

## COMPILATION AND PRESENTATION OF EVIDENCE IN CIVIL LITIGATION: CULTURAL TRADITIONS AND THEORETICAL TRENDS

Michele TARUFFO\*

SUMMARY: I. *Introduction*. II. *Adversarial vs. Inquisitorial procedural models*. III. *The function of civil adjudication*. IV. *The nature and function of evidence*. V. *The compilation of evidence*. VI. *The presentation of oral evidence*. VII. *Conclusion*.

### I. INTRODUCTION

The definition of the role of the parties and the judge in the compilation and presentation of evidence in civil litigation may be conceived as a crossroad where many trends converge, intersect and often confront with each other. Actually such a definition is influenced, in the various legal systems, by cultural and legal traditions, by theoretical and philosophical orientations, by political options, by policy choices, and also by procedural models and rhetorical arguments. Such a complex cluster of factors should not be dealt with—as it often happens—in parochial and legalistic ways, that is: by looking at the rules of evidence currently existing in one's own procedural system and imagining that all the rest of the world shares the same rules. Even the simple synchronic, horizontal and descriptive comparison of various evidentiary systems may end up with no more than a collection of details showing similarities and differences without providing the observer with any significant insight.

A better understanding of what happens or may happen in the “evidentiary crossroads” may be achieved by focusing upon the main as-

\* Professor of Law (University of Pavia, Italy).

pects of the cultural traditions and of the theoretical trends lying in the background of the normative solutions adopted in the most important systems of civil litigation. The purpose of this essay is to throw some light on these traditions and trends, possibly eliciting some aspects that are usually left implicit and unclear in the most frequent approaches to these topics. Of course this essay cannot include a complete comparison of all the relevant systems: scattered references to specific systems and rules will be made just in order to provide some examples. Moreover, a higher level of simplification of complex problems, and of abstraction from particular situations, is the cost that has to be paid for dealing with these topics in a reasonable number of pages of an essay, instead of writing huge volumes.

This essay is divided into two parts and a conclusion. Part I deals with some general issues such as: a) the opposition between adversarial and inquisitorial models of civil litigation; b) the function of civil adjudication; c) the nature and function of evidence in civil litigation. Part II deals with procedural issues such as: a) the methods for the compilation of evidence; b) the methods for the presentation of oral evidence. The Conclusion will include some general remarks, as well as a proposal oriented to overcome the traditional theoretical divergences and to figure out a rational system for the compilation and presentation of evidence.

## II. ADVERSARIAL *VS.* INQUISITORIAL PROCEDURAL MODELS

Much, and perhaps too much, has been written in the last decades—in the United States as well as in other countries—about the opposition between “adversarial” and “inquisitorial” models of procedure. Actually, such a distinction seems to be a sort of “evergreen”, or an always remaining (or never going away) commonplace in the cultural tradition of the Anglo-American systems. Since we are now in a horizontal society in which cultural constructs circulate all around the world, and the Anglo-American culture is by far the most influential set of legal models despite some localistic resistances, this topic may be considered as a generally interesting feature of the Western legal culture. On the other hand, substantially equivalent opposition exist also in the civil law culture, as f.i. between the so-called *Dispositionsmaxime* (or *principio dispositivo* in Italy) and the so-called *Inquisitions-* or *Untersuchungsmazime*

(or *principio inquisitorio* in Italy). However, in recent years the discussion about these general concepts seems to be much more lively in the common law countries than in the civil law area, so that there is certain reason to focus the analysis on these countries rather than upon the civil law ones. However, much of what may be said about the former can be referred also to the latter.

Some years ago, Mirjan Damaška stressed, with several good reasons, that the distinction between “adversarial” and “inquisitorial” models of procedure should be set aside, because it is theoretically poor, heuristically ineffective, and even misleading. However, this distinction seems to be hard to abandon, since even in the recent legal literature, several authors still discuss the merits and the flaws of adversarial and nonadversarial systems of civil and criminal litigation. Much of this discussion focuses upon the issue of which model of procedure should be adopted and whether or not the American system should shift from its current adversarial model to a nonadversarial one. Though the purpose of this essay is not to support one or an other alternative. Deciding the reason why a particular system deserves to be preferred and for which purposes could be an extremely difficult task that would go well beyond the limits of this essay and should be left at the end to the choices made by the political power. That it may well happen that an existing system is not the best one but deserves to be preserved, maybe to be faithful to a long tradition or because radical changes are always difficult to be introduced and accepted in the practice.

However, it is worth to make some remarks about the opposition between adversarial and inquisitorial models with the aim of clarifying some methodological points.

a) First of all there is a commonplace according to which adversarial models of civil procedure are typical of common law systems, while inquisitorial models of civil litigation are common in civil law systems. This commonplace is *descriptively false* in both aspects.

On the one hand, it may be conceded that the common law system of civil litigation, taken as a whole, used to be traditionally adversarial: it was adversarial in the long history of the English, and American civil procedure. At present, it may probably still be maintained that the American system is adversarial, at least to some extent, but the same can no longer be said about other important common law systems, such as England

and Australia. It is well known, in fact, that with the *Civil Procedure Rules 1999* the English lawmaker has abruptly and radically set aside the pre-existing and traditional version of the adversary system, replacing it with a completely different model. This is due mainly because, —as it was said by Lord Woolf, the drafter of the reform— the adversarial nature of civil litigation was responsible of the delays, costs and inefficiencies of the English system of civil justice; in his own words, the adversarial system was “likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply”. The Australian system seems also to be on the way of shifting from an adversarial to a nonadversarial model of civil litigation. On the other hand, one may wonder whether the much discussed but undeniably important phenomenon of the “managerial role” performed by modern American judges, is leaving the traditional adversarial model intact, or is it pushing the American system in the direction of a nonadversarial or much less adversarial model of litigation. Correspondingly, the statement that common law civil litigation is adversarial is no longer descriptively true, at least to a large extent.

As to civil law systems, it is also descriptively false the statement that they are essentially inquisitorial. Such a statement does not reflect the history of civil law systems since the origins of Continental civil procedure in the Middle Ages, civil litigation has been essentially adversarial. For instance the *ordines judiciarii* written in the 12th and 13th centuries and also later on (that is the procedural literature of that period, consisting of a relevant number of texts) describe a model of civil proceeding in which the parties begin the case, determine its subject matter, offer the evidence and manage the proceeding, before a judge that has very limited powers and performs an essentially passive role. The problem of whether the Medieval judge could *supplere in facto* (i.e.: to be active in determining the facts of the case) was much discussed but the negative answer prevailed the idea of an “isonomic” model has been proposed just to describe a procedural system in which the case was developed by the parties on the basis of an equal and active position before a passive judge. Moreover with the only partial exception of the Prussian procedural code of 1748, in which the role of the judge was mostly emphasized, all the European codes of civil procedure enacted in the 18th and 19th centuries followed adversarial models of civil procedure. They

vested the parties with monopolistic powers to start the case, to determine its subject matter, to allege the facts, to offer and to present the evidence. Correspondingly, these codes left the judge in a clearly passive role. This is true, for instance, for the Austrian *Zivilprozessordnungen* of 1781 and 1815, and it was specially true for the code that provided the model for all the other procedural codes of the 19th century, *i.e.* the French *code de procédure civile* enacted in 1806. Correspondingly, it was also true for the Italian 1865 code, for the German 1877 code, and for the Spanish 1881 code. All these codes were different from each other in many details, but they shared the fundamental idea that a civil litigation was essentially a *Sache der Parteien* from which the judge had to keep out waiting for the moment when the parties applied for the court's final judgment.

When, along the 20th century (but beginning with the 1895-98 Austrian *Zivilprozessordnung*) most civil law systems changed their orientations and entrusted the judge with some active managerial powers and with some powers to collect evidence on the judge's own motion, such systems did not become, and are not at present, inquisitorial. In all these systems, in fact, a civil proceeding can be started only by a party, the parties define the subject matter of the case by means of their claims and defences, the parties define the material facts of the case and have the right to offer and to present all the relevant and admissible evidence they may want. Moreover, a "right to be heard" and a guarantee of defence and contradiction are commonly provided as fundamental rights by a number of constitutional rules (see *e.g.* § 103 of the German constitution, art. 24 of the Italian constitution, and art. 24 of the Spanish constitution).

It seems clear, therefore, that most descriptions of the "inquisitorial model" which is supposed to be typically present in civil law systems, are unreliable. In particular, it seems that some American writers have rather odd ideas of the civil law systems of civil procedure. For instance, in a recent study praising the American adversarial system it is said that "the rest of the world has the inquisitorial system, in which the judge plays the pivotal role *in adducing the facts and deciding every case*.<sup>1</sup> This is simply not true, since the parties have the right and the burden of alleging the facts of the case. Another interesting example of how civil

<sup>1</sup> Italics added.

law systems are misrepresented may be found in a recent article published by Richard Posner, where he develops a comparative economical analysis of two evidentiary models, representing the adversarial common law system and the assumed inquisitorial civil law system. In the former model, the parties present the evidence to a non-jury court; in the latter the judge alone searches and compiles all the evidence in absence of the parties. It may be disputed whether or not a non-jury court is a fair description of the American system. Though, certainly for sure a system in which the judge alone does everything and the parties play no role at all, does not exist and never existed in any civil law system of civil litigation. Therefore, one may wonder about the meaning and the purpose of *playing* with fictitious models that do not represent any real procedural system.

b) Another commonplace about the adversarial system is that it is aimed at the search of truth about the facts is issue. This claim is often made in order to respond to the criticism regarding that the adversarial system does not care about finding out the truth. However, this is a puzzling way of dealing with the problem, since it is frequently said that the adversarial system is typically not oriented to discover the truth about the facts. As it has been emphasized by one of the leading authorities in this domain, an adversary system has the purpose of solving disputes rather than searching for tangible truth. This is because “a preoccupation with material truth may be not only futile but dangerous to the society”; at any rate, for the same author, discovering the truth should not be considered as a condition *sine qua non* in order to achieve justice. Similar statements underlying that truth is not included in the aims of an adversarial system, are very frequent in the relevant literature. On the other hand, one of the main criticisms that are leveled against the adversarial system is just that it does not fit with the purpose of finding out the truth about the facts. Both its supporters and critics converge in that the adversarial system is not structurally oriented to the truthfinding.

The claim that the adversarial system is specially effective in finding out the truth about the facts is also frequent, but it is, on its turn, deprived of any support. On the one hand, if it is true that this system is not structurally fit for this purpose, it is hard to believe that it is efficient in achieving it. Some authors, however, do not perceive this contradiction; for instance, Landsman is able to say at the same time that the adversa-

rial system is efficient in the search of truth and that it is not aimed for such a purpose. However, one may wonder whether leaving the parties free to clash with each other in the presentation of evidence is the best strategy to find out the truth about the facts in issue. Of course a free confrontation among different and conflicting theories and versions of a fact is an essential part of any reliable epistemology, but another essential part of such an epistemology would probably be a free, independent and neutral research about the truth about this fact. At any rate, the activity of the parties may not be sufficient to lead the court to find out the truth about all the relevant facts of the case. Actually, the parties cannot be expected to play a cooperative game aimed at a disinterested and objective discovery of the truth; they play a very different zero-sum game with the purpose of winning their case at any cost, and for sure —if necessary— at the cost of truth itself. On the other hand, nothing ensures that the free clash of the competing evidentiary activities of the parties will lead the court to finding out the truth. In fact, it cannot be reasonably assumed that the truth is by definition contained in the parties' versions of the facts, so that choosing the version of the winning party means discovering the truth. Moreover, one cannot overlook the simple reality that the parties may have several powerful reasons to conceal, distort or manipulate the truth, for instance by not offering relevant evidence that may be dangerous, or by coaching their witnesses. It should also be considered that in most cases the parties have not equal or even compatible cultural and economic conditions. The resources of a party may be limited and its possible investment in the compilation of evidence may not be balanced in comparison with the other party's investment. There may be a "weak" party (as the worker, the consumer, the poor) that is not able to make an effective use of his/her rights. Such an imbalance in the procedural positions of the parties may seriously impair the compilation of all the relevant evidence, and therefore the discovery of truth, in systems relying only upon the parties' evidentiary activities. Therefore, a system that is based exclusively upon the fighting among the parties as a method to produce a final judgment on the facts, is assuming *a priori* that the probability of finding out the truth is very low, and —correspondingly— that nobody will know whether or not the truth has actually been found.

c) Another remark that seems to be important is that the whole issue concerning the opposition between adversarial and inquisitorial models is actually much less important than it is commonly believed. On the one hand, it may be observed that this opposition has probably some relevance in criminal procedure, while its importance —if any— is lower in the context of civil litigation. Infact, most of the literature on the topic belongs to the domain of criminal procedure or deals with those systems in which —as it happens in the United States— the civil and criminal trials have substantially the same structure, and the same law of evidence applies in both procedures. On the other hand, a strong assertion of the adversarial guarantees is much more important in criminal proceedings, where the dangers of truly inquisitorial practices are often present, than in civil proceedings, where the parties' rights and guarantees exist permanently ever and the active role of the court should not be necessarily perceived as an infringement of such guarantees. Moreover, the adversarial/inquisitorial issue seems to be a specifically American concern.

Probably it happens this way because, as Robert Kagan has shown, “adversarialism” is a sort of fundamental basis of the American way of thinking the law, so that any diversion from adversarial models of procedure tends to be perceived as an attack on the essential values of American society. Things are different in other common law systems. As abovesaid, the English adversarial system has been radically reversed in 1999. The reform raised criticisms but no revolts defending any basic value of the English society, which is a good proof of the fact that the adversarial system was not (or was no longer) perceived as a fundamental value. In civil law countries some debates are being held about the opportunity of vesting courts with broader or narrower powers for the compilation and presentation of evidence. None the less —with just a few exceptions— this is perceived as a technical procedural problem rather than as a fight about essential political values.

d) A final remark is that, since both the common adversarial and the inquisitorial concepts of civil procedure are highly ambiguous and have a very poor descriptive force and no heuristic or analytical value at all, one may wonder why the discussion about these concepts is still alive in relevant areas of the legal culture. A possible explanation may be found when referring to another cultural feature of many questions that are being raised in this domain. The terms “adversarial” and “inquisitorial” are of-



ten used not with the aim of describing real existing models of civil litigation but as ideological and rhetorical weapons. The term “adversarial” is regularly used with the evident aim of conveying positive ethical and political evaluations and inducing approval of procedural systems in which the whole functioning of the procedural machinery, and particularly of the collection and presentation of evidence, is left to the exclusive and monopolistic activity of the parties. Such systems are usually presented as deeply and directly connected with the values of liberal and democratic societies in which individual enterprise is praised as a fundamental virtue and an essential right, in a political context in which a sort of “minimum” State should restrain from interfering in the private competition for the resolution of disputes. On the opposite, the term “inquisitorial” is often used, playing with the sound of the word and implicitly evoking the tragedies of the Holy Inquisition, as a means to convey negative evaluations and to induce negative ethical and political reactions toward procedural models that are centered upon an active role of the court in the search of truth. Although, as we have seen above, these systems cannot properly be defined as inquisitorial, the word is used to connect them with the phantoms of authoritarian political systems. For instance, Landsman evokes, against the search of truth that would be performed in an inquisitorial system, the spectre of drugs and torture, without observing that—at least in civil litigation—this spectre is very unlike to appear.

It seems clear that this use of the concepts is not reliable from any serious and scientific point of view; their unscientific use may explain the lack of acquiescence and strictness that characterizes most of their definitions.

### III. THE FUNCTION OF CIVIL ADJUDICATION

In the current legal culture there are various conceptions of what could be defined as the main function of civil litigation. For sake of clarity, the variety of these conceptions may be reduced to two main trends. This distinction is roughly equivalent to the distinction that Mirjan Damaska makes in his fundamental work *Faces of Justice*, but there are a couple of differences in the way of defining certain features of both sides of the distinction.

a) According to one of these basic conceptions, the function of civil litigation is to provide the parties with an institutional machinery for the resolution of their disputes. In this perspective, a civil proceeding is oriented exclusively to give an end to the existing conflict between the two individual parties of the dispute. Such a purpose is achieved when the dispute comes to an end. The process is the context in which the parties have and should have a fair and unlimited opportunity to present their positions, their arguments and their evidence, before a court. The role of the court is to deliver a judgment to stop a dispute. In a process that is oriented only to provide a dispute resolution, the parties' initiatives are the main (or even the only) dynamic factor determining the course of the proceeding. The parties begin their dispute, define its subject matter and determine specifically, with a binding effect upon the judge, the facts that—in the parties' versions of the case—need to be proved. Moreover, the parties develop the procedural sequence presenting the court the evidence available for them and submitting their legal arguments backing up the decision they are applying for. In this kind of procedure, that is essentially adversarial, the basic function performed by the court is just that of a final decision-maker. In the course of the proceeding, the court tends to perform the role of a neutral and passive umpire as to the compilation of evidence, since its main task is to ensure the fair nature of the parties' competition.

This conception about the function of civil adjudication is not theoretically incompatible with a procedural system in which the court is expected to perform a managerial role in order to achieve a speedy and efficient resolution of disputes. A managerial court may well be active insofar as the functioning of the procedural machinery is concerned, mainly in order to prevent delays and excessive costs. What is important is that such a court should not be active in the search of truth and in the collection and presentation of evidence that has not been offered by the parties further, the court should not be allowed to take into consideration any fact that the parties did not specifically indicate. In this perspective the lack of a court's power to order the presentation of any evidence on the court's own motion is considered as a factor determining the credibility and the authority of the court and of its judgments. When the parties' perception of the fairness of the proceeding and of the impartiality of the court is enhanced—it is said—the satisfaction of the parties

is also improved, and the probability that the loser will file an appeal is lower. These factors may also increase the efficiency of a dispute resolution, system since they may prevent the court from wasting time and money in collecting evidence irrelevant to the parties. A well developed conception of a “procedural justice” has been proposed in the last decades, just presenting a model of procedure based upon the monopolistic activities of the parties and the passive role of the court as *the* politically ideal and most effective model of procedural justice. On the other hand, the support provided by general theories of procedural justice as that proposed by John Rawls has led many people to believe that the justice provided by a fair procedure actually is the only kind of justice that can be concretely achieved. In a word procedural justice *is the only justice*, and it may be provided only by a judicial process intended as a fair method of dispute resolution in which the parties may play a competitive game with no interference of the court.

In general terms, there are no problems in considering the judicial process as a technique for dispute resolution that may be listed together with other means such as mediation, conciliation, arbitration, and so forth. One may also believe that adjudication has to be considered as a last resort, since it is the least convenient and the least efficient machinery for dispute resolution infact, it requires more time, more money, a complex court organization and all the paraphernalia of complicated procedures, while ADR devices may seem to be simpler, quicker and cheaper. After all, these are just the reasons that are usually adduced to explain the growing resort to ADR in most modern legal systems.

However, some disputable consequences may derive from the fact that adjudication is considered *only* as a device for dispute resolution. First of all, a conception of adjudication as pure dispute resolution takes into consideration only the *fact* that a dispute has been satisfactorily disposed off, but does not take into any consideration the *quality* of the resolution, nor it considers the *method* by which the final judgment is achieved. In other words, *any kind of decision, with any content, no matter how it is made*, is acceptable, provided it is accepted by the parties as a final solution of their dispute. Even an incorrect, inaccurate and unlawful decision may be well considered if the parties, by any reasons, decide to stop their dispute. What really matters in this perspective is the bare fact that the parties stop fighting; what does not matter at all is the content of the de-

cision or the reasons why both parties decide that their competition is over. Therefore, a decision that makes the weak one-shot dealer a loser, even when it is substantially right, is acceptable and rational, since such a party will be strongly discouraged from filing an appeal, therefore the decision will be final. Then, ironically, a rational standard would be to let the usually strong party win inevitably in every case, even if it would deserve to lose, on the merits, because if this party actually loses, it will probably file an appeal, and this is not a good method for a fast and final dispute resolution.

This way of conceiving a civil adjudication may remind us of judge Brideloye so lively described by Rabelais: he spends years leafing through mountains of papers presented by the parties, but in the end, he decides to cast the dices. In a society that may be prone to accept any sort of “random justice” for sake of efficiency in the resolution of disputes, also casting dices—as well as reading tea leaves or betting on football games—may be perceived as a rational means to get rid of disputes. After all, rationality may be intended as a culture-laden concept, which may be adapted—on the basis of social acceptance—to any kind of dispute resolution device.

These remarks may sound paradoxical, but they show some of the consequences deriving from the premise that the quality of the decision is not relevant, a premise existing in any conception of adjudication as a mere dispute resolution technique. Things do not change by virtue of the concept of “procedural justice”. There is no doubt that a just procedure (whatever it may mean, this is a clearly indeterminate concept) may be intuitively taken as a positive feature of any form of adjudication in fact no one would claim that an unjust procedure (whatever it means, this is also an indeterminate concept) is preferable to a just one. It may also be conceded that the parties, as well as the whole social context, would feel better if disputes were solved by fair and just methods rather than by unfair and unjust ones. It may even be conceded that a just procedure may have some influence in inducing the parties to believe that they were fairly treated in their day in court. What is frankly hard to believe is that the parties of a litigation would not actually care about the substantial outcomes of the adjudication, since they would be interested *only* in being treated fairly in the course of the proceeding. On the one hand, the various psychological experiments that were made in order to show that

the parties feel better in an adversarial procedural setting did not actually show that the parties are not interested in the final outcome of the dispute. The experiments were made by comparing different procedural models, but not with the aim of showing that an adversarial procedure is so fascinating by itself that the parties—and particularly the loser—will be uninterested in the substantial outcomes of the adjudication.

On the other hand, the idea that the only achievable justice is a sort of procedural fairness because no other kind of justice can be made in a judicial process, is hardly acceptable. Defining substantive justice is an old and perpetually unsolved philosophical problem, and many ideas of justice were proposed and discussed ever since Plato and Aristotle. Though, it is true only at the level of general philosophical, moral or political conceptions of justice. At the much lower and more particular—or even particularistic, but much more relevant for the parties—level of judicial decisions, ordinary people, and lawyers as well, are inclined to believe that a specific decision can be just or not just over the basis of substantial standards of decision, and not only by reference to the fairness of the proceeding. Particularly in the legal orders that are based upon the rule of law, or upon the quasi-equivalent concept expressed by the civil law “principle of legality”, one should be inclined to believe that a judicial decision’s essential factor of justice is a correct application, in the single case, of the legal rule that governs that specific situation. This is a very trivial remark, but it is necessary to draw the attention to the fact that a court is not free to choose at random the method that the court prefers while taking its decisions; the law provides the court with binding and mandatory legal standards for that. One might even say, perhaps with some reasons, that the law is not always a synonym of justice or, *à la* Derrida, that law is never just because justice is out of the court’s reach. However, law is the only available standard of justice that should guide courts in deciding cases.

b) These last remarks lead us to take into consideration the other main conception according to which civil adjudication is oriented to the enforcement of the law between the parties. This idea is only partially corresponding to Mirjan Damaška’s definition of a form of procedure that is oriented to the implementation of policy standards defined by the political power. Actually Damaška’s concept is much broader, and to some extent more indeterminate, than the one proposed here. Implementing

policy choices may be something wider than just applying the law in specific cases, or even something narrower, if we assume that not every single legal rule embodies a specific policy choice made by the State power. This is not a specially relevant problem here, however. What is worth underlying is that the enforcement of the legal rules governing the case may be considered as *the* standard that courts are bound to follow in their decision-making. Correspondingly, the quality of the judgment is important and is determined by the compliance with the substantive rules applicable to the situation in issue. *Legality* or *legal correctness* may be taken as the concepts defining the basic requirement of the judgment delivered by any court. A correct application of the relevant legal provisions is a substantial aspect of a *legal-rational* ideology of the administration of justice, as it was defined by the well known Polish philosopher Jerzy Wroblewski: an ideology that reflects very well the need of rationality and legality of judicial decisions that is deeply felt in most modern systems of adjudication.

It is clear, however, that a form of adjudication oriented to achieve legally correct decisions may work also a machinery for the resolution of disputes. Moreover, one may think that if a dispute is solved by means of a legally accurate and correct decision, it has been *well* solved. It may even be said that such a correct decision is a particularly efficient way of solving disputes. After all, the parties know –or should know– very well who deserves to be the winner and who deserves be the loser according to the applicable law. If the parties find that the court made the right decision, they may be inclined to put an end to their dispute, since also the loser knows that she was doomed to lose over the basis of a legally correct decision.

On the other hand, putting an end to disputes is only a sort of side-effect, although an important one, of legally correct decisions. The main point is that such decisions may be perceived as *substantially just*, which is the main purpose of any procedural system that is established with the aim of “making justice”. Therefore, the problem of defining when a “just decision” is achieved enters the picture. A “just decision” may be defined as a sort of algorithm combining three main factors: *a)* the fairness of the proceeding (*i.e.*: procedural justice); *b)* the correct and accurate interpretation and application of the substantive legal provisions governing the case; *c)* the accurate, complete and truthful reconstruction of the facts of the case. As Jerome Frank, among many others, pointed out, no judicial

decision can be considered just if it is based upon the “wrong facts”. Of course a decision may be unjust because of a number of other reasons: the proceeding may be unfair, the substantive law may be misinterpreted and incorrectly applied, and so forth. What is worth stressing here, since the main topic of this essay deals with evidence and proof, is that a truthful judgment about the facts of the case is a *necessary condition* (of course not a sufficient condition) of the justice of any decision. Any error in the reconstruction of the facts implies that the legal rules, although properly chosen and interpreted, are not correctly applied in the specific case. An important consequence of these assumptions is that achieving a truthful decision is one of the basic purposes of litigation; not the only purpose, and not the main general purpose—which is taking a lawful, accurate and just decision—but an essential instrumental purpose, since a lawful decision can be based only upon a truthful reconstruction of the facts.

Therefore, procedural regulations should be oriented not only to let the party develop its activities in a fair and “procedurally just” context, but also to maximize the possibility that all the relevant and admissible evidence be affectively compiled and presented to the trier of fact. Only under this condition, in fact, the court would have the opportunity of making a well based, accurate, and reliable decision based upon the relatively best reconstruction of the facts in issue. Providing a just procedure and orienting the procedure to the search of truth are not incompatible goals; on the opposite—as we shall see later on—these goals may well be combined in a consistent and efficient procedural system.

These two conceptions of the function of civil adjudication have been distinguished by means of some degree of abstraction, for sake of clarity. Indeed, it may be difficult to find real procedural systems fitting perfectly with such conceptions. Nevertheless, such general conceptions are useful at least to define a frame of reference framework in which they represent the opposite and extreme poles of a range that includes the various possible intermediate positions representing the existing procedural systems. Current systems may be inspired to a higher degree by the “dispute resolution ideal” or by the “just decision ideal”. This is a possible explanation of the variety of approaches existing in the current procedural systems of civil law as well as of common law. On the other hand, swinging from one ideal to the other seems to be a relevant feature of the modern procedural culture that moves from one pole towards the other,

or vice versa, depending upon the legal, political and social values that are prevailing at certain moment in any given place.

#### IV. THE NATURE AND FUNCTION OF EVIDENCE

Some significant cultural variations in the approaches to the topics of evidence and proof are influenced by various factors concerning the conceptions of the nature and function of evidence. This is a very complex and puzzling cluster of problems, but using once again a degree of abstraction, some relevant aspects may be outlined.

a) First of all, it should be taken into account that the conceptions of the nature and function of evidence are directly connected with more general epistemological options. In a sense, when facts and evidence are concerned in the context of adjudication, the resulting situation is not essentially different from any other situation or experience in which someone has to make a decision based upon the assessment of some facts. In theoretical terms, the judicial situation is just an instant of the general situation in which a subject has to rebuild some facts as a basis for a decision. From this point of view, general philosophical orientations are relevant in determining the approach to the function of evidence in judicial contexts. If, for instance, one follows Richard Rorty in assuming that —generally speaking— truth is nonsense and is not worth thinking or talking, he will be prone to believe that with reference to adjudication, talking of “judicial truth” is nonsense as well. His conception of evidence will then be modelled upon this assumption. If, on the contrary, one assumes that truth, although a relative and context-laden truth, may be achieved, she will be inclined to believe that something as “judicial truth” could be theoretically conceived and practically attained in the context of a judicial proceeding. His conception of the nature and function of evidence will then be modelled upon this assumption.

Dealing analytically with these general philosophical assumptions would mean to write a book about the main trends in contemporary philosophy, which of course is far beyond the scope of this essay. Suffice it to underline that this variety of opinions lies in the background of the topics concerning the nature and function of evidence, and that such a background influences directly every approach to these topics. However, it is worth to point out certain remarks about the influence *rationalistic*



or *irrationalistic* philosophical orientations may exert on procedural theories of evidence.

A rationalistic orientation implies the existence of a widespread and commonly shared belief in reason (“regardless its definition” or “no matter how it is defined”) and a reliance in the possibility of using rational means and reasonable arguments in the administration of justice. Even after the decline of the faith in one general Reason (with a capital R) that was supposed to give a consistent structure to the whole universe and to its knowledge, a rationalistic approach to the problems of knowledge is still possible, on the basis of sophisticated rational devices (such as those provided by modern mathematics and post-euclidean geometries, by various logics, by the theory of pragmatic reasoning, by artificial intelligence devices and by epistemology). Moreover, even when traditional metaphysics are abandoned, critical epistemologies claim that reasonable and acceptable approximations to the truth (in a relative sense, with a small “t”) are possible by means of reasonable inferences based upon the information available.

An irrationalistic orientation moves from the opposite belief, *i.e.* from the assumption that any rational approach to the world and its knowledge is impossible, inappropriate and misleading. Reason is considered as a sort of pigment that is used to conceal the fact that each single subject is alone on the face of the earth, with her individual and subjective reactions, feelings and emotions in any existential situation, including those cases in which the subject has to deal with “facts”. Therefore, knowledge is nothing but a purely subjective imagination of something that remains out of reach and perhaps does not even exist, or a pure act of will or power that escapes any rational analysis.

In the history of Western culture, and in the current era as well, there are several brands interact blend of rationalism and even more numerous brands of irrationalism that intersect with each other and mix up in various ways. Some of these approaches may be found at the basis of some conceptions of evidence and of its use in the context of adjudication.

A distinction between rationalism and irrationalism is a well known topic in the Continental history of evidence. According to Levy-Bruhl’s classical approach, during the Middle Age period, since the fall of the Roman empire until the 13th century, was characterized by the use of “irrational” means of proof such as judicial duels and ordeals like the

proof of fire and water, or the boiling cauldron, and so forth. Of course these means of proof are irrational to the eyes of people living in modern secularized societies, since they were based on the belief that God would have to intervene in order to save the innocent and condemn the guilty. These proofs had a clear irrational core: however, they were used for centuries not only because better evidentiary devices were lacking, but also because they were consistent with a social culture in which mysteries, witchcrafts, devils, gods and miracles were believed to be present in people's everyday life. No wonder, then, that also the decision of judicial cases was deferred to God; an irrational social culture may generate only an irrational conception of proof and decision-making.

The shift from irrational ordeals to rational evidence occurred when the Church prohibited the resort to God's judgments because of theological reasons, *i.e.* because God could not be required to intervene in mundane matters such as civil or criminal trials. However, also the philosophical and legal culture had changed: new concepts of logic and knowledge were developed and the lawyers working on the re-discovered Roman law produced a sophisticated legal culture. This culture gave rise not only to complex and mature conceptions of the *ordo judicarius*, but also to *legal proofs*, *i.e.* to types of evidence with which its probative weight was determined *a priori* and in general terms by legal rules. Legal proofs were considered, in their most developed versions, as a system, *i.e.* as a set of provisions that tended to be complete and to cover all the possible cases. This conception was well consistent with the systematic rationalistic and all-encompassing tendencies that were characteristic first of the Scholastic and then of the Renaissance and Baroque *episteme*. It was also consistent with the social culture of this era, that was faithfully reflected by the rules concerning legal proofs. For instance, the values that were ascribed to the different types of testimony corresponded to the social beliefs and biases concerning different kinds of people: in a society that was dominated by fragmentation, inequality and discrimination, it was obvious to determine the credibility of a witness on the basis of his social, economical, professional and general conditions. Being a bishop or a noble meant being a witness with a high probative value, while being a woman, a Jew, an actor or a slave meant being a bad and much less credible witness. Something similar happened with circumstantial evidence: the huge classical treatises *de indiciis ac*

*praesumptionibus*, in which the probative values of any kind of circumstantial inference were determined, may be understood as *summae* of the commonsense and background knowledge of people at that time. Models of inferences between facts were carefully framed on the basis of the culture of the time.

The other great shift in the conceptions of evidence occurred at the end of the 18th century. The *ancien regime* that collapsed with the French Revolution was based upon judges that in many cases were ignorant, corruptible and corrupt they could not be trusted as wise triers of fact, and this was one of the main explanations of the legal proof system, that functioned just by depriving judges of the power to evaluate proofs according to their own discretion. The “new” judge that emerged with the birth of modern judicial systems, in the first decades of the 19th century, was a lawyer with a professional training, a State servant, and a career judge. This judge was reliable could be trusted, and therefore the old rules of legal proof were no longer necessary. The principle of the *free evaluation* of proofs took the place of such rules, being based on the assumption that the judge would make his decision on the facts on the basis of a rational assessment of the evidence available. At the same time, the philosophical culture had changed as well: the growth of the scientific culture in the 17th and 18th centuries, and finally the philosophy of the Enlightenment that pervaded the European culture in the course of the 18th century, determined the obsolescence of the old, abstract, formalistic system of legal proofs. It was abandoned in favor of more empirical, flexible and discretionary standards for the case by case definition of the weight of proofs.

At present the opposition between rationalistic and irrationalistic approaches is still relevant not only at the level of very general philosophical theories but also at the level of the practice concerning the presentation of evidence and the evaluation of proofs.

Rationalistic approaches usually move from the assumption that proving a fact is essentially a task that may be performed by rational means: the information available provided by any kind of evidence could be processed and used as a basis for logically controlled inferences to lead to rationally justified conclusions about the truth or falseness of the statements concerning the issued facts. This is another fundamental aspect of the abovementioned *rational-legal ideology* of judicial decisions: facts

should be established on a rational basis —*i.e.* by means of rationally reliable judgments— as a necessary condition for a correct application of the law. Rationalistic approaches may have various versions depending upon the philosophical culture and the lawyers’ ability to use more or less sophisticated logical tools. Since the moment this approach emerged in the Enlightenment era, but also during the 19<sup>th</sup> and part of the 20<sup>th</sup> centuries, lawyers used what they considered the best logical model available, that is the Aristotelian syllogism. Therefore, a theory of the *factual syllogism*, as a part of a broader theory of the *judicial syllogism*, was developed as a model for the judgment on the facts; it included also a conceptualization of commonsense and background knowledges in terms of “general rules”, since such rules were conceived viewed as a necessary logical condition to build syllogistic reasonings about the facts.

These old theories are now substantially abandoned because it became clear that the syllogistic model did not fit with the real structure of the judge’s reasoning about the facts. On the other hand, this model was never faithful description of such a reasoning: it was actually a way of expressing an ideology of the judge’s role as a sort of syllogistic slot–machine. At present, several rational approaches to the judgment on the facts are aimed at providing courts with logical frameworks and rational means for fashioning rationally controlled evidentiary inferences. Various conceptual models are proposed and discussed in this perspective: most of them are based on forms of probabilistic reasoning, either in the “quantitative” or “pascalian” version of the probability calculus or in the “logical” or “baconian” version of probability as a logical confirmation of hypotheses on the basis of the available evidence. Other logical models, as the one based on the revival of the Wigmore’s “chart method” or other ones based on the logical analysis of evidentiary inferences, are also proposed with the aim of providing rational means to the decision about the facts. These models and methods cannot be discussed here in detail, but it is worth stressing that they represent a huge amount of contributions to the rationalization of the judge’s reasoning about the facts.

Irrationalistic approaches move from the opposite assumption, that is, from the belief that the evaluation of proofs *cannot* (or *should not*) be conceived or represented as a rational activity. For instance, a clear irrationalistic implication is present in many versions of the *intime conviction* standard used in France to define the discretionary power of the judge

in the assessment of the facts in issue. Here the subjective and intimate, and even emotional, beliefs of the judge are taken as the essential core of his judgment. In every legal culture, however, from time to time, it is said that the discretion of the judge in the assessment of proofs cannot help ending up in a purely subjective and mysterious act of irrational intuition or “hunch”.

On the other hand, in many of the postmodern philosophical trends, the possibility of achieving an objective truth of anything becomes a common target of sharp criticism. Within the theories of litigation, similar approaches are proposed, with similar consequences, by the radical “narrativistic” conceptions according to which a judicial process is nothing but a context of *storytelling*. Such theories claim that all what is done in litigation is telling some stories, and that the only standard by which stories may be taken into consideration is their *narrative coherence*. In this perspective the material facts of the case as empirical events, and their knowledge, are simply out of reach or are simply considered meaningless. Only the literary aspects of procedural stories, such as style, narrative structure and coherence of the story, are significant. Correspondingly, talking of evidence and inference as rational means to achieve truthful statements about the facts in issue is perceived as a sort of nonsense.

Another version of the opposition between rationalistic and irrationalistic approaches to the topics of evidence concerns more specifically the conception of the nature and function of evidence in the context of litigation. Simplifying once again a rather complex landscape, one could distinguish between the *epistemic* and the *rhetorical* conceptions of evidence.

The epistemic conception of evidence is based upon the assumption that evidence is essentially a set of information that is collected and presented with the aim of leading the court to find out a truthful reconstruction of the facts in issue. Such a reconstruction may be grounded on more or less “certain” or “probable” bases, since all judicial truths can only be relative and contextual. Nevertheless, the outcome of proofs is “knowledge”, that is; something reliable that is stated objectively about the occurrence of specific facts. Evidence, therefore, provide the trier of fact with the epistemic bases for such a knowledge and in this sense it is a means to achieve truthful conclusions about the facts of the case. It is well understandable that this conception of evidence is consistent and is usually associated with the “just decision model” of adjudication.

The rhetorical conception of evidence is not concerned with knowledge because it is based upon the assumption that evidence is just a set of arguments that are used as means to persuade the judge that a given version of the facts should be preferred to another one. The basic ideas of this conception are persuasion and subjective belief rather than information and knowledge. The aim at which evidence and proofs are oriented is to create in the judge's mind a psychological condition or status, i.e. a *persuasion* about the facts of the case. Correspondingly, the judicial decision-making about the facts is not conceived as a search for truth of the or as an achievement of knowledge, but as a choice in favor of the version of the facts that appears to be more persuasive. A version is persuasive when the stories told in the course of the process appear to be more appealing, convincing and provocative in that sense than in any other sense. Shortly the judge does not *learn* or *discover* anything about the facts on the basis of the evidence presented; he just reaches the belief that a version of the facts is susceptible of being preferred on the basis of a status of mind that was induced by his contact with the evidence.

The rhetorical conception of evidence is common in several legal cultures, probably because it is usually presented as a realistic picture of what happens in courtrooms. Actually, it may be considered as a rough description of how the parties' lawyers use the evidence, they are not interested in looking for of any "objective" truth about the facts (specially when it could be contrary to their client's interest), since they fight for victory, not for truth (unless truth might them win). Therefore, lawyers do not use evidence as a means for the search of truth but as a means to persuade the judge to decide in favor of their client. Such a skeptical conception, albeit probably faithful to the reality of the attorneys' behavior, stops at the most superficial level of description of what attorneys often are inclined to do, without providing any thorough analysis of the function of evidence in the context of judicial decision-making. Moreover, it does not take into account that the function of evidence is much more narrowly connected with the situation of the judge that has to make a decision on the facts, rather than with the tactical manoeuvres of the lawyers.

## V. THE COMPILATION OF EVIDENCE

a) As we have seen above, in both civil law and common law traditions the parties have a monopolistic power to begin a civil case and to determine its content by means of their claims and defences. It means that the parties have the power to determine also the range of the *material facts* of the case, since filing a claim or a defence actually means to indicate and to define the facts that are alleged as grounds of the claim or defence. There is no need to describe here how and when the definition of the material facts is made depending upon the structure of the various procedural models. In a system based upon a “fact pleading” model, as in most civil law countries, such an allegation has to be made in the first pleadings, with more or less opportunities to change or to amend it in the further steps of the proceeding; in a “notice pleading” system, as the American federal system, it would be made later, usually after the facts of the case have been clarified by means of discovery. However, in both systems it is up to the parties to frame up the factual content of the case.

This is true also in another sense: it is up to the parties to determine, among all the facts that have been alleged as relevant or material, which ones actually need to be proved. Usually this happens because only the *contested facts* shall be proved, while the *not contested* ones would be taken as agreed upon by the parties, and therefore they would not be considered as *facta probanda*. In other words, a party may always choose whether or not denying the facts alleged by the adverse party, and the denial works as a machinery of selection of the facts that the other party shall prove. Therefore, the parties first determine the facts in issue by alleging the facts in support of their corresponding claims and defences, and then select the facts that would be proved by corresponding the adverse party and established by the judge by contesting some, or all, the facts alleged by the other parties. These principles are rather obvious in all systems of civil litigation, but they are worth to be reminded here because they show that the “inquisitorial rhetoric” is meaningless and misleading in civil litigation, and that the definition of the *facts in issue* is made essentially by the parties’ strategic choices.

b) The other important feature concerning the definition of the facts in issue as facts in need of proof is the *burden of proof*. In extremely general terms it may be said that when a party alleges a fact indicating it as the factual ground of a claim or a defence, this party will carry the bur-

den of proving the truth of this fact, as a necessary condition to win his case. The final effect of the rules governing the burden of proof is usually that the party who had the burden of proving a fact but failed to provide the proof of this fact will lose his case; the unproved claim or defence will be rejected. There are, however, different approaches in the civil law and then common law traditions concerning this topic.

In civil law the burden of proof is generally considered as dealing essentially with the burden *of proof* or *of persuasion*. The rules governing this burden are aimed at determining which party will lose if it was not able to persuade the judge that the facts it had alleged are true. So to say, these rules determine the allocation of the negative effects of the failure of proving facts: they are considered as “rules of final judgment” because they are applied mainly at the end of the proceeding and when the court has to make its decision determining which facts were proved and which ones were not. In most cases—but with some exceptions—the civil law procedural systems do not acknowledge any sort of subjective *burden of producing evidence*; common principles applied in this domain say that when the judge determines which facts are proved and which are not, he would do it “objectively”, *i.e.* on the basis of all the evidence presented, without taking into account which of the parties actually presented the evidence. This kind of regulation implies that when a party alleges a fact as a ground of a claim, it takes the risk that this fact will “objectively” result unproved at the end of the proceeding. On the other hand, each party is in the position of knowing in advance if it or the other party will have the burden of proving any single material fact in issue, since the burden of proof is regulated by the law and the judge has virtually no discretion in allocating it among the parties. Therefore, each party may foresee who will bear the consequences of the lack of proof of each fact. Correspondingly, each party has a strong *interest* in presenting any item of evidence that is available to it, in order to maximize its own opportunity to prove “its” facts, and then to win its case eventually. So to say, it is up to each party to play its game in the sequence: allegation of facts-presentation of evidence-proof of the facts-final victory.

Common law systems, and specially the American one, are different to some extent. Two main differences are particularly meaningful here. One is the importance that—given the structure of the American pre-trial and trial phases—is ascribed to the *burden of producing evi-*



*dence*, i.e. to an essentially “procedural” and “subjective” burden that does not govern the final proof of the facts, but determines “who and when” should present the evidence in the course of the proceeding. The other difference is the possibility of the judge shifting the burden of proof from one party to another or establishing which party should prove what, on the basis of a discretionary evaluation. This power of the court is relevant and somewhat unfamiliar to the eyes of civil lawyers, who are accustomed to think that burdens of proof are—or should be—determined objectively and in general terms by the law, and that the court should not intervene by conditioning or even by determining the course of the proceeding, neither indirectly the final outcome of the case, just by manipulating the allocation of the evidentiary burdens among the parties. This is an important power of American courts, that civil law courts do not have. In a sense, then, this domain is much more court-dependent in America and much more law-dependent in Europe and in the other civil law countries.

At any rate, assuming that the parties know which facts each of them is supposed to prove, a *right to proof* is usually acknowledged to all parties. This is an important aspect of the fundamental guarantees of the parties in civil litigation worldwide: it means that each party has the right to present any item of relevant evidence at its reach to it. Theoretically, it means also that the only rule governing the admissibility of evidence should be that “all the relevant evidence is admissible”, without exception. If a party has the burden and the interest of proving “its” facts, it should have also the right of doing it and should not be limited at doing it, providing that the evidence it presents is relevant to prove the facts of the case. However, as it is well known, such a right is limited and restrained in various ways by *rules of exclusion* concerning the *inadmissibility* of certain kinds of evidence. Here, the common law and the civil law traditions diverge significantly; common law rules of exclusion are traditionally based upon the hearsay rule, that does not exist in civil law. On the other hand, some civil law systems have rules excluding witnesses from the proof of contracts, that do not exist in common law. Such differences cannot be examined in the details here; suffice it to underline that all these rules of exclusion are an exception to the fundamental right of proof. Therefore, they should be eliminated or reduced to a minimum in any system—both common law and civil law—that really wants to imple-

ment the rights of the parties to defend effectively their own case before the court. Actually the limits to the presentation of relevant evidence—as for instance in the case of the growing range of evidentiary privileges—are the most important restrictions to the full development of the rights of the parties in civil litigation.

b) Depending on the extent these remarks are meaningful, they will make sense in a “dispute resolution” model as well as in a “just decision” model of civil litigation. In both cases, actually, the role of the parties in a fairly functioning system of litigation deserves to be enhanced and fully implemented. As abovesaid, procedural justice is not sufficient to define the general concept of justice, but it is a necessary condition for the achievement of just decisions. Therefore, ensuring the right to proof of both parties is essential in any model of litigation.

However, things may be different when the function of adjudication is taken into account. In a “dispute resolution” model, that is focused upon the exclusive or overwhelming role of the parties in the development of the proceeding, and particularly in the collection and presentation of evidence, ensuring the role and the rights of the parties is not only necessary: it is *enough*. If any decision is acceptable provided the parties had any opportunity to defend their case, that’s all what is required.

In a “just decision” model enhancing the role and enforcing the rights of the parties is also necessary, but it is *not enough*. The specific problem arising in this model of litigation is that—as abovesaid—a decision requires, in order to be “just”, to be based upon a truthful reconstruction of the facts in issue. Also in this model, it is worth stressing again, the parties have the monopolistic right to begin a case and to determine the facts that should be proved, and they also have the right to offer and present all the relevant (and admissible) evidence that is available to them. The real problem, however, is a different one and deals with what is required in order to let the proceeding end up with a decision possibly including an accurate and truthful judgment on the facts.

This problem could not be specifically relevant if one assumes that a free competition, or even the clash or the fight, of the parties is a good and effective means to elicit the truth of the facts. If it were so, one could conclude that even a pure “dispute resolution” model is able to produce accurate and truthful decisions, as some supporters of the “adversarial system” claim. According to such an assumption, the purpose of a truth-

ful decision could be pursued and achieved just by vesting the parties with all the powers and opportunities that any type of modern civil litigation actually provides. However, the prevailing attitude is clearly skeptical about the possibility that accurate and truthful decisions on the facts may result *just* from the free competition of the parties in the presentation of evidence. As we have seen above, there are many reasons to believe that the parties, if left alone, would not or could not fight for achieving of a well informed, accurate and truthful decision, even assuming that their powers, interests and rights are completely and effectively implemented. On the other hand, also the basic assumption supporting the ideal of a “passive judge” as the optimal trier of fact may be questioned. In its classical versions, this assumption is that the judge should be passive in order to preserve his impartiality, since an active judge participating in the collection of evidence would not be neutral and impartial in his final decision on the facts. This argument may seem *prima facie* concincing but —so to say— it proves too much. If it were valid, it would mean that neither a scientist could be reliable nor the results of his research if it were valid, it would mean that neither a scientist could be reliable, nor the results of his research objective because he was active in doing that research. A historian should not be active in searching for documents; a biochemist should not be active in performing tests, and so forth. This argument is clearly absurd when referred to scientists, but it seems no less odd when referred to a judge. If there is a danger of bias in the judge that plays an active role in the compilation of evidence, such a danger should be counterbalanced by an effective enforcement of the parties’ procedural rights, rather than maintaining the ideal of a passive judge.

Many civil law systems of litigation are oriented to follow a “just decision” rather than a “dispute resolution” model . This is the main reason why these systems moved away from models of litigation that were traditionally based only upon the competition and the activity of the parties in the collection and presentation of evidence, towards different models, in which the rights and powers of the parties are preserved and maintained, but an active role of the court is provided just in order to enhance the opportunity to achieve just decisions based upon truthful reconstructions of the facts in issue. This trend has led to different outcomes, due to the influence of complex historical and ideological factors

that cannot be examined here. Suffice it to say that in current procedural systems the prevailing orientation is in the sense of vesting the judge with significant powers to order the presentation of evidence on the judge's own motion: the most developed system is, from this point of view, the one enacted in the 1976 French *code de procédure civile*, where art.10 says, stating a general principle, that the judge has the power of ordering *ex officio* the submission of all the legally admissible items of evidence. In the current Chinese code of civil procedure, the collection of all the relevant evidence is one of the fundamental tasks of the judge. In Italy the judge has a similar power in labor and landlord–tenant cases, while in ordinary cases he may order some items of evidence since other items –such as testimony– can be presented only by the parties. In Germany the court may order on its own motion the presentation of any evidence except testimony. Other civil law systems are oriented to provide the court with broad powers to order the production of evidence not offered or requested by the parties, the only relevant exception apparently being the Spanish *Ley de Enjuiciamiento Civil* enacted in 2000. As to the common law, it may be stressed that the English *Civil procedure Rules* do not provide the judge with powers to order the presentation of evidence, but the judge may ask the parties to present the evidence that appears to be relevant: the practical outcome is equivalent to that of having the judge order directly the presentation of evidence on the judge's own motion.

Taking this widespread trend into account, and without going into a detailed analysis of the various procedural systems, it seems important to interpret correctly the meaning of the function that is ascribed to the court in the compilation of evidence. First of all, it is clear that the “inquisitorial rhetoric” has nothing to do with it. A court that has a power to order *ex officio* the presentation of relevant items of evidence is “active” but not “inquisitorial”, since these powers of the court are exercised in the context of a proceeding in which the parties have all the powers and the abovementioned. On the other hand, the court is under no obligation or duty to go searching for the truth beyond the structural limits of civil litigation; only the alleged and contested facts need to be proved, and the court usually has no power to insert further and not alleged material facts into the factual subject matter of the case. Moreover, the court cannot rely upon any *private knowledge* of the case and is not allowed to make

private investigations possible items of evidence. In order to make use of its powers, the court has to rely just upon the information contained in the files, documents and about records of the case. Therefore, never does a judge become sort of a police officer or a prosecutor who searches anywhere for evidence about the facts in issue.

One more, and most importantly, the judge may decide whether or not to use his powers in full discretion. Such a discretion may be influenced by some standards. In general it may be said that the judge will be inclined to use his powers when he comes to believe that the parties did not present enough evidence or all the available evidence, and therefore the truth will not be discovered. But even in this case, the judge may decide not to use his powers, with the consequence that if some facts will not be proved at the end, the case will be decided according to the principles governing the burden of proof. Actually, a criticism that is often made about the current practice in several civil law countries is just that judges do not make a sufficiently intensive use of their evidentiary powers, even when they could have good reasons to use such powers. Then a theoretically “active” judge is often a “passive” one who would rely only upon the evidence that is presented by the parties.

At any rate, it seems clear that even when the judge is vested with the broadest powers of ordering *ex officio* the presentation of evidence, and even when the judge makes an effective “active” use of his powers, she is always playing a *subordinate* and *supplementary* role. So to say, the judge’s role is just that of filling the gaps in the parties’ presentation of evidence, not that of confronting crushing the parties, and even less of excluding them and taking their place in the collection of evidence. Correspondingly, when the judge decides that the evidence presented by the parties is not enough to reach an well based and accurate decision on the facts, and that the presentation of other evidence is possible, and therefore orders the presentation of such evidence, he is only trying to enhance the possibility of achieving a just decision on the facts.

Given this function of the evidentiary powers that are given to the judge, his position and function may be defined as “moderately active” in supplementing the parties in their presentation of evidence. Then, any ideological implication or overtone based upon a connection between this function of the judge and political authoritarian models seems to be out of place. It is true that the active evidentiary role of the judge is pro-

vided in systems that are interested in the achievement of just decisions based upon accurate and truthful reconstruction of the facts in issue, but such systems cannot be considered as authoritarian —let alone as fascist or communist— just because they follow this model of litigation. Actually, a political system may be authoritarian even when its model of litigation leaves all the evidentiary powers to the parties, as it was for instance in the Austrian *Zivilprozessordnungen* of the late 18<sup>th</sup> century, while an active role of the judge in the collection of evidence may be present in politically democratic systems, as it happens in most modern countries. The fact that also in some authoritarian political systems the judge may be vested with some active powers in the collection of evidence, (as it happened for instance —but in a very moderate way— in Italy with the 1940 code of civil procedure), does not demonstrate that such powers are a typical symptom of an authoritarian inclination of the political context.

However, the definition of the role of the court in the collection of evidence may be connected with factors concerning the conceptions of the function of litigation and the function of evidence. If it is assumed that evidence performs only a rhetorical function and no epistemic function, and that civil adjudication is not oriented to find out the truth of the facts in issue. Then it is easy to believe that all the judge has to do is to stay passive and still, waiting to be persuaded by the more skilful of the competing lawyers. The persuasive lawyer—that is, the rhetorically more effective one in using evidence—will deserve to win, while the less persuasive lawyer deserves to lose. The function of the court is only to establish which of the two has succeeded in making the court believe that is was right. In such a conception of the judicial context, it is clear that the court should play no active role at all in the compilation of evidence. The judge could not be required to do anything in order to persuade himself that plaintiff rather than defendant deserves to win: in a rhetoric game the subject that has to be persuaded should stay passive while the participants argue in their respective behalf. If, on the contrary, the basic assumption is that evidence performs an euristic and epistemic function in providing the court with reliable information, and that adjudication is aimed at achieving possibly truthful decisions, then an active role of the court may appear not only admissible but useful and perhaps necessary for such a purpose.

## VI. THE PRESENTATION OF ORAL EVIDENCE

In any system of litigation oriented to find out the truth about the facts in issue, an important aspect is the method by which oral evidence is presented to the court: it is intuitively clear, in fact, that truth is more likely to be elicited from witnesses if they are examined in efficient ways, while inefficient method of examination would leave the witnesses' real knowledge undiscovered and their credibility unchecked. As to such methods, two main traditions exist in the history of evidence and in the current systems of litigation.

In the Anglo-American systems, as it is well known, the fundamental method for the examination of witnesses (including parties and experts) is that of a direct and cross-examination carried out by the parties' lawyers. The basic assumption underlying the use of this method is that witnesses "belong" to the parties: a party calls "his own" witnesses and examines them directly: this party expects that "his own" witness will testify in his favor. The other party will cross-examine the "hostile" witness in order to attack the witness's credibility in any possible way, with the aim of showing that the answers given by the witness in direct examination are not reliable. Although the witness is examined under oath, and a false testimony is sanctioned as a perjury, it is considered as normal that the witness testify in favor of "his" party. The historical origin of this method of examination is probably connected with the English jury system and with the emergence of the lawyers' role in England. It was then sanctified by John Henry Wigmore with his famous statement that "cross examination is the greatest legal engine ever invented for the search of truth". Wigmore's opinion is based upon the assumption that the "mental duel" engaged by the lawyers and the witness is an efficient epistemology for drawing out of the witness whatever he knows about the facts and for checking his credibility. Such an assumption may be questioned in many ways, mainly if one takes into account the frequent and sometimes devastating criticisms that are addressed not to the method itself but to its frequent abuses it commits. Moreover, if one looks at the suggestions that are given to the frequent abuses against to the good cross-examiner it is hard to believe that such a lawyer would be really inclined towards an effective search of truth, rather than to "destroy" the unfavorable witness. One may also wonder whether the faith in the efficiency of this method for the search of truth is based upon a

real and well-founded experience, or is it a way to justify one of the clearest expressions of the competitive and adversarial spirit that inspires several features of the American system of litigation. At any rate, if the method is considered alone itself without considering its abuses, one may believe that the combination of direct and cross examination may be a reasonably efficient system to obtain all the possible information the witness may have and to check the reliability of his statements.

In the civil law tradition the presentation of oral evidence is modelled on the ideal of an impartial, neutral and systematic inquiry that is carried out by the judge. The model is that of a scientific and disinterested research aimed at eliciting an “objective” truth, rather than that of a contest or a fight among interested parties. This model emerges under the influence of the scientific revolution in the 17th and 18th centuries, which gives rise to the figure of the impartial scientist devoted to the search of truth, and of the new conception according to which the State is interested in the search of objective truth in the context of litigation. The so-called “asymmetrical” model of litigation, centered upon the role of the judge in the collection and presentation of evidence, reflects this conception.

As to the methods for the presentation of oral evidence, it means that the judge examines the witness with the aim of eliciting whatever the witness knows and of checking his credibility. This historical tradition underlies all the modern civil law systems. With only a few exceptions recently emerged under the influence of Anglo-American models, the typical civil law method for the examination of witnesses is based upon a hearing in which the witness appears before the judge, takes the oath to tell the truth, and the judge asks him questions concerning the facts of the case. The parties play no role or just a little role in the examination; at most, they are allowed to ask some additional questions with the purpose of clarifying the witness’s statements. This being the fundamental model, some further aspects should be taken into account in order to understand it wrongly. One of these aspects is that in most cases the witnesses are actually chosen and called by the parties. When a party applies for the admission of a testimony he has to identify the witness and to specify analytically the facts on which the witness will be heard, also because the relevancy of the testimony is checked by the judge by reference to such facts. Then the judge will examine the witness on the facts that have been specifically indicated by the party who called the witness. The judge is substantially bound to comply with such an indication of the



facts: he may usually ask the witness only supplemental questions aimed at clarifying these facts. The examination may also be less formal, although it always has to deal with the facts indicated by the parties: the judge may let the witness tell freely whatever he knows about the facts, and then ask him more specific questions.

Two main remarks are worthy about this method for the examination of witness. The first remark is that the judge does not make an independent and freewheel inquiry in an inquisitorial style. The judge examines the witness, but the parties determine the subject matter of the testimony. The judge (and the parties) may check the credibility of the witness by asking questions concerning for instance the relationship of the witness with the parties or with the subject matter of the case, but usually this is a short and relatively less important part of the examination.

A second remark is that, although most witnesses are called by the parties, all witnesses are assumed to be neutral, impartial and disinterested: their function is to cooperate with the judge by helping him to achieve an informed and objective reconstruction of the facts. In a sense, then, the witness is a sort of “officer of the court” and his obligation to tell the “objective” truth and not to favor a party is taken very seriously.

A further remark is that this method has considerable disadvantages deriving from the fact that its effectiveness depends upon whether or not the judge is actually oriented to the search of truth, which is rather unfrequent in bureaucratic judicial organizations. Using witnesses as an effective means of information requires not only a generally active judge, but also a judge that knows very well the factual aspects of the case and that is willing to spend time and energy in using his powers for a thorough examination of witnesses. Sometimes it happens, but in many cases the judge is idle and sloppy—as many bureaucrats are—and is not really interested in searching for the truth. Then he will not make an effective use, or any use at all, of his powers. He will hear the witness, but without actively pushing the examination deeply into the witness’s knowledge of the facts, or without checking effectively his credibility. The outcome of this practice is that the testimony is underutilized and much of what the witness knows remains undiscovered. Correspondingly, there are some reasons to believe that the method based upon the judge’s examination of witnesses is frequently inefficient as a device for the discovery of truth.

## VII. CONCLUSION

The set of distinctions and oppositions described in the preceding pages is a simplified but sufficiently realistic way of representing the background of the main evidentiary systems. Of course the picture cannot be complete, but at least the most important lines of the landscape may be identified. However, these oppositions should be intended, to some extent, as the poles of continuums in which specific procedural systems could be placed at different distances from the extremes. For instance, a particular system of litigation may be more oriented to the “dispute resolution model” than to the “just decision model”, or vice versa, depending upon which features of one model or of the other model it includes. Moreover, these distinctions reflect the core of the current “state of the art” of the procedural systems considered, but many features of these systems cannot be fully appreciated without looking at them in their historical context. In many countries relevant changes occurred in the last few years, and procedural reforms are announced in many other countries.

However, the various diverging systems, and the current theories describing the opposition between party-oriented and court-oriented models for the collection of evidence, share the same implicit assumption, usually without being fully aware of it. Such an assumption may be labelled as a “cake theory” of the roles of the parties and of the court. So to say, the powers concerning the compilation and the presentation of evidence are conceived as a sort of unitary set (the cake) that is shared (by cutting different slices) between the parties and the court. In such a vision the powers of the parties and of the court are conceived as complementary, in an inverse proportional relationship, so that when one set of powers decreases the other increases, and vice versa. It is then assumed that when the parties’ powers are broad the court’s powers should be narrow, to the extreme that when the parties have “all” the powers the judge should be completely passive; while when the court has some powers the parties would necessarily have “less” powers, to the extreme that when the court has “all” the powers the parties would be reduced to inaction. Using the same image in a more analytical way, one might think of a three-level cake, or one with three concentric circles: a broader one, in which managerial procedural powers are shared by the parties and by the court in complementary ways (where more “adversarial” powers of the parties imply a passive judge, and an active judge implies li-

mitations of the parties' powers to prosecute their case); an intermediate one, in which the parties and the court share among themselves the powers concerning the compilation of evidence (where if the parties have more powers to offer evidence the court has less powers to order the presentation of evidence on the court's own motion, and if the court has more powers than the parties have less powers); and a smaller one, concerning the presentation of oral evidence (where if the parties may examine witnesses then the court has no role in it, while if the judge examines witnesses than the parties have no role in it).

Although this way of thinking is rather common in the legal theory and is followed by some lawmakers, the conception that may be visualized by means of the cake metaphor is far from being granted. Actually the rights and powers of the parties and the powers of the court do not form a homogeneous set of devices that may be used *either* by the parties *or* by the court. The procedural rights of the parties and the managerial powers of the judge are not the same thing and do not belong to a unitary set: the roles of the parties and of the court are structurally different and each role has its own procedural devices. What is proper for a party, being a party's right or power, cannot be "transferred" to the judge; what is proper for the judge, being a power of the court, cannot be "transferred" to the parties.

On the other hand, the parties' rights and powers may be fully acknowledged and enforced even when the managerial role of the judge becomes particularly strong: in England, the 1999 *Civil Procedure Rules* greatly expanded the managerial function of the judge, but the rights of the parties did not weaken and were not impaired. In France the *code de procédure civile* vests the court with broad powers to manage the proceeding (see *e.g.* article 3), but at the same time the parties have all the rights to defend their case (see *e.g.* article 1, 2, 4,14), and the judge is obliged to ensure that the parties' "right of contradiction" is enforced in all the phases of the proceeding (article16).

Similar remarks may be made about the powers concerning the presentation of evidence. For instance, if a court has the power to call witnesses on the court's own motion, it does not deprive the parties of the right to call their own witnesses. Just the opposite: the parties may be induced to call more witnesses just in order to react to the court's initiative. Correspondingly, the fact that the parties have the right to call witnesses does not logically imply that the court should not have the power to call

witnesses on its own motion, although the court may not find useful to call further witnesses if the parties provided the court with enough evidence to decide on the facts. If, as it sometimes happens, the court has no autonomous powers to call witnesses, this limit has to be justified on independent reasons, not just by referring to the fact that the parties have the power to call their own witnesses.

Again, the examination of witnesses is not a thing that should be divided complementarily among the parties and the court, since there is no inverse proportion between the right of the parties and the power of the court to ask questions to a witness. Actually both the parties and the judge may actively examine the same witness without depriving each other of the power of doing it.

These rather obvious remarks should lead to set aside the “cake theory” as a misrepresentation of the relationship between the rights of the parties and the powers of the court. A different and correct approach should move from the assumption that the rights of the parties and the powers of the court could and should combine with each other, rather than to exclude each other, in a synergy or in a sort of cooperative game. In a word: if we start from the premise that civil adjudication is oriented to achieve just and truthful decisions, then we may imagine how *to maximize* the chances of obtaining such a result. A way of maximizing such chances is not that of emphasizing the role of the parties *instead of* the role of the court, or vice versa, but just that of *summing together* the rights and powers of the parties and the powers of the court, conceiving them as sets of devices converging towards the collection of all the available items of evidence. If the parties *and* the court are allowed to present all the relevant evidence, this would maximize the chances to achieve an accurate and well informed decision on the facts in issue. Such a solution is well regulated in the already mentioned French *code de procédure civile*: while there is no doubt that the parties may offer all the evidence that is available to them, and are obliged to exchange all the information in order to let the other parties prepare their defences (art.15), the judge may order on her own motion the presentation of all the admissible evidence that has not been offered by the parties (art.10). Moreover, the cooperation of the parties with the judge is provided as mandatory by article 11 of the *code*.

As to the presentation of oral evidence, if a witness is examined by the parties *and* by the judge, the chances of eliciting from the witness all what he knows about the fact, and of checking effectively the witness's credibility, would be maximized. A similar method for a joint examination of witnesses, in which direct and cross-examination and the judge's examination are combined together, is provided in the Japanese code of civil procedure, and also in the ALI-Unidroit project of *Principles and Rules of Civil Procedure for Transnational Disputes*.

The preceding pages should have shown that cultural traditions and ideological implications are important and meaningful in order to understand and to explain many relevant features of the various systems for the collection and presentation of evidence in civil litigation. However, cultural traditions may change or may become outdated, and ideological implications may become a constraining obstacle to the development of efficient systems of justice. Going beyond old-fashioned traditions and ideological constraints may lead to adopt a functional approach: it should be based upon clear choices about the purposes of civil adjudication and should include corresponding normative devices. If the choice is in favor of a "just decision ideal" of civil adjudication, as it is in most modern systems, then the effort to maximize the chances of collecting and presenting all the reliable information, and of checking the reliability of such information, seems to be the best rational approach to the problems of evidence.