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Civil Judicial Activism and Civil Procedure

José Luís Bonifácio Ramos*

Associate Professor at the Faculty of Law, the University of Lisbon, Portugal

***Corresponding Author:** José Luís Bonifácio Ramos, Associate Professor at the Faculty of Law, the University of Lisbon, Portugal.*

ABSTRACT

This paper seeks to study aspects of judicial activism in civil procedure. In particular, this focuses on the acquisition of evidence, on procedural cooperation, the burden of proof, and the dynamic theory of burden of proof. Thus, despite the trends devaluing any rising protagonism in the activities of civil judges, there are aspects where the expansion in powers and the role of this procedural subject clearly emerge.

Keywords: *Judicial Activism, Acquisition of Evidence; Procedural Cooperation; Burden of Proof, Dynamic Theory of Burden of Proof.*

INTRODUCTION

GENERAL CONSIDERATIONS

In keeping with this recurrent analytical theme, we deem the study of judicial activism to be especially topical and extremely important from a proceduralist perspective. Thus, while law is not, and cannot be, whatever the interpreter might wish it to be[1], a judge engages in activism whenever he/she decides, according to his/her political, religious or even personal beliefs, to relegate positive law to a lesser level of importance.[2]Indeed, in any reflection on studies either of the judge's powers or of legal compliance in seeking to justify a particular action[3], this problem inevitably arises whenever the exercise of the judge's powers exceeds, or may have exceeded, that enshrined in positive law. In fact, the issue has risen so high in profile that there is even recognition that judicial activism has imposed itself as the predominant prevailing ideology of civil procedure[4]. We therefore need to appropriately reflect on this matter in order to ascertain whether we are now in the presence of activism in certain aspects of civil procedural law and, more specifically, whether regarding the acquisition of evidence or distributing the burden of proof.

INFORMAL ACQUISITION OF PROOF: A TYPE OF ACTIVISM?

As reflections on the extent of the judge's inquisitorial powers focus particularly sharply on the terms of gathering evidence[5], it becomes only natural to ponder on judicial activism in this context. In fact, initiatives taken by the judge may not always be clearly established in the law even while the magistrate has nevertheless played an active role in acquiring the evidence[6]. Accordingly, the magistrate

[1] Cf. LÊNIO STRECK, *O Que É isto: Decido Conforme Minha Consciência?*, Porto Alegre, 2010, p. 25.

[2] Cf. LÊNIO STRECK, *Verdade e Consenso: Constituição, Hermenêutica e TeoriasDiscursivas*, 4th ed., São Paulo, 2011, p. 598.

[3] Accordingly, the defence of the formal rules of procedure, advocated by GIUSEPPE CHIOVENDA, in order to avoid the judge's discretion, becomes particularly impressive. Cf. "Le FormenellaDifesaGiudiziale del Diritto" in *Saggi di DirittoProcessuale*, Vol I, Rome, 1930, pp. 367 ff..

[4] On this topic, GIOVANNI VERDE accepts that activism has been the dominant ideology in Italian civil procedural law for the last five decades. Cf. "Le Ideologie del Processo in un RecenteSaggio" in *Rivista di DirittoProcessuale*, Year 62, no. 3, 2002, p. 684.

[5] Cf. JUAN AROCA, *La Prueba*…op. cit., pp. 528 ff.; LUIZ MARINONI, "Do Processo Civil Clássico à Noção de Direito a Tutela AdequadaaoDireito Material e à Realidade Social" in *Academia Brasileira de Direito Processual Civil*, in www.abdpc.org.br, pp. 1 ff..

[6] According to MICHELE TARUFFO, this would constitute the model of British and Spanish law. Cf. "Poteri Probatoridelle Parti e del Giudice in Europa" in *Rivista Trimestrale di Diritto e Procedura Civile*, year 60, no. 2, 2006, pp. 465 ff..

assumes an intervening and even leading role, albeit not expressly stated in the law. At most, the law does not prevent him/her from procuring the *ex officio* acquisition of means of evidence[7]or, in some way, attributes him/her with powers to take evidence-related initiatives[8].

In clarifying this question of whether the judge may enjoy autonomous investigative powers without being limited or constrained by the activities of the parties, an unavoidable reasoning on judicial activism emerges. Correspondingly, as the monopoly of the parties was abolished in favour of a complex tension between the principle of party disposition and the inquisitorial principle[9], there has since been increasingly consensual acceptance that the civil judge does assume powers of an investigative nature. Moreover, following the incompatibility between the principle of party disposition and the inquisitorial principle[10], there was the need to reconstruct the inquisitorial powers in order to reconcile them with the principle of party disposition[11]as it is unacceptable to simply replace, without any further ado, the monopoly of the parties with the judge's monopoly. Inevitably, maintaining the unavoidable right to proof[12]consolidates the understanding that the pursuit of this right neither implies attributing exclusive evidence-related activities to the parties nor does it represent a serious obstacle to investigation initiatives taken by the judge[13]. Hence, this is where, to a certain extent, activism comes in as the law does not provide any general limit on the magistrate's powers of action as regards the acquisition of evidence.

On this matter, we should take a closer look at Portuguese law. In effect, the idea of acquisition of evidence as limited to the parties, in which the judge was relegated to the role of judge-arbitrator, has been overcome with the initiative of the magistrate neither restricted or even conditioned by the activities of the other procedural subjects. Moreover, having resolved the principle of controversy, the parties are then to cooperate in the search for truth[14]. For such reason, there are no grounds for confusion or dispute between the judge's evidence-related initiatives and those initiatives the parties decide to undertake as the duty of collaboration has become integrated into a broad duty of cooperation. Otherwise, in accordance with Article 519(2) of the 1995/1996 reform of the Code of Civil Procedure (hereinafter CCP), current Article 417(2) of theCCP, those refusing to cooperate should be sentenced to a fine, without prejudice to the applicable coercive means. Moreover, when the refuser is a party, the court will freely assess thevalue of the refusal, without prejudice to the reversal of the burden of proof as provided for under Article 344(2) of the Civil Code.

From a strictly diachronic perspective, spanning a period of time broader than the current CCP, we encounter a clear increase in the powers attributed to the judge in terms of the acquisition of evidence. Thus, ever since the enshrining of the principle of the magistrate's authority in the 1926 reform[15]that ended with a posture of inertia and passivity, we have evolved substantially through to the present day. In fact, in the initial version of the CCP, Article 264

[7]Again according to MICHELE TARUFFO, this would be the model corresponding to French law. Cf. "Poteri…" in op. cit., pp. 459 ff..

[8] In turn, this conveys the case in Italian or even German law. Cf. MICHELE TARUFFO, "Poteri..." in op. cit., pp. 461 ff.

[9] On the duality and contraposition between these two principles, regarding the initiative of the parties and the judge in the acquisition of evidence, UGO FERRONI, *Il Processo Civile Moderno*, CápuaVetere, 1912, pp. 138 ff.; BRUNO CAVALLONE, *Il Giudice*…op. cit., pp. 12 ff.; ERNESTO FABIANI, *I PoteriIstruttori del Giudice Civile*, Nápoles, 2008, pp. 108 ff.; JÜRGEN DAMRAU, *Die EntwicklungeinzelnerProzessmaximen sei der Reichszivilprozessordnung von 1877*, Paderborn, 1975, pp. 110 ff.; Knut Nörr, *Naturrecht un Zivilprozess: Studienzur Geschichte des deutschen Zivilprozessrechtswährend der Naturrechts periode bis zumbeginnenden 19. Jahrhundert*, Tübingen, 1976, pp. 38 ff.

[10] On this issue, TITO CARNACINI, "Tutela Giurisdizionale e Tecnica del Processo" in *Studi in Onore di Enrico Redenti*, Vol. II, Milan, 1951, pp. 759 ff.

[11] In this respect, ERNESTO FABIANI, *I Poteri*…op. cit., pp. 186 ff.

[12] Cf MICHELE TARUFFO, "Il Dirittoalla Provanel Processo Civile" in *Rivista di Diritto Processuale*, Vol…., 1984, pp. 75 ff.

[13]Cf. ,MICHELE TARUFFO, "Il Diritto…" in op. cit., pp. 90-1l.

[14] Cf. LEBRE DE FREITAS, *Introdução*…op. cit., p. 178.

[15] On this matter, JOSÉ ALBERTO DOS REIS, *Comentário*…vol. III, op. cit., p. 8.

firstly attributed the parties with the power of initiative and procedural impetus before subsequently extending to the judge the scope for ordering *ex officio* measures and whatever acts he/she deemed necessary to establish the truth. This meant the introduction of two stages, differentiating between the investigation initiatives of the parties and those of the judge[16]. Accordingly, judges should only deploy their prerogative to order measures of inquiry whenever the parties so request and, therefore, whenever there are insufficient means to ensure exact knowledge about the facts necessary to appropriately determine the case[17].

However, the 1961 reform placed greater emphasis on the inquisitorial principle. In effect, in addition to the title of Article 264 placing the principle of party disposition and the inquisitorial principle side by side, we encounter the normative content, densified into two paragraphs, 1 and 3. Thus, paragraph 3 determines the judge has the power to undertake or order on his or her own volition the measures he/she considers necessary to ascertaining the truth about the facts that he/she may lawfully know. Should we understand Antunes Varela's words in the sense of highlighting an umbilical cut in relation to the previous precept[18], we may conclude that the new version more adequately clarified the limits to the judge's initiative[19]. However, even beyond these limits, it is important to note how judges no longer play subsidiary roles and are able to act in competition or concomitance with the evidence-related activities of the parties. Therefore, it suffices for magistrates to consider that certain measures are necessary in order to be able to undertake them or order them *ex officio* within the scope of contributing to ascertaining the truth.

In the 1995-1996 reform, the parties continued to lose powers of primacy over the action even though the undeniable right to evidence remained intact[20]. Nevertheless, the court assumed a more active posture in order to pursue the fair settlement of the dispute. Thus, while there was a separation of precepts, we should also note that the content of paragraph 3 of Article 265, regarding the powers of the court, was equivalent to paragraph 3 of the former Article 264. However, the change derives from the scope of paragraphs 2 and 3 of Article 264[21], where the powers of the judge in matters of fact are clearly increased. In this way, judges may indeed investigate, even *ex officio*, the instrumental facts. Therefore, as Teixeira de Sousa accepts, this amounts to clear judicial activism not only because the parties share control of the process with the court but also because the court assumes investigative powers, both on the essential facts and on the instrumental, evidence-related and accessory facts[22].

However, the most relevant changes[23]regarding this topic came with the 2013 CCP reform. Here, we encounter a clear rupture between the inquisitorial principle, strictly speaking, and one

[16] In this respect, JOSÉ ALBERTO DOS REIS, *Comentário*…vol. III, op. cit., p. 9.

[17] Cf. JOSÉ ALBERTO DOS REIS, *Comentário*…vol. III, op. cit., p. 11.

[18] In fact, ANTUNES VARELA argued that the 1961 reform cut the umbilical cord with the previous formula that still sought to bind investigation to the principle of party disposition. Cf. *Manual de Processo Civil*, 2ª ed., Coimbra, 1985, p. 475.

[19] Cf. ANTUNES VARELA, *Manual*…op. cit., p. 475.

[20] On this subject, Lemos Jorge notes that the jurisprudence of the higher courts, especially the Constitutional Court, has generally agreed with the parties, given the limitations of means of proof according to some sectoral legislation. Cf. "Direito à Prova: Brevíssimo Roteiro Jurisprudencial" in *Julgar*, no. 6, 2008, pp. 100 ff.

[21] As ISABEL ALEXANDRE states, if the content of Article 265 (3) does not exactly represent an innovation, the precept presents a new regulation by removing some obstacles to the judge's powers. Cf. "A Fase da Instrução no Processo Declarativo Comum" in *Aspectos do Novo Processo Civil*, Lisboa, 1997, pp. 288-9.

[22] Cf. MIGUEL TEIXEIRA DE SOUSA, Estudossobre o Novo Processo Civil, Lisbon, 1996, pp. 59 ff. Furthermore, on inquisitorial powers over instrumental facts, Miguel Teixeira de Sousa, Estudossobre o Novo Processo Civil, 2nd ed., Lisbon, 1997, pp. 322 ff.

[23] The purpose is not to list all the CCP reforms that in some way alter the evidence-related system. Indeed, our scope extends only to those which, in our opinion, appear as the most significant. As a matter of fact, should the intention be any other, we cannot fail to reference, mentioning only those subsequent to 95/96, the reforms brought about by Decree-Law no. 183/2000 of 10 August. On this subject, MIGUEL TEIXEIRA DE SOUSA, As Recentes Alteraçõesna Legislação Processual Civil, Lisbon, 2001, pp. 62 ff.

of the changes enacted by that reform, procedural management. Thus, while Article 411, under the title of inquisitorial principle, includes the former paragraph 3 of Article 265, Article 6, in terms of procedural management, includes the former paragraphs 1 and 2 of the precept. Therefore, even if the former paragraph 3 incorporates Article 411 in its entirety, the same did not occur with paragraphs 1 and 2. Correspondingly, while paragraph 2 of Article 265, current paragraph 2 of Article 6, underwent some changes, the same cannot be said of paragraph 1. In fact, this adds to the previous wording over the adoption of simplification mechanisms and procedural streamlining. Therefore, irrespective of whether or not this addition appears to be redundantas regards formal suitability[24], or whether there is real utility in procedural management[25], it remains of interest to examine whether the latter reform grants further powers to the judge in terms of the acquisition of evidence.

In order to elucidate this facet, it is important to clarify issues already detectable in the 1995/1996 reform and which emerge as a greater priority following the 2013 reform. One such aspect is undoubtedly ascertaining what is meant by the expression *it falls to the judge to undertake or order, even* ex officio*, all necessary measures to ascertain the truth*, which used to form part of Article 265 (3) and now enters into CCP Article 411. Does this initiative of proof consist of a mere faculty or, on the contrary, does it reach further than this? On this matter, Lemos Jorge rejects the position that the legislator's intention was to make an instrument available for usage which would depend on the discretionary will of the judge[26]. In his opinion, this represents more of a binding duty, a linkage, a power-duty in order to pursue a more interventionist posture[27] and to contribute more actively to ascertaining the truth. On our behalf, in agreeing with this reasoning, to the detriment of the mere faculty, we understand that, following 2013, the activities of the judge, when acting of his/her own volition, only makes sense when this avoids discretionary action.

Another question requiring clarification stems from whether the limits on judge's actions have become blurred or if, on the contrary, they have remained immovable since 2013. Prior to this reform, we should remember howLemos Jorge accepted, when faced with an equivalent norm, projected through several means of evidence, the judge might procure measures for the acquisition of evidence, whether documentary, by provoked judicial confession, expert-based, inspection-based or testimony-based[28]. However, following this reform, we now have at least two more means of proof to consider deriving from the *ex officio* actions of judges. These are qualified non-judicial verifications and evidence by party statements.

In the case of qualified non-judicial verifications, there is no problem in admitting the judge's *ex officio* action as judicial inspection is triggered whenever the court deems it convenient in accordance with CCP Article 490. Furthermore, CCP Article 494 determines the admissibility of such verifications in which judicial inspection is legally provided for. Regarding evidence submitted as statements by the parties, the issue unveils another complexity. According to Article 466(1), statements by the parties are characterised by being requested by the deponent himself/herself, not by third parties. However, it is important to bear in mind paragraph 2, which determines the applicability of CCP Article 417 and additionally, with the necessary adaptations, the provisions of the previous section. In other words, the determination of *ex officio* evidence appears to

[24] This seems to be the opinion of LEBRE DE FREITAS and ISABEL ALEXANDRE, although somewhat dubitatively formulated. Code...op. cit., p. 44.

[25] We should here point out the well-founded doubts of ISABEL ALEXANDRE over the adoption of this figure. In fact, the author even admits procedural management may be a fashion, without precise contours. Cf. "O Dever de Gestão Processual do Juiz na Proposta de Lei Relativaao Novo Código de Processo Civil" in O Novo Processo Civil, Lisbon, 2013, pp. 4 ff. In a more optimistic reading, CARLOS LOPES DO REGO, "OsPrincípiosOrientadores da Reforma do Processo Civil emCurso: O Modelo da AcçãoDeclarativa" in Julgar, no. 16, 2012, pp. 101 ff.; JOSÉ LEBRE DE FREITAS, *Introdução*...op. cit., pp. 227 ff.

[26] Cf. NUNO LEMOS JORGE, "Os Poderes Instrutórios do Juiz: Alguns Problemas" in *Julgar*, no. 3, 2007, p. 63.

[27] Cf. NUNO LEMOS JORGE, "OsPoderes…" in op. cit., pp. 63-4.

[28] Cf. NUNO LEMOS JORGE, "OsPoderes…" in op. cit., pp. 69 ff.

become possible under the section on confession and deposition by the parties.

We are here facing the redoubled activities of judges in the sense of ordering evidence-related measures, *motu proprio*, with a wide range of means of proof. And, logically, this occurs in the face of significant evidence-related activism. Therefore, reflecting on this amplitude for investigation by judges, this only naturally raises reservations, ponderations and criticisms, especially regarding the risk of an authoritarian drift emerging, with a loss of independence or even a lack of exemption on the part of the judge with this all motivated by growing judicial activism in the field of acquiring evidence.

GUARANTEEISM

Guaranteeism is undoubtedly the doctrinal current that issues the most serious warnings about the dangers of activism and accordingly criticised the increases in the powers of judges. This stresses concerns over the guarantees of the parties and the imperative need to limit the judge's powers, highlighting what this current considers as constituting the risk of the excessive publicization of the civil procedure, as well as the threat of undermining judicial independence. Furthermore, according to guaranteeism, the publicization of the process, beginning at the end of the 19th century, was reinforced because of the poor choices made by Italian processualists in the first half of the 20th century. Additionally, and subsequently, this would grow into a crescendo, in keeping with the sheer extent of judicial activism, evidenced with particular sharpness in certain legal systems. According to Aroca, Klein and the idea of the social function of processes justified restricting the powers of the parties in favour of an unjustified increase in the judge's powers[29]. Subsequently, this drift has only deepened with the change of azimuth in the 1940 Italian CCP in contrast to the previous liberal CCP. This accentuated the authoritarian trend, together with the extension of powers of procedural management and administration[30]. In fact, according to Cipriani, the civil justice crisis worsened following the entry into effect of the 1940 CCP, conditioned by a public law ideology which, by attributing excessive inquisitorial powers to judges, replaced a system of legality with another in which discretion prevailed[31].

In a similar vein, Montele one emphasises the virtues of the 1865 CCP in contrast with the authoritarian profile of that of 1940, which, in his opinion, clearly contained a harmful inquisitorial mission entrusted to the magistrate[32]. Furthermore, even Aroca himself insisted on the view that both the Austrian ZPO and the Italian CCP of 1940 and alongside several other civil procedural laws of those times, reflected the dictatorial and autocratic ideology of their respective political regimes[33]. In fact, in this regard, Velloso reaches further by highlighting the similarity between the CCP of the USSR, the Nazi Code of 1937 and the Italian CCP of 1940[34], insisting on the ideological approach, of a clearly authoritarian bent, that emerges from them without evidencing any technical option[35]. These signs have actually since intensified in various legal systems, particularly in Brazil, where it was recently considered necessary to promote an important manifesto in opposition against judicial activism and in defence of guaranteeism[36]. This document correspondingly highlights the warning that, and attracting an expressive adhesion among eminent jurists and renowned

[29] Cf. JUAN AROCA, "El DerechoProcesal Civil en el Siglo XX" In *De Processo: Studi in Memoria di Alessandro Giuliani*, Naples, 2001, pp. 497 ff.

[30] FRANCO CIPRIANI argues that the 1940 CCP is anti-liberal and authoritarian, unlike the truly efficient and guaranteeist 1865 CCP. Cf. "I Problemi del Processo di Cognizionetra Passato e Presente" in *Rivista di Diritto Civile*, year 49, no.1, 2003, pp. 40

[31] Cf. FRANCO CIPRIANI, "Il Processo Civile Italianotra Efficienza e Garanzie" in *Rivista Trimestralle di Diritto e Procedura Civile*, year 61, no. 4, 2002, pp. 1248 ff.

[32] Cf. GIROLAMO MONTELEONE, "Principi e Ideologienel Processo Civile: Impressioni di un Revisionista" in *Rivista Trimestralle di Diritto e Procedura Civile*, year 62, no. 2, 2003, pp. 577 ff.

[33] Cf. JUAN AROCA, "El Derecho Procesal…" in op. cit., pp. 498-9.

[34] Cf. ADOLFO ALVARADO VELLOSO "El Garantismo Procesal" in I Congresso Nacional de Derecho Procesal Garantista", Universidad Nacional del Centro de la Provincia de Buenos Aires, 1999, www.derecho-azul.org/congresoprocesal/alvarado.htm, p. 2

[35] Cf. ADOLFO ALVARADO VELLOSO "El Garantismo…" in op. cit., p. 6.

[36] Cf. Manifesto de Jundiaí, of 19 August 2017, entitled "Pela Compreensão e Concretização do Garantismo Processual" in www.conjur.com.br/2017

proceduralists, legislated procedural law is threatened by judicial dirigisme and activism[37].

In this way, procedural guarantees are placed in jeopardy and it becomes important for judges to act within the legal framework in force but never beyond it. Therefore, in the case of civil procedures and, particularly in the acquisition of evidence, judges would exceed their normative permission whenever undertaking ex officio evidence-related measures as this would compromise their neutrality, impartiality and independence. Furthermore, the attribution of initiative for powers of investigation to judges, even under the pretext of protecting the weaker party, would further contribute to weakening their psychological impartiality[38]. Moreover, it is not only in the acquisition of evidence that we would encounter this exaggerated weighting for the initiative of judges thereby capable of compromising their impartiality.

Some guaranteeists point to a tinge of authoritarianism spreading to other aspects of evidence. Indeed, Montesano highlights the limitation regarding the nomination of witnesses, in order to observe the adversarial principle, as well as the nature of the typicality of evidence, to justify his resistance to any agreeing with an active search for new evidence materials[39]. Similarly, Montel one observes that the distribution system of the burden of proof, the preclusion or prohibition on the submission of new documents in appeal proceedings does not prove consistent with attributing a broad evidence-related initiative to persons tasked with deciding on given claims[40].

However, it turns out the acquisition of ex-officio evidence arouses the greatest opposition on behalf of the guaranteeists. Moreover, Cipriani, besides sustaining that such a public law ideology was authoritarian and anti-liberal, thus incompatible with the principles, republican and democratic in nature, of the Italian Constitution[41], singles out the issue of the judge acquiring evidence as a particular theme of his criticism. To this end, he highlights the apparent inconsistencies and the circumstances susceptible to undermining the independence of magistrates. In fact, should judges promote the investigation and, at a later time, decide the case upon its merits, we would face a compromise of the exemption of the judge and a threat to the purposes that Justice aims to nurture[42].

Montesano, after rejecting the idea that this issue should be reduced to a mere procedural technique, emphasises that there is a large amount of evidence that can be produced ex officio and that evidence-related initiatives are likely to undermine the psychological impartiality of judges[43]. It is therefore not enough to limit their initiative but rather to encounter other mechanisms to safeguard and guarantee the rights of the parties[44]. Furthermore, Monteleone claims it still remains to be demonstrated that any judgment is fair when the judge has, *ex officio*, the power of evidence-related initiative[45]. He adds that it is neither scientifically nor empirically proven that the degree of justice is directly proportional to the sum of the judge's powers of initiative[46]. Therefore, although while not interested in making any political assessment of the legislation in effect, he draws conclusions from the results[47]. From that perspective and regarding Italian law, he refers to how the average duration of a case, between the date brought and thatof the resulting judgment, increased after the entry into force of the 1942

[37] Cf. Manifesto de Jundiaí, op. cit., p. 2.

[38] Cf. ELIO FAZZALARI, "La Imparzialità del Giudice" in *Rivista di Diritto Processuale*, Vol., 27, 1972, pp. 199 ff.

[39] Cf. LUIGI MONTESANO, "Le Prove Disponibili d' Ufficio e l' Imparzialità del Giudice Civile" in *Rivista Trimestralle di Diritto e Procedura Civile*, year 32, 1978, pp. 196 ff.

[40] Cf. GIROLAMO MONTELEONE, "Limitialla Prova di Ufficionel Processo Civile (Cenni di DirittoComparato e sui Diritto Comparato)" in *Rivista di Diritto Processuale*, no. 62, no. 4, 2007, pp. 865-6.

[41] Cf. FRANCO CIPRIANI, "Autoritarismo e Garantismonel Processo Civile" in *Rivista di Diritto Processuale*, year 49, no. 1, 1994, pp. 24-5.

[42] Cf. FRANCO CIPRIANI, I Problemi…" in op. cit., pp. 46 ff.

[43] Cf. LUIGI MONTESANO, "Le Prove…" in op. cit., pp. 194-5.

[44] Cf. LUIGI MONTESANO, "Le Prove…" in op. cit., pp. 198-9

[45]Cf. GIROLAMO MONTELEONE, "El Actual Debate Sobre las Orientaciones Publicísticas del Proceso Civil" in *RevistaI beroamericana de Derecho Processal*, year V, no. 7, 2005, pp. 230-1.

[46] Cf. GIROLAMO MONTELEONE, "El Actual…" in op. cit., pp. 233-4.

[47] Cf. GIROLAMO MONTELEONE, "El Actual…" in op. cit., pp. 234-5.

CCP in comparison with the previous 1865 CCP[48].

Aroca prefers to take another path with a view to emphasising the imperative need to limit the powers of the civil judge in matters of evidence. Therefore, after revisiting the historical evolution, in which the liberal concept gave way to the public law option, he seeks to highlight what he considers a paradox. In effect, there was an exchange of positions regarding the extent of the powers attributed to civil judges and to criminal judges at the end of the 19th century and, more recently, already into the 21st century[49]. In reality, 19th century civil judges encountered restrictions unlike their criminal judge peers, who applied extensive powers and able to investigate and determine the content of the judgement[50]. Accordingly, while civil judges could not determine, *ex officio*, the acquisition of any evidence, criminal judges were allowed to request, ex officio, various means of evidence[51]. We would note that, over the course of the 21st century, the civil judge became paradoxically able to determine the ex officio production of any means of evidence even while the judges of criminal cases are no longer allowed to do so in order to guarantee the rights and freedoms of the parties[52].

Aroca adds that the inadmissibility of evidence-related initiatives by the criminal judge is due to the strict need to ensure the judge's impartiality[53]. The author thus consolidates the criticisms directed against the successive reforms of the Ley de Enjuiciamiento Civil (LEC), noting, in this regard, the aim of strengthening the attribution of powers of an inquisitorial nature to judges for the acquisition of evidence[54]. Accordingly, he subsequently returned to the matter to criticise this trend in public law and disagreeing with the extent of the judge's powers in the acquisition of evidence[55]. Accordingly, he proclaims, a mainstay of the guaranteeist orientation stems from the judge's impediment to bring evidence into the process in order to safeguard the monopoly of the parties for evidence-related initiatives and the true impartiality of judges, remaining distanced from the claims of parties[56]. This would be decisive, in the sense of reducing their powers to direct the process, as happens in other legal systems, especially in pursuing the purpose of destroying the social justice related myththa t justifies increasing the judge's powers[57], or even any other illusion of a technicist nature[58]. Moreover, he seeks to demonstrate how procedural good faith is not in line with publicism but rather with the imposition of duties on the procedural subject[59].

Alvarado Velloso probably ranks as the best interpreter of the guaranteeist theories in Latin America while closely following the matrix of Cipriani's and Aroca's thought. Thus, after proceeding with a historical description, he tries to characterise the two models in question, correspondingly listing the following structuring ideas for the inquisitorial model: judges hold the power to steer the proceedings, either on account of their own initiatives or on the basis of a complaint; they take initiative for investigating the facts and acquiring new evidence and, in addition, the judges promoting the investigation end up judging the case[60]. As

[48] Cf. GIROLAMO MONTELEONE, "El Actual…" in op. cit., pp. 235.

[49] Cf. JUAN AROCA, *La Paradoja Procesal del Siglo XXI*, Valência, 2014, pp. 19 ff.

[50] Cf. JUAN AROCA, *La Paradoja*…op. cit., pp. 19-20.

[51] Cf. JUAN AROCA, *La Paradoja*…op. cit., p. 20.

[52] Cf. JUAN AROCA, *La Paradoja*…op. cit., p. 21.

[53] Cf. JUAN AROCA, *La Paradoja*…op. cit., pp. 88 ff.

[54] Cf. JUAN AROCA, *Análisis Crítico de la Ley de Enjuiciamiento Civil ensu Centenario*, Madrid, 1982, pp. 86 ff.

[55] Cf. JUAN AROCA, "El Derecho…" in op. cit., pp. 497 ff.

[56] Cf. JUAN AROCA, "El Proceso Civil Llamadocomo Instrumento de Justicia Autoritaria" in *RevistaIberoamericana de Derecho Procesal*, year IV, no. 6, 2004, pp. 26 ff.

[57] In this way, according to social justice, judges would advocate decisions that would extend beyond the scope of the parties and the process itself. Cf. JUAN AROCA, "El Proceso…" in op. cit., p. 33.

[58] Cf. JUAN AROCA, "El Proceso…" in op. cit., pp. 36 ff.

[59] Cf. JUAN AROCA, "Sobre el Mito Autoritario de la "Buena Fe Procesal" in *Proceso Civil e Ideologia*, Valencia, 2006, pp. 346 ff.

[60]ADOLFO ALVARADO VELLOSO identifies such guidelines in the Austrian Regulation of 1896, the German Law of 1937, the Italian CCP of 1940 and the Civil Procedure Law of the USSR of 1979. Cf *Garantism oProcesal Contra Actuación Judicial de Oficio*, Valencia, 2005, pp. 93 ff.

regards the opposite model, the accusatory model, the magistrate does not steer progress in the case but rather accepts the facts admitted by the parties; there is parity between the accuser and the party and the judge cannot take evidence-related initiatives[61]. However, after constructing this antinomy, Velloso is forced to recognise the inexistence of pure systems and rather the prevalence of several mixed systems that adopt multiple combinations of one and the other[62].

Velloso insists that the judge's impartiality is seriously compromised whenever assuming a dynamic posture in search of evidence[63]. Therefore, when the judge experiences doubt or considers the evidence insufficient, he/she must simply apply the rules on the distribution of the burden of proof and decide accordingly[64]. In emphasising his ideas, he invokes the reforms to Argentinean criminal procedure in order to consolidate the accusatory model before stressing the contrast between the prohibition of the judge to order, of his/her own volition, evidence-related initiatives and the status quo emerging from the civil procedure[65]. These trends, which are contradictory, would allow for criminal procedure to become increasingly civilised, while penalising civil procedure[66]. He perceived this as wrong and contradictory as it would allow for the persistence of an inquisitorial system or, at the most, a mixed version, in civil proceedings, susceptible to compromising freedom, bilateralism, the exemption of the judge and guaranteeism[67].

We would also mention a Portuguese author, Luís Correia de Mendonça, and his advocacy of several guaranteeist postulates. Accordingly, after confirming the Italian CCP is anti-liberal and authoritarian and praising Cipriani's claims[68], he seeks to demonstrate how the Portuguese CCP adopted the same assumptions and fits into the same model[69]. He also notes that Manuel Rodrigues and José Alberto dos Reis were its founding fathers in keeping with its emphasis on the social value of the dispute[70]. He also references how CCP Articles 264 to 266 endow judges with three important categories of power: power of investigation (to order the necessary steps and actions for establishing the truth), power of discipline (to refuse that impertinent or merely dilatory) and the power to guide proceedings (to order that necessary for the case's continuation)[71].

Moreover, the duty of cooperation for ascertaining the truth, under the terms of CCP Article 554, would constitute a clear drift towards the affirmation of the public law purpose of the process[72]. Remaining with this focus, Mendonça then seeks to demonstrate how the authoritarianism and reinforcement of the judge's powers is evident in CCP Article 555, when he/she may request, on his/her own initiative, whatever information, technical opinions, documents, plans, photographs, drawings or objects deemed necessary to clarify the truth. Once again, under CCP Article 646, the judge receives the scope to examine witnesses not called by the parties[73]. He also expresses surprise that the Portuguese CCP was not politically conceived in suggesting that reinforcing the inquisitorial nature, evident in

[61] Cf ADOLFO ALVARADO VELLOSO, *Garantismo*…op. cit., pp. 153 ff.

[62] Thus, Adolfo Alvarado Velloso sets out the characteristics of the Argentine procedural regime, demonstrating the corresponding departure from any of these pure systems. Cf *Garantismo*…op. cit., pp. 157 ff.

[63]ADOLFO ALVARADO VELLOSO presents these conclusions, after a study of criminal and civil procedures. As regards the latter, he mainly considers the judge's excessive evidence-related dynamism in the juvenile court and the labour court, although he then generalises his considerations to the whole of civil procedure. Cf. "Imparzialità del Giudice e Giusto Processo" in *Stato di Diritto e Garanzie Processuali: Attidelle II Giornate Internazionali di Diritto Processuale Civile*, Naples, 2008, pp. 159 ff.

[64] Cf. ADOLFO ALVARADO VELLOSO, "Imparzialità…" in op. cit., p. 162.

[65] Cf. ADOLFO ALVARADO VELLOSO, *Garantismo Procesal Contra*…op. cit., pp. 304 ff.

[66] Cf. ADOLFO ALVARADO VELLOSO, *GarantismoProcesal Contra*…p. 306.

[67] Cf. ADOLFO ALVARADO VELLOSO, *GarantismoProcesal Contra*…p.. 307 ff.

[68] Cf. LUÍS CORREIA DE MENDONÇA, "O Pensamento…" in op. cit., pp. 75 ff.

[69] Cf. LUÍS CORREIA DE MENDONÇA, "O Pensamento…" op. cit., p. 106.

[70] Cf. LUÍS CORREIA DE MENDONÇA, "Vírus…" in op. cit., pp. 74 ff.

[71] Cf. LUÍS CORREIA DE MENDONÇA, "Vírus…" in op. cit., p. 80.

[72] Cf. LUÍS CORREIA DE MENDONÇA, "Vírus…" in op. cit., p. 82.

[73] Cf. LUÍS CORREIA DE MENDONÇA, "Vírus…in op. cit., pp. 83 ff.

the 95/96 reform, would have been induced by the same guidelines[74]. In brief, the judge must remain a separate subject, foreign to the subject matter of the case, unable either to change it or to act on the production of evidence of the facts as alleged by the parties[75].

NEGATIONISM

Having formulated the main assumptions of guaranteeism, also known as revisionism, by virtue of praising the virtues of the previous Italian CCP, as opposed to the 1940 CCP, we should mention the assumptions of those who reject such fears, in particular the loss of impartiality of judges, the so-called negationists[76]. Thus, if the garanteeists are opposed to judicial activism, the negationists seek to counter the more catastrophic claims of the guaranteeists or at least assert that the fears of the former are exaggerated and ill-considered.

Notwithstanding this identity matrix, negationist authors take up different positions to criticise the militant enthusiasm of the garanteeists. However, negationists do not claim to affirm the advantages of judicial activism. Rather, they seek to point out how negationism represents a third way, a tertium genus, which evaluates the arguments of the guaranteeist thesis but equally contradicts the structural foundations of judicial activism, proposing something distinctive and intermediate in the face of these two mutually antagonistic orientations.

One of the paradigmatic cases of this third way comes with the thinking of Verde who, after evaluating the arguments of Cipriani, Monteleone and Aroca, claims that judicial activism has failed to assume such worrying contours with greater utility and proficiency arising from directing the debate towards other topics, such as the need for promoting reforms and designing models capable of contributing to swift and effective justice[77]. Accordingly, Verde argues that the controversy between guaranteeism and activism holds an essentially ideological connotation, and that it would instead be more beneficial and fruitful to reflect on other relevant issues, such as the length of time before serving justice[78].

Moreover, Ricci's formulations should also fall within the negationist current as the author considers Aroca's position to be overly rigid in deciding to emphasise the relevance and usefulness of the judge's procedural management[79]. Accordingly, with a view to containing the drift into activism, he warns of the need to guard against the private law aspect to the protection of the subjective right, noting that ex officio evidence-related activities generate advantages but also disadvantages[80]. Therefore, while stressing the complementarity between the principle of party disposition and the inquisitorial principle, he impressively emphasises the judge's powers of acquisition of evidence can never be either discretionary or unlimited[81].

In addition, Pisani, in order to eliminate pre-understandings, claims the lawsuit contains a public law component and a private law component in seeking to demonstrate, therefore, that no legal system adopts a procedural system based entirely on the prevalence of either of these two components, unlike the Italian CCP of 1865[82]. He then explains the role of Mortara and Chiovenda in the drafting of the current CCP, which incorporates a public law component and also a private law component[83]. Lastly, he maintains that the entry into force of the Italian Republican Constitution has neither shaken nor called into question the assumptions underlying the CCP[84]. In short, while recognising the

[74] Cf. LUÍS CORREIA DE MENDONÇA, "O Pensamento…" in op. cit, p. 68.

[75] Cf. LUÍS CORREIA DE MENDONÇA, "Vírus…" in op. cit., pp. 72-3.

[76] Cf. FRANCO CIPRIANI, "El Proceso Civil Italiano entre Revisionistas y Negacionistas" in *Proceso Civil e Ideología*, Valencia, 2006, pp. 53 ff.

[77] Cf. GIOVANNI VERDE, "Le Ideologie …" in op. cit., pp. 683 ff.

[78] Cf. GIOVANNI VERDE, "Le Ideologie…" in op. cit., pp. 686-7.

[79] Cf. GIAN RICCI, "Il Processo Civile fraIdeologie e Quotidianità" in *Rivista Trimestralle di Diritto e Procedura Civile*, no. 1, 2005, pp. 82 ff.

[80] Cf. GIAN RICCI, "Il Processo…" in op. cit., pp. 82-3.

[81] Cf. EDOARDO RICCI, "Il Principio Dispositivo Come Probleme di DirittoVigente" in *Rivista di Diritto Processuale*, 1965, pp. 385 ff.

[82] Cf. ANDREA PISANI, "Il Codice di Procedura Civile del 1940 Fra Pubblico e Privato" in *Foroitaliano*, Vol. CXXIII, Parte IV, 2000, pp. 76-7.

[83] Cf. ANDREA PISANI, "Il Codice…" in op. cit., pp. 77-8.

[84] Cf. ANDREA PISANI, "Il Codice…" in op. cit., pp. 78.

virtues of Cipriani's historical and evolutionary analysis, he observes that the predominance of public law does not betray a hint of authoritarianism just as it does not destroy or compromise the guarantees of the parties[85].

Carnacini's reflections should still be included in negationism. In fact, after explaining the origin of the judge's inquisitorial powers, Carnacini accepts the duality between these powers and the principle of party disposition, rejecting any concept of a sharp antithesis[86]. However, he notes equivalence between these two principles is simply not possible as the monopoly of the party when bringing a case before court continues to be recognised[87]. Nevertheless, according to Carnacini, the powers of judges neither prevent nor hinder the activities of parties seeking to demonstrate the facts underlying their claims[88]. In fact, on this latter point, Liebman had accepted the emergence of the judge's inquisitorial powers as regards evidence while stressing how impartiality remains unaffected as the judgement is only handed down at a later time[89].

Remaining on the subject of the alleged loss of independence of judges due to the increased investigative powers, Taruffo seeks to convey how unfounded such fears are and how correspondingly alarmist the considerations that posit the party guarantees are somehow threatened. Therefore, he rejects the idea that only passive and inert judges might attain impartiality and even stating that searching for the truth and the clarification of facts, in cases where they are not clarified, makes their impartiality stand out[90]. Thus, a judge who is satisfied, always and in whatever the case, with the evidence put forward by the parties would not be impartial[91]. Therefore, he notes that the actions of judges in refusing the admissibility of a given means of evidence should not be perceived as compromising their exemption and impartiality[92].

Recognising the upsurge in controversy, especially in Italy and Spain, over the scope of the investigative powers attributed to judges and the alleged opposition between an authoritarian model versus some supposedly liberal model, Taruffo points out that the term *inquisitorial* is not equivalent to the concept of *authoritarian*[93]. Furthermore, the *ex officio* powers are of a supplementary nature in relation to the evidence brought to the investigative proceedings by the parties[94]. Moreover, this author does not even consider the attribution of inquisitorial powers constitutes an ideologically based problem as the phenomenon is not exclusive to authoritarian states[95]. Consequently, it is sufficient to look at French, Italian and German civil procedural laws to note simple differences in the extent of those powers[96]. Thus, while French law enshrines a broad discretionary power for the judge to dispose of admissible means of proof, Italian and German law recognises the magistrate's power to take evidence-related initiatives which do not concern the range of means of proof available[97]. Furthermore, British and Spanish laws, despite hasty labelling of a liberal nature, have reinforced the ability of judges to promote, *ex officio*, evidence-related initiatives[98]. Therefore, Taruffo concludes there

[85] Cf. ANDREA PISANI, "Il Codice…" in op. cit., pp. 82 ff.

[86] Cf. TITO CARNACINI, "Tutela…" in op. cit., pp. 724 ff.

[87] Cf. TITO CARNACINI, "Tutela…" in op. cit., pp. 740-1

[88] Cf. TITO CARNACINI, "Tutela…" in op. cit., pp. 741 ff.

[89] Cf. ENRICO LIEBMAN, "Fondamento del Principio Dispositivo" in *Rivista di Diritto Processuale*, Vol. II, 1960, pp 561 ff.

[90] Cf. MICHELE TARUFFO, "L' Istruzione Probatoria" in *La Provanel Processo Civile*, Milan, 2012, p. 95.

[91] Cf. MICHELE TARUFFO, "L' Istruzione…" in op. cit., p. 95.

[92] Cf. MICHELE TARUFFO, "L' Istruzione…" in op. cit., p. 96.

[93] Cf. MICHELE TARUFFO, "L' Istruzione…" in op. cit., p. 96.

[94] Indeed, MICHELE TARUFFO states that when there is evidence-related initiative on behalf of the judge, it appears to be marginal and secondary, "PoteriProbatoridelleParti e del Giudice in Europa" in *Le Prove nelProcesso Civile*, Milan, 2007, p. 56.

[95] Cf. MICHELE TARUFFO, "Poteri…" in op. cit., pp. 59-60

[96] Cf. MICHELE TARUFFO, "Poteri…" in op. cit., pp. 61 ff.

[97] In this respect, under German law, Michele Taruffo points out how judges are prohibited from relying on testimonial evidence. Cf. "Poteri…" in op. cit., pp. 62ff.

[98] Cf. MICHELE TARUFFO, "Poteri…" in op. cit., pp. 69 ff.

is no connection between attributing powers for evidence-related initiatives and belonging to an authoritarian or anti-democratic regime as such initiatives assumes a technical rather than ideological nature[99]. Finally, he points out that the purpose of proceedings is to achieve justice and not exactly to settle disputes, and that granting investigative powers to magistrates therefore makes perfect sense in accordance with the criteria of legality adopted by each and every one of those legal systems[100].

As regards Spanish law, Junoy considers it excessive to contemplate the initiatives of judges as based strictly on political reasons, e.g. of an authoritarian or dictatorial nature, given the technical suitability of the rule does not closely interlink with the ideology of any given political system[101]. Consequently, he puts forward the example of procedural good faith, admitted by very diverse systems, in very different historical eras[102]. On another note, as regards the judge's evidence-related initiative, he argues that it should not be confused with something authoritarian whenever limited to the facts discussed in the case and the means of proof in the case file[103]. This would avoid authoritarianism and judges may then contribute, by their *ex officio* actions, to overcome any shortcomings in the evidence[104]. As a consequence, the magistrate's intervention emerges as a technical intervention in the development of the judicial process, without compromising the principle of party deposition attributed to the parties, observing the effectiveness of judicial protection and the pursuit of effective justice[105]. Moreover, Junoy recalls how civil procedure is no longer an eminently private legal relationship, naturally and simply accepting the public nature of Civil Procedural Law[106]. As such, the principle of party disposition cannot mean a monopolistic power of evidence-related initiative, preventing any *ex officio* initiatives of judges[107]. Logically, as Koch adds, assuming the public nature, it is natural that the role attributed to the judge interrelates to aspects linked to the effective promotion of justice and the balance between a reasonable time frame and the result obtained[108]. Thus, it would be reasonable to accept the magistrate's evidence-related initiative, irrespective of the will of the parties[109].

Barbosa Moreira clarifies that the idea that no procedural order regulates the investigation of evidence holds true in terms of absolute exclusivity, whether in favour of the parties or the judge himself/herself[110]. Furthermore, he notes that authoritarian regimes strengthen executive power, not judiciary power, even though proven democratic regimes have accentuated the activities of magistrates as regards evidence.[111]. Within this framework, he highlights the 2001 reform of ZPO, which extended the powers of judges while emphasising how Germany was not under any authoritarian political regime at the time[112]. Furthermore, the acquisition of evidence on the initiative of judges to clarify the relevant facts does not replace or usurp the role of the party but is rather inherent to the function of the judge[113]Consequently, he emphasises the *ex*

[99] Cf. MICHELE TARUFFO, "Poteri…" in op. cit., pp. 73-4.

[100] Cf. MICHELE TARUFFO, "L' Istruzione…" in op. cit., p. 113.

[101] Cf. JOAN PICÓ I JUNOY, "El Derecho Procesal entre el Garantismo y la Eficacia: Un Debate Mal Planteado" in *Proceso Civil e Ideologia*, Valência, 2006, p. 117.

[102] Cf. JOAN PICÓ I JUNOY, "El Derecho…" in op. cit., pp. 118 ff.

[103] Cf. JOAN PICÓ I JUNOY, "El Derecho…" in op. cit., p. 120.

[104] Cf. JOAN PICÓ I JUNOY, "El Derecho…" in op. cit., pp. 120-1.

[105] Cf. JOAN PICÓ I JUNOY, "El Derecho…" in op. cit., pp. 124-5.

[106] Cf. JOAN PICÓ I JUNOY, "El Derecho…" in op. cit., p.. 121.

[107] Cf. JOAN PICÓ I JUNOY, "El Derecho…" in op. cit., p.. 123.

[108] Cf. RAPHAEL KOCH, *Mitwirkungsverantwortungim Zivilprozess*, Tübingen, 2013, pp. 5 ff.

[109] Cf. RAPHAEL KOCH, *Mitwirkungsverantwortung*…op. cit., pp. 15 ff.

[110] Cf. JOSÉ BARBOSA MOREIRA, "Correntes e Contracorrentes no Processo Civil Contemporâneo" in *Cadernos de Direito Privado*, no. 7, 2004, p. 4.

[111] Cf. JOSÉ BARBOSA MOREIRA, "O Neoprivatismo no Processo Civil" in *Revista Iberoamericana de Derecho Procesal*, *year* V, no. 7, 2005, pp. 16-7.

[112] Cf. JOSÉ BARBOSA MOREIRA, "O Neoprivatismo…" in op. cit., p. 19.

[113] This is especially so given that, as José Barbosa Moreira explains, determining, *ex officio*, the testimony of someone does not restrict the right of

officio determination of the statement of a particular subject obviously does not mean that the party's right to propose the hearing of other witnesses is curtailed[114].

Lemos Jorge, in turn, expresses his disagreement with the positioning of the garanteeist current, in particular as regards that referred to by Correia de Mendonça about Portuguese law[115]. In fact, he states he finds it difficult to link the judge's investigative powers to any manifestation of authoritarianism, arguing that those powers allow judges to act through active searches for the truth as regards the facts they may know[116]. In his view, the conduct of judge falls within the scope of attempting to clarify the facts brought by the parties to the proceedings and thus adopting an active position in seeking an appropriate solution to whatever controversy which is the subject of the ongoing proceedings[117]. Therefore, there seems nothing to fear just so long as the guarantees of the parties are safeguarded, and thus a drift towards something less in line with the aims of the process, such as an authoritarian model, is avoided[118].

Other Aspects of Activism

The Working Community

While we might be inclined to consider the garanteeists as somewhat exaggerated and tend to align with some of the negationist formulations, we believe that converting the duty of collaboration into a broader duty of cooperation, on occasion with an overriding matrix or procedural principle, merits serious caution. In fact, cooperation conceived as a guideline, tending towards the building of a working community, may represent a danger and a deviation not in accordance with the purposes of civil procedure.

Moreover, according to Lebre de Freitas, the progressive strengthening of the principle of cooperation has justified the idea of promoting a working community[119], between procedural subjects in order to contribute to the smooth progress of processes. In fact, in a similar vein, Teixeira de Sousa advocates the idea that the working community might hold the court and the parties responsible for the judicial outcomes[120].

On our behalf, before drawing conclusions from this stance, based on a community guideline, a singular idea backed by a supposed idea of community, it is important to consider the duty of collaboration, and even the resulting principle, from a diachronic perspective. Perhaps we are then better able to understand what is really at stake. What the formulation aims to ascertain, at some later stage, is the pertinence of the fears set out above. We should recall that the collaboration of the parties was at first enshrined as a strict duty or rule of conduct[121]in order to provide clarification to the judge, whenever so requested by him/her, in accordance with the provisions of CCP Article 265. And, in addition to this duty, within a broader scope, directed towards all persons, whether or not parties in the case, comes the duty to respond to that which is asked, with correlative submission to the inspections deemed necessary, practicing the acts determined, unless the subsequent refusal falls under the second part of CCP Article 524.

Subsequently, this duty becomes elevated to a procedural principle: the principle of cooperation. In fact, this is duly announced in the title of CCP Article 266 after the revision of 1995/96. According to paragraph 1, the duty imposed on parties and their representatives involves mutually co-operating in order to achieve a fair settlement of the dispute. Accordingly, paragraph 2 seeks to bestow concrete expression on this duty by requiring the provision of clarification on matters of fact or

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the party to appoint and have its own witnesses heard in court. Cf. "O Neoprivatismo…" in op. cit., pp. 22 ff.

[114] . Cf. JOSÉ BARBOSA MOREIRA, "O Neoprivatismo…" in op. cit., pp. 22-3.

[115] Cf. LEMOS JORGE, "OsPoderes…" in op. cit., pp. 80 ff.

[116] Cf. LEMOS JORGE, "OsPoderes…" in op. cit., p. 81.

[117] Cf. LEMOS JORGE, "OsPoderes…" in op. cit., pp. 81-2.

[118] According to Lemos Jorge, we would be facing a participating judge but not partial, an inquirer but not inquisitor, with authority but without authoritarianism. Cf. "OsPoderes…" in op. cit., pp. 83-4.

[119] Cf. LEBRE DE FREITAS, *Introdução*…op. cit., p. 192.

[120] Cf. TEIXEIRA DE SOUSA, *Estudos*…2nd ed., op cit., p. 62.

[121] On this matter, JOSÉ ALBERTO DOS REIS, *Comentário*…Vol. III, , op. cit., p. 4.

law which appear to be relevant, and even justifying the opinion that such expression sets out two essential duties[122]. Thus, we encounter the duty of clarifying or consulting, under which the court clarifies any doubts the parties may have, and the duty of preventing or informing, under which the court warns of possible deficiencies or insufficiencies in the requests or allegations[123]contained in the case file, presented within the scope of the claimant's power of initiative. Therefore, reflecting on the scope of availability of the parties, Teixeira de Sousa argues the court's power safeguards the freedom of the procedural subjects in the sense that they accept the invitation to clarify the judge or to remedy any deficiency indicated by him/her[124]. And, furthermore, he warns that the principle of cooperation cannot be applied without taking into account the self-responsibility of the parties as the remedy of deficiencies does not cover the omission of structural facts from the case[125].

In an even more enthusiastic perspective on cooperation, Fredie Diddier believes that CCP Article 266(1) enshrines a new model of procedural law, the cooperative model, under which the adversarial principle should be resized so that judges nurture *procedural dialogue*[126]. In his opinion, cooperative management[127] would constitute a kind of tertium genus by minimising both the part disposition principle and also the inquisitorial principle, as this enhances equity, parity in dialogue and a balance between the procedural subjects over the course of the procedural process, from the application initiating proceedings through to the trial stage[128]. Moreover, the principle of cooperation would not depend on the intermediation of other specific rules as it stands alone as a general clause endowed with direct effectiveness[129]. Although Didier states that he does not wish to overestimate the principle of cooperation[130]that does seem to be the logical outcome of his long and enthusiastic considerations.

However, this does seem to be the dominant or even the majority understanding of the value and scope of the reform that makes cooperation a structural principle of civil procedure, however committed the formulations of the legislator[131] and some doctrines may have been. In fact, it is worth mentioning the voices raised to express doubts, criticisms and questions on this new model. Indeed, Antunes Varela warned about the superhuman effort that would be incurred by actions of first instance judges as well as the emergence of a serious risk of subversion of the judicial function[132]. Later, adopting a similar tone, Paula Costa e Silva focused on the position of the party, warning that the legislator had drawn up an ideal type of procedural subject, a utopia, given that reality frequently produces unprecedentedly different types of party and rather divergent perceptions of the conflict[133]. Then, in another article, she observed how cooperation effectively imposes a reversal of the process paradigm as a confrontation between private parties[134].

[122] In defence of this view, TEIXEIRA DE SOUSA, "Apreciação de AlgunsAspectos da Revisão do Processo Civil: Projecto" in *Revista da Ordem dos Advogados*, no. 2, 1995, p. 362.

[123] Cf. TEIXEIRA DE SOUSA, "Apreciação… " in op. cit., p. 362.

[124] Cf. TEIXEIRA DE SOUSA, "Apreciação… " in op. cit., p. 363.

[125] Cf. TEIXEIRA DE SOUSA, "Limites da Cooperação do Tribunal" in *Cadernos de Direito Privado*, no. 17, March 2007, p. 46.

[126] Cf. FREDIE DIDIER, *Fundamentos do Princípio da Cooperação no Direito Processual Civil Português*, Coimbra, 2010, p. 46.

[127] Expression by FREDIE DIDDIER, Fundamentos…op. cit., p. 47.

[128] Accordingly, FREDIE DIDIER, after trying to demonstrate the symmetry between the parties, is forced to admit that, at the time of decision, the parties do not decide with the judge. Cf. *Fundamentos*…op. cit., pp. 47 ff.

[129] Cf. FREDIE DIDIER, *Fundamentos*…op. cit., pp. 41 ff.

[130]Cf. FREDIE DIDIER, *Fundamentos*…op. cit., pp. 102-3.

[131] The preamble of Decree-Law 329-A/95 stated that the principle of cooperation was the angular and exponential principle of civil procedure, in order to allow judges and legal representatives to mutually cooperate in order to achieve justice in the specific case.

[132] Cf. ANTUNES VARELA "A Reforma do Processo Civil Português" in *Revista de Legislação e de Jurisprudência*, year 129, pp. 259 ff.

[133] Cf. PAULA COSTA E SILVA, *Acto e Processo*, Coimbra, 2003, pp. 111-2.

[134] Cf. PAULA COSTA E SILVA, *A Litigância de MáFé*, Coimbra, 2008, p. 410.

Mariana França Gouveia and Correia de Mendonça go even further in their critical position towards the cooperative perception. In fact, while Mariana Gouveia accepts the duty to act in good faith, she argues that cooperation cannot mean the expropriation of private rights in favour of a public idea of justice[135]. Consequently, she dismisses the idea of a working community alongside the orientation fostering the social idea of the process and, correlatively, ends up disregarding the individual interests of parties[136]. In turn, Correia de Mendonça, recalling how judges cut across opposing interests when making decisions, claims the principle of cooperation distorts this reality in the name of a supposedly superior interest of an authoritarian nature[137]. Moreover, he notes that judges must be referees, not coaches, due to the impossibility of correcting the technical errors of the parties, and act according to a supposed normative will, without compromising their indispensable impartiality and exemption[138]. Consequently, he warns that the working community is unrealistic and that should this authoritarian and dirigiste approach be pursued, there is a real danger that the legal relationship could plunge into an abyss[139].

Despite the aforementioned doubts and well-founded concerns, the 2013 reform decided to maintain the content of the former CCP Article 266, now CCP Article 7, after the erroneous and mystifying renumbering, which was duly denounced at the time. Logically, while the maintenance of the cooperation principle enthused its supporters, it did not attenuate the criticisms and reproaches of its detractors. And quite the opposite. Accordingly, Silva Pereira, although not expressing total opposition to the reinforcement of the inquisitorial powers of judges, notes that the principle of cooperation, as outlined in the CCP, may open the door to greater judicial arbitrariness in order to promote celerity, allowing or at least not avoiding hasty decisions[140]. Miguel Resende also sets out well-founded doubts concerning the existence of a true working community, given that the strengthening of the judge's inquisitorial powers and the imposition of new procedural burdens on the parties may seriously threaten the guarantees of a fair trial[141].

Correia de Mendonça maintains the emphasis previously attributed when revisiting the subject after the 2013 reform. Therefore, he rejects not only what he terms the assistance role for judges, as there is a risk of this turning into intrusive paternalism, but also the initiatives to invite parties to provide clarifications or to practice certain acts as such attitudes compromise the judge's impartiality[142]. From our perspective, at the time of the 1st Luso-Brazilian Congress at Nova University, we had the opportunity to express our unease in the face of increased procedural cooperation and the enigmatic working community[143]. Accordingly, reflecting on the wording of the CCP, we rejected the idea of a general clause or its susceptibility for immediate application in recognising that strengthening the powers of judges, alongside weakening the rights of the parties within the goal of fostering some community idea of an inherently subjective nature may seriously distort the nature of civil procedural actions[144].

It is also worth adding another topic that may convey the shortcomings of the principle of cooperation in Portuguese law. In fact, in

[135] Cf. MARIANA FRANÇA GOUVEIA, *Regime Processual Experimental Anotado*, Coimbra, 2006, p. 103.

[136] Cf. MARIANA FRANÇA GOUVEIA, "OsPoderes do Juiz CívelnaAcçãoDeclarativa: EmDefesa de um Processo Civil aoServiço do Cidadão" in *Julgar*, no. 1, 2007, p. 56.

[137] Cf. LUÍS CORREIA DE MENDONÇA, "Vírus…" in op. cit., pp. 90 ff.

[138] Cf. LUÍS CORREIA DE MENDONÇA, "80 Anos de Autoritarismo: Uma LeituraPolítica do Processo Civil Português" in *Proceso Civil e Ideología*, Valencia, 2006, pp. 432 ff.

[139] Cf. LUÍS CORREIA DE MENDONÇA, "Vírus…" in op. cit., pp. 96 ff.

[140] Cf. FERNANDO SILVA PEREIRA, "Princípio da Cooperação e DeverJurídico de Colaboração Probatória: Uma Análise à Luz do Novo Código de Processo Civil" in *Revista da Faculdade de Direito da Universidade do Porto*, year X, 2013, pp. 128 ff.

[141] Cf. MIGUEL RESENDE "O Princípio da Cooperação no Novo Processo Civil" in *Balanço do Novo Processo Civil*, CEJ, Lisbon, 2013, p. 26.

[142] Cf. CORREIA DE MENDONÇA, "A Cooperação Processual Civil Entre um Novo Modelo e a Sombra do Inquisitório" in *O Direito*, , no. 1, year 151, 2019, pp. 51 ff.

[143] Cf. JL BONIFÁCIO RAMOS, "Cooperação: Novidadeou Biombo do Aumento dos Poderes do Juiz?" in *O Direito*, no. 1, year 151, 2019, pp. 55 ff.

[144] Cf. JL BONIFÀCIO RAMOS, "Cooperação…" in op. cit., pp. 62 ff.

addition to the exaggerated weight of the judge's intervention, as well as the reversal of the paradigm of the process, it is worth noting the existence of well-founded doubts both about the limits of a duty of truth directed at the parties[145]and the effective enshrinement of this duty in Portuguese law[146]. Furthermore, the rules on bad faith litigation are broader than any simple violation of the duty to cooperate as CCP Article 542 qualifies a bad faith litigant as the subject who acts with will ful intent and serious negligence. In the case of cooperation, only the serious omissions would be illicit, which highlights another difficulty needing consideration.

Dynamization of the Burden of Proof

In view of the discomfort caused by distributing the burden of proof, especially on realising that the special rules were neither sufficient nor adequate in view of the hesitant legislative reformism, and correspondingly accepting, on an occasional basis, other special regimes, a theory began to take shape attributing the judge with the scope for correcting, in borderline situations, the excesses caused by strict application of the legal criteria for the distribution of the burden of proof. Thus, we do not here face any rupture in relation to distributing the burden of proof but rather a methodology capable of adapting the burden of proof to specific situations, decided by judges on a case-by-case basis.

According to one of its leading advocates, Jorge Peyrano, the theory represented an alternative and a remedy. Thus, instead of ruling out or eliminating the classic distribution of the burden of proof, this procedure would act to correct failures or serious deficiencies in evidence-related activities[147], thereby allowing judges to assess the balance and equality between the parties as regards the burden of proof placed upon each of them. Thus, Peyrano reflects on a set of legal rules for distributing burden of proof, the static distribution of the burden of proof before convey marked agnosticism[148]. Accordingly, he seeks to demonstrate how praxis is responsible for illustrating situations in which static rules become inadequate and unfair[149]. He then endeavours to construct a mechanism, a machine in his terminology, designed to prevent or hinder the exaggerations caused by the strict application of legal rules and which accordingly takes into account the circumstances of the individual case[150]. Thus, in light of a 1978 decision by an Argentine court in relation to a medical civil liability case, Peyrano considered that the court had assessed the evidential burden, accounting for the specific circumstances of the case[151], to the detriment of the legal regime's rigidity. Subsequently, in 1984, as in his opinion there were other judicial decisions sharing similar assumptions, Peyrano, in conjunction with Chiappini, set out the fundamental assumptions of the dynamic distribution theory of the burden of proof[152].

In short, when equality between the parties does not exist or is threatened, judges must act in such a way as to avoid injustices arising from the rigid evidential burden[153]. Peyrano then argues that judges should indicate, as a remedy on appeal, *in extremis*, evidential burdens different from those indicated by the law in

[145] Cf. ROLF *STÜRNER, Die Aufklärungspflicht der Parteien, Tübingen, 1976*, pp. 29 ff. Cf. Antonio Carratta "Dovere di Verità e Completezzanel Processo Civile" in *Rivista Trimestrale di Diritto e Procedura Civile*, year 68, no. 1, 2014, pp. 69 ff.; Antonio Carratta "Dovere di Verità e Completezzanel Processo Civile" in *Rivista Trimestrale di Diritto e Procedura Civile*, year 68, no. 2, 2014, pp. 500 ff.; Elisângela Caureo, "Il Dovere di Verità e Completezzanel Processo Civile" in *Civil Procedure Review*, Vol. 9, 2018, pp. 27 ff.

[146] Cf. MENEZES CORDEIRO, *Litigância de Máfé, Abuso do Direito de Ação e Culpa in Agendo*, Coimbra, 2014, pp. 86-7.

[147] Cf. JORGE PEYRANO, "La Doctrina de las Cargas Probatorias Dinâmicas y la Máquina de Impediren Materia Jurídica" in *Cargas Probatorias Dinâmicas*, coord. Jorge Peyrano and Inês White, Buenos Aires, 2008, p. 78.

[148] Cf. JORGE PEYRANO, *El Proceso Civil: Principios y Fundamentos*, Vol. I, Buenos Aires, 1978, pp. 535 ff.

[149] Cf. JORGE PEYRANO, "Nota a Fallo: La Doctrina de las Cargas Probatorias Dinâmicas y la Máquina de Impediren Materia Jurídica" in *Revista de DerechoProcesal*, no. 3, 1999, pp. 396-7.

[150] Cf. JORGE PEYRANO, "La Doctrina…" in op. cit., pp. 82 ff.

[151] Cf. JORGE PEYRANO, "La Doctrina…" in op. cit., p. 85.

[152]Cf,.JORGE PEYRANO e JULIO CHIAPPINI "Lineamientos de las Cargas Probatorias Dinâmicas" in *El Derecho*, no. 107, 1984, pp. 1005 ff.

[153]Cf, .JORGE PEYRANO e JULIO CHIAPPINI "Lineamientos…" in op. cit., pp. 1006 ff.

force[154]. All the more so given that, as detailed in another study, the inequality between the parties may be aggravated in situations with extremely difficult evidence, where the evidential material is assessed in a particularly delicate and imprecise manner as would be the case with evidence of old facts or those taking place in closed or restricted environments[155].

However, Peyrano does not intend to extinguish or disregard the *onus probandi* but rather to partially correct certain evidential efforts[156]. Logically, this may mean lightening the burden of proof for one party in contrast to the burden on the opposing party whenever the latter is more favourably positioned to prove a fact relating to a civil controversy[157]. However, the additional burden for the better positioned party must not represent an excessive or even inappropriate evidential effort. Thus, it would be helpful to introduce mechanisms aimed at avoiding any lack of evidence[158]on behalf of parties, eliminating or alleviating difficulties in demonstrating the facts as proof in court.

However, while the dynamic theory was first adopted by certain sectors of doctrine and jurisprudence before becoming enshrined in law, even if in an incidental manner or as a substitute or exceptional rule, this was not the case in Argentina. In fact, despite the impact of Jorge Peyrano's ideas, the CCP continues to enshrine the classic distribution of the burden of proof. In fact, Peyrano himself, after stressing the impact of the theory on the jurisprudence of the higher courts, as well as on domestic and foreign doctrine, pointed out that the CCP of his own country does not expressly make any such provision[159]. Nonetheless, in his opinion, the CCP would not need to contain an absolutely rigid provision as the principle of procedural acquisition grants judges with a broad criterion of reasonableness, allowing them to act regarding evidential merit by choosing that in *favour probationes;* in more favorable conditions to prove[160]. On this topic, Peyrano actually illustrates his idea with the image of an emergency occurring during surgery in order to justify the mutability of the dynamic theory[161]. In his view, those who are prima facie better positioned to prove may not even be in privileged positions within the scope of demonstrating the truth of a fact[162].

As clarified by Barberio, the dynamic doctrine does not consist of a set of legal rules for assigning the burden of proof but rather a valuation grid designed to assess the evidence gathered and decide who is best positioned to put forward evidence relevant to the subject of the case.[163]. In other words, the doctrine refuses to assign, *a priori*, the evidential burden to each procedural subject[164]. In short, when it seeks to change the distribution of the burden of proof, it does not represent an alternative or special criterion for the distribution of evidence, which means it would not make sense for this to become part of the static distribution framework established by law but should instead result from the judge's power of initiative in the light of certain factual circumstances.

As regards the acceptance of this doctrine, in Brazilian law, it should be noted that, in addition to significant adherence on the part of renowned civil law experts and some jurisprudence, there is also some acceptance through the legislation in effect. Thus, while the CCP of 1973 had not expressed any openness in the sense of rendering such a theory viable, in

[154] Cf. JORGE PEYRANO, ”LaRegla de la Carga de la PruebaEnfocadacomo Norma de Clausura del Sistema” in *Civil Procedure* Review, vol. I, no. 3, 2010, pp. 100 ff.

[155] Cf. JORGE PEYRANO, “La PruebaDificil” in *Civil Procedure* Review, vol. 2, no. 1, 2011, pp. 87 ff.

[156] Cf. JORGE PEYRANO, “La Carga de la Prueba” in EscritosSobreDiversosTemas de DerechoProcesal, Buenos Aires, 2011, p. 969.

[157] Cf. JORGE PEYRANO and JULIO CHIAPPINI, “Lineamientos…” in op. cit., p. 1005.

[158] Expression applied by GUILLERMO SÁNCHEZ, *Carga de la Prueba y Sociedad de Riesgo*, Madrid, 2004, p. 12.

[159] Cf. JORGE PEYRANO, “Informe Sobre la Doctrina de las CargasProbatoriasDinâmicas” in *Revista de Processo*, no. 217, year 38, 2013, pp. 211 ff.

[160] Cf. JORGE PEYRANO, “Informe…” in op. cit., pp. 210-1.

[161] Cf. JORGE PEYRANO, “La Doctrina…” in op. cit., p. 85.

[162] Cf. JORGE PEYRANO, “Informe…” in op. cit., p. 222.

[163] Cf. SERGIO BARBERIO, “CargasProbatoriasDinamicas” in *CargasProbatóriasDinâmicas*, Buenos Aires, 2008, pp. 99-100.

[164] Cf. SERGIO BARBERIO, “Cargas…” in op. cit., p. 100.

Brazilian domestic law, the Consumer Defense Code proposed, in Article 6, a reversal of the burden's *opejudicis*, instead of reversing *ope legis*. This would have represented the legislative adoption of the dynamic burden of proof theory[165]. As a matter of fact, some argued that the precept would not even be applied and, if so, only in the strict scope of consumer relations but with protected collective rights *latosensu* and protected rights of a non-pecuniary nature[166].

However, to the surprise of many, the wording of the new CCP of 2015 does not contain any enthusiastic adherence to the dynamic burden of proof theory. Instead, the CCP seems to have adopted cautions consistent with a more moderate sector[167]. As a matter of fact, Article 373 of the new CCP prescribes, *ab initio*, a classic distribution of the burden of proof. Only after stipulating this general rule, paragraph 1 in the same precept provides for exceptions to this rule in accordance with special law or the circumstances of the case stemming from the impossibility, excessive difficulty or greater ease of obtaining proof of the contrary fact. Accordingly, only in these situations, may judges assign the burden of proof in a different manner, provided they do so with justified reasons, giving the party the opportunity to discharge the assigned burden of proof.

Notwithstanding, paragraph 2 still restricts the dynamism admitted by the previous paragraph as the judge's decision cannot generate a situation in which discharging the burden of proof seems impossible or extremely difficult. As such, when judges so have to define the distribution of the burden of proof during their preliminary reviews, as prescribed in Article 357(2), it is no less true that the content of CCP Article 373 seems more restrictive of judge activities than any hurried interpretation might suppose: all the more so as the most consonant interpretation seems to accept the requirements enshrined in paragraphs 1 and 2 are cumulative[168]. Thus, paragraph 1 of CCP Article 373 allows judges, in view of the peculiarities of cases, to consider the impossibility and excessive difficulties in fulfilling the burden or the greater ease of obtaining proof of the contrary fact, to assign the burden differently through a reasoned decision. However, such decisions cannot generate a factuality in which the party's discharging of the burden becomes impossible or extremely difficult. In other words, shifting the burden of proof is not accepted whenever excessively difficult or a fact impossible for the other party to prove[169]. In short, the distribution of the burden of proof does not operate in any rigid way in terms of general and abstract criteria, in opposition to the original criterion, but rather through a very detailed and reasoned decision. Therefore, the static distribution of the burden of proof opposes a dynamic distribution, where, instead of rules directed at the parties, we have a formulation drafted by the judge in accordance with very restrictive legal parameters[170].

Therefore, the main ideas of the dynamic theory, expressed in the Brazilian CCP of 2015, derive from rejecting any antagonism to the guidelines for the distribution of the burden of proof, rather meaning correction mechanisms for special cases. In fact, Article 373 initially prescribes the burden of proof as falling on the claimant, as regards the fact constituting his/her right, and on the defendant, as regards the existence of any fact impeding, modifying or extinguishing the claimant's right. As already seen, as a general rule, the CCP continues to enshrine a static distribution of the burden of proof[171], allowing for exceptions with another distribution of the burden of proof under the terms of paragraphs 1

[165] Cf. MARCELA MOURA FRANÇA, "Teoria das Cargas Probatórias Dinâmicas e o Artigo 333º do CCP" in http://www.boletimjuridico.com.br, , 2013, p. 3.

[166] Cf. EDUARDO CAMBI, "Teoria das Cargas Probatórias Dinâmicas (DistribuiçãoDinâmica do Onus da Prova)-Exegese do art. 373, §§ 1º e 2º do NCCP", in *Revista de Processo*, no. 246, 2015, p. 91.

[167] In this respect, JOÃO BATISTA LOPES had advised restricting the dynamic theory of the evidential burden to hypotheses of impossibility or excessive onerousness in the production of evidence in order to avoid the measure's discretionary nature. Cf. "Ônus da Prova e Teoria das CargasDinâmicas no Novo Código de Processo Civil" in *Revista de Processo*, no. 204, 2012, p. 240.

[168] Cf. LEONARDO BESSA and RICARDO LEITE, "A Inversão do Ónus da Prova e a Teoria da Distribuição Dinâmica: Semelhanças e Incompatibilidades" in *Revista Brasileira de Políticas Públicas*, Vol. 6, no. 3, 2016, p. 142.

[169] Cf. LEONARDO BESSA and RICARDO LEITE, "A Inversão…" op. cit., p. 142.

[170] In this respect, Araken de Assis, *Processo Civil Brasileiro*, Vol. II, Tomo II, 2nded., 2016. p. 207

[171] Cf.ARAKEN DE ASSIS, *Processo*…Vol. II, op. cit, pp. 193 ff.

and 2 and in accordance with special law or in view of the specific circumstances of a given case. Logically, the new distribution cannot be free, arbitrary or even based on precedents as was previously the case[172], but must rather comply with the strict canons set out in the CCP's precept. From our perspective, these canons appear limiting merely in order to allow for an exceptional[173]or subsidiary[174] dynamic distribution.

However, the restrictive view was not unanimously welcomed, opposed in particular, by those who had defended a broad enshrinement of dynamic theory prior to the approval of the new CCP. Therefore, Moura de Azevedo, when interpreting Article 373, states the static theory was placed on an equal footing with the dynamic theory, with the latter representing an instrument available to the magistrate in order to impose an evidential burden on the better positioned party[175]. Therefore, although he allows for the subordination of dynamic theory, he argues the dangers of arbitrary decisions or even *diabolicevidence* are safeguarded by legal precepts[176]. Indeed, these ideas are reaffirmed by Cambi when he argues that the dynamic distribution of the burden of proof expands the powers of judges, rendering them active interpreters, problem solvers and even law makers[177], despite himself accepting the limits to exercising the dynamic distribution of evidence. Thus, as regards the material limits, the litigant, dynamically burdened, should receive a privileged position by virtue of the role played in the controversy. However, the dynamic burden cannot be applied to compensate for inertia but rather to avoid one of the parties forming *probatiodiabolica*[178]. Furthermore, there are also the limitations of a formal nature, such as the need to justify dynamic distribution as well as the impossibility of the decision occurring only in the decision-making process, in particular in the judgement due to how this fails to safeguard the adversarial principle[179].

Understandably, the issue was also raised in Portugal. Indeed, even before the 2013 reform, Micael Teixeira argued that Portuguese law enshrined the dynamic distribution of the burden of proof[180]. Therefore, by emphasising the procedural principles of cooperation, celerity and procedural economy, he sought to demonstrate the inadequacy of Article 344(1), particularly as regards legal presumptions and

[172]FREDIE DIDIER emphasises this contrast in order to highlight the distinction between the situation prior to the entry into force of the 2015 CCP when judicial precedent provided grounds for the dynamic distribution of the burden of proof and the existence of a legal precept that presupposed the fulfilment of formal and material assumptions justifying such a distribution. Cf. "A Distribuição Legal, Jurisdicional e Convencional do Ónus da Prova no Novo Código de Processo Civil Brasileiro" in *Revista Direito Mackenzie*, Vol. II, no. 2, 2017, pp. 150-1.

[173] According to ARAKEN DE ASSIS, only under certain conditions - specific, prior and delimited grounds - is it acceptable to distribute the burden of proof opejudicis. Therefore, this distribution cannot function as a rule but rather as an exception to be interpreted restrictively. Cf. *Processo*…Vol. II, op. cit, p. 211.

[174]LENIO STRECK, DIERLE NUNES and LEONARDO DA CUNHA recall that the rule is that the claimant is responsible for proving the facts constituting his/her right and the defendant is responsible for proving the existence of an impeding, modifying or extinctive fact to the claimant's right. Thus, the dynamization arises, in a subsidiary way, whenever necessary for the appropriate provision of the protection of material rights. Cf. *Comentáriosao Código de Processo Civil*, São Paulo, 2016, p. 558.

[175] In their opinion, CCP Article 373 provides for dynamic distribution arising as a way of overcoming difficulties encountered during the procedural investigation and to come as close as possible to exhaustive knowledge on the facts brought before the court. Cf. ANTÓNIO MOURA DE AZEVEDO, "A Consolidação da Teoria Dinâmica de Distribuição do Ónus da Prova no Novo CCP" in *ÂmbitoJurídico*, no. 143, December, 2015, http://ambito-juridico.com.br, p. 2

[176]Thus, regarding the risk of abusive or arbitrary decisions, he stresses the importance of appeals, invoking any violation of important procedural principles. As regards *diabolic evidence*, CCP Article 373, paragraph 1 allows the party charged with proving, within the scope of the adversarial principle, to demonstrate that the distribution of the evidential burden causes serious prejudice to its interests. Cf. ANTÓNIO MOURA DE AZEVEDO, "A Consolidação…" in op. cit. p. 2.

[177] Cf. EDUARDO CAMBI, "Teoria…" in op. cit., pp. 100-1.

[178] Cf. EDUARDO CAMBI, "Teoria…" in op. cit., p. 102

[179] Cf. EDUARDO CAMBI, "Teoria…" in op. cit., p. 102

[180] Cf. MICAEL TEIXEIRA, *Por uma Distribuição Dinâmica do Ónus da Prova*, Lisbon, 2012, n. ed., pp. 32 ff.

cases of waiver or releases from the burden of proof[181]. Henceforth, he advocated dynamic distribution should constitute the legal criterion for distributing the burden of proof as he discerned a hidden gap in Article 342 of the Civil Code regarding the imbalance in the evidential capacity of parties[182]. Accordingly, applying the dynamic distribution of the burden of proof would result from deepening the principle of formal adequacy, provided for under former Article 265A, which corresponds to current CCP Article 547[183].

From another perspective, which admitting the limitations of the rules on distributing the burden of proof, Elisabeth Fernandes notes how the scope for the courts applying dynamic distribution, without any rule allowing for this, should be declined[184]. In a similar vein, Luz dos Santos, while expressing sympathy for dynamic distribution[185], disagrees with the ideas of Micael Teixeira as he maintains that it is within distributing the burden of proof, and not within the assessment of the evidence, that the difficulty of proof requires consideration[186]. Subsequently, he does allow for, from a*iurecondendo* perspective, the functional distribution of the burden of proof through a general facility clause for distributing evidence that takes into account the proximity and control of the facts, the technical knowledge and the correlative exercising of professional activities as well as access to the means of proof[187]. Later, now co-authored with Wang Wei, Luz dos Santos returns to this theme, warning that the scope for debate remains *iurecondendo*[188]. Nevertheless, these authors perceive an open door through the procedural management mechanism, adopted by the 2013 CCP reform in the sense that, in a prior hearing, the judge, deploying the powers conferred by CCP Article 6, indicates the distribution of the burden of proof that seems most appropriate to the specific case[189].

In the opposite direction to those postulating that theory, doubts, comments and criticisms have been advanced in order to demonstrate the disadvantages and even the dangers of any enshrinement of such evidence-related dynamism. This view is naturally shared by all those opposing judicial activism, the garanteeists. Hence, it comes as unsurprising that Alvarado Velloso rejects the dynamic theory. In fact, disapproving of the exaggerated protagonism attributed judges, he observes that such orientations and ideas do not even merit a place in keeping with the contents of Article 377 of the Argentine CCP[190]. He claims that only the law, never case law, can alter the burden of proof assigned to the parties, otherwise judges might simply change the rules of the game, in unfair manners and thereby violating the guarantees and basic rights of the parties[191].

Insisting on this point, while not himself a garanteeist, Taruffo expresses surprise and discomfort at the opinions that attempt to attribute the distribution of the burden of proof to judges and not to written law,[192]. In addition, Taruffo states not having even found any serious

[181] Cf. MICAEL TEIXEIRA, *Por uma Distribuição*…op. cit., pp 54 ff.

[182] Cf. MICAEL TEIXEIRA, *Por uma Distribuição*…op. cit., pp. 77-8.

[183] Cf. MICAEL TEIXEIRA, *Por uma Distribuição*…op. cit., pp. 81 ff.

[184] Cf. ELISABETH FERNANDES, "A Prova Difícilou Impossível" in *Estudose m Homenagemao Prof. Doutor José Lebre de Freitas*, Vol. I, Coimbra, 2013, p. 831.

[185] Cf. HUGO LUZ DOS SANTOS, "Plaidoyer por uma Distribuição Dinâmica do Ónus da Prova e pela Teoria das Esferas de Risco à Luz do Recente Acórdão do Supremo Tribunal de Justiça de 18/12/2013: o Admirável Mundo Novo no Home banking" in *O Direito*, no. 147, III, pp. 740 ff.

[186] Cf. HUGO LUZ DOS SANTOS, "A Distribuição Dinâmica doÓnus da Prova no Direito Probatório Material Português: Algumas Notas *Iure Condendo*" in *Revista de Direito e Estudos Sociais*, year 57, no. 1, 2016, pp. 248 ff.

[187] Cf. HUGO LUZ DOS SANTOS, "A Distribuição…" in op. cit., pp. 250 ff.

[188] Cf. HUGO LUZ DOS SANTOS, WANG WEI, "A DistribuiçãoDinâmica do ònus da Prova no Direito Processual Civil de Portugal e da Região Administrativa Especial de Macau: Algumas Notas à Luz do Direito Comparado" in *Scientia Iuridica*, no. 343, 2017, pp. 57 ff.

[189] Cf. HUGO LUZ DOS SANTOS, WANG WEI, "A Distribuição…" in op. cit., pp. 66-7.

[190] Cf. ADOLFO ALVARADO VELLOSO, *Garantismo*…op. cit., p. 203.

[191] Cf. ADOLFO ALVARADO VELLOSO, *Garantismo*…op. cit., pp. 203-4.

[192] Cf. MICHELE TARUFFO, *La Semplice*…op. cit., pp. 260 ff.

dysfunctionalities in the legal distribution of the burden of proof, the necessary exceptions and the system of presumptions corrected by the system to provide it with the supposed necessary balance[193]. For this reason, he regards the postulates of the dynamic theory with great scepticism[194], affirming that modifications of evidential burdens by judges are of a discretionary nature, susceptible to generating arbitrariness[195]. Moreover, he adds that the proximity of proof, or the ease of proving a certain fact, clearly constitutes a weak argument against the legal distribution of the burden of proof as there are other methodologies more suitable for the same purpose[196].

He therefore warns against the dangers of dynamic theory[197]. Specifically, they may violate the principle of adversarial proceedings in the event judges make changes to the evidential burden only at the moment of formulating their final decisions, by placing the parties in a position where they are unable to defend themselves as they did not gain knowledge of the evidential burden in due time[198]. As a matter of fact, should judge manipulate the distribution of the burden of proof, then they do undermine the rules relating to adversarial proceedings according to which the parties had, in due time, considered their investigation initiatives[199]. This would amount to a surprise decision potentially able to undermine the fundamental guarantee of the party's defence[200]. Accordingly, Taruffo then points out, in commenting on Spanish law, that the civil law judge, unlike the common law judge, does not have discretionary powers to alter the distribution of the burden of proof between the parties[201].

Beltrán goes even further in claiming that the dynamic theory has been superseded in keeping with the consolidation of the principle of procedural acquisition[202]. Consequently, the degree of evidential demand depends rather on the body of evidence put forward for the process either by the parties or by the judge and not on the individual behaviour of a certain procedural subject[203]. He also emphasises the increasing loss of importance of the subjective dimension to the burden of proof and even views that have gained some acceptance in the sense of reflecting on abolishing the burden of proof[204]. Furthermore, there are more appropriate mechanisms available of relevance to assisting parties in submitting evidence to the process for assessing the case subject. One would be, also according to Beltrán, the duties arising from the principle of procedural cooperation accompanied by an effective set of sanctions in the face of non-compliance with the legal consequences related to implementing that principle[205].

In turn, Fenoll, drawing support from the history of the process, seeks to demonstrate how distributing the burden of proof corresponds to the apogee period for legal proof[206]. Therefore, in a free valuation of evidence system, it would not matter so much whether certain evidence was submitted by a party or even by the judge[207]. Defendants should not await the claimant failing to prove his/her claim but should put forward all the evidence at their disposal in order to contribute to the dismissal of the claim[208]. Consequently, Fenoll proposes the

[193] Cf. MICHELE TARUFFO, *La Semplice*…op. cit., pp. 264 ff.

[194] Cf. MICHELE TARUFFO, *La Semplice*…op. cit., pp. 264 ff.

[195] Cf. MICHELE TARUFFO, "Oneredella Prova" in *Diritto on Line: Treccani*, 2017, p. 20.

[196]Such would include the case of requesting a document within the scope of the judge's inquisitorial powers. Cf. Michele Taruffo, "La Valutazione…" in op. cit., pp. 256-7.

[197] Cf. MICHELE TARUFFO, *La Semplice*…op. cit., pp. 266 ff.

[198] Cf. MICHELE TARUFFO, *La Semplice*…op. cit., pp. 268-9.

[199] Cf. MICHELE TARUFFO, "L ' Onere…" in op. cit., pp. 431-2.

[200] Cf. MICHELE TARUFFO, "Casi Una Introducción" in *Contra la Carga de la Prueba*, Madrid, 2019, p. 13.

[201] Cf. MICHELE TARUFFO, "L ' Onere…" in op. cit., pp. 432-3.

[202] Cf. JORDI BELTRÁN, "La Carga Dinâmica de la Prueba: Entre la Confusión e lo Innnecesario" in *Contra la Carga de La Prueba*, Madrid, 2019, p. 71.

[203] Cf. JORDI BELTRÁN, "La Carga…" in op. cit., p. 72.

[204] Cf. JORDI BELTRÁN, "La Carga…" in op. cit., p. 73.

[205] Cf. JORDI BELTRÁN, "La Carga…" in op. cit., pp. 80 ff.

[206] Cf. JORDI FENOLL, "La Carga de la Prueba: Una Reliquia Histórica que Debiera ser Abolida" in *Contra la Carga de la Prueba*, Madrid, 2019,pp. 32 ff.

[207] Cf. JORDI FENOLL, "La Carga…" in op. cit., p. 38.

[208] Cf. JORDI FENOLL, "La Carga…" in op. cit., p. 48.

existence of cases without any distribution of the burden of proof as it is not even be the burden of proof that determines the winning case in a given legal action[209]. In short, the dynamic theory of the burden of proof and the consequent ease of proof appear to be based on the misconception that distributing the burden of proof represents the cornerstone of civil procedure when this is not, in fact, the case[210].

In Portugal, Maria dos Prazeres Beleza also warns on this matter. She initially accepts that the dynamic theory, with its flexibility and adaptable to the circumstances of each case in shifting the burden of proof to the party in the best technical or factual position to produce the evidence, displays certain virtues[211]. Nevertheless, she stresses the insecurity and great uncertainty that the acceptance of such dynamism may bring regarding the distribution of the burden of proof as magistrates assume real powers in altering the evidential burden[212]. Nonetheless, as the rules on distributing the burden of proof are not strict rules of evidence, but may nevertheless determine the content of the judgment on their merits as there are legal rules determining against whom judges decide in case of doubt, she sees no advantage in accepting this doctrinal position[213]. Moreover, beyond the inexistence of any explicit law allowing for the application of such a theory, she stresses the multiple enshrining of special rules, in particular as regards consumer protection, in order to overcome situations in which the general rules prove inadequate[214].

In turn, Paula Costa e Silva and Nuno Trigo dos Reis sought to reflect on the most appropriate methodologies for dealing with this difficult test[215]. Consequently, they consider the prospect of lowering the degree of conviction about the correspondence between the report and the reality of a fact: in other words, the *probatiolevior*[216]. They also reflect on the value of proof by the sampling, reversal and dynamic distribution of the burden of proof[217]. On this latter topic, they then express surprise at a distribution scheme for the evidential effort based on the idea of the difficulty of proof for one party[218]. Especially given how the overcoming of evidentiary needs, through an unjustified reversal of the burden, might lead to a prevalence of the idea of efficiency over the motives grounding the action underlying the violated norms[219]. Furthermore, as regards diabolical evidence, they noted the susceptibility for situations in which the evidence appears doubly diabolical and therefore rules seeking to place the burden of proof on the party best placed to prove this would neither be efficient nor provide any appropriate criterion[220]

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[209] Cf. JORDI FENOLL, "La Carga…" in op. cit., pp. 43 ff.

[210] Cf. JORDI FENOLL, "La Carga…" in op. cit., pp. 45 ff.

[211] Cf. MARIA DOS PRAZERES BELEZA,"O Activismo…" in op. cit., p.9.

[212] Cf. MARIA DOS PRAZERES BELEZA,"O Activismo…" in op. cit., pp. 10-1.

[213] MARIA DOS PRAZERES BELEZA refers here to the former articles 515, 516 and 265 no. 3, currently CCP articles 413, 414 and 411 CCP, respectively. Cf."O Activismo…" in op. cit., pp. 11.

[214] Cf. MARIA DOS PRAZERES BELEZA, "O Activismo…" in op. cit., p. 13.

[215] Cf. PAULA COSTA E SILVA, NUNO TRIGO DOS REIS, "A Prova Difícil: Da *Probatio Levior* à Inversão do Ónus da Prova" in *Revista de Processo*, Vol. 38, no. 222, 2013, p. 155.

[216] Cf. PAULA COSTA E SILVA, NUNO TRIGO DOS REIS, "A Prova…" in op. cit., p. 159.

[217]Cf. PAULA COSTA E SILVA, NUNO TRIGO DOS REIS, "A Prova…" in op. cit., pp. 161 ff.

[218] Cf. PAULA COSTA E SILVA, NUNO TRIGO DOS REIS, "A Prova…" in op. cit., p. 166.

[219] Cf. PAULA COSTA E SILVA, NUNO TRIGO DOS REIS, "A Prova…" in op. cit., p. 167.

[220] CF. PAULA COSTA E SILVA, NUNO TRIGO DOS REIS, "A PROVA…" IN OP. CIT., P. 169.