Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

What is left of Klein? Procedural reforms: statism or privatism? For a co-participative model on the new Brazilian CPC[1]

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Resumo: O presente ensaio pretende discutir as bases nas quais devem ser compreendidas as ideias de comparticipação e policentrismo, que inspiram parcialmente o Novo CPC. O problema apresentado foi tratado a partir do questionamento da discussão entre estatalismo *versus* privatismo; da análise das advertências de Franz Klein e a necessidade de releitura do papel do processo pelos atuais intérpretes e aplicadores do direito. Concluiu-se pela importância do entendimento e da leitura do Novo CPC sob a ótica do policentrismo e comparticipação, de modo que o viés constitucional de processo enquanto garantia democrática seja obtido em prol do cidadão. Demonstra-se, portanto, que as ideias trazidas pelo professor Picardi acerca da superação da dicotomia estatalismo *versus* privatismo são fundamentais para a consecução dos objetivos da processualística atual.

Palavras-chave: Novo CPC. Comparticipação. Policentrismo.

Abstract: This essay discusses the basis on which should be understood the ideas of conparticipation and polycentrism, which partially inspired the New CPC. The problem presented was treated from the questioning of the discussion between state basis *versus* privatism; the analysis of Franz Klein's warnings and the need for reinterpretation of the role of the process by the current interpreters and law applicators. It was concluded by the importance of understanding and reading the New CPC from the perspective of polycentrism and conparticipation, so that the constitutional process bias as a democratic guarantee be obtained in favor of the citizen. It's been demonstrated, therefore, that the ideas brought by Picardi

[1] Paper written on the occasion of the *liber amicorum* as a tribute to the friend and *Professor* Nicola Picardi.

about the overcoming of the dichotomy state bias *versus* privatism are fundamental to the achievement of the current processualistic goals.

Keywords: New CPC. Conparticipation. Polycentrism.

1. To start with....

When one is gifted with the auspicious invite to write in honour of a great master, one bows in face of the great responsibility and need to dialogue with the master's work.

However, given the magnitude of Picardi's ideas, I shall constrain myself to one of the points by which his thinking has edged into the construction of a normative theory of co-participation, that guides and partially inspires the New Brazilian Civil Procedural Code (New CPC - law number 13.105, from March 2015 – that will come into effect after one year of *vacatio); a Law* that I had the honour to serve with my technical counselling while it made its transition at the House of Representatives

Right from start, I should anticipate by saying that this is not about a theory of cooperation or collaboration,[2] according to procedural socialization ideas, or from the perspective of an "Arbeitsgemeinschaft" (working community), idealized by Klein[3], that would

[2] This is not about parties adopting a collaborative function towards the judge, as thought by Klein, that would depart from the premise that the alleged judicial protagonism to which all parties should be subservient would have the judge taking over a selective judicial activism that should benefit the weak (counter-majoritarian role), but rather one that allows in many legal procedural systems that major economic groups (such as banks) be privileged by the benefits. Cf. NUNES. Dierle; TEIXEIRA, L. Democratic Access to Justice. Brasilia: Gazeta Jurídica, 2013. As Picardi recalls, according to Klein's model: "temi centrali diventano così l'uguaglianza sostanziale fra le parti e la funzione compensatrice del giudice. I poteri del giudice, però, non possono non essere limitati, altrimenti il sistema assumerebbe carattere inquisitorio. In definitiva, si pone un problema di collaborazione fra giudici e parti nell'accertamento del fatto." PICARDI, Nicola. Le Riforme Processuali e sociali di Franz Klein. *Rivista di storia giuridica dell'età medievale e moderna*. Historia et ius. www.historiaetius.eu - 2/2012 - paper 16.

[3] RECHBERGER, W., Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa. *Ritsumeikan University Law Review (*2008), pp. 102 ss.

depart from an alleged judicial protagonism to which the parties would be subservient; neither from a search for rescuing from the full spectrum of the disposition principle, of liberal matrix.[4]

The idea of co-participation is not connected to the content ordinarily attributed to the *Kooperationsmaxime,* that of searching for a procedural truth anchored on the publicistic duties aimed at being the mainstay of the hierarchy between legal parties (*ordine assimetrica*)[5] but rather, based on the dynamic adversarial principle (as a guarantee of influence, debates and no surprise) and in the necessary participation of interdependent subjects in the procedural environment throughout the whole course of action forged by constitutional procedural principles.

This proposal takes procedural polycentrism[6] and its impact on the legal system rather seriously, forging a normative theory (non-axiological) of counterfactual duties to induce the cooperative behaviour of the parties to a claim, in consultation duties, clarification, assistance, righteousness, in pursuiy of a genuine dialogue at the procedural level.

In order to accomplish that, my stay during the academic year 2005-2006 at the Law Faculty of the University "La Sapienza" of Rome, conducting research under the tutorship Master Picardi, was essential. I hope this simple contribution may express part of my gratitude and my affection for one of the greatest worldwide experts in procedural law of his generation.

2. The new Brazilian CPC between Statism and Privatism

In times of new procedural legislation (New CPC) we should look at the past in order to learn from it and avoid the mishaps that we tend to repeat.

[4] GÖNNER, N. Thaddäus von. *Handbuch des deutschengemeinen Prozess*. 2ª ed. Erlangen, 1804. p. 175 et seq. TARELLO, G. *Dottrine del processo civile*. Bologna: Il Mulino, 1989. p. 14; 22, passim.

[5] PICARDI, N. Processo civile (diritto moderno). *Enciclopedia del diritto.* Milano: Giuffrè, 1987, p.101-117. GIULIANI, A. *Ordine isonomico ed ordine asimmetrico. Nuova retorica» e teoria del processo.* in "Sociologia del diritto", 1986, p. 81 et seq.

[6] [6] PICARDI, Nicola. *Manuale del processo civile.* Milão: Giuffrè, 2006. p. 208.

Such a warning is more than required in the face of what we see in Brazil today, as exposed further along these lines.

On the one hand, statist driven jurists defending then strengthening of the role of the Higher Courts (specially its judicial protagonism when creating precedents without a proper debate) - "standardizzazione» delle sentenze[7] - in the face of the ever growing emphasis on the study of law and jurisprudence having, as a result, the advocacy for (arguable) virtues of the above mentioned highest courts of justice (without procedural control by constitutional guarantees and by an adequate theory of precedents).

On the other, tending towards the liberal-privatistic side, jurists have been resurrecting some of the theories of the will (already abandoned by civilists themselves after studying private autonomy) for the defence of a comprehensive (privatistic) flexibilization of the procedural framework, especially due to an inadequate reading of the wide procedural negotiation clause brought by the new law (arts. 190 and 191, new CPC).[8]

The reading often seems, in new clothing and using new techniques, to make reference to the clash between the statists-publicists (precursors of procedural socialization) and the privatistic-liberal Austro-Germans in the nineteenth century (beginning of scientific proceduralism) in their debates that have culminated in the prevalence of opinion of the firsts, from Oskar Bülow's new dogmatic proceduralism. [9]

[7] "A partire da decisioni rese in alcuni casi, si è, infatti, ritenuto possibile fissare "standard interpretativi". Si è stabilito, quindi, che tutti gli altri casi simili saranno giudicati sulla base del *precedente*, senza considerare le loro specificità. Il Consiglio Nazionale di Giustizia ha, inoltre, fissato le c.d. *mete di produttività* ed ha collocato, nel suo sito, un "processometro" con l'indice di produttività dei singoli tribunal"(cfr. PICARDI, Nicola, NUNES, Dierle. *Il processo civile brasiliano, dalle ordinazioni filippine al codice del 1973*, in "Riv. dr. proc." 2011, p. 934-935.

[8] Art. 190. Once the procedure deals with rights that admit self-determination of interests, its rightful that fully capable parties alter the procedure so as to adjust it to the specificities of that claim and establish a consensus about the burdens, powers, procedural rights and duties, before or during the process itself. Single Paragraph. By his own motion, or under request, the judge will control the validity of the covenants provisioned in this section, only refusing to apply them in case of nullification or unconscionable clause in adhesion contracts, or in cases when any of the parties are conspicuously vulnerable.

[9] TARELLO, G. *Dottrine del processo civile*. cit.. p. 47.

And even the "resurrection" of procedural business (*processrechtliche Verträge*) with a renewed spirit, cannot be conceived of as the German pandectistic has structured them[10], with categories of agreements between the parties, that by means of an unlimited will could have an impact on the procedure. This extremely important phenomenon must be ascertained under the new co-participative approach.

As it has been pointed out in previous occasions:[11]

> The decline in the centrality of the state in the normative production (legiscentrism), studied since the 1960s, but with emblematic procedural impact not before the 1990s, with the disenchantment of state dominance (even in face of an advancing neoliberalism) has been guaranteeing the strengthening and sophistication of consensual clauses. This leads to the apparent paradox between two concepts traditionally presented as irreconcilable, on one hand the contract (that departs from the agreement), and the procedure on the other (that departs from the disagreement), or as we prefer, of uncooperative behaviour, are put in check, and this is easily noticeable when one sees the growing use of commitments to avoid solutions awarded by the arbitration agreement. In being so, one could estimate agreements of the parties, with substantial efficacy, as in the case of judicial reconciliations and tacit agreements on non-challenging provisions; agreements in the process, with acts committed outside that very procedure with internal efficacy, including on judicial powers, as the arbitration agreement and the agreements on evidence; and agreements in the process to the process, which would correspond to procedural agreements, provided, for example in art. 764 of the French *Nouveau Code* or our CPC 2015. It is worth pointing out that both in France and in the recently approved CPC/2015, such procedural agreements should be analysed in line with the cooperative normative premise (co-participative) and the adversarial principle (art. 5, inc. LV, CRFB / 88 and arts. 6 and 10, CPC/2015)12, acting as a civil procedure complementary management technique, with a balanced extent of the

[10] Cf. KOHLER, J. Ueber processrechtliche Verträge und Creationen. *Gesammelte Beiträge zum Zivilprozeß*. Berlin: Scientia Verlag Aalen, 1894. Reedição: 1969.

[11] THEODORO JR, H; NUNES, Dierle; BAHIA, A; PEDRON, F. *Novo Código de Processo Civil: Fundamentos e sistematização*. 2ª edição. Rio de Janeiro: GEN Forense, 2015.

[12] CPC- 2015 Brasileiro: "Art. 6º All parties in a process should mutually cooperate as to have an effective and fair decision within reasonable length of time. [..] Art. 10. A judge cannot rule, regardless of his/her level of jurisdiction, based on grounds about which parties were not given the chance to make a statement, even in the face of matters over which he/she should decide on own motion.."

incidence of private autonomy in shaping procedural activity.

In face of that, we must leave this dichotomy (statism versus privatism) in order to accomplish an effectively democratic procedural framework[13] and, for that, we must appreciate the past.

3. Recall of Klein and his warning ...

On November 9, 1901[14], Franz Klein, the idealizer of the great social and oral legislative model for the civil procedure for the twentieth century (the Austrian ZPO 1895), delivered a notorious conference in Dresden, in which he showed the need to break with the procedural system ruling at that time, based on individualistic and liberal premises (technically governed by the parties and lawyers, and that reduced conflicts to a private discussion).[15]

During his lecture, the Austrian master highlighted and defended the instrumental role of the process, in addition to being the first one to value its immense social, political and economic significance (and function); that was divulged as something new in the late twentieth century, by a large number of thinkers.

Continuing the Austrian tradition of strengthening the role of the judge[16] and following the statist conception of his master (Menger) when assigning material direction to the judge in order to approximate the straightening of the procedural reality give to the material reality.

[13] NUNES, Dierle. Por un proceso civil efectivamente constitucionalizado. RÚA, Mónica Bustamante. *Reformas procesales em Colombia y en el mundo*. Medellín: Univ. de Medellin, 2014. p. 47-49.

[14] KLEIN, F. *Zeit-und Geistesströmungen im Prozesse*. Frankfurt am Main: Vittorio Klostermann, 1958.

[15] NUNES, Dierle. *Processo jurisdicional democrático. cit*. As Picardi would put it: "Klein considerava la controversia civile come una violazione del bene comune ed il processo come una *Wohlfartseinrichtung*, un istituto per il benessere sociale[15]. Ne consegue che – come rileva Nörr - «il processo muta il proprio padrone»: da strumento a servizio della *giustizia commutativa* diventa strumento al servizio della *giustizia distributiva*. Ciò comporta che, in un *sozialer Zivilprozess*, va ridisegnata la ripartizione dei poteri fra parti e giudice." PICARDI, Nicola. Le Riforme Processuali e sociali di Franz Klein. **cit**.

[16] TARELLO, G. *Dottrine del processo civile*. cit. p. 22.

This vision enabled an intensification of judicial powers in the vast majority of procedural systems, as judges were assigned to drive the case, (richterliche Prozessleitung) and not only in the formal aspect (formelle Prozessleitung), regulating and promoting the order and the pace of procedural acts, but also in its material aspect (materielle Prozessleitung), offering the judicial authority control and unofficial initiative to gather the material that would constitute the object of judgment on the merits.[17] The judge should offer some support to the parties[18], but unfortunately, in many jurisdictions, this has been distorted into an authoritarian stance. And that becomes a more sensitive issue in the face of a supposed integrative activity of indeterminate concepts[19] that would allow some shielding in case the judge would not reveal the grounds on which he's based that content.[20]

Klein would say that in the second half of the previous century (XIX), the great rise of the continental economy and popular culture have had powerful effects and had significant impact on property, possession, trade and societal structure. Production, productivity and sales grew quickly and the exchange of goods increased unexpectedly.[21]

[17] CAPPELLETTI, M. *La testimonianza della parte nel sistema dell'oralitá*. Milano: Giuffrè, 1974. p. 74-75.
[18] KLEIN, F. *Zeit-und Geistesströmungen im Prozesse*. cit. p. 28
[19] KLEIN, F. *Zeit-und Geistesströmungen im Prozesse*. cit. p. 18-19
[20] Once aware of the risks and as an attempt to prevent such behaviours, Brazilian lawmaking authorities for the CPC-2015 have based their arguments on the following grounds: Art. 489. A decision should mandatorily contain the following elements: [...] § 1º Any legal decision, be it interlocutory, sentence or ruling, will not be considered sufficiently grounded when: I – it is limited to the indication, reproduction or paraphrase of a normative act, failing to explain its relation to the matter or issue decided upon; II – it deploys undetermined legal concepts, without clarifying the concrete reason for its incidence on that matter; III – it invokes reasons that would serve to ground any other decision; IV – it fails to defy all arguments inferred on the procedure, that in theory could underpin the decision adopted by the judge; V – it is limited to invoke precedent or previous decisions without identifying its determining fundamentals, nor demonstrating that the case under decision matches them; VI – refrain from following precedent or previous decisions, jurisprudence or precedent invoked by the parties, without demonstrating the existence of a distinction to that case or that such opinion has been overridden. § 2º In case of conflict between norms, the judge should justify the object and general criteria of his/her balancing, clarifying the reasons that authorize the interference in that rule and the factual premises that ground the conclusion. § 3º Legal decisions should be interpreted from the conglobation of all its elements in compliance with the principle of good faith. (own highlight).
[21] KLEIN, F. *Zeit-und Geistesströmungen im Prozesse*. cit.

Individual's needs for enjoyment, together with the strengthening force of credit, have become many and, along with the ends, the means have also extended, which mainly consisted of a rich associative and corporate gathering of a population in expansion.[22]

According to him, these twists, which cast their reflections on all sides, would evidently compromise all legal life. In this respect, the procedure was not spared. New challenges were defying its mechanism and performance.[23]

We cannot neglect that the author wove considerations about a time when there was a tight division amongst the roles of State functions (judicial/legislative/executive) and, following these same terms, in which the civil procedure and jurisdiction would only help to ascertain private disputes, notably the ones involving property issues, ownership, contracts, family and inheritance (bipolar disputes).

Such an interpretive horizon reduced the procedural discussion to a technical perspective and lead the procedure specialist to merely analyze institutions that would permeate its structural trilogy (Process - Jurisdiction - Action).

Despite the already clear perception at the time, the publicistic character of the procedural system (which, unfortunately, has helped to gradually reduce the concern of scholars with purely formal questions and with the romantic tendency to believe that the problems would be solved with legislative changes and the strengthening of role of judges), the latter was thought about in a quite reductionist way, seeking to solve but the traditional bureaucratic issues of cost, speed and access to justice (in its liberal version). Issues still seen as technical ones.

Some decades have passed by and, meanwhile, an academic, legislative and pragmatic discussion linked to the search for a transition from a liberal (procedural liberalism) to a social process (procedural socialization).[24]

[22] Idem
[23] Idem
[24] NUNES, Dierle. *Processo jurisdicional democrático. cit.*

And in this period, by the time the incipient legal constitutionalization taking place in foreign legal systems (from the 1920s) reached out to the procedural field, it imposed some changes in the reading of their institutes.

The situation described here so far gradually begins to change after the post-World War II period, when the rejection of political actions aimed at social improvement, including in countries of democratic-liberal regime, started to be implemented. This period was also accompanied by a larger legal science openness towards society's problems.[25]

In the words of Picardi, a transition from *a Gesetzesstaat* (State of Law) to a *Richterstaat* (State of Judges)[26] with a reduced importance of lawmaking entities and an ever stronger role of the judiciary.[27]

This situation allowed the rupture of a positivistic view (or even exegetic) and had the power to put on the agenda a number of 'new' paradoxes for the 'new' functions performed by the foreign jurisdiction since then (a phenomenon that has recently victimized us, from 1988).

With all those elements, the "controversy" around the powers and roles (old and new) of the Judiciary was set, leading magistrates to clash with one another about an activist profile, for some, or a minimalistic one (self restraint), for others.

Institutional dialogues about the three functions will enhance the role of the judiciary, and its power, and likewise may increase the importance of the procedure, now constitutionalized, as a constitutional guarantee of the participation of stakeholders in the formation of provisions and as the enabler of fundamental rights.

[25] DENTI, V. *Processo civile e giustizia sociale*. Milano: Edizioni di Comunità, 1971. p. 31.

[26] PICARDI, Nicola. La de nostro tempo per la iurisdizione. *Rivista Trimestrale di Diritto e Procedura Civile*, p. 44-45, 2004. Note that this trend, the collapse of a parliamentary legislative state, was already pointed out in 1932 by Carl Schmitt (SCHMITT, p. 3), when he envisioned the existence of jurisdictional states where the last word when resolving a conflict was not given by legislator, but rather by the judge (SCHMITT, p. 6). He claimed, further, that the *ethos* of the jurisdictional state guaranteed that the judge would be judging immediately, in the name of law and justice, without mediation or charges of other non-judicial powers. Thus, the Law and Justice should have an unambiguous content (SCHMITT, C*. Legalidad y legitimidad***.** Madrid: Aguilar, 1971, p. 12).

[27] PICARDI, Nicola. La vocazione de nostro tempo per la iurisdizione. *cit.* p. 42.

A new perspective on the procedural "working community" (from a normative theory of *co-participation*[28]) between a judge and parties (and their lawyers), preventing their relationship from becoming a conflict of categories, and promoting the idealization of a procedural polycentrism within the procedural doctrine, which rejects any conceptions of leadership (both from the parties and their lawyers on procedural liberalism, as well as from the judge during socialization). Interdependence and shared responsibility between parties are assumed at first.

Especially when one sees that the Brazilian legal system provides an environment in which non-cooperative interests of all parties to an action do prevail. That would be comparable to having the judge immersed in the search for the numerical optimization of his/her decisions[29] and parties (and their lawyers) acting as part of a strategic litigation (strategic action[30]) in order to obtain success. This pathology, factual in nature, does not even minimally represent the legal standards imposed by the constitutional model of Brazilian procedure, nor does it represent the major purposes that a claim, as a guarantee, should offer. By this recognition, it is up to Law, based on its counterfactual premises, to offer a normative base that induces a genuine dialectic behaviour in which these non-cooperative behaviours are mitigated.[31]

This is not about implementing cooperation between parties themselves and the judge, a proposal that has long been advocated by foreign doctrinal schools, which still depart from the (socializing) statist premise, according to which parties should be subservient in relation to the judge, the latter seen as a prevalent figure.

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[28] NUNES, Dierle. *Processo jurisdicional democrático. cit.*

[29] At the last report "justice in numbers" by Brazilian National Committee of Justice they came to conclusion that there are more than a hundred million litigation demands being processed in Brazil. CNJ. Justiça em números 2015- Ano base 2014. Brasilia, 2015.

[30] The expression is being used under the same meaning used by HABERMAS, J. *Facticidad y Validez: sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso*. Trad. Manuel Jiménez Redondo. Madrid: Trotta, 1998. Rather than that one linked to the thinking expressed in GOLDSCHMIDT, J. *Princípios Gerais do Processo Civil.* Belo Horizonte: Líder, 2002.

[31] Adopted by the New CPC: THEODORO JR, H; NUNES, Dierle; BAHIA, A; PEDRON, F. *Novo Código de Processo Civil: Fundamentos e sistematização*. cit

The strength of a court decision (*jure imperii*, characteristic of state acts) should not change the normatively determined cooperative environment, or induce the permission of asymmetry between parties to an action, a common finding in statist discourses since the late nineteenth century.[32]

Not even from a romantic view that would lead others to believe that people involved in a suit, by ties of solidarity, intend to get to the most correct result for the sake of the legal system. This utopian procedural solidarity does not exist (nor has it ever existed): parties want to win and the judge wants to reduce his heavy workload. The problems are the costs of non-cooperative activity.

From a counterfactual perspective (inhibitor and corrective of such behaviours), this is a normative democratic reinterpretation of cooperation with a co-participative profile, which takes the adversarial principle rather seriously as an influence and no surprise, as another way to ensure the influence of all parties in shaping and fulfilling decisions, and to inhibit detrimental acts to the cause practiced in bad faith.

The normative correction that derives from co-participation, takes away statists views and tries to excel in behaviour objectively linked to procedural objective good faith.[33]

Therefore, the procedure should, within this mistaken interpretation view, serve to

[32] This is not about Klein's conception according to Picardi's opinion, based in Böhm: "In sostanza il modello austriaco si caratterizza, secondo Böhm, per una forma di collaborazione attiva fra giudice e parti nella ricostruzione dei fatti. Qualora questa collaborazione non si realizzi in concreto, interverranno – in via suppletiva o integrativa – i poteri istruttori del giudice. Si tratta di un delicato problema di contemperare i poteri delle parti con quelli del giudice, problemi che si porrà anche in altri ordinamenti e sui quali si tornerà nel prosieguo di questa relazione."(PICARDI, Nicola. *Le Riforme Processuali e sociali di Franz Klein. cit.*). This alleged collaboration does not automatically lead to a cooperative procedural environment, but rather reinforces the survival of parties under a compensating role of the magistrate, that in practice, generates decisionistic behaviours that do not contribute to better efficiency in the procedural system, nor aid in the legitimacy/effectiveness of law, especially when law starts to be co-opted by economic and administrative macro-interests. Such dangerous co-optation is noticed by Picardi: "Il tramonto della sovranità statuale non può non riflettersi sul *diritto*. Il rapporto fra Stato e diritto, del resto, non è un problema concettuale, ma soltanto un problema storico[..] L'esperienza attuale ci suggerisce un diritto che si forma e si estende «oltre lo Stato». Nella crisi del monopolio statuale della legislazione e della giurisdizione non è più lo Stato che orienta e controlla l'economia; è l'economia globalizzata, ed i suoi tecnocrati, che condizionano gli Stati. Ci troviamo in presenza di una forma di «policentrismo giuridico»." (PICARDI, Nicola. *Le Riforme Processuali e sociali di Franz Klein. cit.*).

[33] THEODORO JR, H et al. *Novo Código de Processo Civil: Fundamentos e sistematização*. cit.

legitimate judge's privileged pre conceptions, especially when one realizes their *cognitive biases*.[34]

American empirical studies show that even being experienced and well trained, the judge's vulnerability to a cognitive illusion in a solitary trial influences his/her actions.[35]

A simple example, found in researches and that clarifies this situation, is how prone would a magistrate be to ultimately reject a claim, considering that he had already rejected an injunction earlier. For a blocking effect it has been demonstrated that the judge is less likely to change his/her decision even in light of new information or after more time for reflection.[36]

Such cognitive blockage occurs because of the tendency to justify the initial allocation of resources (avoidance of rework), confirming that the initial decision was correct. This finding should induce the fostering of debate as a disrupting tool for illusions and cognitive biases. And here, in the Brazilian case, we could expand for the use of decision summaries and precedents without reflexion and as facilitating anchors of judgments, with the only private sense of numerically optimizing the number of decisions.

The National Centre for State Courts (NCSC), [37] for instance, has devised a pilot project in three states (California, Minnesota and North Dakota) to educate judges and court staff on the *biases* of the magistrate during decisions in matters involving prejudice. In fact, it was necessary to scientifically demonstrate to judges the implicit social cognitions, the problems with these cognitive biases (for taking the identified technical-procedural countermeasures) and the risks they bring to the adequate judgement, including increasing the importance of the appeal system. All these findings create the need for sizing up procedural countermeasures, for the purpose of removing and/or controlling the non-cooperative and contaminated behaviours of all procedural parties.

[34] NUNES, Dierle; BAHIA, A. Processo e república: uma relação necessária. Disponível em: <http://justificando.com/2014/10/09/processo-e-republica-uma-relacao-necessaria>
[35] KANG, J et al. Implicit Bias in the Courtroom. *UCLA Law Review*. v. 59, 2012. p. 1175
[36] LYNCH, K J. The lock-in effect of preliminary injunctions.*Florida Law Review,* Vol. 66. Ap. 2013. p. 779 -821.
[37] GUTHRIE, C et al. Inside the judicial mind. *Cornell Law Review*, 777, May, 2001, p. 778-829.

All these conceptions began to suffer consistent criticism from the moment that the (socializing) judicial role began generating adverse fruits in concrete situations, not to mention the risks of decisionism and arbitrariness.

It is clear, therefore, that the trend to overcome both the liberal model, by diminishing the power of the judge, as the authoritative social model of solitary exercise of rewarding application of Law by the judge, reducing the endoprocedural space for discussion, and technical function developed by the parties and their lawyers, which often imposes on them a mere position of subjection. [38]

Having said that, it has been shown to be completely incompatible with a democratic perspective to proceed with a merely functional search for productivity, reducing the procedural role, quite typical to procedural neoliberalism.[39] All this perception only demonstrates the impossibility to perform a segmented analysis of the procedural system and the behaviour of its parties.

The establishment of focal points and centrality, be it in the parties, the lawyers or the judges, does not fit the democratic profile of the States of Law of high modernity.

Thus, just as Klein urged procedural experts in the early twentieth century to take a new position for the analysis of procedural law, it is paramount to provoke modern jurists, especially in Brazil, to new perspectives and new concerns that transcend a legal and dogmatic analysis of our procedural system.

Paradoxically, procedural science remained oblivious to this perception and only recently began to perceive the qualitative change of litigiousness and the importance of constitutionalizing the rights and the procedure.

[38] CIVININI, M. Poteri del giudice e poteri delle parti nel processo ordinario di cognizione. Rilievo ufficioso delle questioni e contraddittorio. *Il Foro Italiano*, p. 3, 1999.

[39] For criticisms about procedural neoliberalism cf. PICARDI, Nicola; NUNES, Dierle. *O codigo de processo civil brasileiro, origen, formação e projeto de reforma*, in "Revista de Informação Legislativa", 2011. NUNES, Dierle. *Processo jurisdictional democrático.* cit.

However, until recently, the vast majority of thinkers were attached to a technical perspective, that concerned itself with the old dilemmas of speed and efficiency, without realizing qualitative changes in the discussions. Increased productivity used to be sought almost exclusively, turning a blind eye to the fact that all speculations of procedural science should be considered having citizens and their fundamental rights as its hinge point, thus the realization of their rights would be its ultimate goal.

Since the 1990s, and the Washington Consensus, Brazil has tried to seek the implementation of the neoliberal proposal for seeking a quantitative efficiency of justice in the face of new requirements imposed by the IMF and World Bank.

However, after 1988 and the assumption of the paradigm of the Democratic Rule of Law, one has to keep in tension (not in opposition) liberal and social conceptions, and the Security - Celerity binomial. If previously exclusive, they are now complementary.

It would no longer be possible to reduce the object of procedural science to dogmatic debates about the construction and reform of legislation (Code); legislation is but one chapter in the discussion, along with much more complex issues about the previously discussed new roles taken over by the Judiciary and the resulting need to rethink its mode of operation and management.[40]

In current times, once one realizes that we not only deal with bipolar cases (one author - one defendant) in property claims, but with multifaceted processes (involving litigation of public interest: land issues, consumer, health, minorities, environment, among other issues) with various stakeholders, we realize the need to expand the focus of the analysis.

Cases involving judicial interference in the organization and operation of public administrative officials, for instance, in charge of subsidizing and planning medical drug supply, have become common in Brazil, however the approach is no longer focused on the judge, but

[40] As mentioned in many other opportunities, v.g. NUNES, Dierle; BAHIA, A. Por um novo paradigma processual. *Revista FDSM*, Pouso Alegre, n. 26, p. 79-98, jan.-jun. 2008.

rather on the active dialogue among all those involved (co-participation), also reducing risks. The deliberative model is being trusted, with concentrated adversarial practices and participation of all stakeholders, experts and members of the public administration in the negotiation for the best possible solution, under temporary and transparent conditions. A renewed procedural logic is being deployed.

Just as Klein warned the thinkers of his time and ushered them towards an interpretative rupture, there is an urge to promote a diverse invitation to today's procedural experts in order to interpret the procedural legal system in a constitutional democratic vision, causing the hitherto prevailing paradigm to shift (interpretive horizon in silence), especially when all efforts at discussion in Brazil are directed to the mere reading of the New CPC, just recently sanctioned.

4. Interpretation of the New CPC: co-participation and polycentrism

We need to open up to a panoramic view of our legal system, its dilemmas (and potential solutions) and in which the constitutional procedure[41] will become one of the major guarantors for the granting of rights to citizens and become a shield against the decisionistic exercise of power.

No matter how deeply the principles and models of constitutional procedure are studied, it is still absolutely imperative for us to envision the substance and fundamental rights basis that is embedded in each procedural form and that the technique and practice be conceived and implemented within this assumption that favours more effective solutions for the new dilemmas that our system has been experiencing.

For quite some years now a third interpretation route has appeared in our midst, one that seeks to break with the old dichotomy, discussed earlier (Statism versus Privatism), by means of

[41] About the constitutional procedure. Cf. BRÊTAS DE CARVALHO DIAS, R. *Processo Constitucional e e Estado Democrático de Direito*. Belo Horizonte: Del Rey, 2010.

a *normative theory of co-participation*, better explained at other opportunities[42], and supported by the set of principles and premises of the New CPC.[43]

That being so, it would be more acceptable to read the new dogmatic model (New CPC) raising the same struggles of the past. The moment calls for sobriety, reflection and a panoramic look at the Brazilian legal system so that we can really evolve towards an effective procedural democratization anchored in the adequacy of the constitutional procedure.

In the realm of procedural technique,[44] Picardi acknowledged the existence of the so-called "procedural polycentrism" in which

> (...) L'attività è giurisdizionale strutturata necessarily eat process, inteso eat sottospecie del procedure, cioè eats procedure struttura polycentric ed the dialettico svolgimento (cfr. Artt. 111 and 24 Cost. And 101 CPC). Il process è polycentric poiché coinvolge Soggetti diversified, ognuno dei quali ha una particolare collocazione and svolge un Ruolo specifico. Alla struttura soggetivamente complessa corrisponde poi one svolgimento dialettico.[45]

The renewed "working community" should keep the relationship between procedural parties from remaining as a conflict of categories, [46] aside from outlining in the procedural doctrine the idealization of the procedural polycentrism,[47] which elides any conception of protagonism.

[42] NUNES, Dierle. *Direito constitucional ao recurso:* da teoria geral dos recursos, das reformas processuais e da comparticipação nas decisões. Rio de Janeiro: Lumen Juris, 2006. NUNES, Dierle. *Processo jurisdicional democrático*. cit.
[43] THEODORO JR, H. et al. *Novo CPC: Fundamentos e sistematização*. cit.
[44] Cf. NUNES, Dierle. *Processo jurisdicional democrático*. cit.
[45] PICARDI, Nicola. *Manuale del processo civile.* cit. p. 208.
[46] CAPONI, R. Note in tema di poteri probatori delle parti e del giudice nel processo civile tedesco dopo la riforma del 2001. *Atti del XXV Convegno Nazionale*. Milão: Giuffrè, 2007. p. 274.
[47] TARUFFO, M. *Giudizio*: processo, decisione. Sui confini: scritti sulla giustizia civile. Bologna: Il Mulino, 2002. p. 160.

And although there is a unique conception of the socializing dimension,[48] the relationship between the parties to a procedure happens to be revisited when seeking to escape their own degeneration. As Wassermann highlights,

> Beyond some shifts in the power relationship between the judge and the parties, the procedural model of the Social Rule of Law consists of changes in the communication between the court and parties. The requirement of a procedural debate surpassed the model of the silent judge and also put into disrepute the monologist kind of judge [solipsistic], to whom the performance in court is a roleplay during which he/she plays a role, giving those who take part in the process the single ability to act as adjuvants [to him, the judge]. Discussions on legal issues and factual issues are not amenable to separation in the process, but influence each other. [...] as the most modern procedural science, allowed to determine how open and argumentative communication between all those who take part in the process with regard to information, opinion formation and decision-making deliberation.[49]

The adoption of a cooperative conception (*Kooperationsmaxime*) wouldn't be allowed to authorize a search for the truth by the protagonist judge, but a relationship between subjects that respects the division of roles and the resulting polycentrism.

One of the foundations of the democratic perspective, brought in by the New CPC, lies in maintaining the tension between liberal and social perspectives, imposing that the working community should be reviewed in both polycentric and co-participative perspectives, ruling out any protagonism and being structured from the constitutional procedural model, leading to the coexistence of guiding and managerial powers of the judge, with a renewed private autonomy

[48] One cannot deny that the so called "working community" is born with Klein and, as Wassermann highlights it, within a social perspective. WASSERMANN, R. *Der soziale Zivilprozeß*. Neuwied: Luchterhand, 1978. p. 88.
[49] WASSERMANN, R. *Der soziale Zivilprozeß*, cit., p. 88.

of the parties and lawyers (as in procedural negotiation clause. - Article 190),[50] through the adversarial parameters as a guarantee of influence (Article 10)[51] and structured basis (art. 489)[52] that will foster the best debate in building the decision, and may allow the reduction of resource rates and impose the reduction of procedural rework to the extent that everyone should exercise their activity with a high level of responsibility in the first place.

The new CPC can only be interpreted in its unity, its fundamental norms and the normative theory of co-participation, in such a way that one cannot interpret/apply dispositions over its core without considering its principles and the necessary assumption of a procedural polycentrism.

Prof. Picardi's insight about polycentrism proves essential in overcoming statalistic thinking and in adopting a truly democratic model. Having said that, this is the invitation for all lovers of procedural law to open themselves up to overcome the old dichotomies.

[50] Vide note 7.
[51] Vide note 13.
[52] Vide note 21.