FACT-FINDING: MUST PARTIES TELL THE TRUTH (AND/OR MUST THE JUDGE SEEK IT)?

Cindy Seinen[*]

Dear Members of the NVvP Board,
Dear President De Groot and Professor Akkermans, my esteemed supervisors,
Dear President Laviņš of the Latvian Constitutional Court,
Dear Interveners,
Dear Members,
Dear Guests,

On behalf of my fellow rapporteurs, Professors Gomille, Vandenbussche and Rouvière: it is a great pleasure to see you all here today, to celebrate the conclusion of a project made possible by the grant this association bestowed on me some years ago. It has taken a while to come to fruition, due to personal circumstances. I take this opportunity to thank you for your kind patience and for allowing me to keep working on this project. It has been a source of positivity for me and – thanks to my fellow rapporteurs – I am hopeful the returns on your investment will not disappoint.

1. Introduction

1. The point of departure for this comparative project was that both the Dutch article codifying the duty of parties to tell the truth in civil procedures[1] and the article codifying the powers of the civil judge to ask for additional information[2] were inspired by articles in the German and the French codes of civil procedure, which codify basic principles of civil procedural law.[3] This information was the basis for two working hypotheses:

a) As both topics touch on basic principles of civil procedural law, they reflect what might be referred to as 'legal culture' – which made me assume that the law in the books on these topics might differ from the law in practice.
b) As the German and French articles were much older than the Dutch ones, German and French law would have more developed statutory provisions and case law on the topics.

* Mr. C.J-A. Seinen is a judge at the District Court of The Hague and a PhD candidate at the Vrije Universiteit Amsterdam / Amsterdam Centre for Comprehensive Law.

1 Art. 21 Rv (the Dutch Code of Civil Procedure).

2 Art. 22 Rv.

3 *Kamerstukken II*, 1999-2000, 26 855, nr. 3, p. 52.

I also assumed:

c) As Belgian law had also been grappling with these topics for some time without codifying a solution, Belgian legal practice might have found some workarounds that could be helpful for the Dutch practice as well.

2. The first hypothesis turned out to be correct, but to my surprise, the other two were not, at least not in the sense I had expected. In my contribution, I will point out four developments in European civil justice that I think are relevant when interpreting our findings and give you a summarized version of the more surprising findings concerning the procedural duties around fact-finding. Also, I will suggest some conclusions we might draw from our findings.

3. Spoiler alert: I will defend the notion that both judges and lawyers have important – and, in part, overlapping – roles to play. I do not subscribe to the notion that it would be best to phase out lawyers from civil litigation as much as possible, and to have judges be solely responsible for the fact-finding process, instead. That is where my intervener, Emile Snijders – a lawyer, comes in. He will also share his thoughts on the topics, and, for the remainder of this first part of the symposium, he and I will explore the roles of lawyers and judges together with you, the audience.

2. The primary goal of civil justice

4. Let us start with the premise all four legal systems agree on and have agreed on for a very long time, and that is the main goal of civil justice as a whole and civil procedures conducted before courts in particular:

Civil justice must render to everyone their due.[4]

5. What one's due is, is governed by material law and will differ between legal systems; we will not go into that today. But where there is a civil right, there must be a remedy, and, if necessary, the courts must provide this remedy through civil

4 'Iustitia suum cuique distribuit', Cicero, *De Legibus*, I, 15. Cf. 'Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere', *Digesta* (Ulpianus) 1, 1, 10, 1; *Institutes* (Iustinianus) 1, 1, 3.

procedures. This is true in Belgium[5] and France,[6] in Germany[7] and in the Netherlands[8] – as it is true in most countries.[9]

But *how* must civil procedures render to everyone their due?
How does one go about establishing whether there is a right?

3. Background: relevant developments in civil justice

3.1. Adversarial approach to case management and fact-finding

6. In the nineteenth century, the four legal systems we are comparing today took a similar approach to the two aforementioned questions.[10] Because civil procedures centre around civil rights, which citizens may dispose of as they see fit, governments and lawyers tended to view civil litigation as a predominantly private matter. Of course, it was a public matter in the sense that the state had to provide the forum where citizens could bring their civil cases, but it was up to citizens to decide whether they would start a procedure, to choose the rights they wished to debate, and the extent to which they wished to debate them. It was up to the parties' lawyers to decide how to conduct the procedure,[11] what information

5 P. Taelman, 'Abuse of Procedural Rights: Regional Report for Belgium – The Netherlands', in M. Taruffo (Ed.), *Abuse of Procedural Rights: Comparative Standards of Procedural fairness*, Den Haag: Kluwer Law International, 1999, pp. 125-150.

6 J. Vincent and S. Guichard, *Procédure civile*, Précis, Dalloz: Paris, 2001, p. 20; C.H. van Rhee, D. Heirbaut & M.E. Storme (Eds.), *The French Code of Civil Procedure (1806) After 200 Years. The Civil Procedure Tradition in France and Abroad*, Kluwer: Mechelen, 2008.

7 BGH 18 November 2004 – IX ZR 229/03, openJur, 2012, 57930, Rn. 23; C. Gomille, *Informationsproblem und Wahrheitspflicht. Ein Aufklärungsmodell für den Zivilprozess*, Jus Privatum 210, Mohr Siebeck: Tübingen, 2016, pp. 3-4.

8 I. Giesen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 1. Beginselen van burgerlijk procesrecht*, Deventer: Wolters Kluwer, 2015, §10.

9 Cf. A.S. Zuckerman (Ed.), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Oxford University Press, 1999, pp. 3-4; A. Uzelac (Ed.), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems*, Ius Gentium: *Comparative Perspectives on Law and Justice* 34, Heidelberg, New York, Dordrecht, London: Springer Cham, 2014.

10 As did many legal systems at the time; see M. Cappelletti and B.G. Garth, 'Introduction – Policies, trends and Ideas in Civil Procedure', in M. Cappelletti (Ed.), *International Encyclopedia of Comparative Law*, Volume XVI, Mohr Siebeck | Nijhoff, Tübingen | Leiden, (1987) 2014, Chapter 1, §IV-VI; C.H. van Rhee and R. Verkerk, 'Civil Procedure', in J.M. Smits (Ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham, 2006, pp. 120-134.; R. Garcia Odgers and C. Fuentes Maureira, 'El surgimento del Case Management y la superación del juez director del proceso: el proceso como reflejo de las exigencias y problemas de nuesta Época', *Rivista de derecho* (Concepción) 248 (June 2020), §IV. Austria skipped ahead to the third development in 1898, thanks to its CCP drafted by Franz Klein, which later inspired many European CCPs – see M. Marinelli, E.M. Bajons & P. Böhm (Eds.), *Die Aktualität der Prozess- und Sozialreform Franz Kleins*, Verlag Österreich: Wien, 2015.

11 Germany: Dispositionsmaxime/Verhandlungsmaxime/Grundsatz der Parteiherrschaft, Parteiautonomie; France: principe dispositif /principe accusatoire, principe de neutralité; Belgium

and evidence to submit and which witnesses to call; judges applied the law to the results of this procedure.

7. As many procedures were conducted without an oral hearing, this meant the case documents were the main or even the only source of facts for the judge's decision. Prof. Rouvière will share his thoughts on the relationship between oral hearings and the activity level of civil judges in fact-gathering later today, so I will not linger on that topic.

8. The point I will make here is that despite the many differences between our four legal systems, they at one point shared a predominantly adversarial approach to fact-finding. This is perhaps less of a development and more of a starting point.

9. One of the downsides of this approach is that adversarial prowess and adequate funds tend to become the main factors driving the outcome of proceedings, instead of rights rooted in the way things actually are – the material truth, if you will. In an adversarial system, a disparity in funds and the quality of legal representation can lead to results that are broadly felt to be unfair, and it did so on a scale large enough that the socioeconomic consequences eventually became hard to deny.

3.2. Growing emphasis on procedural rights; decreasing emphasis on party autonomy

10. In the second half of the last century, several movements – inside and outside Europe – began to work on improving access to justice.[12] In the beginning, many focused on the accessibility of legal aid[13] and the basic right to commence civil proceedings,[14] but later they also began to target other barriers such as the monetary and non-monetary costs of civil proceedings, their complexity and the inaccessibility of legal language. Again, the solutions legal systems adopted differed, but the trend was towards the adoption and codification of procedural rights.

11. The best example, which still binds our legal systems today, is Article 6 of the European Convention on Human Rights, which guarantees citizens' access to justice and the right to a fair trial – which in civil cases means a trial which

& Netherlands: lijdelijkheid van de rechter, partij-autonomie; Belgium: beschikkingsbeginsel/principe dispositif.

12 Germany: Bericht der Kommission für das Zivilprozessrecht (Bonn, 1977); Cappelletti and Garth, 1987, s. IV-VI.

13 E.g., ECHR 9 October 1979, app. no. 6289/73, ECLI:CE:ECHR:1979:1009JUD000628973 (*Airey v. Ireland*), §26.

14 E.g., ECHR 21 February 1975, app. no. 4451/70, ECLI:CE:ECHR:1975:0221JUD000445170 (*Golder v. UK*).

seeks to achieve a rapid, equitable, truthful and enforceable judgement. These requirements became embedded as goals of procedural law – or at least as yardsticks against which national procedural rules and practices were measured. This created obligations for governments to ensure that the civil justice system they instated adhered to these standards, and it also created a new role for the civil judge overseeing the case, to make sure those standards were met in the procedure at hand.[15]

12. And that is the second development I would like to point out. Because although it might seem counterintuitive, the growing emphasis on guaranteeing individual procedural rights led to a decrease in emphasis on party autonomy, as judges were now expected to act as enforcers of those rights – to differing degrees in different legal systems, but in all systems: more than before.

13. An illustration of the international nature of this tendency can be found in Article 14 §1 of the United Nations' International Covenant on Civil and Political Rights[16] and the *Recommendation on the principles of civil procedure designed to improve the functioning of justice*.[17] In the latter, the ministers of justice of the member-states of the European Economic Community subscribed to the notion that judges should ensure that all necessary procedural steps were taken in good time and that judges should sanction procedural behaviour that either caused undue delays or breached a party's duty of fairness in its conduct of the proceedings. Also, the ministers thought professional associations of lawyers should make provision for disciplinary sanctions in cases where one of their members had participated in unfair procedural behaviour.

3.3. Growing emphasis on procedural duties and judicial case management

14. And so, public considerations seeped into civil justice – a trend that was reinforced by the third development I want to bring to your attention: a development that has been referred to in the international literature as the 'crisis in civil justice'.[18]

15. 'Crisis' is a term that is used rather loosely these days, so suffice it to say that in the last three decades, civil courts around the world have been struggling

15 Cf. Vincent and Guichard, 2001, §44.a: "*une publicisation de la procédure civile*".

16 UN General Assembly resolution 2200A (XXI), adopted on 16 December 1966; Entry into force: 23 March 1976.

17 Recommendation No. R (84)5 of the Committee of Ministers on the principles of civil procedure designed to improve the functioning of justice (Adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies); https://rm.coe.int/16804e19b1.

18 Zuckerman, 1999; J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis*, Cambridge University Press: Cambridge, 2014, Ch. 1 ('The crisis in civil justice'); R.L. Marcus, A Genuine Civil Justice Crisis?, *Int'l Ass'n Proc. L. World Cong*, 2015, XV, 27; Odgers and Fuentes Maureira, 2020, §IV.