

## Discovering the Truth: Process or Project?

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### Introduction

This paper considers the various roles that judges play in the civil process and the truth that results. It also deals with whether discovering the truth is a process or a project. If it is a process, we must attribute either a passive role or an active role to the judge. If it as a project, we can imagine the judge's role as a pragmatic one.

### A. The Passive Role of judge

In the adversary system judges take a passive role. They are confined to the evidence presented by the parties and they cannot take an active role in developing the case. In the civil law under the Napoleonic Code of Civil Procedure (1806) and in Middle East's jurisdictions (specially Islamic countries) which have followed up it, judges have taken a more active role.

While it was once thought that the passivity of judge guarantees impartiality, it is emerging that impartiality does not necessarily require complete passivity. Under this misconception, discovering the truth was thought to be a process in which the parties needed to play a more active role.

The advantage of this system was the speedy adjudicating of the disputes but it made the adjudicative process mechanical in order to reflect an objective truth. However, when judges play a passive role, they may get at the truth but it is really a subjective one, namely, one based on the evidence presented by the parties without taking the realities of the case into consideration.

### B. The Active Role of judge

It gradually emerged that impartiality is not the same as neutrality, and justice is a public service. Judges can no longer remain passive and indifferent between the parties. because social justice required that they assist to parties by extending their *ex officio* measures to them, particularly when one party has fewer resources to litigate than the other.

When this occurs, in addition to the evidence that the parties provide, the judge has authority to take any measure necessary for discovering the truth. Some Civil Law systems regard this "authority" as permissive and others regard it as mandatory. However, this authority must be handled carefully as it works in parallel with the parties' right to provide evidence.

The emergence of this idea has caused concern among academics and practitioners as it is thought that it might affect the judge's impartiality. For example, the right to summon witnesses belongs to the parties and if judges *ex officio* summon witnesses, it is thought that they could lose the ability to be impartial. However, it is unclear why this is so because the judge does not at that point know the content of the testimony. When a judge plays an active role, he may get at the objective truth, namely, the truth that not only for the judge hearing the case but also for all concerned.

### **C. The Pragmatic Role of judge**

Some judges admit that they arrive at their decision intuitively and then justify it legally. In this way, the judge determines the truth the desired result then arranges the necessary arguments to support it. Some object to this, regarding it as unacceptable and creating a rift between the two points of view: certainty on the one hand and justice on the other hand.

One famous English judge said: "I feel that I would always come down for justice. I hope fundamentally that judges, especially in fields of law like tort, would do justice. But there is a qualification. In commercial matters, contracts, once an interpretation has been given by the courts I say let that stand, because people have to base their transactions on it in the future".

In some jurisdictions, when there is a conflict between "*voice of conscience*" and "*voice of law*", the former is to be given priority. This reminds us of the concept of truth as expedience. However, a pragmatic approach such as this can create difficulties for appellate review. This signals the need for caution.

### **Conclusion**

Discovering the truth is a process not a project. If the judges transform it into a project, this will create instability in adjudication and uncertainty in the world of business. If judges begin by deciding the case and then crafting arguments in support they will turn it into a project. In the common law, where judges play passive role in the civil proceedings, the pragmatic role of judge is less evident. In the civil law, where judges play a more active role, they tend to be more pragmatic.

Recently developed codes of civil procedure tend to provide a more active role for the judges, as for example, Principle 14-1 Of Transnational Civil Procedure (the Joint project of ALI/UNIDROIT), which specifies: "Commencing as early as practicable, the court should actively manage the proceeding...". On the other hand, the pragmatic role is a judge-made phenomenon; When a judge is not satisfied with the law, she/he resorts to the pragmatic role in discovering the "truth" while the result is better described as expedience not truth.