What is Foundherentism, and what can it contribute to the Theory of Evidence in The Law?

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1. THREE ANECDOTES ABOUT SUSAN HAACK

When I call to mind how I met Susan Haack, three memories from three different places come to mind, although the contexts are similar. The first is of an encounter after a lecture I gave in Lima on some problems raised by evidentiary argument. Susan Haack was in the audience (she was giving a lecture later) and when I had finished she came up to me, apologised for not being able to express herself better in Spanish (although her Spanish was a lot better than my English) and gave me a copy of her book *Evidence Matters* (Haack 2014). The second memory is from Girona, at a congress paying tribute to Michele Taruffo. I gave a lecture on the philosophical problems raised by the possibility of using progress in neuroscience to provide evidence of mental states. Once again, she came up to me afterwards, and offered me her opinion of the importance of language for the emergence of mental states and activities. Then, Larry Laudan called her because they were going to lunch. She replied along these lines: "Just a minute, I'm talking to my friend Daniel." You cannot imagine how honoured I felt at that moment. The third memory is from Alicante, where Susan Haack had come to give a lecture as part of the master's degree course in legal argument. Quite some time had passed since our previous meetings, so I had serious doubts about whether she would recognise me, but she had no sooner caught sight of me than she smiled broadly and opened her arms in recognition. When people ask me about Susan Haack, I tend to recount these stories because they so nicely demonstrate her serious and permanent commitment to philosophy and, at the same time, her affable, open nature and easy manner.

Susan Haack has published widely on questions of legal evidence, always with reference to specific themes (the role of probability as a criterion for evaluating evidence, truth in Law, evidence of causality, scientific evidence, etc.) rather than as a general topic. However, each of these works demonstrates that her conception of epistemology can contribute to the subject of legal evidence. In these pages, I am going to try to suggest that foundherentism—presented fundamentally but not exclusively in *Evidence and Inquiry* (Haack 1993)—can provide a good framework for constructing a theory of legal evidence and for rethinking certain issues which legal philosophers have perhaps considered to be closed. So, I have two aims: firstly, to present the main features of foundherentism, and secondly to link some of these features to important discussions of the theory of evidence in Law.

2. WHAT IS FOUNDHERENTISM?

"Foundherentism" is the neologism used by Susan Haack (a keen creator of neologisms) to refer to her theory of epistemic justification. According to Susan Haack, epistemology must try to answer two basic questions: first, what reasons or evidence justify our beliefs; and, secondly, how are such criteria themselves justified. In other words, what is the relationship between those criteria and truth of those beliefs. Foundherentism tries to answer both questions, overcoming the problems that have arisen for foundationalist and coherentist epistemologists by integrating elements of both approaches.

Foundationalism considers that a belief is justified when it is supported by another belief, which is supported by another, and so on, establishing a chain of justification (in a single direction) ending with basic beliefs (foundations of knowledge). These would be defined as those beliefs for which justification does not depend on other beliefs. In empirical foundationalism, which is what interests us here, these basic ideas are directly justified by the subject's experience.[1] In this way, foundationalism has to distinguish between two types of belief (and justification): those justified by other beliefs and those justified by the subject's experiences. But this raises several problems, including two important ones: the first arises because beliefs based on experience also seem to be *loaded with theory*—any observational statement refers to other ideas or knowledge. For example, my belief that there is a glass full of water in front of me refers to concepts like "glass" and "water" (which suggests that justification cannot depend only on experience unless this is supported by other ideas). A second problem is that although the foundationalists maintain that the justification relation is a logical relation between propositions, it is not easy to explain how there can be logic relations between experiences (which are facts) and the content of beliefs (which are propositions). Foundationalism may, therefore, explain how experience can justify the fact that people have beliefs, but not how it can justify the content of those same beliefs.

Meanwhile, coherentism maintains that beliefs are always justified by other beliefs in a kind of network rather than in a linear structure. The justification of a belief depends on this conception that it is coherently integrated into a network of beliefs that support one another. This raises the problem, however, that there may be a lack of connection with experience and reality, so that two incompatible beliefs inserted into different coherent systems can simultaneously be justified. Borrowing an image from C. I. Lewis, Haack argues that, without any connection with experience, empirical knowledge would be like two drunken sailors holding each other up so they did not fall over, both of them in a vacuum.

Foundherentism is an attempt to overcome these and other objections. To do this, it takes from foundationalism the idea that experience is important for justifying beliefs (but without requiring that beliefs should be exclusively justified by experience) and from coherentism the idea of mutual support between those beliefs. Susan Haack offers the following minimum characterisation of foundherentism:

a) "A subject's experience is relevant to the justification of his empirical beliefs, but there need be no privileged class of empirical beliefs justified exclusively by the support of experience, independently of the support of other beliefs.

b) "Justification is not exclusively one-directional but involves pervasive relations of mutual support" (Haack 1993, p. 19).

The best way of intuitively comprehending foundherentism is an image or metaphor that Haack frequently uses: instead of the inverted pyramid of foundationalism or the network of coherentism, her model is the crossword. Justifying a belief is like filling in a crossword in which each of the solutions depends on certain initial clues (perceptions, experience) and on the solutions provided by other solutions already filled in (mutual support between beliefs).

3. PRAGMATISM AND NATURALISM

To complete this initial, sketch of foundherentism, two more characteristic features must be taken into account: pragmatism and moderate naturalism.

Pragmatism is a philosophical attitude, not a developed philosophical conception articulated and it includes shared material commitments. Some of the features of this attitude pointed out by Susan Haack are:

"• An approach to meaning in terms of consequences (...) a conception of meaning as in constant evolution, shifting and growing in use and in experience.
• A disinclination to philosophize in an *a priori* way and an understanding of philosophy as about the world and not exclusively about concepts or language.
• A distaste for dogmatism and, correspondingly, a robust and thorough-going fallibilism.
• A repudiation of false dichotomies and a corresponding stress on (to borrow Peirce's word) synechism.
• A concern with the social character both of language and inquiry.
• An acknowledgement of contingency, of the role of chance, both in the cosmos and in human affairs.
• A willingness to draw on results from the sciences and, in particular, to take evolution seriously.
• An inclination to look to the future and a distinctive way of knitting future and past" (Haack 2018, 1055).[2]

All these features can be detected in Susan Haack epistemology, but the aversion to dogmatisms, the rejection of dichotomies, the conception of philosophy as being about the world, and the attention to results from science seem particularly clear. And it is this last idea that connects with the second feature of foundherentism: moderate naturalism.

Philosophical naturalism is the tendency to reconstruct philosophical concepts and theories based on concepts admitted, or at least admissible, by natural or empirical sciences (frequently identified in the strict sense of science with physics, chemistry and biology). This broad (and minimalist) characterisation can cover both what we might call the "thesis of replacement" of philosophy by science and what we might call the "thesis of complementarity" or "continuity" (Martínez and Olivé, 1997, 16). While Quine, who at times suggested the replacement of epistemology by cognitive psychology, can be seen as leaning towards the first thesis, Haack aheres to the the second, or at least some versions of it.

Susan Haack distinguishes three main types of naturalism in epistemology:

a) *A posteriori* reformist naturalism, which maintains that epistemology is not an entirely *a priori* task but rather operates in continuity with the cognitive sciences, accepting that these could be relevant for solving epistemological problems.
b) Scientific reformist naturalism which maintains that the cognitive sciences by themselves can provide responses to some epistemological problems.
c) Revolutionary scientific naturalism which takes the view that traditional epistemology should be replaced by the cognitive sciences.

The position adopted in *Evidence and Inquiry* to develop foundherentism conforms to the first of these. This has various consequences in Susan Haack's epistemology, as shown by the criteria for justifying our beliefs with human capacities; the continuity between scientific forms of knowledge and other areas and the rejection of the possibility of an epistemology without a knowing subject. We will examine this thesis and its relevance for a theory of evidence in Law.

4. THE UNITY OF EPISTEMOLOGY

One of the theses accepted by foundherentism which is important for a theory of legal evidence is upholding the continuity between the scientific method and other cognitive activities in other spheres. We might call it the thesis of the unity of empirical argument or evidentiary argument. For Susan Haack, what counts as evidence, and as criteria for confirming our beliefs, is not something exclusive or internal to scientific activity. Faced with the excessive deference towards the scientific method, which often results in disillusioned scepticism, the author suggests an approach which says that the criteria used by all those who investigate are the same (Haack 1998, 45). (Ultimately a "critical common sense", which recalls the jurists' reference to "healthy criticism"). Scientists are not, she writes, "in possession of a uniquely rational and objective method of inquiry, unavailable to historians, detectives, and the rest of us, and guaranteed to produce true, or probably true, or progressively more nearly true, or progressively more empirically adequate, etc., results" (Haack 2009, 26). This does not mean that a layman can easily understand what scientists do. Despite the fact that ultimately the criteria (the way the evidence is weighed) are the same, knowledge of the underlying scientific theories, experimentation methods, technical terminology, the use of statistics and specific formalisms increase the complexity of science. Nor does this mean denying that science has had considerable success that must be recognised. However, this is the result of more accurate measurement methods and observation instruments, statistical methods and complex formalisation as well as, especially, the sustained cooperation of many researchers over generations gradually filling in the puzzle of knowledge. A crucial element that accounts for the success of the natural sciences is their social nature; they are not in possession of a specific, privileged method ensuring objectivity and the knowledge of reality (Haack 1998, 46).

This can be applied to the case of legal argument about facts. Although this is subject to special institutional restrictions and although there are important limitations on the methods of collecting evidence aimed fundamentally at safeguarding values other than the discovery of the truth, which can come into conflict with them, there is no valid *legal epistemology* exclusive to this sphere. When—in a radical interpretation of the "free evaluation of evidence"—jurists considered that a belief has to be accepted as justified if the judge feels intimately convinced of it, without no further requirement, or when they over-estimate the role of immediacy as intuitive access to the credibility of a statement,[3] they are simply wrong, assuming irrational criteria, not criteria validated by the peculiar circumstances of the context. If we are looking for rational criteria for legal argument about facts, we must look for guidelines to evaluation that are valid in any sphere concerned with investigating facts.

Susan Haack distinguishes between criteria for justifying beliefs and guidelines for the conduct of inquiry. The former are like the criteria for judging whether or not a meal is nutritious and the latter are like instructions for cooking it (Haack 1993, 279). The procedural guidelines attempt to determine the strategy that should be followed to carry out a good investigation, but it is possible that there may be a plurality of methods (and it is even desirable that the same investigation should be carried out using diverse methods). These methods are subject to the investigator's discretion and it can only be "regulated" using broad guidelines. This distinction could serve to help understand what is peculiar about legal evidence. The peculiar thing about evidentiary activity in Law lies not in the argument about facts in the strict sense (how the weight of 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. This regulation of procedure has an important impact on argument, but not enough so that we can say there is a different epistemology for Law.

5. EPISTEMOLOGY WITHOUT SUBJECTS AND OBJECTIVITY

As theorists of judicial evidence, we have been concerned to reduce the possibility that decisions on proven facts should be arbitrary or wrong. 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 rooted in subjectivism.[4] It is beginning to be commonplace to assume that only an objectivist conception of evidence can be rational, so we need to release judicial evidence from its psychological bonds, avoiding, as far as possible, its references to mental states. Following Jordi Ferrer, for example, it has been assumed that "*p* has been proven" must be understood as "There are sufficient elements of judgement in favour of *p*", and not as "The judge believes that *p*" or "The judge is convinced of *p*" (Ferrer 2005, p. 28 and ff). The distinction between "It is proven" and "It has been held to be proven" has also been stressed (Ferrer 2005, 96). Concerning standards of proof, it has been maintained that one of the requirements that must be met is to "avoid linking evidence with the deciding subject's beliefs, convictions or doubts concerning the facts" (Ferrer 2008, 146). To this is added the thesis that beliefs (the fact of having a belief) are not voluntary, from which the conclusion can be drawn that they may not be considered as justified or unjustified. In fact, what may or may not be justified is the proposition believed, but not the fact of having beliefs—belief as a mental state. For this reason, insisting on linking evidence with beliefs makes the former arbitrary.

This process of "de-psychologisation" is strongly reminiscent of Popper's *epistemology without knowing subject*. As Haack points out, Popper is apparently "an atheist about beliefs—an *objectivist* atheist, one might say, since he seems to assume that any epistemological theory acknowledging a role to beliefs is thereby bound to be objectionably subjectivist" (Haack 2010, 73), which leads him to see epistemology as a question of "propositions and their logical relations" (Haack 2010, 73). For Popper, traditional epistemology is a philosophy of belief but it is not genuine epistemology. He sees epistemology as relating to scientific knowledge; it belongs to what he calls *world 3*, the world of theories, and constitutes objective knowledge. On the other hand, knowledge understood as a subjective mental state belongs to *world 2*—to psychology (Haack 1979, 310).

On the other hand, Susan Haack's epistemology revolves around the issue of when a belief (not merely the proposition that is believed but its being believed) is justified. This is in keeping with her pragmatism and her moderate naturalism. Her aim is to give content to the idea that "*A* is more/less justified, at time *t*, in believe that *p*, depending on …" (Haack 1993, 117), where the ellipsis is intially filled in by "how good his evidence is". In her conception, 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 the person really has and the reasoning he really undertakes, not on those they think they have (Haack 1999, 41). 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. Beliefs (some beliefs) form the bridge between perceptions and sensations (experience) on one hand, and propositions, on the other.

By eliminating beliefs understood as mental states, Popper's epistemology ends up losing its grip on empirical reality. As we know, for Popper there is no undoubted knowledge—in other words, there is no room for the absolute confirmation of theories. This is a result of his rejection—linked to his anti-psychologism—of induction as a valid type of inference. The characteristic feature of scientific theories, which allows us to continue talking about rationality in science, is that they can be either partially corroborated or refuted by science. A theory is partially corroborated when a singular statement can be deduced from it which is confirmed as true, and it is refuted when such a singular statement is proved false. But how can we know if such a singular statement is true or false? For Popper, the provability of basic statements does not come from experience, because the relationship between this and the decision to accept a statement can only be causal and not logical (deductive). The acceptance of basic statements is a matter of *convention*. But, if this is the case, it is not appropriate to empirically corroborate or refute any theory because everything ultimately depends on a convention of the scientific community. Popper's project collapses. Ultimately, "any plausible account of the epistemic relevance of experience will have to throw off the Popperian constraints of extreme deductivism and extreme anti-psychologism" (Haack 1993, 108). The failure of projects like Popper's demonstrates that justification cannot merely be a relation of inference between propositions and that a "double aspect" notion of justification is required: causal and logical. For a belief to be justified by an experience, it must be possible to infer (not necessarily by deduction) the content of the belief from the content of the experience, and having had this experience must have caused the state consistent with having that belief.

In any case, before wrapping up this point, a conclusion could be drawn for the theory of judicial evidence: an appeal to psychological states, such as belief, knowledge, etc. as part of a theory of evidence, even as part of the meaning of "p is proven", does not necessarily lead to arbitrariness or irrationality, nor to any objectionable meaning of the term "subjective". "*P* is proven" can mean that "The judge justifiably believes *p*" (where *p* can mean the fact subject to the evidence or the fact that there are reasons for accepting this as a premise of judicial syllogism). The error of the "proceduralists' (and judges') theory of evidence" is not that it relies on the judge's mental states but rather that, sometimes (even recently, although probably now only in exceptional cases) there is an attempt to infer from this that judges do not therefore have to give reasons for their convictions. This is what should be criticised, not the reference to mental states.

6. THE CRITERIA FOR JUSTIFYING BELIEFS AND THE EVALUATION OF EVIDENCE

One of the central problems of the theory of evidence is that of providing criteria for evaluating evidence —criteria to support the hypothesis that the judge considers proven. Legal systems are quite vague when it comes to indicating these criteria and usually restrict themselves to referring to common sense or "healthy criticism". Case law in our countries has made some progress, suggesting some of these criteria, especially concerning circumstantial evidence (given the particular difficulty it presents). And, if we assume the thesis of the unity of epistemology or evidentiary argument, then we can find more clues drawing on criteria proposed in other areas (and realise that, except in terminology and frequently in precision, they do not differ from those established by case law). Foundherentism can also be useful for understanding the criteria we need to use to support our hypotheses. But before seeing the criteria we should remind ourselves of some ideas:

a)   As we have seen, what interests Susan Haack is the degree of justification of a belief of a particular subject at a particular time. For example, the degree of justification of a judge at the time of making a decision. Justification is gradational (this is something that was not always mentioned in the proceduralists' theory of evidence, at least with respect to so-called direct evidence); personal (the same belief can be justified for one person but not for another); and temporary (a belief may be justified for a subject at a particular time but not at another).

b) The justification of beliefs is an objective matter (in the sense of not being arbitrary or entirely discretionary): what matters in order to justify a belief is not what the subject thinks about whether the reasons for this belief are correct but on how good they, in fact, are.

c) The justification of a belief depends on experience and on the support it receives from other beliefs. The degree to which the two elements combine can vary from one belief to another, but there is no belief that is not ultimately partly justified by experience (Haack 1993/1997, 76).

d) The criteria for whether beliefs are correct are different from procedural guidelines or strategies for carrying out an investigation.

e) There are two aspects to the justification of a belief: a causal aspect and a logical aspect. Two dimensions of beliefs must be distinguished: belief as a mental state (state beliefs) and what is believed, its content and its propositional aspect (content beliefs). The two dimensions of beliefs are interlinked with the two corresponding dimensions of proof or evidence: their dimension as a mental state (state evidence) and their content (content evidence). The causal relations arising between state evidence and state beliefs and logic (or evaluational) relations arise between content evidence and content beliefs. State evidence causes me to have certain state beliefs, but those state beliefs have a particular content. Causality forms part of justification because a belief is justified when its content is inferred from the evidence that causes it and not from any other. In the author's words: "The degree of justification will depend on the quality of the evidence that, *in fact*, causes the belief in question" (Haack 1999, 41; my italics).

What are the criteria on which the degree of justification of a subject's belief, *p*, at a particular time depend? Let us return to the crossword example: The correctness of a solution in the crossword depends (a) on the clues and the other solutions already filled in that cross it, (b) on the correctness of these other solutions (regardless of the one we are evaluating and (c) how complete the crossword is. In a parallel way, the justification of a belief B1 depends on:

(1) the level of support provided by other beliefs B2, B3, Bn etc. for belief B1 (support);

(2) how justified the other beliefs B2, B3, Bn are, regardless of belief B1 (independent security);

(3) how complete the subject's set of evidence is with respect to the set of relevant evidence for belief B1 (Haack 1993/1997, 117; 46 and ff). (comprehensiveness).

In previous work, I have suggested analysing a judge's argument about facts as an inference connecting the evidence with the hypothesis to be proven through empirical regularity (maxims of experience). I have suggested the following criteria for the solidity of this inference (and I have also suggested that what jurists call evidence evaluation criteria can be understood as criteria for the solidity of evidentiary inference). With respect to evidence, this means how much we have in favour of the hypothesis, its variety, its reliability and its relevance. With respect to empirical regularity, this refers to its inductive foundation and the probability that the correlation it establishes is fulfilled. And, with respect to the hypothesis, it concerns its corroboration, its preference compared to alternative refuting hypotheses, its narrative coherence, its capacity to explain the evidence, etc. The criteria I have suggested are parallel to those the courts have suggested in case law in various judgements, particularly in relation to circumstantial evidence. They are more specific than those suggested by Susan Haack, but that does not mean they contradict hers. Rather the contrary, they can be seen as making her criteria more specific and they can be seen as being based on her criteria. So, requirement (1) (support) is related to the relevance, quantity and diversity of the evidence or the greater weight of the hypothesis that is finally accepted compared to the refuting hypotheses or the degree of probability expressed in the maxim of experience; requirement (2) (independent security) relates to the reliability of the evidence and the solidity of the empirical regularity (maxims of experience); requirement (3) (comprehensiveness), meanwhile, has been put forward by Jordi Ferrer, following Keynes, under the notion of "weight of evidence" (Ferrer 2014, 227).

The result of assessing the justification of a belief in accordance with these criteria offers a certain higher or lower degree of justification, and this raises the problem of deciding whether that degree of justification is sufficient for the judge to make the decision. This—the degree of sufficiency of the evidence—is an important matter that has been the centre of many arguments and works on the theory of evidence. Philosophers and legal philosophers, such as Larry Laudan and Jordi Ferrer, have demanded more precise formulations of standards of proof than those we normally find in Law (such as "beyond all reasonable doubt", "sufficient conviction", "clear and convincing evidence", etc.). The purpose of these standards would no longer be to evaluate the justification of a belief (although, unfortunately, standards of proof are often confused with evidence evaluation criteria), but rather whether the level of justification achieved is sufficient for making the corresponding juridical decision. The ultimate aim is to eliminate the judge's discretion in determining the sufficiency of evidence and to increase juridical certainty, but I would venture to say that, within the framework of foundherentism, this objective (a sufficiently precise standard of proof to reduce discretion concerning the *sufficiency* of evidence) is impossible to achieve. In Haack's words: "Because the quality of evidence is multidimensional, we should not necessarily expect a linear order of degrees of justification; e.g. the evidence for A with respect to p may be strongly supportive (support) but weak in terms of comprehensiveness (amplitude), while its evidence with respect to q may be strongly comprehensive but only weakly supportive. *A fortiori*, it does not seem possible to aspire to something as ambitious of a numerical scale of degrees of justification" (Haack 1999, 49). Those who maintain the need for a standard of proof do not aspire as highly as a numerical scale of justification. Nevertheless, if it is not possible to have a linear order of degrees of justification, it does not seem possible to meet these lesser expectations either. I believe foundherentism does not support the possibility of precise, general standards of proof determined *a priori*. Nor do I, as I have tried to argue on other occasions (González Lagier, 2020a, 90 and ff). All we can do is clarify the justification criteria and require judges to use them in giving reasons for their decisions. We can also indicate what makes for lack of justification. In an approximate way, and without being able to avoid gradual expressions such as "good fit", "high degree of support", etc., we can elucidate what makes for reasonably well justified belief; much more than this we can't do.

7. RATIFYING CRITERIA

We began by pointing out that foundherentism attempts to answer two basic, related questions: what are the criteria justifying our beliefs? And what makes these criteria valid? In other words, why are these the right criteria for justifying beliefs? Susan Haack's answer is that the criteria of support, independent reliability and comprehensiveness are *truth-indicative*. The aim of investigation processes is to achieve a knowledge of the world, so it is fundamental that our beliefs aspire to be true. Therefore, if the aim of judicial evidence is to try to ensure, as far as possible, the truth of statements declared to be proven, the criteria used must be truth-indicative.

What can be said to support the idea that these criteria are really truth-indicative? This is one of the points where Haack, together with other arguments, makes use of a resource drawn from a naturalistic conception of epistemology. Criteria of justification are closely related to the capacities of human beings needed to ensure their survival. Anchoring our beliefs in experience (perceived through the senses and through introspection) on one hand, and the way they fit into the network of beliefs that explain the world (on the other) serves to guide us in a reality independent of ourselves. These are fallible capacities, but the fact that they have allowed our survival to date supports their approximate reliability, which is all we can aspire to (Haack 1999, 52). It is a version of the best explanation argument: the best explanation we have that our cognitive capacities have allowed us to adapt to the natural world and "ride the wave of evolution" is that such capacities are reliable when it comes to showing us what this world is really like. Meanwhile, the fact that these are our cognitive capacities is, in turn, also based on what cognitive sciences and the theory of evolution tell us. So, the different entries in the crossword of the problem of ratifying the justification criteria fit together and the crossword is filled in.

In order to be suitably linked to the human capacities that allow us to adapt to our environment and survive, criteria of justification must be persistent over different cultures and communities. Susan Haack's position is that apparent divergences of opinion about when a belief is justified are not, as relativists would maintain, due to the fact that different justification criteria are used in each community, but rather to the "deep beliefs" providing these criteria with content. Communities may differ with respect to what counts as good evidence, but we do not differ over the fact that the justification of our believes depends on having good evidence. To use one of Susan Haack's examples: "Now suppose you and I are on an appointments committee. You believe that a certain candidate should be ruled out on the grounds his handwriting indicates that he is not to be trusted; I think graphology is bunk and scoff at your 'evidence' (...) Here we disagree not only about *p*, but also, as we might say, about 'what counts as a reason' for doubting the candidate's honesty. But I don't think anyone would be much inclined to think that this kind of commonplace disagreement suggests that you and I have 'different standars of evidence' in any deep or interesting sense. We simply disagree about what evidence is relevant because we disagree in some background beliefs" (Haack 1993, 206).

8. EPISTEMIC VIRTUES AND ETHICS OF INVESTIGATORS

If epistemology has to take into account the role of the subject; if it is not a merely a question of deductive relations between propositions; if what matters is how we can expand our knowledge and that our beliefs point to the true; and if it is not possible to design precise methodological rules that tell us, implacably, how to conduct the investigation so that will be infallible—ultimately if the investigator's discretion and good practice are necessary for the success of their investigations—we need to think about the characteristics and abilities the investigator must have. That means considering their virtues.

Susan Haack has concerned herself with this point in various works, as well as reflecting on the aspects of organisation of science and universities that could make investigative activity difficult. As virtues of an investigator, we should mention capacity for imagination, necessary, for example, for formulating hypotheses; skill and persistence in seeking evidence; rigorous argument for deciphering the consequences of conjectures; and good judgement for evaluating evidence (Haack 2003, 97). These would be epistemic virtues. But the most important of these would be at once an epistemic and an ethical virtue (Haack 2003, 305): intellectual honesty and integrity, which Haack defines as respect for evidence "the moral fiber to resist the temptation to stay out of the way of evidence that might undermine their conjectures, or to manipulate unfavorable evidence they can't avoid" (Haack 2003, 97). Intellectual honesty is an attitude towards oneself and towards others: "Being honest with yourself means avoiding self-deception, both about where the evidence you have leads and whether you have the evidence you need to draw any conclusion at all. It doesn't require that you abandon a promising idea in the face of any and every piece of apparently contrary evidence; but it does require that, recognizing how complex and confusing evidence can be, you are ready to follow in good faith wherever it takes you. Being honest with others requires, obviously, that you not present fabricated, fraudulent or massaged data, but also that when you report all your work you report all the relevant evidence" (Haack 2007, 9-10).

This virtue follows from the aim of pursuing the truth and is the criterion for distinguishing a genuine investigator from a false investigator (who does not pursue the truth, whatever it is, but rather seeks arguments to support preconceived theses at all costs) and a pseudo-investigator (who seeks arguments to support the truth of a proposition to which they are indifferent but that allows them to promote themselves in some respect) (Haack 1996, 1,415).

It is clear that these virtues are also judicial virtues (to which could be added others deriving from the specific function of the judge and the fact judges are subject to the Law)[5] in as far as these also seek truth as an objective. Respect for evidence is also an assumption of the rational evaluation of evidence and a requirement imposed by the judge's duties of independence and impartiality. As Josep Aguiló points out, "while independence refers to control over the judge's motives with respect to extra-legal influences coming

from the social system, impartiality concerns the judge's motives with regard to extra-legal influences from the proceedings" (Aguiló 1997, 77). The best way of avoiding these influences is making the judge subject to the law and, it should be added, respect for evidence (Muñoz Conde 1999, 67) in the sense indicated by Susan Haack.

So what is the relevance of these virtues? Of course, it is possible to make good discoveries without intellectual honesty, and it is possible to be the most honest investigator and not make them. They are, in all cases, contributory conditions, and the need for them must be measured in overall rather than individual terms. Intellectual honesty is a condition for excellence in investigation and intellectual dishonesty degrades investigation. In the same way, a judge's dishonesty when evaluating evidence makes that judge, of course, a terrible one, even though in a particular case the same judge may have made a correct decision. A lesson for the theory of evidence in Law which can be drawn from this is that we must pay more attention to the theory of epistemic virtues (and ethics). However, in my opinion, we do not need to concede that the justification of decisions depends exclusively on them having been made by a "virtuous" judge (González Lagier, 2020b, 99 and ff).

Finally, we might wonder, how are virtues learned? For Aristotle they are learned through habit, developed through effort and the imitation of good examples. Scientists must imitate model scientists; judges must imitate exemplary judges; and philosophers must imitate philosophers like Susan Haack.

NOTES

1. I will consider only empirical foundationalism, which says that justification of basic beliefs depends on (sensory or introspective) experience. However, foundationalism can also consider that basic beliefs are logical or mathematical rather than empirical, or that they are self-evident, or that they are directly justified (via some causal relation) by a state of things that makes them true.
2. For an analysis of Susan Haack's legal pragmatism see Atienza, 2018, 467-489.
3. A critique of both issues can be seen in Ibáñez, 2015, 251 and ff.
4. For example, de Paula 2019, Chap. I.
5. Amalia Amaya considers that judicial virtues are a specification or concrete expression of general moral virtues and lists the following: impartiality, sobriety, courage, wisdom and justice. In her opinion, these are simultaneously moral virtues (they tell us how to act correctly) and intellectual virtues (they help us form justified beliefs (Amaya 2009, 24). Meanwhile, Manuel Atienza, proposes "good judgement, prudence, broad-mindedness, sense of justice, humanity, compassion and courage", to which he adds temperance or self-control in the use of their power (Atienza 2001, 140).

REFERENCES

Aguiló, Josep. 1997. Independencia e imparcialidad de los jueces y argumentación jurídica. *Isonomía*, no. 6.

Amaya, Amalia. 2009. *Virtudes judiciales y argumentación*. Tribunal Electoral del Poder Judicial de la Federación, Mexico.

Andrés Ibáñez, Perfecto. 2015. El juez y la cuestión de hecho: Formación de la convicción judicial. In: *Tercero en discordia: Jurisdicción y juez en el Estado constitucional*. Madrid: Trotta.

Atienza, Manuel. 2001. *Cuestiones judiciales*. Mexico: Fontamara.

_____. 2018: Pragmatismo jurídico. La propuesta de Susan Haack. In: *Estudios filosóficos,* Vol. 67, No. 196.

Ferrer, Jordi. 2008. *La valoración racional de la prueba*. Madrid: Marcial Pons.

_____. 2005 *Prueba y verdad en el Derecho*. Madrid: Marcial Pons.

_____. 2014. La prueba de la causalidad en la responsabilidad civil. In: Diego M. Papayanis, *Causalidad y atribución de responsabilidad*. Madrid: Marcial Pons, p. 227.

González Lagier, Daniel 2020a. Emociones sin sentimentalismo. *Las emociones y las decisiones judiciales*. Lima: Palestra.

_____. 2020b ¿Es posible un estándar de prueba preciso y objetivo? Algunas dudas desde un enfoque argumentativo de la prueba in Revista Telemática de Filosofía del Derecho, No. 23. http://www.rtfd.es/numero23/04-23.pdf

Haack, Susan. 1979. Epistemology with a Knowing Subject. *The Review of Metaphysics*, vol. XXXIII, no. 2.

_____. 1993. *Evidence and Inquiry.* Oxford: Blackwell, 1993. (*Evidencia e investigación. Hacia la reconstrucción en epistemología*, Tecnos, 1997).

_____. 1996. La ética del intelecto: Un acercamiento pierciano. *Anuario filosófico*, no. 29.

_____. 1998. Defendiendo la ciencia, dentro de la razón. In: Pascual F. Martínez-Freire, *Filosofía de la ciencia actual*, *Contrastes. Revista interdisciplinar de filosofía*, Suplemento 3.

_____. 1999. Una teoría fundaherentista de la justificación empírica. In: *Ágora*, 18/1: 41.

_____. 2003. *Defending Science—Within Reason. Between Scientism and Cynicism.* Buffalo: Prometheus Books.

_____. 2007. La integridad en la ciencia: Significado e importancia. En: *Contrastes. Revista internacional de filosofía*, vol. XII.

_____. 2009. Esperando una respuesta: El desordenado proceso de buscar la verdad. In: *Cuadernos de Neuropsicología*, no. 3.

_____. 2010. Belief in Naturalism. an Epistemologist's Philosophy of Mind. *Logos & Episteme*, vol. I.

_____. 2014 *Evidence Matters.* Cambridge: Cambridge University Press.

_____. 2018. The Pragmatism Tradition: Lessons for Legal Theorists. *95ᵗʰ Wash. U. L. Rev.*

Martínez, S. F. and Olivé, L. 1997. Introducción. In: Sergio F. Martínez and L. Olivé (comp.) *Epistemología naturalizada*. Buenos Aires: Paidós.

Muñoz Conde, Francisco. 1999. La búsqueda de la verdad en el proceso penal. *Revista de Proceso y Derecho Penal*, no. 1.

Paula, Vitor de 2019. *La prueba testifical. Del subjetivismo al objetivismo, del aislamiento científico al diálogo con la psicología y epistemología*. Madrid: Marcial Pons.