicability of the norm, and—by requirement of the principle of inexcusability and the judge's subjection to the law—additional norms are needed to legitimize a decision despite the uncertainty: the rules on the burden of proof (in the objective sense).

IV. THE SUBJECTIVE BURDEN OF PROOF AND THE PRINCIPLE OF PRIVATE AUTONOMY

If the thesis advocating the abolition of the objective burden of proof reveals a blind spot regarding the judicial function in the modern state, the thesis advocating the abolition of

[54] PRÜTTING (1983), p. 264.

the subjective burden reveals a blindness to the principle of private autonomy as the basis of civil procedure.

4.1. Private Autonomy as Basis of Civil Procedure

A judicial process is not determined solely by the act of judicial cognition toward which it is directed, but also by the substantive law it is called upon to apply. Civil procedure (in patrimonial matters) is a form of conflict resolution between private parties regarding disposable rights governed by the principle of private autonomy. Therefore, their judicial protection requires that this autonomy remain effective during civil proceedings—and this is why the principle of party disposition and the principle of submission of evidence are indispensable for civil justice not to contradict the substantive law it is called upon to apply. Protection of disposable rights would be inconceivable in a judicial process committed solely to the public interest. If that were the case, the judicialization of civil disputes would mean the loss of private disposition once the claim is admitted for proceedings, which would cease to be a private claim and become a mere denunciation of non-application of the law. This does not mean denying that public interests also exist in civil procedures, and it hardly entails a regression to nineteenth-century liberal procedure.[55] It is a recognition that, at the latest since the formation of the modern state, civil procedure operates in a field of tension between private autonomy (required by the substantive law it must apply) and the public interest (required by the jurisdictional power exercised therein); a tension that is *constitutive* and therefore cannot be overcome, only managed through doctrinal solutions tailored to each problem (e.g., extensions of jurisdiction, evidentiary agreements, agreements on the conduct of the process, etc.). Recognizing this constitutive tension also means acknowledging the naïveté of adopting purely "privatist" or "publicist" positions regarding civil procedure.

4.2. Civil Procedure as the Exercise of Subjective Rights and the Principle of Party Presentation

In this line of recognizing private autonomy, HENCKEL clarifies that civil procedure must be understood not only as judicial protection but also as a *form of exercising subjective rights*.[56] He notes that under substantive law, a freely disposable right can lose its effectiveness through any type of conduct by its holder, whether by will (waiver, remission, agreement, etc.) or by inaction, when such inaction entails the failure to meet certain conditions established for the protection of a general or third-party interest (limitation, extinction, unenforceability, etc.). Similarly, a procedural party can lose their right or their defensive position within civil proceedings, in accordance with their will (withdrawal, admission, settlement, etc.), but also through inaction, when they fail to comply with conditions of judicial protection[57] (admissibility requirements, competence of the court, timely filings, etc., or precisely: burdens of proof). In this sense, civil procedure should be considered a continuation of the domain of private disposition enjoyed by the civil law subject outside the process, with the particularity that it must be coordinated with the rights of the adversary and the public interests involved. That is, the aim of civil procedure is a formalized exercise of subjective rights— "formalized" in the sense

[55] Against this prejudice, HENCKEL (1970), p. 64.
[56] HENCKEL (1970), pp. 61-64; WAGNER (1998), p. 60.
[57] HENCKEL (1970), p. 62.

that it is constrained by procedural rules designed to reconcile general interests with the principle of private autonomy.[58]

The *principle of party disposition*[59] is the highest expression of this connection between substantive and procedural law, as it safeguards the parties' control over the initiation, the subject matter, and the termination of the proceedings. It is also reflected in the *principle of party presentation*,[60] which ensures that the parties maintain control over the factual basis of the decision they request from the court.[61] It grants them the exclusive authority to present factual assertions, to decide which assertions are to be subjected to proof (through the act of disputing facts), and they bear the responsibility of submitting evidence in the proceedings. These activities must be coordinated. A tool is needed to define the spheres of responsibility of each party with respect to the activities of asserting and disputing facts and offering evidence. This is the function of the "subjective" burdens: the burden of alleging and disputing facts, and the burden of presenting evidence and requesting its admission—in other words, the burden of proof in the subjective sense properly speaking.

4.3. The Subjective Burden of Proof as Rule of Risks' Distribution

To create a sphere of autonomous action, equivalent to that which governs outside the proceedings, procedural law must clarify the expectations of conduct for each party. It does so by establishing spheres of responsibility through burdens, understood as *rules for allocating the risks* of inactivity. In the case of the subjective burden of proof, this refers to the risk of procedural failure arising from inactivity in presenting a factual account and in establishing the legally relevant facts

Abolitionists—like the proponents of dynamic burdens—insist that the concept of the subjective burden reflects a hidden bias concerning each party's capacity to contribute to the determination of the facts (*supra*, 2.2). This reveals confusion regarding the doctrinal concept of the procedural burden. A burden is a rule through which risks are allocated, serving to guide and coordinate the exercise of procedural rights and duties.[62] A *burden* is distinguished from a *duty* in that its non-fulfillment entails a procedural consequence regardless of any judgment of reproach or imputability on the party subject to it. It does not describe standards of conduct, but rather the conditions under which the parties exercise procedural rights and fulfill procedural duties. A party does not incur the procedural disadvantage because it is deemed at fault for failing to discharge the burden, but because the risk of inactivity or the ineffectiveness of activity is attributed to it. This is a necessary mechanism for making the consequences of exercising—or failing to exercise—procedural rights predictable, rights which are (and must be) within each party's sphere of autonomous decision—just as with the exercise of disposable rights outside the proceedings. Therefore, assigning the burden of proof to one party is perfectly compatible with assigning a duty of cooperation to its adversary (i.e., the party who does not bear the burden of proof), duties that are undoubtedly indispensable in contemporary civil proceedings. This will be revisited below (*infra*, 5.1).

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[58] HENCKEL (1970), p. 63.
[59] Note of the translator: "*principio dispositivo*" in the original.
[60] Note of the translator: "*principio de aportación de partes*" in the original.
[61] HENCKEL (1970), p. 143.
[62] STÜRNER (1976), p. 75; PRÜTTING (2020), § 286 paragraph. 105.

4.4. The Application of Subjective Burdens During the Proceedings

Abolitionists argue that the subjective burden of proof has no function *during* the proceedings and can therefore be eliminated. That is false. First, the subjective burden of proof identifies the party that bears the burden of asserting legally relevant facts. The allocation of the burden of assertion is essential to ensure that the litigation is framed on the basis of factual allegations appropriate to the rules invoked, thereby avoiding unnecessary evidentiary activity or proof concerning vague matters.[63] If the claimant does not provide allegations adequate to the right being asserted, or the defendant with respect to defenses, their submissions are inadmissible (after being given an opportunity to remedy the defect), and no evidentiary stage at all should be opened.[64] Inadmissibility, as a consequence of submissions with an inadequate factual account, operates *during* the proceedings, prior to the evidentiary stage, as an effect of non-fulfillment of the burden of assertion, and its very purpose is to prevent the case from moving forward to an evidentiary stage on a defective basis.

If the parties discharge the burden of allegation the burden then arises for the opposing party (that is, the one who does not bear the subjective burden of proof) to dispute the allegations with precision and grounds. This act of disputing amounts to a declaration of intent to have the truth of the allegation formally determined at the stage of taking evidence.[65]

And finally, the subjective burden operates at the stage of offering evidence. By disputing the fact, the party who does not bear the burden of proof expresses its intention to submit the opposing party's allegation to evidentiary examination. If the party bearing the burden of proof neither offers evidence nor requests evidentiary activity regarding the disputed fact, that is, if it fails to exercise the available rights for clarifying the fact, the court must refrain from conducting proof-taking and deem the allegation not factual. Unlike the objective burden of proof, the problem here is not insufficiency of evidence, but rather the absence of the minimum conditions required to subject a factual allegation to evidentiary examination. If the party bearing the burden of proof is unable to undertake any evidentiary activity—whether by offering evidence in its possession, by requesting that the opposing party be ordered to disclose evidence, or by requesting a judicial order for disclosure—the risk materializes, and the party will not succeed with its factual allegation. There is no justification for subjecting the opposing party—and for expending public resources—to evidentiary activity when the party "charged" with the matter shows no initiative whatsoever in clarifying it (whatever the reason may be). In a proceeding that imposes duties of disclosure on the opposing party, this consequence cannot be regarded as "unfair," but rather as an indication of disinterest in establishing the facts at the proof-taking stage.

Now, it is only once the evidence has been offered and the evidentiary activity regarding a disputed fact has begun that the public interest in a decision in accordance with the truth becomes relevant. Indeed, one could say that by disputing the facts, the parties, in the exercise

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[63] In detail: VOGT (2018), pp. 269-273.

[64] For the proper preparation of the evidentiary stage, it is important that this admissibility review can be carried out *ex officio* and not depend on an action by the defendant. A problem with the discussion stage of Chilean civil proceedings is precisely that it requires the filing of an objection for ineptitude of the complaint in order to trigger this review. See: VOGT (2018), pp. 267-269.

[65] BREHM (1982), p. 179.

of their autonomy, decide to use the "truth" of the assertions as the decisive criterion for determining whether they may serve as the basis of the judgment. It is only at this point that the principle of procedural acquisition comes into effect, and one may argue that the subjective dimension of the burden of proof loses its independent significance, with only the incentive remaining that derives from anticipating the decision in accordance with the objective burden of proof.

4.5. So, Should the Subjective Burden of Proof Be Abolished?

Abolitionists maintain that the subjective burden of proof is useless because, under the principle of procedural acquisition, the parties' evidentiary initiative is irrelevant. This is incorrect. In a modern civil proceeding, the subjective burden of proof (and other related burdens) allocates risks in order to make the autonomous exercise of procedural rights predictable. If a party does not fulfill its burden of assertion or shows no evidentiary initiative with respect to disputed allegations, the risk materializes, and the corresponding claim or defense must be rejected without the need to submit it to the proof-taking stage. Therefore, the burden of proof has essential functions *during* the proceedings and is not limited to its objective facet at the stage of deciding on the evidentiary results.

V. Burden of Proof, Duties of Disclosure and Confidentiality

Once the functions of the burden of proof are clarified, it is easy to understand its relationship with two related figures: the parties' duties of disclosure and the protection of legitimate interests of confidentiality

5.1. The Burden of Proof as Basis of the Duties to Cooperate in Fact-Finding

I consider that today there is a comparative consensus regarding the value of the comprehensive fact-finding, and the general principle is that a proceeding should seek to integrate all relevant sources of information, unless there are legitimate reasons to exclude them.[66] Therefore, if the relevant means of evidence are in the possession of the opposing party, contemporary civil procedure recognizes the duty of the parties to cooperate with the other side's fact-finding efforts, with "the other side" defined precisely as the one that bears the risk by virtue of the burden of proof. Thus, under this paradigm of comprehensive fact-finding, the subjective burden of proof plays the essential role of assigning each party responsibility for the success of the proof-taking stage and, therefore, for making use of all the opportunities for obtaining information that the proceeding provides: whether by presenting the evidence they possess, requesting that the opposing party submit evidence pursuant to their duty of cooperation, or, if they wish to take the risk, relying on the court to adopt disclosure measures *ex officio* (if available).

This makes clear the mistake of believing that the burden of proof (in its subjective dimension) has an epistemic function and that, as such, it "competes" with the *duty* to disclose information. From that perspective, it could plausibly be argued that the concept of duty ensures the completeness of the evidentiary record much more effectively than the incentives triggered by the burden of proof, and that therefore there would be no problem in abolishing

[66] VOGT (2020), pp. 5 ff. See also Article 25 of the 2021 European Rules of Civil Procedure.

it.[67] However, as just explained, the subjective burden of proof is not intended to guarantee the success of the proof-taking stage. Its function is, rather, the opposite: it allocates the risk of evidentiary failure. In doing so, it provides the parties with legal-procedural certainty, giving them clarity as to how such failure relates to their interest in a victory in the proceedings. Without the burden of proof, there would be uncertainty regarding the parties' interests in successful fact-finding and, consequently, it would not be possible to identify who bears a *duty* to contribute and who holds the corresponding *right* to demand contribution to the establishment of the facts (duties and rights that do have an epistemic function). The burden of proof removes this uncertainty, links evidentiary success or failure with the parties' interests, and only in this way makes it possible to identify procedural rights of one party vis-à-vis the other. Only in this manner can proof in civil proceedings be conceived as a sphere for the autonomous exercise of rights subject to private disposition, according to the aforementioned HENCKEL'S conception (*supra*, 4.2). This is by no means incompatible with recognizing that civil proceedings must produce decisions in accordance with the truth. Generally, it is the parties who are best acquainted with the available information, and it is desirable to mobilize their initiative through a clear definition of their interests—something possible only if they are aware of the risks of ultimate evidentiary failure. Without clarity regarding such evidentiary risks, the parties would not know whether it is in their interest to request a measure for the determination of facts (whether through their own submission of evidence, requesting cooperation from the opposing party, or from the court), and would instead be left at the mercy of the court's *ex officio* powers for providing evidence, without knowing how to position themselves in relation to the exercise of such powers. This situation is incompatible with the parties' private autonomy, and perhaps even with the right of defense.

The risk distribution provided by the burden of proof is also indispensable prior to the proof-taking stage, or even before the proceedings begin, in order to assess the risk of initiating them.[68] At these stages —not proof-taking but preparatory access to information[69]—the subjective burden of proof is required in its dimension as a burden of allegation and substantiation. That is, the burden of presenting legally relevant factual allegations that meet a threshold of precision in order to produce any procedural effect.[70] It is the responsibility of the parties to gather the information and transform it into a narrative of legally relevant facts capable of meeting that threshold (it cannot be the judge's task, unless they were to be assigned an investigative police for civil cases). Now, nothing prevents the recognition of preparatory duties of disclosure that oblige the parties to assist the one bearing the burden of allegation and who lacks access to the sources of information needed to construct a precise and detailed account of the facts (which is precisely what Anglo-Saxon *discovery/disclosure* achieves). But again, these duties and the corresponding rights operate on the basis that there is a distribution of risks regarding the failure of proof, a distribution that is precisely what the rules on the burden of proof provide.

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[67] So it seems, DE PAULA (2020), p. 115, when he proposes "that evidentiary activity should not be framed as a burden, but as a duty (with different limits), so that the party cannot compromise the completeness of the evidence (Original text: *"que la actividad probatoria no se configure como una carga, sino como un deber (con distintos límites), para que la parte no pueda perjudicar la completitud del material probatorio"*)

[68] SCHILKEN/BRINKMANN (2022), p. 172.

[69] About this distinction, VOGT (2022), pp. 164-167.

[70] In this regard, SCHILKEN/BRINKMANN (2022), pp. 171 ff.

5.2. The Burden of Proof as Basis for Managing Confidentiality

The risk distribution provided by the burden of proof is also indispensable for regulating the management of the tension between confidentiality and publicity, an issue of increasing relevance in civil litigation.[71] With the emergence of the information society, situations have multiplied in which a party opposes disclosure requests by invoking a legitimate interest in confidentiality that is threatened by the publicity of judicial proceedings (privacy, reputation, trade secrets, professional secrecy, protection of minors, etc.).[72] Such requests for the protection of confidentiality give rise to incidents whose proper regulation requires clarity regarding the distribution of the risk regarding the determination of the facts—that is, regarding the burden of proof. These incidents arise from two constellations: the confidentiality exception (passive constellation) and the confidentiality claim (active constellation).[73] The burden of proof is indispensable for distinguishing between these constellations and identifying the roles and expectations of the parties within these confidentiality disputes, whether they occur at the proof-taking stage or the preparatory stage of access to information. The *confidentiality exception* is a tool available to the party that *does not bear the burden of proof* regarding the fact to be proven through the requested information. This is the party that has no interest in determining the facts but, on the contrary, has an interest in not cooperating with fact-finding in order to protect a confidentiality interest. The dispute is structured around the clash of interests between the interest in fact-finding of the party bearing the burden of proof and the confidentiality interest of the party who does not bear the burden of proof but is, in principle, obliged to provide the information. The *confidentiality claim*, by contrast, is the protective tool available to the party that does bear the burden of proof. In this constellation, the same party has, on the one hand, an interest in producing the information to achieve successful fact-finding (since failure implies its procedural defeat), while at the same time having a legitimate interest in ensuring that the information is not disclosed, that its confidentiality is preserved. In this case there is an "internal" collision of interests. The same party has, on the one hand, an interest in providing the information, and on the other, in keeping it secret. The confidentiality claim precisely allows this party to present the information for successful fact-finding while simultaneously requesting safeguards that ensure its confidential use in the proceedings.[74]

From the above, it follows that the allocation of risks defined by the rules on the burden of proof is indispensable as a basis for regulating the duties of disclosure with respect to the legitimate confidentiality interests present in judicial proceedings subject to publicity requirements.

CONCLUSIONS

In recent years, the thesis advocating the eradication of the burden of proof has been widely disseminated in Spanish-speaking procedural thought and has given rise to a debate blind to the functions it serves in modern procedural law, which this article has sought to clarify.

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[71] See the European Union Directives cited in note 4.
[72] In detail in VOGT (2025), pp. 16-19.
[73] VOGT (2025), pp. 6-8.
[74] VOGT (2025), pp. 25-30.

The function of the objective burden of proof is to ensure the judge's subjection to the law in fulfilling the duty to render a decision despite factual uncertainty. Since any judicial process can end with factual uncertainty, the objective burden of proof is a general institution, applicable to all judicial proceedings, regardless of how the fact-finding process is designed. In civil proceedings, moreover, the notion of the subjective burden of proof is indispensable, as it operationalizes the principle of private autonomy in the proceedings by regulating a distribution of risks that allows the parties to foresee the consequences of their procedural conduct in defining the issues to be proven and in taking the initiative in presenting evidence

This distribution of the risk of failure in determining the facts is the foundation for other dominant features in contemporary civil proceedings. On one hand, it is indispensable for a proper understanding of the procedural duties of disclosure, both at the proof-taking stage and at the stage of preparatory access to information; on the other hand, it provides the basis for regulating incidental litigation concerning the protection of legitimate confidentiality interests, which increasingly arise in opposition to procedural activity subject to publicity requirements.

Therefore, anyone who wishes to persist in an abolitionist stance will have to convince others of the uselessness—not of the functions that the burden of proof used to serve in proceedings in the past, as NIEVA does—but of the functions that the burden of proof serves in contemporary proceedings: nothing less than promoting the Rule of Law and private autonomy in civil procedure. I doubt that this is possible.

BIBLIOGRAPHY

BENFELD ESCOBAR, Johann (2020). "A favor de la carga de la prueba: sobre el carácter jurídico-imperativo de las reglas de onus probandi", *Estudios de Derecho*, vol. 77, N°170, pp. 47-70. [DOI: 10.17533/udea.esde.v77n170a02]

BREHM, Wolfgang (1982). *Bindung des Richters an den Parteivortrag und Grenzen freier Verhandlungswürdigung* (Tübingen, Mohr Siebeck).

CALVINHO, Gustavo (2020). "A favor de la carga de la prueba", *Estudios de Derecho*, vol. 77, N°170, pp. 167-199. [DOI: 10.17533/udea.esde.v77n170a07]

CARVAJAL, Patricio-Ignacio (2012). "Non liquet! Facilidad probatoria en el proyecto de un nuevo Código Procesal Civil", *Revista Chilena de Derecho*, vol. 39, N°3, pp. 565-604.

DE PAULA, Vítor (2020). *La carga de la prueba en el proceso civil: de la carga al deber de probar* (trans. Laura Criado Sánchez, Madrid, Marcial Pons Ediciones Jurídicas y Sociales.)

DEL RÍO FERRETTI, Carlos (2021). "La carga de la prueba con relación al cumplimiento-incumplimiento civil como *thema probandum* en la responsabilidad médica y la *exceptio non adimpleti contractus" Revista Chilena de Derecho*, vol. 48 Nº 3, pp. 155 - 179

FERRER, Jordi (2019). La carga dinámica de la prueba. Entre la confusión y lo innecesario. En NIEVA, Jordi; FERRER, Jordi & GIANNINI, Leandro J. (eds.), *Contra la carga de la prueba* (Madrid, Marcial Pons Ediciones Jurídicas y Sociales), pp. 53-87.

GIANNINI, Leandro J. (2019). Revisitando la doctrina de la «carga dinámica de la prueba». Aportes para esclarecer sus principales problemas conceptuales. In NIEVA, Jordi; FERRER, Jordi & GIANNINI, Leandro J. (eds.), *Contra la carga de la prueba* (Marcial Pons Ediciones Jurídicas y Sociales), pp. 89-115.

HENCKEL, Wolfram (1970). Prozessrecht und materielles Recht (Göttingen, Otto Schwartz).

HUNTER, Ivan (2020). Rol del juez. Prueba y proceso. (Santiago, DER ediciones).

KASER, Max (1996). Das römische Zivilprozessrecht, 2a ed. (Múnich, C.H.Beck).

LEIPOLD, Dieter (1966). *Beweislastregeln und gesetzliche Vermutungen insbesondere bei Verweisungen zwischen verschiedenen Rechtsgebieten* (Berlín, Duncker u. Humblot).

MARTÍNEZ BENAVIDES, Patricio (2012). "El principio de inexcusabilidad y el derecho de acción desde la perspectiva del estado constitucional", vol. 39, Nº1, pp. 113-147

NIEVA FENOLL, Jordi (2019). La carga de la prueba: una reliquia histórica que debiera ser abolida. En NIEVA FENOLL, Jordi; FERRER BELTRÁN, Jordi & GIANNINI, Leandro J. (eds.), *Contra la carga de la prueba* (Madrid, Marcial Pons Ediciones Jurídicas y Sociales), pp. 23-52.

— (2020). "Carga de la prueba y estándares de prueba: dos reminiscencias del pasado", *Estudios de Derecho*, vol. 77, N°170, pp. 406-407. [DOI: 10.17533/udea.esde.v77n170a05].

— (2024). *Trilogía sobre la carga de la prueba: hacia su abolición* (Lima, Palestra Editores).

PRÜTTING, Hanns (1983). *Gegenwartsprobleme der Beweislast* (Múnich, C.H. Beck).

— (2020). Comentario a § 286 de la Ordenanza Procesal Civil alemana, in: KRÜGER, Wolfgang; RAUSCHER, Thomas (2020). *Münchener Kommentar zur Zivilprozessordnung*, tomo I: §§ 1-354 (Múnich, C.H. Beck)

REINECKE, Gerhard (1976). *Die Beweislastverteilung im Bürgerlichen Recht und im Arbeitsrecht als rechtspolitische Regelungsaufgabe* (Berlin, Duncker & Humblot).

ROSENBERG, Leo (2019). *La carga de la prueba,* 3a ed. (trad. Ernesto Krotoschin, Santiago, Librotecnia).

ROSENBERG, Leo; SCHWAB, Karl-Heinz & GOTTWALD, Peter (2018). *Zivilprozessrecht*. 18a ed. (Múnich, C.H. Beck).

STÜRNER, Rolf (1976). *Die Aufklärungspflicht der Parteien des Zivilprozesses* (Tübingen, Mohr Siebeck).

SCHILKEN, Eberhard; BRINKMANN, Moritz (2022). *Zivilprozessrecht*, 8a ed. (Múnich, Vahlen).

TARUFFO, Michele (2019). Casi una introducción. En NIEVA, Jordi; FERRER, Jordi & GIANNINI, Leandro J. (eds.), *Contra la carga de la prueba* (Madrid, Marcial Pons Ediciones Jurídicas y Sociales), pp. 11-21.

VOGT GEISSE, Thomas (2018). La diferencia entre afirmar y probar en el proceso civil. In RIVERO, Renée & MARÍN, Juan Carlos (eds.), *Reformas necesarias a la justicia chilena* (Santiago, Editorial Librotecnia), pp. 253-280.

— (2020). *Aufklärung und Informationskontrolle im Zivilprozess* (Tübingen, Mohr Siebeck).
— (2022). La distinción entre esclarecimiento probatorio y esclarecimiento preparatorio en el proceso civil, *Quaestio facti. Revista Internacional sobre Razonamiento Probatorio*, Nº 3, pp. 159-173.
— (2025). "Confidencialidad procesal en juicios públicos", *Revista Derecho PUCP*, Nº 94, pp. 135-176.

WAGNER, Gerhard (1998). *Prozeßverträge: Privatautonomie im Verfahrensrecht* (Tübingen, Mohr Siebeck).