# RELATIONSHIPS BETWEEN PARTIES, LAWYERS AND JUDGES IN CIVIL CONTENTIOUS PROCEEDINGS

Marjorie de TOMBE-GROOTENHUIS

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## I. INTRODUCTION

In the Netherlands, like in other European countries such as France, Germany and the United Kingdom, the civil procedural law was recently modernised and revised in the new Code of Civil Procedure (CCP), in force as of 1 January 2002.[1]

The reason for this new Code was the experience that litigation in general lasted too long, was inefficient and as a result was too costly. Litigants and their lawyers tended to reveal the dispute only bit by bit depending on the defensive attitude of their opponent, whilst the court played a mere passive role and had no legal means to urge parties to disclose all relevant issues at an early stage in the procedures.

Furthermore the rules on civil procedures allowed litigants to file several statements and to appeal interlocutory judgments.

The modernisation of the Dutch Code of Civil Procedure was realised by way of simplifying the procedure and harmonising the different civil procedures, thus promoting the efficiency and reducing costs. Inevitably this had an effect on the relationship between parties and their lawyers and the court. A new balance had to be found between the autonomy of parties and a more active role of het judge.

[1] Wetboek van Burgerlijke Rechtsvordering.

Besides by the new Code of Civil Procedure, the position of all participants in civil proceedings is greatly influenced by case law, especially of the Hoge Raad (the Supreme Court of the Netherlands), by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and by article 14 of the International Covenant on Civil and Political Rights.

In the following chapters the present position of parties towards each other and towards their lawyers as well as towards the judge in civil contentious procedures will be specified further.

On the basis of the fundamental principles and charateristics of civil proceedings insight will be given in the interactive position of the team-players of the litigating game. From the initiation of proceedings by a party, the legal representation, to the judge's increasing active role in the management of the proceedings, the relating rules of the new Code of Civil Procedure will scrutinised on their effectiveness. As much as possible recent research and experiences of legal practioners are used to underlie the description of the intertwining relationships between parties, lawyers and judges and the results of the new procedural rules.

## II. The Position of Parties in Civil Proceedings

### 1. *The Right to Seek Legal Judgment and its Boundaries*

Before describing the position of parties in civil proceedings, it is necessary to establish the scope of the assumption, that parties have a right to start proceedings in order to solve their dispute by way of a legal judgment.

Litigation is a situation of proceeding from a uncertain or disputed legal status towards a certain and undisputable legal position.

Does a natural person or legal entity have the right to involve another (legal) person in proceedings in order to solve assumed disputes?[2]

According to article 3:296 of the Civil Code (CC)[3] a person has the "*ius agendi*", the right to initiate proceedings, in the case a legal obligation to give, to perform or to refrain from a legal act exists. So, anyone who claims

[2] Van der Kwaak, D. J., "Kan procederen onrechtmatig zijn?", WPNR 02/6500, p. 579.
[3] Burgerlijk Wetboek.

he holds a subjective right (or claims his prospective opponent lacks such a right), is competent to start civil proceedings.

In order to perform the right to initiate proceedings, it is —according to article 3:303 CC— necessary that the prospective party has a sufficient interest in the claim.

The legal right to request the aid of a judge is restricted by article 3:13 CC. The right of litigation can be abused:

1. If exercised with the sole purpose of damaging the other person.
2. If exercised in view of a different aim than this right is granted for.
3. If exercising this right would be unreasonable, considering the disproportionality between the interest in exercising this right and the interest that could be harmed by it.[4]

The first ground is difficult to prove, as it isn't easy to establish the alterier motives of the initiating party. This can only be the case if and when for example a company openly expresses it's desire to break a rival company by starting proceedings against it.[5]

The second ground is especially evident when proceedings are initiated not with the aim of realising subjective rights, but with the *sole* purpose of putting the opponent under pressure.[6]

The third ground —the disproportionality of interests— can only be subjected to a very limited review by the judge, in which the respective interests are weighed. Only in extreme cases the court will be able to establish that no person in his right mind and within all reasonableness would have exercised his right to start proceedings. In the jurisprudence one does come across the term "lack of reasonable interest", a term that also fits in the more extensive criterium of arbitrariness.[7]

Establishing the boundaries of the right of (natural) persons to seek the aid of a court in order to effect their subjective rights by initiating civil proceedings, now takes us to the next step: the position of parties in civil proceedings.

[4] Taruffo, M., *Abuse of Procedural Rights: comparative standards of procedural fairness*, Kluwer Law International, 1998, pp. 126 and ss.
[5] HR 26 June 1959, NJ 1961, 553.
[6] HR 1 February 1963, NJ 1964, 157.
[7] HR 6 February 1987, NJ 1988, 1.

## 2. *Fundamental Principles of Civil Procedural Law*

Within civil proceedings, fundamental principles of civil procedural law play an important role in establishing the position of parties. These principles apply in all countries at all times. Some principles can be found in the Constitution, others are derived from article 6, ECHR. Further detailing of principles can be found in the Code of Civil Procedure and in case law.

Principles that are regarded as fundamental are generally described as principles that are indispensable for conducting fair civil proceedings.[8] Such fundamental principles are:

1. The right to hear and to be heard.
2. Impartiality of the judge.
3. Public hearing and judgment.
4. Motivation of the judgment.
5. Party-autonomy.
6. Judgment within a reasonable time.

Aside from these fundamental principles, there are main characteristics of civil proceedings, which are not indispensable as such, but characterize the nature and quality of civil procedures. The main characteristics are:

1. Examination and judgment in two instances by way of appeal to a higher court.
2. Supervision on jurisprudence by cassation by the Supreme Court.
3. Obligatory representation in court.

The main term used to identify the procedural position of litigating parties, is the autonomy of parties. First of all the extent of the autonomy of parties in itself will be explored, starting at the initiating of the proceedings and following it further through the different stages of the procedure.

## 3. *Initiating Civil Proceedings*

Anyone holding legal rights has the right to dispose of his civil rights and to enforce these rights against his opponent. It is the right of parties to

[8] Hugenholz, W. and Heemskerk, W. H., *Hoofdlijnen van Nederlands Burgerlijk Procesrecht*, Elsevier, Den Haag, 20a. ed., 2002, pp. 6 and 7.

determine whether or not proceedings shall be started. The initiative to begin proceedings lies in the hand of the plaintiff. To end proceedings, it is necessary to have the mutual consent of parties.

The autonomy of parties is not only expressed by the exclusive right of parties to initiate proceedings, but also —and even more specific— by their right to determine the subject of the proceedings.

### 4. *The Contents of the Dispute*

Party-autonomy is most significantly expressed with regard to the contents of the proceedings. The plaintiff and the defendant determine the boundaries of the dispute that is subjected to the court's judgment. The extent of the party-autonomy is reflected by the —in principle— passive role of the court in civil proceedings.

The court may not pass judgment on matters that are not claimed by the plaintiff (or by the defendant by way of lodging a counterclaim) or to allow more than is claimed nor fail to pass judgment on any part of the claim (article 23, CCP). The judge must examine and pass judgment on the case as it is presented by the parties in their claim and their defence, unless the law prescribes differently (article 24, CCP).

The judge is bound by the facts which the parties put forward and may under no condition add facts to the statements of the parties. The judge may not add any facts or circumstances to the legal basis of the claim that is stated by the opponent in his defence or that have become known to the judge in the personal appearance of the parties or the examination of witnesses or experts, unless these facts or circumstances are added to the legal basis of the claim as yet. Facts that have been stated in the proceedings by the parties and that have not been disputed sufficiently, must be regarded by the judge as established facts that do not have to be proven anymore (article 149, CCP).

However, this being the position of the judge towards facts, the position of the judge with regard to the legal rules is quite different. According to article 25, CCP, the judge *ex officio* has the legal duty to add the correct legal grounds to the claim, even if the plaintiff has failed to base his claim on legal rules at all or on the incorrect legal rules. The court's ruling must always be based on the correctly applicable legal rules. Thus it is impossible for parties to manipulate or to avoid the application of legal rules by alleging that the claim is based on other —more favourable— rules.

### 5. *The Duty of Substantiating and of Adducing Evidence*

One of the fundamental changes brought about by the new Code of Civil Procedure, is the duty of substantiating and the duty of adducing sufficient evidence in the very first stage of the proceedings. In its quest for more efficiency in civil proceedings, the new Code burdens parties who seek judgment by a court, to clarify the disputed matters immediately, and, on the other hand, shortens the whole procedure by —in principle— restricting it to the writ of summons and the defence, followed by a personal appearance of the litigating parties.

Article 111 of the CCP attacks the problem of holding back relevant information, evidence or unfavourable issues by obliging the plaintiff to issue an extensive writ of summons. In the writ of summons the plaintiff's duty of substantiating, contains —beside his claim and the basis thereof— the duty to reveal the defence and the basis of the defence of his opponent. Futhermore, the plaintiff has a duty to adduce evidence, which contains the duty to reveal the means of evidence he can dispose of and the witnesses to be examined (article 111, par. 3, CCP).

The defendant has the same duty to adduce evidence, according to article 128, par. 5, CCP.

Facts alleged by one party and sufficiently disputed by the other party have to be proven. Facts that have not been disputed sufficiently or that have been acklowledged, are deemed to be established facts. The same applies to facts of general knowledge or experience and to the rules of objective law. It is the task of parties to deliver evidence.

What if a party does not comply with article 111 CCP? Are there sanctions? First of all there is the practical problem, that it will not always be clear to the judge, if a party is withholding information or evidence. But in the case the judge does suspect the failure of a party to comply with article 111, par. 3, CCP, article 120, par. 4, CCP, prohibits the nullity of the summons. All the judge is able to undertake according to this article, is to order the party to provide the necessary information. The Minister of Justice was opposed to the idea of strict sanctions, because in his opinion this would lead to an unacceptable pressure on the due care of civil proceedings. To a certain extent the development of the procedure must not be blocked by sanctions. The judge can ask for oral information or the disclosure of documents by ordering a appearance of parties (article 22, CCP) and

parties may request the disclosure of documents by het other party via article 843a, CCP.[9]

The Minister of Justice instead chose a two-way approach: the first being that the judge, confronted with a negligent party, can settle the behaviour by way of shifting the burden of proof and ordering the payment of the costs of litigation. Secondly parties are derived of the certainty that after the summons and defence, they will be granted the opportunity to present additional pleadings.[10] In practice it seems that especially the so-called repeat players do not find it necessary to file an extensive writ of summons. Ordering the plaintiff to reveal the missing facts or documents appears to be pointless, as in many of these cases the defendent doesn't appear anyway, whilst staying the proceedings costs a lot of time and only leads to extra work for the court registry. Even in case the defendent does appear in court, staying the proceedings in order to give the plaintiff the opportunity to produce the missing information as yet, does not serve the purpose anymore, as the judge will by that time already have knowledge of the defence. This situation has lead to the appeal for stricter sanctions, like the abovementioned nullity of the writ of summons.[11]

### 6. *The Fundamental Right of Parties to Hear and to be Heard*

The fundamental principle of the right to hear and to be heard is generally considered to be the most important principle of civil procedural law. This fundamental principle is also referred to as the principle of defence or the principle of equality. The last principle is laid down in article 1 of the Constitution.[12] It is also derived from the principle of fair hearing and fair trial in article 6, ECHR.

Article 19 of the CCP describes the assumption that parties in civil proceedings have the fundamental right to defend themselves properly. Parties should at all time during the procedure allow each other the opportunity to put forward his point of view and to react to each others standpoints. Each party should be granted sufficient opportunity to react to disclosed documents and all other disclosed information during the procedure.

[9] Burgerlijke Rechtsvordering, J. P. Fokker, artikel 111, aant. 7.
[10] *Idem*.
[11] Wetzels, W. J. J., "De substantiëringsplicht: zin en onzin", *Praktisch Procederen*, 1, 2003, pp. 1-2.
[12] Grondwet.

In the last sentence of article 19, CCP it is made clear that the judge may not pass judgment, unfavourable for one party, when the judgment is based on documents or other information to which this party did not have the opportunity to react to sufficiently.

According to case law it is generally maintained that new facts alleged by a party in the last stage of the proceedings and to which the other party has not reacted, should not be deemed to be established facts, because they were not disputed (sufficiently). The Supreme Court has ruled that a party cannot be required to file a new statement in order to avoid having these untimely new facts deemed as established facts.[13]

## III. The Position of Lawyers

### 1. *The Position of Lawyers in General*

#### A. *Representing Public Interest*

Within the dispensation of justice the legal profession fulfills a complementary role in respect to the judge's role. The legal profession has a public task in the field of access to justice. This public task is fulfilled by representing the individual interests of clients, but moreover implies representing a public interest. As an indispensable pillar of the legal society the public task of lawyers forms the moral dimension of the legal profession. The proper exercising of the legal profession is of public interest: lawyers should use their specific position and special privileges accordingly. But how far does the public and moral responsibility of lawyers go?

In the past years the legal profession has changed significantly and so have the professional ethics. Developments in the market have changed lawyers into businessmen. Enormous growth of the legal profession has lead to an increase of the number of lawyers as well as extensive law firms and increasing specialisation in specific legal fields has changed many lawyers from a general practitioner to specific legal experts. These major developments seem to have lead to a loss of a mutual professional culture.

Taking these changes into account, the question remains to what extent the modern lawyer should fulfull the public interest. A lawyer is not an

[13] HR 23 oktober 1998, NJ 1999,114. The same applies to appeal: HR 7-12-2001, NJ 2003, 76.

officer of the court neither a socalled hired gun. The truth must lie somewhere in between these two extreme positions.

Considering the public task of the modern legal profession, the boundaries of the public and moral responsibility of the profession lie within: a commitment to the legal society, the fundamental principles of fair play and the responsibility for access to justice.[14]

### B. *Representing the Individual Interests of the Client*

The main task of a lawyer is to give advice and to render legal assistance to individual clients or groups of clients with parallel interests. Representing his client's interests means a lawyer maintains a principle partial position towards these interests. This position subsequently prohibits the representation of conflicting interests or the persuit of the lawyer's own interests. Representation of the client's interests implies a trustworthy position towards the client, which forms the basis for the lawyer's obligation of confidentiality, that in it's turn is the basis for the lawyer-client professional privilege.[15]

## 2. *The Obligatory Representation in Court*[16]

According to article 79, CCP, litigating parties always have to be represented in court by counsel, unless the subdistrict section of the court is the competent court or in the case the party is the defendant in summary proceedings before the district or subdistrict court (article 255 CCP).[17] In the case access to justice can only be acquired through legal representation, the initiation or defence in civil proceedings should not be made inaccessable due to lack of recourses.[18] As prescribed by article 18, sub 2,

[14] Loth, M. A., De publieke verantwoordelijkheid van de advocatuur, Advocatenblad 1, 2003, p. 28.

[15] Gedragregels voor Advocaten, 1992, Introduction.

[16] Hugenholz-Heemskerk, *op. cit*., note 8, p. 35.

[17] Hendrikse, M. L., "Enige wetsvoorstellen ten aanzien van het vernieuwde burgerlijk procesrecht", *Praktisch Procederen*, 1, 2003, p. 6, appeals for a right of the defendent in summary proceedings before the President of the district court to appear in person or to be represented by a professional legal counsel, who does not have to be a procurator.

[18] ECRM 9-10-1979, NJ 1980, 376, Airey/Ireland.

of the Constitution, the Legal Aid Act (Wet op de Rechtsbijstand) states the conditions under which natural or legal persons are entitled to financial aid. The financial aid is restricted to interests within the legal area of the Netherlands (article 12, sub 1, Legal Aid Act). In the near future this area could be extended, as this year the Council of the European Union published a Directive on legal aid in cross-border disputes in order to secure effective access to justice for both parties.[19] The Directive establishes certain minimum common standards for legal aid in cross-border disputes for persons who lack sufficient resources.

The exception to the principle of obligatory representation before the subdistrict court is based on the idea that for certain disputes, parties should have the freedom to choose whether or not to engage the services of legal counsel and thus to cut the costs of litigation. The subdistrict judge is —in general— the competent judge for claims up to €5000 and among others, in labour and rentdisputes (article 93, CCP). However, a litigating party, who does not feel confident in handling his own case, is free to choose a representative ad litem in all cases wherein counsel is not obligatory (article 80, CCP). A representative ad litem wil in practice often be a lawyer or —in the subdistrict section— a bailiff, but this is not a necessary condition to act as such.

Recent research has shown that the increase in 1999 of the competence of the subdistrict court for claims up to €5000 on the one hand has been effective in the sense that many litigants in these cases have indeed chosen the aid of a bailiff in stead of the counsel of a traditional lawyer, but on the other hand has shown that there is a difference in the quality of the counsel. In the case the procedure was handled by a lawyer, many more specific procedural actions took place, such as incidental claims, counterclaims and the examination of experts and witnesses, than in the case the procedure was handled by other counsel. However, this being so, it is generally expected that in the near future the competence of the subdistrict court for claims up to €5000 will be increased to €11.250.[20]

[19] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

[20] Verhoging competentiegrens kantonrecht "effectief", onderzoek WODC, Advocatenblad 1, 2003, p. 9.

### 3. *Counsel*[21]

In the Netherlands there is a distinction between the lawyer and the procurator litis. Both professions are based on the Counsel Act.[22] Furthermore the Rules of Conduct for Lawyers (1992) are applicable.[23] These rules maintain the conditions of ethical conduct between lawyers and towards lawyers and their clients. Usually a lawyer is both lawyer and procurator litis, but it is possible to be either of these.

The legal relationship between the client and his lawyer is qualified as an agreement based on assignment as described in article 7:400, CC.

The main function of a lawyer is to act as a legal counsel and representative on behalf of his client. A lawyer will draw up the summons or the statement of defense and act on behalf of his client at hearings and pleadings. The legal relationship between the client and the procurator is specified by mandate. In case the mandate is exceeded, third parties are protected by article 3:61, sub 2, CC, in the sense that they are protected against an appeal on an exceeded mandate. The procurator litis is the competent counsel at the district court to perform the formal acts of procedure during the proceedings. A lawyer has to make use of the services of a procurator litis when the proceedings are held at a court outside the district in which the lawyer is competent. Within his own district the lawyer can act as his own procurator.

The procurator litis will sign and deliver all the necessary pleadings, that have been draw up by the lawyer (article 83, CCP). The lawyer is always competent within the whole country to represent his client and speak for his client at hearings and in pleadings. The distinction between the lawyer and the procurator is only activated outside the lawyers district and only with regard to formal procedural acts.[24]

Together the lawyers and procurators litis are associated in the Association of Lawyers, a public corporate body, that has regulatory power with regard to the professional practice of lawyers and procurators litis.[25]

[21] *Ibidem*, p. 70.
[22] Advocatenwet, revised 6 december, 2001, Stb.584.
[23] Gedragsregels voor Advocaten, 1992.
[24] In the near future the distinction between lawyers and procurators *litis* will disappear (The Mannouri-Commission on the practical consequences of abolishing the procurator *litis*).
[25] De Orde van Advocaten.

Infringement of the regulations of the Association of Lawyers, conduct in conflict with the Rules of Conduct of Lawyers or negligent conduct towards clients can be subject of disciplinairy measures, taken by the Counsel of Discipline or —in appeal— by the Court of Discipline. This year the General Counsel of the Association of Lawyers issued a Directive, urging lawyers to join in the new Complaints and Dispute Regulation for the resolution of disputes of the consumer-client in relationship with their lawyer. Although it is not compulsary to join the regulation, the law firms are strongly recommended to do so.[26]

### 4. *The relationship between the Lawyer and his Client in Civil Proceedings*

According to the Rules of Conduct for Lawyers 1992 (RCL), lawyers should act on behalf of and in the interest of their client with due care. A lawyer should at all time inform his client sufficiently and seek his permission to act on his behalf.

According to rule 6, RCL, a lawyer has an obligation to confidentiality towards his client with concern to everything that the client has revealed in confidence to the lawyer in his profession.

Subsequent to the rule of confidentiality, a lawyer who is summoned to be heard as a witness in civil proceedings, may decline to answer certain questions due to his lawyer-client privilege (article 165, par. 2b, CCP). Privileged information that falls under the obligation of confidentiality is per definition only information that a client revealed to his lawyer in his position as trustworthy counsel with a professional privilege. According to case law, the judge may research marginally if the lawyer is within reason able to answer a certain question without revealing privileged information.[27]

When acting on behalf of his client in civil proceedings, a lawyer may not rely on and submit correspondence between himself and the lawyer of the opposed party without the latter's consent (rule 12, RCL). The same applies to negotiations on a settlement: unless an explicit reservation was made, the contents of a settlement proposal may not be revealed without the consent of the other lawyer (article 13, RCL).

[26] Nepveu, J. P., Van verordening naar richtlijn, Advocatenblad 1, 2003, pp. 34-36.
[27] HR 22-6-1984, NJ 1986, 174 and HR 7-6-1985, NJ 1986, 174.

However, if the lawyer has revealed this correspondence in civil proceedings, the information that has been revealed is deemed not be confidential anymore, in which case the lawyer cannot invoke his professional pivilege in order to refrain from answering questions as a witness.[28]

These two rules have become the subject of discussion, due to the new article on the prescribed contents of summons (article 111, CCP). As is described herefore under I D, in the present civil proceedings a comprehensive summons is obligatory and considering the basically shortened procedure, a necessity. The discussion focusses on the dilemma of revealing as much as possible in the summons and the prohibiting to use correspondence between lawyers without mutual consent. In the explanatory memorandum on article 111, CCP, the Minister of Justice considered that —apart from the Rules of Conduct for Lawyers— the law as such does not hold a prohibition in this sense. According to the Minister of Justice there is no objection to state the defence of the opponent, even if the defence is embodied in correspondence between lawyers, as it is not necessary to actually submit the correspondence. The Minister of Justice even goes as far as suggesting that, if the Association of Lawyers feels that there is a conflict between article 111, CCP and article 12 and 13, RCL, it is up to the Association to adapt these rules accordingly.

## IV. The Position of the Judge

### 1. *The Independence of the Judge*

According to article 6, ECRM, litigants have the right to treatment and judgment of their dispute by an independent judge. But, what is exactly an independent judge? What might seem to be a straightforward condition does in fact entail several aspects. The judicial independence can be divided into four kinds of independence:

1. The constitutional independence.
2. The legal-positional independence.
3. The functional independence.
4. The actual independence.

[28] Rb's-Hertogenbosch 1-3-2002, NJ, 2002, 513.

The constitutional independence focusses on the independent position of the judicial power as a whole towards the legislative and executive power. Both the European Court and European Commission have stressed that the "independent tribunal", as mentioned in article 6, ECRM, should be independent towards the executive power[29] and the legislative power.[30] The question arises to what extent this independence towards these other powers in practice can reach. According to articles 11, 12 and 13 of the General Provisions Act (Wet Algemene Bepalingen) the court should issue its legal judgments according to the law and is bound by all legal acts brought forth by the legislative power. However, what may appear to be a subjection to the legislative power is not as rigid as it seems, as in practice the court has the freedom to interpret acts, whilst the legislative power frequently uses open standards. Also many judgments of the Supreme Court have a general meaning, and consequently have the effect of a precedent. Thus, in it's turn the legislative power has a competitor from time to time in the form of the legislative power.[31]

Neither in its position towards the executive power, is the legislative power completely independent, as the appointment of judges and responsibility for the judicial power lie in the hands of the executive power. In 2001 a Council of Justice (Raad voor de Rechtspraak) was formed and given power in the field of budget and management of the legislative power (articles 84-109 Judiciary Organisation Act).[32]

A consequence of the independent position of the judicial power towards the legislative and executive power is that the national state cannot be held liable for unjustifiable legal judgments. To this end litigants should take recourse to a legal remedy and appeal the judgment.[33] Case law shows that the state can only be held liable for a wrong judgment, if it clear that during the preparation of the case fundamental principles have been breached in such a way that one cannot speak of a fair and impartial trial

[29] EHRM 16-7-1971, Serie A, § 95, EHRM 8-7-1986, serie A, vol 102, § 202; European Commision in: ECRM 12-10-1978, Zand/Austria, 7360/76, DR 15, p. 81 § 74, EHRM 23-4-1987, Ettl, serie A, vol. 117, pp. 26, § 92-95.

[30] ECRM 18-12-1980, Crociani e.a./Italy, 8603/79, 8722/79, 8723/79 & 8729/79, DR 22, p. 172.

[31] Smits, p. 258 and Stein and Rueb, p. 42.

[32] Stein, P. A. and Rueb, A. S., *Nieuw Burgerlijk Procesrecht*, Kluwer, 13a. ed., 2002, pp. 641-642.

[33] *Ibidem*, pp. 181-182.

and if it is not possible to appeal the judgment. In that case the principle of equal treatment by way of the right to hear and to be heard is breached (article 6, ECRM).[34]

The legal-positional, functional and actual independence of the legislative power is described in case law of the European Court and Commission: "…in order to establish whether a body can be considered 'independent', regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether or not the body presents an appearance of independence".[35] This description flows into the impartiality of the judge.

### 2. *The Impartiality of the Judge*

One of the fundamental principles of civil proceedings, considered to be an absolute condition for fair justice, is the impartiality of the judge. The principle of impartiality of the judge derives from the principle of equal treatment of litigating parties.

The impartiality of a judge is based on the independence of the judge towards the parties in dispute. A judge should be independent towards the person who appointed him, towards the litigating parties and towards third parties. The right to have a case dealt with by an impartial and independent judge is based upon article 6, ECRM.

It is essential that the judge is unprejudiced towards the litigating parties and their dispute. The judge should be unbiased and in no way influenced whilst dealing with case. Even the slightest semblance of partiality must be avoided at all times. As soon as facts or circumstances arise, that could endanger the impartiality of the judge, the judge is challengable by the parties (articles 36-39, CCP) or the judge himself may request his own excusal from the case (articles 40-41, CCP).[36]

Recently research was executed on the legal grounds for challenging the judge and of excusal. Contrary to the past where for a long time trust in

[34] HR 17-3-1978, NJ 1979, 204; HR 8-1-1993, NJ 1993, 558.

[35] EHRM 28-6-1985, Campbell en Fell, serie A, vol 80, § 78; EHRM 22-6-1989, Langborger, serie A, vol. 155.

§ 32; ECRM 7-9-1990, 12733/87, DR 66, p. 11; ECRM 29-6-1994, 20664/92, DR 78-B, p. 97.

[36] Hugenholz-Heemskerk, *op. cit*., note 8, p. 8.

the judicial power seemed to be undisputed, doubts about the impartiality of the judge have surfaced in recent years. Influenced on the one hand by case law of the European Court of Human Rights on the interpretation of article 6, ECRM, and the changed role of the judge in general from "bouche de la loi" to a more political and policy-making role, a renewed interest in the impartiality of the judicial power was triggered.[37] The research shows that the main grounds for challenging the judge appear to be:

1. The former involvement of the judge with the same case.
2. The knowledge of related cases.
3. The personal treatment by the judge.
4. The actual handling of the case.

In practice however, the research of the specific case law only very seldom found the European Court of Human Rights to consider the court to be in conflict with article 6, ECRM, on the grounds of not being impartial towards the case.

Furthermore now and then the discussion arises whether or not lawyers may act as a deputy judge. The use of lawyers as deputy judges in courts started as a necessity due to a structural lack of sufficient judges. But there has always been an undercurrent feeling that this is not an ideal situation, because it is felt that lawyers acting as judges are not completely impartial.

Some courts now refuse lawyers as deputy judges, unless for educational reasons, some courts do not employ lawyers as deputy judges from the same district as the district in which the lawyer acts as such and finally there are other courts that have not changed their strategy in employing lawyers as deputy judges.[38] However, within all courts it is now the general practice to maintain a list of additional functions of all judges, including the deputy judges. By publicising the additional functions of (deputy) judges, the courts aim to avoid the semblance of partiality.

From quite a different point of view it has been suggested that lawyers and scholars should be accepted as deputy judges. The reason herefore is that unlike the increasing specialisation amongst lawyers, judges have to pass judgment in all kinds of legal fields and often lack the necessary spe-

[37] Kuijer, M., "Schijn van partijdigheid", NJB 42, 2002, p. 2089.
[38] "Discussie over rechter-plaatsvervanger laait op", Advocatenblad 1, 2003, p. 4.

cific knowledge. The lack of specific legal knowledge can be especially felt during the personal appearence of parties, when specific to-the-point questions should be raised.[39]

### 3. *Public Hearing and Judgment*

#### A. *Public Hearing*

The fundamental right of public hearing is based on article 6, ECRM, article 14, International Covenant on Civil and Political Rights, article 121 of the Constitution and article 27, CCP. In principle all hearings during civil proceedings are public. In order to execute this fundamental principle, the public is allowed to attend hearings, written reports of hearings are drawn up by the press, radio- and television broadcasts are allowed and via internet reports are made public.

Article 27, CCP, states the grounds upon which exceptions to this principle may be made. The judge may order the hearing to be held behind closed doors or in the presence of only certain persons:

1. In the interest of public order or decency.
2. In the interest of State security.
3. In the interest of minors or the privacy of the parties.
4. In the interest of proper judical procedure.

The possible violation of the public order or decency may, depending on the nature of the accusations, be accepted as a ground for a closed hearing in cases based on defamation. In that case the judge could for example order the examination of witnesses behind closed doors.

State security may become an issue, when militairy facts or matters of the Intelligent Service could be the subject during a public hearing.

In most hearings of minors, the protection of minors in view of the burden of appearing in court, will be maintained as a ground for a hearing behind closed doors.

The protection of the privacy of natural persons may be a ground for a closed hearing, if medical, sexual or financial aspects are the subject of the

[39] Hendrikse, M. L., *op. cit*., note 17, pp. 2-3.

hearing. Also the privacy of companies may thus be protected, when disclosure of confidential economical or technical information of the company is feared. In case law, the protection of company secrets can be found to be the ground for the rejection of a request for a preliminary hearing of witnesses.[40] In cases of bankcruptcy, article 4 of the Bankcruptcy Act[41] states that all hearings with regard to the annual accounts or the annual report will be held behind closed doors.

Lastly, in the case a request for the challeging of a judge is based on severe allegations, a hearing behind closed doors may be requested in the interest of a proper judicial procedure. In that case a closed hearing could be ordered, but the judgment will be public.[42]

Under the new CCP the question has risen if parties have the right to hold a closing speech in civil proceedings. Generally the right to an oral hearing is derived from the right to public hearing as mentioned in article 6, ECRM. According to article 131, CCP, the personal appearance of parties has become the standard procedure. Upon request of the parties, the judge may allow parties to hold a closing speech. But, if parties have been heard sufficiently during the personal appearance, the judge may refuse a further closing speech. Generally it is felt that the personal appearance of parties has a different character than a closing speech and that furthermore it is questionable if the personal appearance can be seen as an oral hearing, as meant by article 6, ECRM.

The European Court of Human Rights has indirectly interpreted the matter in the sense that in the case a party is heard orally in view of the investigation of the case, the personal appearance of the party can be seen as an oral hearing in the sense of article 6, ECRM.[43] Subsequently the legislator has interpreted articles 131 and 134, CCP, in het sense that if, after the personal appearance of parties further evidence is necessary and an examination of witnesses or experts or the production of documents has taken place, parties have a right to hold a closing speech.[44]

[40] HR 29-3-1985, NJ 1986, 242 and HR 11-3-1988, NJ 1988, 747.

[41] Faillissementswet.

[42] Wesseling-van Gent, E. M., losbladige Burgerlijke Rechtvordering, article 27, aant. 1-7.

[43] ECHR 21 february 1990, Håkansson/Sturesson, Series A, judgments and decisions, vol. 171, par. 67.

[44] Heemskerk, W., Hoe zat het ook al weer met… het recht op pleidooi?, *Advocatenblad* 23, 2002, p. 1026.

B. *Public Judgment*

The fundamental principle of the right to a public judgment, based on article 121 of the Constitution, is literally repeated in article 28, CCP. Any person —not only parties— is, upon request and against payment, entitled to a copy of a judgment, ruling or court order, unless the registrar deems the issying (as a whole or partly) in conflict with substantial interest of others (parties including). Protection of privacy or company secrets could be regarded as such. In that case the copy may be issued in anonimised form. An anonimised version is also issued in the case the hearing took place behind closed doors.

Contrary to the right to a public judgment, the law does not provide the right to inspect documents, because this would be too time-consuming for the registrars and because the principle of publicity is sufficiently fullfilled by the right to obtain a copy of a judgment.

4. *Judgment within Reasonable Time*

According to case law of the European Court of Human Rights, all Member States should furnish their legal system in such a way that a final judgment on the establishment of civil rights and duties can be reached within a reasonable time.[45] The national state should facilitate the necessary means to this end. It is the judge who is responsible for the course of the proceedings, but also parties have a duty to act with due diligence and may not obstruct the progress of the proceedings.

More specifically the European Court has stipulated that the judge should see to it that the oral hearings are held within a reasonable time, that the effectiveness of a personal appearance of parties is enhanced by informing parties prior to the appearance which information is required and that the examination of witnesses and expert reports take place within a reasonable time.

Furthermore the judge should pass judgment within a reasonable time, the boundaries of which depend on the specific circumstances of the case: the complexity of the dispute, the conduct of the complainant, the conduct of the competent judicial authorities and the interests of the complainant at stake.

[45] ECRM 25-6 1987, NJ 1990, 231; ECRM 6 april 2000, NJ 2000, 612.

The case law of the European Court of Human Rights greatly influenced the new Code of Civil Procedure. It lead to the general obligation of both the judge and parties to contribute to speedy proceedings and to avoid unreasonable delay (article 20, CCP).

Other specific articles on procedural time management supporting the judge's active task in this field, can be found in the following rules:

- Refraining from taking a procedural action for which delay is not granted, may extinguish the right to do so later (article 133, par. 4, CCP).
- Reply and rejoinder after a personal appearance following the defense, may be waived by the judge, if deemed unnecessary (article 132, par.1, CCP).
- The same applies to further oral pleadings (article 134, par. 1, CCP).
- *Ex officio* the judge may ignore any change or increase of the claim, if that could lead to delay of the proceedings (article 130, par. 1, CCP).
- For oral pleadings that could not be held an the set date, a new date will in principle not be set (article 134, par. 2, CCP).

In addition to these articles, the uniform National Cause List Regulation speeds up the civil proceedings by stipulating short periods for the filing of pleadings or documents.[46]

5. *Motivation of the Judgment*

Subsequent to the principle of public justice, article 121 of the Constitution, article 5 of the Judiciary Organisation Act and article 30, CCP, obliges the judge to motivate all his judgments.

The fundamental principle of motivation of judgments has three functions:

1. It gives parties insight in the judge's thoughts, in the acceptence or rejection of the claim or defence and the applicable legal grounds, thus enabeling parties to decide whether or not to appeal the case.

[46] Landelijk reglement voor de civiele rol bij de rechtbanken 2002.

2. The motivation is indispensable for the appealate court to assess the lower judge's judgment.
3. It provides a garantuee for proper justice in general and acts as a precedent for similar cases in the future. Therefore, publication of important judgments in professional literature plays an important role too.

### 6. *The Role of the Judge in Civil Proceedings: Passive or Active?*

The modernisation of civil procedure law by way of simplifying the procedure and enhancing efficiency, has also had an effect on the relationship between the judge and the litigants.

The structure of this relationship has always revolved around the question to what extent the judge plays a passive role in civil proceedings. The historically passive role of the judge is the counterpart to the party-autonomy. But the judge's role has become less and less passive over the years. Subsequent to this development, the Code of Civil Procedure of 2002 shows that the role of the judge is only passive with regard to the initiation of the proceedings and the extent of the claim. As is described under I C and D, it is the exclusive right of parties to initiate proceedings and to determine the contents and extent of the dispute. The extent of the passiveness of the judge is thus derived from the procedural party-autonomy. Where the active role of parties is restricted, the role of the judge will be active. Thus the relationschip between the judge and the parties is evenly balanced.

One of the main changes the CCP has brought forth, is the general obligation of parties to disclose information. The object of restricting the party-autonomy in this way is to avoid having the judge become more active in the proces of factfinding.

Other restrictions in the party-autonomy that have been brought forth, focuss on the active role of the judge in avoiding unnecessary delay in the procedure (article 20, CCP) and the general authority of the judge to order a personal appearance of parties in any stage of the proceedings to clarify their allegations or to submit documents (article 22, CCP) or to try to reach a settlement (article 87, CCP).

Recent research has shown that shortening the proceedings by eliminating the right to reply and rejoinder and introducing the personal appearance as a standard procedural option, has had a two-way effect: first of all

it has lead to a prolonged period of 8 weeks to 3 months for the personal appearance to take place, due to the fact that more preparation time is needed, and secondly it has lead to a longer session, i.e. longer than an hour and a half, as most lawyers now tend to hold a longer speech, and, subsequently, also has lead to a more detailed report, because more information has to be processed at this point of the procedure.[47]

Furthermore the role of the judge has become active with regard to the instruction of the procedure. It is the judge who has to consent to further pleadings: without the permission of the judge parties may not present a statement of reply or rejoinder (article 132, CCP) or hold a closing speech (article 134, CCP). These restrictions serve the purpose of depriving parties of the security —not the possibility— that they will be able to extensiate on the writ of summons or defence after the personal appearence, thus forcing parties to submit a comprehensive writ of summons and defence at the beginning of the proceedings. Consequently the compromised civil proceedings should lead to a shorter, more efficient and effective way of dispute resolution with a more satisfactory result for the litigants.[48]

Another field where the judge plays an active role, is during the examination of witnesses. It is the judge who examines the witnesses and asks the questions and who will dictate a summary of the statement of the witness to the registrar. The lawyers only play a secondary role.[49]

### 7. *Examination and Judgment in Two Instances*

One of the characteristics of the civil proceedings is the examination and judgment in two instances. Appeal to a higher court means a renewed judgment of the whole case, including a renewed appreciation of the facts. This appeal should be distinghished from an appeal to the Supreme Court, that is restricted to a renewed judgment of purely legal questions and explicetly does not entail a renewed appreciation of the facts.

[47] NIPO research, instructed by the Council for Justice, 2003, www.rechtspraak.nl.

[48] The current CCP does not prescribe the obligation of the court to instruct parties to participate in mediation. Court-annexed mediation is however the subject of a project in several courts as a try-out.

See: E. Beukering-Rosmuller, Mediation naast rechtspraak in civielrechtelijke geschillen: een vergelijking tussen de Engelse en Nederlandse situatie, TMD 4, 2002, p. 64 en pp. 67-69.

[49] Klomp, R., "Geef ons Amerikaanse toestanden", *Advocatenblad* 3, 2003, p. 99.

Not all judgments can be appealed. Claims upto €1750 brought before the subdistrict court may not be appealed (article 332, par. 1, CCP), nor, for example, claims regarding the dissolution of employment contracts (article 7:685, CC). These judgments may however be appealed in case fundamental principles of civil procedural law have been infringed in the proceedings.[50] According to article 337, par. 2, CCP, interlocutory desicions of the judge may not be appealed, unless the judge has ruled differently. Not in all situations this measure of efficiency serves the right purpose. The fact that for example interlocutory decisions on the allocation of the burden of proof or on the right to hold oral pleadings may only be appealed *after* the final judgment, enhance inefficiency rather than efficiency.[51]

The essence of the examination and judgment in two instances lies in the guarantee that *all* aspects of the dispute will be examined a second time and that any omission, oversight or mistake of the lower judge can be corrected. For the appealing party the appeal serves the purpose of correcting or adding to his own omissions in first instance.[52]

In reassessing the lower court's judgment, the appealate judge (the district court or the court of appeal) is bound by the writ of summons in appeal and the grounds for appeal. This is referred to as the negative aspect of the "*tantum devolutum quantum appellatum*".[53] However, the defence of the defendent before the lower court must always be included in the new judgment of the appealate court.

## V. Conclusion

With the aim of promoting efficiency, the new Code of Civil Procedure has activated and changed the role of all participants in civil proceedings.

Parties still have the autonomy in initiating civil proceedings and in establishing the extent of their claim. But now parties also have the legal

[50] Mollema, K. E., Losbladige Burgerlijk Rechtsvordering, artikel 332, aant. 2.

[51] Margetson, N. M., "Efficiency of recht?"; het appèlverbod tegen tussenvonnissen (article 337, RV)", *Praktisch Procederen*, 1, 2003, p. 20.

[52] Stein, P. A. and Rueb, A. S., *op. cit*., note 32, p. 188.

For the correction of an obvious and undoubtable slip of the pen a party may issue a simple request for correction (article 31, CCP).

[53] Mollema, K. E., *op. cit*., note 50, aant. 10.

obligation to issue a comprehensive writ of summons and to disclose all relevant information and evidence.

Naturally these new obligations have also influenced the position of lawyers. Drafting a comprehensive writ of summons may now involve intercolleagel correspondence. The shortened proceedings —with further pleadings dependent on the consent of the judge— and the impossibility to appeal interlocutory judgments, have a profound effect on (pre-) litigating stategy.

The enhanced active role of the judge has put the judge in charge of managing the proceedings, but has also put a claim on the capability of the judge in leading the personal appearence effectively. Furthermore the principle of judgment within a reasonable time has surfaced within the new code to a prominent first place and pressurises the judge —parallel the obligations of the litigants on this point— to pass judgment within a short time.

Research has shown that the comprehensive writ of summons combined with the obligation of disclosing all relevant facts and underlying evidence have lead to possitive results in accordance to the aim of efficiency of the new legislation. On the other hand the lack of effective sanctions in case of non-complience of parties with their new obligations, paralyses the active role of the judge in effectively pressurising litigants into fulfilling their obligations. Experience with the new rules may lead to minor amendments in the future, but as a whole the conclusion must be that new efficient civil proceedings have been born.

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