Introduction

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The First World Congress on Evidential Legal Reasoning, organised by the Legal Culture Chair of the University of Girona, was held between 6 and 8 June 2018. The Congress was attended by 350 participants and featured 18 speakers from 4 continents. The three days of formal and informal presentations and discussions yielded excellent results, strengthening the interrelation between the legal communities and specialists of different traditions. The eighteen papers from the Congress, reviewed by their authors based on the discussions and the suggestions made at the Congress, have been compiled in this book.

The leitmotif of the Congress and of the book is coloured by the subject matter, namely evidence and proof in judicial proceedings, addressed by different judicial traditions and with the emphasis placed on different specific problems. This book does therefore not constitute a mixed debate or discussion of a specific evidential area. The value of this book lies in the variety of topics, approaches, bibliographies used, case law analysed and even the concepts taken as its point of departure.

Twining, whose chapter opens the volume, proposes that a multidisciplinary approach be taken to evidence:

> Evidence as a multidisciplinary subject is a 'field concept', that is a label for a broad, varied, ever-changing field with no stable boundaries or agendas. Viewed thus it would be a mistake to start with trying to construct a precise definition of the field or a Grand Theory of Evidence just as it would be a mistake to try to explicate 'Law' in the phrase 'the Harvard Law School'.

Without taking up the discussion as to whether a general theory of evidence is or is not possible, in the way that Kelsen conceived the general theory of law, we believe that there is a clear common leitmotif in the studies in this field that operates on different levels. The first one is conceptual: it is indeed possible to debate the key notions of the field of evidence (inside and outside law), such as

'evidence', 'proof', 'burden of proof', 'expert testimony', and 'standard of proof'. The second level pertains to evidential reasoning and is comprised of studies about the argumentation of facts and epistemology. The third level is clearly institutional, characterised by the legal regulation of evidence in judicial proceedings. Finally, there is a fourth – normative – level which includes debates in the field of political and moral philosophy about, for example, what scope we should afford to the right to silence or what the most suitable distribution of risk of error should be in certain types of proceedings.

The first two levels pave the way for discussions that do not depend upon each country's legal specificities or on the different families of legal systems and in this regard are clearly common to all of them. The third level depends on specific national regulations, although there are clear lines of convergence, and comparative studies are highly useful. Once again, the fourth level is general in scope and does not depend directly on the regulation of specific legal systems. Of course, all four levels are related and are not watertight compartments, although a distinction can be made between them, which is useful in order to individualise the analysis perspectives and to see how in most of them it makes sense to begin the discussion beyond the confines of the actual legal tradition.

Sometimes there are specific institutions of a judicial system or family of systems which in other systems use different technical terminology that has to be clarified in order to avert purely verbal disagreements. Thus, in the English-speaking literature it is common practice to use a gradual concept of burden of proof, which affords meaning to the question of how much burden of proof one of the parties to the process has. This is because the notion of burden of proof already includes the standard of proof applicable, meaning that one may say that the party has the burden of proof beyond reasonable doubt, for example. On the other hand, in Roman-Germanic tradition countries, the burden of proof responds strictly to the question as to which party will lose the case if there is insufficient proof, leaving aside the concept of determination of the threshold of sufficiency of evidence (perhaps because normally less attention has been dedicated to it as well). Only when these conceptual differences have been understood is it possible to have a proper understanding of the institutions and avoid purely verbal discussions. However, once these 'translation' problems have been dispelled, it transpires that there is also a common leitmotif, shared theoretical options and very similar problems and discussions. This is why it is so important to make the effort to go beyond parochial debate and broaden the focus of our studies.

This was one of the core objectives of the First World Congress on Evidential Legal Reasoning: to offer a meeting point between different legal

traditions to debate evidential problems. We believe that this book clearly mirrors the highly encouraging outcomes of this debate.

Nevertheless, the reader will realise that the presence of the different families of legal systems is unequal: English- and Spanish-speaking countries obviously enjoyed the greatest representation, which is why the book places particular emphasis on a dialogue between the way the doctrine is being developed in the field of evidence in English- and Spanish-speaking traditions. This is also a novel aspect of the Congress and of the book, because the comparison between common law and continental traditions has usually been addressed taking the French or German models as points of reference for the continental tradition. However, we believe that the vitality of the procedural reforms and doctrinal debates ongoing in the last twenty-five years in Spanish-speaking countries also provides a very interesting point of view on or for the subject matter studied in this book.

The book is organised into five thematic blocks: Part I: Evidence As an Area of Knowledge, Part II: Convergences Between Systems, Part III: On Evidential Inferences, Part IV: Expert Evidence and Part V: Standards of Evidence As Decision-Making rules.

The first part, 'Evidence As an Area of Knowledge', is comprised of two works that stress highly important aspects of this enterprise, namely its multidisciplinary nature, as well as the complexity of a legal system of which evidence is a part. In 'Evidence as a Multi-Disciplinary Field: What Do the Law and the Discipline of Law Have to Offer?', William Twining shows how inferential evidential reasoning for validating hypotheses and for justifying conclusions is an axis that renders it possible to generate a 'multidisciplinary focus' that transcends law, even although legal evidence is a semi-autonomous area. He wonders how we jurists can contribute to an exchange, co-operation and a search for a core of evidence as an area of multidisciplinary knowledge, and in answer he gives us two major challenges: to reach a solid consensus about a point of departure and to identify whether there is something characteristic in evidence in the law. Moreover, Ronald J. Allen, in 'New Directions for Evidence Science, Complex Adaptive Systems, and a Possibly Unprovable Hypothesis about Human Flourishing', departs from the consideration that trials, legal systems, governments and market economies are all complex adaptive systems. Viewing them in that light opens up new avenues for research and leads to a possibly unprovable supposition that human flourishing will be enhanced at the intersection of societies with a commitment to the rule of law that embraces free elections, market economies and responsive legal systems of which the common law is the paradigmatic example. These complex adaptive systems have the advantage of feedback mechanisms that

may facilitate the intelligent exploitation of the vast amount of information contained in each of the systems.

The second part, 'Some Convergences Between Legal Systems', is comprised of four chapters that address different ways in which legal systems have gradually changed and are curiously shifting towards points of convergence, very commonly on account of their relationships with other countries, and in many other cases even as an unexpected result of a specific procedural reform that actually pursued other goals. In order to plot the differences between the legal systems, essentially between the common law and civil law families, a distinction has traditionally been made between 'inquisitive systems' and 'adversarial systems'; although the label does not necessarily have a specific content and its uses vary, it can sometimes prove useful to emphasise certain aspects that are regarded as key. Thus, for example, in 'Truth-Finding and the Mirage of Inquisitorial Process', Adrian Zuckerman takes, as his central axis, a reform in the English civil law system regarding free legal aid, and with this a new demand upon judges to guarantee procedural equality for citizens who eventually represent themselves. A demand which, in his opinion, by translating into a more active role on the part of judges in the presentation of evidence, may involve inquisitive elements inconsistent with the obligation of judicial impartiality, including the prevention of cognitive biases. The fact that it is only the parties who determine the object of litigation and the presentation of evidence, which Zuckerman identifies as an 'adversarial system', would prevent the judge from being involved in activities which could make him or her more vulnerable to corrosive factors.

On the other hand, in 'Common Law Evidence and the Common Law of Human Rights: Towards a Harmonic Convergence?', John Jackson explores the role played by the European Court of Human Rights in diluting certain rules of exclusion in a common law system such as the English model, particularly the impact of certain criteria on the right to legal aid during police questioning or the right to question witnesses. In particular it has developed certain rules that have had the effect of encouraging common law judges to engage more holistically with the effect of certain kinds of evidence on the weight of the evidence as a whole and on the fairness of the proceedings as a whole. The effect has been to reinforce a shift in the nature of both their epistemic and non-epistemic reasoning during the trial. In doing so, the ECHR takes on a more supervisory position of 'director of operations' to ensure that the right to a fair trial and the rights of the defence are made sufficiently 'practical and effective' within the member states.

Sarah Summers is another theoretician who in recent years has extensively questioned the 'inquisitive' and 'adversarial' distinction. In her chapter,

'Evidential Remedies for Procedural Rights Violations: Comparative Criminal Evidence Law and Empirical Research', she provides an example to demonstrate how this classification is not only over-reductionist, but also that it does not properly reflect what criminal proceedings are like in the real world. Moreover, her work reveals how the implementation of idealised procedural models has influenced national and even supranational courts, promoting a certain reluctance to establish absolute evidential rules instead of allowing for discretion of the court, which would obviously involve a discussion on the cases in which this is legitimate. The specific example provided by Summers is the right to be represented by a lawyer in Switzerland, more specifically the right to be informed about the right to legal aid, demonstrating, with empirical data, violations of this right, not because the accused was not informed but rather because they were informed in an incomplete or biased way, being told insistently that lawyers are unnecessary and costly.

In 'The Transformation of Chinese Evidence Theories and System: From Objectivity to Relevancy', Baosheng Zhang and Ping Yang show the impact of not only the dissemination of Common Law evidence in China but also on the concept of evidence. The 'objective fact theory', which has been playing a dominating role in Chinese legal scholarship and judicial practice over a long period of time, confuses empirical fact with objective existence. As a result, the theory of 'objective evidence' was established, and judicial notions such as 'seeking truth from fact', 'the perpetrator of every murder case must be captured', 'zero tolerance to wrongful convictions or acquittals', are derived from this theory. They not only accounted for the deficiencies in Chinese evidence theories and system, but also led to judicial injustices. In recent years, however, Chinese evidence theories and system have shown a trend of transformation from adhering to the 'objective evidence theory' to evidence relevancy. Nevertheless, such a transformation is still unfinished, with the co-existence of both new and conventional notions and systems. To establish relevance as the foundational principle of the modern evidence system is of great significance to advancing the Chinese evidence system and evidence law scholarship.

The third part, 'On Evidential Inferences', compiles chapters dealing explicitly with different questions about inferential reasoning in evidential matters: the basic premises, the role of ostension versus inference, the influence of ethical and political questions and even the process of deliberation that may take place in collegiate bodies.

Michele Taruffo, in 'Inferences in Judicial Decisions about Facts', presents a map of types of evidential inference and inferential schemes based on the work of Toulmin. To this end, Taruffo's point of departure is the non-mathematical

probabilistic nature of evidential reasoning, geared towards the objective of ascertaining the truth, understood as correspondence.

Giovanni Tuzet, in 'On Probatory Ostension and Inference', discusses two theses on juridical evidence: the *ostension thesis* and the *inference thesis*. According to the first, the process of juridical proof typically requires some ostensive act. In this sense the evidence consists in some element susceptible of being shown, or exhibited, or indicated to someone in a given context. According to the second thesis, the process of juridical proof requires necessarily some inference. In this process juridical evidence becomes the content of one or more inferences performed by the parties or by the fact-finders (judges or jurors). It can be the content of a premise which, together with other premises, leads to a conclusion about the disputed facts; or the content of a conclusion the premises lead to. Tuzet will rather concentrate on the first thesis, whose subject is somewhat neglected by the literature. He will address the probatory role of ostension, the logical structure of the ostensive act, and some points that pertain to the pragmatics of evidence discourse, namely the role of indexicals and demonstratives in this kind of discourse. Tuzet emphasises that in the fact-finding process ostension comes first: parties present fact-finders with pieces of evidence and then elaborate probatory arguments out of them. No probatory inference can be performed without an ostensive input.

In 'Silence as Evidence', Hock Lai Ho tells us that the right to remain silent and not to incriminate oneself in the criminal process is recognised in some quarters as a human or fundamental right, but the right is not given this exalted status everywhere; indeed, it has its fair share of ardent critics. The existence of the right, constitutionalised or not, varies across jurisdictions. There is much debate on its significance and desirability. His work looks at the position taken (i.e. what the law is and how it got there) and discourse (i.e. how officials talk when they go about defending legislative amendments or praising the current law) on the right of silence in Singapore. Does the experience in Singapore reveal a distinctly Asian perspective to the right of silence? The study of Singapore will be used as a springboard for theoretical reflections on the right in general. Beyond the example of Singapore, the work illustrates a basic general question related to evidential reasoning: while it is primarily theoretical, it is legally regulated by rules that are often shaped by practical – including political and ethical – considerations.

Finally, in 'Group-Deliberative Virtues and Legal Epistemology', Amalia Amaya highlights the social dimensions of argumentation about factual questions in law and, more specifically, analyses the character traits that are conducive to good group deliberation. Considering the effectiveness of deliberative groups and the process of exchange of reasons allows us to broaden the

scope of the analysis on the quality of the argumentative process that leads to the acquisition of true beliefs.

The next part, 'Expert Evidence', comprises a further four chapters around a kind of evidence that is acquiring increasingly greater importance in judicial proceedings, namely the expert witness. As in the previous blocks, very different topics are covered, from a general model of expert evidence, taking in an analysis by court-appointed experts, through to the obstinate judicial practice of insisting upon the continued use of unfounded practices despite the scientific information available and the legal errors resulting from such practices.

In 'From Institutional to Epistemic Authority: Rethinking Court Appointed Experts', Carmen Vázquez deals with court-appointed experts in the Spanish system. On the one hand, she demonstrates that court-appointed experts is an institution that can be implemented in highly diverse ways, although in systems that systematically (not exceptionally) avail themselves of such experts, the most common form consists of generating lists to make it easier to identify experts. On the other hand, she also sets out to expose the irrationality of the courts' reliance on these experts, given how they are selected, since their selection and appointment processes are fraught with certain aspects that render it totally unjustifiable. The court's assessment of expert evidence cannot be reduced to who the expert is or how he or she was selected, since attention must be paid to what they actually say, and if this duty is to be observed then this selection process is not the right way.

Gary Edmond, in 'Unreliable Law: Legal Responses to Latent Fingerprint Evidence', focuses on reported decisions in four common law jurisdictions, namely England and Wales, the United States, Canada and Australia, examining the overwhelmingly accommodating response to forensic scientific evidence from its inception to the present day. Through examples the chapter demonstrates sustained legal insensitivity to scientific knowledge and the actual reliability of fingerprint evidence.

Marina Gascón Abellán, in 'Prevention and Education: The Path towards Better Forensic Science Evidence', provides an up-to-date discussion on the traditional debate between expert evidence models that defer to experts and decision-maker educational models, taking forensic science as her basis. As we shall see, she advocates a preventivist and educational system.

Finally, in 'Evidentiary Practices and Risks of Wrongful Conviction: An Empirical Perspective', Mauricio Duce offers an empirical study performed in the Chilean context about how poor- or zero-quality expert evidence, eye witnesses and identification parades generate evidential errors that lead to wrongful convictions.

The final part, 'Standards of Evidence As Decision-Making Rules', includes three chapters that address the problem of the applicability of standards of proof to transnational cases, and the debate about the possibility of formulating general rules that objectively determine the threshold of sufficiency of evidence and its distinction with evidence assessment criteria.

In 'Burdens of Proof and Choice of Law', Dale Nance focuses on private international law and its traditional view that all aspects of the burden of proof are procedural. It is typically inferred that a forum court properly uses the law of the forum on such matters even when comity dictates the recognition and application of the substantive law of another jurisdiction to the matter in dispute. However, this characterisation has never been entirely accurate, at least in American law. Moreover, there has been discernible movement towards the opposite conclusion over the last century, at least as to certain aspects of the burden of proof. In order to make sense of this, it is necessary to recognise that the two components of the burden of proof, the burden of persuasion and the burden of production, have quite different functions in an adversary system. Once these functions are identified, it becomes clear that only the burden of production, in both its allocation and the severity of the burden that it imposes, should be governed by forum law, while the burden of persuasion, in both its allocation and the severity of the burden that it imposes, should be treated as part of the substantive law that the forum court chooses to apply. Thinking through the reasons for these conclusions provides an interesting lens through which to view the nature of evidential legal reasoning and the rules that provide.

Daniel González Lagier, in his work 'Is It Possible to Formulate a Precise and Objective Standard of Proof? Some Questions Based on an Argumentative Approach to Evidence', asserts that the relationships and differences between the standard of proof and the evidence assessment criteria remain unclear in civil law systems. This lack of precision can make it difficult to discuss which evaluation criteria and which particular standards are appropriate, or even to discuss the possibility of formulating a precise, objective standard of proof. For this reason, he seeks to offer a set of conceptual suggestions that could be used to make progress in the search for a shared terminological and conceptual basis on this point. To do so, he focuses on the structure of evidentiary inference, the reasons that count as good reasons for establishing the degree of corroboration of a hypothesis and the possibility of formulating a precise, objective standard of proof.

In 'Prolegomena to a Theory of Standards of Proof: The Test Case for State Liability for Undue Pre-trial Detention', Jordi Ferrer Beltrán presents the methodological requirements that must be fulfilled by a standard of proof in

order to fulfil the function of determining the threshold of sufficiency of evidence. To this end, his point of departure is, on the one hand, that the institutional aim of evidential reasoning in any type of judicial proceedings can only be ascertaining the truth surrounding the facts, and on the other that probative reasoning is of a non-mathematical probabilistic nature (probably Baconian). On this basis, the chapter also presents certain factors to be taken into consideration in order to take the political decision as to the degree of evidentiary requirement according to which the standard will be defined, distributing the risk of error among the parties. Finally, the case law of Spain and the European Court of Human Rights are analysed with regard to indemnity for undue pre-trial detention, serving as a test case for a proper understanding of the role of standards of evidence.

As the reader will have noticed, these works address different topics, written by authors from highly diverse judicial cultures and in which oftentimes parallel and somewhat impermeable debates have taken place. Nevertheless, reading all of them leads to a very interesting conclusion: the evidential problems and the fundamental aspects under discussion are, to a great extent, shared. Sometimes, there are specific institutions of a legal system or family of systems, in others there are different technical terminologies that have to be clarified in order to avoid purely verbal disagreements, although there is also a common leitmotif, shared theoretical options and highly similar problems and discussions. This is why it is so important to make the effort to go beyond parochial debate and broaden the focus of our studies. By doing so, we can also learn from the successes and failures of the experiences of other systems and thus be able to avoid both a shallow understanding of them and even hasty transplantations.