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EDITORIAL
“NEMO CONTRA SE TENETUR EDERE”:
THE CURIOUS CASE OF DISCOVERY IN CIVIL LAW,
ESPECIALLY IN ITALY

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1. Like many legal principles we rely on daily, “Nemo contra se tenetur edere”—meaning no one can be compelled to give evidence against themselves—does not have noble Roman origins. In fact, the Romans were quite accustomed to disclosure. Nevertheless, this principle dominates within civil law systems.

A quite recent article by a prominent Italian scholar of Roman law has once again demonstrated that secrecy in ancient Rome was not considered a virtue, but rather the opposite¹. For example, the confidentiality of a will was an exception, intended to protect its integrity from tampering and falsification².

In this editorial, I will briefly examine this principle in the context of obtaining documentary evidence from the opposing party.

Why is this subject important? The primary motivation lies in the numerous statements we draft in EU countries due to EU legislation, which often seem to conflict with the general principle of “nemo contra se tenetur edere”. Several EU directives mandate extensive disclosure, such as in antitrust dam-

¹ F. Arcaria, Il “dovere di verità”. Contributo alla comparazione tra la deontologia forense italiana e l’esperienza giuridica romana, in *Teoria e storia del diritto privato*, 2019, 1 ff.

² R. Orestano, Sulla problematica del segreto nel mondo romano, in *Il segreto nella realtà giuridica italiana*. Atti del Convegno Nazionale, (Roma 26-28 ottobre 1981), Padova 1983, 95 ff., 143.

ages (2014/104) and representative actions (2020/1828). Even before these European legislative measures, international agreements had pioneered access to relevant documentary materials held by the opponent, which were then incorporated into national laws.

At the World Trade Organization level, the TRIPS agreement since 1994 has required member states to allow extensive disclosure in copyright and intellectual property proceedings³.

These are just three areas, but they are quite significant. Furthermore, when we consider that most contemporary cases are proven through documentary evidence rather than witness testimony, we can fully appreciate the importance of the process of obtaining documentary evidence.

In this discussion, cannot be overlooked the current challenges posed by digital evidence and artificial intelligence in evidence gathering, which transcend national borders.

The scenario outlined requires precise reference points and carefully defined boundaries, necessitating a search for common ground between various national legal and procedural systems.

The interconnection with discovery systems, now prevalent in transnational litigation, necessitates that civil and common law systems seriously consider building a common understanding⁴. In my view, the best approach is to look to history to find common roots within national legal systems.

2. When I began this research, I started with the following questions: Why is there such a significant difference in the mode of evidence gathering between civil law and common law countries? Why, in this part of Europe, are we so concerned about the principle of *nemo contra se tenetur edere* when it seems to be of little concern in England and other common law countries?

The discovery process (now called “disclosure” in England and Wales) seems to starkly contrast with the principle of *nemo contra se tenetur edere*. So where does this discovery process originate? It did not take long to realize that “discovery,” as a method to access documents before trial, was initially conceived in Chancery courts to compensate for the absence of this method of the taking of the evidence in common law courts.

The rigid formalities and often vague content of writs in common law courts prevented parties from knowing what evidence their opponents possessed, hindering their ability to present an adequate defence. Consequently, parties began appealing to the Court of Chancery to obtain orders for the discovery of documents. These documents would then be presented in proceedings before common law courts.

³ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) at the World Trade Organization, Marrakesh 1994.

⁴ G. Gioia, *L'acquisizione delle prove all'estero tra scontri di sistemi e necessità di raccordo*, in *Studi in onore di Nicola Picardi*, (Pacini) Pisa 2016, 1235 ff.

What surprised me the most was discovering that the Court of Chancery was led by bishops who were educated in Roman law. This led me to suspect that the bishops, in developing the concept of discovery, drew upon Roman legal traditions.

The prevailing opinion is that Roman law did not mandate the discovery of documents from the opposing party (or a third party), except for those documents owned by the claimant but temporarily held by others. This was facilitated by a specific legal action known as “*actio ad exhibendum*”.

To my knowledge, there has been little research into the history of this area, apart from a little-known Roman law scholar from Spain⁵.

The Romans did have a concept of document discovery from the opposing party, not limited to the “*actio ad exhibendum*” but also encompassing the “*actio de edendo*”⁶. The “*actio de edendo*” included the “*edictio actionis*”, intended to support any legal action, and the “*editio instrumentorum actionis*”, intended to provide evidence, both issued by the praetor. Failure to comply with the latter order led to prosecution, while failure to obey an order for “*editio rationum*” (disclosure of accounts) resulted in compensation. Additionally, significant disclosure rights were granted to bankers’ clients, likely influenced by ancient Greek law.

Many other examples of document disclosure exist in Roman law, such as actions for the return of documents after a debt was paid and the powerful “*interdictum de tabulis exhibendis*”, which benefited anyone with an interest in a testament.

Thus, it can be said that the Romans developed mechanisms for the discovery of documents from the opposing party or a third party in critical areas of law, or wherever it was necessary. While property transfers were proven by witnesses and did not require document discovery, the concept of proving a case by requesting documents from the opposing party was robust, both in substantive and procedural law. In procedural matters, the duty to disclose was often derived from the principle of “*aequitas*” (meaning equity).

3. During the Middle Ages and the Modern Era, prominent jurists dedicated extensive sections of their essays to the topic of document disclosure. Continuing the traditions of earlier periods, discovery was treated and enforced as both a procedural rule and a rule of subjective law in various areas, particularly concerning commercial documents.

While the concept of discovery was evolving in England, on the other side of the Channel, the notary system was taking root since the 12th century, beginning with Irnerio. Notaries initially drafted deeds and worked for judges for similar purposes but eventually gained significant authority in the evi-

⁵ A. Fernández Barreiro, *La previa información del adversario en el proceso privado romano*, 1969, 1 ff.

⁶ From “*edere*” meaning to disclose.

dence-gathering process. Even testimonies were eventually turned into documents.

Notaries, much like today, drafted important deeds and provided copies to both parties. If a copy was lost, it could always be requested again from the notary. Therefore, it can be argued that one reason because discovery did not develop in continental Europe as it did in England was the establishment of the notary system, which did not occur in the same way in England.

Commercial cases, where access to evidence was crucial, were the primary focus for powerful discovery mechanisms in continental Europe. Notaries typically did not intervene in these cases, which led to the development of robust document discovery processes specifically for commercial documents.

Prominent jurists devoted extensive sections of their essays to the topic of document disclosure. Continuing the tradition of earlier periods, discovery was treated and enforced as both a procedural rule and a rule of subjective law in various areas, especially those related to commercial documents.

Essays from the 16th and 17th centuries on the subject reveal that the goal was not to ban discovery but to regulate it and establish boundaries to prevent abuses.

Another principle emerged during this time: "non sunt sumenda arma de domo rei" (it is not permitted to force the opponent to provide weapons against themselves). While the right to obtain documents could sometimes be misused to overpower others, it was universally accepted that the need for evidence gathering could not be hindered by the *nemo contra se tenetur edere* principle.

4. The Enlightenment significantly addressed the excesses of the previous eras and emphasized the principle of *nemo contra se tenetur edere*, which until then had been the exception rather than the rule. The Enlightenment also introduced the related principle of "*nemo tenetur se detegere*", aimed at abolishing torture as a standard method to extract the so-called truth. Notably, torture had been used not only in criminal cases but also in some important civil cases.

Despite these advancements, the Enlightenment could not eliminate the practice of discovery. Subsequent legislation, particularly the Napoleonic Code, incorporated discovery into numerous rules.

In pre-unification Italy, almost all civil procedure codes addressed the requirement for the discovery of documents from the opposing party. The absence of general rules on discovery in the Italian unification's civil procedure code may have resulted from the extensive provisions for obtaining documents in both the national Civil Code and Commercial Code.

5. When the current Italian Code of Civil Procedure was established in 1940, it included a general rule for obtaining documents from the opposing

party⁷. However, numerous caveats were included to limit its application⁸. Consequently, scholars and judicial decisions have been, and continue to be, extremely cautious in its implementation⁹.

The result is a very limited duty of disclosure: the system provides only minimal means to enforce a judge's order for disclosure. Failure to disclose documents can be used by the judge as an argument in their judgment (*argomento di prova*)¹⁰. Recently, the legislature introduced a weak monetary sanction for non-disclosure¹¹. This has led to undesirable uncertainty, illustrated by conflicting judgments regarding the discovery of bank documents¹².

To reduce the number of lawsuits against banks, some courts deny the procedural right to obtain documents unless the substantive right has first been exercised out of court.

For instance, in divorce cases, civil courts cannot compel the tax office to produce a spouse's income tax return. The requesting spouse must apply to the administrative court, incurring additional time and costs¹³. The recent reform of family court proceedings seeks to address this gap with specific disclosure provisions¹⁴.

In tort law cases, particularly complex ones like antitrust litigation, companies need documents from the opposing party to prove their case, such as demonstrating a dominant position and its abuse. The difficulty in proving liability is sometimes mitigated by laws that enforce disclosure for specific documents, such as bank records or medical records, or by *prima facie* evidence or legal presumptions established by the courts.

⁷ See Articles 210 – 213 CPC: “il giudice istruttore, su istanza di parte, può ordinare all'altra parte o a un terzo di esibire in giudizio un documento o altra cosa di cui ritenga necessaria l'acquisizione al processo”.

⁸ Some requirements: well determined documents (art. 94 disp. att. CPC) and evidence of possession; indispensability; without serious damages; without forcing the violation of secrets punished as crimes.

⁹ G. Ruffini, *Produzione ed esibizione dei documenti*, in *Riv. dir. proc.*, 2006; 433 ss.; A. Graziosi, *L'esibizione istruttoria nel processo civile*, Milano, 2003; B. Cavallone, *Esibizione delle prove*, in *Dig. disc. priv.*, sez. civ., vol. VIII, Torino, 1991; V. Sparano, *L'esibizione istruttoria nel processo civile italiano*, Milano, 2003; B. Ficcarelli, *Esibizione di documenti e discovery*, Torino, 2004.

¹⁰ See Article 118 CPC.

¹¹ If the party does not comply with the order without justified reason, the judge sentences them to a fine ranging from 500 euros to 3,000 euros. If the third party does not comply, the judge sentences them to a fine ranging from 250 euros to 1,500 euros.

¹² See Art. 2711 c.c. Disclosure of accounting ledgers. On banks documents, see Directive 2004/109/EC: Art. 1.1. 'This Directive establishes requirements in relation to the disclosure of periodic and ongoing information about issuers whose securities are already admitted to trading on a regulated market situated or operating within a Member State'.

¹³ See Cons. Stato, Ad. Plen., 19/20/21 2020.

It is possible to ask the judge for an assessment of actual income through the tax police. See Arts. 337-ter CC, 736-bis.2 CPC (for children); Art. 5.9 l. 898/70 (for divorce)

In practice, however, it is a little used means also because there are limits to the acceptance of the request: if there are no concrete elements from which to infer the existence of hidden income (or a minimum indication) they cannot be requested since it would be a purely exploratory instance.

¹⁴ See Art. 473.bis.44 CPC.

However, both *prima facie* evidence and legal presumptions are not typically provided by law but are judicially created to resolve individual cases and subsequently adopted as jurisprudential principles for similar cases. This judicial principle can relieve the favored party from the burden of proof, placing an onerous burden on the opposing party.

6. In Germany, § 142 ZPO governs the discovery of documents and § 144 ZPO covers their inspection. An order to obtain documents from the opposing party or a third party is permitted only if a specific substantive law mandates their disclosure. However, a judge can order the disclosure of any document referenced by the parties. Inspection, on the other hand, is at the judge's discretion and does not require substantive law for the requested documents. The scope of inspection is broad, including digital documents¹⁵. Requests for disclosure or inspection must pertain to specific items and cannot be generic or cover groups of documents. Notably, there are no penalties for refusing to comply with court orders for disclosure or inspection. The judge may apply § 427.2 ZPO, which allows them to accept the requesting party's statements about the document's quality and content or the object's characteristics as proven.

The structural differences in evidence gathering compared to common law have fuelled debate among German scholars regarding U.S. discovery practices. This controversy is closely linked to the rejection of U.S.-style class actions and, more importantly, punitive damages.

7. In France, significant changes were made to the traditional Enlightenment-era approach in 1975 to address the growing number of tort and divorce cases. The amendments aimed to enhance the protection of rights by broadening the scope for obtaining documents from the opposing party. The French system allows for disclosure both before and during proceedings (Arts. 138-142 CPC)¹⁶. Judges' orders for disclosure can be accompanied by an "astreinte", a strong penalty payment. According to these articles, a party may request the judge to compel the production of documents held by another party if these documents are necessary for resolving the dispute and sufficiently well-defined for their existence to be verified. General requests for all documents, letters, emails, etc., whose existence is uncertain and relevance unproven, are not enforceable.

¹⁵ The BGH makes a distinction between document taken for its contents and document taken as an object, like the one used to prove the validity/invalidity of a signature.

The provision of § 144 ZPO (inspection) serves to provide the court with the necessary understanding or expertise *ex officio* for the correct understanding of the party's submissions. However, its purpose is not to establish the factual basis required for this in the first place.

¹⁶ L'obtention des pièces détenues par un tiers or une partie (Articles 138-142 CPC).

Article 138: Si, dans le cours d'une instance, une partie entend faire état d'un acte authentique ou sous seing privé auquel elle n'a pas été partie ou d'une pièce détenue par un tiers, elle peut demander au juge saisi de l'affaire d'ordonner la délivrance d'une expédition ou la production de l'acte ou de la pièce.

Article 142: Les demandes de production des éléments de preuve détenus par les parties sont faites, et leur production a lieu, conformément aux dispositions des articles 138 et 139.

8. In Spain, the “Deber de exhibición documental entre partes” is established by Articles 328-334 LEC (Code of Civil Procedure). The law specifies the consequences of refusal to exhibit. The court, considering the remaining evidence, may attribute probative value to the version of the document’s content provided by the requesting party. Failure to comply with the order is a criminal offense.

9. Across continental Europe and in civil law countries, discovery is allowed only under specific conditions. In contrast, in common law countries, discovery is the norm, and its limitations are the exception. It is important to note that in England, and all common law countries, the law of evidence applies equally to civil and criminal procedures.

Over the centuries, England has established several rules to limit discovery. Although discovery in the U.S. is broader than in England, similar boundaries are observed. Exceptions to discovery are based on confidential conversations, private matters, and the privacy rights of third parties, with significant concern for keeping discovery information confidential. Even when disclosure is required, courts can ensure the information remains confidential. Furthermore, in the UK, the Civil Procedure Rules (CPR) set limits on evidence gathering in general and on disclosure in particular.

From the perspective of allegations, two significant U.S. cases have led courts to limit evidence collection while simultaneously broadening the scope of pleas¹⁷.

10. If the principle of “nemo contra se tenetur edere” lacks a strong historical foundation, does it still hold relevance in today’s principles of evidence? Historically, nemo contra se tenetur edere was a limit to disclosure rather than a rule. It became more rigid due to excessive applications. The question now is whether it still has a justification within our current evidence systems.

The gathering of evidence is based on several principles. Foremost among these is the so-called disposition principle (also known as the “principle of party disposition” or “principle of free disposition”). This principle asserts that, in civil and administrative cases, parties are free to manage their claims—advancing, withholding, or withdrawing them as they see fit—and thereby control the course of litigation. The consensus is that if parties are entitled to direct the proceedings, they can decide which means of evidence to provide to the court and which to withhold¹⁸.

The disposition principle essentially defines the scope of the judge’s investigative powers. Consequently, parties generally decide to make a claim only if they have sufficient evidence to support their case initially. Without such evidence, they cannot expect to obtain further evidence from the opposing party.

¹⁷ Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

¹⁸ In Italian is “principio dispositivo”, while in German, this principle is “Dispositionsmaxime” or *Verhandlungsmaxime*.

In Italy, for example, the lack of evidence, sometimes due to information asymmetry, cannot typically be remedied by the judge's power to order evidence. The judge's power is limited to the facts already presented and the evidence specified by the parties, with additional requests restricted by procedural constraints.

The disposition principle is often cited to generally exclude the judge (or an expert) from requesting document disclosure. However, this shouldn't prevent the judge from ordering disclosure at the request of a party.

The burden of proof is commonly seen as a barrier to document disclosure. The rationale is that each party should be responsible for proving specific facts, and one party should not be required to prove facts that are the other party's responsibility. Many scholars, starting with Michele Taruffo, view the burden of proof as a rule of adjudication. This means the judge, when allowing evidence, should not consider who has the burden of proof. If the requested evidence is admissible and relevant to any fact of the case, it must be allowed. Therefore, the burden of proof should not impede the obtaining of documents, especially if disclosure is based on a general principle.

I am acutely aware of the risk that the burden of proof may be shifted by the judge (i.e., the evaluation of the gathered evidence) rather than remaining with the parties. This shift can create unwritten rights, which may alarm proponents of written law, such as Ahrens in Germany. However, the mere possibility of obtaining documents from the opposing party, even if only in specific cases, challenges the notion of the burden of proof in its subjective sense.

Both the disposition principle and the subjective burden of proof have been increasingly marginalized by EU legislation in areas such as antitrust damages, representative litigation, and intellectual property proceedings. In every EU civil law country, there are typically two forms of disclosure: the ordinary and the special. The latter may sometimes fall outside the civil procedural law but can also be integrated within it, as seen in representative litigation proceedings in Italy.

One might assume that commercial matters necessitate more invasive evidence-gathering than non-commercial ones. However, this is not the case. Broader disclosure can be beneficial in various fields, including divorce cases, claims against well-organized entities (such as large corporations or governments), consumer cases, and labor law discrimination cases. German scholars are already voicing concerns about discriminatory treatment between parties, especially in cases where non-compliance sanctions are not applied, unlike in antitrust cases.

The broad disclosure permitted for groups of documents in antitrust and representative actions conflicts with the principle of *nemo contra se tenetur edere*. This inconsistency highlights the need for a nuanced approach to evidence disclosure across different legal contexts.

When evidence is absent or insufficient, the judge must rely on the burden of proof or the rule of judgment to decide the case. However, this approach should be a last resort rather than the primary method, as it indicates that the facts have not been adequately established, leading to the failure of the judicial process. While it is true that in some instances ascertaining the facts is challenging and the burden of proof must be applied, this should be the exception, not the rule.

The continuous development by jurisprudence of principles deviating from standard evidentiary burdens, such as the proximity of proof, does not aid in establishing facts. These principles, initially developed for specific cases, are often extended to unrelated cases, relieving the favored party of their evidentiary obligations. This practice creates principles that are not grounded in law and are arbitrarily applied to other cases, undermining the integrity of the judicial process.

PARTY DISPOSITION AND *EX OFFICIO* POWERS IN THE TAKING OF EVIDENCE. HOW TO MAKE MUTUAL COOPERATION WORK

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ABSTRACT: Although the taking of evidence relies primarily on the parties' initiative, the tendency to confer the court *ex officio* investigative powers is diffuse and shows in the last decades a growing trend. After a brief overview of this trend throughout legal systems traditionally tied to the so-called dispositive principle, the author focuses on how a court is expected to manage these powers. In this context, the Italian experience will serve as a test-bench for an analysis of the way the issue should be dealt with.

KEYWORDS: taking evidence; judicial powers of inquiry; disposition principle; principle of party initiative; *ex officio* measures of inquiry; verhandlungsmaxim; dispositivsprinzip

SUMMARY: 1. INTRODUCTION AND SCOPE OF THIS CONTRIBUTION.— 2. A TERMINOLOGICAL CLARIFICATION.— 3. RECENT APPROACHES TO COURT'S POWERS OF INVESTIGATION.— 4. HOW THINGS STAND IN ITALY.— 5. *EX OFFICIO* POWERS AND COURT'S IMPARTIALITY: A FEW REMARKS.— 6. JUDICIAL SELF-RESTRAINT.— 7. SOME DIRECTIONS. HOW ITALIAN COURTS DISPENSE THEIR POWER OF INITIATIVE IN THE TAKING OF EVIDENCE.— 8. *EX OFFICIO* POWER AND PARTY'S REQUEST TO USE IT.— 9. *EX OFFICIO* TAKING OF EVIDENCE. LIMITS: 9.1. Already Proven Facts; 9.2. Allegations and Content of the Case File.— 10. JUDICIAL POWERS OF INITIATIVE IN FAVOR OF CONSUMERS.— 11. RIGHT TO BE HEARD

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1. INTRODUCTION AND SCOPE OF THIS CONTRIBUTION

In its traditional and all-comprehensive definition, principle of party disposition means that the parties only may bring action before the court, as well as the related allegations and evidence. It is, though, a well-known fact that also in civil litigation this principle reflects nowadays at most a tendency, since purely disposition principle-based proceedings are quite difficult to track down.

Although a general tendency persists to reserve to the parties the initiative of bringing and setting up the claim along with the relevant factual allegations, remarkable openings to *ex officio* judicial powers in the taking of evidence must be acknowledged in Europe and generally in the rule-of-law-based countries. In the field of the evidential initiative, we may plainly start from assuming that, as a matter of fact, reference to the principle of party disposition isn't but an index on how, in a given context, the balance between parties' initiative and judicial powers weighs in favor of the former.

It is precisely with respect to the taking of evidence that I would like to discuss the topic concerning the limits of the court's own initiative.

Contrary to the conventional score of the debate, little space will be given to the general issue of whether the court's initiative should be encouraged or prevented¹. I would rather point out that the current tendency in evidential matter is that of extending the court's initiative powers; which will be illustrated, in the first part of the essay, through a short overview of some of the legal systems traditionally based on the disposition principle.

The second part will be dealt with the main issue, which is how is the court expected to manage those powers insofar as it is endowed with. The Italian legal system will serve in this respect as a test-bench for an analysis of the way the issue should be addressed.

The analysis will be centered on the common areas of civil litigation where the parties have a significant control on whether to start proceedings and on its subject-matter (*thema decidendum*). It will not extend to those matters where public interest prevails, and the parties' control over the *thema decidendum* gives in to pervasive *ex officio* powers (e.g. vulnerable persons' protection, insolvency, in general the so-called non-contentious matters): this peculiar area of civil justice requires a distinct investigation that falls outside the scope of this essay.

¹ See on this subject, also for bibliographic references, Nieva Fenoll (2014); Taruffo (2012), spec. pp. 79 ff.; Stürner (2010); Cavallone (1991), spec. pp. 291 ff.; Cavallone (2010); Fabiani (2008); Panzarola (2019).

2. A TERMINOLOGICAL CLARIFICATION

As anticipated, significant openings to *ex officio* powers in the taking of evidence show up in many countries historically based on the disposition principle.

This trend is accompanied by the now diffused tendency to distinguish between a «principle of party disposition», here intended as a rule strictly related to the initiative of asking for judicial protection and lodging the relative statements, and a «principle of party initiative» whereby the facts must be established, as a rule, through the party's initiative consisting in alleging them and providing the related evidence. According to this distinction, the former (*Dispositionsmaxime*) is quite rigidly observed, to the effect that the court almost always prevented from bringing a lawsuit *ex officio* and generally from introduce variations in the subject/matter of the proceedings, whereas the latter (*Verhandlungsmaxime* or *Beibringungsgrundsatz*) depends on specific technical choices which may vary consistently from a procedural scheme to the other². Yet, the allegation of facts on one side, and the bringing of evidence on the other, respond to basically different *ratios*. In the context concerned, the court's powers of initiative are far more accepted as regards the taking of evidence than for the allegation of facts. The latter activity contributes to the very texture of the claim: it is therefore quite difficult, and to some extent impossible to distinguish the allegation from what is the subject of the said *Dispositionsprinzip*³, which gives rise to doubts over the consistency of such a distinction and the utility of subsuming both phenomena under the same *Maxime*. As far as terminology is concerned, I'll therefore keep using terms such as «party disposition» when I refer to the idea of a dominance by the parties over the taking of evidence.

² Starting from the German scholars, it is at present a widely accepted distinction: see for references Morell (2022), pp. 5 ff.; Kern (2016), pp. 161 ff. and 175 ff.; Taruffo (2011), pp. 447 ff. and 462 f.; Picó i Junoy (1996), pp. 208 ff. The term *Verhandlungsmaxime* was initially used in a broad sense: in his *Handbuch des deutschen gemeinen Prozess*, 1804, N.T. Gönner, to whom we probably owe the term, included in the *Verhandlungsmasime* what later has been split between *Verhandlungs- und Dispositionsmaxime*, the conceptual distinction between the two categories dating the second halfth of the XIX century; even in recent times the same term is been used in the first, extensive meaning: see for references Leipold (1982), pp. 441 ff., spec. 442.

³ See already in this sense Cappelletti (1962), p. 329. It may be of help the distinction between principal and secondary facts: the formers to be intended as those that build the inherent frame of the claim and pertain to the disposition principle, and as such to be subsumed into the *Dispositionsprinzip*; the latters, instead, as circumstantial facts allowing an indirect representation of the principal facts and serving mainly as an evidential function (see on this distinction Jolowicz, 2009, pp. 250 ff.) to be ascribed, as such, to the *Verhandlungsmaxime*. However, it should be not overlooked that such a distinction, between principal and secondary facts, is problematic, both due to the ambiguity of the terms in the common legal language and because it does not prevent an allegedly secondary fact to be set at the base of the claim and therefore to perform not only an evidential, but also the constitutive function of shaping the claim itself.

3. RECENT APPROACHES TO COURT'S POWERS OF INVESTIGATION

With a view to illustrate the said tendency, a brief overview throughout various legal systems should be of help⁴,

Reference can be made, firstly, to countries that have adopted general rules providing the court with general evidential powers of initiative.

So, in France, articles 10 and 143 of the *Code de procédure civile* grants the court power to have all the admissible evidence determined *ex officio*⁵. On its part, art. 370 of the Brazilian *Código de Processo Civil* confers the court, either of its own motion or at party's request, power to take evidence deemed necessary for the judgment on the merits⁶.

In the lack of general rules of a similar kind, other systems evolved through the progressive marginalisation of the parties' disposition in evidential matter.

So in Germany the generally accepted *Verhandlungsgrundsatz* (see previous para.) conferring such initiative to the parties, has been almost overturned as regards the court's initiative; which is positively confirmed by a wide range of provisions, to begin with the measures of inquiry envisaged in the ZPO - *Zivilprozessordnung* and notably in its §§ 142 and 143 on the exhibit of documents and of document acts; § 144 on the inspection and the appointment of experts; § 448 as for the questioning of the parties, aimed at assessing a disputed fact on which the evidence already taken isn't enough for the court to be persuaded⁷. In short, what at present remains in the parties' disposition is the witness evidence (§ 373 ZPO)⁸.

Despite a general opposite rule, other legal systems have developed an array of techniques aimed at significantly extending judicial powers of inquiry.

In Spain⁹ a general tribute to the principle of party disposition in the taking of evidence is made in art. 282 LEC – *Ley de Enjuiciamiento Civil*¹⁰ as

⁴ An overall picture of the current regulations in the EU Countries is available in the e-justice portal dedicated section: https://e-justice.europa.eu/76/EN/taking_of_evidence?SPAIN&member=1#to-cHeader1.

⁵ So, in the French *Code de procédure civile*, art. 10: "Le juge a le pouvoir d'ordonner d'office toutes les mesures d'instruction légalement admissibles" and art. 143: «Les faits dont dépend la solution du litige peuvent, à la demande des parties ou d'office, être l'objet de toute mesure d'instruction légalement admissible.» See on this topic Cadiet & Jeuland (2020), pp. 510 ff.

⁶ So art. 370 of the Brazilian c.p.c. «Caberá ao juiz, de ofício ou a requerimento da parte, determinar as provas necessárias ao julgamento do mérito», which reproduces art. 130 of the previous c.p.c. 1973. See on this provision Bedaque (2013); Nunes Silva & Pereira de Almeida (2023), pp. 230 ff., spec. 541 ff.; Cabral (2012), 55 ff., 97 ff.

⁷ See also on § 448 ZPO Huber (2023); and in an overall critical attitude towards this legal framework, see Braun (2014), pp. 87 ff., spec. 91.

⁸ Not to mention, though, the general provisions in specific areas, such as that of child protection: see §§ 151 ff. *FamFG*.

⁹ For an overall picture see Ríos López (2006), pp. 127 ff.

¹⁰ LEC, Art. 282—Iniciativa de la actividad probatoria.—Las pruebas se practicarán a instancia de parte. Sin embargo, el tribunal podrá acordar, de oficio, que se practiquen determinadas pruebas

well as implied by Art. 429.1., comma 3, LEC, whereby the court, prior to the opening of the inquiry, if considers the evidence offered by the parties as insufficient for the ascertainment of some disputed facts, will point this out to the parties, highlighting, where appropriate, the additional evidence they may resort to¹¹. The same implication is reflected by art. 435.2. LEC¹², in so far as it grants the court, in exceptional cases, power to renew a measure of inquiry when its previous execution has been unsuccessful owing to circumstances the parties weren't accountable for: it is in fact —and unlike the *Diligencias para mejor proveer* provided for in artt. 340-342 of the LEC previously in force enacted in 1881¹³— a power of second degree, depending on the fact that the taking of evidence was originally requested by the party¹⁴. Besides the formal tribute to the disposition principle, a rule such as that of art. 429.1, comma 3, LEC achieves in fact a result that goes in the opposite direction, since it is normal that an *ex officio* indication of a missing evidence prompts the interested party (i.e. the one who's more likely to take advantage of it) to act accordingly; which reduces almost to a nuance the difference between such a technique and that of allowing directly the court to proceed of its own motion to the taking of evidence¹⁵.

o que se aporten documentos, dictámenes u otros medios e instrumentos probatorios, cuando así lo establezca la ley.

¹¹ So Art. 429.1, comma 3, LEC: “Cuando el tribunal considere que las pruebas propuestas por las partes pudieran resultar insuficientes para el esclarecimiento de los hechos controvertidos lo pondrá de manifiesto a las partes indicando el hecho o hechos que, a su juicio, podrían verse afectados por la insuficiencia probatoria. Al efectuar esta manifestación, el tribunal, cifiéndose a los elementos probatorios cuya existencia resulte de los autos, podrá señalar también la prueba o pruebas cuya práctica considere conveniente.” See on this provision Chico Fernández (2006).

¹² So art. 435.2, comma 1, LEC: “Excepcionalmente, el tribunal podrá acordar, de oficio o a instancia de parte, que se practiquen de nuevo pruebas sobre hechos relevantes, oportunamente alegados, si los actos de prueba anteriores no hubieran resultado conducentes a causa de circunstancias ya desaparecidas e independientes de la voluntad y diligencia de las partes, siempre que existan motivos fundados para creer que las nuevas actuaciones permitirán adquirir certeza sobre aquellos hechos.” See on this provision Lumbreras Martín (2005).

¹³ These *Diligencias* granted direct powers of initiative, in the sense that they were independent from a previous corresponding initiative by the party. See on this legal instrument Serra Domínguez (1972), pp. 538 ff.; Ostos (1989), pp. 51 ff.

¹⁴ In a different perspective J. Nieva Fenoll (2014), pp. 967 ff., suggests an evolutive extension of this provision, so to allow the court to order measures of inquiry the parties haven't previously requested, whenever it is likely that the evidence exists.

¹⁵ What may still cause a significant difference between the two approaches is the fact that the court provides the parties with those indications before the taking of evidence, that is to say in a phase where it might still have scarce knowledge of what may be missing in the evidential means the parties have filed (similar remark in Taruffo 2012, p. 134) which may result in a problem every time procedural law restricts the parties' powers of initiative within the preparatory phase of the proceedings. On the other side, if the evidence suggested by the court is expensive, the interested party may deliberately not comply merely out of economic considerations. Hardly necessary to add that, also in Spain, important areas of civil justice are ruled differently, if not by the opposite principle, insofar as the rights involved are featured as either non disposable or affected by significant disbalance between the parties: just by way of example, in family, child, incapacitation matters, the court may order of its own motion the evidence it deems appropriate: in this sense Art. 752.1, comma 2, LEC reads: “Sin perjuicio de las pruebas que se practiquen a instancia del Ministerio Fiscal y de las demás partes, el tribunal podrá decretar de oficio cuantas estime pertinentes.” For a general picture of the enhanced court's powers of inquiry, see Ríos López (2006), pp. 148 ss.

Significantly the same approach encountered in the Spanish LEC shows up in the ELI/UNIDROIT Model European Rules of Civil Procedure 2020¹⁶, where both Rule 25 and 92¹⁷ provide the court general authority to advise the parties on possible additional offers of evidence, whereas is labeled as “exceptional” the court’s power to take evidence of its own motion. This model too results therefore in a compromise¹⁸ that goes clearly in favor of a basically active role of the court in this matter.

Art. 115 of the Italian C.p.c.—Code of civil procedure—makes the taking of evidence dependant on the request of the parties; yet, legislation and case law set forth a diffuse series of exceptions tending to overturn such a general provision. This system will be discussed further on in more detail.

Finally, derogations to the dispositive principle are also to be found in countries traditionally modelled on the adversary system.

In England the adversary system still holds, despite the almost complete disappearance of the jury in civil litigation¹⁹, the abolition of the hearsay rule²⁰, and the fact that the 1998 Civil Procedure Rules conferred the court significant means to effectively exert its case-management powers²¹. Nevertheless, the court is granted general authority to advise the parties on evidence it is for them convenient to offer (Rule 32.1.), to which the previous remarks on art. 429 LEC may apply. Also, the court may take of its own motion

¹⁶ Available online in <https://www.europeanlawinstitute.eu>, on which see also Stadler et al. (2023), pp. 35 ff. and 252 ff.

¹⁷ Pursuant to Rule 25(3) “In so far as appropriate the court may invite the parties to supplement their offers of evidence. Exceptionally, it may take evidence of its own motion.” Accordingly, Rule 92(2) allows the court “while affording the parties an opportunity to respond, may suggest evidence not previously proposed by a party, which it considers may be relevant to an issue in dispute. If a party accepts such a suggestion, the court will order the taking of that evidence so that it may be offered in support of that party’s contentions of fact and law.” Then goes on in sentence 3 by stating that: “Exceptionally the court may, while affording the parties an opportunity to respond, order the taking of evidence not previously proposed by a party”.

The official commentary tends however not to take firm position in favor of the party disposition principle: it highlights on the other hand the fact that (so comm. to Rule 25, para. 7) “In practice, however, both forms of judicial intervention are likely to be of little effect as courts are not, generally, provided with sufficient resources to conduct their own investigations of factual and evidential matters. In reality, notwithstanding such powers, courts are likely to continue to be limited to such materials as are introduced by parties’ pleadings, with the court doing no more than making suggestions to the parties, under its substantive case management powers, of what supplementary evidence may be necessary (see the first sentence of Rule 25(3) and Rule 92 especially with comment 4).” Which isn’t, though, a good reason to prevent the Court from having granted general powers of initiative in this matter.

¹⁸ So explicitly the official commentary on Rule 92, par. 4.

¹⁹ It is interesting that even in the few cases a trial by jury is provided for—outside actions for defamation it is hardly ever used—the court is granted power not to set it up if “the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury” (so the Supreme Court Act 1981, prov. n. 69), which indicates a system clearly oriented towards a rational and skilled assessment of facts.

²⁰ The definitive abolition of the hearsay rule by the Civil Evidence Act 1995, prov. 1(1) may also be understood as a contribution to a rational and skilled assessment of facts: the rule against hearsay evidence actually represented the major hindrance to the use of either the oral testimony and the document as evidential source of the statements therein contained.

²¹ See on this topic Jolowicz (2009), pp. 373 ff.; Zuckerman (2013), pp., 5 ff.

specific measures of inquiry, like that of ordering a party to clarify any matter in dispute or give information thereto (Rule 18.1.(1)), of appointing technical advisors («assessors»: see Rule 35.15), in addition to that of giving binding directions to the party-appointed experts²² and to the parties themselves²³.

Even the North American civil justice, famous for being a diehard model of the adversary system, undergoes since decades the tendency to give the judge effective powers in case management, encompassing *ex officio* powers to take measures of inquiry. See notably, of the 1975 *Federal Rules of Evidence*, Rule 614 (a), whereby “The court may call a witness on its own or at a party’s request.”; and Rule 706 (a), stating that “[...] The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.”²⁴ It is interesting to note that one of the reasons for granting the Court power to call witnesses has been expressed this way: “the judge is not imprisoned within the case as made by the parties.”; which openly conflicts with the intimate logic of the adversary system.

4. HOW THINGS STAND IN ITALY

The second part of this essay is focused on Italy and its way of managing the balance between parties’ and court’s powers of initiative in the taking of

²² See., e.g., Rules 35.12 providing the court a general power of direction covering the merits of the expert’s task. Of particular significance is also Rule 35.9., stating that “Where a party has access to information which is not reasonably available to the other party, the court may direct the party who has access to the information to — (a) prepare and file a document recording the information; and (b) serve a copy of that document on the other party.” As to assessors and experts in general, see Andrews (2013), 349 ff., and in a comparative perspective, Ferraris (2012), pp. 81 ff., spec. 90 f.

²³ See in general, as regards the judicial control of evidence, Andrews (2013), pp. 391 ff. It should be however borne in mind that “English law ... Unlike some of the continental systems, it has not developed a distinction between procedural truth and real truth. ... English law, by contrast, is reluctant to accommodate judicial findings of fact that are known to be factually incorrect or that have been reached without consideration of relevant evidence that is known to exist and which could have been produced”: so Zuckerman (2013), p. 161 f. Which, evidently, does not prevent English law to be reluctant to provide the court general power of initiative in taking evidence.

²⁴ As for Rule 614 (a), according to the *Advisory Committee on Proposed Rules*, “While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. One reason for the practice, the old rule against impeaching one’s own witness, no longer exists by virtue of Rule 607, *supra*. Other reasons remain, however, to justify the continuation of the practice of calling court’s witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.” As for Rule 706 “The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. The trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the sheer availability of the procedure decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.” Further references are available on <https://www.rulesofevidence.org/>.

evidence. It will provide the opportunity for general remarks on how court's power should be administered to be effective and not to jeopardise fundamental guarantees.

Art. 115 of the Italian civil procedure code (hereinafter «c.p.c.») states that, unless otherwise provided for by law, the court shall base its decision on the evidence offered by the parties and the public prosecutor. It makes then, as a rule —and according to the current opinion— the taking of evidence dependent on the parties' request²⁵. Still, a diffuse and important series of exceptions emerges in such a way as to significantly weaken the general rule.

It is worth pointing out that some influential scholars have been challenging the reported mainstream interpretation of art. 115 c.p.c. Michele Taruffo²⁶, especially, maintains that said article doesn't even set out a rule of the like: it must be interpreted as simply imposing the judge not to disregard the evidence provided by the parties – ultimately what has been called the «right to evidence» – without saying anything about his own powers of investigation²⁷. This author is one of the most prominent representatives of the idea that, to carry out its task of being fair and just, a modern civil judicial system should grant the court general power of initiative in the taking of evidence, such being a fundamental factor for the proceedings to attain an outcome as much as possible consistent with the factual truth and therefore effective protection for the rights involved. In this respect, a restrictive approach to court's powers should be regarded as a relic from the past and rejected accordingly.

Contrary to this reading of art. 115 c.p.c., one might say that not only art. 115 but the complex of the statutory provisions dealing with the matter say what this doctrine has been challenging, namely that the court shall not order the taking of evidence of its own motion, unless the law provides otherwise²⁸. This is in fact not only the intention the original lawmaker expressed alongside the articles of the 1940 code of civil procedure: the procedural legislation developed thereafter seems in fact to be going in the same direction, since it is *only in specific matters or situations* that it expressly grants the court *ex officio* powers in the taking of evidence. Which is to say that explicit provisions are deemed necessary for those powers to be conferred to the court²⁹.

²⁵ See for references, Comoglio (2012); Zuffi (2013); Patti (2021), pp. 51 ff.; Gioia (2020), pp. 399 ff.

²⁶ M. Taruffo (2011), spec. pp. 470 ff. and 477 ff.

²⁷ See also in this sense Comoglio (2012), pp. 371 ff.; in the sense that art. 115 enshrines a right to evidence see already Ricci (1974).

²⁸ This is what seems to me quite clear, and what Taruffo himself tends ultimately to concede (Taruffo, 2011, p. 471). Comoglio (2012), pp. 357 ff., instead, is much more doubtful that the common understanding of art. 115 c.p.c. was shared by the 1940 lawmaker.

²⁹ A wide array of specific derogatory provisions affecting the older as well as the most recent legislative regulations suggests that, while parties' evidential initiative is generally assumed, judicial initiative is not. Just by way of some examples, the c.p.c. confers the judge power to order judicial inspection (art. 118 c.p.c.); to request public authorities to provide relevant information (art. 213 c.p.c.); as for witnesses, to examine them beyond the questions submitted by the parties (art. 253 c.p.c.) and even to summon *de relato* witnesses (artt. 257 and 281-ter c.p.c.), to appoint a technical expert and to

The above-mentioned, alternative interpretation of art. 115 c.p.c. requires therefore a deliberate denial of the assumption underlying the complex of the legislation today in force. Which is in principle even possible, since on a pure syntactic basis the provision in question is compatible with this interpretation³⁰ and the general theory admits the evolutive interpretation of laws.

Aside from reasons centered on constitutional values and present needs, a significant role in this respect should indeed be played by the mass itself of derogatory provisions to the general rule. As already pointed out, provisions of the like are supposedly consistent with an opposite rule excluding general *ex officio* powers of initiative in this respect. Nonetheless, they have been gradually extending *ex officio* evidential powers; and the more these provisions proliferate, the more the general clause loses its sense along with its attitude to reflect values and needs of the present society.

In parallel with statutory trends, the case law has been on its part progressively improving *ex officio* powers of investigation. Recent examples of deviations from the general rule can be observed in the activity of the court's technical expert, whose considerable improvement relates to the same phenomenon here in question, resulting in a significant interference by the court (via its expert consultant) in the parties' evidential initiative³¹; then in the area of consumer protection, where a series of decisions by the ECJ have conferred the court significant *ex officio* powers to control the absence of unfair clauses in the contract at the base of the claim (see further on this topic, para. 10.). It is always possible to give distinct explanation for each of the

outline the related questions (artt. 61 ff. and 191 c.p.c.): although conceived for the understanding of technical facts otherwise acquired in the case file, it is in fact an important source of proof, specifically for those requiring specific skills to be identified or taken: see in this sense the leading case Cass., Sez. un., 1.2.2022, n. 3086, ECLI:IT:CASS:2022:3086CIV, also publ. in *Foro italiano*, 2022, I, 1773, comm. by A. Alfieri; critical towards this approach Cavallone (2022). An *ex officio* measure of inquiry is also the court's power to question the parties about the relevant facts any time the judge considers appropriate (art. 117 c.p.c.), insofar as, according to the case law, the court may also use the responses as evidence (see e.g. Cass., 1.3.2019, n. 6168). In specific areas, the court has even a general power of taking of evidence —such being the case, e.g., of labor and social security matters (art. 421 c.p.c., as introduced in 1973), of familiar, juvenile and adult-protection matters (art. 473-bis.2 c.p.c., as introduced in 2022); the in-chamber proceedings encompassing a wide array of different subject matters, stretching from non-contentious to the contentious areas (art. 739, comma 3, c.p.c.). Then a wide range of special statutes confirms the same approach: e.g. art. 121-bis of the industrial property code (introduced in 2006) confers the court, during the examination of the persons involved, power of addressing *ex officio* all the question deemed relevant.

³⁰ It must be said, though, that such an interpretation in question renders quite difficult to give a convincing sense to the introductory derogation clause "Unless otherwise provided for by law" whereby art. 115 c.p.c. admits derogations to the general rule. According to Taruffo (Taruffo, 2011, p. 478 f.), said clause must be referred to the situations where specific provisions exempt the court from taking evidence which it deems superfluous. It is a possible reading, though actually a stretched one: if one accedes to Taruffo's interpretation of the main clause "the court shall not disregard the evidence provided by the parties" the derogative clause should be more consistently read in the sense that, in specific situations, the court in its judgment may overlook the evidence, not its taking, and whatever the way it's been taken. For a similar objection see also Comoglio (2012), pp. 374 ff., whose alternative reading seems, though, even harder to support.

³¹ Reference is particularly to Cass., Sez. un., 3086/2022, cited above, fn. 29.

case law-based derogation from the alleged general rule; yet, what is here to point out is the fact that none of them has been prevented by the traditional and still now commonly accepted interpretation of art. 115 c.p.c.

In such a context it becomes increasingly less important wondering whether a disposition principle in evidential matters survives, and more urgent, instead, determining how judicial powers can be rightfully governed so to prevent a wanton use and a prejudice—more than to a disposition principle—to the parties' fundamental rights, namely the right to be heard, to contradict, to set the subject-matter of the proceedings.

5. *EX OFFICIO* POWERS AND COURT'S IMPARTIALITY: A FEW REMARKS

As anticipated in the foreword, the debate on whether to grant the courts general power to take evidence is not the subject of this essay. Just on one of the most disputed aspects of this topic I will spend some remarks for a better clarification of the next passages.

Within the arguments for supporting a general judicial power of initiative in evidential matter, one is that it does not undermine the third-party position of the court. Leaving aside the amount of legislation explicitly providing this power, and the reasons why the courts' general approach to the taking of evidence was kept generally passive along the centuries³², I find this argument, up to a certain point, convincing.

From a formal-functional perspective, what a court generally does by ordering evidence of its own motion is, in fact, ordering evidence to be taken, which is a vehicle (a means of proof) and not a proof. Strictly speaking, the former is neutral since the court does not know in advance whether and which party the evidence turns out to be favorable to³³.

³² According to Nieva Fenoll (2019), p. 1233 f., these reasons have far more to do with a prejudicial mistrust towards the court's ability and impartiality than with the fear that, during the proceedings, an allegedly impartial court could lose its third-party position by taking evidence *ex officio*. This is also why the famous medieval sentence *iudex secundum allegata et probata iudicare debet* implied most probably the predicate *partium*, irrespective of the fact that this word was not included in the Durante's text to which we owe the major dissemination of this maxime: see also, for a convergent conclusion, Panzarola (2019), spec. pp. 26 ff. As to the common law system, the trial by jury—i.e. the proceedings structured in function of a judgment rendered by a jury—has been a long-lasting factor of passivity by the judge, capable of significantly influencing the court's attitude even today, where the judge mostly sits without jury: "After centuries of familiarity with the restraints imposed by use of the jury, English legal thinking has come to see them as virtues. The conviction that the adversary system is the best adapted for the good administration of justice in England is still with us": so Jolowicz (2009), p. 377 and pp. 373 ff. extensively on this topic.

³³ So, *inter alios*, Gioia (2020), p. 401 f.; Nieva Fenoll (2014), p. 961 f. Along with M. Taruffo, these authors maintain, on the contrary, that the one which loses indeed impartiality is the court which does not use the *ex officio* powers it is entitled to, in the sense that it privileges its own interests to that of the proceedings to the search for truth. Apart from this peculiar understanding of court's impartiality,

On a more substantial basis, the attitude to address dubious points of fact towards a solution as close as possible to reality —without detracting from the inescapable margins of complexity and relativity in this assertion as well as in its single components— is indeed what a rule of law-shaped society expects from a court, this being vital for the rights proclaimed by law to be effective. As regards the factual issues, a court is therefore expected to be neither indifferent nor partial but aimed at rationally assessing the relevant facts. Once this premise is accepted, there's no reason why this attitude should affect the court's impartiality when it materializes in taking evidence, and not, let's say, when the court raises *ex officio* an objection of contractual invalidity; or even when, based on the evidence provided by the party, it positively establishes a party's assertion to be true.

In the meantime it is true that judicial powers of initiative in the taking of evidence may, on a statistical basis, result in an advantage for the weaker party, namely for that who either finds it harder to accede to a qualified (and generally more expensive) legal assistance or has less chance to have access to evidence; and that the court may also foresee the possible outcome of evidence. However true, this backdrop is not capable to undermine the court's third-party position in the single case, once it is accepted that these are possible consequences, not the causes of the judicial initiative.

Still, it would be erroneous acceding to the geometric and absolute conclusion that the use of these judicial powers cannot affect in any case the court's third-party position, since there are limits the court should not trespass, lest this position is compromised. This is the case of a court that, despite the presence of evidence already acquired on a certain allegation, orders of its own motion the taking of evidence to double-check the same allegation. A behavior like that may be interpreted as an attempt by the court to refute an already proven fact by finding evidence pointing to the contrary: this is indeed an index of partiality a court should not afford, which requires, when put in place, appropriate remedies. On this specific issue I shall return below (*infra* 9.1.).

6. JUDICIAL SELF-RESTRAINT

The conferral to the court of *ex officio* powers in the taking of evidence entails issues of different nature.

Even when the court is provided with such powers, its attitude, left aside notable exceptions in specific areas or activities³⁴, remains generally passive.

the question whether the court is subject to a positive obligation to exert its evidential powers will be discussed, *infra*, 8.

³⁴ As to the subject matters, it is, for example, the case of the civil proceedings for protection of vulnerable persons and particularly of children. As to the activities, reference is mainly to that of the court's technical expert, whose activity often result in, or actually ends up collecting new evidence.

This is partly due to the court's cultural tendency to self-restraint, partly to the lack of resources for systematically assuming an active role³⁵, which often results in a veritable disproportion between the number of magistrates and the average case-flow. In short, the normal vehicle of evidential initiatives was, and keeps being, the parties, whereas the court maintains in this respect a subsidiary function.

In this scenario, the major risk is that of a non-uniform use of those powers, which may be a factor of distortion and unfairness when, in comparable situations, the court behaves differently, respectively by abstaining from and by using the powers in question.

7. SOME DIRECTIONS. HOW ITALIAN COURTS DISPENSE THEIR POWER OF INITIATIVE IN THE TAKING OF EVIDENCE

Italy lacks specific provisions on the consequences of failure by using *ex officio* powers. On its part, the Italian case-law tends in the last decades to consider this power as a veritable though discretionary duty ("potere-dovere"), and the failure to exert it as a defect capable to invalidate the procedural and insofar the subsequent judgment.

Some clear directions as to how the court shall make use of its powers of investigation have been given in labor litigation³⁶, where the judge, pursuant to art. 421 c.p.c., is expressly granted general power of initiative in the taking of evidence. Yet the reasons expressed in this case-law should extend in general to the situations where the court is given similar powers of initiative.

From the referred case-law it is possible to draw some directions that are worth considering for a general approach to the problem concerned.

A) *a)* A party, although time-barred from the right to offer evidence, may nonetheless request the Court to take evidence of its own motion: in this case the court may not dismiss the request solely on the ground that the party's request is belated, and in the lack of other impediments (see further on, *sub C*) and para. IX) it shall use its evidential powers accordingly. *b)* In any case, the court shall rule on the request and state grounds for its decision. *c)* Failure

³⁵ In this respect the ELI/UNIDROIT commentary to Rule 25 (see above, note n. 18) hits the mark, along with the Scholars who stress this point: see e.g. Jolowicz (2009), p. 220 f.; Nieva Fenoll (2014), p. 965. The lack of resources results not seldom in a severe disproportion between the number of magistrates and the average volume of the case-flow, encouraging the tendency by the judges not to exert their own powers initiative.

³⁶ See above all the Joined Chambers of the Italian Corte di Cassazione: Cass., Sez. un., 17.6.2004, n. 11353, spec. par. 6., in *Foro Italiano*, 2005, I, 1135 ff., comm. by E. Fabiani, establishing that the judicial power to take evidence *ex officio* underlies specific rules, the violation of which results in a breach of procedural law exposing the consequent judgment to annulment; and Cass., Sez. un., 23.1.2002, n. 761, *ivi*, 2002, I, 2017 ff., comm. by C.M. Cea, establishing, among other important directions, that a party, although time-barred from the right to offer evidence, may nonetheless request the Court to take evidence of its own motion.

to comply with either these directions *sub a)* or *b)* results in an infringement affecting the proceeding and the consequent judgment.

B) In the absence of a party's request, the failure to exert *ex officio* powers of investigation does not seem to constitute a procedural infringement.

C) Whether or not there's a party's request, the court may validly take evidence of its own motion under the following conditions: *a)* at the basis of the measure lies an evidential trail, i.e. there are already some circumstances supporting the allegation; *b)* the court may not take evidence *ex officio* on facts the parties haven't previously alleged; *c)* by derogation from *b)*, a measure of inquiry may be taken *ex officio* over a fact that, though not alleged by the party, results from the documents in the case-file, either if *c1)* it is a fact whose legal effects may be raised by the court of its own motion (e.g. the nullity of the contract underlying the claim) or *c2)* it is a secondary fact³⁷, such being a fact allowing an indirect representation of the principal facts—*i.e.* the facts representing the ground (the justification) of the legal effect—and serving basically as an evidential function.

D) Whenever the court resolves to take evidence of its own motion, the parties shall be given the opportunity to comment on it and bring additional evidence consequent to that ordered by the court.

8. EX OFFICIO POWER AND PARTY'S REQUEST TO USE IT

I would firstly spend some remarks on the approach considered on *A)* and *B)*, as regards a positive duty for the court to exercise its *ex officio* powers under penalty of procedural infringement.

This approach, which is far from being universally accepted³⁸, leads indirectly to a restitution of the party's evidential powers. It adds to the general situations where the law explicitly grants the party such a benefit, and it is basically a special type of restoration.

The outcome conflicts somehow with the aim pursued with the time-bar: since it meets the need to give the proceedings a certain speed, it is

³⁷ For references see also above, 2., fn. n. 3

³⁸ Almost needless to say that this solution is far from reflecting a global trend. In Germany, just to offer an example, there seems to be still valid the opposite solution, that the court's power of initiative in the taking of evidence is a purely discretionary and unquestionable power, so that the court has neither the duty to oblige the party's request nor to state the ground of its denial, this being allegedly an implication of the *Verhandlungsmaxime*: see for references Kern (2016), n. 184. See, though, in the specific case of *ex officio* questioning of parties pursuant § 448 ZPO, BGH 23.2.1994, in *NJW-RR*, 1994, 636, which had the appealed decision quashed on the ground that the court of the merits hadn't used its *ex officio* power to question a party under said § 448, despite of its saying that the allegations of this party were entirely plausible (*durchaus möglich*) yet unable to convince it: see further on this topic M. Huber, § 448, cit., para. 5. In a much more resolute manner, art. 194, comma 3, of the Peruan Código Procesal Civil points out that "*En ninguna instancia o grado se declarará la nulidad de la sentencia por no haberse ordenado la actuación de las pruebas de oficio.*"

then indifferent whether the proceedings is slowed down by a party's or by a court's initiative. In addition, it renders an *ex officio* power something contrary to its *ratio*, namely an instrument for the party to obtain what he has been already foreclosed on. A conflict like this is nonetheless acceptable³⁹, being consistent with the need for the court to rationally assess the facts "without being imprisoned within the case as made by the parties" (so the comment to the U.S. Federal Rules of Evidence 614 cited *supra*, 3.).

On the other hand, this solution leads to a procedural breach only in the presence of a request by the party (so direction A)), being in fact clear that, according to this direction, in the absence of a formal request the court's abstention from using its powers of investigation doesn't constitute a proper procedural violation (cfr. direction B)). It is a quite empirical solution since it leaves to the party's initiative the legal consequences of a failure by the court to comply with a duty of its own, which restores to the party a disposition power that in theory was taken away. It is, though, a realistic compromise between the conferral of *ex officio* powers and the fact that the possibilities for the court to extensively exert these powers are very limited, on account of both its resources and its functional structure, more tailored for controlling the parties' initiative than for assuming the initiative itself.

9. EX OFFICIO TAKING OF EVIDENCE. LIMITS

The limits to the court's own evidential initiative, as reported *sub C*), provide material for extended analysis, which I'll try here to outline in few remarks.

9.1. Already Proven Facts

The condition mentioned *sub C)a*), whereby at the basis of the requested evidence there has to be an evidential trail, is in part convincing. If there's already clear evidence of a factual allegation to be true, or false, a court's resolution to take evidence *ex officio* is not only questionable as superfluous, but gives (as anticipated *supra*, 5.) actual ground to suspect that the judge is prejudiced in favor of a party or against the other. Despite the court isn't aware of the outcome, it is obvious that an additional measure in this situation, if not irrationally superfluous, may serve the sole purpose of refuting the previous finding.

Different is the situation where a point of fact remains uncertain because none of the parties have succeeded in demonstrating their respective assertions. Despite that, I don't think that, in this case, an *ex officio* initiative to shed light on the fact may call into question the court's impartiality, more

³⁹ See also in this sense Cass., Sez. un., 3086/2022, cit. above, fn. n. 29, spec. p. 30 f.

than it does where an evidentiary trail exists. In both cases, an objection that the point of fact should be directly adjudicated in accordance with the burden of proof would also miss the mark, being in contradiction with the legislative choice to endow the court with evidential powers of initiative, provided this choice always interferes with the burden of proof. Which doesn't mean that the burden of proof never applies; it means, instead, that its application must be considered as a last resource, to be applied after the parties, and eventually the court of its own motion, have tried to positively establish the relevant facts⁴⁰.

9.2. Allegations and Content of the Case File

Condition *sub C)b)* stems from the general rule whereby it is for the parties only to bring the action, to set the relative statements as well as the underlying factual assertions. The court may therefore not take evidence on facts the parties haven't previously alleged, provided these facts are constituent elements of the case. This condition prevents the overstepping of the *thema decidendum* which is for the parties to set out; in addition, it serves the principle that the court shall not base the judgment on facts of which it has special knowledge – meaning for «special» what it may draw from a personal knowledge, not reflected in the case file. Also, it applies to the facts regardless of whether they constitute the base of the claim or of an objection.

A series of problems on this direction arise, since neither all the facts nor all the objections are at the same level. And here come the directions *sub C)c)* as correctives to the former.

Provided that the court may not draw the assessment of facts from its special knowledge, problem is whether and when the base for the finding

⁴⁰ A different, though connected issue, stems from the diffuse tendency to assign legal significance to the failure of one party to challenge the opponent's allegations. Depending on the consequences each legal system draws from the party's failure to challenge a fact asserted by the opponent, a non-challenge clause is capable to influence or even bind the judge not to question the allegation concerned and —accordingly— not to use his *ex officio* investigative powers. As for Italy, art. 115 c.p.c. seems to be rigorous in this respect, stating that the court shall base its decision on the facts that are not challenged by the party who had entered an appearance. The case law is then unanimous in granting a limited time frame for the party to challenge the facts asserted by the counterpart (the time-window is confined within the preliminary stage of an ordinary proceedings, though the precise deadline is disputed), which makes quite high the risk that, instead of renouncing intentionally, the party simply runs unintentionally into a time-barrage. There are however many reasons to disagree with such a reading, and to assume that art. 115 c.p.c. must be interpreted in that it does not prevent the court from refuting the non-challenged facts if the contrary already results from the case file, irrespective of whether the facts involved are to be qualified as principal or secondary, and, where the contrary appears to be likely, from taking evidence on party's request or *ex officio*: see in this sense Taruffo (2011), pp. 483 ff.; Carratta (1995), pp. 282 ff.; see also for references Mandrioli & Carratta (2022), p. 94, spec. fn. n. 67. As for Germany, § 138 ZPO expressly equates the lack of challenging to a voluntary admission of a fact: the former is here featured as an intentional behavior, which § 138 expressly points out by stating that the will not to challenge should result also from the total of the party's allegations (lit. aus den übrigen Erklärungen der Partei): see on this provision Anders (2024), spec. nn. 45–51.

may consist solely in the parties' allegations or also in any element emerged during the proceedings and acquired in the case file. According to the common opinion, what distinguishes the party's allegation from other sources of factual representation is that the former consists in, and have the function of, conveying a party's self-aware statement of facts; a function that other sources available in the case file in principle don't have, even when the content results itself in a deliberate declaration of the party.

In a system where it is for the parties to bring proceedings and to outline its subject-matter (i.e. the *thema decidendum*), it is then consistent that this subject matter and its perimeter be set out through the sole parties' allegations—understood in the sense above-mentioned—and not also by other sources present in the case file, lest this perimeter be exceeded. Within this perimeter, though, an investigation on facts emerging from other sources is possible and even advisable: provided that those facts are secondary—i.e. not capable to shift the *thema decidendum* and mainly functional to provide evidence (see also above, 2., note 3)—a judicial inquiry extended to any source collected in the case file gives more chances for a better finding⁴¹.

Also, it cannot be neglected that, frequently, relevant facts and related evidence show up out of an *ex officio* inquiry, without being previously included in any act or document collected in the case file. Such a situation is indeed quite common during the operations of the court's technical expert since his technical skills help targeting facts and evidence otherwise scarcely detectable – and assuming that, within the present scope, his activity is equivalent to that of the court, which should be certainly the case of experts appointed as court's auxiliaries. Here the question arises as to whether it is possible to extend the *ex officio* powers to secondary facts the case file doesn't even mention (but the issue also affects evidence that the court may not take of its own motion). I think that a complete denial of access to external sources would be excessive and most of all unrealistic⁴²; and that, when it comes to secondary facts, the answer should be in principle in the affirmative⁴³.

There's just to add that, in practical terms, the distinction between principal and secondary facts remains problematic, and I doubt it is possible to set firm boundaries between the two, being the related criteria subject to many variables⁴⁴. I'd venture to say that, in questionable situations, the better ap-

⁴¹ See also in this sense Taruffo (2012), pp. 127 ff., spec. 129.

⁴² Even the adversary-modelled English civil procedure singles out, among the functions of the expert, that of providing "evidence on fact only observable, comprehensible, or open to description by experts": see Andrews (2013), p. 354. Left aside the court's technical expert, it would be hard to rigorously discern, for example, in the witnesses' statements or in those of the parties questioned by the court, the circumstantial facts already mentioned in the case file from those that are not.

⁴³ In a similar direction is also the recent approach by the Italian Corte di cassazione, as set out in Cass., Sez. un., 3086/2022, cit. above, fn. n. 29.

⁴⁴ Caution on the use of this distinction is, with good reason, suggested by Jolowicz (2000), p. 224 f. Just to point out a critical area, we may consider the situations where the fact referred to by law never or rarely occurs as material fact, and it is hence normal for the plaintiff to allege a different fact capable to justify a decision that the former exist. This is the case, e.g., of claims consequent to a breach of the

proach is that of assuming the fact as secondary and shifting then the focus to the direction *sub D*), namely to the implementation of the right to be heard (on which see below par. 11.).

Similar remarks also apply when the inquiry involves those facts whose legal effects is for the court to raise of its own motion, regardless of their qualification as principal facts. Since the court is in this case entitled to influence the *thema decidendum*, there's the same reason illustrated above not to tie its powers of investigation to the parties' allegations.

10. JUDICIAL POWERS OF INITIATIVE IN FAVOR OF CONSUMERS

Consumer protection in civil justice has been the subject of extensive activity by both the lawmakers and the case-law. The recent developments in the EU area show an intensive use of *ex officio* powers as a fundamental resource for achieving the goals of the EEC Directive 93/13 on unfair terms in consumer contracts and, more specifically, for implementing artt. 6 and 7 thereof⁴⁵. Next to court's power to raise *ex officio* the unfairness of relevant contractual clauses⁴⁶, judicial protection of consumers results also in conferring the court related powers of initiative in the taking of evidence.

According to the ECJ case-law⁴⁷, the national court shall notably order of its own motion all the investigative measures deemed necessary to ascertain the absence of unfair clauses at the base of the relevant contract, and this introduces a specific, EU-featured derogation to the disposition principle whenever the Member States don't already include a rule of the like within their internal legal sources⁴⁸.

common duty of care, where the plaintiff has often no choice but to allege the material fact that have purportedly caused the accident. Although this may be labeled as a typical secondary fact, it plays such an essential function in the factual grounding of the claim that it would be hard to maintain that it might not be specifically alleged by the party.

⁴⁵ See, in particular, Article 6.1., whereby "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms", and Art. 7.1. stating that "Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers." It is also relevant what follows in Art. 8, whereby "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer."

⁴⁶ See in this regard, and in support of the ECJ direction towards an enhanced protection of the consumers, Nieva Fenoll (2019). See also, for critic remarks on the Swedish approach towards the EU legislation affecting civil procedure, Wallerman (2017), pp. 147 ff., spec. 155 ff.

⁴⁷ Reference is particularly to ECJ, joined C- 419/18 and C-483/18, 7.11.2019, *Profi Credit Polska v. Włostowska et al.* ECLI:EU:C:2019:930; see also ECJ C-511/17, 11.3.2020, *Lintner v. UniCredit Bank Hungary*, spec. nn. 26 - 27, ECLI:EU:C:2020:188.

⁴⁸ As for Italy, the relevant provisions implementing the Directive 93/13 concern solely the court's power to raise *ex officio* the unfairness of the clause and the related nullity (see spec. art. 36, comma 3,

These investigative powers, as defined by the ECJ case-law, don't seem however to go beyond the limits envisaged in the abovementioned directions *sub C)c*). It should first be recalled that the court is called upon to examine *ex officio*, on the basis of the elements available in the case file, the relevant contractual terms so to assess the possible unfairness of the clauses involved. In this respect, and according to the ECJ, the court's duty to further investigate by ordering measures of inquiry of its own motion, in accordance to direction *sub C)c1*), requires the national court to have serious doubts as to the fairness of the contractual clause involved. In line with the direction above referred to on *C)c2*), such a doubt may also emerge from any document collected in the case file, without being necessary for it to result from the consumer's allegations.

A peculiar discipline the ECJ case law has set out when the claim brought by the professional is channeled by means of a request for an injunction *in-audita altera parte* – meaning here with «injunction» an order for payment of a money debt, or for the fulfillment of any other obligation, the creditor is entitled to obtain without the need for the defendant to be previously heard. In this case, a now well established ECJ jurisprudence entitles the judge, in carrying out his duty to assess the absence of unfair clauses falling within the scope of Directive 93/13, to request *ex officio* from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue⁴⁹. Here it seems that, for *ex officio* investigative powers to be exerted, serious doubts as to the fairness of the relevant clause are not required by the ECJ; which implies that judicial powers of initiative go beyond the limits referred to above on *C)c1*) and even beyond the more elastic criterion proposed in para. 8.1. This solution is, though, consistent with the fact that before the injunction there's no possibility for the defendant to respond or somehow to be heard, which may leave the judge totally unaware of possible infringements and even of the contract in question in its full text.

11. RIGHT TO BE HEARD

Whenever the court orders to take evidence of its own motion, the parties shall be given the opportunity to comment on it and bring additional evidence consequent to that ordered by the court. In this sense is the di-

d.lgs. 6.9.2005, n. 206, stating that “La nullità opera soltanto a vantaggio del consumatore e può essere rilevata d'ufficio dal giudice.”); they don't deal, instead, with the court's related investigative powers.

⁴⁹ See in this sense ECJ, C453/18 and C494/18, *Bondora AS*, spec. para. nn. 45 ff., ECLI:EU:C:2019:1118, which specifically concerns the European Order for Payment as set out by EU Regulation 1896/2006, but the same *ratio* should apply to any national procedure for injunction. On this topic, also for the specific implication in Italy of the said ECJ jurisprudence, see S. Marta, *Tutela del consumatore e superamento del giudicato tramite opposizione tardiva ex art. 650 c.p.c. in caso di decreto ingiuntivo non opposto*, in www.aldricus.giustizia.it.

rection *sub D*, which – and it’s almost needless to say⁵⁰ – is imposed by the fundamental right of defense and to be heard, in the sense, accepted by the ECHR, of being granted the opportunity to take a position on any relevant element of the proceedings, concerning factual and legal issues; as well as that of responding with appropriate means to the initiatives coming from the other party or from the judge.

I would also add that the more accurately this guarantee is implemented, the minor should be the concern to improve judicial powers (in the taking of evidence in particular). This could be seen as a modern version of the idea of an “isonomic procedural order”. Not in the sense that the judge remains passive, but in a sense of equality between parties and judge in the «evidential dialectic», *scil.* of a full possibility for the parties to take position and request evidence in response to the court’s initiative.

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⁵⁰ See however in this sense M. Taruffo, *La prova*, cit., 135 f.; and from Peru, with reference to art. 194 of the national Código Procesal Civil, the landmark decision of Corte Suprema de Justicia, X Pleno Casatorio (tenth judgment of the Plenary Session), 24.9.2020, Case 1242-2017, spec. 87- 90.

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BURDEN OF PROOF: THE EROSION OF AN ANCIENT RULE

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ABSTRACT: The ancient rule of the burden of proof contained in Article 2697 of the Italian Civil Code has experienced a significant erosion in recent years due to case law. The judge often creates presumptions and distributes the burden by asking the party that has the greatest possibility or facility to provide evidence. The rule of the burden of proof, moreover, was traditionally understood to mean that the burdened party had to provide full evidence, only in such cases the burden could be considered to have been met. But even this rule, in many areas, is no longer respected, as case law uses quite different standards of proof, even settling for the so-called prevailing probability. Lastly, a further erosion factor is related to the increasingly frequent use of court-appointed expert witnesses to provide the judge with elements useful for the decision, so that the reference to the party responsible for providing the evidence is disregarded.

KEYWORDS: evidence, burden, conviction, proximity of evidence, presumptions, standard of proof, expert opinion

SUMMARY: 1. ARTICLE 2697 OF THE ITALIAN CIVIL CODE AND THE TWO FUNCTIONS OF THE RULE ON THE BURDEN OF PROOF.— 2. THE MANDATORY NATURE OF THE RULE WITH REGARD TO THE DISTRIBUTION OF THE BURDEN OF PROOF AND THE RULE OF JUDGMENT.— 3. THE EROSION OF THE RULE CONCERNING THE DISTRIBUTION OF THE BURDEN OF PROOF THROUGH PRESUMPTIONS.— 4. THE EROSION OF THE RULE REGARDING THE DISTRIBUTION OF THE BURDEN OF PROOF THROUGH THE CRITERION OF PROXIMITY OF EVIDENCE.— 5. THE EROSION OF THE RULE REGARDING THE FULFILMENT OF THE BURDEN OF PROOF.— 6. THE EROSION OF THE RULE AS A RESULT OF A COURT-APPOINTED EXPERT OPINION.— 7. CONCLUSIONS.

1. ARTICLE 2697 OF THE ITALIAN CIVIL CODE AND THE TWO FUNCTIONS OF THE RULE ON THE BURDEN OF PROOF

The Italian Civil Code of 1942—as is known—contains Article 2697 in Book VI, a provision on the burden of proof¹ that sets a rule considered fundamental as well as an expression of reason and common sense. Precisely because of these characteristics the rule, which has a clear historical continuity with well-known maxims of Roman law such as *actori incumbit probatio* and *ei incumbit probatio qui dicit, non qui negat*, has not been provided for in other European codes, for example in the German Civil Code (BGB)².

According to a systematic interpretation, shared by the prevailing legal doctrine, the function of Article 2697 of the Italian Civil Code is twofold. First, it distributes among the parties the burden of proving the facts that constitute the basis of their claims: in this sense, we speak of the burden of proof in the subjective sense. Secondly, although the principle has not been expressly established, the function of enabling the judge to decide in any case, either by granting or rejecting the claim, depending on whether or not the burden has been met: in this case we speak of a burden of proof in the objective sense³.

To have failed to meet the burden of proof equals a failure to provide the judge with sufficient evidence to convince himself of the truth of the facts alleged and relevant for the decision. For this reason, the rule on the burden of proof has traditionally been linked to that of Article 116 of the Italian Code of Civil Procedure, which governs the principle of free belief, arguing that if the judge is not convinced of the truth of the facts, he must decide the case based on the «rule of judgment» contained in Article 2697 of the Italian Civil Code⁴.

Analysing both functions of Article 2697 of the Italian Civil Code, the eminent legal doctrine has emphasized the public importance of the rule on the burden of proof, which allows it to achieve «an end of general relevance»⁵. This is because the rule provides the judge with the means to avoid having to pronounce a *non liquet*, justified by the permanence of doubt as to the factual situation, since, following the application of the rule on the burden of proof, the proceedings will end by granting or rejecting the claim.

¹ The Italian Civil Code of 1865 had merely reproduced Article 1315 of the *Code civil* concerning the proof of obligations.

² The rule that is applied in Germany, however, has accepted the famous theory of Rosenberg (1965), which is the theoretical basis for the rule in the Italian Civil Code. It is argued, in fact, that a rule can be applied only if the judge is convinced that all the factual conditions set forth in the rule are met. Therefore, the burden of proof rests on the party invoking the favourable effects provided by the rule.

³ See, among others, Micheli (1966), p. 177 ff.; Comoglio (1995), p. 262 ff. In the German doctrine, see for all Blomeyer (1955), 605 ff.

⁴ See Patti (2021), p. 311 ff.

⁵ Taruffo (2012), p. 429.

2. THE MANDATORY NATURE OF THE RULE WITH REGARD TO THE DISTRIBUTION OF THE BURDEN OF PROOF AND THE RULE OF JUDGMENT

The parties may derogate from the provision of Article 2697 of the Italian Civil Code within the limits set forth in Article 2698 of the Italian Civil Code. The parties may thus reverse the burden of proof or exclude the possibility of the use of certain means of evidence, provided that this does not make it «excessively difficult» for the other party to exercise its right⁶.

However, in the absence of an agreement between the parties, the rule of Article 2697 of the Italian Civil Code is mandatory. The judge must distribute the burden of proof taking into account the nature of the (constituent, impeditive, modifying, extinguishing) facts relevant to the case and cannot grant the claim (or exception) if the burden of proof has not been met.

Thus interpreted, the rule has provided, in general terms, stability and certainty. If, for example, A claims that B has caused him harm and seeks compensation, he must prove the basis of his claim and, therefore, convince the judge of the truth of his allegations.

In the absence of evidence, the judge *must* dismiss the case. If evidence is provided, primarily in the form of «legal» evidence that the judge *must* take into account in making his decision in the sense prescribed by law, the discretion on the *quaestio facti* is somewhat limited. The so-called principle of free belief expresses only the power/duty to assess the evidentiary material, but without creating any room for «subjective» considerations. What dominates is the rationality of the evaluation of the evidence, subject to scrutiny through the logic and reasonableness of the argumentation; thus, the preservation of existing situations is favoured and the protection of interests secured by subjective rights is strengthened.

In this sense, it is stated that «free belief» must be understood in a precise and strict manner, and this seems indisputable if one considers that belief is indeed the final moment and the result of a procedure guided by logical and legal rules. It is added that, ultimately, it is not the mode of formation but the *an* of the belief that is free⁷, and it is specified that in any case it is a «free» belief only in a particular sense: as sure as the judge's «intimate belief» may be, if it derives from means that do not correspond to the schemes established by the law (e.g. facts not alleged, private knowledge of the judge), at the time of the decision the judge—it is said—must absolutely «forget» what he has learned⁸. Thus, the judge arrives at a belief that *must* be formed according to specific rules, under which, for example, certain facts must be taken into account while others not.

⁶ On this subject, see Patti (2021), p. 343 ff.

⁷ Andrioli (1967), p. 267.

⁸ Calamandrei (1939), p. 112.

Ultimately, the freedom of belief concerns only the existence of the belief itself. Regardless of the «degree» of probability reached, except in matters where the criterion of «more likely than not» has been affirmed (see *below*), the judge is indeed considered free to be «convinced» of the truth of the facts or not. The judge has to give reasons for his decision to consider the fact as not proven although the party has presented certain evidence, but since no evidence—apart from legal evidence—guarantees the certainty of the fact *probandum*, an explicit or implicit reference to the persistence of doubt nevertheless remains possible⁹. The judgement is final.

Well, this world of certainties, which in many respects reminds us of the world «of yesterday» described by Stefan Zweig, for various reasons does no longer correspond to the reality (of many areas) of civil law.

3. THE EROSION OF THE RULE CONCERNING THE DISTRIBUTION OF THE BURDEN OF PROOF THROUGH PRESUMPTIONS

The rule provided for in Article 2697 of the Italian Civil Code does not correspond to the reality of the judicial proceedings, especially as far as the distribution of the burden of proof is concerned.

In order to avoid the application of the rule under examination, two techniques developed by case law are most commonly used. The first consists in the use of reversals of the burden of proof of jurisprudential «creation», often through the more or less formal construction of simple presumptions under Article 2729 of the Italian Civil Code¹⁰. The second, for which it is difficult to find even a frail normative basis, is that of «proximity to (or of) evidence».

In the case of the reversal of the burden of proof, the judge, disregarding Article 2697 of the Italian Civil Code, decides on the burden of proof of the parties on the basis of the mere reasonableness of the asserted hypothesis¹¹. Frequently, the judge—who according to Article 2729 of the Italian Civil Code shall only admit material, precise and concordant presumptions that relate to the circumstances of the particular case submitted to his examination—makes presumptions that are placed on the same level as the legal ones, as they go beyond the specifics of the case to which they are applied from time to time, have the characteristics of generality and abstractness of legal norms,

⁹ On this point, see Carnelutti (1965), p. 6 according to whom «the judge, after examining the evidence, after listening to the reasons, after evaluating them, continues to find himself, in reality, faced with that doubt, which his thinking cannot, at any cost, eliminate. There will be macroscopic doubts and microscopic doubts; but even the latter are enough to constitute his difficulty and torment.»

¹⁰ See Patti (2020), p. 891 ff.; and (2022), p. 3041 ff. For a comparison with French and German law, see Ghestin and Goubeaux (1994), p. 694; Laumen, (2015), p. 1 ff.

¹¹ Verde (1974), p. 142 ff.

and do not have the function of discovering the ignored fact from the known fact, but rather of distributing the burden of proof¹².

Thus, the jurisprudence does not apply the rule of Article 2697 of the Italian Civil Code in the aforementioned cases, and the use of the presumption has only a function of formal legitimation of the rule adopted. In some cases, the presumption scheme is even abandoned and one formulates (directly) a rule for the distribution of the burden of proof, by saying, e.g., «it is not up for the plaintiff to prove...but it is up for the other party to prove... »¹³.

Presumptions of this kind, also analysing the less recent case law, are found in numerous areas of private law, from domestic work and work between family members to the dismissal of an employee followed by an immediate re-employment with identical duties, assuming a gratuitous performance in the first case and fraudulent dismissal in the second one.

In this regard, one must agree with the considerations that in these cases there is usually no assessment in terms of the probability of the alleged fact and the question is not posed in terms of personal belief, but rather according to the distribution of the burden of proof in light of the mere reasonableness of the asserted hypothesis¹⁴.

Therefore, the judge, who according to the wording of Article 2729 of the Italian Civil Code should only rely on material, precise and concordant presumptions regarding the circumstances of the individual case submitted to his examination, makes presumptions that—as said—are placed on the same level as legal presumptions, both because they go beyond the specifics of the case in which they are applied from time to time, having the characteristics of generality and abstractness of legal norms, and because they do not have the function of moving from the known fact to the unknown fact, but rather that of distributing the burden of proof.

Ultimately, the jurisprudential formation of «presumptions» that have the function of distributing the burden of proof, as well as the «direct» affirmation of a rule for the distribution of the burden of proof other than the one established in Article 2697 of the Italian Civil Code, constitute an (inadmissible) creation of legal norms.

The above-mentioned use of simple presumptions has long been criticized by those who denounce a reversal of the burden of proof that is not provided for by law and thus lacks a legal basis¹⁵. It is particularly noted that any reconstruction of an event is based on experience and, therefore, the use of simple presumptions, whose «construction» is justified in light of experience, in order to determine the distribution of the burden of proof is not considered permissible.

¹² See Patti (2021), p. 774 ff. On the topic see also Taruffo (1974); (1991), p. 211; (2018), p. 1316 ff.; and the essays collected in Patti and Poli (2022).

¹³ Italian Supreme Court, April 23, 1969, no. 1298. See also Italian Supreme Court, October 30, 2018, no. 27680, in *NGCC*, 2019, p. 483.

¹⁴ Verde (1974), p. 142 ff.

¹⁵ Tietgen (1966), p. 55 ff.

Given, in fact, that the rules for the distribution of the burden of proof belong to substantive law, the reversal of the burden of proof can only be based on a rule, as in the case of legal presumptions *iuris tantum*. The simple presumption, on the other hand, based on Article 2729 of the Italian Civil Code, allows the judge, on the basis of data relating to a fact of life (and thus often in light of statistical laws), to consider a fact as true in the absence of evidence to the contrary¹⁶. It is therefore a logical operation which in principle does not concern the reversal of the burden of proof, but exclusively the proof¹⁷.

Nevertheless, the resulting «erosion» of the old rule deserves appreciation in many cases, either because the plaintiff is spared the need to provide negative evidence, or because criteria of reasonableness are followed that take into account the underlying interests and often the need to protect the weaker party.

In other cases, «jurisprudential presumptions» are not created, but a presumption is nevertheless construed, with regard to the concrete case, on the basis of an interpretation of Article 2729 of the Italian Civil Code that is completely contrary to its literal wording, considering a single piece of evidence as sufficient, sometimes without ensuring the contradictory participation of the parties¹⁸.

4. THE EROSION OF THE RULE REGARDING THE DISTRIBUTION OF THE BURDEN OF PROOF THROUGH THE CRITERION OF PROXIMITY OF EVIDENCE

Similar considerations can be made with regard to judgments in which the burden of proof is distributed according to the criterion of the so-called proximity to (or of) evidence¹⁹. This criterion, as well, has no basis in law, but responds to the requirements of common sense and reasonableness, which are especially evident in certain areas.

¹⁶ See Italian Supreme Court, May 24, 1979, no. 2994, in *Giur. it.*, 1979, I, 1, p. 1934.

¹⁷ The English-speaking doctrine is similarly oriented, according to which, unlike in the case of *iuris tantum* legal presumptions, the simple presumption does not have the effect of placing the burden of proof «...presumptions of fact amount to nothing more than examples of circumstantial evidence». In other words, through the simple presumption the judge «assists» the burdened party, who is only called upon to allege the relevant facts with precision. It is stated, however, that «The party relying on the presumption bears the burden of establishing the basic fact». The other party, in any case, and the clarification seems of great importance, must have the opportunity to provide contrary evidence. Keane (1985), 470 ff.

¹⁸ See Italian Supreme Court, March 26, 2003, no. 4472, *Rep. Foro it.*, 2003, section *Presunzione*, no. 9; Italian Supreme Court, September 11, 2007, no. 19088, in *Giust. Civ., Mass.* 2007, no. 1550; Italian Supreme Court, March 2, 2017, no. 5374, in *Corr. trib.*, 2017, 1453 with note by Pellicchia.

In the doctrine, see Cavallone (1991), p. 426 ff; Taruffo (2012), p. 1113 ff; (1974), c. 107; Muroi, (2015), p. 633 ff.

¹⁹ See recently, e.g., Italian Supreme Court, July 6, 2020, no. 13851, in *Foro it.*, 2020, I, c. 3856 ff. and the extensive review by Franzoni (2016), p. 360 ff. On the topic see also, among others, Besso (2015), p. 1383 ff.; Sassani (2022), p. 425.

The criterion (or principle) of proximity to evidence is obviously not unrelated to the normative structure of evidence and can be used, for example, to explain the rule on the imputability of non-performance contained in Article 1218 of the Italian Civil Code. In fact, the rule imposes on the debtor the burden of proving that the impossibility of performance is due to a cause not imputable to him. It is also recognized that the debtor can prove the non-imputability if the cause is not ascertainable. Thus, the criterion of proximity to evidence does not imply that the debtor must positively prove the non-imputability.

Hence, in the present case there is an exception to the general rule of Article 2697 of the Italian Civil Code, but it is an exception provided for by law.

An important (and cogent) application of the criterion developed instead by case law can be found—for example—on the subject of defects in the object of sale. The judgment of the Italian Supreme Court, Joint Chambers, dated May 3, 2019, no. 11748²⁰, modified on this point the precedent set by the famous Italian Supreme Court, Joint Chambers, dated October 30, 2001, no. 13533²¹, according to which the burden of proving the lack of defects at the time of delivery of the goods lies with the seller. The most recent decision, which has accepted the widespread view according to which the warranty for defects does not constitute an obligation of the seller, has followed—with greater rigour—the criterion of the proximity of evidence, the buyer, who received the good, certainly being in the best position to prove the existence of the defects.

Indeed, the grounds state that «the principle of proximity of evidence leads to allocating the burden of proof as to the defects (themselves) on the party who, having received the good, has its material availability»²².

5. THE EROSION OF THE RULE REGARDING THE FULFILMENT OF THE BURDEN OF PROOF

The rule provided for in Article 2697 of the Italian Civil Code does not correspond to the reality of the proceeding even as a rule of judgment, since the required standard of proof is often «lowered». In fact, whenever the judge considers it sufficient that the evidence meets the standard of «more likely than not», or even that of the so-called prevailing probability, he does not

²⁰ Italian Supreme Court, Joint Chambers, May 3, 2019, no. 11748, in *Foro it.*, 2019, I, c. 2726 with note by M. Magliulo. In legal doctrine, see also Modica (2022), p. 276 ff.

²¹ Italian Supreme Court, Joint Chambers, October 30, 2001, no. 13533, in *Foro it.*, 2002, I, c. 769 with note by P. Laghezza. On the issue under consideration, the ruling had been criticized by Patti (2010), p. 160 ff; (2015), p. 170 f., and the criticism was shared by Villa (2019), p. 744 ff.

²² Italian Supreme Court, Joint Chambers, May 3, 2019, no. 11748, cit.

apply Article 2697 of the Italian Civil Code, which would have obliged him instead to dismiss the claim (or the objection)²³.

The phenomenon is also known in other legal experiences, in which, however, it occurs in attenuated terms and often on the basis of statutory requirements²⁴. Regarding the «more likely than not» parameter, the evolution of jurisprudence can be shared, but it requires extreme caution in evaluating the percentages of evidence as well as an adequate reflection on the scope of the rule regarding the judge's belief.

Precisely, the above result is achieved by requiring the party to prove only a certain «degree» of probability of the occurrence of the asserted fact and establishing that the judge has to deem it sufficient to consider the evidence provided²⁵.

Hence, the judge does not have to achieve the belief of the truth—albeit understood as «moral certainty», to use an expression widely used in our doctrine—but merely to determine, based on the evidence presented by the parties, whether (the existence of) a certain fact has a certain degree of probability²⁶. The permanence of doubt is thus expected and in a certain sense physiological: the judge does not have to make an effort to take that «further step», according to some of an exclusively psychological nature, which should lead him to the highest moment of inner certainty.

Of course, the judge must take into account the empirical generalisations drawn from experience, but it is ultimately up to him to determine the probative value of the facts and thus to decide whether the required «degree» of evidence, usually «more likely than not», has been achieved in the specific case²⁷.

Thus, there is no room left for a subjective «belief» of the «truth», at least not in the sense we understand it in our experience. A certain margin of subjectivity is indeed apparent with respect to certain types of evidence, with regard to establishing the degree of probability reached. In many cases, moreover, science now helps to determine the degree of evidentiary value so that the remaining subjective aspects tend to disappear²⁸.

²³ In the hypothesis that a «high degree of rational credibility» is not found, the rule on the burden of proof should apply, as this is expressed by a legislative will of distribution: in this sense Poli (2018), p. 2517 ff., 2529.

²⁴ Clermont and Sherwin (2002), 243 ff.

²⁵ Scognamiglio (2010), p. 619 f.; see Ramponi (1890).

²⁶ In doctrine, for all, see Carratta (2003), p. 27 ff., 43 ff. In case law, among many others, Italian Supreme Court, March 8, 2019, no. 6734; Italian Supreme Court, September 27, 2018, no. 23197, in *Rep. Foro it.*, 2018, section *Responsabilità civile*, no. 86; Italian Supreme Court, July 11, 2017, no. 17084, in *Foro it.*, 2017, I, c. 3358.

²⁷ For an extensive discussion of the topic, see Patti and Poli (2022).

²⁸ Lombardo (2007), p. 35 ff.; Comoglio (2018).

6. THE EROSION OF THE RULE AS A RESULT OF A COURT-APPOINTED EXPERT OPINION.

Finally, the rule of distribution of the burden of proof established in Article 2697 of the Italian Civil Code does not concretely apply in some of the cases where the technical complexity of the facts compels the judge to obtain an expert opinion. For example, if A has purchased a complex machine to be integrated into the production chain of his company, and he brings an action for the defective functioning of the machine itself, the judge—usually—does not rely only on the technical reports submitted by the alleged injured party, but he requires a court-appointed expert opinion. The more intricated the matter (and consequently the expert opinion), the less the possibility of evaluation and independent judgment by the judge. Above all, it seems necessary to overcome the old orientation that excludes the expert opinion from the means of evidence and, in fact, the rule of the burden of proof loses its meaning, since the judge will decide in favour of the plaintiff or the defendant on the basis of the indications provided by the technical expert, in the example given about the existence or non-existence of the defect of the machine supplied.

In this way, on the one hand, the long-standing doctrine is respected according to which the judge, using his own non-official investigative powers, should avoid, as much as possible, resorting to the rule of judgment established in Article 2697 of the Italian Civil Code²⁹; on the other hand, in many cases the decision on the facts is actually made by the expert. The judge—only formally *peritus peritorum*—takes into account the results of the expert opinion and bases his decision on them. On the other hand, due to the complexity of the issues and the technical assessments, it is extremely unlikely that a decision contradicting the results of the expert opinion will be sufficiently substantiated.

For certain matters, it is even envisaged that the expert takes the place of the judge or that the formation of adjudicative panels consisting of jurists and technical experts is considered³⁰.

In fact, the position of the expert at the side of the judge as an «auxiliary» reduces the scope of the reported difficulties. In other words, the Italian system does not ignore the fact that in some cases the technical expert not only provides the judge with the elements to evaluate the evidence, but is himself involved in its evaluation. It should be noted that the degree of this participation can change considerably: consider modern systems of paternity assessment—the judge can do no more than accept the indications from science and decide the case in light of them.

²⁹ Fabbrini (1985), p. 736 ff.

³⁰ Patti (2021), p. 322.

In the legal vocabulary, the different character of the expert opinion is defined by the distinction between the so-called deductive expert opinion, which is directed only to the evaluation of already obtained facts, and the so-called percipient expert opinion, which aims precisely to establish the otherwise inaccessible fact. Due to its essentiality, the percipient expert opinion is considered an objective source of evidence and, as such, must be admitted by the judge if the party asserts a fact that can only be ascertained by technical means.

Recent rulings of the Joint Chambers confirm the aforementioned trend, stating that «The court-appointed technical expert may, within the scope of the issue assigned to him and subject to adversarial proceedings with the parties, ascertain all facts inherent in the subject matter of the dispute and obtain all documents the investigation or procurement of which is necessary to answer the formulated questions »³¹.

In other matters the problem arises—to some extent in a sense opposite to the one examined—as regards the limits of use of any «specialized» knowledge of the judge. It seems certain that the question cannot be resolved on the basis of the principles applicable in the case of «empirical generalisations drawn from experience», since we are dealing precisely with specialized knowledge and not with rules belonging to the common culture.

Therefore, it seems appropriate for the judge to inform the parties of his special knowledge, so that the guarantee of adversarial proceedings is not undermined.

7. CONCLUSIONS

The reasons for the erosion of the ancient rule of the burden of proof are also found in other countries and, above all, in legislation of European source. Consider, first of all, the legislation on product liability which, on the subject of evidence, by implementing the Council Directive of July 25, 1985 (85/374/EEC), used the concepts of «probability» and «likelihood»³², and, in general, the legislation protecting the consumer as the weaker party in the contractual relationship: for example, on the topic of unfair clauses derogating from the jurisdiction of the court and evidentiary covenants contained in general terms and conditions of contract³³.

The spread of the phenomenon and the undoubted benefit of the new criteria force us to take note of the (partial) decline of the ancient rule and show

³¹ See Italian Supreme Court, Joint Chambers, February 1, 2022, no. 3086 and Italian Supreme Court, Joint Chambers, February 28, 2022, no. 6500, in *Giur. it.*, 2022, p. 2136 ff., with note by F. Auletta.

³² See Patti (1990), I, p. 705 ff.

³³ See Bin (1996), p. 8 ff. De Nova (1996), p. 18 ff.; Sirena, (1997), p. 123 ff.; Patti (2000), p. 513 ff.; Scarano (2003), p. 990 ff.; Dalmotto (2005), 144 ff. In case law, see Italian Supreme Court, March 20, 2010, no. 6802, in *Obblig. e contr.*, 2011, 271 with note by O. Trombetti.

that even norms based on «principles» of reason and responding to ancient traditions are inevitably subject to the erosion of time.

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THE SOUND OF SILENCE AND THE ADVOCACY'S FORGOTTEN ROLE

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ABSTRACT: This article discusses the old dictum *nemo tenetur edere contra se* from the point of view of lawyers, identifying ethical profiles in the presentation of evidence in relation to the professional secret and discussing the rationale of the lawyer's role who is entrusted with the task of selecting evidence, both in civil and common law systems.

KEYWORDS: Law of layering, The right to remain silent, Lawyer's professional secret, The duty of confidentiality.

SUMMARY: 1. THE RIGHT TO REMAIN SILENT AND THE ADVOCACY.— 2. PROFESSIONAL SECRET AND CONFIDENTIALITY.— 3. RELATIONSHIP BETWEEN THE PROFESSIONAL SECRET AND THE RIGHT OF DEFENCE.— 4. MATTERS COVERED BY THE PROFESSIONAL SECRET.— 5. THE PROFESSIONAL SECRET'S RATIONALE.— 6. THE HOLDER OF THE PROFESSIONAL SECRET.— 7. THE LAWYER AS A GATEKEEPER OF THE CLIENT'S INFORMATION.

1. THE RIGHT TO REMAIN SILENT AND THE ADVOCACY

The longstanding dictum *nemo tenetur edere contra se* serves as a fundamental tenet underpinning the right of defense within legal proceedings. Specifically, it safeguards the right of individuals to refrain from actions that may incriminate themselves¹. While not explicitly enshrined in the Italian Constitution, the Italian Constitutional Court maintains that the right to silence is

¹ Cfr. ECtHR, 25.2.1993, *Funk v. France*, §44; *ex multis*, ECtHR, 5.4.2012, *Chambaz v. Switzerland*, §52, which stated that this principle lies in the notion of *fair trial*, according to Article 6, §1, ECHR.

an inherent aspect of Article 24², which guarantees the right to defense and aligns with the principles of a democratic rule of law³.

Debates persist regarding the scope of application of this principle, whether confined solely to criminal proceedings or extending to civil proceedings⁴. Nevertheless, it is unequivocal that the right to remain silent does not equate to forfeiting one's entitlement to defend oneself in court. Moreover, non-exercise of the right to silence does not mandate comprehensive disclosure of information to the court or opposing party. This concept is underscored by the inherent constraints on the court's authority to gather evidence. The court's discretion in utilizing this power is circumscribed, contingent upon the necessity to rectify information asymmetries⁵. In the realm of legal proceedings, it is evident that wide-ranging discovery processes inherently lack efficacy in establishing factual truths during trials. Consequently, any rigorous framework within this domain must prioritize the formulation of precise discovery methods, thereby restricting their admissibility solely to cases demonstrating *prima facie* validity⁶.

Given that individuals lacking legal expertise must depend on legal representation to secure a fair hearing and uphold their rights before the judiciary, the pivotal role of advocacy emerges. This is underscored by the fundamental entitlement to competent legal counsel, ensuring the realization of the right to effective assistance in legal matters⁷.

² Corte cost. 10.05.2019, n. 117, Corte cost., ord., 28.6.2004 n. 202, Corte Cost., ord., 26.11.2002, n. 485, Corte Cost., ord., 26.06.2002, n. 291.

³ Corte cost. 22.10.2014, n. 238, Corte cost. 11.02.1999, n.26, Corte Cost. 6.6.1989, n.323, Corte cost. 2.2.1982, n.18.

⁴ Calamandrei (1927), p.131 ss.; see also Calamandrei (1939), c. 237 ss.; Calamandrei (1950), *Il processo come giuoco*, p. 31; Calamandrei (1950), *Processo e giustizia*, p. 289 ss., believes the principle applies to both civil and criminal proceedings. Similarly, Consolo (2007), p. 45, argues that privilege against self-incrimination is only one aspect of a much more general guarantee typical for every proceedings; Scarselli (2010), §3 thinks that no one, not even the Court, can demand that the parties behave against their own interest; Reali (2009), p. 196 s.; Liebman (2012), p. 117. *Contra*, Bertolino, p. 146 ss., spec. p. 156 ss., according to whom, the rationale for the privilege against self-incrimination is typical to criminal proceedings only and it balances State's power; Gradi (2018), p. 632 believes that an extension from criminal to civil proceedings is the result of an arbitrary logical leap.

⁵ Gradi (2018), p. 632 ss.

⁶ Dondi (2012), p. 233.

⁷ Corte Cost. 18.03.1957, n.46 states that the right of defence must be understood as the effective power of the technical and professional assistance in the conduct of any trial, so that the bilaterality of the hearing is ensured and any obstacle to asserting the reasons of the parties is removed; ECtHR 27.11.2008, *Salduz c. Turchia*, §51, according to Article 6 ECHR: «although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial»; *Powell v. Alabama*, 287 U.S. 45, 68-69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64 (1932): «The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law». On the legal grounds of the mandatory nature of advocacy, cfr. Punzi (2009), p.589 ss., spec. p.596.

2. PROFESSIONAL SECRET AND CONFIDENTIALITY

To safeguard the right to defense of a party, legal practitioners are mandated to maintain confidentiality concerning specific information or documentation⁸. Similarly, in their capacity as representatives of clients, attorneys possess the prerogative to decline testimony⁹ and contest efforts by either the State or opposing parties to procure such information during trial proceedings¹⁰.

In civil law countries, this matter is regulated by the concept of professional secrecy, while common law systems uphold it through the attorney-client privilege. Both doctrines encompass several facets, including: (i) privileged communication originating from the client within legal proceedings or acquired for the purpose of legal advice¹¹; (ii) information provided by *ex parte* experts or other attorneys appointed to assist the party in proceedings¹²; (iii) documents stemming from preliminary legal work or investigative endeavors undertaken for the case¹³. Consequently, legal professionals are bound by professional secrecy to refrain from divulging such information and documents, with legal provisions prohibiting lawyers from testifying about facts protected by professional secrecy or from disclosing confidential materials.

It is imperative to differentiate professional secrecy from the broader duty of confidentiality recognized by professional codes of ethics¹⁴. These codes not only extend the scope of protection¹⁵ but they also delineate the conduct

⁸ For an overview, see Allen *et al.* (1990), pp. 359-397. For a historical background, see Hazard (1978), pp.1061-1091.

⁹ Article 6, §3 l. 31.12.2012, n. 247, implemented by Article 200, §1, lett. b) and Article 249 Civil Procedure Code («CPC»), and Article 195, §6 Criminal Procedure Code («CPP») prohibits the indirect testimony of a person who has learned information covered by the attorney-client privilege, unless the lawyer has decided not to avail himself of the right to abstain or the facts themselves have not been previously disclosed. This rule is not mentioned in the Civil Procedure Code, but indirect testimony aimed at proving facts covered by attorney-client privilege would be inadmissible in civil proceedings since it is aimed at circumventing an evidentiary rule.

¹⁰ Article 6, §1 l. 247/2012 states that lawyers are obliged, in the interest of their client, to keep absolute professional secrecy and full confidentiality with reference to the facts and circumstances learned in the advocacy, legal counseling and out-of-court assistance.

¹¹ Andrews (1994), 12-009, «modern society accepts that there is an important constitutional value in obtaining “free, confident, and candid” legal consultation».

¹² See Rule 26 (b) (3) *Federal Rules of Civil Procedure* which implements Work-product doctrine («*Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative*») specifying that are included «*the other party's attorney, consultant...or agent*»).

¹³ Since *Hickman vs. Taylor*, in U.S. 1947, vol.329, p. 495 ss. documents, drawings, charts, photographs, computer data that constitute the work product of the lawyer are excluded by the duty of disclosure.

¹⁴ Article 13 and Article 28 Codice Deontologico Forense («CDF») for Italian lawyers; Article 2, Règlement Intérieur National (RIN) de la profession d'avocat for French lawyers Article 5 Código Deontológico de la abogacía Española («CDAE»); §2 Berufsordnung für Rechtsanwälte (BORA), for German lawyer; §2.3 Code of conduct for European lawyers adopted by Council of Bars and Law Societies of Europe («CCBE Code»).

¹⁵ Principle (b) of the *Charter of Core Principles of the European Legal Profession* adopted by CCBE states «the right and duty of the lawyer to keep clients' matters confidential and to respect professional

expected of lawyers toward their clients. They mandate the preservation of all information obtained in the course of professional engagements as confidential and prescribe penalties for any breaches thereof.

The underlying objective of the duty of confidentiality is to foster trust between clients and their legal representatives while upholding the core tenet of loyalty in the professional relationship¹⁶. Furthermore, it is noted that the lawyer's duty of confidentiality encompasses not only the obligation to maintain professional secrecy but also the duty to uphold the confidentiality of all information garnered during the professional association. The former represents an integrity-based obligation, paralleled by the client's corresponding right; the latter is a correlative duty, meaning that the client has a substantive right to keep the personal information obtained by his or her lawyer during the professional relationship confidential¹⁷. This correlative duty primarily pertains to information within the realm of privacy protected by law, encompassing details shared by the clients to avail themselves of legal services¹⁸.

The provision of a duty of confidentiality, in fact, is intended to induce laymen to consult lawyers in order to find legal advice, or as the professionals who have special skills or knowledge, not only limited to the legal sphere, that he or she habitually uses for his or her profession. Frequently, laymen hire a lawyer because they need a professional who knows negotiation techniques, which might help the conclusion of a business deal; story telling skills, which might help the client in a shareholders' meeting; or even just because they want certain jobs to be performed by a professional who discharges its tasks with independence, loyalty, probity, dignity, decorum, diligence, and competence.

secrecy». Among the scholars, *Vlies (2014)*, p.231 s., distinguishes between professional secrecy (which he brings back to public policy) and confidentiality (for which he admits exceptions), echoing Cruyplants *et al.* (2005), p. 574. Borghesi (2008), p. 671, states that secrecy exists as a function of the process and it is related to the lawyer's role within the system, whereas confidentiality concerns the information itself. The 1969 Model Code of professional responsibility (DR 4-101(A)), which was the model before adopting the 1983 Model Rules of professional conduct, uses the terms «confidences» and «secrets». Confidences are «information protected by the attorney-client privilege» and secrets are «other information ... the disclosure of which would be embarrassing or would be likely to be detrimental to the client».

¹⁶ Patterson (1987), p. 43 ss., at p. 73, notes that lawyers characterize the duty of confidentiality as an independent duty necessary to fulfill the duty of loyalty to the client; Bianchi Riva (2012), p.198 ss. reconstructs medieval confidentiality doctrine as an implementation of loyalty to the client.

¹⁷ Patterson (1987), p. 72 ss.; Patterson (1981), p. 717 ss., p. 720 ss. who resumes, developing them, the ideas of O'Brien (1842), p.108, 115.

¹⁸ About privacy as the rationale for duty of confidentiality, see Scalfati (2004), p.1240 ss., who believes there exists a claim not to be subjected to indiscriminate disclosure of what has been confided by reason of a relationship necessitated by the indispensability of technical service; Patterson (1987), p.73 thinks that «the client's right of privacy creates the lawyer's duty to protect client information which no one else has a right to know»; Wendel (2016), p. 205 ss.

3. RELATIONSHIP BETWEEN THE PROFESSIONAL SECRET AND THE RIGHT OF DEFENCE

The professional secret is therefore an expression of party's right to silence and can be justified to the extent that it serves to guarantee its right of defence¹⁹. Other scholars²⁰ assert that the lawyer, as an officer of the Court, is entitled to a sphere of inviolability of communications with her client and a duty to keep such information confidential. On this ground, §2.3.1 CCBE Code states that «It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State». However, in a democratic society this argument, which assigns a special role to the lawyer, whenever allowed, represents a last chance to be used with caution, only when there are no other ways to achieve results that are deemed essential.

So, assuming that there is a close connection between professional secret and the right of defence, it could be alleged, according to Taruffo²¹, that there is a general moral and political, as well as legal, obligation of truth from which procedural law may derogate. In this framework the professional secret constitutes the exception to the general rule. But it can also be reasonably argued that all the interests and rights involved in the issue must be balanced and, in so doing, the right of defence is bound to overrule the others. If that is the case, then the professional secret is the rule, not the exception.

This is the *rationale* of the discipline allowing the party to remain silent, therefore preventing certain information and documents from reaching the Court. This explains the lawyer's role as a 'gatekeeper' who, within the range of information in the client's possession, selects those that are appropriate to present.

¹⁹ Corte cost. 8.4.1997, n.87 in *Giur.it.* 1997, I, 425 ss. states that professional secret is intended to protect the activities inherent in the defence and not the subjective interest of the professional. In the United States A, *Upjohn Co. v. United States* 1981, in U.S. 449, p. 383 ss., spec. 389, states that «Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice». Buyle, Van Gerven (2012), p. 329, n° 8: «Même d'ordre public, (le secret professionnel) est limité au but dans lequel il a été institué à savoir l'intérêt du client. Le secret professionnel fait partie des droits de la défense et est donc lié à la défense des intérêts du client».

²⁰ Danovi (1993), p.121 ss.; Hazard (1982), c.215 ss., at §3, Lambert (1985), p. 193, note that the power to protect secrets constitutes one of the typical powers of the office of a lawyer, on the same level as the power to represent clients in court and to assist them in negotiations. This idea was already existing in Tommaso d'Aquino, *Summa theologia*, IIa IIae, q.70 art.1 and throughout medieval and modern scholarship, as notes Bianchi Riva (2012), p.198 ss.

²¹ Taruffo (2009), p. 152 s.

The close connection between professional secret and the right of defence implies that: (§4) professional secret does not cover all information received by the lawyer in the exercise of his professional activity; (§5) information covered by professional secret is information that can be used by the lawyer to value alternative claims; (§6) the client is the holder of professional secret: the secret does not belong to the lawyer and the client may waive the privilege.

4. MATTERS COVERED BY THE PROFESSIONAL SECRET

As seen before, confidentiality must be distinguished from professional secret: the former covers personal information that no one else is entitled to know; the latter concerns professional information, whose disclosure would be of qualified interest for someone else, however protected by the law for policy reasons²².

The professional secret is based on the client-lawyer relationship and on the right of defence: the client is entitled to keep confidential information that others have an interest in knowing but that the law allows him not to disclose. It follows that the lawyer²³ has a corresponding right to keep that information confidential and this way the client can implement his right in the context of the proceedings.

In this framework, professional secret does not cover all the confidential information received by the lawyer during his professional activity, but only the information, whatever support is used²⁴, (i) obtained in the context of proceedings, or (ii) aimed at providing a legal opinion or legal advice to the client, or (iii) acquired during a legal transaction²⁵. It is not only the content of confidential information known to the lawyer, but also all information acquired by the lawyer from third parties, technical reports from other professionals relating to the subject matter of the dispute, correspondence with them²⁶, as well as the lawyer's notes and drafts of court documents²⁷.

²² Patterson (1987), p. 73.

²³ Legal trainees (Corte cost., 8.04.1997, n. 87, cit.), employees and even occasional associates of the lawyer have the same privilege (Article 6, §2, l.247/2012). In France, Article 2.3 RIN «*L'avocat doit faire respecter le secret par les membres du personnel de son cabinet et des structures au sein desquelles il exerce, et par toute personne qui coopère avec lui dans son activité professionnelle. Il répond des violations du secret qui seraient ainsi commises*». Similarly, §2.3.4 CCBE Code «A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality».

²⁴ In France, Article 2.2 RIN states «Le secret professionnel couvre en toute matière, dans le domaine du conseil ou celui de la défense, et quels qu'en soient les supports, matériels ou immatériels (papier, télécopie, voie électronique ...); in Spain, Article 5, §5 CDAE states «El secreto profesional ampara las comunicaciones y negociaciones orales y escritas de todo tipo, con independencia del medio o soporte utilizado».

²⁵ See *Restatement 3rd of The Law Governing Lawyers*, §68 (now onwards «*Rest.*»).

²⁶ In the United States, attorney-client privilege covers confidential information relayed to individuals who cooperate with the attorney for a legal advice. See Allen *et al.* (2006), p.799 s.; *United States v. Kovel*, in 296 F.2d 918 (2nd Cir. 1961) stated that the confidence to an accountant employed by a

Footnote 27 in next page

In other words, it is necessary that the information is connected to a professional activity aimed at providing legal advice to the client, in the context of judicial activity or in the out-of-court practice. Thus, the other information is excluded from the procedural protection of professional secret and the lawyer may not refrain from testifying as a witness. It is the information that the lawyer should acquire in the business or financial activity, or in accounting matters, when he or she is asked to identify a public relation strategy: These scenarios involve legal services that do not require the assessment of alternative or competing legal claims²⁸.

5. THE PROFESSIONAL SECRET'S RATIONALE

Traditionally it is taught that professional secret encourages the client to provide the lawyer with true information because this allows the lawyer to work better²⁹; but it has been said that this is only an empirical assumption yet to be demonstrated³⁰. Recently, it has been argued that the professional secret is aimed at protecting privacy³¹; more refined is the idea of those who have argued that the benefits to the community from the rules on professional secret (equal to the sum of the benefits of the protection of privacy and the utilitarian ones) are greater than those that would derive from being able to decide the dispute with a complete picture of the information available³². However, none of these theories explain why the procedural rules frequently allow the violation of the parties' rights concerning privacy³³.

Some scholars, according to Bentham, have wondered about the opportunity to protect confidential information³⁴. It has been said that the professional secret protects the offender who relies on the lawyer's confidentiality. However, this statement goes too far: from this perspective, the citizen should never be allowed to hire a lawyer. In this framework it is noted that professional secret operates as a one-way filter for the facts useful to the client³⁵.

law firm that specialized in tax law are privileged; Murphy (2005), p. 545 ss. discusses the issue about spin-doctor.

²⁷ In France, Article 2.2 RIN «Le secret professionnel couvre ...: les consultations adressées par un avocat à son client ou destinées à celui-ci; les correspondances échangées entre le client et son avocat, entre l'avocat et ses confrères, à l'exception pour ces dernières de celles portant la mention officielle; les notes d'entretien et plus généralement toutes les pièces du dossier, toutes les informations et confidences reçues par l'avocat dans l'exercice de la profession...».

For the United States, see Allen *et al.* (2006), p.836 ss.; Wendel (2016), p. 197 ss.; *Rest.*, §87.

²⁸ Allen *et al.* (2006), p.382.

²⁹ «The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services». *Rest.*, § 68; Wigmore *et al.* (1961), §2285; Aa, Vv. (1985), 1481 ss.; Buyle, Van Gerven (2012) p. 329, n° 2.

³⁰ Krattenmaker (1963), pp. 85-94; Saltzburg (1984), p. 822.

³¹ Krattenmaker (1963), pp. 61 ss.; Saltzburg (1984), p.817 ss.; Scalfati (2004), p. 1240 ss.

³² Wright, Graham (1980), 23, §5422, p. 672; Shuman, Weiner (1982), p. 906 ss.

³³ Allen *et al.* (2006), p.373 ss.

³⁴ Bentham (1838-1843) vol.VII, libro IX, pt. IV, cap. V, p. 475.

³⁵ Kaplow, Shavell (1989), p.565.

Thus, the costs of the attorney-client privilege outweigh the benefits because the resulting rules stand in opposition to the principle that all relevant facts must be acquired³⁶.

R.J. Allen's argument overcomes this criticism and appears persuasive. According to him, confidentiality is a cost to the other party and to the community and it is a benefit to the client because it makes more difficult for the opponent to acquire some information. This cost is justified to the extent that it becomes a benefit for the administration of Justice, and this occurs for several reasons³⁷.

First, a comprehensive and candid disclosure by the client enables the lawyer to assess the existence of contingent claims, i.e., the possibility of claims other than those abstractly assumed by the client³⁸. Second, the professional secret increases the material for the trial, with reference to that information which is both favourable and unfavourable to the client. It is not reasonable to think that the client will voluntarily disclose such facts, but with the provision of the professional secret it is more likely that the lawyer will decide to use them for the client's defence³⁹. Third, professional secret motivates the lawyer to carry out a preparatory work for the trial. Normally the lawyer's investigations are both helpful (a benefit) and harmful (a cost) to the client; thus, forcing lawyers to disclose all investigations, the lawyer's work product would have advantages for the administration of justice, but would constitute a disincentive for this type of activity⁴⁰.

The rationale thus identified explains the exceptions to the professional secret. When the client avails himself of the services of a lawyer in order to break the law or to commit a criminal offence, this hypothesis is outside the scope in which the lawyer is called upon to assess alternative claims and the cost of the professional secret would not be justified; indeed, the exception operates even when the lawyer is in good faith⁴¹. The same applies to information about the client's personal identity, since the client is not entitled to keep it confidential⁴², and for which there is no room for the lawyer to develop an alternative claim.

³⁶ Frankel (1982), p.51 ss.

³⁷ Allen *et al.* (2006), pp. 359-397.

³⁸ Allen *et al.* (2006), p. 371 ss.

³⁹ Allen *et al.* (2006), p.361.

⁴⁰ Allen *et al.* (2006), p.388.

⁴¹ In this case, before ordering the lawyer to testify, the judge must summarily determine whether it is existing the client's intent to commit a crime. Cfr. Allen *et al.* (2006), p.823 s. and St.Peter-Griffith (1993), 259.

⁴² See Article 651 Criminal Code («CP») which punishes refusal to give information about one's personal identity, status, or other personal qualities and Article 66 Code of Criminal Procedure («CPP»), which compels the defendant to answer.

6. THE HOLDER OF THE PROFESSIONAL SECRET

As it is typical in the civil law tradition⁴³, the professional secret must be protected regardless of the benefit to the client, as it is a fundamental element of the legal profession and closely linked to the subjective qualities of the lawyer⁴⁴. This outlook is linked to the idea that the lawyer cannot be independent if he or she were forced to disclose client information. So, disclosure of information acquired by reason of agency would not in fact be permitted, as such conduct would not be considered professionally appropriate.

From the opposite view, the client is the holder of the professional secret, and it is the client who benefits from the confidentiality⁴⁵; the advantage for the administration of justice is only a «collateral», not direct, consequence of the rules on secrecy⁴⁶.

This means that clients may waive the privilege⁴⁷. Such a waiver does not need to be expressed in words but may legitimately be performed by voluntary disclosure of the information⁴⁸ or because of a legal claim is based on confidential information. Thus, the lawyer and the client must observe minimal precautions to ensure said confidentiality, in the absence of which it can be assumed that the information is not covered by secrecy⁴⁹: what is relevant is «how» the client-lawyer communication takes place⁵⁰.

7. THE LAWYER AS A GATEKEEPER OF THE CLIENT'S INFORMATION

According to Patterson «the three core ethical duties of legal ethics all pertain to the communication of information: keeping confidences of the

⁴³ Hazard (1978), p.1070 notes that originally the lawyer's was the holder of the privilege because «a gentlemen does not give away matters confided to him».

⁴⁴ See Hazard, Dondi (2005), p.210; Danovi (1993), p.121; Dondi (2009), p. 653 s.; Lambert (1985), p. 193; Cachard (2006).

⁴⁵ See Allen *et al.* (2006), p.798. Some openness in the civil law tradition is visible in Buyle, Van Gerven (2012), p. 329: «Même d'ordre public, (le secret professionnel) est limité au but dans lequel il a été institué à savoir l'intérêt du client. Le secret professionnel fait partie des droits de la défense et est donc lié à la défense des intérêts du client»; and, presumably, in the arguments that exclude that the rationale for attorney-client privilege can be traced to subjective characteristics of the witness, such as Dondi (1997), p.59; Taruffo (1988), p.751; Dittrich (2019), p. 2015; Corte cost. 8.4.1997, n.87, cit., stated that the exemption from the duty to testify is not aimed at securing a condition of personal privilege for those who practice a particular profession.

⁴⁶ Dondi (2009), p.655 states that U.S. rules on attorney-client privilege have shifted from a secrecy-protective to an information-selective device aimed at a more effective search for truth in litigation.

⁴⁷ *Contra*, Borghesi (2008), p.681 s., believes that the lawyer has a duty to refuse to testify even when the client has waived professional secret.

⁴⁸ Wendel (2016), p.188 ss.

⁴⁹ For an analysis of the impact of new technologies on the duty of confidentiality, see Baker (2018), p. 1 ss.; Guttentag (2012), p. 415 ss.; Ho (2017), p. 853 ss.; Frostestad Kuehl (2019), p. 1 ss.; Preston (2018), p.879 ss.

⁵⁰ Dondi (2009), p.652.

client, displaying candor to the tribunal, and showing truthfulness to the adversary»⁵¹.

This analysis shows that the lawyer has the control over client information and that the rule on professional secret is part of the legal regulation of this essential task of the lawyer.

These rules are procedural in nature, since they allow for the enforcement of substantive rights and duties, and they have an ethic nature too as they constitute the limit of the lawyer's power to control information⁵². In particular, the lawyer constitutes a filter to the information presented to the judge⁵³. Such a filter is efficient when the reduced possibility of obtaining information, due to the lawyer's control over confidential information, is justified by the greater number of alternative claims on which the defence can be based⁵⁴. Therefore, the rules on professional secret must be read through this interpretative criterion in order to balance the opposing party's right to evidence.

This function of selecting relevant information is inherent to the party's right of defence and to the role of the lawyer as a gatekeeper of the information provided by his or her client: at least in this context it is an expression of the dictum *nemo tenetur edere contra se*.

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⁵¹ Patterson (1987), p. 66

⁵² Patterson (1987), p. 66.

⁵³ Dondi (2009), p.655.

⁵⁴ Allen *et al.* (1990), p.368.

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