Litigants' duty to disclose

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1. The subject

The research aims to trace the evolution of the litigants' duty to discover the information relevant to a civil proceeding. This duty is present in the Anglo-American tradition but is, in contrast, absent in the European continental tradition, where even the word "discovery" has an exotic and unknown flavour.
The research makes (I hope) a small contribution to the subject of the convergence between the laws of procedure of common law and civil law jurisdictions, the two fundamental families that have permeated almost all current procedural systems.

With the idea that knowledge of the past is vital for an understanding of the present and future, the research has three specific objectives.
1) The first objective is to examine the origins of the duty to discover. Discovery was injected into the common law system only by the Act of 1854, and had its origin in a quite different model of process, the proceedings of the English Chancery court, strongly influenced by the continental tradition of the Romano-canonical model.
To most people, who see the machinery of discovery as quintessentially Anglo-American, the realisation of this historical fact may come as a shock. Yet, a fact it is. Nobody will deny that discovery has indeed developed in the course of the centuries into a peculiarly Anglo-American (above all, American) phenomenon. Nevertheless, at its very beginning discovery was unrelated to common law and was, on the contrary, connected to civil law.
2) The second objective, more ambitiously, seeks to find the answers to two correlated questions. The first question is about the factors that have transformed the Anglo-American discovery of pre-modern England in the contemporary machine. If the machinery of discovery was, at the beginning, unconnected with the culture of "adversarial legalism", it is now one of its most impressive manifestations.
The second question, a mirror of the first, is why European continental systems, which historically had something similar to the duty to discover, gave up this tendency toward the ascertainment of truth and adopted the principle "*nemo tenetur edere contra se*."
3) The third objective is, first of all, to use the results of historical investigation in order to better understand the latest reforms in the Anglo-American world and in the continental European world. If in the U.S. and in England there is a tendency to limit discovery abuses by strengthening the court's management powers, in Europe there is a tendency to introduce limited duty to disclose information.

Secondly, the results of the investigation will be helpful in building a notion of the duty to discover that is acceptable to both civil law and common law countries.

In the following sections you will find explanatory material on single issues of the research. Sections 2, 3, 4 are devoted to preliminary issues, which form the starting point of the research. The remaining sections are dedicated to the three objectives of the research.
In the appendix, you may read information about three films which will give us, through showing a few of their images at the presentation, an idea of trial and discovery in a current U.S. civil court on the one hand, and of a hearing in the 19th century English Chancery court on the other.

2. Anglo-American and European continental civil proceedings: key features [1]

The common law process has been developing since the 12th century in the English royal courts and presents three fundamental structural features:

- enlistment of lay judges – the jury – in the administration of justice;
- temporal concentration of proceedings around the "day-in-court" trial;
- prominence of the parties, or, rather, of their counsels in the procedural action.

Opposite the features of the civil law process - heir to the so-called Romano-canonical procedure (i.e., the procedure which, ultimately derived from the late-Roman professional procedure, was developed in the Church courts and by the 13th century was adopted in continental secular courts) - this process:

- is entirely professional;
- does not involve trials;
- places the judge in the pivotal role.

As a consequence, common law and civil law jurisdictions have different styles of evidence-taking:

- In the Anglo-American systems we have an adversarial presentation of evidence by battling lawyers in which witnesses are examined and cross-examined by the lawyers and experts are presented by the parties on the same basis as other witnesses.
- In the European-continental process, conversely, it is the court that conducts the examination of the witnesses and appoints the experts.

[1] For some useful remarks see J.A. Jolowicz, *On the Comparison of Procedures*, in *Law and Justice in a Multistate World*, New York, 2002, 721-740; and R.A. Kagan, *Adversarial Legalism*, Cambridge, 2001.

These differences are gradually vanishing (cross-examination is a technique no longer unknown in civil law jurisdictions, and the appointment of an expert by the judge is provided by a common law system like the English one).
One deep difference remains: in the Anglo-American systems, the parties are compelled to disclose all relevant information, while in continental Europe systems the parties do not have a similar duty.

3. Discovery rules in comparison

- United States

Under the Federal Rules of Civil Procedure of 1938 (rules 26-37), the attorneys for the parties may, before the trial, require virtually any data that can reasonably be anticipated to lead to evidence that will be admissible in the litigation.
Here is the impressive list of discovery devices:

1. deposition by oral examination and cross-examination of a deponent as they would be at trial or by written questions;
2. interrogatories to parties;
3. producing documents, electronically stored information, and tangible things;
4. entering onto land, for inspection or other purposes;
5. physical and mental examinations;
6. request for admission.

In the words of the Supreme Court in the leading case *Hickman v. Taylor* (1947): "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation; to that end, either party may compel the other to disgorge whatever facts he has in his possession."

- England

In England, discovery traditionally relates to the production of documents only.
Under the Civil Procedure Rules (1998), part 31, the party of a civil proceeding has to disclose "the documents on which he relies and the documents which adversely affect his own case (..) or support another party's case."

- France

In France, the so-called new code of civil procedure (1975) contemplates that each party has the duty to contribute to the ascertainment of truth (Article 11). A party and a non-party can be required to give evidence and to produce documents by the judge. The party has to apply to the judge for such an order and it will be granted only if the documents and other evidence are identified with precision (Articles 138-142).

- Germany

The German system is more restrictive than the French one. The *Zivilprozessordnung* allows an order for production of documents against the will of a party only if she has a duty according to substantive law to produce the document to the other party (§ 442 ZPO). A new rule came into effect in Germany on January 1, 2002, allowing an order for the production of documents against a non-party.

4. Discovery of documents: a case of international "Justizkonflikt"

The subject plays a significant role in contemporary transnational litigation.
Not surprisingly, the controversy pits the United States against European countries, (even England has been at the forefront in diverging from American-style discovery requests, labelled as "fishing-expeditions").

Two decisions of the U.S. Supreme Court are explanatory examples of this international contrast:

- The *Aérospatiale* case [2]

The background of the decision: In 1980, an aircraft crashed in Iowa and a suit was brought against two French corporations owned by the Republic of France alleging that they had manufactured and sold a defective plane. The plaintiffs served, in the pre-trial phase, a request for the production of documents, a set of interrogatories, and requests for admission. The defendants filed a motion for a protective order, invoking the application of the Hague Convention on the taking of evidence abroad (under which it is possible to block the "discovery of documents as known in common law countries," see article 23). The motion was denied. The French corporations appealed. The Court of Appeals rejected the appeal. The corporations then sought review of the decision by the Supreme Court.
The Supreme Court stated that the Hague Convention represents merely an auxiliary instrument, whose application requires "a prior scrutiny in each case of the particular facts, sovereign interests and likelihood that resort to those procedures will prove effective."

- The *Intel Corporation v. AMD* case [3]

The underlying fact scenario: Advanced Micro Devices (AMD), the historical competitor of Intel Corporation, the world-wide leader in computer devices, in October 2000 took action before the European Commission, charging Intel with violating the anti-trust rules of the European Treaty, article 82. AMD requested the Commission

[2] *Société Nationale Industrielle Aérospatiale versus United States District Court for the Southern District of Iowa* (1987). Comments on the decision, amongst the most famous and controversial in private international law, are countless.
[3] *Intel Corporation versus Advanced Micro Devices* (2004). For a comment see my *Discovery all'estero: un nuovo capitolo del confronto tra Europa e Stati Uniti*, in *Il diritto processuale civile internazionale*, edited by Consolo and De Cristofaro, Milano, 2006, 1387-1397.

order Intel to produce documents covered by a privacy order produced in another anti-trust action in the U.S. The motion was denied by the Commission.
AMD served the request for the production of the documents to an American court, the California Northern District Court. The District Court denied the motion. AMD then appealed and the Court of Appeals of the Ninth Circuit granted the motion. Intel sought review of the decision by the Supreme Court.
The Supreme Court decided that 28 U.S.C., section 1782(a) - which provides that an American court may order a person residing or found in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal (..) upon the application of any interested person" - authorized a federal court to provide assistance to a complainant in a European Commission proceeding, leaving the District Court to decide whether assistance was appropriate in this case.

5. The origins of the duty to disclose

The Chancery procedure was totally different from the common law one. It:

- was entirely professional;
- did not involve trials;
- placed the Chancellor in the pivotal role [4].

Why? The motive usually referred to is the fact that the chancellors of the late middle ages, who were ecclesiastics until Tudor times, formed the procedure of their court after the model of the Romano-canonical procedure [5].

Taking of evidence [6]:

- as in the Roman-canon process, the Chancellor had to be the seeker of truth and was responsible for evidence taking;
- witnesses, instead of being orally examined at trial, were examined on oath under the control of the court, with the examination to be carried out by court

[4] St. German was the first English author (his *Little Treatise concerning writs of subpoena*, published in 1787, was probably written in 1532) to give an account of the equitable jurisdiction of the Chancellor. In the *Little Treatise* St. German focused his attention on the writ of subpoena and the practical operation of the Chancellor's equitable jurisdiction (see D.E. Yale, *St. German's Little Treatise concerning writs of subpoena*, 10 *Irish Jurist*, 1975, 324-333).
[5] Despite its frequent claims to uniqueness, common law drew on the Roman-canon legal tradition. On the migration or borrowing of doctrinal concepts from the Romano-canon by the Anglo-American system see P. Stein, *Roman Law in European History*, Cambridge, 1999; R.C. Van Caenegem, *The Birth of the English Common Law*, II ed., Cambridge, 1988, *European Law in the Past and the Future. Unity and Diversity over Two Millennia*, Cambridge, 2000; C.H. Van Rhee, *Civil Procedure: A European Jus Commune?, European Review of Private Law*, 2000, 589-611.
[6] M. Mac Nair, *The Law of Proof in Early Modern Equity*, Berlin, 1999.

officers on interrogatories supplied by the parties, and with the result kept secret until publication.

The subpoena *ad respondendum* and *duces tecum*

A key feature of the proceedings was the request to the defendant to answer the plaintiff's allegation [7]. In this mechanism – a writ of subpoena *ad respondendum* - by which the defendant was forced to make a disclosure under oath regarding all the matters charged in the bill and to even produce documents "for the better discovery of the matters," the so-called subpoena *duces tecum*, is identified as the ancestor of the modern discovery.

According to the authoritative opinion of Wigmore [8] - the leading American scholar on evidence [9] , the Chancery subpoena *ad respondendum* had its antecedent in the inquisitional or interrogatory oath introduced and developed in the early 1200s, chiefly by the decretals of Innocent III.

The historical continuity between the canon law oath *de veritate dicenda* and the later methods of discovery in Chancery has been traced in the endorsement of a bill in Chancery in Henry IV's time ("*Infrascriptus Ricardus in Cancellaria Regis personaliter comparens & ibidem super sancta Dei evengelica juratus et examinatus ad veritate dicendam de materia in hac billa contenta dicit quod*").

6. Reasons for an opposite evolution: the Anglo-American systems

As to the Anglo-American evolution of discovery, my thesis is that a central role was played by empirical philosophy and the underlying idea that to reach a rational decision the court must have all knowable facts.

My points:

- Barbara Shapiro [10] has demonstrated the links between law and the scientific revolution in the 16th and 17th centuries [11]. The scientific revolution was not

[7] A. Daimond, *Discovery in the court of Chancery: the rule that a defendant who submits to answer must answer fully 1673-1875*, dissertation, Cambridge, 1992.

[8] J.H. Wigmore, *Evidence in Trials at Common Law*, Boston, vol. 8, 1961, 273-278. On a different line H. Coing, *English Equity and the Denuntiatio Evangelica of the Canon Law*, 71 *Law Quarterly Review*, 1955, 223.

[9] W. Twining, *Theories of Evidence: Bentham and Wigmore*, London, 1985.

[10] The subject has been investigated by Shapiro since 1970[t] (see *John Wilkins 1614-1672*, Berkeley, 1970; *Probability and Certainty in Seventeenth-Century England*, Princeton, 1983; *Beyond reasonable doubt and probable cause. Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley, 1991; *A Culture of Fact. England*, 1550-1720, Ithaca-London, 2000).

[11] The link between the emergence of modern science and Puritanism in 17th century England is the central theme of the so called Merton thesis, enunciated by the sociologist Merton in his doctorate thesis of 1938, which has been discussed continually through more than half a century

confined to a narrow group of professional scientists. Not only was there no such professional category, but those with scientific interests and accomplishments came from many different professional and non-professional groups, among whom lawyers were numerous.

- The close connection between the philosophy of empiricism and the ideology of the discovery machine is evident in the two fundamental moments in the history of Chancery proceedings (its consolidation and its ending) and is related to two leading philosophers and lawyers, Francis Bacon and Jeremy Bentham.

Bacon (1561-1626)
Bacon was a central figure in the scientific revolution of the 17th century. He was also one of the leading lawyers and jurists of his day and was appointed Chancellor in 1617 [12], when the Chancery court began to consolidate its proceedings and had contributed to improving the details of the system [13].
Bacon's "obsession" with the collection of facts is well known and he spoke about discovery in these terms: "you must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery (..) if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer" (in the *Countess of Shrewsbury Trial*, 1612).

Bentham (1748-1832)
Educated at Westminster and Queen's College, Oxford, and called to the Bar at Lincoln's Inn, Bentham abandoned practice at the bar in disgust and devoted the rest of his life to the criticism and reform of legal, political, and social institutions on the basis of the Principle of Utility. When he died he had probably written more then any other English jurist before or since [14].
The importance of facts for Bentham is undoubtedly known. Let us think of Mr Gradgrind, Dickens's caricature of a Utilitarian: "All I want is Facts. Facts alone are wanted in life." (*Hard Times*, 1854)

The importance of the Anglo-American "culture of fact" to the evolution of the discovery machine is confirmed by the U.S. experience:

- the American civil proceeding was modelled on the English one;

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of approval and disagreement, right down to the present day (*Puritanism and the rise of modern science*, edited by B. Cohen, New Brunswick-London, 1990).
[12] Bacon's career as a Chancellor did not end happily: in 1621 he was indicted on charges of bribery and forced to leave the office.
[13] R.W. Millar, *Civil Procedure of the Trial Court in Historical Perspective*, New York, 1952, 29.
[14] W. Twining, *Globalization & Legal Theory*, London, 2000, 91-107.

- the distinction between common law and equity courts was abolished in the middle of the 19th century;
- with the abolition of the equity courts, discovery (limited to documents) was taken in by the common law process.

A central role was played by David Dudley Field, the author of the 1848 New York State Code of Civil Procedure [15] (soon adopted by the other 27 States).
Field, who loved science, was drawn to the word "facts" and believed that one should try to determine objective reality, just like a scientist [16].

1938 Federal Rules of Civil Procedure:

- Clark, the main author of the Federal Rules, had a "realistic infatuation" with facts, and at the heart of his empirical work was the quest to ascertain relevant information [17];
- discovery reform must be put in the broader context of procedural jurisprudence of the time (which considered it modern to eliminate lines and categories and to permit the amassing of information), the legal realist movement (which stressed the importance of amassing all the facts before deciding [18]) and the New Deal [19].

7. The continental abandon of the tendency toward truth

The Roman-canonical procedural model prevailed on the continent of Europe throughout the *ancien régime* and survived the French Revolution.

An example is the civil procedure in the Great Council at Malines in the 16th century [20].
The Great Council was one of a group of newer central royal courts operating with basically Romano-canonical procedural forms, which developed in parallel in several European countries towards the end of the middle ages and in the early modern period. Other examples include the parliament of Paris, the German Reichskammergericht, and the English equity courts.

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[15] S.N. Subrin, *Fishing Expeditions allowed: the Historical Background of the 1938 Federal Discovery Rules*, 39 *Boston College Law Review*, 1998, 696; D.S. Clark, *The Civil Law influence on David Dudley Field's Code of civil procedure*, in *The reception of continental ideas in the common law world 1820-1920*, edited by Reimann, Berlin, 1993, 63-87; L.M. Friedman, *A History of American Law*, New York, 1973, 340 ff.
[16] S.N. Subrin, *How Equity Conquered Common Law*, 135 *University of Pennsylvania Law Review*, 1987, 935.
[17] S.N. Subrin 1987, 967-968.
[18] B. Leiter, *Naturalizing Jurisprudence*, Oxford, 2007.
[19] S.N. Subrin 1998, 739-740.
[20] C.H. Van Rhee, *Litigation and Legislation: Civil procedure at First Instance in the Great Council for the Netherlands in Malines* (1522-1559), Brussels, 1997.

At the beginning of the 19th century, continental scholars, mainly Germans, constructed a rigorous model of the lawsuit as a dispute of two autonomous parties before a passive court [21].
The civil process was to be governed by very broad notions of party autonomy – the two principles of *Dispositionsmaxime* and *Verhandlungsmaxime* – and the party dominance over lawsuits was indisputable.

As a consequence, the earlier emphasis of Roman-canonical authorities on the discovery of truth was greatly weakened:

- the judge was resolutely denied any power to call witnesses on his own;
- it was widely accepted that a party had no obligation to make truthful allegations, and only minimal, if any, obligations were imposed on litigants to produce relevant documents to the court.

The liberal model of civil procedure did not have a long life, and since the end of the 19th century many continental countries have passed legislation centered on the development of judge powers.
However, these reforms did not provide broader discovery duties.

8. Towards the convergence: the present

Anglo-American systems

- U.S. discovery reforms of 1980, 1983, 1993, and 2000

There is a good deal of discontent in the United States with the current practice of discovery, and there has been a continuous re-examination of the rules. The first episode included changes to the Federal Rules in 1980 and 1983 (amendments required judges to undertake some managerial action in most cases). Other changes occurred in 1993 and in 2000 (amendments imposed numerical limits on depositions and interrogatories, a new "initial disclosure" duty, and involved the judge more at the outset of discovery).

- English Civil Procedure Rules (CPR) of 1998

Lord Woolf – the father of the CPR – criticized discovery ("a hugely complicated and expensive exercise") but accepted the basic desirability of discovery "because of its contribution to the just resolution of disputes." He underlined that "a substantially greater control over the scale of discovery has to be exercised than at present." Under the CPR usually only a limited discovery of documents is possible, the so-called standard disclosure.

[21] M.R. Damaška, *Evidence Law Adrift*, New Haven, 1997; *The Faces of Justice and State Authority*, New Haven, 1986.

The movement, which in some way moves the discovery devices away from the pure adversarial model, is not inconsistent with the "nature" of the machine, which was developed in the Chancery proceeding, and which was totally controlled by the court.

European continental systems

- Latest Dutch reform of the code of civil procedure (2002)

Wetboek van Burgerlijke Rechtsvordering (RV), sections 843a and 843b (obligation to submit documents).

- E.U. legislation

Directive 2004/48/EC on the enforcement of intellectual property rights, article 8, §1: "Member States shall ensure that, in the context of proceedings concerning the infringement of intellectual property rights and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information (..) be provided by the infringer or any other person (..)."

9. The future

- *Principles and Rules of Transnational Civil Procedure* (1997-2004) [22]

Principle 16 (Access to Information and Evidence): "2. Upon timely request of a party, the court should order disclosure of relevant, non-privileged, and reasonably identified evidence in the possession or control of another party or a non-party. It is not a basis of objection to such disclosure that the evidence may be adverse to the party or person making the disclosure."

[22] The American Law Institute (ALI) began the project in 1997. The idea (by Hazard and Taruffo, two academics, one American and the other Italian, specialized in Civil procedure) was to establish a model system of legal procedures for use in transnational commercial transactions, that would maintain the integrity of individual cultures and, at the same time, advance cross-border cooperation. ALI was joined in 1999 by the European Institute for the Unification of Private Law (Unidroit). In 2004 the Council of Unidroit formally adopted the Principles. The text of the Principles, together with Comments, may be read in *Principles of Transnational Civil Procedure*, Cambridge, 2006.

Appendix: **Images of civil proceedings**

- **A Civil Action** (1998)

directed by Steven Zaillian
with John Travolta and Robert Duvall

Based on Jonathan Harr's book, the film is a hybrid, a fictionalized representation of a non-fictional representation of actual historical events.
The story: in 1982 a group of families in Woburn, Massachusetts, brought action against two large corporations, W.R. Grace and Beatrice Foods, for injuries due to the contamination of the town's water supply. The families alleged that the toxic materials were carcinogenic and led to the leukaemia-related deaths of six children and one adult in a nearby neighbourhood. Following a seven-month trial, W.R. Grace was found liable for polluting the wells. A second phase of the trial was to consider whether the pollution caused the leukaemia cases, but W.R. Grace settled with the families for a reported $8 million. Beatrice Foods, which had owned a tannery on the Woburn site and retained liability for the plant, was found not responsible for any contamination by the presiding judge.
The film, similar to a western, structures its narrative as a conflict between two individuals: the plaintiffs' lawyer, Jan Schlictmann (John Travolta), and one of the defence attorneys, Jerome Facher (Robert Duvall)

For a comment, D. Waldman, *A Case for Corrective Criticism: A Civil Action*, in *Law on the Screen*, Stanford, 2005, 201-230.
Information about the "real" case, *Anderson et al. v. Beatrice Foods et al.*, may be found at *serc.carleton.edu/woburn/about.html*. All pleadings may be read at *www.law.fsu.edu/library/courseresources/beatrice/index.html*.

- **Class Action** (1990)

directed by Michael Apted
with Gene Hackman and Mary Elizabeth Mastrantonio

The story: an aggressive personal injury lawyer, Jedediah Ward (Gene Hackman) files a suit against a carmaker (Argo Motors) on behalf of a client whose wife was killed when their car exploded into flames after a collision. Argo's attorney is none other than Jedediah's daughter, Maggie Ward (Mary Elizabeth Mastrantonio).
Much of the pretrial "skirmishing" between father and daughter – again, the narrative is structured as a conflict between two individuals - involves "discovery" and we see the

abuse of two of the most useful discovery devices, depositions and motions to produce documents.
The film is loosely based on the case of *Grimshaw v. Ford Motor Company*, involving a 1972 Ford Pinto that exploded when it was rear-ended. The jury awarded the plaintiff $2.5 million in actual damages and $125 million in punitive damages.

For comment see P. Bergman and M. Asimov, *Reel Justice. The Courtroom Goes to the Movies*, Kansas City, 1996, 270-276.

- **Bleak House** (2005)
directed by Justin Chadwick and Susanna White
with Gillian Anderson and Charles Dance

A typical, almost literal transposition of a classic by the BBC, this TV drama is based on one of Charles Dickens' masterworks, Bleak House (1853).
The novel is focused on an interminable suit in the High Court of Chancery, the case of Jarndyce and Jarndyce, and the connected lives of several characters well known to the readers (Esther Summerson, John Jarndyce, Mr. Tulkinghorn, Lady Dedlock, and so on).
Dickens, who at the age of fifteen worked as a clerk to a solicitor and then became one of the best court reporters in London, was inspired by an actual suit concerning a contested fortune, the Jennens case, that had begun in 1798 and was still unsettled in the 1850s. Also informing the novel was Dickens' personal experience of Chancery. In 1844 he had been plaintiff in five actions to restrain breaches of copyright of *A Christmas Carol*.

See *Trial and Error*, edited by F.R. Shapiro and J. Garry, New York-Oxford, 1998; and W.S. Holdsworth, *Charles Dickens as a Legal Historian*, New Haven, 1929, 79-115.