Does Evidence Matter?

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Evidence, whether in law, in natural or social science, or in belief systems, is about establishing certainty. Evidence has thus been central to law, to science, and to theologies as a way of making truth *visible*[1]. Evidence in these realms is not confined to establishing fact; establishing fact serves to create certainty about truth. The paths to certainty, i.e. the requirements of methods to achieve certainty in these different realms and also in different scientific traditions, different legal orders and different religious beliefs are diverse (Berti et al. 2015). I do not want to compare such different methods of generating evidence and of making it credible and persuasive through various ritual forms (ibid.) Rather, I

want to ask whether evidence (still) matters.

> *While we assume 'evidence' to be a fundamental element of different knowledge practices, it seems to me that its status and relevance is changing, and that this has implications particularly with regard to its role in mediating power differentials,*

(mediating in the double sense of being a medium of but also of balancing out). The question whether evidence matters leads to the question what status "truth" has in different fields of interaction, and whether the status of truth is changing in some fields, but possibly not in others.

The status of truth is closely related to the necessity and the possibility of judgement, distinguishing between true and false, particularly in law. It is in the changing necessity of judgement on the one hand, and in the changing possibilities of judgement on the other, that we can possibly see changes in the status of evidence. Because of its meaning as the way to make truth apparent, questioning evidence means asking how evidence changes when new technologies impact on the possibilities and the character of our knowledge about the relation between cause and event (see e.g. Rottenburg et al 2015). Equally, changing conceptions of how social cohesion is preserved – via retribution, reconciliation or prevention – influence (not necessarily but possibly) the relevance of truth and evidence. Thus we need to ask whether and how the nature of evidence is evolving, and whether its relevance and status in legal procedure and other forms of knowing is changing. More precisely, we should examine in what fields of social interaction evidence matters, in which legal fields, in which debates of academic knowledge. Asking where and when evidence matters is also asking how evidence relates to asymmetrical relations of power in legal procedures. Is evidence power? Most importantly, what is evidence to justice?

Does Evidence matter?

Evidence provides the justification for judgement: it serves to establish the possibility to distinguish true from false. Judgement within the legal field differs from that of science, insofar as it determines not only truth or falsehood, but thereby also attributes fault and guilt. Judges, unlike anthropologists, I would claim, face an imperative to decide (or Luhmann's proscription to avoid decision).

But is this really so? Is there not more to legal practice than its systemic code legal/illegal (*Leitunterscheidung;* Luhmann 1995)? Is this distinction not a normative fiction that has at its root and as its implicit end a specific idea of law and legal procedure, but does not actually describe the operation of many a legal system?

The attribution of responsibility and liability are central to any concept of law. Anthropologists have for a long time pointed out widely varying notions of responsibility and liability in different legal orders (Evans-Pritchard 1937; Gluckman 1965; Falk-Moore 1972; Strathern 2009). They have shown that these constructions of responsibility differ in their theories of causality, their norms of obligation and their ideas of morality, and that they differ in how they relate causal responsibility, responsibility in terms of duties and obligations and moral responsibility to each other. Many "traditional" norms of responsibility have long or cyclical socio-temporal conceptions of the liability of an individual or a collectivity, extending towards the past, towards the future, and most importantly taking into account as relevant for the attribution of responsibility actions that enable those which produce the state of affairs in question (Kirsch 2001). Modern law, by contrast, has relatively short temporal and socio-spatial conceptions of responsibility, linking liability to specific forms of evidence that concur with contemporary scientific and technological methods of making facts visible, thereby limiting liability to that which can be proven according to such methods of establishing cause and fact. Any legal system, of course, has gradations of responsibility, knows extenuating circumstances, distinguishes situations in which strict liability is the norm and others in which liability is moderated.

> *However, for the evaluation of the status and relevance of evidence the question is not whether there are differentiations of liability, but whether judgement is necessary, and therefore whether truth needs to be established, and what place evidence thus has in legal procedures.*

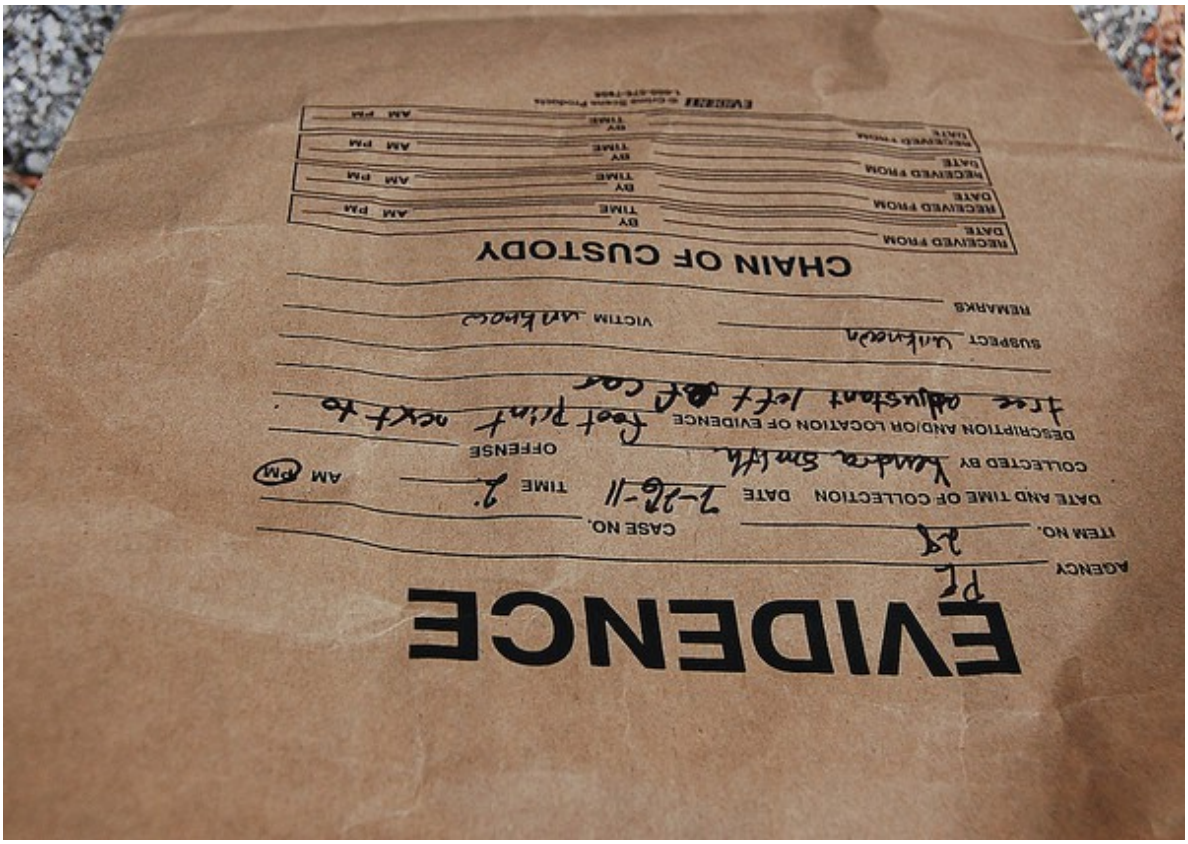
Or: When does law decide, and when does it seek to relegate questions of truth to the sidelines and foreground questions of peace? When does evidence determine truth, and when does this truth determine a judgement? Are we not today facing two developments in legal procedure – unrelated to each other – that fundamentally change the nature and relevance of evidence in legal procedures?

One of these developments is the increasing complexity of evidence in highly complex fields of technological impact (Beck 1996). On the one hand, the perception of causal links reaching far in space and time are ever more explicitly pronounced; on the other hand, the very complexity of these links often engenders a fragmentation of responsibility and liability both in law (Veitch 2007) as well as in moral commitment. Moreover, those institutions of legal responsibility attempting to reflect some of these interrelations are often criticised as insufficient. Liability in modern law, despite its gradations of extenuating circumstance, different degrees of culpability, categories such as aiding and abetment, have been criticized as individualising cause, reducing analysis to immediate causation rather than taking into account enabling structures, and to reducing narratives of conflict by the simple dichotomisation of perpetrators and victims (Clarke 2010).

> *More generally, current institutions of responsibility in law appear to abstract from what could be called enabling contexts; they perform their cuts in the chains of enabling interactions at brief intervals (Strathern 2001).*

The result is often "organised irresponsibility" (Veitch 2007). This raises the question whether the nature of evidence in the anthropocene, an anthropocene that is fundamentally shaped by the specific asymmetrical interdependence of a

world capitalist system, is reflecting the far reaching relations in which we live in such a way that it jars with the current categories of legal judgement, legal liability or the different legal conceptualisations of participating in causation.



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Does evidence about our current world exceed contemporary legal possibilities?

What does the shift to statistical and algorithmic forms of evidence mean in this context of evident causal interdependence for our understanding of truth? Big Data and algorithmic technologies "encode particular understandings, political interests and ontologies. What to quantify, how to name it, how to make diverse phenomena commensurable, how to engage elementary data depend on practices of knowing that are embedded in institutions of power and professional education…" (Rottenburg/Merry 2015, 4).

Moreover, these technologies of "fact making" offer new possibilities of establishing evidence of risk, rather than "fact". Evidence of risk is, however, different from evidence of fact. Their temporal qualities are opposite. The technological possibilities of calculating risk are increasing, while the possibilities determining cause in a way that could accord with differentiated legal categorisations of responsibility seem to be decreasing. That is: the complexities of causation as evident through evidence are not mirrored in corresponding legal categories of responsibility. While law has always also regulated the future, prevention, as the logic of risk control, often suspends legal procedure and turns to the governance of risk – whether in matters of violent crime, technological impact, environmental harm, climate change, or any mixture of these (like robotics, nano- and bio-technologies etc.). In some fields this means controlled exclusion (see Garland 2001); in other fields it means insurance (see e.g. Laidlaw 2014, 208-212), i.e. the collective sharing of risk.

The other development is the tendency to increasingly rely on methods of mediation, of ADR (Alternative Dispute Relation; see e.g. Nader 1999), of making deals that we observe in legal fields as diverse as financial crime, sexualized violence, racist attacks, divorce law, contract law or tort. Often, and traditionally, such mediations occur *after* facts have been settled; they replace punishment rather than judgment. However, they do not necessitate judgement of fact, fault, or guilt. They can do without and replace judgement along with punishment.

Arguments are often brought forth that such alternative dispute resolution actually benefits all parties to a dispute more than punishment would do. This might be the case because it lessens the costs of procedures, it makes restitutive measures more accessible for the victims. Because it can desist from precisely attributing guilt and rather ameliorate suffering, the increasing resort to such procedures poses the question of whether this changes the relevance of evidence in legal procedures. If the goal is a settlement, an agreement, to what degree does truth matter? We do not have to decide whose narrative is true. Both, or all can be, and the issue at hand is to find an agreement that satisfies all.

No matter whether we approve of such abstention from judgment normatively and consider it productive for certain social goals, we need to ask what its implications are. I would venture the thesis that it affects power relations in legal conflicts; that the lessening relevance of evidence privileges "the Haves" (Galanter 1974) because often in a compromise, a deal, the weak lose out.

It appears that the relevance of evidence and judgment is decreasing only in specific fields of law and only in specific situations or constellations. We can thus possibly identify patterns where evidence loses significance, and where it retains its role in providing the grounds for determining fault and liability. These patterns might tell us many things. They might tell us what type of conflicts are deemed irresolvable by attributing guilt, such as increasingly in divorce law, but also – sometimes – matters of collective violence. They might furthermore indicate in which fields evidentiary complexity is assumed to make conventional legal categories of fault and guilt inappropriate, for example with regards to technological impact, especially of new technologies. They might tell us in which situations costs are estimated to prevent access to the law, such as when ADR is advocated as a measure of access to law for the poor.

> *They thus probably also tell us something about the changing relation between evidence and power, the effect of different procedures for the relations between the Haves and the Have-Nots (Galanter 1974).*

Evidence and Justice

So what is the impact of these developments sketched out above on the status of evidence? And if we can actually observe a changing – decreasing – relevance of evidence in legal procedure, how does this relate to our notions of justice? How dependent is justice on truth? Might experiences of justice also transform, as when, for example, verdicts of guilt are experienced as insufficient to bring about justice because they leave unchanged the conditions of suffering, and ameliorative measures are felt to bring about substantive justice? If we see truth

as only one element of legal judgement, peace and well-being being equally or more important ones, are we also witnessing the emergence of notions of justice that depend less on truth and more on the re-establishment of harmonious relations or simply on material well-being? And if this is so, can we learn from other normative orders in which – allegedly – such a focus on the re-establishment of harmonious relations and restoration (or compensation) always has been central to legal procedure? Who benefits from such changes in the different fields of law where they occur? Truth and Reconciliation Commissions attempted to combine the two, truth without judgement and punishment making for reconciliation. They put a high value on evidence, dissociating it from judgement – and in effect most often also from liability.

While we might question the sense of retributive punishment (but see e.g. Wilson 2003), can we do without the attribution of liability or responsibility altogether? Or rather: what are the effects for social relations of giving up on liability and guilt and replacing it with insurance or reconciliation?

> *If evidence is central to the attribution of liability or guilt, can we forgo it without sacrificing justice? If attributing liability and guilt is increasingly unjust: reductionist, individualizing and inadequate to the complexities of distributed agency in our current world, are there less reductionist methods of attributing liability? If so, what type of evidentiary procedures and methodologies do they rely on?*

These questions are central to oppositional struggles, too. Struggles for justice are today often also struggles about the legal attribution of responsibility, because law is perceived – rightly or wrongly so – as defining the content and scope of both retrospective and prospective responsibilities and the distribution of obligations. Such struggles often attempt to give justice to the complexity of interdependence and correlation in world society and overcome any unjustly reductionist, individualising, or nationally limited conceptions of legal responsibility. Thus, they often attempt to transform legal institutions of

responsibility to accord more to alternative visions of just responsibility. Be it environmental movements that engage in the negotiations of climate justice; be it protest for better working conditions in global production and consumption chains; be it the criticism voiced against the notions of command responsibility that is the focus of the trials at the International Criminal Court, to name but a few examples: such struggles try to expand the spectrum of responsibility by taking into account those involved in creating enabling structures. For these endeavours, such struggles need evidence, evidence which mirrors the complexity of the issues at hand; they have adopted forensic methodologies (e.g. Forensic Architecture 2014), and engaged in 'data activism' (Milan 2016) that takes up the possibilities for social struggles, advocacy, and campaigning provided by the possibilities and accessibility of so-called 'big data'. They (attempt to) wrench evidence from the institutions of power within which it is produced, and provide, counter-evidence.[2] Precisely because any evidence that reflects our inescapable entanglement is imbued with the very power differentials of these entanglements, such counter-evidence faces particular challenges.

> *Evidence matters.[3] We need evidence to attribute responsibility, especially when it reaches far and wide. We need evidence to counter-balance power differentials and to accomplish some equality before the law. Thus, we need evidence to make law just.*

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[1] After all, its etymological root is videre, to see.

[2] Such oppositional evidenciary practices have different leverage in cases where they oppose alternative evidence, and those in which they oppose the sidelining of evidence.

[3] I thank Agathe Mora for pointing out to me Susan Haack's book by the very same title „Evidence Matters: Science, Proof, and Truth in the Law, Cambridge, CUP. I am dismayed to admit that at the time of writing I have not been able to get the book, and have therefore not been able to read it.