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TO UNDERSTANDING OF THE BURDEN OF PROOF IN ANGLO-AMERICAN LAW

The basic purpose of this article is to explicate understanding and verbal expression of the burden of proof in Anglo-American law. For this, the method of comparative analysis of few analogous fragments from different editions of Black's Law Dictionary is used. As a result, firstly, the set of concepts and corresponding terms by which the burden of proof is understood and expressed is found out. In a first approximation, omitting analogous ones, it is appropriate to restrict the subset of terms, on the one hand, by "(legal) truth", "belief", "burden of persuasion", "risk of nonpersuasion" and, on the other hand, "burden of production" or "burden of going forward with the evidence", "prima facie case", "order of proof". Secondly, understanding and expression of the burden of proof vary greatly depending on recognition of one or the other legal standard of proof. Thirdly, understanding of the burden of proof has evolved and is currently functioning in the following principal dimensions: legal, rhetorical, and logical. These ones complement dimensions of space and time that are natural for any human activity. Fourthly, it seems possible to extrapolate the conclusion about legal-rhetorical-logical multidimensionality of concept of the burden of proof to entire cluster of concepts (and terms) which grasps legal proof, including concept of proof beyond a reasonable doubt. Thus, any attempt to reduce definitions of elements of this cluster, in particular – of concept of proof beyond a reasonable doubt, to pure logical definitions will be unsuccessful in general case. The conclusion is that the multidimensionality of concept of proof beyond a reasonable doubt seems to be an actual source of well-known difficulty of unification of practical explanation and using of standard of proof beyond a reasonable doubt.

Key words: *proof; legal proof; burden of proof; proof beyond a reasonable doubt; Anglo- American law; Black's Law Dictionary*

Problem statement

Article 17 of the Code of Criminal Procedure of Ukraine 2012 includes idea of proof beyond a reasonable doubt, which is an essential innovation for our law. This idea, obviously, was borrowed from still quite distant for us – both literally and figuratively – Anglo-American law, where it gradually during about two hundred years took root in description of the due process[1]. However, how to understand and use it correctly under conditions of the Ukrainian law? And whether this "transplantation of an alien" does not entail some undesirable inconsistency or even a dangerous "reaction of rejection"? Any search for answers to these and related questions actualizes the need for preliminary in-depth study not only of the very idea of proof beyond a reasonable doubt but also of a set of concepts (and corresponding terms) related to this idea, especially in their natural context[2]. This

[1] In Great Britain and the USA some mentions of proof beyond a reasonable doubt occurs at the end of the XVIII century. This legal phenomenon and the term calling it had become widely accepted from the second half of the XIX century. Standard of proof beyond a reasonable doubt have got the constitutional status in the USA since 1970 (see, e.g., (Kenney S. 1995 : 990–992)). Nevertheless, the appropriate concept is under intensive discussion until now. At the very end of the XX century on base of careful analysis, Thomas V. Mulrine concluded: "No judicial system in any country in the world adequately defines the concept of 'innocent until proven guilty beyond a reasonable doubt.' Virtually no definition of this concept escapes criticism." (Mulrine T. V. 1997 : 225).

[2] During the recent few years, concept of proof beyond a reasonable doubt and some related to it have been stud-

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need is reinforced by current widening of the domestic specialists field of practice: they are becoming increasingly involved in different litigation in jurisdictions of the USA, England, etc. Therefore, in order to succeed here, they must be well-versed in the original concepts and in the appropriate terminology.

Concept of proof beyond a reasonable doubt is a natural element of the set, or better to say cluster, with central concept of *legal proof*. A core of this cluster as well as a core of cluster of corresponding terms were found in my previous paper. The latter core includes, first of all, "truth", "proof" and "evidence", "to prove" and "to evidence", "degree of proof", "burden of proof", "standard of proof", "standard of proof beyond a reasonable doubt", "standard of proof by preponderance of the evidence", "standard of proof by clear and convincing evidence", "legality", "admissibility" as well as "belief", "conviction" and "to convince", "persuasion" and "to persuade" (Tiaglo O.V. 2018 : 24).

Term "burden of proof" seems quite important element of the cluster mentioned. Therefore, in this paper I have an intention to explicate this term in frame of the wider discussion of the burden of proof phenomenon in Anglo-American law. Black's Law Dictionary, the first edition of which was published in 1891 and the tenth in 2014, provides representative material for this type of research[3]. This dictionary is positioned as the most widely used and authoritative secondary legal resource in frame of the Anglo-American law today. However, it has not yet found proper analysis and discussion in Ukraine. This circumstance was the additional stimulus to write the article proposed.

Evolution and contemporary understanding of the burden of proof

Explanations regarding the burden of proof in the first and second edition of the Black's dictionary coincide by essence (cf.: (Black H.C. 1891 : 157-158) and (Black H.C. 1910 : 156)). Some difference is in the fact only that the second edition includes references to real cases that were the sources for these explanations.

"**BURDEN OF PROOF**. (Lat. *onus probandi*). In the law of evidence. The necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a case. Willett v. Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684…

The term 'burden of proof' is not to be confused with '*prima facie* case'. When the party upon whom the burden of proof rests has made out a *prima facie* case, this will, in general, suffice to shift the burden… Kendall v. Brownson, 47 N. H. 200..." (Black H.C. 1910 : 156)[4].

Even these initial explanations reveal a fundamental fact: concept of the burden of proof is important for understanding of not a mono-logical activity, to which, in principle, logical proof can be reduced but of a legal dispute between parties defending different, often completely incompatible positions[5]. It is significant, this goes beyond boundaries of, so to speak, logical dimension – above all, into legal dimension.

The third edition of the dictionary was published after the death of H. C. Black. Of the two paragraphs cited above, only the first was reproduced here practically literally, and the second one included important additions.

"The term 'burden of proof' is not to be confused with '*prima facie* case', Kendall v. Brownson, 47 N. H. 200… or with expressions referring to a similar

ied in publications of Ukrainian and Russian researchers: see, for example, (Budylin S.L. 2014), (Stepanenko V.V. 2017), (Tiaglo A.V. 2018), (Tiaglo O.V. 2013, 2018).

[3] Henry Campbell Black himself had prepared only the first edition and the second one entitled "A Law Dictionary" and published in 1910. The subsequent editions with traditional title "Black's Law Dictionary" were prepared by different groups of experts.

[4] According to the Black's dictionary, the Latin expression *"prima facie"* means "at first sight", "as far as can be judged from the first disclosure", "presumably", etc. It is explained further, a litigating party "is said to have a *prima facie* case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side…" (Black H.C. 1910 : 938)

[5] In accordance with the classical Aristotle's explanation, "reasoning is an argument in which, certain things being laid down, something other than these necessarily comes about through them. (a) It is a 'demonstration', when the premisses from which the reasoning starts are true and primary, or are such that our knowledge of them has originally come through premisses which are primary and true: (b) reasoning, on the other hand, is 'dialectical', if it reasons from opinions that are generally accepted" (Aristotle 1975 : 4). Therefore, in accordance with Stagirite, correct logical proof, or the demonstration, from true premisses draws with necessity (only one) true conclusion. To achieve this result, in principle, one reasonable individual is sufficient. Such standard of proof is understood as proof beyond *any* doubt, or the demonstration.

idea, such as the 'burden of evidence,' Hyer v. C. E. Holmes & Co., 12 Ga. App. 837, 79 S. E. 589, 60, or 'the burden of proceeding,' Mason v. Geist (Mo. App.) 263 S. W. 236, 237, or the burden of going forward with the evidence, First Nat. Bank v. Ford, 30 Wyo. 110, 216 P. 691, 694, 31 A. L. R. 1441.

It is frequently said, however, to have two different meanings: (1) the duty of producing evidence as the case progresses, and (2) the duty to establish the truth of the claim by preponderance of the evidence, and though the former may pass from party to party, the latter rests throughout upon the party asserting the affirmative of the issue. Sellers v. Kincaid, 303 Ill. 216, 135 N. E. 429, 433 … Again 'burden of proof' is sometimes used to refer merely to the rule of practice fixing the order of proof, as distinguished from the 'preponderance of the evidence' meaning the weight of evidence. Welch v. Creech, 88 Wash. 429, 153 P. 355, 358, L. R. A. 1918A, 353 ... "(Black H.C. 1933 : 258)[6].

The above fragment clearly divides the target aspect from the procedural aspect of the burden of proof. The aim of proof here is the truth, or true knowledge, and in this sense, legal proof is similar to logical. At the same time, this aim is achieved through the use of not the logical standard but the special legal standard of proof: preponderance of the evidence. In general, this standard does not guarantee the achievement of only indisputable truth. In other words, the “legal truth” established in this way really remains only more or less probable knowledge, not excluding the possibility of error and, therefore, legal objection. Finally, the procedural aspect of the burden of proof includes the order of proof according to some practical rule.

The fourth edition of the Black's dictionary was published for the first time in 1951, and in 1957 and 1968 were published its two reprints. As can be seen from the reprint of 1968, the dictionary entry “Burden of Proof” almost exactly reproduces the content of its analogue of 1933 (Black H.C. 1968 : 246). In contrast, the analysis of the 1979 fifth edition reveals significant changes alongside with some succession.

"**Burden of proof**. (Lat. *onus probandi.*) In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a case. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Burden of proof is a term which describes two different concepts: first, the 'burden of persuasion', which under traditional view never shifts from one party to the other at any stage of the proceeding, and second, the 'burden of going forward with the evidence', which may shift back and forth between the parties as the trial progresses. Ambrose v. Wheatley, D.C.Del., 321 F. Supp. 1220, 1222" (Black H.C. 1979 : 178).

A comparison of these fragments with the analogous ones in the third and fourth editions founds significant changes. These relate, first of all, to aim of proof: now proof is aimed not to reach the truth but to establish in the minds of, above all, judges and jurors the requisite degree of belief in a fact or in a party's position in whole. The way to achieve such belief is a persuasion process that, in fact, is a matter not of logic but, if one remembers Aristotle again, of dialectics or, even more importantly, of rhetoric[7]. Of course, the persuasion can be based on the logical search for indisputable truth or on the operations with this truth. However, is this recognized as necessity in all real litigations between all real parties?

Further, basic explanations regarding specificity of implementation of the burden of proof depending on nature of any specific case and, accordingly, on standard of proof adopted in this case were proposed in the fifth edition’s entry.

"The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. Calif. Evid. Code, § 115.

In a criminal case, all the elements of the crime must be proved by the government beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368…

[6] It is well known that for criminal cases Anglo-American law uses stronger standard of proof than proof by preponderance of the evidence. The fragment cited is valid, for instance, for some civil cases.

[7] Rhetoric, in accord to Stagirite, discovers the possible speech means of persuasion in reference to any subject whatever. There are three kinds of such means, or proofs: "The first depends upon the moral character of the speaker, the second upon putting the hearer into a certain frame of mind, the third upon the speech itself, in so far as it proves or seems to prove" (Aristotle 1926 : 15-17).

'Burden of establishing' a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence. U.C.C. § 1–201(8)" (Black H.C. 1979 : 178).

According to the Black's dictionary, in Anglo-American law after the middle of XX century concept of the burden of proof and some related to it concepts, at least in part, had gone beyond the classical logical dimension. A crowding out or, possibly, partial replacement of their logical understanding with the rhetorical one is a contemporary law fact[8]. In this regard, the change in the aim of (legal) proof seems very indicative: *directly* requisite degree of belief of the jury and judge was recognized as such aim but not achievement or support of indisputable truth.

In the sixth edition of the dictionary, published in 1990, the entry of the burden of proof is reproduced with little or no change. In contrast, the next 1999 edition has profound transformations in both the form and content of the relevant material. In subsequent editions of 2004 and 2009, with the exception of purely informational and technical innovations, explanation of concept (and corresponding term) of the burden of proof reached some stability. One can understood it, given, in particular, the fact that Brian A. Garner, a well-known American specialist in legal lexicography, remained the editor-in-chief of the recent editions of the Black's dictionary. In this situation, I restrict myself to further consideration only of the relevant entry of the ninth edition.

"**Burden of proof**. (18 c.) 1. A party's duty to prove a disputed assertion or charge. The burden of proof includes both the *burden of persuasion* and the *burden of production*. – Also termed *onus probandi*. See SHIFRING OF THE BURDEN OF PROOF. 2. Loosely, BURDEN OF PERSUASION. [Cases: Evidence ☞ 90.]" (Black H.C. 2009 : 223)[9].

Further this brief purely dictionary article was complemented and clarified by the fragment from contemporary university casebook.

"In the past the term 'burden of proof' has been used in two different senses. (1) The burden of going forward with the evidence. The party having this burden must introduce some evidence if he wishes to get a certain issue into the case. If he introduces enough evidence to require consideration of this issue, this burden has been met. (2) Burden of proof in the sense of carrying the risk of nonpersuasion. The one who has this burden stands to lose if his evidence fails to convince the jury or the judge in a nonjury trial. The present trend is to use the term 'burden of proof' only with this second meaning. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 78 (3d ed. 1982)."

And once more addition here.

"The expression 'burden of proof' is tricky because it has been used by courts and writers to mean various things. Strictly speaking, burden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law. Burden of proof is sometimes used in a secondary sense to mean the burden of going forward with the evidence. In this sense it is sometimes said that a party has the burden of countering with evidence a prima facie case made against that party. William D. Hawkland, *Uniform Commercial Code Series* § 2A-516:08 (1984)."

The above fragments describe different aspects of the burden of proof from different points of view. However, analysis of these fragments taken together fully confirms the essential points of its understanding already identified in previous editions of the Black's dictionary. Namely, this confirms the *binary structure* of the burden of proof, and, accordingly, of appropriate concept (and term) that grasps it. By means of this concept, one thinks about two necessary things. First, it is the obligation of logical-rhetorical-legal persuasion that is aimed to get the requisite degree of relevant belief of jury, judges, etc.; a party wishes to succeed must never refuse to complete this obligation (the burden of persuasion). Second, it is the party's duty to participate in litigation and to bring evidence in favor of its position orderly, in accordance with def-

[8] It seems necessary to point out that contemporary – informal – logic includes in its subject matter not only demonstrative but also non-demonstrative reasoning based both on "true and primary" premisses and on opinion, or probable premisses. In this sense, informal logic overcomes the Aristotelian division of logic and dialectics (see, e.g., (Tiaglo A.V. 2008 : 167-169)). Nevertheless, even this essential transformation does not allow to grasp the means of persuasion, which depend on the "moral character of the speaker" or the hearer's "certain frame of mind", within boundaries of logical dimension.

[9] This article includes information about the period when expression "burden of proof" appeared in English: this is XVIII century. In addition, the West key number system, a feature of which is the key icon ☞, is used to refer to the original legal documents.

inite rules (the burden of production, the burden of going forward with the evidence). In addition, concept of the burden of proof in general case includes a warning about the risk of nonpersuasion, which will entail a party's failure to achieve its aim ultimately[10].

At the very end of the article, there is a following fragment concerning the burden of proof.

"***middle burden of proof***. A party's duty to prove a fact by clear and convincing evidence. This standard lies between the preponderance-of-the-evidence standard and the beyond-a-reasonable-doubt standard. See *clear and convincing evidence* under EVIDENCE. [Cases: Evidence ☞ 596.]" (Black H.C. 2009 : 223).

Thus, the burden of proof and, accordingly, the concept and term that grasp it, are recognized as situational in sense that they depend on the adoption of one or the other standard of proof. This, in turn, is determined by the nature of cases under consideration (criminal, civil, etc.).

Conclusions

The research article devoted to different means of understanding and speech expression of the burden of proof in Anglo-American law. This one is a part of broader discussion about the phenomenon of legal proof.

In the article, firstly, two interconnected sets of concepts and corresponding terms that grasp the burden of proof directly are fixed. In a first approximation, omitting analogous ones, seems reasonable to add to the very term "burden of proof" the cluster of terms, which includes, on the one hand, "truth" or "belief", "burden of persuasion", "risk of nonpersuasion", and, on the other hand, "burden of production" or "burden of going forward with the evidence", "*prima facie* case" and "order of proof".

Secondly, it is clear that understanding and expression of the burden of proof vary greatly depending on recognition of one or the other legal standard of proof.

Thirdly, it is strongly emphasized that understanding of the burden of proof has evolved and is currently functioning in the three dimensions: legal, rhetorical, and logical. These ones complement dimensions of space and time that are natural for any human activity.

Fourthly, it is advisable to take into account contemporary comprehension of the logical dimension. According to it, the logical dimension not only unites the logical and dialectical, which Aristotle divided, but also embraces both demonstrative and nondemonstrative kinds of reasoning. If one takes into account at least these circumstances, it is not difficult to recognize in general case the probabilistic nature of the result of fulfilling the burden of proof and, therefore, the inevitability of idea of risk of nonpersuasion in its understanding. In addition, the probabilistic nature of even here-and-now successful completion by a party its burden of proof does not preclude the possibility of a legal error arising because of a sincere mistake or a true false.

Fifthly, this article proposes an assumption: it seems possible to extrapolate the conclusion on legal-rhetorical-logical multidimensionality of concept of the burden of proof to the whole set of concepts (and terms) that grasps legal proof, including the concept of proof beyond a reasonable doubt. If so, any attempt to reduce definitions of elements of this cluster, in particular – of concept of proof beyond a reasonable doubt, to pure logical definitions will be unsuccessful in general case. The multidimensionality of concept of proof beyond a reasonable doubt seems to be an actual source of well-known difficulty to unify practical explanation as well as using of standard of proof beyond a reasonable doubt.

Competing interests

This study did not receive any financial support. I believe that there are no conflicts of interest related to this article.

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[10] Search for indisputable truth or operation with it can be a part of specific process of persuasion. However, one should not forget that in general case legal persuasion is not obliged to meet pure logical standard of proof beyond any doubt. Such persuasion (and resulting degree of the belief) must meet one or other legal standard of proof, remaining only more or less probabilistic by nature in fact. Therefore, there is a natural risk of nonpersuasion and of non-acceptance of correspondent belief.

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