Arbitration, Rhetoric, Proof: The Unity of International Arbitration Across Cultures

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I have stolen my title, or at least most of it, from a volume of lectures by the historian Carlo Ginzburg, titled History, Rhetoric, and Proof (1999).1 Ginzburg observed that “proof,” in historical studies, has become the odd term out of the three.2 “Proof” is now viewed either as an antiquated and hopeless ideal or, for those who still believe in it, “proof” is deemed to be excluded by “rhetoric.”3 Ginzburg argued that, in the past, “proof” was rightly understood to be an integral part of “rhetoric,” and this indicated an image of the working methods of historians that is both more realistic and complex than today’s image.4

In tracing the relationship between rhetoric and proof, Ginzburg’s interests reached well beyond the historian’s craft. He contended that “history/rhetoric/proof” illuminates the broader question of the co-existence

3 Id., Ginzburg here is referring to rhetoric in the sense of a narrative having the fundamental aim of effectiveness (i.e., convincing its audience). See his first lecture, “Aristotle and History, Once More,” id. at 39.
4 Id., 1. The parts of the “Introduction” that are particularly relevant for my purposes are pages 1-2, and 19-25. However, the “Introduction” and the lectures should be read in their entirety to appreciate Ginzburg’s analysis of how proof and objective knowledge have become “an antiquated ideal” in many quarters and the subtleties of his “disagreement with skeptical relativism” (id. at 25). For a similar analysis by a law professor of the “influential currents of contemporary thought [that] are skeptical of truth as a philosophical principle, and…doubt that the acquisition of objective knowledge is possible,” see Mirjan Damaska, “Truth in Adjudication,” 49 Hastings L.J. 289 (Jan. 1998). Professor Damaska’s article is contained in the Hastings Law Journal Symposium, “Truth and Its Rivals: Evidence Reform and the Goals of Evidence Law” (49(2) Hastings L.J. (Jan. 1998)). I am indebted to Professor Catherine Rogers, The Dickinson School of Law, for bringing this symposium to my attention.
and clash of cultures. Baldly summarized, his explanation ran as follows: “one hears from all sides that the moral and cognitive” (and, Ginzburg might have added, legal) “principles of the various cultures are not comparable. This attitude, which in theory should result in unlimited tolerance, paradoxically originates from premises similar to those that inspire the principle equating right with might.”\(^5\) Skeptical relativism, then, comes in two versions—(1) meek (at least in intentions) and (2) ferocious—but the political distance between the meek and the ferocious cannot hide a common intellectual origin: “an idea of rhetoric that is not only foreign but actually opposed to proof.”\(^6\) Whether in the meek or the ferocious version, the limitation of relativism is that “it misses the distinction between judgment of fact and value judgment, suppressing, depending on the case, one or the other of the two terms.”\(^7\)

So where does “proof” come in, or at least where should it come in? According to Ginzburg, proof provides for the co-habitation between diverse cultures—and here we can definitely add diverse legal cultures. Without proof, each group or culture is “enclosed within its own relationship with the world,” with knowledge fragmented “into a series of incommunicable points of view.”\(^8\) Proof, as Aristotle taught and as Ginzburg reminds us, is the rational core within rhetoric.\(^9\) This proof is certainly not scientific truth; rather, it is “probable truth.”\(^10\) And rhetoric, Ginzburg observes, “moves in the realm of the probable”: it requires “the knowledgeable use of context” in order to express a shared knowledge,” and thereby achieve effective communication and argument.\(^11\)

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\(^5\) Ginzburg, supra note 1, at 2.

\(^6\) Id.

\(^7\) Id. at 20.

\(^8\) Id. at 21. Professor Damaska makes similar points in refuting skeptical relativism and concluding that the working assumption that truth is in principle discoverable should be retained: “Without massive cross-cultural convergence in the construction of reality there would be no way to explain various forms of contemporary international life…. Nor should it be forgotten that cognitive methods supply a decisive criterion of objectivity in some circumstances when social standpoints diverge.” Damaska, supra note 4, at 293.

\(^9\) Ginzburg, supra note 1, at 39.

\(^10\) Id. at 24. Historians must be satisfied with “probable truth,” because, as Adam Gopnik notes, the “past is so often unknowable not because it is befogged now but because it was befogged then, too, back when it was still the present.” Adam Gopnik, Angels and Ages 142 (2009).

\(^11\) Ginzburg, supra note 1, at 22-23.