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I. Non-Jury Trial

The *Principles and Rules* adopt a kind of trier of fact that corresponds substantially to the civil law model, being based upon a non-jury type of court composed just by one or more professional judges. Several reasons may be invoked for such a choice, for instance the absence of the jury trial in the tradition of all civil law countries, with the corresponding difficulty for these countries to accept a model based upon the jury, the virtual disappearance of the civil jury in England, and so forth. A further major reason not to adopt a jury-trial model, with the consequence of having a professionally trained judge, or a panel of professional judges, as triers of fact, may be an epistemic reason, i.e., a reason connected with the kind of decision that is assumed to be made about the facts in issue.

As it is well known, the jury-trial model is based upon several assumptions, among which a prominent role is played by the idea that the jury will assess the evidence according with the standards that are typical of the common sense that will be used by jurors in order to make up their minds on the basis of the evidence presented. In their role of fair representatives of common people—i.e. of "the people" at large—the

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jurors will apply the standards that are typical of the "common" or "average" culture of their society in the place and at the time in which the decision is made. No technicalities, therefore, no sophisticated logic, no scientifically correct epistemology: just common sense. Moreover, common values and common evaluative standards should be applied in the various moments of the decision-making about the evidence that implies value judgments and discretionary appreciations (for instance, when the credibility of a witness has to be assessed). Given these assumptions, in the American legal and political culture a choice is made in favor of *this* model of decision about the facts in issue, based upon the epistemology of common sense (whatever it may mean and whichever standards, values and notions the common sense may include). This choice is obvious, on the other hand, if it is assumed that the jury is a necessary and unavoidable factor of democracy and "populism" in the administration of justice. However (especially if we adopt the viewpoint of civil law systems) there are costs to pay for this choice, such as the difficulty of obtaining from the jurors a fair and credible assessment of sophisticated scientific evidence, the "mystery" that is peculiar of the jury room, and the lack of any justification of the verdict (with the corresponding impossibility to check whether or not the verdict is justified by a rational evaluation of the evidence presented).

The civil law tradition, and the approach prevailing in current civil law systems, is quite different. In such systems the main assumption is that deciding about the facts in issue is a possibly difficult and technically complex enterprise that can be better accomplished by trained people, such as professional judges. In particularly difficult cases, the court may be integrated by experts, or experts may be appointed by the court in order to help the court to achieve a scientifically well grounded decision. Moreover, those systems are oriented not to accept any kind of decision just because it is made "by the people." They require that the final judgment on the facts be based upon a rational and logically controlled reasoning concerning the value of the evidence presented and the inferences that the court drew from such evidence. This is the reason why the judge is required, sometimes also on the basis of constitutional provisions, to deliver an opinion in which she justifies the conclusion she reached about the facts in issue on the basis of logical arguments and rational standards of evaluation. Of course also the civil law judge cannot but rely upon common sense, whenever there are no scientific items of evidence possibly supporting her decision, but common sense has to be used in a rational and logically controllable way. In no case may the decision about the facts be a sort of "black box" in which the judge mysteriously and secretly decides which statements of fact are true and which are false on the basis of the evidence. So to speak, this is a

model of decision on the facts that is based upon a "rational epistemology." Sometimes there are approaches according to which such an epistemology of the judgment of fact is not shared: the followers of the *intime conviction* theory may prefer to rely upon the subjective impressions of the judge rather than upon her "rationalized" inferences, and the "free evaluation of proof" may be interpreted as a sort of full discretionary choice made by the single judge. However, the clearly prevailing trend is in favor of a rational model of the decision about the facts, in which the judge works out a possibly complex set of inferences in order to reach her conclusions and justifies her decision by means of logically structured arguments.

The *Principles and Rules* share a "rational epistemology" of the judgment about the facts in issue both because the jury-trial model is not accepted, and because correspondingly they require a specific justification of the decision about the facts of the case. Principle 23.2 clearly says that "the judgment should be accompanied by a reasoned explanation of the essential factual, legal and evidentiary basis of the decision," and an equivalent provision is stated in Rule 32.1.

II. Role of the Parties and Role of the Court

A further important issue that has to be faced while analyzing evidentiary systems in a comparative perspective, and that needs a solution whenever a set of rules concerning evidence is drafted, is whether the proceeding is intended as a mere device aimed at solving disputes, or as a machinery that is, or should be, aimed at deciding cases on the basis of a truthful assessment of the facts in issue. If the former alternative is chosen, then the truth of the facts is not included among the basic purposes of adjudication. Truth is not a necessary condition if a decision is only to be effective in solving the dispute; truth can even be a hurdle, or may even be counterproductive, in a proceeding that is aimed just at putting the conflict to an end. At best, it is irrelevant: it may be a by-product, but it is not searched by itself. Therefore, the proceeding need not be oriented to the search of truth; it has to be fashioned in order to achieve the purpose of closing up the dispute, no matter how. In such a context one may wonder why the parties and the court should waste time and energy (and money) in the presentation of evidence, if it is assumed that the collection of evidence is not oriented to provide the proof of the facts in issue: A possible answer is that the trial—and more generally the presentation of evidence—is not conceived as an epistemic enterprise oriented to the search of truth, but rather as a ritual, a theatrical event, the purpose of which is not to find out the truth, but to make the public believe that the truth is seriously searched. When this is the

prevailing conception of the function of civil litigation in general, and of the presentation of evidence in particular, the model of a pure adversarial type of litigation appears to be the most effective: an adjudication in which the parties have used all their means in a fair individual competition is perceived as the best way to make the parties (including the looser) accept the final decision, independently of its quality and of its contents.

Things are completely different if the assumption concerning the function of litigation and adjudication is oriented to solve disputes by means of *just* decisions, and if—as Jerome Frank, among many others, said—no decision can be just if it is based upon the wrong facts. In this perspective an accurate and truthful reconstruction of the facts in issue, on the basis of the available evidence, represents one of the fundamental goals of adjudication and is a necessary condition of the justice of the final decision. Correspondingly, the structure of the proceeding, and particularly of the law of evidence and of the trial, should be fashioned in order to facilitate the search of truth. Some supporters of the adversarial system of litigation claim that such a system is effective for this purpose, since in their opinion the truth should automatically emerge from the free clash of the opposing parties, but this claim has no historical and rational basis. John Langbein clearly shows that the adversarial system never was a good mechanism for the search of truth. In general, moreover, the civil law systems that are oriented to include the search of truth among the purposes of civil litigation do not trust the parties as the only actors in the enterprise of finding out the truth. Actually there is—in these systems—an overwhelming movement in favor of expanding the power of the court not only in the management of the proceeding, but also in the collection of the evidence that may be relevant to establish the truth of the facts: then the court is allowed—and sometimes is requested—to go on its own motion beyond the evidence that has been offered by the parties. This trend is more or less advanced in the various civil law systems, and it may lead to the adoption of different procedural devices, but there is no doubt that the judge is expected to play an active role with the aim of having all the relevant evidence available actually presented.

This is the systemic choice that has been made by the *Principles and Rules*. Principle 22.1 clearly says that "the court is responsible for considering all relevant facts and evidence[,]" which means the court—and not the parties—has the responsibility of making a correct "determination of fact[.]" In order to achieve this purpose, the court may—as it is said in Principle 22.2.2—"order the taking of evidence not previously suggested by a party," and may also—as it is said in Principle 22.2.3—"rely upon . . . an interpretation of the facts or of the evidence that has not been advanced by a party[.]" It is clear that the adversarial

conception of civil litigation has been set aside in favor of a model in which the court should be oriented to the search of truth about the facts in issue. This model is present in the *Rules* as well: Rule 22.2 says that the court may order the production of evidence not offered by the parties "as necessary in the interest of justice[;]" Rule 25.5 says that the court may order any party or non-party to present any relevant information, document or thing that is in this person's possession, and Rule 28.3 says that the court may, even on its own motion, order reception of any relevant evidence.

III. Disclosure and Discovery of Evidence

In the context of an epistemology that is oriented to favor the achievement of accurate and truthful decisions, the possibility of having all the relevant evidence actually presented is obviously very important. In the perspective of the procedural implementation of this purpose, two main points are worth consideration: the disclosure and the discovery of evidence.

Disclosure is an obligation of each party: if all the relevant evidence has to be presented, a fundamental assumption is that all the parties are under the obligation to disclose, to the other parties and to the court, all the relevant evidence that is in their possession or control. This is a very important point, because in several systems the parties are not under a general obligation of disclosing the evidence they have in their possession, and they may also choose not to present some of such evidence. With the aim of favoring the broadest and possibly complete information of all the parties about the evidence that is in possession of all the other parties, the *Principles* state the guarantee of the "access to evidence": Principle 16.1 says that the court and each party should have access to relevant evidence of any kind, and Principle 16.2 says that upon request of a party the court should order disclosure of any relevant evidence in possession or control of another party or of a non-party. A necessary premise is stated by Principle 11.3 when it says that in their pleadings the parties should "describe with sufficient specification the available evidence to be offered in support of their allegation[.]" The same perspective is adopted by the *Rules* as well: according to Rule 12.1 the plaintiff should describe the evidence supporting the facts she alleges in her complaint, and the same has to be made by the defendant (Rule 13.4). Another important rule is 21: under the heading *Disclosure* it specifies the ways in which any party must disclose to the court and to the other parties the evidence on which this party intends to rely, in addition to that provided in the pleading.

If the duties of disclosure are met by all the parties, all the evidence

that is available to all the parties can be examined by the court and by all the parties. However, it may happen that not all such evidence is voluntarily disclosed by all the parties, since a party may have a strong interest not to disclose relevant evidence that may provide a clear support to the case of another party. Then the problem arises of what the common law systems call *discovery of evidence* that is of the devices that could be used in order to obtain access to the evidence that is in possession or in control of another party, or of a non-party, and that has not been voluntarily disclosed. In the current procedural systems there are two main models of discovery: a) the American discovery, that is characterized by the fact of covering all the possible kinds of evidence, including testimonial evidence, expert evidence, and so forth, by the availability of a wide range of procedural devices, and by the fact of being possible whenever the item of evidence that should be discovered has any connection with the subject matter of the case; b) the limited discovery, that is used in all the other systems, including the English one, that concerns mainly the area of documentary evidence and can be obtained only on the basis of a "strict" relevance of the evidence to the facts in issue.

The American discovery is well known for being possibly abused, for its costs and for its exceeding effectiveness in penetrating into the other parties' records. Because of these reasons it is criticized and rejected in transnational and international contexts. A limited discovery of documents, on the contrary, is commonly accepted and used in all the other procedural systems: the only possible variation is that in some systems the discovery of a document may be ordered by the court only upon a party's request, while in other cases it may be ordered on the court's own motion.

The peculiar features of the American discovery make it unique all around the world, but they make it hardly acceptable out of the American system. The *Principle and Rules* adopted a model of discovery—cautiously called "disclosure" or "exchange of evidence" in order to avoid misunderstanding and confusions with the American device—that is by far less broad than the discovery existing in the American system. The main purpose has been to prevent the "fishing expeditions" that are the most frequent kind of abuse in the practice of American discovery. Then principle 16.2 says that the court should order disclosure of relevant and reasonably identified evidence in the possession of a party or of a non-party. Relevancy should be determined by reference to the facts in issue that should have been specifically defined in the pleadings (*see* Principle 11.3), and the "reasonable identification of evidence" is aimed at preventing the party from sifting the records of the other party in the hope of finding out something useful (as the decisive "smoking

gun"). Rule 22.1 is more detailed in providing that a party may request the court to order production, by any person, of any evidentiary matter "that is relevant to the case and that may be admissible[,]" including documents and other records of information that are specifically identified (Rule 22.1.1), information identifying persons having knowledge of a matter in issue (Rule 22.1.2) and the report of an expert that the other party intends to present (Rule 22.1.3). These provisions deal mainly with documentary evidence of various kinds, and are aimed at preventing fishing expeditions. However, they are broad enough to allow the presentation of all the evidence that may be really relevant for the decision on the facts in issue.

IV. Examination of Witnesses

Another important issue concerns the method that is used in the oral examination of witnesses (including non-parties, parties and experts). Generally speaking, the traditions of common law and civil law systems are very different: common law systems are based upon the method of examination and cross-examination made by the lawyers of the parties (with a limited role of the court, the function of which is just to ensure the fairness of the examination), while civil law systems are based upon the method of an examination performed by the court, essentially on the basis of a set of statements of facts previously drafted by the parties (with a very narrow possibility for the parties to examine directly the witness). On the basis of an epistemology that is oriented to the search of truth about the facts in issue, the question is to determine which method for the examination of witnesses is the most effective among the various methods that could be adopted. Such a question is very difficult to solve on the basis of the experience of the different systems. On the one hand, the cross examination may be considered—following Wigmore—as the best legal engine ever invented for the search of truth, but it is well known that in the actual practice it is often abused and becomes a means to "destroy the witness" and to prevent the discovery of truth, rather that an efficient mechanism to find out the truth. On the other hand, the experience of several civil law systems (for instance: Italy) is that an examination performed by a judge that is not specially interested in discovering the truth, or that does not know the facts in issue well enough to be effective in examining the witness, may be a very poor and inefficient device for finding out what the witness actually knows about the facts. However, both the methods considered are so tightly connected with the traditions, the professional habits and the practice of the systems in which they are used, that it is almost impossible to imagine any other form of examination that could be

accepted in any procedural system.

Because of these difficulties, the *Principles* do not make a choice in favor of one specific method of examination: Principle 16.4 just says that testimonies should "proceed as customary in the forum[.]" However, the same provision includes something that is clearly drawn from the Anglo-American practice of cross-examination: it says that a party should have "the right to conduct supplemental questioning directly to another party, witness or expert who was first questioned by the judge or by another party[.]" Such a "supplemental questioning" is clearly a form of cross-examination, and is intended—following Wigmore—as an efficient means for the discovery of truth. In a roughly equivalent but more specific form, Rule 29.4 provides that a person giving testimony may be questioned first by the court or by the party seeking testimony, depending on whether the witness was called by the court or by a party. Then all the parties are allowed to ask "supplemental questions." Moreover, the court and the parties may challenge the witness credibility, by means of further questions. This Rule is clearly oriented to maximize the possibility that both the court and the parties ask questions to the witness, in order to elicit all the witness's knowledge about the facts and to check effectively the witness's credibility. Substantially, this is a method of examination that is based upon the Anglo-American model, but with the significant difference of the active role that the court may perform both by calling witnesses on the court's own motion and by intervening in the examination and counter-examination of all witnesses.

V. Expert Evidence

Another puzzling and important question is that of expert evidence. The use of experts has become more and more frequent in civil litigation, and will probably be even more frequent in the future, since the need to rely upon scientific evidence in the decision-making is becoming a sort of ordinary feature in many areas of civil justice. Once again, the traditions of common law and civil law countries are basically different insofar as the methods for the presentation of expert evidence are concerned. As is well known, common law systems are based upon party-oriented expert witnesses that are chosen, paid, prepared and examined (and cross-examined) by the parties: then the "battle of experts" is the most common device to present expert evidence to the court. The basic assumption here is that from the clash of two or more partial experts, a reliable scientific advice about the facts should emerge. The court may have a power to appoint independent experts, but such a power should be unfrequently used, since it is up to the parties to provide the court with "their own" answers to the scientific or technical question

that has to be decided. The trier of fact will choose which of the two competing versions provided by the parties' experts deserves to be taken as the good one.

In civil law systems the expert is basically an officer of the court: the court decides whether an expert's advice is needed; then the court chooses and appoints the expert and determines which questions the expert will answer. The expert is neutral, impartial, and is supposed to provide the court with a reliable answer to the question the court asked her. The parties may use their own experts, but they are not officers of the court and—just because they are "partial"—they may challenge the advice of the court's expert but are not considered as a reliable source of evidence.

Once again, the choice among different methods for the presentation of evidence is determined by the assumptions concerning the evidentiary epistemology that is adopted, and about the purposes of civil litigation. If the assumption is that civil proceedings are not interested in achieving an impartial and truthful reconstruction of the facts of the case, because an adversarial competition is the best way to achieve the goal to put the dispute to an end, then the clash of partisan experts in the context of an adversarial mode of trial may be preferred: in a sense, the "battle of experts" is one of the most significant faces of the "battle of the parties" that is deemed to be the core of any adversarial system. On the other hand, if the purposes of civil adjudication are defined according to a rational epistemology, i.e., including among these purposes a reliable and neutral reconstruction of the facts, then the model of the independent and impartial expert is clearly preferable. Such an expert, in fact, is supposed to provide the court with a scientifically reliable answer to the question that the court has to decide.

The *Principles* do not deal expressly with such a puzzling question. In Principles 16.1 and 16.4 there are references to the "expert testimony" that could be intended as a clue in favor of the adoption of the common law model according to which an expert is treated as any other witness, although Principle 16.4 provides that an expert's testimony shall be elicited "as customary in the forum[,]" then opening the possibility that each system may use its own domestic model of expert evidence.

However, the *Rules* make a clear choice in favor of the civil law model of expert evidence. Rule 26.1 provides that the court will appoint a neutral expert or panel of experts when the court considers that expert evidence is helpful. The only limit to the discretion of the court is that if the parties agree on the choice of an expert, the court will "ordinarily" (i.e., not necessarily) appoint this expert. Rule 26.2 says that the court must specify the issues on which the expert's advice is requested, and will give directions and orders to facilitate the expert's activity. Rule

26.3 allows the parties to designate their own experts, but it is clearly stated that these experts should follow the same standards of objectivity and neutrality that govern the activity of the court-appointed expert.

VI. A Conclusion

Drawing a sketchy conclusion from these remarks, it seems clear that, notwithstanding some gaps that can be found in the *Principles*, probably because of their generality and their synthetic texture, in their global context the *Principles and the Rules* are oriented in the sense of adopting an epistemic perspective in which an accurate and truthful reconstruction of the facts in issue is included among the fundamental purposes of civil adjudication. In such a perspective, the search of truth is considered as a governing value that underlies the whole regulation of the proceeding and determines several choices concerning the kind of trier of fact, the role of the court and of the parties in the presentation of evidence, the disclosure and discovery of evidence, the methods of oral examination and—substantially—even the presentation of expert evidence. Therefore, the whole project is based upon a clear and consistent "evidentiary epistemology."