

# RAISING POINTS OF LAW ON THE COURTS' OWN MOTION?

## Two Models of European Legal Thinking

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### ABSTRACT

*This article examines how judges can raise points of law ex officio in a comparative context. Based on Schlesinger's case oriented factual method, it compares the relevant provisions of Italian, Hungarian, Swiss, French, Belgian, German and Austrian civil procedure. The main conclusion is that there is no common legal solution in Europe and that the national legal systems developed divergent approaches. However, two models can be identified: in the first system, the principle of judicial passivity plays a crucial role, while the second one is based on a general authorization under strict control with special regard to the requirements of a fair trial. Because of this duality, this paper argues that a unified model does not actually exist. However, contrary to the apparent divergences, a common core composed of two elements can be drafted.*

**Keywords:** common core; comparative civil procedure; comparative law; ex officio application of law

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## §1. PRELIMINARY AND METHODOLOGICAL REMARKS

### A. INTRODUCTION

In a Grand Chamber decision at the end of 2009, the Court of Justice of the European Union (CJEU) had to face an evergreen and uneasy question concerning European procedural regimes.<sup>1</sup> In this state aid case, the CJEU had to decide whether a court can act on its own motion in public policy related issues, or whether it is bound by the principle that the subject matter of a case is strictly determined by the parties. Even though the problem seems to be purely theoretical at first sight, it has serious practical repercussions. Fundamentally, the scope of both the national and community judges' power to decide a case autonomously,<sup>2</sup> that is, totally or partially independent of the parties' original will and intention expressed in the pleas submitted to the court, is strongly dependent on the answer given to this question.

Thus, this important decision re-exposed the problem of whether or not courts have a right or a duty to raise points of law on their own motion in a European Union legal context. Its relevance cannot be ignored since both the primacy and the direct effect of EU law is dependent upon it in the everyday adjudication at the national level. As a preliminary remark, it should be mentioned that the CJEU's case law provides a certain leeway in this question for the Member States since it does not require national legislators to establish a civil procedure framework in which the *ex officio* application of EU law is compulsory. Essentially, it makes it dependent of the general setting of national civil procedure.<sup>3</sup> However, an exclusive study of the CJEU's case law does not provide a comprehensive understanding of this problem.<sup>4</sup> National legislation should also be analysed, since an in-depth discussion of various national models may shed light on the

<sup>1</sup> Case C-89/08 P *Commission v. Ireland et al.* [2009] ECR I-11245.

<sup>2</sup> Concerning the question whether judges should have the opportunity to decide cases autonomously, even in the rational and predictable context of modern formal law, see the seminal article by Eugen Ehrlich, one of the founding fathers of the modern sociology of law. See E. Ehrlich, 'Freie Rechtsfindung und freie Rechtswissenschaft', in E. Ehrlich, *Recht und Leben* (Duncker und Humblot, 1967), p. 170–202. For a recent review, see B. Hess, 'Judicial Discretion', in M. Storme and B. Hess (eds.), *Discretionary Power of the Judge. Limits and Control* (Kluwer, 2003), p. 45–72. For a complex (EU law – comparative law – legal history) approach of *ex officio* application of law by judges, see J. Chorus, 'Le relevé d'office des moyens de droit et de fait: l'application des règles du droit européen par le juge national: étude de droit comparé et d'histoire de droit', in L. Vacca (ed.), *Scienza giuridica interpretazione e sviluppo del diritto europeo* (Jovene Editori, 2013), p. 123–165. With special regard to the context of EU law, see A. Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationship between Individuals* (Kluwer, 2012), margin numbers 124–130.

<sup>3</sup> See Joined Cases C-430/93 and C-431/93 *van Schijndel* [1995] ECR I-04705, para. 22.

<sup>4</sup> The leading cases in this field might be Case C-166/73 *Reinmühlen* [1974] ECR-33; Case C-106/77 *Simmenthal* [1978] ECR-630; Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen* [1991] ECR I-3768; Joined Cases C-430/93 and C-431/93 *van Schijndel* [1995] ECR I-04705; Case C-312/93 *Peterbroeck* [1995] ECR I-04599; Case C-72/95 *Kraaijeveld* [1996] ECR I-5403; Joined Cases C-222/05 to C-225/05 *van der Weerd* [2007] ECR I-4233.

major points of the European understanding of *ex officio* application of law before civil courts. The application of a comparative law methodology is therefore indispensable for this research as it is the most useful tool when mapping similarities and divergences of co-existing domestic legal models.

## B. COMPARATIVE PROCEDURAL LAW ON STAGE

The comparison of procedural law provisions is a very relevant but, simultaneously, a slightly unpopular field of study within general comparative law scholarship. This is understandable to the extent that procedural law can rapidly change, reflecting certain policy choices of the legislator.<sup>5</sup> Additionally, some secondary, non-legal factors – such as historical reasons,<sup>6</sup> the peculiarities of the general institutional structure,<sup>7</sup> or the unintentional effects of legislation<sup>8</sup> – also seriously affect their general context. Hence, a comparative mapping and assessment of procedural law provisions can generally be very demanding. Nevertheless and contrary to these difficulties, the comparison of national procedural regimes is necessary for this study. A comparison provides valuable information and is useful for the broadening of our general legal knowledge as well as for the formulation of normative policy choices.<sup>9</sup>

As initially stated, this article is devoted to a tiny, but highly relevant segment of procedural regimes: how, and to what extent, do national civil procedures allow judges to introduce new legal elements of their own accord during civil proceedings? What are the main lessons to be drawn from a comparison of this practice in different jurisdictions? Generally, behind the very technical surface one can find a condensation of many competing principles and expectations playing an important role in the design

<sup>5</sup> The advent of ‘managerial judging’ in the US, broadening the ‘managerial powers’ of judges in order to facilitate reaching settlements, considerably changed the entire culture of lawsuits in civil law cases starting in the 1970s. See for a classical article, J. Resnik, ‘Managerial Judges’, 96 *Harvard Law Review* (1982–1983), p. 376–412; about the recent developments, S.S. Gensler, ‘Judicial Case Management’, 60 *Duke Law Journal* (2010–2011), p. 670–743.

<sup>6</sup> On the impact of historical factors on the formation of modern European procedural laws, with special regard to the cross-border influences, see C.H. van Rhee, ‘Introduction’, in: C.H. van Rhee (ed.), *European Traditions in Civil Procedure* (Intersentia, 2005), p. 3–23.

<sup>7</sup> See for example the general setting of the French system, where two different ways of legal procedure (*juridictions de l’ordre judiciaire* and *juridiction de l’ordre administrative*) exist simultaneously. See H. Caniard et al., ‘France’, in: Cour de justice des Communautés Européennes, *Les juridictions des États membres de l’Union Européenne. Structure et organisation* (Communautés européennes, 2009), p. 261–314.

<sup>8</sup> For example in France, the introduction of the so-called ‘*question prioritaire de constitutionnalité*’ in 2010, providing the opportunity for an ‘*a posteriori*’ constitutional control of legislation, significantly changed the relationship between the *Conseil constitutionnel*, *Cour de cassation* and *Conseil d’État* by subduing the latter two courts to the *Conseil constitutionnel* in cases related to constitutional justice.

<sup>9</sup> For example, The ALI/UNIDROIT Principles of Transnational Civil Procedure declare that it can even be ‘a basis for future initiatives in reforming civil procedure’. Compare, ‘The ALI/UNIDROIT Principles of Transnational Civil Procedure’, 4 *Uniform Law Review* (2004), p. 758.

of civil procedural law systems. The national solutions in this field can be motivated by various, frequently competing principles and interests. For instance, private autonomy, material justice expectations, fair trial, public policy choices, governmental interest, and conceptions of the role of judges all could have a decisive role in the shaping of national provisions. Furthermore, the precise formulation and functioning of these solutions can considerably influence the parties' procedural strategies, thereby defining the entire litigation culture.

## §2. METHODOLOGICAL CONSIDERATIONS AND DELIMITATIONS

### A. A CASE ORIENTED FACTUAL STARTING POINT AND SOME FURTHER DELIMITATION

As a methodological basis, this paper follows the so-called 'case oriented factual approach' coined by R.B. Schlesinger.<sup>10</sup> It states that the starting point of the comparison is neither a given legal provision, nor an institutional solution, but a simple factual situation. In this study this situation can be briefly summarized as follows: if a judge wants to raise a point of law not included in the parties' submission, can he/she do so or not? Alternatively: can a judge base his/her decision on a point of law which was not mentioned in the parties' claims, but was solely raised on his own motion? The most important problem is the capacity available to judges to autonomously decide on the application of those legal rules or points which are outside of the scope of the parties' claims.

This factual situation is composed of two elements. The first one is related to the judges' legal capacity to act during the procedure; this is the actual setting of civil procedure rules determining the boundaries of judicial actions (for instance, suspension of the procedure, adjournment of the hearing, fining the parties, ordering ad interim relief, or relying on a point of law on its own motion). The second element pertains to judges' autonomy how to make a decision based on such legal points that were not included in the parties' submission. This study will discuss the national civil procedure rules from this aspect, meaning it will not focus on the legal categorizations but it will look for those rules that have a substantial impact on these two factual elements. In sum, the research question of this paper can be summarized as follows: to what extent and how do national civil procedures allow judges to introduce new legal elements on their own motion in a trial and what are the main lessons to be drawn from their comparison?

<sup>10</sup> See R.B. Schlesinger, 'The Common Core of Legal Systems – An Emerging Subject of Comparative Study', in K. Nadelmann et al. (eds.), *XXth Century Comparative and Conflict Laws. Legal Essays in Honor of Hessel E. Yntema* (A.W. Sythoff, 1961), p. 65–73. For a contemporary discussion, see M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law', 3 *Columbia Journal of European Law* (1997–1998), p. 339–356.

Some delimitation should be made at the very beginning in order to specify the paper's scope as precisely as possible. First, this research is exclusively concerned with civil procedural regimes, so neither administrative law, nor criminal process is considered.<sup>11</sup> Thus, this article only deals with civil procedure; therefore, the possible insights garnered cannot be automatically applied to other fields of law. They may possibly become points of reference, but nothing more. This choice was motivated by the recognition that both administrative and criminal law are strongly pervaded by public interest through governmental policy choices. This setting, primarily focused on public interest, generally provides a broader space to manoeuvre for courts as autonomous agencies of the state. Civil procedure is still based, at least in principle, on civil autonomy and it is more or less comprehensively reflected in the entirety of various procedures.

Lastly, a technical problem should also be mentioned. In European civil procedural regimes, two special ways to raise points of law on the courts own motion exist amongst European legal systems. The most obvious option is when the civil procedure provides a certain well-defined opportunity for judges to raise general and basic procedural requirements autonomously.<sup>12</sup> If a fundamental element is missed from the plaintiff's claim, the judge can raise this problem freely and dismisses the claim if it is necessary. However, this article does not intend to discuss this dimension of the problem. The key aspect of this research is the ability of the courts to introduce new legal elements into the discussion during the hearings, and, if introduced, whether they can base their decisions (at least partially) on these elements? Thus, we focus on this second dimension, that is, on the possibilities of judges to act and decide autonomously or *ex officio*.

## B. THE LEGAL SYSTEMS SELECTED AND JUSTIFYING THE CHOICE

A further methodological point that must be stressed at the very beginning is that this research focuses only on some of the European legal systems. Consequently, it does not strive to provide a comprehensive, all-embracing analysis either in geographical terms, or from a legal perspective. Only a part of the main legal cultures of the Western Legal Tradition<sup>13</sup> is discussed in this study, predominantly due to practical concerns. Chief amongst them is the lack of linguistic competence. No single scholar may have such a command of each Western- and Central-European language that enables her or him to provide a comprehensive study of all relevant legal systems. Furthermore, and it

<sup>11</sup> Compare F.C. de la Torre, 'Le relevé d'office par la juridiction communautaire', *Cahiers de droit européen* (2005), p. 397–401. For a comparative analysis of administrative processes, see J. Schwarze, *Europäisches Verwaltungsrecht. Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (Nomos, 2005), especially p. 1201–1271.

<sup>12</sup> For example, §139(3) of the German Code of Civil Procedure (*Zivilprozessordnung*) set forth that the court must call the parties' attention to those points, mostly prerequisites to suit, that may be raised by the court's own motion.

<sup>13</sup> See H.J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard University Press, 1999), with special regard to p. 7–10.

makes this challenge even harder, as mastering a language is simply not enough when making a comparative study. A certain level of knowledge of both the general and the legal culture of a given country is also necessary for a real comparison.<sup>14</sup> Therefore, due to the aforementioned reasons I selected such legal systems for this study which can be studied by using primary and secondary sources in English, French, German, Italian and Hungarian – languages and cultures with which I am familiar to a certain, varying degree. As a result, this research presents certain Western national and supranational patterns and a comparative discussion of these patterns, yet, further remarks and additions can be easily added.

In addition, another methodological concern should also be addressed. This article does not discuss each national solution with the same level of scientific scrutiny. Rather, it tries to identify some core solutions which were comprehensively or partially adopted by various other procedural regimes. Precisely this approach goes back to the concept of the so-called 'core' and derivative legal systems (*systèmes souches et dérivés*) that has already been submitted in comparative law scholarship from the 1950s.<sup>15</sup> Its main insight is that not all legal systems have the same significance and role in general legal history. Some of them exert major influence on a certain field, while others are less relevant. Therefore, the study of those systems where a given legal institution emerged may provide a substantial help in eventually understanding the law of those countries which imported the given legal institution. This does not mean that there may be no differences in the importing legal systems, but it supposes that there are no structural differences.

In this sense, the paper analyses two patterns of legal regulation in detail, the model of judicial passivity and that of the general authorization. As for the first approach, this paper analyses the Italian, the Swiss and the Hungarian rules, while the study of the second approach is mainly based on the French and German legal systems. In addition, Belgian and Austrian law are also referred to as an illustration. Even though these references to Belgian and Austrian civil procedure mostly have an illustrative role, they may however also be interesting contributions to the more general problem of legal transplants; as they can illustrate how a principle can be imported to another legal system having an almost similar cultural character.<sup>16</sup>

<sup>14</sup> Compare René David who argues that the best way to avoid dilettantism – one of the main dangers of comparative law – is to compare the law of such countries about which the comparatist has a good level of cultural knowledge, including a certain command of the language. See R. David, *Traité élémentaire de droit civil comparé* (LGDJ, 1950), especially p. 20–25.

<sup>15</sup> Compare P. Arminjon, B. Nolde and M. Wolff, *Traité de droit comparé I* (LGDJ, 1950), p. 47–49. According to the authors, seven 'core' legal system exist: the French, the German, the Scandinavian, the English, the Russian, the Islamic and the Hindu. Schlesinger also suggests a similar approach: he argues that the selection of some influential legal systems at the beginning of the study can really be helpful as it contributes to the understanding of other legal system. See R.B. Schlesinger, in K. Nadelmann et al. (eds), *XXth Century Comparative and Conflict Laws. Legal Essays in Honor of Hessel E. Yntema*.

<sup>16</sup> See as a classic work, A. Watson, *Legal Transplants. An Approach to Comparative Law* (Scottish Academic Press, 1974). For the recent 'state of art' in this field, see G. Mousourakis, 'Legal Transplants and Legal

### §3. MODEL ONE: THE PRINCIPLE OF JUDICIAL PASSIVITY AND EXCEPTIONS

One of the main European models regulating the way of *ex officio* application of law in civil procedure is the restrictive approach. Essentially, this solution prohibits judges from autonomously raising points of law. The phrasing of these clauses is always short and compact, generally being no longer than a simple declaration or prohibition. It can be clearly seen that the legislator seemingly strived to regulate this question as evidently as it was possible within the framework of legal language. However, to complete the picture, other parts of the civil procedure code or case law always warrant a number of possible exceptions as well. Thus, this approach is framed on the logic of a main rule alongside possible exceptions. Because of this twofold structure, the best option to fully understand the elements is to examine both components independently.

#### A. THE PROHIBITION

The inherent diversity of legal cultures<sup>17</sup> teaches us that even such a simple point as a prohibition of doing something can appear in very different forms. One can clearly read the declaration of judicial passivity in the pages of the Italian Code of Civil Procedure as it simply declares that ‘the judge shall decide upon all the claims and within its limits’, therefore, he cannot introduce *sua potente* new elements to the case.<sup>18</sup> Consequently, judgments that are at least partially based on autonomously raised points of law are generally forbidden. The case law of the Italian courts reinforced this restrictive approach since it declared that it is prohibited for a court to grant a relief different from the original claims.<sup>19</sup>

The Hungarian Code of Civil Procedure formulates this general prohibition from another angle. It declares that the court is bound by the parties’ claims and declarations.<sup>20</sup> Hungarian scholars agree that this provision is one of the most important corollaries of the principle that civil procedure is fundamentally party-driven.<sup>21</sup> As a result, the

Development. A Jurisprudential and Comparative Law Approach’, 54 *Acta Juridica Hungarica* (2013), p. 219–236.

<sup>17</sup> Compare P. Legrand, ‘European Legal Systems are not Converging’, 45 *International and Comparative Law Quarterly* (1996), p. 52–81; or W. van Gerven, ‘Bringing (Private) Laws Closer to Each Other at the European Level’, in F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (Oxford University Press, 2005), [www.casebooks.eu/documents/2005-01-18\\_WvG\\_Impact\\_courts\\_on\\_private\\_law.pdf](http://www.casebooks.eu/documents/2005-01-18_WvG_Impact_courts_on_private_law.pdf).

<sup>18</sup> Article 112 Italian Code of Civil Procedure (*Codice di procedura civile*). S. Grossi and M.C. Pagni, *Commentary on the Italian Code of Civil Procedure* (Oxford University Press, 2010), p. 158.

<sup>19</sup> *Ibid.*, p. 159. See for example, Corte di Cassazione, Sezione Lavoro Civile, Sentenza 11 gennaio 2011, n. 455.

<sup>20</sup> Article 3(2) Hungarian Code of Civil Procedure (1952. évi III. törvény a polgári perrendtartásról).

<sup>21</sup> Compare L. Gáspárdy et al., *Polgári perjog. Általános rész* (KJK-Kerszöv, 2005), p. 32–34.



national legislator did not focus on the explicit prohibition for courts to raise points of law on their own motion, but underlined the duties of the judges. They cannot raise points of law, since they are bound by the parties' intents expressed in the claims.

Another different approach can be found in Swiss law. In Switzerland, the code simply declares that the court must *ex officio* apply the law<sup>22</sup> as other codes of civil procedure do.<sup>23</sup> Thus, on an initial reading, it appears to ignore our topic. One can easily recognize that this provision mirrors the classical procedural principle *iura novit curia*, one of the cornerstones of modern procedural law. However, its relevance comes from the fact that in the eyes of commentators this provision is strictly limited by a principle. This principle states that the court is bound by the claims of the parties – *Bindung an die geltend gemachten Ansprüche* or *Klageidentität* –, that is, *ex officio* application of law can only be done within the boundaries of the parties claims.<sup>24</sup> Indeed, the court can only adjudicate within the boundaries of the parties' submissions. Therefore, from this provision – which is a simple statement and contains no prohibition at all – it is impossible to deduce in reality that courts may have the right to raise points of law on their own motion.

Nevertheless, the Swiss legislator took an even further step and specified this principle. The next article of the code shows the strong impact of the so-called '*Dispositionsmaxime*', granting fundamental power to the parties over their cases. The code explains that the court (i) cannot grant more or any different thing than has been requested by a party, and (ii) it cannot even grant less than has been recognized by an opposing party.<sup>25</sup> Thus, in principle the court must strictly respect both the scope of the claims and the parties' will.

## B. THE EXCEPTIONS

Obviously, such strict regulations would harshly contravene many underlying elements of civil procedure. For instance, material justice expectations or public interests in the administration of justice would be seriously harmed if parties could control a civil law trial in absolute terms.<sup>26</sup> Therefore, these legal systems should also have harmonizing mechanisms in place to relax the strictness of this general prohibition symbolizing the parties' all-embracing power over their cases.

These procedural regimes try to solve this problem through creating exceptions, sometimes really broad or vague, under the general rule. It is unnecessary to outline

<sup>22</sup> Article 57 Swiss Code of Civil Procedure (*Code de procédure civile*).

<sup>23</sup> For example, Article 12 first sentence French Code of Civil Procedure (*Nouveau code de procédure civile*).

<sup>24</sup> K. Spuhler, L. Tenchoi and D. Infanger (eds.), *Schweizerische Zivilprozessordnung* (Helbing Lichtenhahn Verlag, 2010), p. 318.

<sup>25</sup> Article 58(1) Swiss Code of Civil Procedure.

<sup>26</sup> Compare G. Radbruch, *Rechtsphilosophie* (Koehler, 1956), p. 97–105.



them individually but certain important exceptions should be mentioned. The legal techniques introducing these exceptions are also worthy of a short analysis. The Hungarian Code of Civil Procedure introduced a brief sentence within hyphens into the general prohibition: unless law does not regulate it differently.<sup>27</sup> Thus, the national legislator reserved the right to deviate from the general prohibition based on a case-by-case legislative authorization. Likewise, the Swiss legislator provided a general option to deviate in the form of a reservation, concerning the courts' power to raise points of law (*Officialgrundsatz*).<sup>28</sup> Both of these provisions say nothing about the precise content, that is, what they mean exactly by these reservations. Hence, they should be somewhere else within the corpus of national laws.

The first exceptions are those legal provisions which explicitly authorize judges to deviate from the general rule in certain, well-defined groups of cases. These can be found in both the civil procedure code itself or in various other codes or acts. The most usual examples of these are some provisions of matrimonial law. Swiss scholarship generally accepts that the parties' claims do not bind judges in this field,<sup>29</sup> and the Civil Code contained certain special provisions pertaining to rules of divorce until the latest reforms.<sup>30</sup> The Hungarian legislator followed exactly the same pattern; some articles of the civil procedure code assert that in a matrimonial suit, the court can *ex officio* decide about the spouses' use of the common flat.<sup>31</sup> Other typical examples are child issues in family or in matrimonial law. Swiss law explicitly declares that in family law cases related to children, the court is not bound by the parties' claims.<sup>32</sup> On the contrary, Hungarian law applies a more casuistic approach. It enlists certain special cases when the court can act independently; for instance for the accommodation of the child or children with one of the spouses, and the broadening or limiting of parental supervisory rights.<sup>33</sup> Lastly, it should also be mentioned that Hungarian law also renders it possible to appoint a temporary trustee even before the start of the hearings or when hearings are adjourned.<sup>34</sup>

The second part of these exceptions comes from the case law of national courts. Hungarian courts, for instance, developed further exceptions having no precise legal basis in codified civil procedure or in other civil law rules. Perhaps, the most relevant of these is the consistent practice of courts that they are not bound by the claims when they make a decision about the form of compensation (*in integrum restitutio* or the compensation of losses).<sup>35</sup> Other areas of this practice include providing interim measures concerning

<sup>27</sup> Article 3(2) Hungarian Code of Civil Procedure.

<sup>28</sup> Article 58(1) Swiss Code of Civil Procedure.

<sup>29</sup> K. Spuhler, L. Tenchoi and D. Infanger (eds.), *Schweizerische Zivilprozessordnung*, p. 322.

<sup>30</sup> *Ibid.*

<sup>31</sup> Article 287. §Hungarian Code of Civil Procedure.

<sup>32</sup> Article 296(3) Swiss Code of Civil Procedure.

<sup>33</sup> Article 287. §Hungarian Code of Civil Procedure.

<sup>34</sup> Article 308/A. §Hungarian Code of Civil Procedure.

<sup>35</sup> The Hungarian Supreme Court declared this in an opinion aiming to provide orientation for the case law of the Hungarian lower level courts (*Legfelsőbb Bíróság* PK. 44.). This position was reasserted in

child support in the case of divorce,<sup>36</sup> the elimination of common property, the violation of personal rights, or the consequences of trespass.<sup>37</sup> Thus, through a consistent line of case law, courts can gain leeway to raise points of law on their own motion, even if it seems to be contrary to the underlying principle.

The last way to acquire certain opportunities under the rigid rule of general prohibition is by an interpretative approach. Both the Italian and Hungarian laws authorize the courts to interpret the parties' claims from a substantive point of view.<sup>38</sup> This means that the content of claims must always be determined by their substance, not by their strict form and wording. As a special point, Italian law even accepts that the goals, so to say, the interest of the parties, could also be taken into account in this substantive interpretation. Obviously, the precise boundaries of this kind of interpretation have always been blurred in the light of recent developments of case law, so it is impossible to speak of it in general terms. In Hungary, however, there is a clear tendency in the application of this provision: courts only rely on this provision in the qualification of procedural issues. For example, if a counterclaim does not contain in its title the term 'counterclaim', which is otherwise a constitutive requirement, but the aim is obvious from the content, the court will handle it as if it were a valid counterclaim and does not dismiss it due to the lack of a constitutive element.<sup>39</sup>

In sum, these exceptions offer possibilities for judges to raise points of law on their own motion. Subsequently, even in regimes focusing on the strict prohibition, judges are able to exercise their rights to autonomous legal decisions, but their playground is certainly not the broadest one. It cannot be denied that this is a necessary development, since the absolute prohibition would destroy very important values of civil procedure. Theoretically, all of these exceptions can be legitimized by public or third party interest considerations,<sup>40</sup> and it proves that civil procedure is more than a game played by two actors – the plaintiff and the defendant. Civil procedure should always regard the broader context of its operation; thus, it does not operate in the vacuum of exclusive private interests.

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another opinion on the problems of incorrect performance (2/2011. (XII. 12.) PK *vélemény*). Actually, since the new Civil Code came into effect on 14 March 2014 and restructured the general rules of compensation, the procedural points of the Supreme Court's opinion PK 44 are still valid while its substantive part lost its relevance (1/2014 PJE *Határozat* (Uniformity decision)).

<sup>36</sup> Székesfehérvári megyei Bíróság Pf. 20 903/1980 – BH 1982. évi 3/97.

<sup>37</sup> J. Németh and D. Kiss (eds.), *A polgári perrendtartás magyarázata 1* (Complex, 2010), p. 73–74.

<sup>38</sup> In Italian law, case law created this exception, see for example, Corte di Cassazione, Sezione Lavoro Civile, Sentenza 11 gennaio 2011, n. 455. Compare S. Grossi and M.C. Pagni, *Commentary on the Italian Code of Civil Procedure*, p. 158–159. In Hungarian law, the legislator made it explicit in the second sentence of Article 3(2) Hungarian Code of Civil Procedure. Furthermore, the case law of the Hungarian Supreme Court also accepted that if a court requalifies the title of a claim, this does not amount to the breach of the principle that the court is bound by the parties' claims. See *Legfelsőbb Bíróság Pfv. VII 20.618/1998. sz.* – BH 2000. évi 20. sz.

<sup>39</sup> Compare for example, *Legfelsőbb Bíróság Gf. III. 30 773/1988* – BH 1989. évi 6/244. sz. or *Legfelsőbb Bíróság Pf. IV. 20 670/1991.* – BH 1992. évi 2/113. See L. Gáspárdy et al., *Polgári perjog. Általános rész*, p. 75–77.

<sup>40</sup> K. Spuhler, L. Tenchoi and D. Infanger (eds.), *Schweizerische Zivilprozessordnung*, p. 321.

## §4. MODEL TWO: GENERAL AUTHORIZATION UNDER STRICT CONTROL

### A. THE FRENCH APPROACH

French law regulates the problem of courts' raising points of law on their own motion based on various principles through their refined harmonization. The first principle appearing in this setting is the parties' autonomy over both the institution of proceedings and the determination of their content. The very first article of the French Code of Civil Procedure (*Nouveau Code de Procédure Civile*)<sup>41</sup> points out that only the parties have the right to commence a lawsuit,<sup>42</sup> while another provision declares that the subject matter of a dispute is determined by the parties' claims.<sup>43</sup> Furthermore, this principle is strengthened by the next provision, stressing that the judge can only adjudicate upon the points submitted by the parties, and must do so in any event.<sup>44</sup> Thus, parties' autonomy is one of the underlying principles of French civil procedure.

#### 1. *The primary solution: general authorization and the role of 'principe de la contradiction'*

The French Code of Civil Procedure regulates the question whether or not judges can raise a point of law on their own motion in a rather sophisticated provision reflecting a fundamentally different understanding of the judges' role and activity than the earlier discussed model of judicial passivity. Article 16 third sentence declares that '*[i]l ne peut fonder sa décision sur les moyens de droit qu'il a relevés d'office sans avoir au préalable invité les parties à présenter leurs observations*'. (A judge must not base his decision on points of law which he raised on his own motion, without having first invited the parties to comment thereon.)<sup>45</sup>

This sentence is of key importance, so it is worth discussing in detail. First, in theory, the *a contrario* interpretation of this provision points out that French judges have the possibility to raise points of law on their own motion if certain conditions are met. That is, they can base their decisions on these autonomously raised points.<sup>46</sup> On the other hand, this power is strongly limited by the '*principe de la contradiction*', a corollary of the fundamental requirement of fair trial.<sup>47</sup>

<sup>41</sup> For an English translation see N. Brooke (ed.), *The French Code of Civil Procedure in English (Translated by Nicolas Brooke)* (Oxford University Press, 2008).

<sup>42</sup> Article 1 French Code of Civil Procedure.

<sup>43</sup> Article 4 French Code of Civil Procedure.

<sup>44</sup> Article 5 French Code of Civil Procedure.

<sup>45</sup> For the English translation, see N. Brooke (ed.), *The French Code of Civil Procedure in English*, p. 4.

<sup>46</sup> S. Guinchard, C. Chainais and F. Ferrand, *Procédure civile: droit interne et droit de l'Union européenne* (31<sup>st</sup> edition, Dalloz, 2010), p. 573.

<sup>47</sup> *Ibid.*

The case law of French courts as well as French scholarly opinion regards this principle as a cornerstone of civil procedure.<sup>48</sup> It implies that each party has the right to get to know and discuss every submission presented to the judge during the trial. Thus, parties have an absolute right to be informed about any legal or factual element that has the ability to influence their position. Furthermore, the judge must not only supervise the functioning of this principle, but he must respect it in all cases – the code uses a very strong wording here: ‘*en toutes circonstances*’ (in all cases) –, therefore he is strictly bound by it.<sup>49</sup> In essence, a judge cannot rely on such points – issues, explanations, documents<sup>50</sup> – in his decision, which have not been discussed by the parties, or to which the parties did not have the opportunity to react to ‘in an adversarial manner’.<sup>51</sup> Additionally, French law established the so-called presumption of regularity in oral processes. It supposes that as long as the contrary is not proven, the judge’s acts meet all the requirements arising from this principle.<sup>52</sup>

This means that the judge can only raise points of law on his own motion if he firstly communicates this intent to the parties and offers them proper opportunities to discuss it. If he does so, that is, the parties are informed about the intent of introducing non-submitted points of law into the debate, the French judge can legitimately raise points of law on his own motion.

Additionally, theoretical exceptions from this principle also exist. For instance, if the parties fail to indicate the legal bases of their claim, the judge has the right to determine them without a mutual discussion. However, it is only of theoretical importance since according to the French Code of Civil Procedure, if a submission is sent in without the explanation of the legal aspects, it can be declared null and void.<sup>53</sup> The one real exception where the judge exercises exclusive powers is when ordering provisory execution of an order or when fining the parties.<sup>54</sup> Thus, French judges have no real possibility to opt out from the all-embracing ‘*principe de la contradiction*’.

<sup>48</sup> *Nouveau Code de Procédure Civile* (98<sup>e</sup> edition, Dalloz, 2008), p. 31–32.; S. Guinchard, C. Chainais and F. Ferrand, *Procédure civile: droit interne et droit de l’Union européenne*, p. 570. Its importance is also stressed by a landmark decision of the *Conseil d’État* (No. 01875 01905 01948 à 01951, Lecture du 12 octobre 1979) by which the Court annulled a number of articles of the French Code of Civil Procedure introduced in 1971 and 1972. Third line of Article 12 French Code of Civil Procedure originally provided the court with the right to raise pure points of law on its own motion independently of the legal basis referred by the parties. The *Conseil d’État* annulled this provision because, in the eyes of the court, this article would have been able to seriously curb the essential guaranties – equality of citizens and the character *contradictoire* of the process – of anyone involved in the trial.

<sup>49</sup> First line of Article 16 French Code of Civil Procedure.

<sup>50</sup> Second line of Article 16 French Code of Civil Procedure.

<sup>51</sup> Second line of Article 16 French Code of Civil Procedure. For this translation, see N. Brooke (ed.), *The French Code of Civil Procedure in English*, p. 4.

<sup>52</sup> *Nouveau Code de Procédure Civile*, p. 35. French scholars strongly criticize this presumption, since it seems to be very difficult to prove that a judge did not respect the ‘*principe de contradiction*’ in an oral process. S. Guinchard, C. Chainais and F. Ferrand, *Procédure civile: droit interne et droit de l’Union européenne*, p. 579.

<sup>53</sup> Article 56 French Code of Civil Procedure.

<sup>54</sup> For a detailed discussion, see S. Guinchard, C. Chainais and F. Ferrand, *Procédure civile: droit interne et droit de l’Union européenne*, p. 572–579.

We may conclude, therefore, that the French solution simultaneously provides both an opportunity for judges to introduce new points of law into the debate as well as a guarantee that this cannot be done without a preliminary consultation and discussion. Thus, judges have the right to do so, but they must always keep in mind the requirement of fair trial.

## 2. A secondary option: judges' power to legally recharacterize the acts and facts

Another way for judges to raise point of law on their own motion is provided by Article 12 French Code of Civil Procedure. Here, French law also breaks up the principle of party autonomy, however, certainly in a different manner. Article 12 French Code of Civil Procedure provides certain room for judges to deviate from the parties' submissions. The French Code of Civil Procedure declares that judges have the power to provide the correct legal characterization of the disputed acts and facts and in doing so they are unbound by the parties' initial suggestions.<sup>55</sup>

It is important that the French Code of Civil Procedure uses the words 'to give' (*donner*) and 'to reconstruct' (*restituer*), that is, it emphasizes the inherent and independent power of judges to recharacterize the facts from the angle of the professional application of law. If someone can give or reconstruct something, it implies that he is not bound by any external influences, even by the parties' interpretation. The case law of French courts offers many examples: for instance, a court changed the qualification of a work contract with limited duration to an unlimited one,<sup>56</sup> or it requalified a layoff due to individual reasons to a layoff due to economic reasons.<sup>57</sup> In these and other cases,<sup>58</sup> the court qualitatively changed the legal positions submitted by the parties, so it unambiguously had the opportunity to introduce new legal elements into the dispute via the interpretation of facts and acts.

This power of French judges, however, also has certain limits. Firstly, if the parties agree to an 'express agreement' (*accord exprès*) about the legal characterization of certain elements of the case, it is always compulsory for the judges.<sup>59</sup> Therefore, the parties' common interpretation of facts cannot be changed by the court, even if it seems to be incorrect from the court's perspective. Secondly, judges can exclusively use this power in relation to the facts and acts invoked by one of the parties.<sup>60</sup> That is, they cannot refer to

<sup>55</sup> Article 12 French Code of Civil Procedure.

<sup>56</sup> Cour de Cassation, Chambre sociale, du 26 mai 1983, 80-42.179, Bulletin des arrêts Cour de Cassation Chambre sociale N. 283.

<sup>57</sup> Cour de Cassation, Chambre social, du 5 octobre 1983, 81-40.846, Bulletin des arrêts Cour de Cassation Chambre sociale N. 472.

<sup>58</sup> For example, Cour de Cassation, Chambre civil 3, du 29 janvier 1970, 68-13.431, Bulletin des arrêts Cour de Cassation Chambre civile 3 N. 73 P. 53 (here the court re-qualified a contract of sale to a rental contract). For more see *Nouveau Code de Procédure Civil*, p. 22.

<sup>59</sup> Third line of Article 12 French Code of Civil Procedure.

<sup>60</sup> *Nouveau Code de Procédure Civil*, p. 23.

facts which were not submitted at all, even though they acquired information through other unofficial channels.

Interestingly, this provision seems to be essentially similar to some of the interpretive exceptions mentioned above when discussing the approach of judicial passivity. That is, this article may even be regarded as the appearance of a component of the earlier discussed model advocating judicial passivity in French law. It is certainly true from a substantial point of view, since some exceptions in the model of judicial passivity make it possible to re-qualify the claims. This is the case for instance in Italian and Hungarian law by the way of judicial interpretation. However, the entire context of Article 12 French Code of Civil Procedure, with special regard to the general authorization embedded in Article 16 French Code of Civil Procedure – and the lack of the general prohibition – should also be taken into account, potentially leading us toward a different conclusion. The role of Article 12 French Code of Civil Procedure is not to create an exception to the general, prohibitive role but to provide an opportunity to correct the parties' claims from a legal point. The secondary effect of this would also be the *ex officio* application of some civil law provisions.

In general, even if these provisions of the French Code of Civil Procedure use the term 'giving a correct characterization', that is to say, the legislator seemingly strived to avoid the impression that judges could have the opportunity to raise a point of law on their own motion in this context, it still provides some possibility to do so within well-defined limits. Moreover, and it should also be stressed, this power of recharacterization always remains a possibility and can never be interpreted as an obligation.<sup>61</sup>

### 3. *The influence of the French approach: the Belgian case law*

The Belgian code of civil procedure (*Code judiciaire/Gerechtelijk Wetboek*) does not contain any provisions concerning judges' possibilities to raise points of law on their own motion. However, the case law of the *Cour de Cassation* has gradually developed a well-functioning solution. In general terms, in harmony with the standards of modern procedural laws, the Belgian civil procedure system is also a deeply party-driven one. The parties determine the content of a lawsuit and also control the procedure in its entirety.<sup>62</sup>

Although the Belgian solution has some unique features, it mirrors the logic of the French approach. Originally, the case law of the *Cour de cassation* was deeply influenced by the conviction that the legal basis of a claim could not be transformed by the judges. Consequently, judges were generally bounded by the parties' submissions. This position, focusing on the principle of party control of the procedure (*principe dispositif*), was generally strongly criticized on the basis of French scholarly opinion.<sup>63</sup> However, this

<sup>61</sup> Ibid.

<sup>62</sup> D. Mougenot, *Principes de droit judiciaire privé* (Edition Larcier, 2009), p. 92–94.

<sup>63</sup> Ibid., p. 117.

position had started to dissolve into fragmentary decisions during the 1990s.<sup>64</sup> In a landmark decision in 2005, the *Cour de cassation* radically changed its position. In its ‘*arrêt de principe*’ of 14 April 2005, it made explicit that judges are obliged to find the proper legal rules for all of the facts that were specifically referred by the parties, so that they have the possibility to deviate from the original legal qualifications. Thus, Belgian judges can also autonomously raise points of law on their own motion.<sup>65</sup>

Obviously, this power also has certain important limits. Firstly, the *Cour de cassation* emphasized that the rights of the defence must be respected in any event.<sup>66</sup> Here, the term of rights of the defence (*droit de défense*) is slightly misleading, since it has a criminal law connotation. However, the literature immediately guides the readers to the ‘*principe du contradictoire*’, emphasizing its central place.<sup>67</sup> As a result, the Belgian law precisely follows the French pattern, providing a key relevance to this principle. Secondly, this possibility is also limited by the rule that the subject of the claim – namely, what was asked by the plaintiff in factual terms – cannot be changed.<sup>68</sup> Lastly, the parties’ explicit agreement about the legal qualification of certain facts also prohibits judges from autonomously reinterpreting these facts.<sup>69</sup>

## B. TO AVOID THE SURPRISE IN ADJUDICATION: THE ‘HINWEISPF LICHT’

German and Austrian law approaches our problem from a slightly different position; however, it does not deviate from the core of the model of general authorization. Both regimes of civil procedure regard the ‘*Dispositionsmaxime*’ or ‘*Verhandlungsmaxime*’ as a fundamental starting point.<sup>70</sup> Thus, parties in principle control the scope and the subject matter of a civil trial, as is the case in the other legal systems. At this point, German law allows for an important exception which is similar to those solutions that regard the principle of judicial passivity as the main rule. In the so-called non-contentious proceedings, where public interest appears beside the private parties’ interests – for instance where a procedure is initiated by the prosecutor;<sup>71</sup> or cases where serious public interest concerns can be raised – the court has the opportunity to raise a point of law on

<sup>64</sup> Ibid., p. 96.

<sup>65</sup> Cass., 14 April 2005 C.03.0148.F.

<sup>66</sup> Cass., 14 April 2005 C.03.0148.F/8.; D. Mougenot, *Principes de droit judiciaire privé*, p. 96.

<sup>67</sup> D. Mougenot, *Principes de droit judiciaire privé*, p. 97–98.

<sup>68</sup> Ibid., p. 118.

<sup>69</sup> Ibid., p. 117.

<sup>70</sup> Compare W.H. Rechberger (ed.), *Kommentar zur ZPO* (Springer, 2006), p. 926.

<sup>71</sup> For example, the prosecutor is entitled to officially start the so-called ‘procedure of declaration of death’ if a person has disappeared for ten years. See §16 *Verschollenheitsgesetz* 1939; various acts provide an opportunity for prosecutors to start disciplinary proceedings against either tax experts (§113 *Steuerberatungsgesetz* 1961) or advocates (§119 *Bundesrechtsanwaltsordnung* 1959).



its own motion, primarily in order to defend manifest public or third party interests.<sup>72</sup> However, in contentious proceedings the primacy of party-control cannot be seriously questioned.

As can be surmised, if a procedural regime regards this principle as its fundamental basis, the rigidity of the regime should always be somehow relaxed. The creation of various exceptions proved to be one legislative way to manage this. These regimes however chose a slightly different way to solve the conflict of party-control, material justice expectations and public/third party interests as compared to the French approach.

The logic in German and Austrian law is practically similar to that found in French Code of Civil Procedure. On its own, their goal may be regarded as a considerable difference compared to the French solution. Indeed, the main purpose of these provisions is that surprise in adjudication must always be avoided, even though the proper legal solution of the case may justify the deviation from the original claims.<sup>73</sup> If a court adjudicates something that does not meet the claims of the parties in a strongly party-controlled regime, this would seriously endanger the parties' right to fair trial and might have detrimental effects concerning civil law lawsuits. In order to solve this apparent contradiction of party interests and material justice considerations, the legislation handles the question from the direction of the courts. They essentially set forth a comprehensive obligation to inform the parties – exactly similar to the case of the *principe de la contradiction* – and it can also be a basis for *ex officio* application of law, although it is not obvious at first sight.

### 1. Courts' obligation 'to give hints and feedback'<sup>74</sup>

Generally, both systems oblige the judge 'to discuss with the parties the relevant facts and issues in dispute from a factual and legal perspective to the extent reasonable' (*Hinweispflicht*).<sup>75</sup> German commentators agree with the prominent importance of this duty regarding the entirety of the civil procedure; in a very telling way, they call it the 'Magna Charta' of civil procedure.<sup>76</sup> Due to its relevance, it pertains to all judicial acts in a civil lawsuit.<sup>77</sup> In general terms, the duty of *Hinweispflicht* has three different dimensions. It may represent that the judge should initiate a discussion about the factual and legal issues of the case in order to simplify the setting; it may also imply that the

<sup>72</sup> Compare P.L. Murray and R. Stürner, *German Civil Justice* (Carolina Academic Press, 2005), p. 157.

<sup>73</sup> Compare A. Baumbach et al., *Zivilprozessordnung mit FamFG, GVG und andere Nebengesetzen* (Verlag C.H. Beck, 2009), p. 697; W.H. Rechberger (ed.), *Kommentar zur ZPO*, p. 948. Further, see BGH Urteil vom 21.1. 1999 – VII ZR 269/97 (arguing if one of the parties makes an improper reference, the court has to call the attention to this; further, it has to refine this reference and has to provide the opportunity to parties to comment thereon).

<sup>74</sup> P.L. Murray and R. Stürner, *German Civil Justice*, p. 166.

<sup>75</sup> §139(1) German Code of Civil Procedure; §182a first sentence Austrian Code of Civil Procedure.

<sup>76</sup> A. Baumbach et al., *Zivilprozessordnung mit FamFG, GVG und andere Nebengesetzen*, p. 692.

<sup>77</sup> P.L. Murray and R. Stürner, *German Civil Justice*, p. 169.

judge must call the attention of the parties to apparent contradictions; lastly, it may also indicate that he/she must point out those facts that are unclear before declaring their lack of clarity.<sup>78</sup>

## 2. How to base a decision on an apparently overlooked or insignificant point?

The next provision of this article provides an opportunity for judges to raise points of law on their own motion. The §139(2) of the German Code of Civil Procedure and §182 second sentence of the Austrian Code of Civil Procedure, declare that the court can only base its decision ‘on a point of fact or law which a party has apparently overlooked or considered insignificant’<sup>79</sup> if it calls the parties attention to this point and offers them proper opportunity to comment thereon.<sup>80</sup> Furthermore, the German legislator also requires the judges to apply the earlier rule, if they regard certain points of law or fact fundamentally differently from the common understanding of the parties.<sup>81</sup> It is worthy of mention that German law uses this term ‘point’ (*Gesichtspunkt*) in a very broad sense. The commentary points out that a ‘point’ can be practically everything, and there is no clear dividing line between factual or legal points. Whether a point of law or fact is apparently overlooked or considered insignificant has to be assessed always on the basis of the earlier declarations made in the claims or during the hearings.<sup>82</sup> Thus, if a court wants to introduce a new element to the trial, the parties must always be invited to discuss it in detail. Essentially, through this refined phrasing of these articles, the legislator silently offers the option of deviating from the parties’ claims, that is, of raising points of law autonomously.

Hence, German and Austrian judges are under a comprehensive obligation to mutually discuss ‘the relevant facts and issues in dispute’.<sup>83</sup> Further, this provision offers them certain powers to introduce *ex officio* new legal elements into the dispute. Thus, judges of the German-speaking legal world can also shape their cases to a certain extent autonomously. The main question here is the scope of this judicial power. Can they raise absolutely and qualitatively new points of law on their own motion arguing that the given point was considered insignificant?

Of course, the case law is always inconsistent, but commentators agree that the very subject matter of a case and the ‘goal of the case’ cannot be altered by the hints of the court. Additionally, suggesting that the party may enlarge its demand or add another claim is also prohibited.<sup>84</sup> The court therefore has considerable room to play with, but

<sup>78</sup> Ibid., p. 169.

<sup>79</sup> This English translation can be found in P.L. Murray and R. Stürner, *German Civil Justice*, p. 168.

<sup>80</sup> §139(2) German Code of Civil Procedure; §182a second sentence Austrian Code of Civil Procedure.

<sup>81</sup> §139(2) second sentence German Code of Civil Procedure.

<sup>82</sup> A. Baumbach et al., *Zivilprozessordnung mit FamFG, GVG und andere Nebengesetzen*, p. 698.

<sup>83</sup> §139(1) German Code of Civil Procedure.

<sup>84</sup> P.L. Murray and R. Stürner, *German Civil Justice*, p. 172.

there is a fundamental limit: judges cannot qualitatively change a claim by raising points of law on their own motion.

### 3. *Some other common rules*

Both provisions – the general obligation of mutual discussion and the possible introduction of new elements – have some common rules. The timing, the form, and the consequences of these judicial acts are also worthy of a concise analysis as they are set forth in recent German law.

First, timing is important, as it may have a serious impact on the trial strategies followed by the parties. As a main rule, the court should always give sufficient and adequate time for the parties to address the issue raised by the court. In simple cases, immediate answers can reasonably meet this requirement; however, in cases that are more complicated the court should await the written reactions of the parties concerned. If the court did not give appropriate time to react to its hints, it can be viewed as a denial of the constitutional right to be heard.<sup>85</sup>

Secondly, how should a judge fulfil this obligation in reality? In general, there are no strict rules; the judges can exercise their obligation in various forms. Statements during an oral hearing, questions to the parties, or even various orders can be proper instruments. What is important is that they must always act in the presence of both parties; they cannot communicate solely with one of the parties or their counsels.<sup>86</sup> Moreover, 'hints and feedback' are to be documented in the case record as soon as possible, since it can be important evidence in the next possible phase of the proceeding.<sup>87</sup>

Lastly, the impact of case law from higher courts has to be factored in. Commentators agree that the failure of a judge to comply with this rule, that is, to give proper advice to the parties or to provide insufficient possibility to comment on his suggestion may be grounds for both second instance appeal or review appeals.<sup>88</sup> The breach of this duty is one of the important procedural errors frequently invoked in appeal submissions.<sup>89</sup>

<sup>85</sup> Ibid., p. 171.

<sup>86</sup> Ibid., p. 174–175.

<sup>87</sup> §139(3) German Code of Civil Procedure.

<sup>88</sup> Compare BVerwG, Beschluss vom 16.6.2003 – 7 B 106. 02 (explaining that the main goal of this obligation is to protect the requirement of a fair trial).

<sup>89</sup> See for example, BGH Urteil vom 4.10.2004 – II ZR 356/02 (the appellate court considerably and unprecedentedly deviated from the interpretation of a contract given by the court of first instance without indicating it to the parties that it could be regarded as a breach of §139(2) German Code of Civil Procedure). BGH Urteil vom 14.10.2004 – VII ZR 180/03 (the court argued that an appeal cannot be refused if the lower court did not make all the necessary effort to inform the parties); P.L. Murray and R. Stürner, *German Civil Justice*, p. 175–176.

## §5. COMPARATIVE LESSONS AND SUPRANATIONAL EFFORTS

Having regarded the models setting forth certain opportunities to raise points of law on their own motion for civil courts, two preliminary conclusions can be formulated. Firstly, as there is no common legal solution to this problem in Europe, the national legal systems encompass rather divergent approaches. Secondly, however, and this should also be stressed, some common points exist in this colourful landscape of various principles and different legal logic.

### A. COMPARATIVE LESSONS

#### 1. *The coexistence of both an abstract common core and a colourful diversity of detailed provisions*

Having finished a comparative analysis one should try to identify the common core of the national solutions analysed earlier. If one cannot find such a common core, it does not mean that the research can be considered as unsuccessful since this may also point out important conclusions. For instance, the lack of a common core may indicate either the overwhelming importance of cultural factors or the incompatibility of legal thinking and logic, providing a framework for the provisions studied.<sup>90</sup> Therefore, the paper again follows Schlesinger's methodological insights on the design of comparative law research.<sup>91</sup> As a conclusion, this paper argues that it is possible to identify a common core of the civil procedure provisions studied on the level of legal principles. However, national provisions show such an inherent diversity that a similar common core cannot be found when comparing the very detailed rules including case law.

On a higher level of abstraction, that is, on the level of principles, it can be argued that the common core of these civil procedure solutions consists of two elements. The first element is the assumption that civil procedure is party-driven and party-oriented in general. Each legal system analysed accepts this starting point as established. It is mainly declared within the very first articles of the various civil procedure codes,<sup>92</sup> and scholarly public opinion further shares this view unambiguously.<sup>93</sup> In addition, the principle that judges are allowed to adjudicate only within the boundaries of the parties'

<sup>90</sup> Even if the diversity of national procedural laws is striking or apparent on many points, it is argued that in any event a certain convergence can be noted. Compare Opinion of Advocate General Jacobs in Joined Cases C-430/93 and C-431/93 *van Schijndel*, para. 33–37.

<sup>91</sup> Compare R.B. Schlesinger, in K. Nadelmann et al. (eds), *XXth Century Comparative and Conflict Laws. Legal Essays in Honor of Hessel E. Yntema*.

<sup>92</sup> For example, Articles 1 and 4 French Code of Civil Procedure.

<sup>93</sup> For example, W.H. Rechberger (ed.), *Kommentar zur ZPO*.

claims (meaning that they are generally bound by the parties' will) is the most natural and logical consequence of this.

However, the common core also contains another element. It cannot be overlooked that even those legal systems that regulate our problem from a very strict perspective provide certain exceptions under the general rule. Other procedural regimes are more generous with the judges; they even explicitly authorize them to raise points of law autonomously. Overall, it is not the opportunity for judges to raise points of law *ex officio* that is the real question, but its logic and scope. Therefore, national provisions show a real diversity – there are many different solutions to provide certain liberties for judges in these cases.

Accordingly, the common core of the studied European solutions allowing judges to introduce new legal elements on their own motion in a civil trial can be constructed as follows. Generally, the civil procedure regimes prohibit judges from raising points of law autonomously, but they always provide them with a certain leeway – narrower or broader – to raise points in the form of exceptions or a general, but controlled, authorization. Specifically, neither the general prohibition, nor the explicit authorization exists in these systems; the legislators always try to strike a fair balance between the various competing interests.

In sum, this common core is a good match with the factual starting point of this research discussed in the introductory part. Both parts of the common core coincide with its two components. On the one hand, the principle that civil procedure is of a party-driven nature implies that judges are bound by the submissions of the parties. That is, the capacity of judges to act is substantially limited by the will of the parties as it is expressed in their claims and submissions. On the other hand, those provisions that set forth narrow or broad exceptions under the general rules provide certain autonomy for the judges to base their decisions on legal points not referred by the parties. That is, the abstract common core identified seems to justify both the method applied in this research in general and the starting factual situation specifically.

## 2. Varying features of national solutions

Those parts of the national rules where one cannot identify such common points are also worthy of a detailed analysis.<sup>94</sup> This diversity can inform us about our legal thinking, mostly about the differences among national legal cultures.

Primarily, the divergence of the national approaches regarding the exemptions under the general party-driven nature of civil procedure should be noticed. In some systems there are strict exceptions stemming from case law, a legislative source, or even an

<sup>94</sup> Compare G. Frankenberg, 'Critical Comparison: Re-thinking Comparative Law', 26 *Harvard International Law Journal* (1985), p. 411–456; J. Husa, 'Farewell to Functionalism or Methodological Tolerance?', *Rabels Zeitschrift* (2003), p. 419–447.

interpretive source. Other systems allow the judges to raise points of law on their own motion due to a general authorization. However, this permission has two main forms, as is evident from French and German law, and they further have strict and precise limits, mainly arising from principles setting forth procedural guarantees as requirements of fair trial.

Furthermore, courts may have indirect options to raise points of law autonomously as it is granted by French law, where judges have a general possibility to requalify the facts and the acts in a given case, independently of the initial suggestions of the parties.<sup>95</sup> The interpretive exceptions offered by the Italian and Hungarian law – namely that courts should always interpret the parties’ submissions according to their substance – appear to be another dimension of this indirect solution.<sup>96</sup>

Moreover, there are legal systems where a general authorization exists. The provisions of Austrian, French and German procedural law indicate that in these regimes judges have the option to introduce new elements into the discussion. The most direct manifestations are found in the French and Belgian provisions, which allow for the possibility for judges to deviate from the parties’ original claims, but if a judge does so, he must always respect the requirements of a fair trial and he must provide appropriate opportunities for the parties to discuss and comment on his suggestion. Hence, he cannot act unilaterally; the introduction of a new legal point always has to be the result of a mutual discussion with the parties.

The German regulation represents another approach as it creates a comprehensive duty for judges to discuss the legal and factual points of the case and ‘to give hints and feedback’<sup>97</sup> to the parties. Further, it also creates the possibility to base a judgment or decision on ‘apparently overlooked’ legal or factual points or points ‘considered insignificant’, that is, to raise points of law based on marginal elements of the case. Thus, judges of the German-speaking legal world can also raise points of law on their own motion by giving ‘hints and feedback’, but some strict limits must also be respected. On the one hand, they should discuss it in detail with the parties, as French judges must, and, on the other hand, they cannot change the very subject matter of the case by suggesting substantial additions to the given claim.

To make the whole picture more complete, another question is discussed in brief to illustrate how sophisticated differences exist in the national regulations. From the perspective of this comparison, the French and the German solutions are structurally identical as both provide a general authorization for judges to introduce new legal points *ex officio* and both solutions put a serious emphasis on the requirements of a fair trial and procedural guarantees. Therefore, they are classified under the model of general authorization. However, important differences also exist between them. Firstly, under

<sup>95</sup> Article 12 French Code of Civil Procedure.

<sup>96</sup> Compare Article 3(2) Hungarian Code of Civil Procedure.

<sup>97</sup> P.L. Murray and R. Stürner, *German Civil Justice*, p. 166.

French law the judge can always freely give the legal characterization of the facts provided by the parties, so he is not bound by the parties' initial suggestions. However, in German law, the judge should always respect the subject matter and goal of a case, so he does not have such a broad discretionary power of legal characterization. Secondly, this re-characterization is optional in French law, so it is at the judges' discretion, but, according to the German rules, the discussion of the elements of the case including the hints and feedback, concerning overlooked or marginal points is an obligation.

In conclusion, it can be summarized that to raise points of law on the courts' own motion, the analysed legal systems offer two fundamentally different options. The first one can be called the fragmentary approach, where judges have no general authorization to do so, but through a refined network of exceptions, they have certain, broader or narrower, options to exercise this power. The second one is the model of general authorization with clear-cut limits. The interpretation of certain provisions allows judges to autonomously raise points of law, but they can only do it within very strict limits. The requirements of fair trial and the subject matter of the case can be regarded as the main constraints.

### 3. *Motives behind the scene*

As a result of this comparison, we have formulated certain impressions about the possible driving forces behind these regulations. What is the main impetus that formed the current shape of these solutions? At the outset, the respect of parties' autonomy in civil cases has to be mentioned as being one of the cornerstones of modern law. This assumption arises from the classic modern liberal anthropology, putting focus on the autonomy and responsibility of human beings.<sup>98</sup> If people are able to recognize, and decide autonomously about their interests, their rights to control the content and scope of civil procedure can hardly be questioned and restricted. In this setting, the judge must act as a neutral actor who controls the whole process and observes its compliance with the law. However, active participation in the case is unnecessary, since the parties are better informed about their interests and situation than an outsider could ever be.

It is obvious that such a party-oriented system cannot effectively work, since other interests should also be taken into consideration to have a fair decision. Law always strives to obtain manifold goals, and this is significantly true for civil procedure.<sup>99</sup> Aside from party interests, material justice expectations and the respect of public or third party interests also have to be taken into account. Therefore, judges need to have a certain room to deviate from the parties' claims. Sometimes the parties can make bad choices concerning their legal argumentation, sometimes such circumstances emerge that may justify the judges' intervention through raising points of law on their own motion. Thus,

<sup>98</sup> Compare J.S. Mill, *On Liberty* (Ticknor and Fields, 1863), especially chapters II and III, p. 104–180.

<sup>99</sup> G. Radbruch, *Rechtsphilosophie*.



the respect of various other interests, mostly public or third party interests, is also an important stimulus for these solutions.

In conclusion, European legislators were always aware of the fact that private interests dominating the entire civil procedure should somehow be balanced against other, important considerations, such as public or third party interests. As a result, they tried to strike this fair balance in each case even though the outcome of their efforts considerably differs from the other. Nevertheless, the intention to find a proper balance of interests in a deeply party-driven procedural structure is certainly a common point.

## B. TOWARDS A 'IUS COMMUNE' SOLUTION?

A commonly stated catchphrase of the last two decades' public legal thinking within Europe has been a reference to either 'legal harmonization' or 'legal unification'. Many scholarly projects have been started in order to explore the possibilities of harmonizing given fields of law.<sup>100</sup> Obviously, civil procedure has also been studied in this way, and some final drafts are interesting from our point of view.<sup>101</sup>

One may recognize that, regarding our problem, the philosophy underlying these drafts follows the general European pattern. As for the party-driven nature of the civil procedure, both drafts agree. The 'Storme Report' indicates that this principle was among those underlying principles that the Working Group accepted without any doubts.<sup>102</sup> The ALI/UNIDROIT draft also points out that proceedings should be started by the plaintiff, likewise it expressly excludes that proceedings could be initiated by the court 'acting on its own motion'.<sup>103</sup> The next article stresses that the scope of the proceeding is fundamentally determined by the parties.<sup>104</sup>

Having clarified the starting point, both drafts regulate the question of the courts' autonomous power to introduce new elements based on the French model, stressing the importance of a fair trial. Neither of them prohibits or allows the introduction of new elements to the trial explicitly, but both of them use a broad phrasing. Interestingly, the 'Storme Report' discusses this question in a negative sentence by pointing out that 'the court may not apply, for the purposes of its judgment, a rule or principle of law which

<sup>100</sup> See for example the so-called 'Trento Project' ([www.common-core.org/](http://www.common-core.org/)) or the 'Ius Commune Casebooks' project ([www.casebooks.eu/welcome/](http://www.casebooks.eu/welcome/)).

<sup>101</sup> See M. Storme (ed.), *Rapprochement du Droit Judiciaire de l'Union européenne – Approximation of Judiciary Law in the European Union* (Kluwer, 1994); 'The ALI/UNIDROIT Principles of Transnational Civil Procedure', 4 *Uniform Law Review* (2004), p. 758–808.

<sup>102</sup> M. Storme (ed.), *Rapprochement du Droit Judiciaire de l'Union européenne – Approximation of Judiciary Law in the European Union*, p. 64.

<sup>103</sup> P-10.1., 'The ALI/UNIDROIT Principles of Transnational Civil Procedure', 4 *Uniform Law Review* (2004), p. 776.

<sup>104</sup> P-10.3., *ibid.*

has not been invoked by a party unless (...),<sup>105</sup> while the ALI/UNIDROIT principles suggest an affirmative regulation, stating that 'the court may (...) rely upon a legal theory (...) that has not been advanced by a party'.<sup>106</sup> Here, the wording is perhaps not the most concise since the term 'legal theory' is normally not used in such a context, but the general meaning is understood.

Theoretically, the first part of these provisions makes it possible for the judges to raise points of law on their own motion. However, they also impose strict limits on this option. Both of them refer to the '*principe de la contradiction*' from the French legal system, since they declare that courts must allow the parties to comment on these suggestions of the court.<sup>107</sup> Based on the earlier comparative analysis, it is easy to reveal the similarities of these proposals to that pattern of regulation that was introduced by the French law.

At the very first sight, the supranational reception of French law seems to have no practical relevance since some autonomy for judges to raise points of law on their own motion is guaranteed by the other model, too. Either the model of general authorization, on which French law is based, or the model of fragmentary exceptions lead to the same result in practical terms. However, due to their different underlying logic with special regard to the high priority of the principle of fair trial and its requirements, one may conclude that it is certainly a proper choice to design *ius commune* rules inspired by French law. This setting of the *ex officio* application of law in civil trials definitely provides a higher level of procedural guarantees for the parties involved than those that set forth a similar autonomy through a complex network of exceptions.

Additionally, these two harmonization proposals may also illustrate that it is simply impossible to find a unified solution to our problem for all EU civil procedure regimes; a harmonization or approximation attempt should always choose one pattern from the various options. It seems that this divergence, in this very important segment, cannot really be resolved since the divergence is related to the 'deep structures' of diverse legal culture, referring to the logic of legal thinking and assumptions about the role of judges.<sup>108</sup>

<sup>105</sup> M. Storme (ed.), *Rapprochement du Droit Judiciaire de l'Union européenne – Approximation of Judiciary Law in the European Union*, p. 194, Article 3.5.

<sup>106</sup> P-22.2 and P-22.2.3., 'The ALI/UNIDROIT Principles of Transnational Civil Procedure', 4 *Uniform Law Review* (2004), p. 798.

<sup>107</sup> M. Storme (ed.), *Rapprochement du Droit Judiciaire de l'Union européenne – Approximation of Judiciary Law in the European Union*, p. 194, Article 3.5: '(...) all the parties have had the opportunity to be heard thereon'; P-22.2, 'The ALI/UNIDROIT Principles of Transnational Civil Procedure', 4 *Uniform Law Review* (2004), p. 798, states that '[t]he court may, while affording the parties opportunity to respond: (...)':

<sup>108</sup> P. Legrand, 45 *International and Comparative Law Quarterly* (1996), p. 64–74.