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The Methodological Phases of Civil Procedure and Their Impact on the Evidentiary System: A Comparative Analysis

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Abstract

The purpose of this paper is to draw a parallel between the methodological phases of the process and the evidential systems, emphasizing the current phase of formalism-valorative, and describing the influence of this methodological phase on the evidential system. It will argue in favor of the judge's duty to refer evidence to the parties, *in the* light of the cooperative model, which is an advance on the classic model (*adversarial system*) and the modern model (*inquisitorial system*) *of* evidentiary initiative.

Keywords

Process, Methodological Phases, Evidential Systems

1. Introduction

Nowadays, the process is no longer just seen as a technique (a method). The process, first and foremost, is a phenomenon of power (Lacerda, 1961; Mitidiero, 2004; Ferrajoli, 2004)[1]; the technique comes later, justified by the ideology that guides it (Zaneti Jr., 2014; Cappelletti, 1981; Taruffo, 2012)[2].

[1]On process and power and process and culture, see the following works: (Lacerda, 1961; Mitidiero, 2004; Ferrajoli, 2004).

[2]Mauro Cappelletti writes about the influence of ideology on the process: "This is really the first 'door' and, I would even say, the great door, through which ideologies penetrate the process. I am of course referring to the ideologies that underpin substantial law, both public and private, and its institutes. Perhaps the most macroscopic example can be deduced from the study of feudal systems, in which the institutes of substantial law reflected a differentiated, hierarchical, non-equal conception or ideology of society. This non-equal ideology penetrated the process in various and multiple forms. It is enough to recall the system of judicial evidence, in which that ideological conception meant, for example, the prevalence of the testimony of the noble over that of the non-noble or less noble, of the ecclesiastical over that of the lay, of the rich over that of the poor, of the man over that

As a phenomenon of power, the Codes, despite their technical nature, are the fruit of their time (cultural nature), like any human work (Oliveira, 2004).

This is why civil procedure has presented different methodological perspectives over time, as it is linked to the social culture and state model of the time (Fazzalari, 1965).

Fredie Didier Jr. (Didier Jr., 2015) cites four major methodological phases of civil procedure, namely: 1) praxis (or syncretism), 2) proceduralism (or autonomist phase), 3) instrumentalism and 4) the current phase, called formalism-valorative.

The methodological phases of civil procedure have influenced the way in which evidence is used, since the system of evidence in the process has been guided by the ideology that has sustained the structure of civil procedure in each era, this will be explained in the next topic. By way of illustration, if civil procedure followed a liberal ideology (primacy of the will of the parties), the judge would intervene little in the process, including in the field of evidence (production of evidence ex officio).

2. Parallel between the Methodological Phases of the Process and the Evidential Systems

Let's now take a brief look at these methodological phases of civil procedure, drawing a parallel with the evidential system of each era.

2.1. Praxism (Syncretism)

In the first phase (praxis or syncretism), there was no distinction between process and substantive law: process was just an appendix of substantive law, studied as a complement to it. Because of this, the action was defined as the injured subjective right, and each right corresponded to an action (Didier Jr., 2015)[3].

In the field of evidence, this methodological phase of civil procedure has two stages: 1) free conviction and 2) priced evidence.

2.1.1. The Judge's Free Will

The free conviction system originated in the Roman Empire, giving the magistrate total and unrestricted power to assess evidence according to his free conviction[4]. In this system of proof, the magistrate is sovereign, and acts according

of the woman, of the old over that of the young, etc.". Similarly, Michele Taruffo: "These ideological choices condition not only the approaches of scholars, but also the structure of the process and its functioning: ideological choices influence the orientations of legislators who deal with the process, and who introduce different rules depending on the ideology adopted in the circumstances."

[3]This is why there is still a misconception in Brazilian legislation, using expressions such as "possession maintenance action", "repossession action", "prohibitory interdict action" etc. For Humberto Theodoro Jr., such errors are reminiscent of the anachronistic and outdated civil concept of action, according to which each material right violated would correspond to an action to protect it.

[4]"The origins of the system of free conviction can be traced back to Roman law, under which the judge was given the widest freedom in gathering and assessing evidence. 'The judge of Rome had the office of freely seeking the truth of the facts by evaluating the evidence: he pronounced the decision that his conscience suggested to him."

to his conviction about the evidence presented to him, without being compelled to give reasons for his decision.

This freedom of conviction of evidence by the judge, giving him exorbitant powers as a state representative, is in line with the state model of the time, the autocratic government of the Roman Empire, which concentrated unlimited powers in the hands of the Emperor.

In this period, as beliefs in divine beings were partly confused with law, the means of proof used to demonstrate the facts were linked to religion, such as the practice of swearing oaths (Lopes, 2002).

2.1.2. Priced Evidence

In the system of tariffed evidence, each piece of evidence had a value pre-defined by law or religious tradition, so that the magistrate had no freedom to evaluate the evidence. In this way, the magistrate expresses the truth in the sentence, not according to his conviction resulting from the evidence, but in accordance with the pre-established value of the evidence.

Luigi Ferrajoli (Ferrajoli, 2002) classifies priced evidence into two types: 1) irrational of the magical and archaic type (ordálias, judicial duels, divination), which appeal to an infallible and superior judgment, of a divine nature; 2) rational of the legal type (confession, examination of the body of the crime, minimum number of witnesses).

1) Irrational proofs of the magical kind

The Middle Ages in Europe were marked by the predominance and influence of the Christian religion over peoples and rulers, and the absence of the state as a sovereign entity, in the period between the fall of the Roman Empire and the emergence of modern states.

Because of this, religion ended up being confused with law, so that the means of proof used to demonstrate the facts were closely linked to religion, through ordinaries and judicial duels (Lopes, 2002).

Ordalia (or judgments of God) was a type of judicial test used to determine the guilt or innocence of the accused through the participation of elements of nature, and whose result is interpreted as a judgment of God. Examples of trials by ordeal include trials by fire, trials by bitter drinks and trials by cold water. If the defendant overcame these trials, he would be considered innocent; if not, he would be considered guilty.

2) Rational proofs

The system of legal evidence was already well established in the 12th century in continental Europe, and was perfected in the following centuries, above all through the European legal science of the 16th and 17th centuries, based on scholastic philosophical thought and, later, humanistic rationalism, which attempted to present a formal logical and mathematical structure to the evaluation of evidence (Taruffo, 2014).

This epistemological trend (rationalism) was born with René Descartes, in his work "Metaphysical Meditations", and emphasizes the absolutism of the "crite-

rion" (not the subject or the object), seeks the certainty of knowledge, and uses deductive reasoning (from the universal truth to the particular), in which knowledge is acquired *a priori*.

Rationally priced evidence was a major breakthrough at the time, as it put an end to the arbitrariness committed in the Middle Ages with irrationally priced evidence (such as ordinaries), bringing rationality to the system and, in a way, protecting the individual (Taruffo, 2014)[5].

In the system of rational priced evidence, each piece of evidence had a value pre-defined by law, so that the magistrate had no freedom to evaluate the evidence, not least because the nature of the process was still private, due to the syncretism between substantive and procedural law. An example of rationally priced evidence is confession and the examination of the corpus delicti, which were considered by law to be qualitatively superior to other types of evidence, as well as the requirement for a minimum number of witnesses to prove a fact.

In this system, as the legal nature of the process was still private, being the protagonists of the process the parties, the judge was not free to value the evidence, but had to observe the value of the evidence already pre-established by law, and there was no room for the production of evidence ex officio by the judge. At that time, the ideology of the Liberal State prevailed, with the freedom of the parties being an almost supreme value, which reduced the freedom of the magistrate.

The system of priced evidence predominated in continental Europe until the end of the 18th century, when it collapsed for two reasons: 1) the philosophical culture of the Enlightenment, which let go of the old concepts of rationality; 2) institutional changes in the structure of the Judiciary, because while the system of legal evidence was based on a general lack of trust in judges, and it was dangerous to leave decisions to their discretion, the new judge, created after the French Revolution and Napoleon's reforms, is a professionally trained official and a neutral judge, giving rise to the emergence of the system of free assessment of evidence (Taruffo, 2014: p. 132).

The system of free assessment of evidence follows the epistemological trend of *empiricism*, which was born with John Locke (knowledge comes from the senses) and David Hume (knowledge through experience), and emphasizes the role of the object in knowledge, seeks possible certainty (not absolute), and uses inductive reasoning (from the particular to the general), in which knowledge is acquired mainly later, through empirical investigation.

2.2. Proceduralism (Automomist)

In the second phase (proceduralism or autonomism), marked in 1868 with the publication of Oskar Von Bülow's "The theory of dilatory exceptions and pro-

[5]"In a way, this system was 'rational': in fact, it replaced the old irrational evidential forms based on ordinals and divine judgments. Moreover, it helped to reduce or even eradicate the discretionary and often unreliable assessments made by judges, thus simplifying the problem of decision-making in complex and uncertain situations."

cedural presuppositions" (Bülow, 2003), the process is emancipated from material law, emerging as an autonomous science[6], and studied independently from material law[7], distinguished by its subjects, its presuppositions and its objects. Hence the public nature of the process.

Because of this public nature of the process, and coupled with the subsequent emergence of the Welfare State, in which the state is responsible for guaranteeing public services and protection for the population in order to ensure the value of equality, so that the legal order is centered on the state as the ultimate representative of the common good, and not on the individual (as in the Liberal State), all of this influences the system of evidence in civil proceedings.

Thus, due to the public nature of the process and the ideology of the Social State, the judge became the protagonist of the process, and no longer the parties, being at the apex of the system, giving the judge the possibility of producing evidence ex officio in search of the truth of the facts, based on the inquisitive principle (Taruffo, 2014)[8].

2.3. Instrumentalist

In the third (instrumentalist) phase, although the process is an autonomous science, it (the process) should not be seen as an end in itself, but should serve (a means/instrument) to concretize the material right with a view to effectiveness, thus bringing substantial law and procedural law closer together. For this reason, instrumentality appears in this context as an attempt to bring the process closer to its ultimate object, aiming to (re)visit its concepts and achieve social, political and legal goals (Dinamarco, 2002).

This rapprochement between substantive law and procedural law takes place within the Constitutional Rule of Law, in which the centrality of the system revolves around the Constitution.

In this context, with the return to valuing substantive law at the procedural level, the system of evidence was also influenced, by encouraging the role of the

[6]Oskar Bülow separated two types of relationship: one, material, which is debated in the process and forms its object; the other, procedural, which is formed between the plaintiff, the defendant and the judge, through powers, duties, burdens and faculties, having as its object the jurisdictional provision, subject to special presuppositions (procedural presuppositions), hence the theory of the "legal-procedural relationship".

[7]Procedural law, now an autonomous science and based on the theory of the legal-procedural relationship, sought to give abstraction and neutrality to the concept of process, relegating substantial law. However, as no state is neutral, having ends to fulfill in accordance with its constitutional values, it can be seen that the process served to hide any state political will (including totalitarian regimes), since this neutrality was merely apparent, as the process was strongly influenced by the ideology of the Liberal State of the time (security in the process, through strict legality and rigid separation of powers, with no creative power of the Judiciary).

[8]Michele Taruffo points out the historical reasons for the increase in the judge's power in the field of evidence: "the emergence of conceptions of civil procedure as a 'public' instrument for the protection of rights and the role of the judge as the *long manus of* the State that provides such protection; the trend in favor of the search for truth in civil procedure and the lack of confidence in the initiative of the parties; the growing need for direction and control by the judge over the procedure and the requirement to supplement the evidentiary initiatives of the parties when these prove insufficient to prove the facts in dispute."

judge in evaluating evidence, but setting limits on the judge's evidentiary initiative (regulation of the inquisitive principle), such as respect for the principle of congruence.

However, the judge is still the recipient of the evidence (the protagonist of the process), and this is considered, in the field of the burden of proof, to be a rule of judgment, and not of procedure (of activity), with the evidence produced by the judge, or the burden of proof distributed by him in the judgment, not being subject to the adversarial process.

2.4. Valuative Formalism

Finally, in the current stage of the process (formalism-valorative) (Oliveira, 2010)[9], without neglecting the proceduralist (process as an autonomous science) and instrumentalist (process as a means) phases, a new paradigm emerges, a new theoretical structure of the process, whose foundations are based on fundamental constitutional values (notably fundamental rights) and ethical values (good faith and cooperation), combining effectiveness and legal certainty (Oliveira, 2010).

The theoretical premises of this procedural phase are based mainly on 1) the normative force of the Federal Constitution; 2) the theory of principles; 3) the reconstructive role of the judicial function; 4) and the protection of fundamental rights (Didier Jr., 2015).

As you can see, the formalist-valorative approach finds its support in the Constitutional Democratic State, which, surpassing the Liberal and Social States, consists of a state model characterized by the supremacy of the law written in the Constitution, established in a rigid manner, and which guarantees fundamental rights and the value of participation (democracy) in the formation and discursive processes of state decisions (Bonavides, 2009)[10].

This new conception of civil procedure also influences the system of evidence. Now, in the Constitutional Democratic State, evidence becomes the nerve center of the process, the protagonist of the process, and no longer the judge (Roman State, Social State and Constitutional State) or the parties (Liberal State).

This new paradigm revolutionizes the system of evidence: the process will be the recipient of the evidence, and not just the judge or the parties; the evidence will be produced in a coordinated (cooperative) model (Cadiet, 2011; Didier Jr.,

[9]An expression coined by Carlos Alberto Alvaro de Oliveira. For him, it is necessary to understand the process of the Constitutional Democratic State in the light of evaluative formalism, a methodological phase that allows the form to be adapted to the content, encompassing the study of the process in the "formal totality of the process, comprising not only the form, or the formalities, but especially the delimitation of the powers, faculties and duties of the procedural subjects, coordination of their activity, ordering of the procedure and organization of the process, with a view to achieving its primary purposes […] to indicate the boundaries for the beginning and end of the process, to circumscribe the material to be formed, to establish within what limits the persons acting in the process must cooperate and act for its development […] the very idea of the process as an organization of disorder, lending predictability to the procedure".

[10]The Constitutional Democratic State thus adds the fourth dimension of fundamental rights, which refers to the right to democracy, the right to information and the right to pluralism.

2015)[11], in which the tasks will be divided between the subjects of the process (plaintiff, judge and defendant), in a true working community. Furthermore, as the process is the recipient of the evidence, and as the process must ensure the value of adversarial proceedings, the burden of proof consists of a rule of procedure (activity), and not of judgment, prohibiting surprise decisions by the judge (Rodrigues, 2020)[12].

The Cooperative Evidence Model

In order to understand the structure of the legal system of evidentiary initiative of procedural subjects, it is necessary to mention two evidentiary models, according to the usual classification (Giuliani, 1971): 1) classic model (*adversarial system*): system informed by the dispositive principle (liberal and individualistic ideal), in which the initiative of the evidentiary activity rests with the parties, who are on an equal footing, with the presence of the judge only to monitor "the rules of the game", which is characteristic of Anglo-Saxon countries (*common law*) (Zaneti Jr., 2014: p. 85)[13]; 2) modern model (*inquisitorial system*): a system informed by the inquisitive principle, in which the judge is given greater powers and is given a more active role, which is characteristic of the countries of Continental Europe and Latin America (*civil law*) (Zaneti Jr., 2014: p. 87)[14].

As can be seen, the nodal point of distinction is that in the adversarial system the parties are the protagonists of the initiative to produce evidence (little action by the judge), while in the *inquisitive system* the judge also plays a leading role alongside the parties (greater action by the judge).

Michele Taruffo writes that, today, it no longer seems possible to affirm the existence of pure and watertight evidentiary models, since the *adversarial system* and *inquisitorial system* models have suffered reciprocal influence, as has happened with US law (*adversarial system*), which has given the judge an active role in the production of evidence, through the *Federal Rules of Evidence*, giving the judge the power to summon witnesses, question the parties' witnesses ex officio and appoint neutral judicial experts, while in Italy and Spain (*inquisitorial sys-*

[11]The cooperative process model is umbilically linked to the current State model, since each process model corresponds to a State model, and the distinction between the Liberal, Social and Democratic States is noteworthy in order to verify the correspondence between the attitudes adopted regarding the division of labor between the parties and the judge. The dispositive model of procedure corresponds to the Liberal State; the inquisitive model, to the Social State; and the cooperative model, to the Constitutional Democratic State.

[12]For further information on the limits of the judge's role in the production of evidence, see: (Rodrigues, 2020).

[13]"Classic, symmetrical and persuasive model: evidence as *argumentum* (*common law*). […] The evidentiary procedure is characterized by two main aspects: 1) development through dialogue between the parties (known today in *common law* as the *adversary system*; 2) taking place before a passive judge. This model can thus be defined as isonomic, because the parties are on an equal footing and the judge only verifies the admissibility of the evidence."

[14]"Modern, asymmetrical and scientific model: evidence as demonstration (Roman-Germanic) (…) In this model, the procedure is characterized by strong judicial activism, that is, a bureaucrat judge representing the State, who actively participates in the evidentiary instruction. In this way, it is considered asymmetrical, precisely because the judge assumes a relevant role in the investigation and ends up unequalizing the relationship of isonomy between the parties."

tem), legislation has restricted the judge's ex officio production of evidence (Taruffo, 2014: pp. 111-114).

In this context, Taruffo (Taruffo, 2014: pp. 191-196) presents three types of legislative approach to the problem of the judge's instructional powers: 1) a model in which the judge is given a general power to decide on the production of evidence ex officio; 2) a model in which the judge has some powers of instructional initiative; 3) a model in which the judge's actual powers of instructional initiative are not expressly provided for, but the judge plays an active role in the production of evidence.

In the *first model*, in which the judge is endowed with a general power to order the production of evidence ex officio, it is necessary to ask whether the judge has the duty or the (discretionary) power to produce evidence ex officio. The first situation (duty) was typical of Soviet systems, in which the judge had the duty to investigate the truth of the facts ex officio. The second situation (discretionary power) is present in France and Switzerland, where the judge has the discretionary power, and not a duty, to order the production of evidence that he considers useful to establish the truth of the facts (Taruffo, 2014: p. 191). In France, the judge can ex officio order the production of any type of evidence (art. 10 of the *Code de procédure civile*)[15], but this power must not be used for the purpose of filling in the gaps of the parties (art. 146 of *the Code de procédure civile*)[16]. This model is also included in Portuguese law (art. 411 of the Code of Civil Procedure)[17], as well as Brazilian law (art. 370 of the current CPC)[18], according to the literalness of this legal rule[19].

The *second model*, in which the judge has some powers of instructional initiative, includes Germany, the United States and Italy (Taruffo, 2014: pp. 191-195). The German judge can dispose of all means of evidence ex officio (§142 of the Zivilprozessordnung), with the sole exception of testimonial evidence (Taruffo, 2014: p. 193). In addition, according to the rule in §139 of the *Zivilprozessordnung*, the judge has the task of clearing the case, when the relevant evidence must be identified by the parties and the judge. In the United States, for example, *Rule* 614 (*a*) *of the Federal Rules of Evidence*[20] gives the judge the power to ex officio dispose of testimonial evidence not adduced by the parties. In

[15]"Le juge a le pouvoir d'ordonner d'office toutes les mesures d'instruction légalement admissibles."

[16]"Une mesure d'instruction ne peut être ordonnée sur un fait que si la partie qui l'allègue ne dispose pas d'éléments suffisants pour le prouver. En aucun cas une mesure d'instruction ne peut être ordonnée en vue de suppléer la carência de la partie dans l'administration de la preuve."

[17]Article 411 It is the judge's responsibility to carry out or order, even of his own motion, all the steps necessary to ascertain the truth and the fair settlement of the dispute, with regard to the facts of which he is entitled to know.

[18]Art. 370. It shall be incumbent upon the judge, ex officio or at the request of the party, to determine the evidence necessary for the trial on the merits.

[19]To say that the Brazilian system fits into this first model, which generically grants the judge instructional powers in any type of evidence, is not the same as saying that the judge can exercise this power in any factual situation, so much so that in the French system, as we have seen, the judge cannot fill in the gaps of the parties.

[20]"The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness."

Italy, according to the *Codice di Procedura Civile*, the judge can question the parties (art. 117)[21], request inspections (art. 118)[22] and expert evidence (art. 61)[23], request information from public officials (art. 213)[24] and request the testimony of a third party when the parties make reference (art. 281 "Ter")[25]. On the other hand, as Taruffo points out (Taruffo, 2014: p. 114), the Italian judge cannot ex officio request the exhibition of documents, confession or summon witnesses who have not been indicated by the parties.

Finally, in the *third model*, although the judge's powers of instructional initiative are not expressly provided for, the judge plays an active role in the production of evidence. This third model includes England and Spain.

In the English system, there is no rule authorizing the judge to take evidence ex officio; however, the judge may indicate to the parties the issues of fact on which they require evidence, specifying the type of evidence they should propose (*Rule* 32.1 *of the Civil Procedure Rules*)[26].

Similarly, in the Spanish system, art. 435 of the *Civil Judicial Act*[27] provides for a final step in which the judge can order, ex officio, that evidence already produced in the case be renewed, while art. 429[28] gives the judge the power to indicate evidence to the parties when he or she considers that the evidence pre-

[21]"The judge, at any stage and level of the proceedings, has the right to order the personal appearance of the parties in contradiction with each other in order to question them freely about the facts of the case. Le parti possono farsi assistere dai difensori."

[22]"Il giudice può ordinare alle parti e ai terzi di consentire sulla loro persona o sulle cose in loro possesso le ispezioni que appaiono indispensabili per conoscere i fatti della causa, purché ciò possa compiersi semza grave danno per la parte o per il terzo, e semza costringerli a violare uno dei segreti previsti negli articoli 351 e 352(1) del Codice di procedura penale."

[23]"When necessary, the judge may be assisted, for the completion of single acts or for the entire process, by one or more consultants of particular technical competence."

[24]"Apart from the cases provided for in Articles 210 and 211, the court may request from the public administration written information concerning the acts and documents of the public administration itself which it is necessary to obtain for the proceedings."

[25]"The judge may ex officio dispose of testimonial evidence by formulating chapters, when the parties in the account of the facts are referred to persons who appear to be in a position to know the truth."

[26]"1) The court may control the evidence by giving directions as to—(a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court."

[27]"Article 435. Final proceedings. Proceedings. (1) Only at the instance of the party may the court agree, by means of a report, to the taking of evidence as final steps, in accordance with the following rules: 1. The evidence that could have been offered in time and form by the parties, including the evidence that could have been offered after the court's ruling referred to in section 1 of article 429, shall not be taken as final hearings. 2. When, for reasons beyond the control of the party that offered the evidence, none of the admitted evidence was taken. 3. Pertinent and useful evidence referring to new or newly reported facts, as provided for in Article 286, shall also be admitted and practiced. 2. Exceptionally, the court may agree, of its own motion or at the request of a party, that new evidence be taken of relevant facts, duly alleged, if the previous acts of evidence had not resulted in circumstances that had already disappeared and were independent of the will and diligence of the parties, provided that there are well-founded grounds for believing that the new acts will make it possible to acquire certainty about those facts. In this case, in the record in which the practice of the diligence is agreed, those circumstances and reasons will have to be expressed in detail."

[28]When the court considers that the evidence proposed by the parties could be insufficient to clarify the disputed facts, it will make the parties aware of this, indicating the fact which, in its judgment, could be affected by the lack of evidence. In making this statement, the court, referring to the

sented by the parties may be insufficient to establish the facts (Taruffo, 2014, pp. 196-197).

Having made these considerations, in our view, from the perspective of the current methodological phase of civil procedure (formalism-valorative), since the judge and the parties are no longer the apex of the system, evidence must be produced in a dialog between the judge and the parties, giving rise to the cooperative model (*fourth model*) of evidence production.

The principle of cooperation is intended to transform civil proceedings into a "working community" (*Arbeitsgemeinschaft*, *cumunione di lavoro*) and to make the parties and the court responsible for its results (Sousa, 1997), and is based on the Constitutional Democratic State.

This division of labor in the process imposes an objective duty of conduct on the parties and the judge, as a result of the duty of objective procedural good faith, so that the behavior of the parties and the court must be guided objectively in order to obtain a fair, adequate, timely and effective decision on the merits (Zaneti Jr., 2017).

The bundle of legal relationships that are established between the various subjects of procedural relationships generates duties of loyalty, protection and clarification, in the sacramental language of civil law on the ancillary duties of objective good faith, which is equally applicable to procedural law (Cordeiro, 2007; Didier Jr., 2010). These duties are the core of the principle of cooperation and are binding on the parties and the judge.

In relation to the judge, the duty to clarify covers the judge's duty to clarify with the parties any doubts about their allegations. According to Daniel Mitidiero (Mitidiero, 2015), citing German doctrine, the duty of clarification gives rise to the duty of indication (*Hinweispflicht*), which imposes on the judge the duty to point out precisely what should be clarified by the party, as well as the duty of the judge to indicate to the parties possible legal qualifications of the facts not undertaken by the parties. Along these lines, Reinhard Greger (Greger, 2012: pp. 123-134) states that the duty to indicate is expressly provided for in the German ZPO, in §139, I[29] and §278, III.

Based on these premises, in the sanitation phase of the process, based on the duty to assist and to indicate, which derives from the principle of procedural cooperation, it will be up to the magistrate, in the event of inertia or insufficiency of evidence requested by the parties, to delimit the questions of fact on which

evidence whose existence results from the case file, may also indicate the evidence or evidence whose practice it considers appropriate. In the case referred to in the previous paragraph, the parties may supplement or modify their evidence proposals in the light of what the court has said.

[29]To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.

the probationary activity will fall, indicating the means of evidence admitted.

In this sense, Reinhard Greger teaches about the judge's duty to indicate evidence in German law (Greger, 2012: pp. 123-134):

> Many appeals could be avoided if judges—as made possible by §278 II 2—were to expose, after the evidence has been produced, the rest of the facts to be proven, in order to possibly allow for additions or corrections. Furthermore, by establishing an open and cooperative conduct of the proceedings, it is possible to better resolve the complicated issues of the burden of proof (Darlegungslast). Currently, the parties often entrench themselves in their petitions behind objections to exposure (Darlegungsrüugen) or substantiation (Substantiierungsrügen), and only the Bundesgerichtshof ends up deciding whether in the case, exceptionally, the party not obliged to prove will have a burden of exposure (so-called secondary burden of affirmation [Behauptungslast]).

We believe that not only in the sanitation phase of the process, but even after the end of the evidentiary instruction, if there remains a state of doubt for the magistrate, due to the absence or insufficiency of the evidence produced, the judge may indicate to the parties the evidence he deems necessary to discover the truth of the facts.

In fact, as has already been pointed out, in the Spanish system, art. 429 of the Ley de *Enjuiciamiento Civil*[30] gives the judge the power to indicate evidence to the parties, when he considers that the evidence presented by the parties may be insufficient to establish the facts; in the English system, the judge can indicate to the parties the issues of fact on which they require evidence, specifying the type of evidence they should propose (*Rule* 32.1 *of the Civil Procedure Rules*)[31]; in the German system, the judge has the task of clearing the case, on which occasion the relevant evidence must be identified by the parties and the judge (§139 of the *Zivilprozessordnung*)[32].

To this extent, the judge, instead of ordering the production of evidence that he deems necessary, will transfer this procedural burden to the party, pointing

[30]"When the court considers that the evidence proposed by the parties could be insufficient to clarify the disputed facts, it shall make the parties aware of this, indicating the fact which, in its judgment, could be affected by the lack of evidence. In making this statement, the court, referring to the evidence whose existence results from the case file, may also indicate the evidence or evidence whose practice it considers appropriate. In the case referred to in the preceding paragraph, the parties may supplement or modify their evidentiary proposals in the light of what the court has said."

[31]"1) The court may control the evidence by giving directions as to—(a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court."

[32]"Section 139. Direction in substance of the course of proceedings. (1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions."

out the evidence needed to clarify the facts, thus providing assistance to the parties, and indicating the specific evidence, by virtue of the principle of procedural cooperation.

By doing so, the judge will indicate to the parties the evidence they need to request, and will not produce it ex officio, avoiding any allegations of impartiality, reconciling the judiciary's duty to provide quality protection (fair trial) with the dispositive principle (Grasso, 1966: pp. 604-605)[33].

3. Conclusion

The new conception of civil procedure, in the light of the methodological phase of formalist-valorative procedure, has greatly influenced the system of evidence. Now, in the Constitutional Democratic State, evidence becomes the nerve center of the process, the protagonist of the process, and no longer the judge (Roman State, Social State and Constitutional State) or the parties (Liberal State).

As a result, the evidence must be produced jointly, after a dialog between the judge and the parties, giving rise to the cooperative model of initiative in the production of evidence, which is an advance on the classic model (*adversarial system*) and the modern model (*inquisitorial system*) of *evidentiary initiative*.

To this end, it has been proposed that, in the sanitation phase of the process, based on the duty to assist and indicate, which derives from the principle of procedural cooperation, the magistrate must, in the event of inertia or insufficiency of evidence requested by the parties, delimit the questions of fact on which the probationary activity will fall, indicating the means of evidence admitted.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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[33]In this sense, the Italian Eduardo Grasso has already written: "The intervention of the judge, as an impartial technician, is decisive. Il giudice istruttore (indica le questioni rilevabili d'ufficio di cui ritiene opportuna la trattazione). Per art. 316 cod. proc. civ. il pretore o il conciliatore può indicare alle parti in ogni momento le lacune che ravvisa nell'istruzione e le irregolarità deli atti e dei documenti che possono essere riparate. [… Egli can introduce a relevant fact into the proceedings, stimulating the parties' arguments about events that he first assumes to exist (a phenomenon already mentioned by Chiovenda); it can make its point of view known about the accuracy and sufficiency of the facts added as the basis for the claim and the conclusions, and about the accuracy of their legal qualification; it can suggest the production of evidence reserved for the party. (…) And if the party denounces the fact itself, integrating in such a way the demand or the eccezione, or proposes the suggested proof, or modifies in genere its defense, the initiative of the ufficio is surpassed by the initiative of the private lawyer; this cannot therefore be considered less legitimate just because it is inspired by the judiciary."

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