Comparative Law Review

2024 – Vol. 15 n. 2

ISSN:2038 - 8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

Office address and contact details:
Department of Law - University of Perugia
Via Pascoli, 33 - 06123 Perugia (PG) - Telephone 075.5852437
Email: complawreview@gmail.com

Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE LAW REVIEW

VOL. 15/2 - 2024

Contract Law for Interesting Times

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THE CROSS-EXAMINATION: COMPARATIVE ANALYSIS BETWEEN THE ITALIAN AND THE US LEGAL SYSTEM

Giacomina Esposito

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The institute of cross-examination is the beating heart of both Italian and American criminal trials, given the tendentially, or wholly, accusatory nature of the same. Evidence is formed in a dialectical confrontation between parties who have opposing interests and who are able to draw from the source of evidence the reconstruction of the fact and guide the decision of the judge or, in the American system, the jury.
Given the central role of the institute, it appears interesting to verify the manner in which it is elicited in the two systems, Italian and American, and the differences in the evaluation of the results, highlighting the respective strengths and weaknesses with a view to improvement.

L'istituto della cross-examination è il cuore pulsante del processo penale sia italiano che americano data la natura, tendenzialmente o totalmente, accusatoria degli stessi.
Le prove si formano in un confronto dialettico fra parti che hanno interessi contrapposti e che sono in grado di trarre dalle fonti di prova la ricostruzione del fatto e di orientare la decisione del giudice o, nel sistema americano, della giuria.
Data la centralità dell'istituto, appare interessante verificare le modalità con le quali esso viene eseguito nei due sistemi, italiano e americano, e le differenze nel valutarne i risultati, mettendo in luce i rispettivi punti di forza e di debolezza in un'ottica di miglioramento.

Keywords: Italian and the US trial; Evidence; Cross-examination; adversarial principle; witness.

I. INTRODUCTION

«*Cross-examination is the greatest legal engine ever invented for the discovery of truth*»[1], as it allows evidence to be formed in a dialectical confrontation between parties who have opposing interests and who are able to draw from the sources of evidence the reconstruction of the fact and guide the final decision.
In the modern era said tool has become the beating heart of trial systems, starting from common law[2] systems, characterized by the presence of the jury, and reaching civil law systems, without a jury but with a 'more protagonist' judge.
The main purpose of the institute is to screen the credibility and reliability of the declarative source in order to enable the judge, or jury, to properly direct their legal and rational conviction. Moreover, cross-examination becomes the privileged tool for the implementation of the adversarial principle for the formation of evidence, pursuant to

[1] J. H. Wigmore, *Evidence in Trials at Common Law*, Boston, 1367 (1983)
[2] The relevance of cross-examination in common law jurisdictions is confirmed by the Federal Rules of Evidence governing the introduction of evidence in civil and criminal trials in U.S. federal courts, which will be discussed in the following paragraphs

Article 111, paragraph 4, Constitution[3], a cardinal principle of the entire procedural matter. As a dialogic method of evidence formation, it uniquely succeeds in realizing the constitutional architecture. Likewise, in the American system, the right to cross-examination is protected at the constitutional level, in particular in the VI amendment which contains the "comparison clause[4]".

II. THE RIGHT TO EVIDENCE

2.1 *Evidence: means of seeking procedural truth*

In the Italian criminal procedure[5], the right to evidence is a corollary of the right of defense recognized to all parties to the trial, public and private, who exercise it before the judge as a function of cross-examination of the facts in evidence.

The term evidence means the set of elements of procedures and reasoning by means of which the reconstruction of facts is elaborated, verified, and confirmed as "true"[6].

The Italian Constitution has incorporated a guarantor model that rejects the myth of truth as a "correspondence", but makes it dependent on «compliance with the rules and procedures that govern its ascertainment with an authoritative and conventional character»[7], which condition its objectivity and certainty.

The most congruous mode has been identified in the evidentiary dialectic, as the effective participation of all protagonists, engaged in continuous and close confrontation, enhances the jurisdictional function[8].

The search for truth requires an argumentative proceeding that implies a justification of interpretive hypotheses through a series of evidentiary elements that support them, subjecting all plausible versions of a fact to scrutiny.

2.2 The right to evidence and the attenuated dispositive principle

The term right to evidence uses an expression that summarizes «the right of all parties to seek sources of evidence, to request the admission of the relevant means, to participate in

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[3] Art. 111, § 4, Cost.: "*Il processo penale è regolato dal principio del contraddittorio nella formazione della prova. La colpevolezza dell'imputato non può essere provata sulla base di dichiarazioni rese da chi, per libera scelta, si è sempre volontariamente sottratto all'interrogatorio da parte dell'imputato o del suo difensore*".

[4] Amendment VI: "*In all criminal prosecutions, the accused shall enjoy the right […] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, […].*"

[5] For an in-depth look at Italian criminal procedure see, among many others: P. Tonini - C. Conti, *Manuale di procedura penale*, Giuffrè Editore, (2022); (a cura di) Adolfo Scalfati, *Manuale di diritto processuale penale*, Giappichelli (2018); A.A. Dalia- M. Ferraioli, *Manuale di diritto processuale penale*, CEDAM, (2018). The Criminal procedure have most recently undergone reform: On Oct. 10, 2022, Legislative Decree No. 150 implementing Law No. 134 of Sept. 27, 2021, on "*delega al Governo per l'efficienza del processo penale, nonché in materia di Giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari*". On the hearing, among the many, see: A. Di Tullio, D' Elisiis, *Il dibattimento nel processo penale. Profili ermeneutici*, Primiceri Editore (2017); L. Lupoli, *Il dibattimento nel processo penale*, Aracne (2014); E. Ercole – P. Silvestri, *Il giudizio dibattimentale*, Giuffrè (2006); F.G. Catullo, *Il dibattimento*, UTET (2006).

[6] B. Pastore, *Decisione e controlli tra potere e ragione- materiali per un corso di filosofia del diritto*, Giappichelli editore, 72, Torino, (2013)

[7] L. Ferrajoli, *Diritto e Ragione. Teoria del garantismo penale*, 33, Laterza, (11th ed., 2009)

[8] Art. 111 Cost, § 4: "*il processo penale è regolato dal principio del contraddittorio nella formazione della prova*". The adversarial principle is not regarded as an end in itself, but as a method that, where it is unworkable, can be replaced. Indeed, paragraph 5 of the article under consideration enunciates that "*La legge regola i casi in cui la formazione della prova non ha luogo in contraddittorio per consenso dell'imputato, o per accertata impossibilità di natura oggettiva o per effetto della provata condotta illecita*".

its taking and to present an evaluation at the time of the conclusions»[9], with a view to allowing the parties to represent to the judge «the reasons why they believe that what they claim in their respective positions is well-founded»[10].
The current Italian criminal procedure Code has embraced an "attenuated" dispositive principle, since it has attributed the evidentiary initiative to the parties but has placed as a corrective the powers exercisable ex officio by the judge, constituting in any case an exception. It is intended, on the one hand, to guarantee the fairness of the parties' evidentiary contention, so as to prevent illegitimate behavior from affecting the regular acquisition of elements useful for the decision, and, on the other hand, to provide a remedy for any culpable inertia of the parties in evidentiary matters[11].

2.3 *The evidentiary process*
The right to evidence is fully expressed in the trial, a procedural phase technically intended for the formation of evidence[12].
The evidentiary procedure is punctuated by the procedural code in the fundamental moments of the search, admission, taking, and evaluation of evidence. The activity of searching, producing, and forming evidence is the sole responsibility of the parties, who must search for useful sources so as to support their case in court.
The phase immediately following the admission is divided into two moments: the first concerns the request incumbent on the parties, who in the trial have «the burden of indicating the facts they intend to prove and of requesting the admission of evidence», pursuant to Article 492 of the Italian Criminal Procedure Code; and the second moment, governed by Article 495 of the Italian Criminal Procedure Code, in which the judge has the task of providing for the proposed requests, regarding the admission or non-admission of evidence, considering the criteria of Article 190 of the Italian Criminal Procedure Code.
In addition, the contrary evidence[13] is allowed with respect to the evidentiary allegations of the other parties: «*The accused has the right to the admission of the evidence indicated against him on the facts constituting the object of the evidence against him; the same right belongs to the public prosecutor with regard to the evidence against the accused on the facts constituting the object of the evidence against him*»[14].
The division between incriminating and exculpatory evidence pertains to the subject matter of the trial: incriminating evidence tends to affirm, in the same way as the prosecution, the extremes of the duty to punish and its measure; exculpatory evidence aims, in contrast, to directly deny the evidence presented in support of the accusation.

[9] P. Tonini, *La prova penale*, 67, CEDAM, (2000). Translation by the author.
[10] A. A. Dalia- M. Ferraioli, *Manuale di diritto processuale penale*, *cit*., 204. Translation by the author.
[11]This approach is enshrined in Article 190 of the Italian Code of Criminal Procedure, which enunciates in the first paragraph: "*Le prove sono ammesse a richiesta di parte. Il giudice provvede senza ritardo con ordinanza escludendo le prove vietate dalla legge e quelle che manifestamente sono superflue o irrilevanti*".
[12] Exceptionally, the formation of evidence may also take place at earlier stages through the means of the evidentiary incident, under Article 392 of the Code of Criminal Procedure, and at the preliminary hearing, albeit with the adjustments due.
[13] A. De Caro, *Poteri probatori del giudice e diritto alla prova*, 103, Annali Università degli studi del Molise – dipartimento giuridico (2003). The author argues that it is necessary to highlight on this side also "the right to contrary evidence" with respect to the evidentiary allegations of "other parties" (meaning defendant and prosecutor) where it represents a very significant aspect of the right in question because it specifies it and gives it the widest significance. The right to contrary evidence, as expressed in Article 495 paragraph 2 of the Code of Criminal Procedure gives the side a special completeness because it projects it on the right of defense and the right to cross-examination.
[14] Art. 495, § 2, The Italian code of criminal procedure

The last sub-stage of the evidentiary process is the evaluation of evidence, through which the evidence becomes an evidentiary result, that is, evidence as a gnoseological tool becomes evidence as a cognitive epilogue.
The evaluation is the exclusive pertinence of the judge, to whom the parties can only offer their arguments in a dialectical setting, which will be evaluated by him or her according to the free conviction cd. 'reasoned'. The judge, art. 190 Italian Criminal Procedure Code, is required first of all to carry out an assessment of the law and exclude the evidence prohibited by law; secondly, he or she will have to carry out a factual assessment and not admit evidence which in practice is manifestly superfluous or irrelevant.
Evidence "prohibited by law" means evidence for which there is an express prohibition regarding the subject or object of the evidence, or regarding the procedure for acquiring the same.
As regards the "relevance", it is required that the evidence be attributable to the object represented by the facts that refer to the charge, to the punishability of the accused, and to the determination of the penalty.
Finally, as regards the "non-superfluity", it is necessary to verify that the evidence introduces interesting elements for the judgment.
The evaluation is both a legal and rational activity: 'legal' because it is exercised on legitimately acquired evidence; 'rational' because it implies the obligation to give reasons and justify the decision according to the criteria of reasonableness in compliance with three orders of rules: rules of logic, science, and current experience[15].
The legislature wanted, then, to delimit the object of evaluation and curb the arbitrary and indiscriminate uses of elements that are not accorded the same persuasive effectiveness as evidence, excluding the possibility of inferring a fact from clues, «*a meno che non siano gravi, precisi e concordanti*»[16].
The clue is a logical procedure that starts from a proven fact and allows the judge, through an inference based on scientific laws or maxims of experience, to consider the main fact proven. Since it is an indirect evidentiary procedure, precautions are necessary to exclude probable alternative reconstructions, and the legislator requires, precisely, that the clues be: serious, that is, that they have a high degree of persuasiveness; precise, that they are not susceptible to other different interpretations, having made the assessments of the credibility of the source and reliability of the means of a proof; and concordant when the relevant results converge toward a unitary reconstruction of the fact. It is also clear from the normative dictate that a single piece of evidence is never sufficient to ground the judge's conviction.
Compliance with the rules of evidence and the dialogic way of forming evidence is necessary to attach to the trial a limpid material on which to carry out the intellectual activity of the judicial decision.

III. CROSS EXAMINATION IN ITALY

3.1 *Field of cross-examination*

Through the mode of cross-examination, the parties measure themselves in a dispute, fair and regulated, for the construction of the evidence and put themselves in direct contact with the subject called to expose his knowledge[17].

[15] On this point see, P. Ferrua, *Il giudizio penale: fatto e valore giuridico*, in La prova nel dibattimento penale, Giappichelli editore, (IV ed.)
[16] Art. 192, § 2, the Italian code of criminal procedure: "*Unless they are serious, precise and concordant*"
[17] V. Maffeo, *L'esame incrociato tra legge e prassi*, 4, Padova (2012)

The main purpose of cross-examination is to scrutinize, with particular care, the credibility and reliability of the declarative source. The judge can properly direct his or her legal and rational conviction[18].
This is a technique, originating in common law systems, which directly entrusts the parties with the task of examining the source of evidence, subject to rules protecting the fairness of evidentiary elicitation and the reliability of the results[19].
The "direct, cross, -redirect examination" scheme, governed by Article 498 of the Italian Criminal Procedure Code, is used to examine different means of evidence: testimony; examination of private parties; and examination of the expert and technical consultant.
To the general rules applicable for witness examination, exceptions are added for the examination of private parties and experts, and technical consultants.
It seems appropriate to mention the distinction between the above means of evidence.
Testimony, governed by Articles 194 ff. of the Italian Criminal Procedure Code, consists in collecting the statements of third parties on facts that are the subject of evidence and are relevant to the decision. It is the representation of an "experience", acquired by direct knowledge, that a subject offers to the judge to allow him or her to reconstruct the modalities of the criminal matter or to know a circumstance useful for this purpose[20].
The witness must be a third party other than the parties to the proceedings and without interest in relation to the subject matter of the case. He or she testifies by answering the questions addressed to him or her about the facts around which he or she is called to make statements[21], respecting certain limits. He or she cannot lay down on the morality of the accused unless it is specific facts, capable of characterizing their personality in relation to crime and social dangerousness; they may not speak on the voices of the public; they may not express personal appreciation unless it is impossible to separate them from the statement of facts.
As stated by art. 198 of the Italian Criminal Procedure Code, the witness, following a request from the party, has the obligation to appear before the court and answer according to the truth.
These obligations distinguish the witness examination from the examination of private parties[22]. In the criminal trial it is allowed to acquire data of knowledge from private parties, on a voluntary basis, which have no obligation neither to appear in court; nor to answer questions; nor to tell the truth, if they choose to answer.
Finally, the judge can expand his or her knowledge landscape with contributions of a technical-scientific nature through the examination of experts and technical consultants[23].

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[18] G. Rossi, *La Cross-examination ed il ruolo del giudice*, in Annali Università degli studi del Molise Dipartimento giuridico, 2011/2012, (683-704)
[19] L. Kalb, *Ruolo delle parti e poteri del giudice nello svolgimento dell'esame testimoniale*, in Opinioni. Processo penale, Diritto penale e processo, 1544, (12th Ed., 2004)
[20] A. A. Dalia- M. Ferraioli, *Manuale di diritto processuale penale*, 220, Padova, (2003). On testimony as a means of evidence capable of reporting the contents of an experience see V. Grevi, *Prove*, in AA.VV., Compendio di procedura penale, 310, Padova (2003); G. Lozzi, *Lezioni di procedura penale*, 209, Torino (2001); V. Perchinunno, *I mezzi di prova*, in AA.VV., Manuale di procedura penale, 225, Bologna, (2001); P. Tonini, *Manuale di procedura penale*, 213, Milano, (2003); D. Siracusano, *Le prove*, in AA.VV., Diritto processuale penale, 350, Milano, (I ed., 2001).
[21] Italian Supreme Criminal Court (*Corte Cass.*), Sez. VI, Case No. 6118, in Riv. Pen. (03/02/2000)
[22] The private parties who can make an examination are the accused, the civil party, the civil responsible and the civilly obliged for the pecuniary penalty. For definitions see notes 13 and 14.
[23] If knowledge of data or assessments requiring specific technical, scientific, or artistic skills is necessary for the process, the judge appoints an expert in the field (Art. 220, the Italian code of criminal procedure.). Subsequently, the parties may appoint their own experts, called party consultants (art. 225 the Italian code of criminal procedure).

Their position is equivalent to that of witnesses as to the obligations to be fulfilled, but they are also entitled to consult, during the examination, documents, written notes, and publications[24], without requiring the prior authorization of the judge.

3.2 *Prior discovery of sources of evidence*

Particular emphasis is placed on the rules which allow the parties to prepare themselves for the formation of adversarial evidence.

In compliance with the principle of procedural fair play, the parties are forced to a sort of discovery of evidentiary strategies[25]: art. 468 1 paragraph of the Italian Criminal Procedure Code requires to disclose in advance which sources of evidence each party wishes to examine and what circumstances the examination will cover.

Specifically, whoever intends to request the examination of witnesses, experts, or technical consultants, as well as the persons indicated in art. 210 of the Italian Criminal Procedure Code, must deposit, at least seven days before the date fixed for the trial, the list of persons to be examined. In addition, the circumstances under which the trial will be conducted must be indicated in order to avoid the introduction of surprise tests[26].

The citation of the requested persons is authorized by decree by the judge, which excludes the witnesses prohibited by law and those manifestly redundant.

As for proof to the contrary, it is always possible, ex art. 468 paragraph 4 of the Italian Criminal Procedure Code, the direct presentation in the trial of the person to be questioned, without prior attachment of a list and without authorization to quote[27].

3.3 *The 3 steps of the testimonial exam: direct, cross, and re-direct examination*

The procedures for correct performance of the testimonial examination are governed by art. 498 and 499 the Italian code of criminal procedure which ensures the possibility of intervention to each interested party, adjusting the time and manner.

The first 3 paragraphs of art. 498 Italian Criminal Procedure Code introduces a three-phase mechanism.

The first segment consists of the direct examination, characterized by the fact that the questions are directly asked by those who has requested the admission of the test.

The second is the cross-examination, conducted by who did not request direct examination.

The last segment is the redirect examination, which takes place in the event that whoever had requested the examination decides to use the option to propose "new questions".

The three moments have different purposes and characteristics.

The direct examination tends to obtain the accurate exposure of knowledge by the examining, in order to bring out facts that may influence the judge favorably. The party who conducts the direct examination shall have prior knowledge of all the information available to it, which shall be examined to assess its evidentiary value.

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[24] Art. 501 the Italian code of criminal procedure

[25] They argue that list filing serves a discovery function, among others: P. G. Garuti, *Il giudizio ordinario*, Aa. Vv., Procedura penale, 581, Torino, (2018); A. A. Dalia-M. Ferrajoli, *Manuale di diritto processuale penale*, 722, Padova, (2016); E. Fassone, *Il giudizio*, Aa. Vv., Manuale pratico del nuovo processo penale, 874, Padova, (2007); F. Nuzzo, *Regole consolidate e prospettazioni interpretative in materia di liste testimoniali*, in Dir. pen. proc., 612, (2002).

[26] There is an exception to the burden of submitting the list governed by art. 493 § 2 the Italian code of criminal procedure, which admits the acquisition of evidence not included on the list when the party that requests them demonstrates that he/she could not have indicated them in a timely manner.

[27] L. Tavassi, *Lista tesi, diritto alla prova contraria e imparzialità del giudice: spunti per una coerente ricostruzione del sistema*, in Rivista Italiana di Diritto e Procedura Penale, 859, fasc.2 (1giugno 2019)

In the cross-examination, the purpose is to challenge the reconstruction of the facts made in the direct examination, so that the examination corrects or modifies the previous statements in order to present the facts in a more favorable light for the other party. In this way, the credibility of the witness is also judged.
The last moment, eventual, is the redirect examination, conducted by the applicant for the direct examination. The aim is to offer the possibility of clarifying the points that may be called into question by the cross-examination or to refute the previous statements[28].
These phases must occur immediately after each other, without interruptions not due to special needs, in order to ensure the genuineness of acquisitions[29].

3.4 *The formulation of questions*
According to the Italian legislator, art. 499 of the Italian Criminal Procedure Code, dictated the general rules to ensure the legality of the witness examination.
The first paragraph establishes the scope of the witness examination: questions on specific facts, which must concern the circumstances mentioned at the time of filing a list of texts pursuant to art. 468 of the Italian Criminal Procedure Code, mentioned above.
The specificity of the questions allows detailed and precise declarations to be obtained in order to allow the evaluation of the declarative contribution and more faithful reconstruction of the fact. The obligation of specificity also protects the purposes of the cross-examination, more difficult to prosecute in the face of a generic narrative.
However, on the basis of the answers given gradually, it may seem justified to broaden the subject matter of evidence, provided that the guarantees underlying the discovery of the case are not prejudiced.
The second and third paragraphs set out two prohibitions.
First of all, questions that can harm the sincerity of the answers are prohibited.
The interest pursued by the legislator is to avoid the ability of the witness to correctly narrate the facts is altered. Therefore, veiled threats, enticements, words or violent gestures, and provocative or derisive attitudes that adversely affect the correct course of the examination are prohibited.
The prohibition of harmful questions protects the sincerity of the answers, which differs from the genuineness of the answers. Sincerity must be considered as correspondence between what the witness knows and what is declared; genuineness as correspondence between the declaration and the intention[30].
In order to ensure that the examination is genuine and sincere, it shall be carried out in such a way as to prevent the persons mentioned from being able, before giving evidence, to communicate with the parties, with the defendants, or with the technical advisers, or to listen to other examinations or, otherwise, be informed of what is happening in the courtroom (Art. 149 disp. Att. the Italian code of criminal procedure).

[28] G. Illuminati, *Ammissione e acquisizione della prova nell'istruzione dibattimentale*, in *Ferrua-Grifantini-Illuminati-Orlandi* La prova nel dibattimento penale, 110, Giappichelli editore, (4th Ed.).
[29] The continuity of the examination is also derived from the provision of art. 509 The Italian code of criminal procedure, according to which the trial can be suspended for preliminary needs only in cases of admission of excluded evidence (art.495 paragraph 4 Italian code of criminal procedure), of judicial indication to the parts of new or wider test topics (art. 506 paragraph 1 Italian code of criminal procedure) the admission of new evidence (Art. 507 Italian code of criminal procedure). It is always necessary to refer to the general rule of art. 477 the Italian code of criminal procedure on the suspension or postponement of the hearing, but the coordination with the aforementioned article 509 the Italian code of criminal procedure requires to assess with even greater rigor the requirement of the absolute impossibility of continuing the trial when it comes to interrupting the examination.
[30] G. Spangher, *Trattato di Procedura Penale*, Vol. IV, Tomo II, Giudizio. Procedimento davanti al Tribunale in Composizione Monocratica, 308, Torino, (2009)

The second prohibition concerns direct examination and, possibly, re-examination: suggestive questions cannot be asked. The aim is to avoid that the way of formulating the question can become a ploy to guide the answer.
The ban does not apply to cross-examination. Here, the relationship between the questioner and the witness is usually conflictual, which excludes the risk of an agreement on the answer. Rather, resorting to suggestive questions can prove useful to weaken statements already made, revealing their pre-packaged nature and thus undermining the reliability of the witness.
Finally, after the witness testified, to establish his or her credibility, the parties may use the statements previously made and contained in the public prosecutor's file and contest that what the witness claims is different from what he or she has previously stated[31].

3.5 *The role of the judge*

Once the limits of the examination have been set, the focus should be on the recipient of the cross-examination results: the judge.
His or her main function is that of guarantor of the contradictory, which also exalts his or her position of the third party with respect to the accusation and defense[32].
He or she must carry out a double control: the protection of the personality of the witness[33], aimed at preventing that the parties, especially during the cross-examination, offending or attacking the witness or unnecessarily invading his or her privacy; secondly, the protection of the evidentiary data[34] aimed at ensuring the relevance of the questions, the genuineness of the answers, the loyalty of the examination and the correctness of the objections.
To ensure compliance with these parameters, the court is granted an interdictive power of intervention, which prevents that the question or answer may go beyond the limits established by law.
Otherwise, in order to protect the genuineness of the answers, the judge should also be able to intervene to obtain clarification from the witness about the content of a previous answer.
Two other powers of intervention are governed by art. 506 of the Italian Criminal Procedure Code, which are more significant and must be exercised necessarily in certain temporal excursus.
The first power concerns the possibility of indicating to the parties new or wider test themes, not indicated in the lists or developed during the examination, widening the subject of the test. This power can only be exercised at the end of the taking of evidence in the trial to make up for any deficiencies.
The second power concerns the possibility of directly addressing questions to persons who have already made statements (witnesses, experts, advisers, private parties), but only after the direct examination and cross-examination has been concluded. Reserving to the

[31] The rules governing the readings and disputes were not considered to be dealt with there. It's contained in articles 500 and 511-514 the Italian code of criminal procedure
[32] E. Selvaggi, *Esame diretto e controesame*, DIG. DISC. PEN. 280, Torino, (IV ed., 1990)
[33] Art. 499 paragraph 4: "*The President takes care that the examination of the witness is conducted without affecting the respect of the person*"
[34] Art. 499, paragraph 6: "*During the examination, the President, also of the office, intervenes to ensure the relevance of the questions, the authenticity of the answers, the loyalty of the examination and the correctness of the disputes, ordering, if necessary, the presentation of the minutes in the part where the statements were used for disputes*"

judge a residual function of clarification of aspects that remain unclear ensures respect for the principle of adversarial[35].
The intervention of the judge, aimed at remedying a failure to comply with the rules laid down as the basis of the cross-examination, as well as actionable ex officio, can be requested by the parties through opposition.
The opposition is the request of the party with which, in the course of examination, the President is entrusted with the decision on matters relating either to the profile of the succession in the scans of the examination, or to that of the admissibility of applications in relation to the subject matter or, still, to the modalities of formulation, even though it is the president who conducts the examination[36].
The intervention of the judge remains essentially "destined to fill in the gaps of an incomplete examination". He or she may not interfere freely and indiscriminately in the path of evidence outlined by the parties by means of cross-examination.

IV. CROSS-EXAMINATION IN THE US SYSTEM

4.1 *The recognition of the confrontation clause in the U.S. system*

The manifesto of the adversarial procedural model is contained in the 6th Amendment[37] of the Bill of Rights.
First, it states the right to a process of reasonable duration, temporally close to the facts subject to indictment - c.d. speedy trial - held before an impartial jury and in the jurisdiction of the community offended by the crime. The text provides, then, the need for timely communication of the nature and reasons of the charge raised against the individual undergoing proceedings.
This is followed by the statement of the right to confront the witness who makes statements against the accused and the possibility of obtaining, even compulsorily, the convocation of texts that depose on circumstances favorable to him or her.
The last provision concerns, however, the right to assistance of the technical defender.
Thanks to the Sixth Amendment, for the first time in the history of legal systems, confrontation takes place in terms of subjective law. The US system boasts the primacy of having raised the right to comparison to the rank of constitutional guarantee.
Given the absolute novelty of the confrontation clause, this initially received little attention even in the application, by the Supreme Court[38]. The Court first dealt with this guarantee in the context of the Mattox v. United States[39] decision of 1895 and subsequently in a few other cases[40].

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[35] G. Dean, *L'escussione ex officio delle fonti di prova dichiarativa nel giudizio penale*, in Riv. dir. proc., 137, (2001); A.A. Sammarco, *Metodo probatorio e modelli di ragionamento nel processo penale*, 227, Milano, (2001); B. Galgani, *Sub art. 42 l. 16 dicembre 1999, n. 479,* in Leg. pen., 510, (2000).
[36] As regards the possibility of opposing questions put by the court ex. Art. 506 the italian code of criminal procedureco.2 supposedly, the doctrine considers that the same must be considered implicit in the need to safeguard the values underlying the prohibitions on the questions proposed during the examination.
[37] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense".
[38] C. A. Chase, The five faces of the confrontation clause, 40 Hous. L. Rev. 1003 (2003)
[39] *Mattox v. United States,* 156 U.S. 237, (1895).
[40] *Motes v. United States,* 178 U.S. 458, 467(1900); *Kirby v. United States*, 174 U.S. 47, 55 (1899); Mattox, 156 U.S. at 240; Reynolds, 98 U.S. at 158.

Following the incorporation of the due process of law clause into the 14th Amendment[41], the Court ruled in Pointer v. Texas that the defendant should be tried, also by the States, *respecting the protections offered by the guarantee of the sixth amendment.*
The Sixth Amendment, by establishing the right of confrontation with the accuser, identifies a fundamental and essential procedural right for the celebration of a fair trial.
With the decision on the California v. Green case[42] in 1970, and in particular, as a result of the concurring opinion drafted on that occasion by Judge Harlan, it was noted the need to dictate an organic theory of the right to comparison.
An articulated and divisible guarantee was outlined in at least five corollaries.
First of all, the confrontation clause guarantees the accused the right to be present at the hearings in which the process to which he or she is subject is articulated.
Secondly, it allows the defendant to request that the witness evidence be formed in his or her presence. The right of comparison with the accuser also guarantees him the possibility of counter-examining the texts against him or her.
And again, it sets strict limits to indirect testimony, c.d. hearsay, and conditions and limits the use of hetero-accusatory statements between co-defendants (spillover confessions) and co-defendants or individuals subject to what in the Italian system we would define as accused and suspected in related or related proceedings[43].

4.2 *The value of cross-examination in the American process*
The American criminal trial is a trial of parties.
The search for evidence and its production or training in debate depends exclusively on the initiative of the party.
Neither the jury, responsible for judging in fact, nor the judge, arbitrator of the proper course of the trial and subject vested with the task of applying the relevant legal provisions, after the jurors have expressed their views on the defendant's innocence or guilt, they shall have official powers to request or admit evidence.
Since the fate of the process depends entirely on the activity of the parties, cross-examination is of crucial importance in the American process. As noted in doctrine: «*In a system based on a contest between partisan warriors, fairness demands a certain balance that each side be able to test the opponent's evidence – which is not possible with respect to statements of declarants shielded from cross-examination … Evidence which has been created or manipulated by advocates comes to court tainted with partisan poison which must be purified by the fire of cross-examination*»[44].

4.3 *Lay witnesses*

[41] It was adopted in 1868 and radically changed the relationship between federal and state constitutional law. The first section, of our interest: binds the federated governments to respect the privileges and immunities accorded to the citizens of the United States of America; provides that states, in the exercise of their power, may eliminate the rights to life, to freedom and private property only at the outcome of a trial conducted according to the rules of procedural fairness evoked by the syntagma "two process of law"; proclaims the right of access to jurisdiction under conditions of equality

[42] *California v. Green* 399 U.S. 149 (1970). On the innovative nature of the Green decision and the interpretative tension of the Sixth Amendment between the California Supreme Court and the United States Supreme Court, R. W. Kirst, Does Crawford Provide a Stable Foundation for Confrontation Doctrine?, notes: «*Green differed in two ways from every prior confrontation decision of the Supreme Court. It was the first time the Court reviewed a case in which another court had found a confrontation violation, and it was the first time the Court concluded that another court had read the Clause too broadly*».

[43] Ex rel. C. A. Chase, *The five faces of the confrontation clause*, cit., passim; P.C. Giannelli, *Understanding Evidence*, 563, 2013

[44] G. V. Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 Hastings L.J. 477,502 (1998)

Evidence solicited or provided through oral or written testimony, whether by oath or by affirmation and whether at trial or in the discovery process, is testimonial[45].
Witnesses are people with knowledge of out-of-court events who are called on to reveal that knowledge in court, under oath, in front of the judge, jury, and litigants.
There are two major classifications: lay and expert.
Expert witnesses are usually perceived as scientific, dispassionate third parties and outside observers to the ongoing litigation. The expert is an individual possessing specialized knowledge, skills, or training and is granted wide testimonial latitude.
The expert testifies broadly, while lay witnesses testify to perceptions, facts, and data grounded in their own experience[46].
Rules 601 and 602 outline the a priori conditions precedent to the legal admissibility of testimonial evidence: competency and personal knowledge.
The competency of a witness to testify regarding a particular matter requires the minimum capacity to observe, recollect, and recount, coupled with an understanding of the duty to tell the truth. It does not mean testimonial perfection. Perception and understanding are complex psychological and intellectual processes.
This should not be confused with credibility, which can be questioned during the examination of the witness and during the impeachment.
Competency must be combined with personal Knowledge, which is one of many critical questions. The witness must be able to coherently relay a storyline and deliver a "rational, factual basis that supports the speaker's position"[47].
Personal knowledge means firsthand knowledge acquired directly by perception through one of the five senses[48].
A useful witness competency checklist was dictated[49]. Duty to tell the truth: witness must understand the duty, to tell the truth; ability to perceive: witness must have the ability to perceive the incident which is the subject matter of her testimony; ability to remember: witness must be able to remember what he or she perceived; ability to communicate: witness must be able to communicate to the jury; personal knowledge: witness cannot testify unless he or she has personal knowledge of the subject of his or her testimony.
The scope of lay testimony is indicated in the FRE rule 701. Part (a) of the above rule reaffirms the requirement of firsthand knowledge and personal observation[50]; part (b) is a policy statement holding that even the subjective shortcomings of lay witness opinion are overcome when said opinion aids the trier of fact[51]. FRE 701 (b) is designed to prevent witnesses from usurping the jury's function by drawing interferences or conclusions; it also tends to force witnesses to stick to the facts to the extent possible.

[45] C. P. Nemeth, *Law & Evidence: a primer for criminal justice, criminology, law, and legal studies*, (2001)
[46] FRE Rule 701: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702"
[47] N. J Turbak, *Effective Direct Examination*, 34 Trial 68 (June 1998)
[48] It is to be contrasted with speculation and hearsay. Speculation refers to a witness offering more or less plausible theories or hypotheses based on generalizing rather than direct perception. Hearsay concerns information acquired secondhand, from the statements or reports of others. Note: the hearsay rules or its exceptions will not be discussed here.
[49] N. Schleifer, *Litigation Forms and Checklists* 13-25 (1991)
[50] Common forms of unfounded opinions are: hidden hearsay; speculation; unfounded interferences or overgeneralizations.
[51] C. P. Nemeth, see *supra* note 45.

4.4 *The ways of examining the witnesses' source*

The examination of the witness takes place in 3 steps: direct examination; cross-examination; redirect examination.

The only provision of the Federal Rules of Evidence dealing directly with witness examinations is FRE 611, which seems to take largely for granted the established modes of presenting direct and cross-examinations, specifying only a few limitations and otherwise granting the trial judge broad discretion over "the mode and order" of examining witnesses[52].

Therefore, it applies an unwritten tradition of trial practice.

The goal of the direct examination is to let the witness provide pieces of narrative that build an overall story to the jury. It is important to help the witness appear as credible as possible, as most of the evidence the party will introduce at trial comes in through direct examination.

FRE 611 does not say anything affirmatively about direct examination. It states only, at point (c) that leading questions[53] are not allowed, except as necessary to develop the witness's testimony.

Differently, the leading questions should allow on cross-examination and when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. The right to ask leading questions carries with it an obligation: that one shall ask clear, coherent questions.

The cross-examination, as mentioned above, is the heart of the adversary system[54].

FRE 611(b) establishes two general areas of inquiry that are permissible. First, it is permissible to explore matters about which the witness has testified on direct examination[55]. Second, it is always permissible to ask questions that may impeach the credibility of the witness. Asking rhetorical questions, making speeches and comments instead of asking questions, and stating one's personal conclusions are prohibited as being "argumentative"[56].

Lastly, when the cross-examination has been completed, the direct examiner may conduct a redirect examination on the matters that were raised in cross-examination.

4.5 *The role of the judge and of the jury*

The judge controls the trial process by setting limits, primarily pursuant to the rules of evidence, in the interests of the rationality of results, of fairness between the parties, of social and moral values, and efficiency as well

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[52] R. Allen, E. Swift, D. S. Schwartz, M. S. Pardo, A. Stein, *An Analytical Approach to Evidence: Text, Problems, and Cases*, WOLTERS KLUWER, 33, (6th Ed.)

[53] A leading question is a question that suggests a particular answer and contains information the examiner is looking to have confirmed.

[54] Francis Wellman's classic The art of cross-examination sets a high ethical standard: "*The purpose of cross-examination should be to catch truth, ever an elusive fugitive. If the testimony of a witness is wholly false, cross-examination is the first step in an effort to destroy that which is false. . . If the testimony of a witness is false only in the sense that it exaggerates, distorts, garbles, or creates a wrong sense of proportion, then the function of cross-examination is to whittle down the story to its proper size and its proper relation to other facts… ..[But if] the cross-examiner believes the story told to be true and not exaggerated . . . then what is indicated is not a "vigorous" cross-examination but a negotiation for adjustment during the luncheon hour. . . . No client is entitled to have his lawyer score a triumph by superior wits over a witness who the lawyer believes is telling the truth.*"

[55] Talk about the "*restrictive*" rule, in contrast to the wide-open rule of cross-examination, used in the English trial system. However, Courts interpret the limited scope rule differently: Strict view, see *Philadelphia & T. R. Co. v. Stimpson,* 39 U.S., 14 Pet., 448 (1840); in the opposite direction *Ronald Zoerner v. State of Mississippi,*96 KA, 318 (Miss. 1998).

[56] J. Alexander Tanford, *The Trial Process: Law, Tactics, and Ethics*, 292, (4th Edition)

FRE Rule 611 recognizes in broad terms the sweeping authority of the judge to control the examination of witnesses during the trial: "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: make those procedures effective for determining the truth; avoid wasting time; protect witnesses from harassment or undue embarrassment".
Moreover, even the two express provisions, FRE 611 (b) and (c), purporting to limit the scope of cross-examination and the use of leading questions may be overridden in the discretion of the trial judge.
FRE Rule 614 grants the judge the power to call a witness on his/her own initiative or at the request of a party. However, the judge cannot intervene during the testimony of the witness nor examine them afterward.
On the other hand, the jury uses its senses to perceive information in the courtroom and its reasoning capacity to evaluate and make inferences about that information in order to reach a conclusion about which version of disputed events is the truth[57].
Credibility and factual dispute resolution are for the jury.
The jury must have a specific degree of certainty in order to make a finding on a particular issue, it is called the burden of persuasion. In the criminal case, it is guilt "beyond a reasonable doubt".

4.6 *The techniques of the impeachment*
The lawyers provide information to the jury through the use of witnesses, documents, and other exhibits. Because the jury is passive, the role of the advocates is to investigate, interview, select, prepare, and present the sources of information that the advocates think will most advance their respective cases.
Many trials turn on the question of witness credibility, remitted to the jury's decision.
The way to discredit or attack the credibility of a witness is called "*impeachment*". It is an attempt to show that a witness may have inadvertently narrated the events incorrectly, lied, misperceived the events about which the witness testified, or forgotten some or everything about what happened.
Methods to impeach the credibility of a witness are described by FRE 608: (a) Reputation or opinion evidence; (b) Specific Instances of Conduct.
About the first method, the reputation or opinion testimony can prove the witness's character only for untruthfulness. A witness cannot impeach with evidence of general bad character or bad moral character. When the witness's character has been "attacked" for truthfulness, the opposing party may then rehabilitate the witness by introducing evidence regarding the witness's good character for truthfulness[58].
Rule 608(b) FRE provides one of the most useful and powerful impeachment tools available to lawyers during cross-examination. The rule enables lawyers to ask targeted and damaging questions about a witness's past bad actions, or specific instances of misconduct, during cross-examination. A strong line of questioning can destroy a witness's credibility and leave little room for rehabilitation[59].

[57] The Seven Circuit Pattern Criminal Jury Instructions tell jurors to "use your common sense" and "consider the evidence in light of your own everyday experience". The Fifth Circuit Pattern Criminal Jury Instructions direct jurors "not to let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way."
[58] See: United States v. Holden, 557 F.3d 698, 702 (6th Circ. 2009); Maguire, Weinstein, et al., Cases on Evidence 295 (5th ed. 1965)
[59] T. Timlin, *A Quick Guide to Rule 608(b): An Underutilized Impeachment Tool*, June 07 2019, https://www.americanbar.org/groups/litigation/committees/trial-practice/practice/2019/rule-608-b-impeachment-tool/

The rule's broad scope captures any instances where the witness lied or acted in a dishonest or deceitful way, with no explicit time or substance restrictions[60].

However, the general prohibition against character evidence must always be observed, which applies only if the evidence is offered to demonstrate propensity, or that the person acted in accordance with that character trait at a particular date and time. Extrinsic evidence is not admissible to prove that the witness actually engaged in the specific instance of misconduct at issue. However, the fact that documents relating to the witness's specific instances of misconduct may not be admitted as evidence, does not mean that they cannot be used during the cross-examination. The lawyer, if the court allows it, could provide copies of the relevant documents to the witness during the cross-examination and ask the witness about them. Presenting the document to the witness will indicate to everyone in the courtroom, including opposing counsel, the court, and the jury, that proof of this conduct exists.

Since the possibilities of abuse are substantial, safeguards have been introduced in the form of specific requirements, which establish that the instances investigated be evidence of its truthfulness and that they are not remote in time.

Additionally, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that Rule 611 bars harassment and undue embarrassment.

Another technique of impeachment is the conviction of a crime, treated in detail in Rule 609.

The lawyer, in order to show the contradictions and biases of the witness[61], shows evidence of the commission of the underlying criminal act. It is significant only because it stands as proof of the commission of the underlying criminal act.

FRE 609 (a) permits impeachment with two types of conviction: convictions for serious crimes; convictions, regardless of potential punishment, for crimes involving a dishonest act or false statement[62].

About convictions for serious crimes, if the witness is not a defendant, he or she needs a balancing test of FRE 403: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence".

If the witness is a defendant, the probative value of the evidence must outweigh its prejudicial effect on the defendant.

Differently "dishonest act or false statement" convictions, FRE 609 (a) (2), are automatically admissible without regard to balancing and without regard to the seriousness of the crime. For this reason, it is important to specify the contours of this category of crimes.

The term "dishonest" should not be interpreted like "illegal", because it is too broad.

The Senate Judiciary Committee Report and the Conference Report on the Federal Rules contain the following identical elaboration: "*crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretenses, or any other offense, in the nature of*

[60] Any dishonest conduct in the witness's past, from lying on a job application to failing to file tax returns to more serious allegations of misconduct, like theft or bribery. The conduct need not even amount to a criminal action.

[61] See: *United States v. Gilmore,* 553 F.3d 266, 272 (3d Cir. 2009)

[62] Convictions are not limited to violations of federal law. Because of the constitutional structure, the federal catalog of crimes is far from being a complete one, and the resort must be head to the laws of the states for the specification of many crimes.

crimen falsi the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused's propensity to testify truthfully".

Federal courts have interpreted the term narrowly, but the case law is not entirely consistent[63].

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, pardon, annulment, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Further technique of impeachment is governed by FRE 613, which establishes the process for admitting prior statements to prove inconsistency with the witness's trial testimony, during the cross-examination.

The only guarantee to protect the witness is that his or her defense counsel will be able to view the statement to be used, by request[64].

According to the Advisory Committee, the provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

It is allowed to be shown extrinsic evidence of a witness's prior inconsistent statement, only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it.

There are two exceptions: "if justice so requires" if there are situations in which it is not possible to give the witness the opportunity to explain; "an opposing party's statement under Rule 801(d)(2)[65]".

In compliance with FRE 403, proof of an apparently trivial inconsistency does little, if anything, to impeach a witness's credibility.

The courts recognize other categories of permissible impeachment: lack of opportunity or physical inability to reliably perceive the events about which the witness testified[66]; memory problems, either inherent in an event long past or particular to the witness, including psychiatric history affecting ability to recall events accurately[67]; possible

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[63] Among many, see *United States v. Osazuwa*, 664 F.3d 1169, 1175 (9th Cir. 2009) ('It is undisputed that bank fraud is an act of dishonesty'); *United States v. Harper,* 527 F.3d 396, 408 (5th Cir. 2008) ('theft by check convictions fall under Rule 609(a) (2)"): *United States v. Morrow*, 977 F2d 222 (6th Cir: 1992) (counterfeiting is crime of "dishonesty or false statement"). Compare, *United States v. Wilson*, 985 F2d 348 (7th Cir. 1993) (failure to file income tax return is crime of "dishonesty or false statement"), *Cree v. Hatcher*, 969 F2d 34 (34 Cir. 1993), (failure to file income tax return not within FRE 609(a)(2)).

[64] This disposition formally abolishes the rule of the Queen's Case, which required that the witness be shown the statement prior at any questioning about the statement.

[65] Rule 801 (d) (2): An Opposing Party's Statement. "*The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E)*".

[66] State *v. Dardon, People v. Montes,* 635 N.E.2d 910 (App. Ct. Ill. 1994) (cross-examination of a police officer who took the defendant's confession about his ability to understand Spanish) https://law.indiana.edu/instruction/tanford/web/reference/07cross.pdf

[67] People v. Baranek, 733 N.Y.S.2d 704 (App. Div. 2001) (history of delusions) https://law.indiana.edu/instruction/tanford/web/reference/07cross.pdf

distortions caused by a witness's poor communication skills[68]; bias, interest, prejudice, or other emotional traits that could cause a witness to testify falsely[69].

V. CONCLUSION: THE TWO SYSTEMS COMPARED

In both the Italian and the American procedural systems, cross-examination is considered the most appropriate tool to ensure the adversarial principle and the ascertainment of "procedural truth."

The idea of cross-examination is relatively new in the Italian system, compared to the American one where the adversarial trial model involves the idea of cross-examination as an "art"[70], tradition, represented by trial lawyers, and cultivated and handed down in collections of cases.

The way in which the cross-examination technique is approached differs in the two systems.

This different approach is justified by fact that the Italian trial was born as an inquisitorial rite, characterized by a marked asymmetry between the procedural powers of the defense and the prosecution to the advantage of the latter. In 1988[71] it was modified with the incorporation of principles and institutions of the accusatory rite, typical of common law. This, characterized by absolute equality in the procedural position of the prosecution and defense, could not be accepted by the Italian legal system *sic et simpliciter*, with the introduction *in toto* of the accusatory system.

Thus, the Italian legislator tried to find a balance, introducing a mode of acquiring evidence that would make the parties protagonists, without losing guarantee and intervention by the judge.

In the Italian system, the addressee of the testimonial examination is the judge, who with his or her professionalism can take in the answers, and can also usefully intervene, which is why that "regularized theatricality"[72] is lacking.

In the common law system, the examination is addressed to the jury, which is not allowed to intervene in any way and is made up of people occasionally in charge of the decision, which leads the parties to a certain theatricality of the examination and cross-examination.

Thus, the two peculiar differences concern both the role of the judge and the attitude of the parties.

In Italy, the judge has relevant powers of intervention, ex art. 488, § 4 and § 6, 506 and 507 of the Italian Criminal Procedure Code. Before the federal courts, it is not possible to find homologous institutions that would be radically inconceivable in the American system.

These would seriously undermine the conception of the judge as an impartial arbiter of the regularity of the confrontation between opposing theses.

As to the parties and the manner of conducting the examination of the witness, there are only two rules in the Italian code that regulate the propounding of questions, ex art. 498 and 499 of the Italian code of criminal procedure differently, the Federal Rules of Evidence regulate in detail not only the admissible questions but especially the manner of

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[68] See People v. Plummer, 743 N.E.2d 170 (Ct. App. Ill. 2000) (defendant could impeach on mental health history only if it was shown to affect witness's ability to communicate accurately) https://law.indiana.edu/instruction/tanford/web/reference/07cross.pdf

[69] United States v. Harris, 185 F.3d 999 (9th Cir. 1999) (witness risked losing money if suit against husband's estate was successful); State v. Green, 38 P.3d 132 (Id. 2001) (prosecution witness had pending felony charge, motive to cooperate) https://law.indiana.edu/instruction/tanford/web/reference/07cross.pdf

[70] F. Wellman, *The Art of Cross-examination*, 1903

[71] In 1988, the current Code of Criminal Procedure, also known as the 'Pisapia-Vassalli Code,' was introduced by Presidential Decree on Sept. 22, 1988, and went into effect the following year.

[72] C. Di Martino, T. Procaccianti, *La prova testimoniale nel processo penale*, 193, CEDAM, (2010)

conducting the cross-examination stage and assessing the reliability of the witness through the techniques of "impeachment."
Noteworthy is the initiative of the Standing Laboratory for Examination and Cross-examination (LA.P.E.C.)[73], which has given an influential committee the task of drafting guidelines for cross-examination in due process, given the frequent circumvention of rules by deformation of practice.
The distorted practice of the Italian trial has accepted that the judge's powers of intervention go beyond the regulatory provisions, not respecting the conclusion of the completion of the test, with a consequent restriction of the faculty of the parties to guide the cross-examination.
In the American system, however, the opposite problem is found. The judge has no evidentiary power, and where the defendant realizes that he or she has failed to address the trial by adducing all the necessary evidence, he or she cannot in any way remedy the ineffectiveness of his or her defense activity by relying on intervention by the judge.
From the examination so far, it seems clear that a greater balance should be recovered in both systems between the powers of the parties and the powers of the Judge, which, if the Italian system seems unbalanced in favor of the latter, in the U.S. system there is a total attribution to the parties, which can sometimes be prejudicial to the defendant.

[73] 1. The witness list must contain a specific indication of the circumstances under examination. 2. A forbidden and inadmissible question may not be resubmitted by the party who made it, even if correctly rephrased. 3. If the formulation of prohibited questions, although expressly censured, is reiterated, or oppositions are proposed suggesting the answer to the person examined, the judge shall admonish the party, noting this on the record. 4. Experts and technical consultants shall not be addressed the invitation to the declaration of commitment, to tell the truth regarding the assessments within their competence, except limited to the facts directly learned during their activity. 5. Experts and technical consultants may participate in any hearing of the trial, both before and after their examination. 6. The judge may not intervene during the examination conducted by the parties, except in cases expressly provided for by law. 7. The judge may not formulate questions that tend to suggest the answer to the person examined. (8) Before proceeding to the direct examination of witnesses, experts, and technical consultants, the judge shall indicate to the parties topics of evidence that he or she considers relevant and useful for the completeness of the examination, including for the initiatives that they will deem appropriate to take.
The text thus drafted, following the work of the Venice conference on March 5 and 6, 2010, by the Commission composed of: Giovanni Canzio (Judge), Bruno Cherchi (Prosecutor), and Carmela Parziale (Lawyer).