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JUDICIAL REASONING AND THE EVALUATION OF PROOFS*

I

The problem of judicial reasoning with reference to the evaluation of proofs is evidently important from several points of view. In fact, it is a key problem for the general theory of decision-making, for the theory of the statement of reasons in the judgment, for the legal theory of evidence and proof, and for the procedural theory of the role of the judge as to the search of judicial truth.

Nevertheless, and in spite of its great importance, it is easy to see that such a problem has been studied much less than necessary.

The general theory of decision-making has studied broadly and deeply the interpretation of the rule of law (written rule or precedent, according to the several systems), paying attention to the logic of prescriptive statements, to the semantics of legal norms, to the features of legal reasoning about norms, and so on. This theory has yet studied very little the structure of the judgment on the facts in issue and the evaluation of proofs. The old and traditional opinion is still widespread, according to which the „fact" is „posed" as a minor premise in the judicial syllogism, and the logical features of such a „posing the premise of fact" are left out[1].

As far as I know, there are only few exceptions to the general lack

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[1] I do not consider here the approaches that, depending on particular philosophical views, rule out the possibility of a logical reasoning about the facts in issue, and leave the judgement on the facts to a „hunch" or „intuition" or „moral certitude" of the judge. Moving from the assumption that it is usually ascribed to intuition what is not explained rationally, I consider all „intuitive" accounts of the problem as non-explanations.

of attention towards this problem[2]. Among these, I must remember some essays by Wróblewski, where clear points are fixed for a correct analysis of the problem[3].

The legal theory of evidence and proof has studied broadly (even if not always deeply) the rules of evidence, the means and the proceedings of proof[4], but it has studied very little the evaluation of proofs[5].

Take for instance the principle of free evaluation, which is still more widespread in European legal systems. It is a key point in the history of civil and criminal procedure[6], but still now it works negatively (i.e.: to rule out the system of legal rules about proofs), rather than positively.

Furthermore, to the extent that it got rid of legal (or formal) rules for the evaluation of proofs, yet without replacing them with logical or cognitive rules, it has left room for irrational, emotional or intuitive ideas of the judgment on the facts.

I cannot show it in detail, but most of commonplaces about the intime conviction, the certezza morale, the freie Beweiswürdigung, the sana crítica, and so on, are lacking in a „positive" rational content. In short, almost all the analysis about the principle of free evaluation end up by giving the judge a discretionary and unlimited power to evaluate proofs freely, without requiring him the use of logical and objective criteria in such an evaluation[7].

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[2] See e.g. J. Roedig, *Die Theorie der gerichtlichen Erkenntnisverfahren*, Berlin—Heidelberg—New York 1973, p. 158; K. Engisch, *Logische Studien zur Gesetzesanwendung*, Heidelberg 1960, p. 89. See also M. Taruffo, *Certezza e probabilità nelle presunzioni*, „Foro italiano" 1973, 5, p. 95 and idem, *La motivazione della sentenza civile*, Padova 1975, p. 238.

[3] See chiefly J. Wróblewski, *Facts in Law*, „Archiv fuer Rechts- und Sozialphilosophie" 1973, 59, p. 171 (now published in Idem, *Meaning and Truth in Judicial Decision*, Helsinki 1979, p. 113) and idem, *The Problem of the So-called Judicial Truth* ([in:] *ibidem*, p. 166).

[4] About the European systems see the general outline by H. Nagel, *Die Grundzuege des Beweisrechts im europäischen Zivilprozess*, Baden—Baden 1967. See also G. A. Micheli—M. Taruffo, *L'administration de la preuve en droit judiciaire*, [in:] *Towards a Justice with a Human Face*, Antwerpen—Deventer 1978, p. 105. For socialist systems see W. Broniewicz, *Osservazioni sui mezzi di prova nel processo civile dei paesi socialisti*, [in:] *Studi in onore di E. T. Liebman*, vol. 2, Milano 1979, p. 951.

[5] The classical work on the subject is F. Gorphe, *L'apprécation des preuves en justice*, Paris 1947, but it is by now rather old and methodologically unsound.

[6] See chiefly M. Nobili, *Il principio del libero convincimento del giudice*, Milano 1974, and G. Walter, *Freie Beweiswürdigung*, Tübingen 1979.

[7] See Nobili, *op. cit.*, p. 3, 8; M. Taruffo, *Prove atipiche e convincimento del giudice*, „Rivista di diritto processuale" 1973, p. 399. Generally, the attempts to shape rules for the evaluation of proofs drawing them from the idea of „scientific proof"

This trend is confirmed also in the theory of the statement of reasons in the judgment, since the common approach is not in the sense of requiring an analytic and logically valid argument as a checkable basis of the judgment on the facts[8]. It depends on many reasons, among which an important one is the lack of a clear and rational analysis about the criteria and the method of the evaluation of proofs.

Finally, the general theory of process has studied the role of parties and of the judge in the proceeding as to the collection of evidence, but it did not study what happens in the decision-making.

In particular, it did not study if and how the structure of the proceeding, and the way in which the parties and the judge play their respective roles as to the collection of evidence, have an influence on the judge's reasoning when he evaluates the proofs at the moment of decision-making[9].

Even if the importance of these problems is evident not only in the general theory of law and of process, but also for the daily administration of justice, of course I cannot approach here all its features, not even summarily. Then I shall limit myself to analysing one point, which in my opinion is very important, but to which nobody — as far as I know — has ever paid enough attention.

II

The point is if there is a connection, and what sort of connection it may be, between the structure of the proceeding and the evaluation of proofs in the decision-making.

Intuitively, it seems that such a connection should exist, if only we

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have not given clear outcomes: see V. Denti, *Scientificità della prova e libera valutazione del giudice*, „Rivista di diritto processuale" 1972, p. 414. In socialist countries, the problem is posed in a rather different way, since the principle of the „material" or „objective truth" seems to be a more solid reference point, at least for those who share the marxist-leninist idea of judicial truth. See. L. J. Ginsburg, *Objective Truth and the Judicial Process in Post-Stalinist Soviet Jurisprudence*, „American Journal of Comparative Law" 1961, 10, p. 53; A. J. Troussov, *Introduction à la théorie de la preuve judiciaire*, french translation, Moscou 1965, p. 13; J. Gwiazdomorski, M. Cieślak, *La preuve judiciaire dans les pays socialistes à l'époque contemporaine*, „Recueil de la Société Jean Bodin" [Bruxelles] 1963, vol. 19, *La preuve*, p. 68.

[8] See Taruffo, *La motivazione...*, p. 437.

[9] Some suggestions may be found in J. Thibaut, L. Walker, *Procedural Justice. A Psychological Analysis*, Hillsdale, N. J., 1975, though the whole work is biased in favor of the American adversary system.

think over the fact that the process is oriented towards the judgment, and that evidence collected in the course of the process is intended to be the basis of the judgment on the facts in issue.

From this point of view, we cannot believe that the evaluation of proofs is completely independent of the features of the proceeding, not only because rules of evidence have an influence upon the judgment (which is obvious, f.i., when an item of evidence is legally inadmissible), but also because the model of the process, and the way in which the parties and the judge play their role in it, determine „different decision-making problems" in the several cases.

The comparative analysis confirms it: f.i., the definition of „judicial truth" changes deeply if we consider the adversary system -mastered by parties- or the inquisitorial system, oriented towards the search of material truth, chiefly by means of the judge's powers[10].

To clear up my thought, the analysis of some typical „decision-making problems" may be useful, distinguishing them according to the procedural situations from which they follow.

Then, I shall consider two procedural factors which have an influence in shaping these situations.

My aim is to show how, when the type of proceeding and the method of collecting evidence are different, also the decision-making problem that the judge has to solve changes correspondingly.

1. We have a first type-situation when there is only one item of evidence on the fact that must be proved. If the proof has a positive outcome, it may seem that there are no particular problems of evaluation: the judge determines its probative value and, if such a value reaches a sufficient degree of probability[11], the fact is „judicially true".

As a matter of fact, things are not so simple, because the decision-making problem has different features in the several cases.

First of all, we must distinguish if the evidence was proposed by a party or it was ordered by the judge on his own motion.

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[10] About the idea of judicial truth in the adversary systems see, also for a bibliography, M. Taruffo, *Il processo civile „adversary" nell'esperienza americana*, Padova 1979, p. 44.

[11] Strictly speaking, the probative value is the degree of logical or statistical probability ascribed by the judge to the statement of fact that is the outcome of the proof. Such a definition assumes a rationalisation of the evaluation of proofs that follows the logical model of inductive inference based on probability standards. On this topic see A. Stening, *Bevisvärde*, Uppsala 1975; M. Taruffo, *Studi sulla rilevanza della prova*, Padova 1970, p. 231; V. C. Ball, *The Moment of Truth: Probability Theory and Standard of Proof*, „Vanderbildt Law Review" 1961, 14, p. 807.

1a) In the former case, since the party aims at proving the account of the fact that is favorable to h e r s e l f[12], evidence is „party-oriented". It means that evidence does not aim at showing the „objective" or „material truth" of the fact, but at proving the account of the fact which the party states in order to make her claim founded.

In this case, if the judge limits himself to determining the probative value of the proof (f.i. because he is bound to base his judgment on evidence offered by parties: see art. 115 of the italian code of civil procedure), and he founds the „judicial truth" on this value, the consequence is that we have not an „objective truth", but a „party-oriented" truth that is considered as it were a „material truth".

As a rule, according to the principle of free evaluation, the judge is thought to be allowed to draw on his own motion some elements of proof from other sources, and it could make the judgment on the facts „more objective". Nevertheless, it is often impossible (i.e. whenever evidence offered by a party is the only source of conviction), and the judge often does not worry over searching the objective truth, and he limits himself to judging according to the „party-truth".

1b) In the latter case, evidence is „neutral", since the judge aims at searching the objective truth of the fact. Here the definition of the probative value may be sufficient to determine the judicial truth[13].

Nevertheless, there is the danger that, since evidence is „coming from the judge", he tends to overestimate its probative value[14].

Then, an important variable in such a judgment is wether the parties had, or not, the opportunity to know and to discuss previously the evidence and its probative outcome, and then to give the judge critical elements for its evaluation. Here the legal principle of the contradictory

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[12] It is particularly evident when the party who proposes an item of evidence must also state precisely its „object" (see e.g. art. 244 of the italian code of civil procedure). It means, in fact, that the purpose of evidence is not — quite generically — to prove „a fact", but to prove the truth of a statement of fact which is fixed by the party who offers the evidence: such a statement is obviously favorable to the party's interest.

[13] Here the assumption is that the judge does not state in advance an account of the fact as „object" of the evidence, or, if he does it, the statement of the fact is not party-oriented, but aims at being „neutral" or „objective".

[14] It should not happen if the judge applies strictly the rules of inductive logic and probability standards. The danger arises from the fact that the evaluation of proofs is often loose and open to subjective attitudes.

between parties[15] appears as a rational principle for the proper evaluation of proofs.

We must now introduce the key distinction -made chiefly by Wróblewski- between „facts descriptively determined" and „facts evaluatively determined"[16]. What we have said till now is valid for the first kind of facts, but if the matter is of proving a fact evaluatively determined things turn much more complicated.

Take f.i. evidence of „facts that make the cohabitation of husband and wife unbearable" as a ground for judicial separation (see art. 151 of the italian civil code).

As to evidence of „facts" in a strict sense there is no problem, and what we said before is valid. The problem concerns the impossibility of the cohabitation, which depends evidently on a value judgment about „facts".

In the case (1a) of evidence offered by a party, the party aims at proving not only her own account of the „facts" in a strict sense, but chiefly at founding her own value judgment about the seriousness of the facts and their incompatibility with the cohabitation of husband and wife.

In this case, if the judge is or thinks to be bound to evidence coming from the party, he will consider as „judicial truth" both the party-oriented account of the facts, and the party-oriented value judgment about the facts.

Nevertheless, he might agree with the „truth of the party" about the descriptive element of the „facts", but not with the value judgment of the party about them. Therefore, he might make a value judgment by himself, on the basis of his own values, about the impossibility of the cohabitation.

Furthermore, if the other party had the opportunity to discuss the evidence and then to make her own value judgment about the facts,

[15] See generally M. Cappelletti, *Fundamental Guarantees of the Parties in Civil Proceedings*, [in:] *Fundamental Guarantees of the Parties in Civil Litigation*, Milano—New York 1973, p. 746.

[16] See Wróblewski, *Facts*... Wróblewski's classification of facts is more complex, since facts can be determined in three essential manners: descriptive or evaluative; positive or negative; simple or relational. For my purposes the very essential opposition is the first one; the second one, in fact, may be less relevant from the point of view of the evaluation of proofs, or it may be absorbed by the fact that when there are two opposite proofs, the outcome of one of them is a positive statement of the fact, and the outcome of the other is a negative statement of the same fact. Besides, I may leave out the third opposition both for the sake of plainness, and particularly because the problems of facts determined „in a relational way" concern chiefly the interpretation of the rule of law (or of several rules), rather than the determination of the truth or falseness of a fact.

the judge has to choose between opposite value judgments made by parties.

In the case (1b) of evidence ordered by the judge, not only the „descriptive knowledge" of the facts, but also the value judgment about them are tendentially „neutral". It means that the judge is inclined to search the objective truth of facts in the strict sense, and also to make a neutral evaluation of them. It also means that the values of the judge become criteria of a value judgment that is neutral by definition.

Nevertheless, if parties had the opportunity to discuss the evidence, and then to make their own value judgments about the facts, the judge might choose between opposite party-oriented value judgments, in opposition with his own value judgment. In short, there may be a choice among three value judgments (two made by parties, and the third one by the judge) about the same facts.

III

2. The second type-situation is when on the fact there are opposite items of evidence: the former, proposed by the plaintiff, which aims at proving the truth of the fact; the latter, proposed by the defendant, which aims at proving its falseness. Such a situation is typical of the procedural systems that follow the „adversary principle"[17].

Since the items of evidence are „party-oriented", they give partisan and opposite accounts of the fact. Consequently, the decision-making problem is to choose between the „truth of the plaintiff" and the „truth of the defendant". Here the logic of the judgment is not only the logic of probability of the statements of fact, but the logic of the choice between two statements of the same fact, that are opposite in their content[18].

Such a choice may be put at different levels, that is:

a) at the level of the reliability of proofs taken one by one. It requires a comparative evaluation of the degree of probability of the statement of truth of the fact, and of the degree of probability of the statement of its falseness. The statement with a higher degree of logical or statistical probability is „judicially true".

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[17] See supra n. 10, and Thibaut, Walker, *op. cit.*, p. 28.

[18] In general see G. Gottleib, *The Logic of Choice*, London 1968; See also Roedig, *op. cit.*, p. 112, 148, and idem, *Die Denkform der Alternative in der Jurisprudenz*, Berlin—Heidelberg—New York 1969.

b) at the level of the criteria of evaluation. The choice of the judge may concern not directly the credibility of the proof (f.i. of the witness), but the criteria of inductive knowledge of the facts. According to wether the judge thinks valid one or another rule of common sense or of inductive logic, the outcome of the judgment of fact may change[19]. This is particularly the case when evidence is not direct or „material", but indirect or „circumstantial". In the latter case, what counts more is the inductive inference from the fact directly proved to the fact that must be indirectly (inductively) known by the judge as „material" for the case[20].

If the matter concerns facts evaluatively determined, the opposition may be not at the level of the truth or falseness of the fact descriptively determined, but properly at the level of its evaluation.

In the example of „facts which make the cohabitation unbearable", it may happen that:

a) the opposition is between truth and falseness of the „facts" descriptively determined, or

b) there is no opposition about the truth of the facts, but the opposition is about their capacity to make the cohabitation unbearable.

In the case b), the problem that the judge has to solve is not cognitive, since the parties agree on the truth of the fact, but evaluative in a proper sense. It means that the judge must choose between the value judgment of the plaintiff and the value judgment of the defendant about the same „facts".

In this case there is no problem of determining the higher probability of a statement of fact, and the problem is of choosing the prevailing value to take as a ground for the evaluation.

The fundamental principle of the adversary system compels the judge to choose only between the opposite accounts of the fact given by parties, assuming that the „truth" of one of them must be taken as judicial truth[21]. It means that for facts descriptively determined the judge cannot choose a „third" account of the facts, and also that for facts evaluatively determined he cannot choose a „third and neutral" evaluation of them[22].

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[19] About the problem of rules or criteria of inductive evaluation of facts see generally T a r u f f o, *Certezza e probabilità...*, p. 89; i d e m, *La motivazione...*, p. 243; M. N o b i l i, *Nuove polemiche sulle cosidette „massime d'esperienza"*, „Rivista italiana di diritto processuale penale" 1969, p. 123; J. L o e b e r, *Die Verwertung von Erfahrungssätzen durch den Richter im Zivilprozess*, Kiel 1972.

[20] See generally T a r u f f o, *Studi sulla rilevanza...*

[21] See n. 10.

[22] The point is clear in the „classical" account of the adversary system: see e.g. P. W e i l e r, *Two Models of Judicial Decision-Making*, „The Canadian Bar Review"

3. The third type situation is when, besides opposite evidences coming from the parties, there is on the fact some evidence ordered by the judge. Such a situation is typical of the so-called „mixed" or „inquisitorial" systems, where the judge may or must wield probative powers on his own motion[23].

Since the decision-making problem is to judge on the basis of different evidences, it is a problem of choice among different accounts of the fact. Yet we have here a further element in comparison with the adversary situation. It is given by the existence of evidence that is „neutral" by definition (or „non-partisan"), and that, consequently, should be close to the „objective truth" of the fact more than „partisan" evidence may be. Moreover, there is the possibility that the judge chooses a „third" solution, different both of the plaintiff's and the defendant's ones[24].

About evidence coming from the judge, we may have two basic cases:

a) evidence from the judge agrees in its outcome with evidence from a party;

b) evidence from the judge does not agree in its outcome neither with the plaintiff's one, nor with the defendant's one.

In the case a), evidence coming from the judge strengthens evidently the probative value of the party evidence with which it agrees, because there are two items of evidence for an account of the fact and only one item for the opposite one, and because the „neutrality" of the judge's evidence determines the choice of the judge about the judicial truth of the facts.

In the case b), evidence coming from the judge gives the third chance of judgment. Here the structure of the decision-making problem changes, because the choice is no more between truth and falseness of the fact, but among three different accounts of it. Furthermore, these

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1968, 46, p. 412. Nevertheless, it turns uncertain and debatable when the judge is considered as a law-finder or as a problem-solver who must be active in the search of a just and informed decision: see Taruffo, *Il processo civile „adversary"...*, p. 138.

[23] See generally D. Brueggemann, *Judex statutor und judex investigator*, Bielefeld 1968; B. Cavallone, *I poteri di iniziativa istruttoria del giudice civile*, Milano 1968; V. Denti, *L'evoluzione del diritto delle prove nei processi civili contemporanei*, „Rivista di diritto processuale" 1965, p. 46.

[24] Here and in the following, the idea of judge's „neutrality" is closely relative and functional, since it means only „non-partisanship" of the judge in the search of evidence and in making judgments, cognitive of evaluative, about the facts in issue. Consequently, I do not assume any general idea or ideological definition of the neutrality of the judge in the legal system or in the social order.

three accounts are not homogeneous, because two of them are typically „partisan", while the third one is „nonpartisan".

Also in this situation, the problem is different for facts descriptively determined and for facts evaluatively determined.

For the first ones, the case a) increases the probability of the truth or of the falseness of the fact, while the case b) requires to determine which among the three accounts of the fact has the highest degree of probability.

For the second ones, in the case a) evidence coming from the judge strengthens the evaluation proposed by one of the parties, and, adding a „non-partisan" evaluation, solves the evaluation problem. In the case b), evidence coming from the judge introduces a „third" and „non-partisan" value judgment: so it widens the range of the evaluative choices of the judge, and it makes possible a value judgment that does not agree either with the plaintiff's one or with the defendant's one.

IV

After having seen the main types of decision-making situations, we must now underline that judicial reasoning in the evaluation of proofs does not depend only on the kind of the decision-making problem, but also on the features of the evidentiary material submitted to the judge's evaluation. Such features depend, in their turn, on the technique of evidence collection, and chiefly:

a) on the examination method used in the trial, and

b) on what is actually appraised by the judge.

Examination methods may be roughly divided into two kinds:

1) examination of witnesses by the judge (free or bound to facts stated by the parties);

2) direct examination by a party's lawyer, possibly followed by a cross-examination.

The first method may be defined as non-partisan because, even if evidence is offered by a party about facts stated by herself, the judge tends to obtain from the witness an objective account of the facts. Such a possibility increases if the judge can examine freely the witness, because in such a case the examiner is not bound to facts stated by an interested party.

This method lessens the „partisanship" of the party-oriented evidence, and increases the „neutrality" of the evidence ordered by the judge. The contraindication is that the collection of the items of evidence may be incomplete if the judge is not „active" in the examination (be-

cause he does not know the facts, or because he is not interested in a careful search of truth).

Therefore, this method ensures a good degree of neutrality of the proof, but it does not always ensure its „completeness" from the point of view of the objective truth about the facts in issue.

The second method is typically „partisan", because the lawyer who examines the witness aims obviously at obtaining a confirmation of his own account of the facts.

Consequently, this method increases the partisanship of the party-oriented evidence, and lessens the neutrality of the evidence coming from the judge. Generally, it has a direct influence in shaping the decision-making problem, since it a l w a y s gives the judge an one-sided account of the outcome of the proof.

This one-sidedness is counterbalanced by the cross-examination, which aims at weakening the reliability of the witness, or at giving the judge an opposite one-sided account of the facts, drawing it from the same witness[25].

The decision-making problem is also influenced, because the outcome of the machinery examination/cross-examination is giving the judge two opposite and one-sided series of evaluation elements (descriptive and/or evaluative), drawing them from the same item of evidence. Then the evaluation of the proof cannot be reduced merely to determining the probability of a statement of fact, but it implies the choice between two opposite and one-sided series of statements about the fact.

The advantage of this method may be the more thorough and complete discovery of truth (because made by the interested parties)[26], even if the judge must choose only between two party-oriented truths.

V

The other variant that has an influence on the way in which proofs are evaluated is the specific and material object of the judge's appraisal, that may be different according to the procedural features of the connection between proof and judgment.

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[25] In practice, the real outcome of cross-examination depends both on its legal regulation (which may vary considerably in the several systems), and on the attitudes of lawyers in its use or misuse. See generally, and for references T a r u f f o, *Il processo civile „adversary"...*, p. 29.

[26] At least, this is the most popular and traditional opinion about the scope of cross-examination: see e.g. H. W i g m o r e, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol. 5, Boston 1940, p. 29.

If the judgment follows immediately the collection of evidence (i.e.: facts are judged just at the end of the trial hearing devoted to the examination of witnesses), the object of the evaluation is the direct and complete perception of the evidence, since the judge appraises all what he has heard and seen at the hearing. Such an appraisal is made both on the statements and on the behavior of the witness during his examination.

As a matter of evaluation, in this case the statements made by the witness on the fact are accompanied by two groups of contextual dements that are useful to appraise properly the reliability of such statements:

a) „textual" elements given by the language used by the witness, by the logical and semantic nature of his statements (f.i.: contradictory statements, ambiguities, and so on);
b) „behavioral" elements as embarrassment, reticence, psychological reactions (blush), and so on.

In this case the evaluation of proofs may be very complicated, because it may imply several elements and several criteria, but it has the advantage of being c o m p l e t e, because the judge can really use all what may be relevant for the proper appraisal of the proof.

If, on the contrary, the judgment does not follow immediately the trial hearing, the evaluation of proofs can be made only on the written record of the hearing. Sometimes tape-recordings are used, and in the United States the use of videotapes has been proposed[27], but the normal form of recording is still the written one.

The main consequence is that in this way the „behavioral" elements of appraisal about the credibility of the witness are lost. Even if the judge may order that such elements are recorded, their direct perception is lost all the same, and the record is incomplete all the same, because it cannot reproduce all the behavior of the witness.

As to the „textual" elements, the evaluation of proofs depends on the regulation of the record. Consequently:

a) if the record reproduces all what was said in the course of the examination, all these elements are retained and can be used for the evaluation of proofs.
b) if, on the contrary (as it happens f.i. in Italy), the record is a summary of what was said in the course of the examination, two important consequences follow.

The former one is that many textual elements are lost, and the latter one is that the evaluation is not made directly on the statements of the

[27] See T. D o r e t, *Trial by Videotape. Can Justice Be Seen to Be Done?* „Temple Law Quarterly" 1975, 47, p. 256.

witness, but on an account of them that is summarized, reorganized and handled by the judge of the hearing.

Therefore, the evaluation of proofs is simpler, but much more scanty, failing many of the contextual elements, and it is largely limited and predetermined by the judge that drew up the record. If, furthermore, the judge of the record is not the same who decides the case, or he does not decide immediately (as it is often in Italy), the gap between the reality of the proof and the means for its evaluation becomes almost impossible to fill.

As I hope to have shown, a theory of judicial reasoning in the evaluation of proofs cannot leave out of consideration the fact that the features of the decision-making problems as to the facts in issue depend on several factors. Such factors, in their turn, depend on the general characters of the several procedural systems, on the kind of the facts which must be proved in the several situations, and on the legal regulation of the trial hearing and of the record.

Being of course impossible here a complete examination of all the variables that may have a direct or indirect influence in shaping the decision-making problem in the reality of the judgment, I was compelled to limit myself to single out the most important among these factors, underlining the main consequences that may follow from their variation.

From a more general point of view, two main suggestions may be drawn form what I have tried to explain.

The former is that each theory of decision-making on the facts in issue is probably unsound, if it does not consider that there is not a simple and uniform situation as to the judgment on the facts, but there is a number of different situations in the several legal systems, or even in the same legal system, according to the kinds of facts that must be proved and to the kinds of evidence used by the parties and/or by the judge. It does not mean, of course, that a general theory of decision-making with reference to the evaluation of proofs is impossible, but that such a theory must consider properly all the different situations in which such an evaluation may occur.

The latter suggestion is that rationality in the evaluation of proofs, far from being a „pure" idea, generally valid in all systems and in all situations, is a value that needs to be realized and checked by several means in the several cases, in a close connection with the actual features of the various decision-making problems. Here again, it does not mean that a general idea of rationality cannot be defined, but only that such an idea must be defined on the basis of a proper analysis of the

different decision-making situations. Otherwise, the danger is of speaking abstractly of rationality in the evaluation of proofs, yet leaving actually room for subjective and intuitive evaluations, free from any rational control.

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ROZUMOWANIA PRAWNICZE I OCENA DOWODÓW

Autor rozważa zagadnienie związku między dowodowymi rozumowaniami prawniczymi i właściwościami procesu. Jego analiza ma umożliwić nieupraszczające podejście do właściwości tych rozumowań oraz do postulatu ich racjonalności.

Przepisy regulujące proces dowodzenia oraz określające pozycję sędziego mają wpływ na rozumowania dowodowe. Autor wyróżnia trzy typy sytuacji wpływające na interesujące go rozumowania: (1) gdy powołany jest jeden dowód, (2) gdy strony powołują dowody przeciwne, (3) gdy poza dowodami przeciwnymi stron sąd powołuje swoje dowody.

W pierwszym typie sytuacji istnieją dwie możliwości, a mianowicie powołanie dowodu przez stronę lub przez sędziego: pierwsza jest nastawiona na interes strony, druga zaś jest z założenia neutralna. W drugim typie sytuacji strony przedstawiają dowody przeciwne. Jest to cecha procesu kontradyktoryjnego: prawdę pozwanego przeciwstawia się prawdzie powoda; sędzia rozstrzygając w sposób neutralny przeciwstawne dowody, uwzględnia zarówno istnienie dowodzonego faktu, jak i — w odniesieniu do faktów wyznaczonych w sposób oceniający — kryteria oceny. W trzeciej sytuacji, właściwej procesom typu inkwizycyjnego, do przeciwstawnych dowodów stron dochodzą dowody powołane przez sędziego.

Istnieje związek między rozumowaniem sędziego a samym przeprowadzaniem dowodów z przesłuchania. Występuje kontrast między przesłuchaniem przez sędziego i przesłuchiwaniem przez strony, w którym krzyżowe pytania mają dać równe szanse każdej ze stron w dowodzeniu „swojej" prawdy.

Na rozumowania sędziego wpływa również to, czy sędzia ocenia dowody z przesłuchania bezpośrednio po ich przedstawieniu, opierając się na treści wypowiedzi i na zachowaniu przesłuchiwanego, czy też zapoznaje się z materiałem dowodowym na podstawie pisemnego zapisu w formie pełnej lub w postaci streszczenia protokolanta.

Autor podkreśla, że ocena dowodów zależy również od sposobu zbierania tych dowodów w procesie oraz od rodzaju ich percepcji przez sędziego. Autor z jednej strony rozgranicza systemy inkwizycyjne i systemy kontradyktoryjne, z drugiej zaś — sytuacje, w których sędzia ocenia bezpośrednio dowody ustne oraz takie, w których opiera się na pisemnych protokołach.

W konkluzji autor podkreśla, że dowody ocenia się zgodnie z odmiennymi modelami w różnych sytuacjach, w zależności od właściwości procesu sądowego oraz od cech występujących w nim sytuacji dowodowych. Nie można więc myśleć o „czystej idei" oceny dowodów, ogólnie ważnej dla wszelkich systemów dowodowych i wszystkich sytuacji. Można zdefiniować ogólną ideę racjonalności dowodów, lecz definicja taka musi uwzględniać to, że w praktyce sądowej występuje wiele różnych sytuacji.