The Relevance of the Susan Haack's Epistemology to Evidence Law in Latin America

ANDREA A. MEROI
AND
MARIO CHAUMET

Web:
https://rosario.academia.edu/AndreaMeroi
https://Bdp.academia.edu/Marioechaumet

1. FOREWORD

The tireless and world renowned epistemologist Susan Haack is also a beautiful, inspirational person deserving of great admiration.

We met Professor Haack in Cartagena de Indias (Colombia) at an International Congress on Procedural Law organized by the University of Medellín in 2013. At that time we were amazed by her lucidity and the fine irony she weaves with constant puns, images and metaphors. In many ways, all of them remarkable, we met someone *still so British*, despite living in the United States of America for a long time.

Since then, we have enjoyed the invaluable gift of Haack's friendship and have met with her on various occasions, in Colombia, at her office at the University of Miami School of Law, and in Argentina.

Towards the end of August 2017, she gave an unforgettable lecture on *Justice, Truth, and Proof: not so simple, after all* (Haack 2016, 311-340) to participants of the Master's Degree Program in Procedural Law at the National University of Rosario, Argentina. The title of her talk is very much related to the extensive contributions her epistemology can make to our understanding of evidence law.

2. EVIDENCE LAW AND THE EPISTEMOLOGICAL TURN

From a perspective we share, we turn to *epistemology* in search of "science as a process," that is, a discipline interested in understanding the nature of its *product*, the function of its *procedures,* and the *conditions* under which it takes place (Samaja 2004). We agree that "the question of *doing* is deeper than that of *being*. In particular, Epistemology has been leaving aside the question of 'the being of Science' to ask about ''what Science does' ('what does the scientist do when he does science' or 'what kind of act is *the act of explaining scientifically*')" (Ibid., 15). Trying to narrow down the sense in which he will use the term, the great Argentine mathematician and philosopher Gregorio Klimovsky maintained that "the epistemologist asks a question of crucial importance to understand and analyze the cultural significance of science today: why should we believe in what the scientists affirm" (Klimovsky 2001, 28).

One of the fundamental tasks of epistemology is the attempt to answer questions about the ways in which the synthesis between factual and theoretical components in scientific knowledge relate to each other. Different episte-

mological theses will respond differently to these opposite pairs of "*empeiria*/theory" and "discovery/validation."

Ever since the modern age, the great Latin question *Quid iuris?*—expressed eloquently with the question: "How do we have the right to be safe? Or with this even more explicit question: What circumstances authorize us to be sure?" (Ibid., 58, citing Ayer 1956)—was answered in terms of contradiction by *rationalism* and *empiricism* (and by its unwanted derivations… dogmatism and skepticism) (Ibid., 59). Based on the Kantian criticism and the construction of the concept of action as *praxis*, various "middle ways" that try to get out of these extremes (contemporary empiricism, pragmatism, dialectical-genetic theses) were developed (Ibid., 77).

2.1. Nowadays it is not surprising that legal theorists and philosophers of law undertake studies on aspects of the *quæstio facti*. A few decades ago this was not the case, when the dominant legal theory[1] began, gradually, to become strongly concerned with the *facts* in law (in general), and for the *facts* in the decisive legal context of *process* in particular, and, consequently, for the *proof of facts*. The outstanding work of Twining (1994), Damaška (1997a, 1997b, 1998), Ferrajoli (1998), Taruffo (2002, 2008, 2010), Andrés Ibáñez (1992, 1994, 2010), Gascón Abellán (1999), González Lagier (2000, 2003, 2005), and Ferrer Beltrán (2005), amply testify to this in the Spanish-speaking world.

So thoroughly indebted as we are to the teachings of Daniel González Lagier and Perfecto Andrés Ibáñez[2] in 2004 we published a paper intended to report on these doctrinal efforts, and from there raise questions and open new lines of research around this important topic (Chaumet and Meroi 2004). Clearly, differences between epistemological perspectives in relation to the very possibility of knowing and the ways of knowing also materialize in different perspectives on *evidence in the legal process*.

2.2. A legal *process* can be seen as an *epistemic instrument*: a means of discovering facts (usually past, but also present and future) necessary for making a decision on a controversy to which they are relevant. As González Lagier points out, the extreme epistemological positions of objectivism and skepticism are reflected in the procedural conception of evidence.

Indeed, on the one hand, *objectivist traits* (or, at least, *naive objectivists*) can be found in positions that rely—*tout-court*—on the "*immediacy*" of a judge's direct contact with the parties to the case and the evidentiary material. Similarly, difficulties in or lack of evidence are taken to be problems of lack of information. On the other hand, we can find *skeptical traits* in those procedural positions for which the purpose of evidence is conviction, with total disregard of the truth (unattainable) of the facts alleged, or merely formal or procedural truth (material truth is unreachable) (c.f. González Lagier 2003, 19).

2.3. In a good part of Argentinean procedural dogmatics—certainly, not strange or distant from a good part of the procedural dogmatics of European continental law, to which it is heir—there is a commonplace in the studies of evidentiary law that basically consists of: 1) the distinction between "formal truth" or "procedural truth" on the one hand, and "real truth," "material truth" or "objective truth," on the other; 2) the primacy of "objective truth" over "procedural truth" and, therefore, the claimed triumph of the former over the latter, often "at any cost." These doctrines are present yet more strongly in judicial practice.

In Latin America in recent decades, this panorama has been augmented by an influence of postulates from the so-called "constitutional rule of law," also by a strong impact on the proof of the facts of a case (or, perhaps, we should say, on the frequent "no proof" of the facts).

3. HAACK'S FRAMEWORK AND THE LAW

Our honoree's biography tells us about her transatlantic move from the University of Warwick's Department of Philosophy (converted almost entirely to "postmodernism") to the University of Miami in the 1990s. In a very interesting interview she reveals how surprised she was to learn that Terence Anderson—

professor in the University of Miami School of Law—used her *Evidence and Inquiry* as a textbook (Vázquez 2013). From then on, Haack has been pleased to see a vast and rich field of research growing out of her work, initiating an invaluable academic contribution to evidence law, both from her publications and for her courses at the University of Miami School of Law.

What is Susan Haack's theoretical framework? In the introduction to her book-length contribution to the philosophy of law (2014, xvi), she states that her work is imbued with:

a) the spirit of the classical pragmatist tradition-influenced, that is, not only by Oliver Wendell Holmes's writings on the law, but also by the classical pragmatists' thinking about inquiry generally, and about scientific inquiry in particular;
b) her understanding of the evolution of legal concepts and legal systems and her stress on the limits of formalism, align with Holmes's;
c) her objective conception of truth is in the spirit of Charles S. Peirce's observation that "truth is *so*, whether you or I or anybody thinks it is so or not";
d) her distinction between genuine inquiry and advocacy research runs parallel to Peirce's distinction between real inquiry and sham reasoning;
e) her crossword analogy (one of her "trademarks") is inspired in part by Peirce's critique of Descartes' metaphor of a chain of reasons;
f) her conception of scientific inquiry as a human enterprise, thoroughly fallible but nevertheless capable of real advance, with its echoes, not only of Peirce but of other classical pragmatists;
g) her conceptions of law, morality and the relations between them, shaped, in part, by William James's and John Dewey's ethical writings.

From Haack's perspective, a "two-way traffic" between legal practice and epistemological theory could greatly benefit not only legal thinking about evidence, but also the increasingly self-referential and narrowly-focused "niche" epistemology that, sadly, predominates today (Ibid. xvii).

Haack gives us multiple occasions to rethink evidence law: specifically, her work on truth (2016, 312), her foundherentist epistemology—formulated by González Lagier's formulation as "the aversion to dogmatisms, the rejection of dichotomies, the conception of philosophy as being about the world, and the attention to results from science" (González Lagier 2020)—the intersection of her epistemology with evidence law (Haack 2014), her rescue of the "knowing subject" (see, Haack 2009; 2013, 21), the differences between inquiry and advocacy[3], her theses on "degrees" and "standards" of proof (Haack 2014, 47), among many others, provide many very valuable insights pertinent to analyzing the regulation of evidence in different legal systems.

4. PECULIARITIES OF CERTAIN DEBATES IN LATIN AMERICAN EVIDENCE LAW

Latin America—so often visited by our honoree—is heir to the legal tradition of *civil law*, of "continental law." In this tradition, evidence law has been mostly associated with the so-called *inquisitorial system*, as opposed to *the accusatory system* (in criminal matters) or "*dispositive*" (in civil matters) (*adversarial*, in the common law tradition).

More than half a century ago, Piero Calamandrei summarized the differences between the conceptions of legal process by highlighting that

> the one that entrusts the inquiry of the truth to the judge's responsibility and discretion, before whom the parties appear as the passive object of investigations at the mercy of the public interest, and the one that entrusts the development of the process above all to the incentive of the conflicting interests of the part, and that counts, for the success of justice, with the contenders' collabora-

tion and responsibility, considered as free people to behave according to their interest, but aware of the consequences to which their behavior may expose them" (Calamandrei 1951, 159-160).

These are the two ways of conceiving the administration of justice: the inquisitorial process and the accusatorial process.

Beyond the attempt to sharpen the differences between both conceptions of the process, reality refuses to classify itself in either of these two "pure" forms. As the great comparatist Damaška has shown, "only the core meaning of the opposition remains reasonably certain" (1986, p. 3). Continental procedural scholars have long debated the canonical distinction between a criminal process whose purpose is the search for "material truth" (and is therefore mostly under the rules of the inquisitorial system), and a civil process that pursues the "formal truth" (and is therefore related to the accusatory system).[4]

In recent decades we have witnessed a change in this direction: under the influence of the Anglo-Saxon model, many countries have converted their criminal proceedings to the adversarial system; at the same time, the civil process is adding even more inquisitorial and state driven traits, among which it is worth highlighting the objective of seeking the truth and the greater powers of judges to achieve it.[5]

This topic, with its multiple edges and variants, far exceeds the scope of the present work.[6] Nevertheless, within this framework, we would like to highlight two current trends in evidence law in Latin American civil procedure, in particular their risks and what help foundherentist epistemology may provide.

5. "OBJECTIVE LEGAL TRUTH" AND FOUNDHERENTISM

As part of the debates about the purpose of the legal process and the concepts of "procedural truth" and "material truth," of "formal truth" and "real truth," Argentine civil procedural dogmatics began to recite a kind of mantra: "the conscious renunciation of the truth is incompatible with the service of justice."

This last phrase is taken from a famous, endlessly quoted ruling of the Supreme Court of Justice of Argentina issued in 1957. The construction "objective legal truth" had a very high impact on procedural studies[7] and, above all, on jurisprudence. It has served, very especially, to give a stamp of authority to the incorporation of evidence that, by the application of certain rules of evidential procedure, would not count. Thus, means of proof with expired deadlines for their offer or production, evidentiary negligence of the parties, judge's private knowledge about certain circumstances and a long etcetera, benefit from this "exceptional argument" and its great rhetorical force.[8]

As has been correctly asserted, the *dictum* in "Colalillo" commits the courts to the epic mission of finding "objective legal truth" (Salgado and Trionfetti 2012). Of course, none of the modern epistemologies would embrace a universal, necessary and definitive idea of infallible truth, which this procedural doctrine seems to demand. So the trite phrase "objective legal truth" amounts to "an absurd negative because it refers to a situation in which the subject is absent, which means a crazy adventure of the mind and a mirage of language: someone verifies that something is objective (!)" (Ibid).

Obviously, Haack's teachings come immediately to mind: on the one hand, her warnings about the search for a Truth (that is with capital T, almost holy) and *truths*, i.e., particular true propositions, some of which are relative, subjective, partial, etcetera (Haack 2016, 313), on the other, her alertness to the conditions that the law imposes on that knowledge of "the true" (Haack 2014, 92). How astonishing that an epistemologist should be needed to remind us that a legal system is not a scientific research laboratory and that, rather, it should be thought of as a set of rules and machinery for resolving disputes and making it possible for people to live together in some kind of order!

Moving away—once again!—from false dichotomies, Haack does not believe in a legal system that aims *only* to resolve disputes or *only* to discover the truth: "The goal is to resolve disputes on the basis of evidence, in the hope that this it will, often enough, uncover the truth" (2016, 325).

As Haack would say, while a legal process is about *determining* the truth of a *proposition* regarding facts, "what *determining* the truth means [in this context] is arriving at a conclusion as to the facts in a

legally-correct way; which is by no means the same as *seeking*, let alone *discovering*, the truth" (Ibid., 325-326). And as González Lagier aptly points out:

> [t]he peculiar thing about evidentiary activity in Law lies not in the argument about facts in the strict sense (how the weight of the evidence is evaluated) but in the procedural rules (the rules of evidence) which establish, in this case, unlike other contexts, a rigid method of carrying out the investigation, determining which evidence can and cannot be accepted; who has the burden of proof; and even sometimes which conclusions we must accept as proven. And they do so not only considering truth as a purpose of the process but also bearing in mind the protection of other values (2020).

Unmasking the *cliché* that the *civil law process* is intrinsically better than the *common law process* in respect of the "search for truth," Haack reminds us that

> a civil-law judge's factual determinations are constrained by standards of proof; and the whole process, like a common-law trial, is subject to real constraints of time and resources, not continuing indefinitely or waiting for every conceivably-relevant bit of evidence to come in. So it looks to me as if a civil-law judge, like a common-law 'fact-finder', is asked to determine whether guilt or liability has been established to the required degree of proof by the evidence considered; in the hope, as with common-law trials, that this will, often enough, produce factually correct verdicts (2016, 332).

Of course, none of these considerations are meant to celebrate a process without truth, or endorse an unacceptably formalist drift of adjudication systems that betrays an insufficient regard for the just solution of cases. Rather, the point is that awareness of a host of factors—the difficulty of knowing what is true, and the existence of rules that impose limits (sometimes to promote the emergence of truth, sometimes to safeguard other values that compete with the truth in the process), and of the context of conflicts of interest (and not only of rights), and of the cultural, social and economic restrictions, among many other factors that surround this epistemic instrument called a "process"—can help us better discern the problems and weaknesses of the process and define which factors can be modified and which conform to legitimate political options.

Under these conditions, to insist on a judge's *duty* to *seek objective legal truth* is to ignore all the complexity that lies under the knowledge produced in a process and, often, to hide decisions disregarding evidentiary rules behind an aspiration with a high emotional burden (who does not want the truth?) and with an uncertain result.

6. CONSTITUTIONAL RULE OF LAW, NAIVE OBJECTIVISM AND FOUNDHERENTISM

In evidence law we usually say that the object of proof consists of *facts*. Strictly speaking, the proof falls on statements or propositions about "facts," beyond the linguistic license that we usually allow ourselves (Taruffo 2002, 113-114; González Lagier 2005, 21; Gascón Abellán, 1999, 83). The concept of a *fact* as object of proof is extremely complex (González Lagier 2005, 20) and its characterization encompasses the idea of *legal relevance*. The law is not interested in any old fact, but only in the founding facts of a procedural claim, i.e., those captured by a rule in the description of the factual event that it regulates. Hence, the law decisively influences the selection of factual data: "Since facts are investigated to determine whether they have consequences foreseen in some rule, it is with the prism of law that we judge which facts are relevant to the process. The rules then act like lenses—or theories—that direct our attention towards one or another aspect of the facts" (Ibid, 43).[9]

Nowadays, certain characteristics of the current legal system add to the habitual complexity in the operation of selection of relevant facts.[10] The qualitative distinction between *rules* and *principles* is of course one of the pillars of current dogmatics. To a large extent, the constitutional state model assumes that norms[11] (in general) and constitutional norms (in particular) can be divided into these two categories. The entire system comes to be understood as an open system of principles and rules susceptible to axiological considerations in which the realization of fundamental rights plays a central role.[12]

To be sure, it is beyond the scope of this work to deal with the structural differences between rules and principles[13], although a first distinction can be based on the criterion of *indeterminacy*. From a structural point of view, and with respect to what concerns here, we note that the particularities of a case are not even generically determined by principles; or rather, the conditions under which principles are applied and the model of behavior prescribed, are open-ended. In other words, neither individual actions, nor courses of action causally adequate to achieve proposed objectives flow from the norms themselves.

Consider, for example, the norms that regulate various so-called "new rights": environment, historical and cultural heritage, health, education, consumer... etc. The very definitions of these "goods" are highly problematic.[14] A principle that generically mandates an assessment of "the best interests of the child" poses infinite difficulties, not only in determining what the best interests of the child are in concrete, legally effective terms, but also in determining under what conditions (description of the generic fact hypothesis) the norm must be applied.

The facts—if identified in the norm—appear less and less *denoted* and more and more indicated or gestured at with multiple or even contradictory expressive or suggestive meanings. In such cases, the task of selecting the facts must be preceded by a task of normative integration in which—in an analytical back and forth—the impact of factual data can assume decisive importance. Obviously, it will be necessary to convince a judge first, of the *construction* of the generic factual hypothesis and, later, of the *proof* of the concrete facts of the case.

As Damaška points out,

> [d]espite the simplifying potential of the law's formal regime, divergent viewpoints can still cause problems for the administration of justice. This is especially likely in a deeply split society, where normative standards are uncertain. Fuzzy legal standards in this environment provide no effective barrier to a multiplicity of viewpoints that bear on factual inquiries: legal indeterminacy contributes to the elusiveness of truth. Faced with cacophony in the citadel of justice, an authoritarian government can impose the power-holders' perspective as pertinent. But a liberal polity, with fluid power structures and wide group participation in the administration of justice, has no such option. As a result, it can be difficult in this polity to establish what counts as objective knowledge in some cases" (Damaška 1998, 293-294).

In order better to understand the scope of possible discrepancies among them, as well as difficulties presented by certain kinds of fact (omissions, psychological events, causal relationships, etc.), it is worth remembering the fundamental distinctions among *external* facts, *perceived* facts and *interpreted* facts (González Lagier 2000, 72). For, "if the *law* is awash in *normative indeterminacies* and is constantly referred to *constitutional principles* of great abstraction, and is furthermore charged with an axiological burden, and all of this is claimed to be directly operational: if all this is so, then, now more than ever it is appropriate to assume that in practical effectiveness and especially in judicial application, the meaning of norms is not detachable from the analysis of facts" (Ruiz Pérez 1987, 136). If judicial adjudications are justified from constitutional principles, then, if one proposes an ideal reformulation of the principles that takes into account all the potentially relevant properties, the sociological dimension of legal cases will inevitably have to be taken on board. It is evident that in judicial cases, the discernment of the best interests of the child, the protection of the environment, the consumer, the obligation not to harm, the access to decent housing, the right to health, etc., will depend on the factual circumstances of each case. And the same point holds as regards the

axiological aspects of the case. If we do not want to fall into apriorist positions, we should acknowledge the sociological dimension of the problem. Every valuation supposes the accomplishment of an ideal duty to be applied to a concrete reality. If there is no reality to assess, there is no assessment (Chaumet 2016/2017, 19).

Even within this framework, there are numerous problems to be taken into account and one that is truly significant when it comes to making decisions is that of *verifying the facts*. Paraphrasing Atienza, we could assert that arguing in an indeterminate and constitutionalized law is, in many ways, an argumentation about the facts, even though those facts are qualified by (or seen through) norms (Atienza 1994, 82).[15] It is true that one of the areas where judges have the most discretion—and, consequently, the greatest possibility of arbitrariness—is that of argumentation concerning facts.[16]

Andrés Ibáñez describes the judicial treatment of the facts as natural entities, previously and definitively constituted from the moment of their production, "those cold data of reality." The data as "what has already been given," which allows the judge a kind of spontaneous operation, without mediation, "the judgments of fact understood as simple findings of the 'raw data'" (Ibáñez 1992, 263). This being the case there is still an inadequate, taken for granted culture of motivation, which starts from the idea that questions about the facts are not especially problematic, that it is good enough to approach them with "good eyes," with the best of intentions, and that the issues are beyond interrogation.

6.1. In the context of certain so-called *neo-constitutionalist and activist* tendencies, reference is made to the aforementioned "objective legal truth." At the level of many concrete judicial decisions, it is at least paradoxical that "objectivity" is invoked and yet the immediate conclusions about what happened are formulated by mere intuition, or sheer "gut feeling."[17]

The inclusion of a statement of fact in a declaratory judgment must be provided with the necessary support that justifies it. Mere gestures in the direction of highly valued principles (life, children, women, health, the environment, the consumer, etc.) does not give rationality or criteria of truth to statements of fact.

In many of our judicial decisions, however, this is not usually what happens:

> the majority of people feel that conscience constitutes such an obvious way of arriving at evaluative 'truth' than any 'normal' person (i.e. 'reasonable,' and 'reasonable' tends to coincide, for each one, with the content of the own conscience rather than that of the other) is able to find the correct answer. The guiding myth consists in this, something that in practice we can't rescue from subjectivity is projected onto the field of reality and objective truth. The fact is that this myth tends to preside over legal thinking in general today, and that is why it is so easily accepted that debates are about the application of principles, values and rights that are not detailed, but are stated as if their content were obvious for each case. (Guibourg 2015, 1229).

From the point of view of procedural dogmatics, these decisions are underpinned by a widely disseminated idea: "to circumscribe the purpose of the evidentiary activity to produce in the judge's mind a certainty, not logical or mathematical, but psychological, about the existence or non-existence of the facts stated. In other words, it is the production of a psychological conviction of the agent of the judicial body on this last point, the telos to which evidentiary activity ultimately tends" (Palacio 2011, 264[18]). A "judicial conviction" to which "evident facts" or "well known facts" (the mentioned "facts" related to "values" or "principles") are added.

Is it really so?

6.2. Once again Haack's foundherentism can help us clarify things.

Of course, the evidentiary reasoning just mentioned would not meet the requirement that its justification or guarantee be "*evidentialist, experientialist, gradational, foundherentist, quasi-holistic, and worldly*"

and, in its most fully-developed form, combining "individual and social elements" (Haack 2014, 12). On this latter point, judicial reasoning would be lacking *inter alia* (in Haack's expression), i.e., an account of how warranted a claim is for a group of people (clearly, the parties in conflict, but also other "subjects of proof," like witnesses, not just the judge), by the evidence available at a given time.

6.3. Moreover, this idea of judicial *conviction* calls forth echoes of the foundherentist vindication of the knowing subject and its necessary presence; the perceptions, experience, and background assumptions of actual knowing subjects will all have an impact on evidentiary reasoning. Would it be possible not to count on the judge's *beliefs*?

In this particular instance González Lagier's astute reflections come to our help, reporting on the enormous efforts of legal theorists to avoid arbitrariness:

> One of the dangers we have warned of is the subjectivity of judicial decisions, which would lead to a lack of control over them. In general, it would seem that some of the formulations of procedural rules determining the evaluation criteria and standards of sufficiency of evidence refer to mental states. As such, they do not ensure a minimum level of objectivity and should be reformulated. For this purpose, it has been stressed that the purpose of evidence cannot be merely to convince the judge, and that if a judge states that he or she is (or genuinely is) intimately convinced that something is a fact, it says nothing about the justification for stating that the fact has been proven. What we might call 'the legal philosophers' theory of evidence' is presented as an objectivist conception, while 'the proceduralists' theory of evidence' is labelled a conception based on subjectivism (2020).

Susan Haack's epistemology rescues the "knowing subject" and the concern about how justified a *belief* is: In her view,

> The justification of a belief is something personal, relating to a subject, and not impersonal. One person, therefore, may be more or less justified in believing *p* than another in as far as they have more or less evidence in favour of *p* and depending on the quality of that evidence. But the fact that it is *personal* does not mean that it is *arbitrary*, because its justification depends on the evidence and arguments the person really has, not on those they think they have. The rejection of psychologism is the result of confusion between the two meanings of 'subjective': subjective as 'personal' and subjective as 'arbitrary'. But the first meaning of subjective does not necessarily imply the second. Haack goes beyond denying that an epistemology that can include beliefs must therefore be irrational and also offers an argument in favour of an epistemology that takes the subject into account. Her argument is that an epistemology without a subject cannot take account of the role of experience in justification. However, it would be entirely counterintuitive to think that what we see, hear, etc. should have nothing to do with the justification of our beliefs (González Lagier, 2020).

Thus, certain propositions must be able to be justified with reference both to empirically verifiable data, practices and procedures, and to other beliefs, avoiding dogmatic statements of fact that, frequently, serve to mask reality or disclose a bias.

7. FINAL WORDS

There is a claim to truth in a legal process, but not at any cost; there is a claim to truth, but not only truth.

From our point of view, the search for the truth of facts that gives rise to one sort of claim is of obvious interest; but we must also consider the claims of resolving conflicts as soon as possible (or, at least, in a rea-

sonable time), and of not revealing intimate aspects of a family dispute or allocating huge public budgets to the resolution of small matters, etc. etc.

Examples could be multiplied exponentially, but would end by demonstrating the same thing: law and its institutions (in this case, the legal process and evidence) exist for the regulation of life in society. As Haack argues, legal truths are a special sub-class of truths about social institutions and, like many truths about a society, are socially *constructed*, considered true based on what people *do* (legislators, judges and others) (Haack 2014, xxv). In any case, and even for those who defend the possibility of truth, our theory of it must be reconciled with the view that reality is created by social actors: "the question is important because most facts we seek to establish in adjudication are 'social' facts rather than phenomena intrinsic to nature" (Damaška 1998, 291).

A legal process is not a scientific laboratory; claims founded on *rights* are at stake but also claims founded on *interests* and conditioned by *power relations*. The "just resolution" of the case depends on the declaration of the truth of some of the basic facts of the claim.

Each society designs its own model of a legal process according to its historical-cultural heritage and specific needs. Beyond the phenomenon of globalization and intense legal exchanges, different judicial regimes retain differences when it comes to honoring the values that underlie and inform legal responses.

At this point it must be clear that we do not support irrationalist perspectives but that, at the same time, we suscribe to a sensitively critical cognitivism, which acknowledges context and the strong limits on the possibility of knowing, particularly in a legal process.

As Twining writes:

> [i]n the course of my explorations I have made regular use of three standard devices of 'contextual' or 'realist' thinking: clarification of the standpoint; thinking in terms of total pictures; and thinking in terms of total processes. These devices, coupled with the assumption that for most academic and practical purposes in law the study of rules alone is not enough, justify labelling the approach of this book as 'realist' or 'contextual'. But 'realism' is not a distinctive form of legal theory nor, in my view, do these techniques amount to anything like an comprehensive methodology for the study of law. They ought, however, to be part of the basic equipment of any student of law (Twining 1994, 368).

Twining considers that:

> [m]aybe realism in law stands to Legal Theory as Reality Checkpoint stands to the classroom. It does not itself offer a rounded theory of or about law or life, but it furnishes a point of reference against which to check any theory for its plausibility or connection with what happens out there —if, of course, there is anything there. It is quite compatible with the idea that each of us sees the world around us with multiple lenses which construct, constitute or reveal many different realities. It helps to maintain connections in a down-to-earth way with actual events and practices and people in the world of fact, however varied, complex and elusive that world may be (Ibid).

With Haack (2014, 198) we can conclude by insisting that:

> [o]f course, the real world is always much messier than philosophers would like… The categorical distinction between genuine inquiry and advocacy research… while agreeably neat and tidy conceptually, isn't adequate to the complexities of real life; it needs to be reconstrued as identifying the two extremes of a continuum. No investigator can approach his question free of any preconceptions whatever; most investigators have some preconception of the expected upshot from the beginning.

NOTES

1. In recent years, many thinkers emphasize the consideration of more than one aspect (fact, norm and value) in each legal phenomenon. Thus, for example, Bobbio argued that any legal response must overcome the *reductionisms* that lead to eliminate or confuse the three constituent elements of the legal experience: ideals of justice to achieve, normative institutions to be carried out and actions and reactions of men against those ideals and these institutions (Bobbio 1980, 5); on criticism of the use of the voice "reductionism" see (Guibourg 2010, 1). In the interview that Atienza carried out for *Doxa* review, Robert Alexy answered that "[t]o the first question, that is, what is Law, I have given an answer that is complex, because according to it, Law consists of three elements: (1) legality in accordance with the law, (2) social effectiveness and (3) correction regarding content. The first element represents the institutionality of the law, the second the facticity and the third its morality. The grace of this trialist concept of law is that the three elements are not simply related in any way" (Atienza 2001, 684). We are convinced that the trialist theory of the legal world —which places the emphasis on considering facts, norms and values at stake in each legal phenomenon— satisfactorily responds to the great challenge of current thought that the reference to complexity means (in relation to the subject v. Goldschmidt 1987; Ciuro Caldani 1976, 1982/4, 2000).
2. Lessons in the Master in Legal Argumentation, University of Alicante, 2004.
3. For example, Haack 2009, Chapter: "Epistemology legalized. Or, truth, justice and the american way."
4. This is beyond the worthy criticisms of the very distinction between "material truth" and "formal truth." See, for example, Taruffo (2010, 101-102), who on the one hand considers that "there are no several species of truth depending on whether we are inside or outside the legal process: the truth of the statements about facts always depends on the reality of those facts. On the other hand, the rules that limit or condition the search for truth do not determine the discovery of a different truth; at most, there will be a limited and incomplete truth or no truth. The same should be remembered with respect to *res judicata,* which has even been made more flexible in recent times by expanding the possibilities of new evidence techniques (e.g., DNA studies)."
5. For a critical reference to this change, see Alvarado Velloso 2009a, 145; 2009b.
6. We have expounded on the issue in our doctoral thesis in Meroi, in press.
7. So much so, that an extensive book on the subject takes that title (see Bertolino 2007).
8. "En la aspiración a una verdad omnicomprensiva se cuela con facilidad el quiebre de reglas y principios básicos del Derecho Procesal y Constitucional y la actividad judicial se transforma en la búsqueda de un horizonte que, por ser tan 'noble', como fugaz e incontrolable, crea inseguridad y atropella garantías" (Trionfetti 2002, 193 nota 7).
9. Quote from Jerome Frank.
10. We have dealt extensively with the subject in Chaumet and Meroi 2008. For an interesting and exhaustive study of the influence of the "constitutional rule of law" on the facts, see Vigo 2012, 679.
11. We are using the concept of norm as an encompassing of rules and principles. Although rules and principles appear to be linguistically similar normative entities, there is a difference between the two as regards their use and function in legal reasoning. For example, Alexy claims that "principles" are "norms," even though he distinguishes two kinds of norms, rules and principles: both rules and principles are norms, because both prescribe what is to be done (see Alexy 2001, p. 83).
12. As early as the 1960s, Esser maintained that the center of gravity was slowly moving from the codified system to a judicial casuistry oriented according to principles (Esser 1961). However, it was Ronald Dworkin's (1978) works that pushed the subject to the center of the stage of the theory of law.
13. See Atienza and Ruiz Manero 1996; Vigo 2000.
14. "En cuanto al objeto de la adjudicación, huelga repetir que la comprensión del medio ambiente, del consumo, del patrimonio histórico, cultural, lingüístico, requerirá esfuerzos especiales del juzgador que no encontrará simplemente en las normas. Abordar el análisis de dichos problemas supone la aceptación decisiva de la influencia de otras disciplinas, en muchos casos interactuando con ellas. En muchos supuestos el juez debe integrar su conocimiento—sin diluirlo—en la interdisciplinariedad. Para los reduccionismos jurídicos ello no es relevante. Ya

hemos dicho que, en gran medida, el paradigma jurídico dominante de la modernidad fue construido en un momento en donde no se habían desarrollado la antropología, la psicología y la economía, entre otras disciplinas" (Chaumet 2017, 271).

15. In the same sense, for Comanducci 1992, 221, this activity is not a simple intellectual diversion, it must be recognized that descriptive inquiries are usually carried out through it.
16. It is the moment of exercise of judicial power par excellence, since in the reconstruction of the facts it is where the judge is more sovereign, more difficultly controllable, "puede ser—como ha sido y en no pocas ocasiones sigue siendo—más arbitrario" (Ibáñez 1992, 261). Likewise, Prieto Sanchís (1987, 88), for whom the judge's margin of appreciation is greater due to closer procedural proximity to the *quaestio facti*.
17. Certainly, the intuitive approach to the facts is not enough, supposing that because "common sense" is appealed to, the facts enter the legal process with all their objectivity. Solving according to a hunch is not the same as solving it with suitable criteria to be communicated.
18. Similarly, a classic of Latin American evidence law, see Devis Echandía 1970, 252-253.

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