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The Public and the Private in Dispute Resolution. Reflections for a Comparative Dialogue on the "Public Values" of Adjudication*

Lo público y lo privado en la resolución de controversias. Reflexiones para un diálogo comparado sobre los «valores públicos» del proceso civil

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Abstract: The purpose of this article is to analyze what is at stake when debating "the private" and "the public" in civil litigation. It does so by presenting, for an English-speaking audience, the Wach/Klein debate, which took place in Europe between the nineteenth and twentieth centuries and centers on the so-called "social function" (*Sozialfunktion*) of adjudication, and briefly comparing it with contemporary discussions, especially in the U.S. Indeed, surprisingly, that debate has received minimal attention in the common law academic community. Nonetheless this article argues for, and seeks to show, the common ground of the political and theoretical issues raised.

The article is divided into two parts. The first part (paras. 1-4) establishes the theoretical coordinates, referring especially to current U.S. discussions. The second part (paras. 5–9) delves into the historical contrast between the procedural philosophy advanced by A. Wach, that is procedural liberalism, and F. Klein's advocacy of the "social function" of civil legal processes, linking these ideologies to those outlined in the first part.

Overall, this contribution seeks to trace an arc across two distant legal traditions and epochs, uncovering some unexpected parallelisms between past and current civil procedural scholars, and connecting historical considerations with modern discourses on civil justice policies.

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Resumen: El propósito de este artículo es analizar qué está en juego cuando se debate acerca de «lo privado» y «lo público» en la resolución de controversias. A este fin, se presenta —pensando en una audiencia angloparlante— el debate Wach/Klein, desarrollado en Europa durante los siglos XIX y XX, y centrado en la denominada «función social» (*Sozialfunktion*) del proceso civil, comparándolo brevemente con algunas discusiones contemporáneas en los Estados Unidos. En efecto, de manera sorprendente, dicho debate ha recibido muy escasa atención dentro de la comunidad académica del common law. Este artículo sostiene y procura demostrar la existencia de un terreno común en relación con los problemas políticos y teóricos planteados.

El artículo se divide en dos partes. La primera (secciones 1-4) establece las coordenadas teóricas, con referencia a los debates actuales en los Estados Unidos. La segunda (secciones 5-9) profundiza en el contraste histórico entre la filosofía procesal desarrollada por A. Wach —esto es, el liberalismo procesal— y la defensa por parte de F. Klein de la «función social» del proceso civil, vinculando dichas ideologías con aquellas delineadas en la primera parte.

En conjunto, esta contribución busca trazar un arco entre dos tradiciones jurídicas y épocas distantes, revelando ciertos paralelismos inesperados entre estudiosos del proceso civil del pasado y del presente, y conectando consideraciones históricas con discursos modernos sobre políticas de justicia civil.

Palabras clave: Proceso civil, teoría general del proceso, historia del derecho, derecho comparado, litigación.

I. FIRST PART

I.1. INTRODUCTION: TWO WAYS OF UNDERSTANDING THE PUBLIC NATURE OF DISPUTES AND THEIR RESOLUTION

This article methodologically assumes that the ways in which legal disputes are resolved are closely connected to the ways in which they

are originally understood and conceived. Indeed, historically and across legal systems, civil conflicts oscillate along a sort of continuum, ranging from being seen as purely private matters to being regarded as issues of public importance. Correspondingly, the legal procedures employed to resolve them also shift from being considered mechanisms tailored to private interests to being conceived as addressing broader public concerns. There are, basically, two models—in the sense of "abstract theorizations"—of civil processes.

To better understand this assumption, it is useful to take a step back.

As a matter of general fact, civil controversies (at least some of them) possess a disruptive potential. If left unresolved, they can damage relationships, opening the door to revenge, violence and economic instability. Both the dispute itself and the manner in which it is addressed are, therefore, a matter of concern that potentially affects the community as a whole. This awareness is widely shared and transcends legal cultures. At their core, legal systems exist precisely for this reason: to prevent conflicts in the first place, and to provide an institutionalized way to manage and end them once they have occurred. In this respect, and in a very initial sense (a "weak" one), conflict resolution procedures always fulfill a public function. In modern legal orders, States offer a public forum (adjudication) and a final, binding solution (*res judicata*) to a dispute, not only for the benefit of the disputing parties, but also in order to avoid the potential escalation of violence and the disruption of the orderly development of affairs–and thus for the benefit of society at large. Under this first conceptualization, social peace is considered as the primary purpose of procedures. Or, differently stated, the public interest lies not in the specific manner of resolution, but rather in the fact that the dispute is conclusively (and possibly rapidly) resolved.

This is just one very general way to talk about the "publicness" of dispute resolution procedures. However, there is another sense in which one may speak of this publicness in a narrower—and indeed, stronger—way. This second perspective recognizes that, sometimes, private conflicts may implicate some public interests beyond the mere cessation of the controversy. For instance, we may not wish for a contractual conflict between a large corporation and its consumers, or even between two giant companies, to be resolved in just *any* manner, but rather in accordance with the law, for the broader social or economic or political consequences it may have. Similarly, we would not want a mass tort controversy, such as one involving a pharmaceutical product, to be decided through procedures that reflect the imbalances of power at play, but instead through those capable of achieving a correct result, both procedurally and substantially. The matter discussed in those lawsuits might be said to be of public importance. Such cases are numerous in

today's world: from civil rights or constitutional disputes to consumer and mass-tort class actions, from financial to investment conflicts, from labor to bankruptcy cases, from environmental damages to the emerging global phenomenon of Climate Change Litigation.[1] The same may be said whenever a non-disposable right is at stake, as in family law when a minor is involved, *etc*. In all such scenarios, the public interest extends to the outcomes, too, namely to the fact that the law (even when it is *private law*) is duly applied and actually enforced in each case. In this view, conflict becomes an occasion for the "reassertion" of legal norms within the community.[2]

This perspective underscores that the manner in which disputes are publicly resolved is of paramount importance as the procedures employed must be structured to achieve a substantially correct result in accordance with the law. Consequently, the design of procedural mechanisms must be instrumental in, and functional to, achieving a legally just final resolution.[3]

I.2. "WHOSE DISPUTE IS IT?"

As we have seen, the question is first and foremost about the nature of the conflict itself. In the common law (and particularly U.S.) literature, this has received the most extensive reflection. This is due, if we may say so, to a "political theory" reason, namely that in American common law, more than elsewhere, private litigation has played a "bottom-up" regulatory function, *vis-à-vis* other forms of regulation (for example, public, "top-down" ones, more typical of the Continental tradition, such as legislation or administrative-bureaucratic regulation).[4] However, the following way of approaching it can and should be generalized.

To address this issue, I will draw on the work of one of the most important U.S. procedural law theorists, Carrie Menkel-Meadow. In a path-breaking article dedicated to dispute resolution theory, she provocatively asked "*whose dispute is it?*" (Menkel-Meadow, 1995). When, within a

1 For an example of this dualism, between the private and the public, in this field, e.g., Kysar (2018), and Rossi and Ruhl (2023).

2 In this sense, all law would ultimately assume a public character. The broader question concerns the public function of private law, as it may be argued that private law contributes, as much as public law, to shape the structure of social life according with a particular vision. The discussion transcends the object of this paper. However, see Lucy and Williams (2013) at 52: "Think, again, of contract and tort, equity and trusts, personal and real property. While these areas of law surely protect various 'private' interests individuals have, and allow individuals to achieve various goals, is it not equally true that all members of the community have an interest in these areas of law functioning in those ways? If so, then private law, no less than public law, is a matter of public concern, an interest of, and of relevance to, each and every member of the community in which it exists. And, if all of a community's law is of interest and relevance to all members of that community, then all law is in one sense public (law)." *Cf*. also Papayannis (2016); and Correa-Robles and Pereira-Fredes (2022).

3 On what makes a legal decision "just" (i.e., "correct"), Taruffo (2020).

4 This is, notoriously, a distinct feature of American civil litigation and society. See Kagan (2002) and Viscusi (2002).

society, a legal conflict arises, who does it "belong to"? In her essay, the dispute is treated as a kind of property, an object that, like a physical item, can be possessed and managed by its "owners." This metaphor is a powerful one. It introduced a novel methodology that permits us to look under a genuinely political light at the problem of the private/public distinction in dispute resolution. The fundamental question it raises is: does a dispute belong solely to the parties actually involved (or all those who might be affected by its effects) or does it belong to society at large? And what determines the answer?

Here is how Carrie Menkel-Meadow (1995) frames the problem:

> For those […] who see adjudication as our public discourse, a case, once filed, becomes the property of the polity and is the *matériel* out of which we fashion our social, legal, political, and maybe even moral contracts. For those who regard our legal system as a public service for private dispute resolution, or as a "democratic and participatory" party-initiated system, the dispute and its resolution remain the property of the parties and can be removed from the system in any way, as long as the parties consent. In a sense we could ask: "Whose Dispute Is It, Anyway?" To whom does a dispute belong when it enters the legal system? Whose "property" is a particular dispute, and who should decide how it should be treated? (pp. 2679-2680).

By posing these questions, Menkel-Meadow had in mind defending private *ADR*, that is out-of-court means of solving disputes (and mediation in particular), against its critics—such as, as she explicitly states, the legal philosopher David Luban—who opposed the privatization of civil justice, i.e., the tendency of taking dispute resolution away from public fora and outsourcing it to private entities (Luban, 1995). Her aim was to highlight the existence of two distinct concepts of justice: one that is public, achieved according to established laws ("formal justice") and the other, by no means less worthy, that is private, based on parties' compromise and achieved through settlement ("substantive" or "informal" justice). In the context of a "process pluralism," which posits that "each dispute has its own best way to be resolved," her argument is that if we consider that a certain dispute belongs to the parties, then they alone should have the right to judge its resolution, and no one else (nor the State or the society) (Menkel-Meadow, 2024). "Our dispute" would mean "our justice" (Menkel-Meadow, 1997).

In contrast, adopting the opposite stance—namely that controversies, once they have occurred, belong to the public sphere—leads to the conclusion that they should be solved publicly and justly according to the law. Under this public view—commonly associated, in the United States, with the works of Owen Fiss (1984), Judith Resnik (1994,

2003, 2014), David Luban (1995) and more recently Alexandra Lahav (2015, 2016, 2017),[5] among others, and, in England and Wales, with the ideas of Hazel Genn (2009, 2013)[6]—controversies are primarily seen as occasions for courts to articulate, apply, and enforce the law. When judges publicly determine rights and obligations, they do more than put an end to a conflict: they re-affirm the law's authority and its significance to the community. The specific conflict serves therefore as a representative instance for future adjudications. The specific legal judgment radiates its effects beyond the immediate dispute. It might potentially enunciate a new law or develop a new doctrine, clarify the meaning of an existing rule or offer a new interpretation of it, or simply reinforce its validity—all of which are public functions. Cases produce precedents. And precedents, in their capacity as public goods, certainly transcend private interests and are not something that can be "owned" and managed by individuals.[7]

Today, globally, these two perspectives seem to coexist at once, giving rise to a situation of "process pluralism." On the one hand, virtually all judicial systems now encourage, or somehow even force, out-of-court mechanisms to solve small claims or claims lacking particular legal or social resonance. O it is my view, ordinary courts are assuming a growing "global governance" role in sensitive matters that have wide reach. It might be argued that court adjudication is slowly transforming into a venue where social fractures are politically mediated, due to the gaps in political authority in particularly sensitive areas. This trend is particularly evident, e.g., in Climate Change Litigation, which exemplifies how courts are taking on responsibilities that extend beyond conflict resolution or the strict application and enforcement of existing laws (especially tort law) and are attempting to implement new policies (strategic litigation) (Giabardo, 2021). It may be therefore argued that there is a global, *de facto* tendency to entrust civil courts with concentrating on socially or politically sensitive, or legally important, questions, while relegating to private and confidential means the solution of day-to-day controversies.

I.3. SOME NORMATIVE IMPLICATIONS OUTSIDE AND WITHIN ADJUDICATION

Those two theoretical approaches about the nature of controversies carry multiple practical consequences for the methods used to resolve them, outside and within the realm of formal, public adjudication.

5 This contribution was translated into Spanish in 2024. On this, see Giabardo and Tarifa Dianderas (2023).
6 See also Mulcahy (2013).
7 I have explored these public functions in Giabardo (2023). See also, Giabardo and Tarifa Dianderas (2023).

On the one hand, outside adjudication, the public vision entails that arbitration, mediation, conciliation, and other extrajudicial mechanisms are understood as means that might, in the long run, deprive legal systems of the material on which they are built (i.e., courts' decisions) and are therefore something that should be at least looked at with skepticism, if not openly opposed. The opposite is true for those who endorse a more private posture: mediation and all the variety of extrajudicial means should be encouraged, normatively supported and praised for their empowering and democratic potential.

On the other hand, within the realm of civil procedure itself, these competing visions have many practical effects, too, on the ways judicial processes are designed, arranged, and structured.[8]

Indeed, almost every feature of procedural law is influenced by these opposing philosophies: the powers of judges and the scope of judicial case management, the duties imposed on the parties (e.g., the duty to tell the truth, the duty to cooperate with the court and with each other, etc.), the regulation of evidence, the "flexibilization" and contractualization of the rules of litigation by parties' agreement, the structure of appellate review, the access to supreme courts, and so on.[9] For example, the ongoing global discussion on procedural agreements reflects these tensions.[10] Should litigants have the autonomy to shape aspects of "their own" process in courts as they please? Could established civil procedural rules be altered and arranged differently by parties' mutual consent? And if so, with what limitations, if any? These questions have received different responses in different jurisdictions, and I will not address them here specifically. However, to me, the issue could be reduced to its simplest dimension in this way: if disputes are considered merely private affairs the issue could be reduced to its simplest dimension in this way: if disputes are considered merely private affairs (i.e., if neither the State nor the community has an interest in the way litigation is conducted, not even in the content of the final decision), then there should be few, if any, restrictions on the ability of parties to modify procedural rules. "Our dispute" would mean not only "our justice," but also "our rules" for achieving a resolution.

On the contrary, if the solution to a controversy is considered as something that concerns society at large (because it has an interest that the law is correctly applied to accurately established facts, or that

8 This is the perspective most relevant here, since the Wach/Klein debate presented in the second part was entirely about the structures and functions of State adjudication. Their disagreements were not about the advantages or the drawbacks of public adjudication *vis-à-vis* alternative means, but rather about models of arranging civil processes. Their perspectives were both rigidly state-centered. On this debate, Pérez Ragone (2014).

9 Cavani and Castillo (2021).

10 For a recent comparative overview on this issue, Schumann Barragán (2022), and P. Fonseca (2017). In the United States legal scholarship, critically, Davis & Hershkoff (2011), and Effron (2018).

the precedents set are fair), then the rules that govern public processes should be generally considered as mandatory and not subjected to party negotiations. With, of course, all the nuances that lie between these two extremes.

I.4. FROM MIRJAN DAMAŠKA'S RECONSTRUCTION BACK TO THE WACH-KLEIN DEBATE

Any analysis of the distinction between "the public" and "the private" in dispute resolution must address the dichotomy between two types of legal processes, that is either "conflict-solving" or "policy-implementing." This dichotomy is in its essence political, as it is influenced by the varying tasks assigned, from time to time, to state power within a given society.

This terminology and complex interplays have been notoriously introduced and thoroughly investigated by Mirjan R. Damaška in his seminal book *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (Damaška, 1986). To summarize: in his comparative inquiry, Damaška elegantly binds together political ideologies, legal sociology, and comparative institutional practices of judicial administration, in order to make intelligible the variety of the procedural models existing globally. He argues that contrasting views about the duties of States and governments (i.e., political ideologies) entail contrasting ideas about the role of law and conflicts in societies (i.e., legal sociology), which in turn implicate divergent structures and rules governing the administration of justice, either criminal or civil (i.e., comparative institutional policies).

More specifically, Damaška famously argued that reactive or minimalist governments[11]—exemplified by the United States—are traditionally associated with conflict-solving procedures, mostly characterized by adversarial litigation and not concerned with the content of the final decision. In contrast, more active governments[12]—such as, emblematically, dictatorships—are commonly associated with policy-implementing procedures, whose first and foremost goal is, indeed, to translate into practice the content of the nation's policies. Between these two ideal types, there exists a spectrum of infinite variations.

This is of course an oversimplification of a much more intricate and detailed reconstruction—that also includes, for example, the role of different types of "attitudes" towards authority (whether hierarchical or coordinate [Damaška, 1986, part VI, p. 181]). However, even from

11 That is, governments whose disposition is merely "to provide a framework for social interaction" (Damaška, 1986, c. III, p. 71). Consequently, this State "does only two things: it protects order, and it provides a forum for the resolution of those disputes that cannot be settled by citizens themselves" (p. 73).

12 That is, governments whose disposition is "to manage society" and to transform and change it from the top-down (Damaška, 1986, p. 71).

this brief description it is possible to grasp the intimate link existing between political climates and the different forms of thinking about conflicts and their resolution. The message of the book is that conflict resolution problems are political, rather than merely technical and value neutral. Procedural choices are often influenced, perhaps unconsciously, by political ideologies, understood as a broad set of attitudes and beliefs about society.

It is in such a theoretical framework that the late nineteenth century European debate between Adolf Wach and Franz Klein should be contextualized and understood. Just like in Damaška's reconstruction, that doctrinal battle exemplifies the opposition between a legal process focused on dispute resolution, largely left to the parties' autonomy (championed by Adolf Wach), and the other one (advocated by Franz Klein), oriented towards the enforcement and thus the practical realization of "abstract will of the law" (as Giuseppe Chiovenda used to say).

That discourse emerged against the backdrop of two major political doctrines: European liberalism, on one side, and European, welfare-state ideology, on the other. In this respect, this debate adds an important element to the understanding that conflict resolution is intrinsically political.

The Wach/Klein debate has been important at least for two reasons.

a. The first is historical. Indeed, it is mainly with Klein's opposition to Wach's individualistic views that the awareness that adjudication carries out also social functions gained full theoretical recognition and visibility within the civil law tradition.

b. The second is comparative. The ideas discussed in that debate have had a tremendous influence over current codifications of civil procedural laws throughout Europe (not only in Germany and Austria, which were, respectively, the places where Wach and Klein worked, but also in France, Spain and Italy) as well as in Latin America. Their theoretical models have circulated and have been transplanted into the whole civil law tradition. Yet, despite the undoubted global importance for civil justice and the theoretical similarities between the problems addressed and the conceptual tools employed, this debate has received surprisingly little attention in the Anglophone legal literature.[13] The aim of Part II is to

13 See, however, the insights provided by Garth (1999), Frodl (2012), Koller (2014), Uzelac (2025), and Van Rhee (2012, 2025). For a concrete application of these doctrine, Števček and Gábriš (2020).

begin filling this gap, by offering a preliminary exploration and highlighting the underlying political connections.

II. SECOND PART

II.1. A TAXONOMY OF THE "SOCIAL FUNCTION" OF ADJUDICATION

Before entering into the debate, it is important to offer an overview of how the phrase "social function of adjudication" is used. For this purpose, I will refer to and build on Antonio Carratta's taxonomy, as outlined in a comprehensive article on this topic (Carratta, 2017, 2019).

In that work, three distinct meanings attributed to the expression "social function of adjudication" in the legal scholarship are identified.

a. The first one arose in Europe from the end of the nineteenth century to the mid-twentieth. The socio-political environment of that time was still dominated by liberal-individualistic ideas, but social views about society and law began gradually to become more and more popular. In that legal climate, when scholars employed the expression "social function of adjudication," they did so in a generic fashion, simply to oppose the new conception of civil procedure to the previous, liberal one. There, the word "social" simply equated with "public" or "collective." In this very first sense, the phrase simply meant that civil adjudication was viewed as a phenomenon that has a relevance for the whole community and not only for the individuals involved, as it is of interest for the entire society that, through the activity of courts, a just, efficient and effective enforcement of legal rights be reached (Carratta, 2017, p. 87). This might be called a "weak version" of the social function, to distinguish it from the second, and it is the version this article will focus on.

b. The second sense in which the expression "social function of adjudication" may be used refers to the necessity and capacity of procedural designs to represent an instrument of social promotion for lower social classes (Carratta, 2017, p. 88). Here the expression possesses a more distinctive, more precise and stronger meaning: adjudication is (i.e., should be) social as long as it fosters social justice and realizes social equality. Issues such as the costs of litigation, access to justice and legal aid for the underprivileged, as well as the enforcement of collective or diffuse interests through class actions, became principal concerns. "Accessibility" and "fairness" of court

procedures emerged as the guiding principles for the reforms enacted in that period across many Western jurisdictions.[14] This second notion was preponderant in the second half of the twentieth century and it was influenced by legal socialism, the jurisprudential doctrine dominant at that time, which sought, by and large, to promote equality and reduce structural disparities. This meaning gained full recognition with the global human rights movements that considered the principles of equality in a substantial (and not only formal) sense in many constitutions and supranational charters (leading to the "constitutionalization of civil justice"). This ideology lasted approximately until the crisis of the Welfare State, roughly until the end of the 1980s.

c. The third and last way of understanding the social function of adjudication considers civil procedure in the main as a means of supporting economic activity and the functioning of markets more generally (Carratta, 2017, pp. 89 ss. and 134 ss.). In this sense, the function of adjudication is evaluated primarily in terms of economic efficiency for citizens-as-customers, businesses, and international investments. If—politically speaking—the first notion was linked to the beginning of "The Social" period (in the sense used by Du. Kennedy [2006]) and the second one was preponderant in its most mature phase, this third notion is arguably linked to the rise of Neoliberalism.[15] This last version occupies a central place in current debates concerning the role of courts in today's societies and the justificatory narratives of the current waves of procedural law reforms. It is expressly embraced by various supranational organizations and institutions, such as the European Union, the former Doing Business Reports of the World Bank, and the World Justice Project —Rule of Law Index, when measuring the efficiency of the administration of justice of different legal systems.

II.2. ADOLF WACH AND "PROCEDURAL LIBERALISM"

Let us now turn, albeit briefly, to the two historical doctrines themselves.

The liberal conception dominated ideologically the studies in civil procedure in Europe in the nineteenth century. The best way to

14 See, e.g., Cappelletti (1971), Cappelletti and Garth (1978), and Chiarloni (1972).

15 As is known, Duncan Kennedy has proposed a periodization of legal thought and its "globalizations" divided into three phases. The period of Classical Legal Thought, characteristic of the second half of the nineteenth century, is followed by the social period ("The Social"), which in turn gives way to the current phase, whose defining features remain more uncertain and contested. For an emphasis on neoliberal politics as the distinctive mark of contemporary legal thought, see Tomlins (2015).

understand that view is to conceive it as the "procedural law side" of political liberalism, economic *laissez-faire* and individualism that marked so profoundly the epoch that goes roughly from the beginning to the mid-to-late nineteenth century.

This is not the place to deepen the wider significance of Liberalism. Suffice it to note that it developed as a political doctrine that affirms, at its core, the pre-eminence of individual rights over state power and, consequently, endorses a purely negative function of the latter.[16] By and large, that political and societal environment was marked by a primacy of the private over the public, of the individual over the community, the person over the group, the self over the social, competition over collaboration, and of single parts over the totality.

This political ideology had an impact on almost every domain of public life, and the administration of justice was no exception. The dominant principles of civil procedure were therefore consistent with the assumptions of general political life of that day. Just as in government action there was a preeminence of individual liberties over the prerogatives of public powers, likewise the litigation process was characterized by a preeminence of the parties' rights and by a minimal intervention of the judge. Just like the minimal State, whose objective was merely to enable individuals to freely act, without intervening, the objective of civil procedural rules was merely to oversee parties' free interplay. Civil process was considered to have the sole function of solving private disputes, without any further goals. For this reason, it should be treated as a private matter in the hands of the parties at dispute. Trial was a *Sache der Parteien* (literally, a "thing of the parties"), a phrase that has enjoyed lasting success.

In Europe, one of the most prominent advocates of this procedural ideology was the German jurist Adolf Wach (1843-1926), *Privatdozent* of Civil Procedure in many law schools across Germany (Königsberg, Tübingen, Bonn, Leipzig) and one of the first scholars to advance scientifically the doctrinal study of civil procedure.[17]

Wach's theory of controversy was truly liberal: controversies between individuals are, and should remain, extraneous to the State or society. Recalling Menkel Meadow's metaphor introduced at the beginnings ("whose dispute is it?"), the dispute "belongs" to the parties, and so does the process of adjudication—it is "their" process. The State has no

16 The political philosopher Robert Nozick (1974) famously called it the "night watchman State" or "minimal State."

17 On Adolf Wach's legal thought see Chiovenda (1993 [1926]). In Spanish, see the translation of Wach (2018 [1879]).

interest in the way disputes are solved, but just in the fact that they are solved (Wach, 1896, p. 52).[18]

At a technical level, procedural liberalism entailed two fundamental and distinct principles that are still in force today in many civil law codifications: the *Dispositionsmaxime* and the *Verhandlungsmaxime*. The first one roughly translates as the concept of "free disposability of the object of litigation" and the second one translates as the notion of "free disposability of means of proof" or "party control over allegations and proof" (jointly, *iudex iudicare debet secundum allegata et probata partibus*). How to frame the factual and legal questions and to determine the object of litigation, what piece of evidence to present and what not to present, what to hide and what to reveal and, more generally, how to conduct the process until its end should be in principle left to parties' free interplays and tactical decisions. The role of procedural legislation was merely that of providing a general normative framework within which parties could freely regulate their own conduct and, thus, that of recognizing their full autonomy.

It followed that the judge should be nothing more than a passive umpire. The conception of justice implicitly endorsed therefore was very similar, if not identical, to the "sporting theory of justice," attacked by Roscoe Pound in the United States (Pound, 1906, p. 738). Adjudication, it was said, is like a competition, or a game, in which the winner is decided not according to an external criterion, but by the parties' abilities and tactical skills. "May the best win" is the guiding formula. As James Goldschmidt (1874-1940)—a German civil justice scholar who strongly endorsed procedural liberalism—noted concerning this point, Wach's procedural law ideas represented the faithful transposition in judicial administration of the ideology of liberalism in politics: like in the political arena—he writes—the just and best legal solution should be considered as the one that automatically stems from the free competition of the parties (Goldschmidt, 1925).[19]

Since the State does not, and should not, have an interest in the way in which parties conduct "their own" process, it does not have an interest in the correctness of the final decision either. It followed that discovering the factual truth should not be a legitimate or deliberate aim of adjudication, but, at best, an *unexpected result* of it (Wach, 1896, p. 199).[20] There was no obligation for the parties to tell the truth. Civil

18 "der Civilprocess ist staatliche Privatrechtspflege, die Gewährung des Rechtsschutzes für Mein und Dein. Die Streitsache ist ein dem Staate fremdes, individuelles Interesse" ("Civil procedure is the administration of private law by the State, the granting of legal protection of what is mine and what is yours. The object at dispute is an individual interest, foreign to the State" [my translation]), reported by Carratta (2017, p. 91).

19 On Goldschmidt as a procedural liberal, see Calamandrei (1951).

20 "die Feststellung der Wahrheit ist […] nicht das Ziel des Civilprocesses und kann es nicht sein. Sie ist sein erwünschtes, aber nicht verbürgtes Resultat" (to ascertain the truth is […] not the aim of the

procedure was conceived as a morally neutral battleground. According to a famous maxim of procedural liberalism, a party in a civil lawsuit stands as one does in politics or in wars: no moral judgments are permitted (Goldschmidt, 1925, p. 292).[21] And similarly, as reported, the French jurist Raymond Bordeaux, writing in the mid-nineteenth century in his *Philosophie de la procédure civile*, understood litigation as a private war (*«une guerre privée»*) (Bordeaux, 1857, p. 15).[22]

The liberal view of adjudication informed most European procedural codes of that age. The first was the Napoleonic French Code of 1806 (inspired by liberalism, although drafted under Napoleon's dictatorship, antecedent to Wach's ideas), and then the Italian Code of 1865, the German *Zivilprozessordnung* of 1877 (which retained many features of the Napoleonic model and stood in clear continuity with it) and the Austrian one of 1872.

Liberal ideas are far from being dead in today's discussions. They especially regained popularity, in the late twentieth century, in the Ibero-American context. Civil procedure scholars such as Juan Montero Aroca in Spain (2004), Adolfo Alvarado Velloso in Argentina (2003), Eugenia Ariano Deho in Peru (2006), and in Italy Franco Cipriani[23] (1994, 1995, 2002, 2003a), among others, all based their scholarship on procedural liberalism, in its version known as "*garantismo*" ("guarantism") (Cipriani, 1994).

II.3. THE "SOCIAL FUNCTION" OF ADJUDICATION IN FRANZ KLEIN'S LEGAL THOUGHT

At the outset of the twentieth century, a completely opposite view of adjudication started to emerge. Not surprisingly, this change of perspective in the judicial administration was triggered by a radically new understanding of society and thus of the State's tasks.

Historically, towards the end of the nineteenth century, society grew in size and complexity. The modern industrial revolution was under way in Europe. Different domains of public life that were previously considered as isolated from one another started then to look like they were interconnected. Both old problems and new solutions assumed a collective dimension. Law itself became more complex, pervasive, ubiquitous. Legal rules began to increasingly occupy and regulate domains that were previously untouched by the law (Teubner [ed.], 1988). Slowly, the State ceased to be considered as "minimal", and

civil process, neither it should be. It is a desirable result, but not a result that is guaranteed" [my translation]), quoted by Carratta (2017, p. 105).

21 "*Es ist im Prozess wie im Krieg und der Politik*" ("It's in the process like in war and politics" [my translation]), quoted by Carratta (2014, p. 53, footnote 15).

22 The phrase is reported and quoted by Panzarola (2021; 2023, p. 391).

23 In Spanish, selected and translated by Eugenia Ariano, see Cipriani (2003b).

therefore indifferent to individuals' demands, and started to be seen as an active promoter of the concrete well-being of citizens. In this scenario, law played a crucial role. As a public tool, it was meant to trigger legal change, promote equality, and foster social justice, and the State was supposed to be the guardian and supervisor of the "*just*" application of the law for all its citizens.

Consequently, private conflicts were viewed as opportunities to realize the proper application of the law, and to provoke the transformation of society accordingly. Civil adjudication began to be understood as having the purpose of re-affirming in outer reality the legality that has been breached. In the Continental terminology: through the protection of individual "subjective rights" court adjudication was said to have the (public) function of re-stating and concretely translating the "objective law" ("the law as it is" or "the law in its entirety").

The major advocate of the social task (*soziale Aufgabe*) of adjudication was the Austrian jurist Franz Klein (1854-1926).[24] Franz Klein was initially a pupil of Anton Menger (1841-1906), who was a Professor of Law at Vienna University and the major exponent of legal socialism (*soziale Rechtslehre*), a movement loosely inspired by Marxist views. However, although quite radical in his ideas, Menger had no revolutionary goals. Rather, he considered traditional bourgeois institutions, such as legislation and courts, as leading instruments of reform and potential engines of progress towards the achievement of social justice.

Although Franz Klein, for his moderate ideals, should not be considered a legal socialist, he was deeply influenced by Menger's opinions on the transformative role of courts. In Klein's thought, the expression *Sozialfunktion* does not carry a "socialist" connotation (as it would later acquire, when adjudication came to be conceived as a tool to promote social justice) but simply denotes the public character of courts' institutional tasks. Klein's main interests were civil procedure and, later in life, legal sociology. He was a proponent, during his career, of progressive laws on housing policies, public health, company and labor law. He was *Privatdozent* of Civil Procedure and Roman Law and later served as a *Ministerialsekretär* in the Austrian Ministry of Justice (1906-1908, and then, briefly, in 1916). He is remembered as one of the drafters—and the true intellectual father—of the Austrian Code of Civil Procedure (1895), a code that made history of civil procedure and represents a landmark in the development of civil justice theories.

Franz Klein published in 1891, in Leipzig, his major work, titled *Pro futuro. Betrachtungen über Probleme der Zivilprozessreform in Österreich*

24 On Klein's procedural thought in the Italian scholarship, see Calamandrei (1925), Cipriani (1995), Chizzini (2011), Marinelli (2011), Trocker (2012) and Picardi (2012).

("Towards the Future: Discussions on the Problems of the Reform of Civil Procedure in Austria"), a collection of previous essays written by him, which had earlier appeared in the law journal "*Juristische Blätter*" (Klein, 1891). In this work, he delineated his ideas on civil justice and civil procedural institutions, in opposition to those of Liberalism. His view of civil procedure is indeed characterized by a more active role for the judge, most notably with regard to the exercise of fact-finding powers (*iudex potest supplere in facto*), acting as a "director in the substantive sense" of the proceeding, that is, with respect to the powers to determine the object of the dispute (*materielle Prozessleitung*) and not merely over the formal management of the procedural steps; by an obligation for the parties to cooperate actively with each other and with the judge in order to achieve a just resolution of the controversy (*Kooperationsmaxime*); and by a duty to tell the truth (*Wahrheitspflicht*) (Carratta, 2017).

These are principles that have shaped many contemporary codifications and inspire today the functioning of numerous legal systems, both in the civil law tradition and—albeit without direct derivation from Klein's thought—in common law systems as well. It would therefore not be wrong to speak of a partial convergence of contemporary procedural legislation in this respect.

II.4. SOME PARALLELISMS ON THE PUBLIC FUNCTION OF ADJUDICATION BETWEEN COMMON LAW AND CIVIL LAW

Starting from the analysis that has been carried out, in this section I will seek to demonstrate, although very briefly, some commonalities of concerns between the continental scholars of the past century who reflected on the "social function" of adjudication, and certain representatives of contemporary U.S. scholarship who valorize the public value of litigation (in particular, Owen Fiss, David Luban, and Alexandra Lahav), thus attempting to trace a sort of intergenerational and intercultural dialogue. I therefore wish to report some passages that, given their significance, serve this dialogue particularly well.

The first point of convergence concerns Klein's conception of civil controversies. He had the merit of looking for the first time at the lawsuit (*Rechtsstreit*) as a "social problem" (*soziale Übel*) (Carratta, 2017, p. 97; Klein, 1891, p. 39). Conflicts damage social cohesion, divert their resources away from far more productive uses, and hinder the correct and smooth functioning of the economy. Society, therefore, needs to resolve them correctly, as quickly as possible, without wasting public money and resources. Civil adjudication needs to be both effective and efficient. Effective, in the sense that the final judicial decisions must correctly apply the relevant (substantive) legal rule to the properly established

facts of the case; and efficient in the sense that it must do so with the least expenditure of (public and private) resources and in the shortest period of time. Thinking of a controversy as a social problem means that it concerns the entire social body. A legal dispute is like a wound; even if only an organ is damaged, it is the entire organism that suffers. This metaphor illuminates a first parallel with Alexandra Lahav's analysis on the importance of civil trials for American public life and democracy. When in her book, significantly entitled *In Praise of Litigation,* she writes as an opening line that "A lawsuit is the result of a tear in the fabric of society," she is adopting, so to say *unwittingly*, a Kleinian perspective (Lahav, 2017, p. 1). For her, enforcing the law (and not just solving the conflict) is one of the social goods adjudication produces. Indeed, as she puts it, litigation is itself a "social good" (Lahav, 2017, p. 148). This, despite all differences, resembles the posture of Klein who conceived adjudication as an institution aimed at the well-being of society (what he called a *staatlicher Wohlfahrtseinrichtung*).

Let us proceed further. Private conflict, in the public view, is a signal of deviation that should be fixed. Litigation is the means to correct it. Civil processes are therefore instrumental for the realization, in the outer world, of the will of the State (or of the will of the people), as embodied in legal texts. The law, when violated, needs to be re-stated and interpreted in those specific circumstances. This need, i.e., that adjudication should correct what has unfolded wrongly, is expressed in the United States by Owen Fiss, in his well-known article *Against Settlement*. Referring to courts as "reactive institutions"—that is, institutions that act only when called upon—he writes that civil adjudication is an "institutional arrangement" that uses state power to bring a recalcitrant reality closer to our chosen ideals (Fiss, 1984, 1086). What emerges clearly here is that the parties' initiative is placed in the service of a public good: the re-establishment of the law's values.

A comparable approach can be found among the Italian scholars who followed Klein's legal thinking. For example, the Italian jurist Emilio Betti (1890-1968), an admirer of the social function of adjudication, wrote that

> parties' interest is nothing but a means, through which the purpose of adjudication is achieved; the conflicting private interests are exploited as propulsive devices in order to satisfy the public interest toward the realization of the law for the resolution of the conflict. Giving the victory to the party that is right is not a private interest for the litigants, but a public interest of the entire society (Betti, 1936, pp. 4-5; Carratta, 2017, p. 124).[25]

25 "L'interesse delle parti non è che un mezzo, mercé il quale si raggiunge la finalità del processo, in quanto l'interesse privato in conflitto è messo a profitto quale congegno propulsore per soddisfare

And similarly, Francesco Carnelutti (1879-1965), one of the most influential Italian legal scholars of the last century, in his monumental *Sistema di diritto processuale civile* wrote: "The adjudication is not carried out in the interest of the parties, as the interest of the parties at dispute is a means by which the public scope of adjudication is realized" (Carnelutti, 1936, p. 216).[26] And in his *Lezioni di diritto processuale civile* he made an assertion that may appear quite radical: "It is not adjudication that serves litigants, but rather litigants serve adjudication" (Carnelutti, 1920, II, p. 142).[27]

All these statements, at least in spirit, do not seem far from what the legal philosopher David Luban expressed in his article *Settlement and the Erosion of the Public Realm* (1995) which highlights this function of adjudication in identifying social needs and giving them form, through and following the initiative of the parties:

> Instead of treating adjudication as a social service that the state provides disputing parties to keep the peace, the public life conception […] treats disputing parties as… an occasion for the law to work itself pure […] the litigants serve as nerve endings registering the aches and pains of the body politic, which the court attempts to treat by refining the law. Using litigants as stimuli for refining the law is a legitimate public interest in the literal sense […] The law is a self-portrait of our politics, and adjudication is at once the interpretation and the refinement of the portrait (Luban, 1995, p. 2638).

III. CONCLUSION

This article began with an observation: while I was studying the debate on the public function of litigation in the common law context (in particular, within the framework of a critique of the privatization of dispute resolution), I encountered a series of arguments that, despite the profound institutional, cultural, political, and legal differences, felt *familiar*. To me, they were similar to a European debate—presented here, inevitably, in a broad and certainly insufficient way—that dates back to the late nineteenth century, extends throughout the twentieth, and has had a tremendous influence both on the methodology of civil procedural scholarship and on the procedural codes currently in force across the civil law world. Nonetheless, it is almost entirely unknown to common law scholars. It was for this reason that I first sought to introduce these discussions to an Anglophone audience, using common

l'interesse pubblico all'attuazione della legge per la composizione del conflitto. Il dare ragione a chi ce l'ha, dal punto di vista sostanziale, non è un interesse privato delle parti, ma un interesse pubblico della società intera." On Betti's procedural thinking, see Carratta (2022).

26 "Il processo civile non si fa mai nell'interesse delle parti, in quanto l'interesse delle parti è un mezzo per il quale lo scopo pubblico del processo si attua."

27 "Non il processo serve ai litiganti, ma i litiganti servono al processo."

law categories, initially in 2019, at the Center for the Study of Dispute Resolution of the Missouri Law School, as part of the Annual Meeting of the American Society of Comparative Law, and finally set down in this article.

My primary aim was, and is, to bring civil and common law authors into dialogue. A dialogue that is both challenging and possible. Challenging from a comparative law viewpoint, given the "exceptionalisms" of the American legal context that must be carefully taken into account. Possible—as I have sought to show, briefly, in Par. VIII—as it demonstrates that certain theoretical concerns transcend jurisdictional boundaries and political sensibilities. The private/public continuum in dispute resolution is, in the end, a question of general legal theory. And that, ultimately, is what this inquiry has been about.

BIBLIOGRAPHY

Alvarado Velloso, A. (2003). *El debido proceso de la garantía constitucional*. Rosario: Zeus.

Ariano Deho, E. (2006). En los abismos de la «cultura» del proceso autoritario. In J. Montero Aroca (Ed.) *Proceso civil e ideología un prefacio, una sentencia, dos cartas y quince ensayos* (pp. 357-ss.), Valencia: Tirant lo Blanch.

Betti, E. (1936). *Diritto processuale civile italiano* (2nd ed.). Roma: Foro Italiano.

Bordeaux, R. (1857). *Philosophie de la procédure civile, mémoire sur la réformation de la justice*. Évreux: Hérissey.

Calamandrei, P. (1925). L'opera di Francesco Klein e il processo civile austriaco. *Rivista di diritto processuale civile*, *I*, 80-ss.

Calamandrei, P. (1951). Un Maestro di liberalismo processuale. *Rivista di diritto processuale*, *4*(1), 1-ss.

Cappelletti, M. (1971). Social and Political Aspects of Civil Procedure. Reforms and Trends in Western and Eastern Europe. *Michigan Law Review*, *69*(5), 847-ss.

Cappelletti, M., & Garth, B. (1978). Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective. *Buffalo Law Review*, *27*(2), 181-ss.

Carnelutti, F. (1920). *Lezioni di Diritto Processuale Civile* (vol. II). Padova: Cedam.

Carnelutti, F. (1936). *Sistema di Diritto Processuale Civile* (vol. I). Padova: Cedam.

Carratta, A. (2014). Dovere di verità e completezza nel processo civile. Parte prima. *Rivista trimestrale di diritto e procedura civile*, *LXVIII*(1), 47-ss.

Carratta, A. (2017). La "funzione sociale" del processo civile, fra XX e XXI secolo. In F. Macario and M. N. Miletti (Eds.), *La funzione sociale nel diritto privato tra il XX e il XXI secolo* (pp. 87-ss.). Roma Tre Press.

Carratta, A. (2019). La scienza del processo civile in Italia all'inizio del XXI secolo. *Diritto & Questioni Pubbliche*, *19*(1), 11-ss.

Carratta, A. (2022). L'eredità bettiana nel diritto processuale civile. In A. Carratta, L. Loschiavo and M.U. Sperandio, *Emilio Betti e il Processo Civile* (pp. 237-ss.). Roma Tre Press.

Cavani, R., & Castillo, A. (2021). Garantismo y publicismo en el proceso civil: un enfoque analítico. *Derecho PUCP*, (87), 433-ss. https://doi.org/10.18800/derechopucp.202102.013

Chiarloni, S. (1972). Diritto processuale civile e società di classi. *Rivista trimestrale di diritto e procedura civile*, *27*(1), 733-ss.

Chiovenda, G. (1993 [1926]). Adolf Wach. In *Saggi di diritto processuale civile (1894-1937)* (vol. I , pp. 263-ss.). Milano: Giuffrè.

Chizzini, A. (2011). Franz Klein e i patres della procedura civile. *Il giusto processo civile*, (3), 739-ss.

Cipriani, F. (1994). Autoritarismo e garantismo nel processo civile. *Rivista trimestrale di diritto e procedura civile*, (1), 24-61.

Cipriani, F. (1995). Nel centenario del regolamento di Klein (Il processo civile tra libertà e autorità). *Rivista trimestrale di diritto e procedura civile*, *50*(4), 967-1004.

Cipriani, F. (2002). Il processo civile italiano tra efficienza e garanzie. *Rivista trimestrale di diritto e procedura civile*, (4), 1243-1262.

Cipriani, F. (2003a). Il processo civile tra vecchie ideologie e nuovi slogan. *Rivista trimestrale di diritto e procedura civile*, (2), 455-ss.

Cipriani, F. (2003b). *Batallas por la justicia civil. Ensayos*. Lima: Cultural Cuzco.

Correa-Robles, C., & Pereira-Fredes, E. (2022). Derecho privado y proceso civil: más allá del interés individual. *Revista chilena de derecho privado*, (38), 173-ss. https://doi.org/10.32995/S0718-80722022645

Damaška, M.R. (1986). *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process*. New Haven and London: Yale University Press.

Davis, K.E., & Hershkoff, H. (2011). Contracting for Procedure. *William & Mary Law Review*, *53*(2), 507-565.

Effron, R. (2018). Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion. *Boston University Law Review*, *98*(1), 127-186.

Fiss, O. (1984). Against Settlement. *Yale Law Journal*, *93*(5), 1073-1090. https://doi.org/10.2307/796205

Fonseca, J.P. (2017), The Changing Role of Courts Between the Privatization of Adjudication and the Privatization of Procedure. In L. Cadiet, B. Hess, M. Requejo Isidro (eds), *Approaches to Procedural Law: The Pluralism of Methods, Study of the Max Planck Institute Luxembourg for International, European*

and Regulatory Procedural Law (vol. 9, pp. 147-ss.). Baden-Baden: Nomos Verlagsgesellschaft.

Frodl, S. (2012). The Heritage of the Franz Klein Reform of Austrian Civil Procedure in 1895 – 1896. *Civil Justice Quarterly*, *31*(1), 43-ss.

Garth, B. (1999). Franz Klein, Mauro Cappelletti, and the Mission of Comparative Procedural Scholars: opening lecture for International Association of Procedural Law. *Derecho PUCP*, (52), 555-563. https://revistas.pucp.edu.pe/index.php/derechopucp/article/view/6416/6472

Genn, H. (2009). *Judging Civil Justice*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139192378

Genn, H. (2013). What Is Civil Justice For? Reform, ADR, and Access to Justice. *Yale Journal of Law & the Humanities*, *24*, 397-417.

Giabardo, C.V. (2021). Climate Change Litigation, State Responsibility and the Role of Courts in the Global Regime: Towards a "Judicial Governance" of Climate Change? In B. Pozzo and V. Jacometti, *Environmental Loss and Damage in a Comparative Law Perspective* (pp. 393-ss.). London: Intersentia.

Giabardo, C.V. (2023). Valores públicos y proceso civil en el derecho comparado (Algunas reflexiones a partir de la obra de Eugenia Ariano). *Revista de Processo*, *343*, 427-450.

Giabardo, C.V., & Tarifa Dianderas, C.L. (2023). Una defensa de las funciones públicas del proceso. Una discusión a propósito de Alexandra Lahav, In Praise of Litigation (2017). *Revista Telemática de Filosofía del Derecho*, (26), 77-96. http://www.rtfd.es/numero26/03-26.pdf

Goldschmidt, J. (1925, [1962]). *Der Prozeß als Rechtslage: Eine Kritik des Prozessualen Denkens*, Berlin: Scientia.

Kagan, A. (2002). *Adversarial Legalism. The American Way of Law*. Harvard University Press.

Kennedy, D. (2006). Three Globalizations of Law and Legal Thought: 1850-2000. In D.M. Trubek, A. Santos (Eds.), *The New Law and Economic Development: A Critical Appraisal* (pp. 19-ss.), Cambridge: Cambridge University Press.

Klein, F. (1891). *Pro futuro. Betrachtungen über Probleme der Zivilprocessreform in Österreich*. Wien-Leipzig: Deuticke.

Koller, C. (2014). Civil Justice in Austro-German Tradition. The Franz Klein Heritage and Beyond. In A. Uzelac (Ed.), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (pp. 35-ss.). London: Intersentia.

Kysar, D.A. (2018). The Public Life of Private Law: Tort Law as a Risk-Regulation Mechanism. *European Journal of Risk Regulation*, *9*(1), 48-ss.

Lahav, A. (2015). Participation and Procedure. *DePaul Law Review*, *64*(2), 513-537.

Lahav, A. (2016). The Roles of Litigation in American Democracy. *Emory Law Review*, *65*(6), 1657-1704.

Lahav, A. (2017). *In Praise of Litigation*. Oxford: Oxford University Press.

Lahav, A. (2024). *En defensa de la litigación. Estudio sobre el valor democrático del proceso civil* [C. Tarifa, Spanish transl.]. Lima: Palestra Editores.

Luban, D. (1995). Settlement and the Erosion of the Public Realm. *Georgetown Law Journal*, *83*(7), 2619-ss.

Lucy, W., & Williams, A. (2013). Public and Private. Neither Deep nor Meaningful? In K. Barker, and D. Jensen (Eds.), *Private Law. Key Encounters with Public Law* (pp. 45-ss.). Cambridge: Cambridge University Press.

Marinelli, M. (2011). La concezione del diritto e del processo di Franz Klein nella Vienna fin de siècle. *Il giusto processo civile*, (3), 771-ss.

Menkel-Meadow, C. (1995). Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases). *Georgetown Law Journal*, *83*, 2663-2696.

Menkel-Meadow, C. (1997). When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals. *University of California Los Angeles Law Review*, *44*, 1871-1933.

Menkel-Meadow, C. (2024). Dispute Resolution as Civil Justice: The Evolution of Process Pluralism. In A. Bloom, D. Engel and R. Jolly (Eds.), *Research Handbook on Civil Justice* (pp. 113-ss.). Cheltenham: Edward Elgar Publishing.

Montero Aroca, J. (2004). El proceso civil llamado "social" como instrumento de "justicia" autoritaria. *Revista Iberoamericana de Derecho Procesal*, *6*, 15-ss.

Mulcahy, L. (2013). The Collective Interest in Private Dispute Resolution. *Oxford Journal of Legal Studies*, *33*(1), 59-80.

Nozick, R. (1974). *Anarchy, State, and Utopia*. New York: HarperCollins Publishers.

Panzarola, A. (2021). Considerazioni sul c.d. processo politico. *Judicium*, (March).

Panzarola, A. (2023). "Processo e democrazia": il garantismo processuale nelle lezioni messicane del 1952 di Piero Calamandrei. *Revista da Faculdade de Direito do Sul de Minas*, *39*(1), 369-ss.

Papayannis, D. (2016). *El derecho privado como cuestión pública*. Bogotá: Universidad Externado de Colombia.

Pérez Ragone, Á. (2014). El revisionismo garantista en el proceso civil a través de las ideas de Franz Klein y Adolf Wach. Precisiones sobre eficiencia y derechos procesales. *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, *42*(1), 523-551.

Picardi, N. (2012). Le riforme processuali e sociali di Franz Klein. *Historia et Ius*, (1). https://www.historiaetius.eu/uploads/5/9/4/8/5948821/picardi.pdf

Pound, R. (1906). The Causes of Popular Dissatisfaction with the Administration of Justice. *American Law Review*, *40*, 729-ss.

Resnik, J. (1994). Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century. *UCLA Law Review*, *41*, 1471-ss.

Resnik, J. (2003). For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication. *University of Miami Law Review*, *58*(1), 173-ss.

Resnik, J. (2014). The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75. *University of Pennsylvania Law Review*, *162*(7), 1793-1838.

Rossi, J., & Ruhl, J.B. (2023). Adapting Private Law for Climate Change Adaptation. *Vanderbilt Law Review*, *76*(3), 827-ss.

Schumann Barragán, G. (2022). *Derecho a la tutela judicial efectiva y autonomía de la voluntad: los contratos procesales*. Madrid: Marcial Pons.

Števček, M., & Gábriš T. (2020). The recast civil procedure and legacy of Franz Klein in the Slovak republic. *EJTS, European Journal of Transformation Studies*, *8*(2), 106-133.

Taruffo, M. (2020). *Hacia la decisión justa*. Lima: Zela.

Teubner, G. (ed.). (1988). *Dilemmas of Law in the Welfare State*. Berlin: De Gruyter.

Tomlins, C. (2015). The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy's Three Globalizations. *Law & Contemporary Problems*, *78*(1), 1-17.

Trocker, N. (2012). La concezione del processo di Franz Klein e l'attuale evoluzione del diritto processuale civile europeo. *Il giusto processo civile*, *1*, 31-78.

Uzelac, A. (2025). Comparative Studies of Civil Procedure. In M. Wo and C. van Rhee (Eds.), *Comparative Civil Procedure*. Cheltenham and Northampton: Elgar Pub.

Van Rhee, C.H. (2012). Harmonisation of Civil Procedure: An Historical and Comparative Perspective. In X. Kramer and C. H. van Rhee (Eds.), *Civil Litigation in a Globalising World*. Berlin: Springer.

Van Rhee, C.H. (2025). History of Civil Procedure. In M. Wo and C. van Rhee (Eds.), *Comparative Civil Procedure*. Cheltenham and Northampton: Elgar Pub.

Viscusi, W.K. (2002). *Regulation Through Litigation*. Brookings Institution Press.

Wach, A. (1896). *Vorträge über die Reichs-Civilprozessordnung: gehalten vor praktischen Juristen im Frühjahr 1879* (2nd ed.). Bonn: Adolf Marcus Verlag.

Wach, A. (2018 [1879]). *Conferencias sobre la ordenanza procesal civil alemana*. Santiago de Chile: Olejnik.

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