

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ From “*edere*” meaning to disclose.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ See Article 118 CPC.

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

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

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

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

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

¹⁴ See Art. 473.bis.44 CPC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

