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Legal evidence theory: are we all “rationalists” now?

Daniela Accatino

1 The genealogy of an identity

1 During the last two decades, evidence in law has become a matter of increasing interest in legal theory in the Latin context (a cultural space consisting of Italy, Spain and Ibero-America). In the most recent theoretical literature on this topic, it is common to find ascriptions or explicit references to a “rationalist” or “cognitivist” theory of evidence, shared by authors such as Michele Taruffo, Marina Gascón, Daniel González, Jordi Ferrer and Carmen Vázquez.[1] A similar label, that of the “rationalist tradition”, began to be used some years earlier in the Anglo-American context, when a theoretical approach to evidence in law –the *New Evidence Scholarship*– was emerging. In this context, William Twining (Twining 1982) identified, with the notion of a “rationalist tradition”, a set of assumptions shared explicitly and implicitly by the great modern scholars of evidence law (from Gilbert and Bentham in the 19th century to Thayer and Wigmore in the 20th century), assumptions that would later act as a sort of common arena for discussions on the evidentiary reasoning fostered by the *New Evidence Scholarship*. This label has also been embraced in comparative studies on evidence law and in research on its rising internationalization, particularly in criminal law, to identify certain suppositions shared by evidence literature in common law and civil law systems, assumptions that would constitute the basis for evidentiary principles held by both (for example, in Jackson and Summers 2012: 13ff.).

2 This paper first discuss what is designated by the reference to a rationalist theory of evidence and if there does in fact exist a set of basic theses shared by the Anglo-American and Latin versions. After briefly reviewing the characterization offered by those who use this notion in each of these contexts, as well as the functions of its use in each of these settings (sections 2 and 3), I identify two basic theses in regards to evidence law and evidentiary reasoning that could be considered defining features of a

rationalist approach, in conjunction with a set of underlying philosophical assumptions (section 4). I sustain that these theses and assumptions are imprecise in important aspects and that it is this imprecision that allows the ascription to a rationalist conception to function as a common arena, though in two distinct manners. On the one hand, it suspends the discussion that would be required for the precision (in the philosophical realm) of the conceptual assumptions relative to the notion of truth. On the other hand, it opens the discussion on some epistemological assumptions and on the matters that the theses on evidence in law leave undetermined. The rest of this paper focuses on these two latter discussions (sections 5 and 6).

2 The Anglo-American "rationalist tradition" in the mirror of William Twining

3 The identification of a *rationalist tradition* was sustained by Twining (Twining 1982 and Twining 2005) via the ascertainment of two sets of assumptions shared in the modern evidence scholarship, which are framed under two models or ideal types. The first corresponds to the reconstruction of a "rationalist model of adjudication" that has as its principal objective "something similar to what Bentham called '*rectitude of decision*'" (Twining 2005: 77) by means of the correct application of law and the rigorous establishment of the truth of past events in issue in a case via the rational assessment of evidence.[2] This is a prescriptive model, which establishes a parameter for a critical appraisal of the rules, institutions, procedures, and practices currently in force. In general, Twining adds, modern scholars of evidence law considered that those parameters expressed an attainable aspiration, rather than an utopist ideal, and he thus qualified them as "optimistic rationalists", despite not all being necessarily "complacent" with the prevailing practices (Twining 2006: 79-80).

4 The second model represents the "epistemological and logical assumptions" of the specialized discourse on evidence in law (Twining 2006: 77). However, as Twining himself acknowledges, a certain overlap between the first and second model can be observed, given that the latter also includes normative assumptions regarding the aims that the rules of evidence should achieve. These normative assumptions are: a) that the establishment of the truth regarding alleged past events is a necessary condition for the justification of the judicial decision, and b) that the pursuit of truth is to be given "a high, but not necessarily overriding, priority" as a crucial parameter to evaluate fact-finding institutions, though "other criteria such as speed, cheapness, procedural fairness, humaneness, public confidence, and the avoidance of vexation for participants are also to be taken into account" (Anderson, Schum & Twining 2005: 83). In regards to the other theses, what Twining identifies as central is the commitment to a 'rational' form of determining issues of fact, in contrast with older 'irrational' forms (duels or ordeals), as well as the adoption of a particular view of 'rationality', the one shared by English empirical philosophy and classically expressed in the writings of Bacon, Locke and Mill (Twining 2006: 78). The characteristic assumptions that Twining includes in the second model are: a) the knowledge about particular past events is possible; b) the establishment of the truth of alleged facts in adjudication is typically a matter of probabilities and not of absolute certainties; c) judgments about the probability of allegations can be reached by reasoning from relevant evidence presented to the fact-finder, that is, through an inductive method of reasoning based on the common stock

of knowledge available on the regular course of events (Twining 2006: 76); and d) the adhesion to a correspondence theory of truth (Twining 2006: 78; Anderson, Schum & Twining 2005: 79).

5 Twining initially does not extend his analysis to the contemporary Anglo-American literature on evidence in law. However, in the *postcriptum* added to the chapter on the rationalist tradition in the second edition of *Rethinking Evidence* (Twining 2006), Twining asserts that those works are generally within the framework of that tradition and that the principal open debates of that time –between atomist and holistic theories of evidentiary reasoning, between mathematical theories and inductive theories of probability, as well as the discussions on the justification of certain rules of evidence– can be reconstructed as discussions inside the framework of this approach which do not dispute its basic assumptions.[3]

6 Twining establishes an interesting correlation between this general acceptance of the rationalist assumptions in the Anglo-American evidence discourse and the "specialized" character of the study of the evidence and its legal regulation in this context, if this study and its regulation are compared with the more general studies on judicial procedures and litigation. This specialization would have in a sense kept it "isolated" from the skeptical approaches that acquired prominence in other disciplinary areas. This could explain the rationalist assumptions also being accepted, in general, in the contemporary literature subsequent to Twining, both in the studies centered on the rules of evidence as in those of a more theoretical nature, although is unusual to find explicit ascriptions to that tradition (unlike, as we will see, what has occurred in the Latin sphere, in which the theory of evidence developed under a different context). The use of the label is, conversely, explicit in those who intend to distance themselves from that orthodoxy. This is the case of those who take on and extend the *fact skeptics* theses of Jerome Frank (Frank 1950) in the framework of critical legal theories, such as Nicolson (Nicolson 1994) and Seigel (Seigel 1994), or of those who assume a coherentist approach that discusses the notion of truth as correspondence, such as Bernard Jackson (Jackson 1995: 390).

3 The "rationalist turn" of the evidentiary studies in the continent

7 In the Latin context at the end of the 1990s and beginning of the 2000s, a "rationalist theory" of evidence began to be discussed, in the framework of growing theoretical attention to judicial fact-finding. This attention began some years prior with the 1989 publication of *Diritto e ragione* by Luigi Ferrajoli and with the book *La prova dei fatti giuridici* by Michele Taruffo published in 1991, texts which stood out for the novelty of their perspective against the classic procedural approach to evidence and for their diffusion in the Latin arena. Both works were translated into Spanish, with the first one published in 1995 and promoted by Perfecto Andrés (who in turn began to write intensively on evidentiary matters with the 1992 article *Acerca de la motivación de los hechos en la sentencia penal*) and the second published in 2001 and translated by Jordi Ferrer, who then began his journey into matters of evidence.

8 This new approach tackles evidence in law, attending not (only) to the concrete evidentiary rules of a certain legal system but considering in general its circumstances,

conditions and problems as an epistemic enterprise oriented to the knowledge of the facts. This is why this change in orientation has been characterized as an "epistemological turn" (Dei Vecchi 2013: 235). With this foundation, efforts have been focused on "deconstructing a series of misunderstandings dragged pertinaciously by a bad legal culture – especially a bad judicial culture – in turn based on a bad epistemology", as Bayón (Bayón 2008) has affirmed. It is important to note then that the philosophical legal discourse on evidence has been articulated in great measure in dispute with the literature on procedural law,[4] discussing classical conceptual schemes as, for instance, the distinction between material truth and formal truth or the distinction between direct and indirect evidence, and, based on this, intending to bring clarity to other evidentiary notions nebulously elaborated by the procedural scholarship, such as the notions of proven facts.

9 The issue of the relationship between evidence and truth occupies a central place in the two seminal works that began shaping the rationalist identity, and it is a fundamental argument of various subsequent works that were key in the configuration of this new disciplinary community (including Gascón 1999 and Ferrer 2002). This topic was also the focus of the third volume of the journal *Discusiones* (2003), which was crucial for the consolidation of the distinction between a "cognitivist" or "rationalist" theory of evidence and the irrationally inclined "persuasive" or "psychologist" theory implicit in a good part of procedural and judicial discourse (especially relevant were the contributions of Gascón [2003] and Andrés [2003], in dialogue with Taruffo, as well as the Introduction, written by Ferrer and González Lagier [2003]).

10 In these characterizations, the rationalist theory is defined by its conception of evidence as an instrument of knowledge, an activity directed at discovering the truth about the events in issue in a case, assuming a correspondence notion of truth. The identification of truth as the goal of evidence is derived from the conception of adjudication as rule application, so that the legal consequences must be applied only if the material facts defined in the rule actually took place (Ferrajoli 1995 [1989]: 37 and Taruffo 1997 and Taruffo 2003). Moreover, some authors affirm that the claim regarding evidence and truth is supported by the same concept of law as an order that intends to govern human behavior by imposing sanctions to true deviant behavior (Ferrer 2007: 29ff.). From this teleological relation, the rationalist theory derives the application of epistemic rationality in the assessment of evidence, which tend to be identified with the method of corroboration and refutation of hypotheses. This implies both the acceptance of free assessment of evidence as a general normative principle, as well as the interpretation of that principle as a redirection to the criteria of epistemic rationality. Even under these optimal normative conditions, however, it is recognized that evidence based knowledge is only probable and fallible given its inductive nature and the limitations derived from its institutionalization.

11 This theory is explicitly associated in various works to a "critical objectivist epistemology" or "critical cognitivist epistemology", which intends to distance itself simultaneously from naive objectivism or realism and from skepticism. The denomination of *objectivism,* says Gascón (Gascón 2003: 44), is "because it understands that the objectivity of knowledge lies in its correspondence or adaptation to an independent world" and that of critical is "because it takes seriously the theses on the limitations of knowledge", thus being "an epistemology that maintains that there are independent facts that we can know although the knowledge reached is always

imperfect or relative" (Gascón 2003: 44). Ferrer and González Lagier (Ferrer & González Lagier 2003: 10) define critical cognitivism via the conjunction of a correspondence notion of truth –"the truth of a factual statement consists in its correspondence with the facts to which it refers"– with a thesis on the relativity of knowledge, which assumes that "the meaning and value of the truth of a factual statement is relative to a context, which does not mean that its determination is impossible, rather that it can only be done within the framework of that context (this thesis differentiates critical and uncritical cognitivism by opening the door to those theories of knowledge that point to the intrinsic connection between our knowledge and our thought processes and value judgments, without conceding that this connection makes objectivity impossible)".

12 As anticipated, the rationalist theory of proof is usually contrasted with a "persuasive theory", which understands evidence only as an "instrument of persuasion", since the standard of proof is assumed to consist only in the belief of the fact-finder, free of justification and controls.[5] However, the way in which the contrast between this second theory of evidence and the rationalist or cognitivist theory would be established is not clearly delineated.[6] On one hand, the identification between proof and persuasion may not be incompatible with the acceptance of the determination of the truth as the objective of evidence. It may appear linked, rather, to an understanding of immediacy as a means of direct access to that truth, through the global impression produced by the evidence, under a kind of naive or uncritical objectivism (as suggested by Gascón 2003: 47ff., Ferrer & González 2003, and Bayón 2008), so that the contrast would occur in the level of the epistemology or philosophy of the underlying knowledge. The persuasive theory would then assume that the existence of belief would be the evident, critically inscrutable effect of the epistemic sufficiency of the evidence, whose content has been perceived by the fact- finder. There is also a second form of articulation of the contrast, which seems to be assumed instead by Taruffo (Taruffo 1990: 429ff.) and which links the identification between proof and belief with a certain theory of judicial procedure, especially civil procedure, as an instrument for conflict resolution that would only require the 'formal fixation' of the events in issue by the fact-finder. However, as Taruffo himself recognizes, there is no need for "incompatibility between the understanding of procedure as a conflict resolution mechanism and the search for the truth about the facts, since one could reasonably say that a good criterion for resolving conflicts is to base the solution on a true determination of the alleged facts" (Taruffo 1991: 39). The contrast only emerges to the extent that the overriding priority attributed to the search of efficiency in conflict resolution and to the autonomy of the parties makes the search of truth somehow irrelevant. In this case, that is, if the truth of past events is not in question, it is not clear what the fact-finder's belief that something has been proven refers to, as this belief is left in a "conceptual vacuum" (Taruffo 2003: 30).

4 The core of rationalist theses: identity and indetermination

13 After our brief reviews of the characterizations of the rationalist theory of evidence in both the Anglo-American and the Latin contexts, we can conclude that they overlap in a set of basic theses that could then be considered as defining of this theoretical

approach. These theses can be usefully grouped into two sets: that of the theses on evidence in law and that of the philosophical assumptions regarding the notion of truth and the possibility of knowledge, on which the first set of theses are based.

14 The theses on evidence in law can be summarized in two: a) the thesis of *truth as the preferential aim of legal evidence*, which recognizes the establishment of the truth about the alleged facts of the case as the primary goal of evidence production and assessment and primary justifying end of evidence law, and b) the thesis, derived from the former, *of evidentiary justification as a special case of general epistemic justification*, which affirms the proper application of the criteria of general epistemic rationality to the assessment of evidence by means of constructing inductive inferences based on empirical generalizations that allow to justify conclusions of a probabilistic nature. These are two normative theses which identify the foundations of a *rational* evidence law and of a *rational* evidentiary reasoning as instrumentally functional to the search of truth and the minimization of the risk of error.[7]

15 While rationalist authors may agree on the formulation of these two defining legal theses, this does not exclude the possibility of disagreements with respect to the *scope* of the preference in favor of the truth as a justifying purpose of the rules of evidence and to the *degree of specificity* of evidentiary reasoning with respect to what is purely epistemic. In fact, as we will explore in the following sections (*infra* 5 and 6), several of the current discussions on the theory of evidence touch on these points and confront authors who simultaneously claim, however, their belonging to the rationalist tradition. Thus, the indetermination or opening of the theses on evidence in law allows the rationalist theory to act as an umbrella that covers various theories on what rational law and rational evidentiary reasoning require.

16 As we anticipated, the two theses of rationalism in regards to legal evidence are supported by some shared assumptions that refer to the concept of truth and to the possibility and limitations of knowledge. I thus designate them as *philosophical assumptions*, although, as we shall see, their strictly philosophical elaboration has been narrow within the rationalist tradition. They can also be summarized in two: a) the assumption of a correspondence notion of truth, and b) the differentiation at the ontological and epistemological level from both skepticism and naive cognitivism. The formulation of this second assumption is deliberately left imprecise so as to represent that it is not clear exactly what ontological and epistemological positions are assumed when the rationalist theses regarding evidence in law are adopted or what are the relations between these positions and the assumption of a correspondence notion of truth.[8]

17 The intuition that is seemingly shared by the two strands of evidentiary rationalism is that truth as a correspondence can act as a regulatory ideal with respect to the rules of evidence and to the evidentiary reasoning, although it is not possible to verify such correspondence with complete certainty. In this sense, the affirmations present in the Anglo-Saxon rationalist tradition point to the probabilistic and inductive nature of the judicial fact-finding. The notion of a "critical" cognitivism or objectivism assumed by the continental rationalists is oriented in the same direction, referring, on one side, to the warning of the limitations, which, at the epistemological level, result from the inductive nature of judicial knowledge, and, on the other side, to the difficulties that a naive realist position faces at the ontological level given the influence that our categories and conceptual schemes have in knowledge.[9]

18 The philosophical elaboration of these intuitions has been, as I said, limited and has taken place in light of some discussions related to the structure of evidentiary reasoning.

19 A first discussion, which especially marked the early years of the Anglo-American *New Evidence Scholarship*, refers to the notion of probability applicable to evidentiary reasoning. In this debate, rationalism also appears as an umbrella under which diverse theoretical approaches to evidence coexist, in this case the *Bayesian* perspectives, which defend the application of mathematical probability, and those perspectives that defend instead a notion of inductive or *Baconian* probability.[10] Subsequently, the controversy has focused on the “atomistic” character of these two approaches, which has been discussed by the “holistic” theories of evidentiary reasoning, theories which have highlighted the role played by the constructive integration of evidentiary material in the form of global narrations or stories, both from a psychological and an epistemic point of view.[11] Again, the rationalist umbrella seems capable of covering these disagreements with respect to the evidentiary justification. As Amalia Amaya (Amaya 2015: 130ff.) argues from the holistic ranks, it can be said that these perspectives open *inside rationalism* the discussion on the relevance of coherence in epistemic justification *insofar as they do not affirm a coherence theory of the truth*. The assumption of a correspondence notion of truth seems to act as the insurmountable philosophical limit to claim belonging to that tradition, which evidence theorists do not seem, in general, willing to discuss.[12]

20 It is interesting to note that the same symmetry between openness and closure to discussion, marked by the limit of the correspondence notion of truth, is observed in the elaboration of “critical cognitivism” or “critical objectivism" developed by continental evidence theorists. Here attention has been directed not only to the inevitable uncertainty derived from the probabilistic nature of the verification of a hypothesis, but also to the impact of, in Gascón's words, the “*theoretical contamination* of the knowledge of the facts” (Gascón 1999: 36). It serves as a warning, as González Lagier now explains, that “we usually do not face purely empirical facts, rather complex entities that combine observational and theoretical, normative or evaluative elements (...), which depend on the network of concepts with which we classify and understand them” (González Lagier 2018: 22). Although the conceptual relativity that follows from this warning is often assumed in rationalist approaches, the way in which it could affect the notion of truth as a correspondence with reality is not noted, as González Lagier (González Lagier 2018: 38) himself points out. Again, this seems to be the limit, assumed but not elaborated philosophically, of a rationalist theory.[13]

21 This combination of openness and closure to discussion that characterizes, in the philosophical plane, the rationalist theory of evidence can possibly be explained by its self-understanding as a *philosophy of evidence for jurists* (paraphrasing Bobbio’s classic distinction between the philosophers’ and jurists’ philosophy of law), a field where the notion of truth as correspondence is strongly intuitive. This would also explain why the philosophical matters that have provoked the most discussion are those related to epistemic justification, which can certainly interest legal practitioners when they need to determine what counts as an adequate evidentiary argument.

22 In the next two sections, we will turn our attention to the discussions on the evidentiary theses of rationalism, which have also been quite intense in recent years.

5 The discussions on the priority of truth as a justifying goal of evidence law

23 We already know that the rationalist theory of evidence assumes that the search of truth is the fundamental aim of evidentiary activity and that the main parameter of the critical assessment of the rules regarding the admission, practice and assessment of evidence should also be the degree to which the rules favor the minimization of the risk of error. From this perspective, the normative or axiologically desirable model of evidence law that is promoted is one that ensures, to the greatest extent possible, the application of the criteria of epistemic rationality in the admission, practice and assessment of evidence.

24 Those who share these assumptions do not deny, of course, that there may be other relevant objectives that justify, exceptionally, rules of evidence that produce counter-epistemic effects. These other goals are conceived, at least in the literature of up until a little more than a decade ago, as *extrinsic to legal evidence*. Twining, Anderson and Schum, for example, refer to "other values such as the security of the state, the protection of family relationships, or the curbing of coercive methods of interrogation" and state that "other criteria such as speed, cheapness, procedural fairness, humaneness, public confidence, and the avoidance of vexation for participants are also to be taken into account" (Anderson, Schum & Twining 2005: 83).

25 The image of evidence law traditionally derived from these assumptions –an ideal image but also an image applied to the critical reconstruction of current law– is that of a principle of freedom of proof subject to various exceptions.[14] With freedom in the admission and assessment of evidence, any epistemically relevant evidence, in principle, can be admitted and its weight and probative force can be assessed by the judge without being subject to criteria other than those of epistemic rationality.[15] Exclusionary rules and other constraints to freedom of proof appear then as limited exceptions that are extrinsically justified (like a sort of Gruyere cheese that consists more of holes than of cheese, as Twining [2006: 211] metaphorically suggests). In this framework, the question of what extrinsic objectives can justify the exceptional defeat of the pursuit of truth, under what conditions and by which kind of rules of evidence remains, therefore, open to controversies within the rationalist theory.

26 The most interesting discussion in this field is, however, the one that began around a decade ago, when systematic attention began to be given to the adequate distribution of the risk of error in judicial fact-finding. As Laudan explains, it is an aim related to "error control", which distinguishes it from other goals extrinsic to proof, although it does not refer to its reduction but to its distribution in accordance with "a political decision according to which a certain type of error is worse, or less acceptable, than others" in a determinate type of process (Laudan 2005: 97). Hence, he proposes classifying it as a "quasi-epistemic" goal. In a similar sense, Alex Stein identifies it as an "intrinsic objective" in regards to the determination of the facts (Stein 2005: 1ff.).

27 This interest in the goal of an adequate risk distribution has opened a controversy around the image of evidence law that, until that point, had predominated among those who assumed a rationalist theory of proof. On one hand are those who, like Larry Laudan (Laudan 2006) and Jordi Ferrer (Ferrer 2013), admit that this image must be modified, although only to include one type of evidence rules that does not respond to

the logic of an exception in regards to the principle of freedom in the admission and assessment of evidence. These rules are the standards of proof, which specify different thresholds for asserting the facts of the case as proven, according to the comparative evaluation of the costs of the errors that can affect fact-finding in each class of procedure. At the other extreme, there are those who promote a broader revision of that image of evidence law, moving decisively towards a "non-Benthamian" or "non-Thayerian" approach and assuming that not only the standard of proof but also other classes of rules of evidence –rules of exclusion, of distribution of the burden of proof, of assessment, etc.– can be justified by reference to the goal of the adequate distribution of the risk of error. This is the thesis developed by Stein in his book *Foundations of Evidence Law* (Stein 2005), where he sustains that the main purpose of evidence law is not to facilitate the discovery of truth but to allocate the risk of error under uncertainty. One of its main arguments is that uncertainty, risk of error and the matter of its just apportionment do not relate only to the final decision on the ultimate facts of the case, whose determination is a condition for the assignment of responsibilities and entitlements (Stein 2005: 104 ff.). These problems are also at play with regard to intermediate allegations, such as those concerning the credibility or reliability of a piece of evidence, whose decision represents a step analytically prior to the assessment of its probative force. Thus, he concludes, evidence law should take responsibility for the allocation of those risks not only through the standards of proof regarding the final decision, but also through other rules of admissibility or assessment that may affect those micro-decisions.

28 A similar conclusion is the one that, in the opinion of Bayón (Bayón 2007) and González Lagier (González Lagier 2018b), could arise from the difficulties we face when trying to formulate standards of proof that do not refer to the mental states of the fact-finders, whose satisfaction can be the object of intersubjective control, and that distribute the risk of error according to the ratio of false positives and false negatives considered to be reasonable (a difficulty which I will discuss further in the next section).

29 It is interesting to note that both Stein (Stein 2005: 56ff.) and Bayón (Bayón 2007: 2) claim to be within the framework of the rationalist tradition. I will argue that the indeterminacy of the scope of the preference that this theory recognizes to the aim of accuracy in the search of truth makes this claim acceptable. Indeed, both Stein and Bayón would coincide, I think, with Ferrer's assertion (who in turn cites a long list of rationalist authors) that the evidentiary activity succeeds when the statements of fact that have been declared as proven are true (Ferrer 2007: 30-31). That this is the *institutional* goal of *evidentiary activity* does not mean that this is the only end that *evidence law* must generally take into account. Moreover, the identification of risk allocation as a second end that evidence law should pursue in a general way, and not only exceptionally, is derived from the admission of the inevitable degree of uncertainty and the consequent risk of error in judicial fact-finding, which is a distinctive thesis of evidentiary rationalism. To the extent that the discussion on the equitable apportionment of the risk of error and the ideal ways to achieve it is sensitive to the cost that the introduction of rules therefore justified may have in terms of a general increase in that risk, it does not seem that we have then abandoned the arena of a rationalist approach.

6 The discussions on the scope of the specialty of evidentiary justification

30 The increasing attention to the reasonable allocation of the risk of error and to the role that the standards of proof fulfill in evidentiary reasoning has, lastly, also opened a controversy over the scope of the specialty of evidentiary justification with respect to the general epistemic justification.

31 If we assume, as the rationalist conception classically proposed, a regime of freedom in the assessment of evidence, the fact-finder should make inferences according to the criteria of epistemic rationality and determine, in light of the legally defined standard (which may eventually incorporate the preference for a greater extent of avoidance of one of the risks of error involved in the decision), whether the degree of corroboration of the hypothesis meets the threshold. As Ferrer emphasizes, the statements that consider a fact of the case as proven could then be conceived as descriptive statements, which assert the existence of enough evidence in favor of the acceptance of the statements regarding those facts as true. The adequacy of evidence here affirmed would then be an epistemic quality, susceptible to truth or falsity (so that the fact-finding decision would not be only externally fallible, with respect to what actually happened, but also internally fallible, with respect to the evidence available in the procedure).

32 Although the rationalist authors recognize, from a descriptive point of view of the existing practices, that vague standards of proof and/or standards that refer to subjective mental states leave the decision on sufficiency of evidence radically undetermined, this finding does not seem to affect the force given to the evidentiary statements or the optimism regarding the possible precise formulation of standards of proof, which allows them to effectively operate as an adequacy threshold.

33 That optimism is, nevertheless, an object of controversy in some of the works that have been mentioned before, especially those of Bayón (Bayón 2007) and González Lagier (González Lagier 2018b). The difficulties that are identified have to do with the gradual nature of the confirmation that evidence provides to a hypothesis and the consequent gradual vagueness of the formulas that do not involve the degree’s quantification (a possibility that would lead us to the epistemological discussions regarding mathematical probability), notwithstanding the general intensional vagueness problem of the criteria used to formulate the standards. These authors also notice that these problems are not overcome by using as criteria, in the case of an especially high standard of proof, the refutation of alternative hypotheses. This is because in such a case what is at stake is the proof of a fact supposedly incompatible with these hypotheses (and so the same problems of gradual and intensional vagueness arise again).

34 The consequence of this difficulty is that the decision regarding the adequacy of evidence cannot be reconstructed as the conclusion of a theoretical reasoning or as the object of a purely epistemic justification. Given that from this perspective it will be the fact-finder who will determine and concretize in his decision the value judgment expressed by the standard regarding the symmetry or asymmetry in the avoidance of the risk of a false negative and false positive, the decision about the proven facts should instead be considered the conclusion of a practical reasoning, regarding the axiological

adequacy of the epistemic reasons (as Diego Dei Vecchi [2014] suggests, although not exactly for the same reasons).

35 The "specialty" of the legal evidentiary justification with respect to the general epistemic justification does not depend only, from this point of view, on the existence of exceptional legal rules for the assessment of evidence that give place to normative inferences. Regarding this second factor of specialty, it is worth noting that both Stein and Bayón argue that the way to limit judicial discretion in the decision about the allocation of the risk of error, in this particular case, would consist in subjecting the admission and assessment stage of the evidence to greater legal regulation, thereby making that judgment about the appropriate level of proof more democratic.

7 Conclusions

36 Just as the statement that "*we are all realists now*" became common in the last decades of the 20th century in the United States to account for the critical potential of the theses of legal realism, which made returning to the formalism that preceded it unthinkable, we can now say that in regards to the legal evidence theory "we are all rationalists now". It makes sense to say it, particularly in the Latin context, to highlight the critical distance regarding the theories of proof traditionally assumed in jurisprudential and scholarship discourse, built upon references to the mental states of fact-finders, and to also proclaim here the non-viability of a regression. And it makes sense to say it in a general way to also account for the dissemination of a perspective with respect to evidence in law that demands a rigorous assessment of the impact that any procedural regulation has on the minimization of the risk of error and the consideration of this cost to definitely resolve its justification.

37 Just as the discussion on legal interpretation and the concept of law was not closed after the acceptance of the realists' criticisms against formalism, several theories of evidence exist that recognize the relevance of truth and epistemic rationality in this field. That we are all rationalists now does not mean that we do not discuss how to represent evidentiary inferences or how to combine, in evidentiary regulation, the minimization of the risk of error and its equitable distribution. The only condition of membership that seems, for the moment, to more strictly close the rationalist circle is the assumption of a correspondence notion of truth. As this assumption has insofar been insufficiently theorized, it is expected that theoretical disagreements will soon also take place here.

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NOTES

1. Vid., for example, of the mentioned authors: Taruffo 2003; Gascón 2003; González 2003 and González 2013; Ferrer 2007, Ferrer 2016 and Ferrer 2017, Vázquez 2015. References to a rationalist theory can also be found in: Bayón 2008, Tuzet 2014, Aguilera 2016, Reyes 2017. Though they do not use this label, the analyses on evidence developed earlier by Ferrajoli in *Diritto e Ragione* (Ferrajoli 1989), as well as the in works by Giulio Ubertis (see, for example, Ubertis 1992 and Ubertis 1995), Paolo Ferrua (Ferrua 1995 and Ferrua 2000) and Juan Igartua (Igartua 1994), are also related to this theoretical approach.

2. The complete characterization is as follows: “*The direct end of adjective law is rectitude of decision through correct application of valid substantive laws deemed to be consonant with utility (or otherwise good) and through accurate determination of the true past facts material to precisely specified allegations expressed in categories defined in advance by law, i.e. facts in issue, proved to specific standards of*

probability or likelihood on the basis of careful and rational weighing of evidence which is both relevant and reliable presented (in a form designed to bring out truth and discover untruth) to supposedly competent and impartial decision makers with adequate safeguards against corruption and mistake and adequate provision for review and appeal" (Twining 2006: 76).

3. The same thesis is sustained in Twining 1989 and in the two editions of *Analysis of Evidence* (Anderson & Twining 1991: 97 and Anderson, Schum & Twining 2005: 78); this characterization is also shared by Nijboer (Nijboer 1993: 326) and by Bex (Bex 2011: 2).

4. Nijboer (Nijboer 1993) seems to have correctly anticipated this evolution when he suggested that the models Twining used to reconstruct the rationalist tradition may be useful for the critical analysis of the literature on evidence in the continent, allowing a disclosing and a discussion of its assumptions.

5. Cfr. Taruffo 2003, Gascón 2003, Bayón 2008, Ferrer 2017: 2.

6. This point is emphasized by Diego Dei Vecchi in various works (Dei Vecchi 2013, Dei Vecchi 2014 and Dei Vecchi 2016).

7. Regarding the normative character of these theses and their foundations cfr. Twining 2006: 78ff. and Reyes 2017.

8. I owe the warning about the necessity of this clarification to some of the comments made by Elena Marchese as *discussant* of the version of this work which was presented in the congress En Teoría Hay Mujeres. Her comments also emphasized in detail the various ambiguities and lack of precision presented at the philosophical level by the continental rationalist approaches to evidence.

9. The first limitations are considered, in particular, by Ferrajoli 1995: 51ff., Gascón 1999: 101ff., González Lagier 2003b, and Ferrer 2007. The second are considered, in particular, by González Lagier 2000, González Lagier 2007 and González Lagier 2018a.

10. One of the central criticisms of Bayesianism points to the attribution of a determined initial probability to a hypothesis or to evidence whose results are not mathematically expressed, which would be based on subjective intuitions that cannot be rationalized via empirical generalizations. It is interesting to note that this criticism challenges this perspective belonging to the rationalist tradition, as it may place into doubt the acceptance that evidentiary reasoning occurs via inductive inferences (Jackson 1996: 315). In favor of its belonging (which both Twining 2006: 85 and Jackson 1996 recognize), it can be maintained, however, that also from this perspective there is an attempt to reconstruct the inferences from each piece of evidence and that there is an effort to rationalize the integration of the support a set of evidence provides to a hypothesis via the combination of probability estimations by way of Bayes' theorem.

11. Cfr. a reconstruction of the discussion in Accatino 2014.

12. Bernard Jackson is the exception, and he explicitly considers himself to be a dissident of rationalism when putting in question the notion of truth as correspondence (as also pointed out by Jackson 1990).

13. Both Gascón 1999: 44 and González Lagier 2018: 39 believe that the theses of internal or pragmatic realism offered by Hilary Putnam could provide a good philosophical starting point to redefine the notion of truth in the evidentiary field and promote several theses from its consideration. Going down this road in detail is still, however, a pending task.

14. Cfr. Twining 2006: 210ff. and Taruffo 1991: 349.

15. Regarding the notion of freedom of proof and the possibility of referencing it in arenas other than those of evidence admissibility and assessment, cfr. Dwyer 2005.

ABSTRACTS

This paper focuses on the rationalist theory of evidence and identifies a set of two basic theses and their underlying philosophical assumptions shared by the Anglo-American and the Latin versions of rationalism: the thesis of the pursuit of truth as the preferential aim of legal evidence; the thesis of evidentiary justification as a special case of general epistemic justification; the assumption of the notion of truth as correspondence; the assumption of ontological and epistemological differentiation of rationalism from both skepticism and naive cognitivism. The author sustains that these theses and assumptions are imprecise in important aspects and that this is what allows the adoption of the rationalist conception to function as the common frame for current debates in legal theory of evidence, a frame that closes some discussions (namely, those concerning the notion of truth) and opens others (those regarding the degree of specificity of legal evidentiary justification and the appropriate way to allocate the risk of error).

Dokazna teorija: ali smo sedaj res vsi »racionalisti«? Članek obravnava jedro racionalistične teorije dokazov. Ob tem prepozna sklop osnovnih trditev in filozofskih predpostavk, ki so skupne tako anglo-ameriškim kot romanskim različicam racionalizma: to so trditev o zasledovanju resnice kot preferenčnemu cilju pravnega dokazovanja, trditev o dokaznem utemeljevanju kot posebni vrsti splošnega spoznavnostnega utemeljevanja, predpostavka o korespondenčnem pojmovanju resnice in ontološko ter spoznavoslovno razlikovanje racionalizma od skepticizma in naivnega kognitivizma. Avtorica zatrjuje, da so omenjene trditve in predpostavke v pomembnih ozirih nejasne, prav zaradi teh nejanosti pa da lahko v sodobnih razpravah o teoriji pravnih dokazov posvojitev racionalistišnega pojmovanja deluje kot skupni okvir, ki ene razprave zapira (posebej tisto o pojmovanju resnice), medtem ko druge odpira (takšni sta razprava o stopnji posebnosti dokaznega utemeljevanja v pravu in razprava o primernost razporeditve tveganja napak).

INDEX

Keywords: rationalist tradition, evidence law, truth, evidentiary justification, risk of error
motsclessl racionalistično izročilo, dokazno pravo, resnica, dokazno utemeljevanje, tveganje napake

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