The Socratic Heart of the Adversarial System

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One face, one voice, one habit, and two persons!
A natural perspective, that is and is not.
William Shakespeare, *Twelfth Night*, V, 1, 214

Abstract: Italy is in a special position from which to observe the comparison between the accusatorial and the inquisitorial models, because it has adopted a highly original procedural form. Since 1989 a model drawing its inspiration from the adversarial procedure has been progressively introduced into the Italian inquisitorial judicial system. At first it has been used solely in trials; then, from 1999 it has been extended to all judicial proceedings (as a result of the reform of article 111 of the Constitution). This new introduction cuts deep not only into the judicial culture but also into current Italian culture, because the adversarial principle (in Italy called *contraddittorio*) was presented as a benefit to be safeguarded and maintained, and no longer as a problem to be avoided. Unfortunately, within the sphere of actual judicial experience the value attributed to the adversarial model mainly consist sin a sterile dramatization of facts. The purpose of this research paper is that of explaining the intrinsic rationality and the alethic value of the confrontation between the parties. It demonstrates the integral Socratic structure of the adversarial model, which not only represents a logical means of verification, or refutation, of discrepancies in legal arguments but also defines the truth conditions of legal arguments.

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1. *Introduction*

The two principle models for the organization of a legal proceeding are the adversarial model and the non-adversarial model. Each of which, has valuable features[1], yet can be subject to criticism[2]. Italy constitutes a special case, where one can see both pros and contras of the two models. Since 1989, the Italian legal system moved away from inquisitorialism towards an adversarial approach, as a result of the introduction of the Vassalli criminal procedural code, which was viewed by many as a genuine revolution[3]. Despite this purported revolution, the Italian procedural system has demonstrated slight resistance to the change (as a result, some scholars have labelled the revolution as a failed attempt, as it did not genuinely change or reform the inquisitorial culture underpinning the Italian legal system)[4]. For this reason, in 1999 the "principle of *contraddittorio*" was introduced into the Italian Constitution. This principle can be regarded as the Italian way to the adversarial model[5].

After a brief examination of the international and European contexts, doctrinal arguments supporting the adversarial model will be examined. It will become evident throughout this examination that there is a

1. W. Van Caenegem, *Advantages and Disadvantages of the Adversarial System in Criminal Proceedings*, Bond University, 1999, http://epublications.bond.edu.au/law_pubs/224\, last visited 27/12/2017.

2. See generally D. Luban, *The Adversary System Excuse*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, in *Maryland Studies in Public Philosophy*, Cambridge, 2007, p. 19 ss. and S. Landsman, *The Adversary System: A Description and Defense*, for *American Enterprise Insitute*, 1984; on the contrary see M. E. Frankel, *Partisan Justice*, New York, 1980 and C. Menkel-Medow, *The Trouble with the Adversary System*, in *A Postmodern, Multicultural World*, in *Wm. & Mary L. Rev.*, 1996, p. 5 ss. Available at http://scholarship.law.wm.edu/wmlr/vol38/iss1/3. For a balanced view, see T. Jay, *Complex Litigation and the Adversary System*, New York, 1998.

3. G. Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, in *Washington University Global Student Law Review*, 2005; L. Changsheng, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, in *Journal of Political Science and Law*, 2008.

4. W. Pizzi, L. Marafioti, *The new Italian Code of Civil Procedure: The difficulties of building an adversarial trial system on a civil law foundation*, in *Yale Journal of International Law*, 1992; C. Van den Wyngaert, *Criminal procedure System in the European Community*, 1993.

5. This article draws on theses contained in P. Sommaggio, *Contraddittorio Giudizio Mediazione*, Milano, 2012.

preference for the adversarial model when compared to inquisitorialism[6]. The most important argument provided supporting the adversarial model is empirical in nature: today a rising number of scientists maintain that the direct opposition of two parties – and thus the fundamental concept behind the adversarial model – is the most effective tool, through which one can conclude mutually acceptable decisions, at least largely so[7]. For this reason, I will consider whether in law the accusatorial formula, the antagonistic form of the confrontation, may be the most rational structure for dealing with disputes. Furthermore, I will assess whether the adversarial system is a structure of verification/refutation of the possible inconsistencies in an argument, which is able to define the truth conditions of legal arguments. After doing so, I will progress to analyze the philosophical foundations of the adversarial model, namely, its Socratic heart. Like in a platonic dialogue, in an adversarial system each party in attempting to overcome the opposing position, adopts a Socratic mask. This mask has a series of characteristics which will each in turn be examined, to further explain how it is able to verify and refute the contradiction in the reasoning of the parties. This will provide the opportunity to identify the relationship between the adversarial model and the concept of 'contradiction'. In this context, I will claim that only an oppositional Socratic relationship permits mediation between the parties in a legal proceeding. Finally, I will examine the means through which this maieutic method allows the emergence of the truth from the confrontation between the parties. I argue that in opposing one another the parties create a place where like a bolt of lightning, the truth is revealed[8].

6. About the history of adversarial model see J. H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford, 2003 and David J. A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1850*, Oxford, 1999.

7. Dialogue and opposition is the theme of the logic of dialogue (or dia-logic). Among many authors who proposes a model, see 5-10. See also N. Dixon, *The Adversary method in Law and Philosophy*, in *The philosophical forum*, 1999, p. 13 ss. and S. Toulmin. *The Uses of Arguments*, Cambridge, 1958. On the contrary see the feminist perspective: J. Moulton, *A Paradigm of Philosophy: The Adversary Method*, in *Women, Knowledge, and Reality: Explorations in Feminist Philosophy*, New York, 1989; and P. Rooney, *Philosophy, Adversarial Argumentation, and Embattled Reason*, in *Informal Logic*, 2010, p. 203 ss.

8. E. Barrett, *Adversary System and the Ethics of Advocacy*, in *Notre Dame Law Review*, 1962.

2. *The Adversarial Model: an International Perspective*

The most relevant international authorities maintain that a political guarantee allowing the principles of democratic participation within the structure of a legal proceeding, is indispensable. At the end of Second World War, the dominant States promoted judicial policies inspired by their ideals and values. These were directly opposed to authoritarian ideologies and sanctioned the full equality of the rights of the parties in legal proceedings, public hearings and equality of rights. However, neither at the international nor at the European level has a single model emerged as the sole paradigm of legal adjudication. This can be effectively demonstrated by looking at some of the most important international treaties.

The Universal Declaration of Human Rights requires proceedings where all parties can publicly present their arguments and their evidence[9]. Whilst the parties have the right to be present, it seems, that Art. 10 of the Universal Declaration of Human Rights does not require them to be arranged in a direct and oppositional relationship. Some years after the promulgation of the Universal Declaration of Human Rights, another document (Article 14.1 of the International Covenant on Civil and Political Rights)[10] added a new element, which was only implicit in the Universal Declaration of Human Rights: a direct reference to the competence of the judicial court, established under the law. This text also implies that there is a necessity for both parties to be present at the legal proceedings, although this is not explicitly stated, confrontation between the parties is not excluded.

This trend is followed in European legal documents too. Article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome in 1950, makes the presence of both parties (actual or eventual) in a legal proceeding essential. However,

9. *Article* 10 of *The Universal Declaration of Human Rights* of 1948 says: "Everyone is entitled in full equality to a fair public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any charge against him."

10. *The International Covenant on Civil and Political Rights* was adopted in New York in December 1966, adopted into Italian law 25th October 1977 n. 881, published in G.U. (Gazzetta Ufficiale) 7th December 1977 n. 333 Supplementary; and came into force in Italy on the 15th December 1978. *Article* 14.1 of the *Covenant* states: "In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

it does not determine what kind of interaction they should entertain[11]. At the same time, the Convention expands upon some elements of the general structure of the legal proceedings, as relevance and duration are considered. Even though it is not directly made explicit, the so-called *parità delle armi* (fighting with the same weapons) is generally considered as a corollary of Article 6. In its case law, the European Court of Justice has in fact developed this concept by appealing to the idea of 'fairness'[12]. This concept is important since, insofar as a legal proceeding to be judged as 'fair', the opposing parties need to stand in a direct relationship one with another. This permits us to claim that, for the European Court of Justice confrontation, or even opposition, between the parties in a legal proceeding is an implicit presupposition: if there is no confrontation, then there will be no *parità delle armi*. In effect, the parties will not be fighting with the same weapons, and so the legal proceeding will have to be regarded as being carried out unfairly[13]. Therefore, we can infer from this that at least in Europe, the legal culture tends to look more favorably upon the oppositional, or adversarial model in comparison to other models of legal proceedings.

In terms of this brief review, it is worthy to note that, according to most international treaties, a legal proceeding should take the shape of a public hearing, in accordance to the principles of 'fairness'[14]. Furthermore, we can see that within this purposefully loose structure the parties may find various differing areas in which they can organize procedures and hold a legal proceeding. International conventions are admittedly vague in recommending any particular judicial model. In other words, there are wide margins within which States can organize the structure of legal proceedings. As a result, they can ultimately opt for either an adversarial model or a non-adversarial model. Yet, the legal proceeding before the European Court Justice is confrontational and thus it can be said to incline towards the accusatorial model.

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11. *Article 6* cites: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law".

12. See in this connection: Neumeister v. Austria, sent. 27th June 1968; Delcourt v. Belgium, sent. 17th January 1970.

13. *Article 6* of CEDU was modified with the addition of a new entry (Right to judicial equality) in the *Protocol* signed in Strasbourg the 11th May 1994 and ratified in Italy with law n. 296/1997.

14. L.P. Comoglio, *Etica e tecnica del giusto processo*, Torino, 2004, p. 151 ss.

It is for this reason that at least at an international level, it appears necessary to distinguish between the 'right to defence', as this right is mentioned explicitly in sources, and the 'safeguard of confrontation' between the parties. This is a distinct principle that although not certainly spelled out in detail, may be inferred from the pronouncements of the European Court of Justice[15].

In conclusion, even though it is not expressly stated, the confrontation between the parties appears present in International and European sources and is invoked by international courts.

3. *The Adversarial Model in the Italian Constitution*

Moving to the Italian legal system, one can notice that the adversarial model has been introduced only recently. In fact, the first attempts to introduce the adversarial model in Italy traces back to 1989 with the reform of the criminal procedural code. However, the culture of confrontation can only be introduced in a legal system by changing not only the letter of the law, but also the mentality of the people themselves[16]. The previous code was based on an inquisitorial structure and took the form of an accusatorial system[17]. For this reason, many legal scholars and practitioners initially resisted any change, at least until the constitutional reform (L. cost. n. 2 of 23rd November 1999)[18], which clearly took side in favor of the adversarial model in all legal proceedings[19]. Article 111 of the Italian Constitution was reformed in such a way to establish that all legal proceedings

15. See in this connection Kamasinski v Austria, 19th December 1989; Van Mechelen et al. v. Netherlands, 23rd April 1997; Belziuk v. Poland, 25th March 1998.

16. In other countries this culture may be called 'Adversary culture': G. R. H. Gaskins, *Shaping the Adversary Culture*, in *Informal Logic*, 2001, p. 187 ss.

17. Illuminati, supra note 4, page 569-570.

18. The impact of the constitutional reforms on the so called "fair trial" can be seen, with regard to the field of civil proceedings in S. Chiarloni, *Il nuovo articolo 111 della Costituzione e il processo civile*, Milano, 2001. Regarding the innovation from the criminal perspective, see P. Ferrua, *Il giusto processo*, Modena, 2005.

19. The constitutional reform is the outcome of a series of pronouncements by the Constitutional Court which have reduced the scope of the accusatorial model with the introduction of the concept of "non-dispersal of evidence": sent. no. 255 of 1992. Seemingly in contradiction to sent. no. 361 of 1998. See Illuminati, supra note 4, page 576.

have to be conducted in accordance with an adversarial model[20]. There are just three exceptions to this general principle in Section 5 of Article 111[21].

Let us look briefly at the new provisions. In the first two points of the new formulation of Article 111 we read that these principles are valid for all legal proceedings[22]. The constitutional legislator establishes that every type of legal proceeding must be conducted through the opposition of the parties, and that this opposition is the fulcrum of the entire jurisdiction of the country. The confrontation between the two parties is called '*contraddittorio*'. It would probably have been better if the legislators had used the term '*confronto*' because use of the term '*contraddittorio*' had the collateral effect of evoking traditional civil proceedings. For, within Article 101 of the Civil Proceedings Code the word '*contraddittorio*' means only the formal presence of the parties before the judge, and not a confrontation between the parties[23]. Therefore, the introduction of the word '*contraddittorio*' does not necessarily mean a migration from the inquisitorial to the accusatorial system, because you have to make a choice in the interpretation of the word '*contraddittorio*'. Let us try this accusatorial interpretation. It is easy to interpret the word '*contraddittorio*' with an accusatorial meaning in criminal procedures, because it was established that only through confrontation the truth can emerge[24]. It is more difficult, instead, to do the same in non-criminal proceedings, which are carried

20. See *Article* 111 of the *Constitution*, par. 4 "The criminal process is governed by the adversarial principle for the determination of evidence".

21. See *Article* 111 of the *Constitution*, par. 5 "The law shall govern the cases in which the determination of evidence is not subject to the adversarial process whether because of the consent of the defendant, or where it is objectively proven to be impossible".

22. *Article* 111 of the *Constitution*, par. 1. "The law shall be administered by means of a fair trial governed by Act of Parliament. The parties to all trials may speak in their own defense, in the presence of the other parties, with equal status, before an independent and impartial court. An Act of Parliament shall lay down provisions to ensure that trials are of a reasonable length".

23. We find the expression *contraddittorio* in civil trials at Article 101 *Civil Procedural Code*; it states the *contraddittorio* principle: "The judge may not, except where the law allows otherwise, rule on any question, if the parties against whom evidence is presented are not regularly cited or where they are not present". Traditional interpretation of the word "*contraddittorio*" is the presence of both parties in front of a judge, not (also) the confrontation between the parties.

24. According to Ferrua, *supra,* note 19, page 94, the first meaning of the directive contained in *Article* 111 should function as a principle, leaving to the law sufficient discretion to define the means of gathering evidence in the adversarial process, while the second meaning of the directive should function as a rule, more precisely a rule on evidential exclusion.

out by means of accumulating evidential elements. This may be a serious problem, I think, when the adversarial model is extended to civil proceedings. Despite this deep difference, in its interpretation of the reform of Article 111 the Constitutional Court strongly reaffirms its preference for the adversarial model on the argument that the confrontational relations of opposing parties gives scope to the increase of cognizance[25]. However, the choice of the term *contraddittorio* on the part of the legislature still allows considerable margin of critique for the maintenance of the inquisitorial model. Many, in fact, are the voices of a confrontational approach to this reform, and thus, the stances judges take vary considerably in the face of the adversarial formula. Everything depends, in fact, upon the particular meaning that they attribute to the expression *contraddittorio.* In other words, the expression *contraddittorio* means the Italian approach to the adversarial model. Nevertheless, the reflections on the *contraddittorio* that I will deal with constitutes, in my opinion, the key to understanding the driving force of the adversarial model and further how this model can enhance our knowledge and draw close to the truth. Let us now look at some doctrinal arguments.

4. *The* Contraddittorio *in the Italian Doctrine*

In the Italian legal dogmatics, some regard the *contraddittorio* just as a legal form, or a setting; some take it to be a policy; some consider it to be a means through which the significance of opposition is acknowledged; finally, some think that it is useless to arriving at the judge's decision. The doctrinal debate on this last point is divided between those who consider the *contraddittorio* as a method of obtaining knowledge and those who deny this claim by maintaining that the *contraddittorio* is simply a way of policing judicial proceedings. Let me quickly expand on those statements.

For those who define the *contraddittorio* a form is of little import to understand whether the *contraddittorial form* has some intrinsic value or if it functions more or less in the judicial decision[26]. By contrast, the function of the *contraddittorio* is of great importance for those who regard it

25. Sentence no. 32/2002 of the Constitutional Court relative to *Article* 111 of the *Constitution* confirms this meaning "from this with which the legislator gave formal recognition of the *contraddittorio* as a method the judge obtains objective knowledge of the facts, derives this corollary the prohibition of attributing value to evidence/declarations collected unilaterally from the investigating authorities".

26. S. Satta, *Diritto processuale civile*, Padova, 2000, p. 145.

as a scene or setting, namely, a theatrical presentation in which the parties must place themselves in front of the judge as an homage to the principle of equality (before the law). This alternative idea emerged in the 50s, when the theatrical metaphor was sought to identify the precise function of confrontation between the parties. The *contraddittorio* was meant to stand for a "scenic" game in which the judge was present as a spectator. The "play" had the twofold aim of providing equilibrium between the parties[27] and of aiding the decision of the judge in arriving at justice in the public interest[28]. Many legal scholars defended this view and sought to find the meaning of the *contraddittorio* in a legal proceeding by means of the "play" metaphor[29].

The third idea of *contraddittorio* has a political quality. Within this view, the *contraddittorio* represents from a legal standpoint that which happens on the political level[30]. If the European countries adopted a liberal-democratic political regime, then the procedural reality should adopt a confrontational system similar to the parliamentary confrontation[31]. This approach was embraced in particular during the 70s, when legal proceedings were presented as staging a direct opposition between the parties. On this view, the formal presence of the parties in the legal proceeding was connected with their right to defend themselves (right that is sanctioned by Article 24 of the Italian Constitution)[32]. This amounts to the view that two monologues not directly opposing one another were not sufficient; instead, a direct physical confrontation between the parties is considered essential[33]. This approach is important, not solely for historical reasons. Today everyone agrees on the necessity of a degree of confrontation. Ideally, in my view, the final decision needs to consider

27. F. Carnelutti, *Diritto e processo*, Napoli, 1958.

28. P. Calamandrei, *Istituzioni di diritto processuale civile secondo il nuovo codice*, Padova, 1941.

29. P. Calamandrei, *Il processo come giuoco*, in *Riv. Dir. Proc.*, 1950; republished in *Opere giuridiche*, M. Cappelletti (a cura di), Napoli, 1965, Vol. I, p. 540; F. Carnelutti, *Giuoco e processo*, *Riv. Dir. Proc.*, 1951, republished in *Studi in onore di Vincenzo Arangio Ruiz*, Napoli, 1953.

30. P. Calamandrei, *Processo e democrazia*, Padova, 1954.

31. E. Ceva, *'Audi alteram partem' but Why? On procedural equality and justice, Working Paper 10/2008*, Human Development, Capability and Poverty International Research Centre, 2008, a research center promoted by the *Institute of Advanced Study* (IUSS-Pavia) www.iuss.unipv.it/hdcp2008.

32. E. Fazzalari, *Istituzioni di diritto processuale*, Padova, 1979, p. 200 ss.

33. M. Chiavario, *Processo e garanzie della persona*, Milano, 1984, p. 122; L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Roma, 1989, p. 629.

the evidence that arises from the confrontation between the parties to the effect that the confrontation inscribed in the *contraddittorio* does not have a merely aesthetic value[34].

After the constitutional reform of 1999, the doctrine within Article 111 of the Constitution was characterized by two different interpretations of the principle of *contraddittorio*. The first section of that article has been interpreted as a type of specification of the right of the defence. Section IV of the same article, instead, frames the *contraddittorio* as a value for the entire legal proceeding, namely, a proper method to obtain true knowledge[35].

The opinions of other authors differ, some maintaining that *contraddittorio* would not allow an enhancement of knowledge, because its function would not be an epistemic one[36]. On this view, the *contraddittorio* would serve only to furnish information and to control the correctness of the legal proceeding and the legitimacy of the conduct of all the participants, in particular to the judge. Therefore, the opposition of the parties would have the function of monitoring the procedure[37]. This is because each party, in pursuing his own *private* interests, in the least honorable sense of the word, would not be minded to guide his procedural activities towards the complete and verifiable reconstruction which lies at the heart of controversy. Hence, the *contraddittorio* could not lead to a true result, since the judge alone would be the person capable of ascertaining

34. According to sentence no. 46 of 1957 of the Constitutional Court, the *contraddittorio* is a wording that guarantees the right of defence (*Article* 24 Const.) and is still necessary to ensure from time to time, if the absence of the confrontation might even cause effective damage to the right of defence (thus, Const. Court, sentence no. 190/1970). But compare also sent. No. 199/1975; no. 172/1976.

35. C. Conti, *Le due anime del contraddittorio nel nuovo art. III Cost.*, in *Dir. Pen. Proc.*, 2000, p. 197 ss.; P. Tonini, *Il contraddittorio: diritto individuale e metodo di accertamento*, in *Dir. Pen. Proc.*, 2000. This line of reasoning was also used by the Constitutional Court when it affirmed: "The legislator has given formal recognition of *contraddittorio* as a method of knowledge of the objective facts by the judge", Sentence no. 32/2002.

36. According to other authors, in criminal cases, the *contraddittorio* enjoys instead a strong epistemological or gnosiological function. See G. Giostra, Voce *Contraddittorio*, Dir. proc. pen., Enciclopedia Giuridica Treccani, IX agg., 2001, pp. 1 ss.; A. De Francesco, *Il principio del contraddittorio nella formazione della prova nella Costituzione italiana. Analisi della giurisprudenza della Corte Costituzionale in tema di prova penale*, Milano, 2005, p. 178.

37. On the subject of the control, in Italian trial process, see Illuminati, supra note 4.

the truth in as much as he is not influenced by his own interests[38]. This concept, which is maintained by those in opposition to the adversarial model, presupposes a duality. It is as if at one level the legal proceeding is conducted and at another level (to which this argument refers), there is a supposed reality external to the legal proceeding. Regarding the latter there exists a party who is right and the other who is wrong. Correspondingly, the legal position of the judge who embodies the superior interests of the justice system, guarantees the fact that the judge will rule in favor to the party who is on the "right" side. On this view both parties in a legal proceeding are motivated by egocentric interests. These interests are in themselves antithetical to superior justice which is instantiated by the judge. Consequently, both parties are looked upon with some suspicion.

In my view, this approach can be criticized as it generates at least two narrowly connected consequences. The first consequence concerns the extent to which the parties can be perceived as surrounded by an aura of suspicion because of the egocentric nature of their behaviour. The suspicion of the judge falls upon both parties, since the judge believes that parties seek to impress him/her with a consensus based merely on psychological suggestions. So the contrast is not between the parties but between the parties and the judge.

The second consequence of this conception of the *contraddittorio* is that justice and procedural success seem to repose on two different levels. Therefore, the judge has the titanic, or herculean, task of seeing beyond the evidence of the two parties and their reasoning to determine which of the parties is truly right. The judge has to decide in autonomy, even rejecting or completely disregarding the arguments made by the parties. In doing so, the judge acts in the superior interest of justice as a substitute for the two parties. In Italian practice this phenomenon is called a 'supply judge'. This means that sometimes the judge can openly favor one party because when s/he decides to rule in favor of one of the two parties s/he will be seeking a third solution to demonstrate his/her judicial autonomy and his/her psychological independence from the parties.

This criticism paves the way to a different position, which I will articulate in what follows. This position regards the opposition of the parties in a legal proceeding as an epistemologically-based model whereby the stronger the confrontation is between the parties, the more likely to emerge is (what one may call) the Socratic truth.

38. M. Taruffo, *La semplice verità*, Roma, 2009, p. 172.

5. *The Socratic Heart of the Adversarial Model*

The thesis that I intend to defend can be summarized as follows: the opposition between the parties in a legal proceeding is like a Platonic dialogue and allows the establishment of a shared context by so, also enhancing our chances to access the truth. The opposition between the parties in a legal proceeding consists in a relationship which departs from, and is shaped by the pieces of reasoning they offer in support of their own claims. I will call those pieces of reasoning *logoi*. At the logical level each of the parties' *logoi* constitutes a concrete "pretext" that guides the conduct of each party in the legal proceeding[39]. These pretexts are far from fixed before the legal proceeding, since it is only through the confrontation that a pretext can take shape from an increasingly determined generic disagreement. Let me explain how this happens.

It can be argued that the more different *logoi* clash against one another the more profound the relationship between them becomes. This is the case because he who wishes to win says: "listen to my argument with rapt attention". Therefore, the relationship between the two *logoi* becomes more profound when they seek to rebut each other's evidence. This model of reasoning has been known since the ancient times by the name of *elenchus*[40]. Rebuttal is a process by which one party tries to eliminate the pretext of the other. Thus, in trying to maintain his own pretext each party attempts as well to demolish the pretext of his opponent. He tries to "negate," which means to establish a confrontation. For instance, if I have to defend my pretext (A) and my opponent has to defend her pretext (B), each of us will have to support the opposite view of the other part's adversarial pretext (e.g. non-B, or vice versa non-A). At the point of opposition, then, each party defends a view that is the negation of the other.

A (non-B) v. B (non-A)

39. The pretext is a thesis, an opinion or a belief that the disputing parties wish to have accepted by their opponent S. Toulmin, *The Uses of Arguments*, Cambridge, 1958, trad. it. *Gli usi dell'argomentazione*, 1975. For in-depth analysis, P. Sommaggio, *La logica come giurisprudenza. Saggio introduttivo sulla rivoluzione epistemologica di Stephen Toulmin e di suoi riflessi per la metodologia giuridica*, in *Il lascito di Atena. Funzioni, strumenti ed esiti della controversia giuridica*, F. Zanuso – S. Fuselli (eds.), Milano, 2011.

40. By the expression *élenchos*, I mean the examination of a subject with regard to the statements they have made, putting questions and negating the reply: this is the most characteristic position of Socrates in the first Platonic dialogues. R. Robinson, *Plato's Earlier Dialectic*, Oxford, 1953.

For convenience, I will analyze the confrontation between A and non-A; the reader should keep in mind, however, that this is only one aspect of the confrontation, or exchange. If we reflect on the meaning of the confrontation between A and non-A, we see that this represents the confrontation between A and all possible alternatives (B, C, D, E, F and so on). All these alternatives are represented by the word 'non'. Now, contrasting something with its alternatives enables one to further specific the traits of that *something.* Thus, to negate something means to establish negative proof, namely, it means to take the role of the Socratic persona in a Platonic dialogue, as Socrates used to do in Platonic dialogues, so someone who opposes another party's view calls for that party to show which argument her view is based on. In doing so, the former tries to defeat the argument of the other party, thereby trying to negate it. As a result, the relationship between the parties in a legal proceeding has a Socratic structure: an exchange is, thus, set up in which each party tries to negate the statements of his opponent. This is because opposition between the parties allows each to assume the mask of Socrates by so trying to defeat the argument of her opponent and showing that her pretext is untenable. This negative force reacts with that of the argument offered by the antagonist, who is also meant to support her view by argument. Hence, the exchange between the parties may be considered as a Socratic confrontation. This idea is not completely new: in the extra-legal sphere the Socratic figure and the use of rebuttal are being used in an increasingly successful way[41].

The fundamental characteristic of the Socratically-inspired exchange is its concrete nature, that is, such exchange cannot be reduced to a predetermined and unmodifiable result. In this way, Socratic oppositions show themselves as progressive treatments of a pretext, namely, reciprocal re-elaborations between the parties that allow the recognition of the unavailable nature of the results. This is due to the constant modification of the adversarial contest between the parties makes it impossible for either party to foresee an outcome.

In his work on the figure of Socrates, Plato teaches us that direct confrontation of dialogues between the two parties constitutes the key point of the dialectic. This marks a radical change of the traditional concept

41. Socrates in the medical context: See D. Birnbacher, *The Socratic Method in Teaching Medical Ethics: Potentials and Limitations,* in *Medicine Health Care and Philosophy,* 1999.

of the Hellenic legal proceeding[42]. This transformation of the traditional idea of legal proceeding introduces an *elenchus* based on the direct confrontation between two parties. Through the example of Socrates' behaviour with the other characters of the Platonic dialogues we learn the importance of opposition, which allows us to understand what kind of relationship exists between two *logoi* and to discover if a contradiction exists in the reasoning, or to provoke it. This occurs when some earlier considerations of the adversary are accepted revealing themselves to be in contrast to the other party's conclusions.

The confrontation of a pretext and its negation can bring about different outcomes: if the negation does not overcome the pretext, it has no alternative and shows itself as undeniable. In the opposite case, the negation will overcome the pretext. Therefore, it is only the direct and actual confrontation between two *logoi*, which attempt to overcome each other through reciprocal negation, that are we allowed to understand the type of opposition characterised here. This opposition evolves from a minimum and a maximum (by which I do not mean a difference in quantity, but rather a difference in quality, or kind, of opposition)[43].

This degree arises from the contrariety which, as is generally known, allows the finding of common ground between the two contradictory positions, and where the two positions show themselves as specific negations, the one of the other. In this way two positions cannot overcome each other simultaneously. This is the crucial point of the matter. Parts of the arguments can be justified in self-serving and objective terms; but

42. The ancient Greek trial was made up of two monologues by the parties; each one directed at the judge. In these arguments and proofs which had been collected elsewhere were presented. The scribes, in fact, wrote their discourses before the opening of the trial and outside of period of the trial. Thus, it was not possible to predict the reactions of the opposing parties; neither was it possible to know in advance, for example, the development and the outcome of an interrogation. The arguments, but above all the proofs were in fact pre-ordained with respect to the trial itself. I may therefore consider that the Socratic trial would become a true and proper metamorphosis of the workings of confrontation in, and within the trial procedure. L.A. DORION, *La subversion de l'"élenchos" juridique dans l'"Apologie de Socrate"*, in *Revue Philosophique de Louvain*, 1990.

43. The minimum level for opposition is the emergence of difference: each pretext represents a difference possibility. Put simply, the two pretexts differ, that is; they each demonstrate their specific, contrasting differences. The maximum level of opposition is present when pretext A puts itself forward as absolute, that is in opposition to all the possible alternatives, in such a mode as to choose that alternative which would destroy the pretext itself.

both of the parties lose their availability during confrontation. The reason being that through the confrontation the pretext is thus specified and so becomes the common property of the two contenders. This point is made by Aristotle too. Aristotle claims that if an argument resists its negation it possesses the quality of shareability and thus no longer represents a simple subjective option. For, if a *logos* resists his negation from the possible assumptions (that exist beside its own negation), it becomes undeniable, at least in the context at stake. This is to say that it becomes an undeniable pretext, namely, a pretext that cannot be denied without necessarily falling into contradiction in that particular context.

Therefore, the principle of non-contradiction – that is, the principle disallowing the joining of an element and its negation – is the ground of the adversarial system, since it is that principle that allows one to claim something that is endowed with full meaning[44]. In sum, the opposition between the two parties allows us to determine whether a pretext is shareable or not, because of its structure as negative proof of *logoi*, which is guaranteed by the principle of non-contradiction. Thus, the opposition between the parties (which is the heart of the adversarial model) is a tool for ascertaining the truth, or at least an instrument for increasing our knowledge. This occurs because the adversarial model creates a context of negation to each argument which we use to maintain a pretext, from which arises the form of opposition that exists in the opponent's reasoning showing if a self-contradiction (or the contradiction into which I cause my opponent to fall, or the contradiction into which I, myself fall) exists. The adversarial model reaches this result by showing which of the two arguments is the strongest after they clash. This is to say that the confrontation between the parties is the procedure that allows us to unearth contradiction.

6. *The Adversarial Model and the Idea of Contradiction*

The clash between the two parties is that Socratic procedure which allows the determination of each logical-rational reality exposing the contradictions that are attempting to combine something with its opposite (precisely because it develops from the starting point of negative proof). So, one needs to underline that another way to think about the contradiction exists, wherein is combined an expression of a constituent part

44. Traditionally the most notable formulation of the principle of non-contradiction is that expressed by Aristotle, *Metaph.*, IV 3, 1005 b 19-20.

of that which becomes an assumption[45]. This different way of looking at contradiction allows us to see that oppositional confrontation even as it tries to eliminate contradictions in the arguments of the parties, yet at the same time it has its own structure like a contradiction since it combines something with its negation. This is an irrefutable condition.

The confrontation in fact serves to find out or provoke a contradiction. However, it is conceivable only if you accept a different concept of contradiction[46]. The oppositional confrontation has, as mentioned above, the structure: A v. non-A. This formula, which represents the confrontation of an argument with its rebuttal (that is, a confrontation between an argument and its Socrates), constitutes a real contradiction. This is because it asks us to combine in the legal proceedings (and for the entire duration of it) elements that could not be combined within the principle of non-contradiction. This looks to be the ontological condition of the oppositional relationship between the parties in a legal proceeding, or rather the ontological condition of the adversarial model, despite the fact that it seems a paradoxical structure because of the indissoluble relationship which exists between the opposites. The opposites interact in something that is the *raison d'être* of each other: this entity is not the product of their clash but is the condition that allows the confrontation to exist[47]. This is because a pretext is constituted in such an oppositional form, from its very beginning, that it is able to oppose its own alternative. This capability lies at a different level from the two opposites and from the relationship which connects them. It brings to mind that which allows opposition as well as the connection between the opposites[48].

Therefore the adversarial model presupposes, as an irrefutable condition, a rational limit that stands before each polar opposite[49]. Only in

45. S. Fuselli, *Ragionevoli dubbi: quando non tutte le contraddizioni vengono per nuocere*, in *La Contraddizion che nol consente. Forme del sapere e valore del principio di non contraddizione*, F. Puppo (a cura di), Milano, 2010, p.142.

46. A consideration that I suggest with the help of F. Chiereghin, *L'eco della caverna. Ricerche di filosofia della logica e della mente*, Padova, 2004.

47. The relationship between A and not A is considered. According to Hegel the "and", which in Verstand appears as something that it is unnecessary to consider, is a neutral point in the passage from A to non-A; it becomes instead for the Vernunft that which it is necessary to think about to build both. See Chiereghin, supra note 47, 80-81.

48. I can say it consists of what allows the opposing parties to clash and in doing this remain bound to each other.

49. This condition, which other authors prefer to call contradiction, indicates the unity and not the identity of opposites, since it is a fact that the one cannot stand

activating this possibility of opposition is the relationship which combines the reasoning of the two parties, able to emerge. This is a condition which shows what we are allowed to not only to oppose, but also see the connection[50]. And so, the adversarial model does not fear contradiction; it is in fact homologous to it. This is because it is formally structured as a simultaneous co-presence of opposites. Furthermore, it does not fear contradiction because it may be a tool to denounce the contradiction and expunge it from the reasoning of the two parties until we see a place in which the relationship between the parties stands. We call this place of mediation a 'bridge'. The opposition between the two parties therefore progressively determines the figure of the two opposite "banks" of this metaphorical river, which allows us to trace a horizon of possibility (or a bridging shape), because it allows the connection from the reciprocal attempts of the two opposing parties to demolish each other's arguments.

7. *Confrontation and Mediation: the Bridging Shape*

So far I have claimed that at the friction point of the parties' reasoning there is something that goes beyond the subjective pretext and discover that element which would be a useful determinant for the parties and the third parties, be they the judge or mediator. The confrontation between parties allows us to build a common context in which every pretext is put to test, because it does not permit us to exclude one of the two. Through the clash the differences are reciprocally communicated and discussed. In fact, beyond the oppositional positions a mediational stance exists. I will refer to this as bridging shape. In a bridging shape the opponents fight each other but at this point they come close to the maximum level. In fact, the clash appears to correspond to that condition which we see present in the oppositional relationship which, at the same time, also connects. And yet, the clash appears to be a modality which we cannot remove. It also allows that hidden aspect, the meeting point of the opponents, to function. Therefore, each assumption, when it forms part of the relational structure of the clash, causes at the same time a form of connection:

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without the other. See E. Berti, *Contraddizione e dialettica negli antichi e nei moderni*, Palermo, 1987, p. 40-41.

50. This condition is the co-presence of opposites, which, according to Hegel, would represent the constituent point of the entire rationality. F. Chiereghin, *Incontraddittorietà e contraddizione in Hegel*, Verifiche, 1981.

the 'bridging shape'[51]. The oppositional relationship is at the same time strongly binding in that, at the friction point between the opposing parties, the opposite of the friction itself can also be found. If this is a point of friction it must also contain its own opposite, or the non-opposition since at this point and only at this point opposition and non-opposition mix. This is because we may consider that all the opposites co-habit this point and the opposition between clash and connection. Thus we see that the stronger the confrontation the more the ties that unite will emerge. It is hidden in this clash between the parties that a progressive construction of common elements builds a bridge between the positions of the two parties themselves: the beginning of a possible mediation.

Though all these elements are already sufficient for us to favor the adversarial mode, in the next paragraph we will see more important reasons. The confrontation has a maieutic effect that is; it creates a relationship of the parties to the truth[52]. In fact, the perspective that we seek to elucidate is based in a new way of looking at the truth which neither deals with the correspondence between discourse and reality nor with the internal logical coherence to reasoning, but with the outcome of a dialectical procedure. Thanks to its maieutic strength it allows a connection, vis-à-vis a disconnection, between affirmation and real experience in which this experience exists, since it exists in the connection between the plane of experience (of *bios*) and the plane of reason (of *logos*).

8. *The Socratic Model and the Truth*

The oppositional procedure permits us to obtain from the participants that which we can call a 'parrhesiastic' state, that is, a state in which *parrhesia* manifests itself. To better clarify the concept of *parrhesia*, one can refer to the remarks Michel Foucault defends in a series of conferences held at Berkley in autumn 1983 under the title of *Discourse and Truth. The Problematization of Parrhesia*[53].

51. Berti, supra note 50, page 79.

52. R. G. Johnston, S. Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, in *J. Marshall L. Rev.*, 2002; G. S. Sergienko, *The Ethics of the Adversary System*, Working Paper 396, 2004. Available at http://law.bepress.com/expresso/eps/396.

53. M. Foucault, *Discourse and Truth. The Problematization of Parrhesia*, 1985, trad. it. *Discorso e verità nella Grecia antica*, 2005. English version available at http://foucault.info/documents/parrhesia/ last visited 27/12/2017.

According to Foucault, whose claims are in line with the classical Greek tradition, the oppositional dialogue (refutation) can be shown as functional not only in promoting the linguistic and logical strength of a discourse, but also to permitting the exercise of *parrhesia*, that is, a relationship of man to the truth[54]. Currently *Parrhesia* stands for freedom of thought, or freedom of speech (the word), or independence in confrontation with those who wield power; in short its significance is largely as a *socio-political* definition[55]. But this is not the only meaning of the expression. In the context that we are looking at it is the alethic or truth-value of this expression. From this perspective, it is the oppositional confrontation from which emerges and indeed controls the connections that each party constructs through their reasoning. It is the clash which compels each party to construct a relationship between the particular, their own experience, and the general, their own *logos.* It creates it through its own strength which we can define as *maieutic* since it helps in the creation of that "something." Even though it is not available to the parties it can precisely, thanks to this strength of reciprocal refutation, take the form of the *logos*[56]. And the maieutic or Socratic strength of opposition allows this linguistic procedure to have a meta-linguistic effect of truth (*parrhesia*).

If, on the preceding pages we have demonstrated the more useful aspects of force that opposition possesses, now seems the moment to delineate other aspects that opposition is able to provoke. Let us consider that, when one of the parties attempts to negate the argument of his adversary, the negative force "adopts the mask of Socrates"[57]. Its function consists of a refutation of the reasoning of the antagonist. As well as being logical it is also parrhesiastic, that is, it constrains the adversary in a condition/position to tell the truth, or to connect his reasoning with his concrete experience. The oppositional force has yet another important function. It is not limited solely to the linguistic and logical plane. In the relationship of reciprocal refutation there is a force which we call maieutic that compels the connection of empirical experience with rational precepts, allowing the truth to emerge. The Socratic force has all those

54. In G. Scarpat, *Parrhesia greca, parrhesia cristiana*, Brescia, 2001 the history of the term parrhesiais analyzed.

55. Foucault, supra note 54, pages 49, 63, 71.

56. Plato, *Thaetetus*, 150 B- 151 C.

57. On the persona of Socrates. See G. Reale, *Socrate, Alla scoperta della sapienza umana*, Milano, 2000; G. Vlastos, *Socratic Studies*, Cambridge, 1994, trad. it., *Studi Socratici*, Milano, 2003; G. Nicolas, *Socrate, le sorcier*, 2004, trad. it. *Socrate, lo stregone. Il primo guaritore di anime*, Trieste, 2008.

characteristics which create a form of strong undeniable connection between the *logos* (his vision of the world) and the *bios* (his concrete experience), in the interlocutor.

By virtue of the refutable strength the adversarial system releases it is in fact possible to put to the test the ties that exist in the experience of the opposing parties, and to connect this to a discourse which is accountable to itself: a discourse, either *true* or a discourse which connects its *bios* with its *logos*[58]. This oppositional function is important to compel each of the parties expound upon its connectional reasoning, and so its maieutic function. Thanks to the adversarial model, which forces the location of argumentative justification as a negative proof, we are able to show how these arguments (*logoi*) are in relationship to the empirical experience (*bios*): each is in fact constrained to account for the relationship between his *logos* and his *bios*. If someone is obliged to account for himself in the confrontation, which constitutes the first plane in generating an argument, a discourse within which is constructed by reason of an external opposition or stimulus, a justification which takes account of his personal experience or, better, the relation between personal experience and that which is thought to be in rational or judicial terms[59]. And so we can say that through an activity which develops in spoken language it is also possible to obtain alethic effects, or connections between rational justification and concrete experience of each opponent. This relationship we will call *parrhesia*.

Thus, *parrhesia* is an important function of the adversarial system and it has at least two important characteristics[60]. The first is that we can achieve *parrhesia* through a discursive-dialectic practice formed by the presence of two *logoi* who clash, and not by monologue or single reasoning: the alethic value is unearthed only in an opposition relationship between at least two parties. The second characteristic is the fact that to reach a parrhesiastic state someone has to be in an oppositional context, in which each party has to link its own *bios* with his own *logos*, improving an examination and modification of self, strongly provoked by the adversary. Simplistically, we can consider that the *true* expressed in *parrhesia* constitutes the event which causes the trial or least a part of the same. But this would be a serious mistake because *parrhesia* does not dictate the event but rather expresses how the event interacts with the party's experience,

58. PLATO, *Laches*, 187 E – 188 B.
59. FOUCAULT, supra note 54, page 63.
60. Ibid, page 10.

emotions and rationality. Nor is its dictation the result of the narrative connection between the empirical experience of every party and their rational and value generalisations. In the confrontation between the parties we can test these generalisations, proving the connections with each *bios* (of every party) and also unearth important elements in the clarification of the event. In other words, an event strikes at the experience of a subject and is something that generates a link between his *bios* and his *logos* only if he is forced into a confrontation. The rebuttal blows reciprocally dealt to build and control connections which arise, in the course of the trial, become ever stronger, and thus truer. If the opponent has well exercised his Socratic prerogatives; parrhesiastic truth may emerge and shows itself as something that no one can disconnect in this particular context. These it seems are also the reasons why Sir Francis Wellman maintains the contrast between Socrates and Meletus in the Platonic *Apologia,* which may be considered a masterpiece of cross-examination, indeed the heart of the adversarial model[61].

9. *Conclusions*

At this point we try to summarize the main points I made in this essay. I set out to investigate the meaning and value of *contraddittorio*. I analysed this idea from the international perspective and noticed that the oppositional relationship between the parties in a legal proceeding may be considered as an element which also characterises the legal proceedings of countries adhering to the civil law tradition. At least since 1999, for instance, in Italy the constitutional reform of Art. 111 has introduced a direct confrontation between the parties by stating it as a true principle of all legal systems and not merely a private interest for the defence. Despite this, I claimed, a number of legal scholars still doubt the potential of the adversarial model (of the *contraddittorio*). For this reason, I invited the reader to consider the claim that a legal argument is best understood as a confrontation or a Socratic relationship. This relational model is grounded on the principle of non-contradiction. In accordance to this principle one refutes the contradiction in the party's discourses whilst at the same level structuring the adversarial model as a "contradiction" (on a different level) because it seeks to establish a connection with the opposite views. Precisely for this reason, I argued, the adversarial structure

61. F. L. Wellman, *The Art of Cross-Examination*, Basingstoke, 1903, trad. it. *L'arte della cross-examination*, p. 17.

becomes a perfect instrument to unearth and eliminate contradiction in the discourses of the parties. In this context, I also claimed that the adversarial model permits the establishment of a potentially harmonious relationship between experience and personal rational principles: a form of donning the mask of Socrates that shows itself necessary to communicate our experience to ourselves and to the others. The oppositional structure of the adversarial model permits the crossing of the two Socratic forces provided by the two parties and to obtain thereby very profound alethic effects. This result may be rationally controlled because the connection between empirical experience and arguments (*bios* and *logos*) of the two parties can be submitted to a logical proof that we demonstrated above. The active presence of *bios*, rather the empirical experience of the parties (or the witnesses), I also argued, shows the limit of every approach that tends to reduce the problem of truth in judicial experience to an object, or to a procedure. In other words, every formula, or every method which attempts to guarantee automatic results, without the responsibility of those who have an active role in it, is condemned to failure. For the maieutic procedure which shows itself in the confrontation cannot be disconnected from life and from the responsibility implicit therein. The arguments a party makes should be regarded as a signpost and not a point of arrival: they always demonstrate that the adversarial system calls into question the responsibility (answerable to itself) in confrontation with itself and in confrontation with the others. This explains the humane dimension, indeed the ethical dimension, of the question. In sum, the logical and theoretical foundation of the adversarial system transcends to an ethical dimension: the relation between *logos* and *bios* in fact shows that the logical aspects refer to an ethical context, since no procedural theory can avoid incorporating this dimension. Which dimension constantly takes account of itself and of others thereby demonstrating what *we are*.