Reforming the Law of Civil Procedure: Does it Work?

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1. Introduction

The legislature in many countries has been continuously occupied with combatting the problem of slow justice systems. As demonstrated by the CFMnet-project, the Member States have been very inventive in this battle, by tracing and fighting the various factors that may cause backlogs and delays. There have been various legislative reforms (in a multitude of countries) concerning the powers of the judge that aimed to accelerate the civil procedure. In these reforms, the courts were given more discretion to manage litigation, promote settlements and adjust the proceedings to individual circumstances. In continental legal systems, the law of civil procedure used to be characterised by a dominant position of the litigating parties and a passive role for the court. The inactive role of the court had a derogatory impact on the efficiency of the procedure and the reforms therefore changed the division of roles between the court and the parties. Nowadays, the judge has more freedom to play an active role, involving, for example, decisions on clear time limits and the use of pre-hearing/pre-trial conferences. The reforms were based on the idea that an active judge would increase the efficiency of the civil procedure. The question is, however, if the judge makes actual use of these competences. The amendment of a law does not necessarily change the behaviour of a judge. In the context of the CMFnet-project, it would be interesting to see if the legislative amendments lead to a change in legal practice. The current paper aims to answer this question by discussing three important reforms of civil procedural law in France, Germany and the Netherlands. All three reforms dealt with, amongst other things, active case management by the judge.

The paper is focusing on a specific topic about which there is not much information available. To provide a picture as complete as possible, the information from official evaluation reports of the reforms is combined with scholarly literature, using French, German, English and Dutch

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3 The jurisdictions of France, the Netherlands and Germany were chosen for the following reasons. The legal theory of civil procedural law distinguishes between three legal families within the European Union: the Common, the Roman and the German legal family. The common law system is excluded from the CFMnet research project deliberately, because the law of civil procedure in the common law system is fundamentally different from the continental systems that have their origins in Roman-Canon law. The French Law of Civil Procedure is representative for the Roman school and is said to be at the origin of the active judge doctrine. The French Code has furthermore yielded an enormous influence on procedural codifications elsewhere. The German Code of Civil Procedure is part of the German legal family and had a large influence on codifications around the world as well. Both the French and the German codes are therefore interesting research objects. The Dutch jurisdiction was included because of its ‘forerunner’ status. The Netherlands do not have an exceptionally efficient system, but they have a pragmatic approach that is unknown to other countries and therefore could provide interesting results in the context of this project.
sources. The methodological approach does not include a quantitative research method. The causal link between the reformation of the position of the judge and increased efficiency is hard to find and requires complicated statistical research. This cannot be carried out within the framework of this paper. Still, when there are data available, it will shortly be touched upon.

The paper is structured as follows. The different countries are discussed in separate chapters that begin with a short description of the background of the Code of Civil Procedure, followed by the innovations that are introduced by the reform and finished by an examination of actual implementation of the reforms. The analysis discusses the successfulness of the reforms with regard to their intended goal to give the judge a more active role and provides a possible reason for their (un)effectiveness.

2. France
The French Code of Civil Procedure (1806) can be seen as the very start of modern civil procedural law and dominated the procedural debate for a large part of the 19th century. As a result, the codes of civil procedure in numerous European jurisdictions are heavily influenced by the 1806 Code and contain important characteristics of this codification. The dominant position of the code is remarkable, as it was not the result of its qualitative merits. The 1806 Code was defective in many ways, since it incorporated (for a large part) the provisions from the old ‘Great Royal Ordinance’ that was introduced in 1667 by Jean-Baptiste Colbert under Louis XIV. The important influence of this old document rendered the Napoleonic code outmoded and offered plenty of opportunities to delay the proceedings. The parties could remain passive with regard to the progress of the cases and the judge did not have the power to interfere. Despite several modernisation efforts, the general structure of the 1806 Code remained largely unaltered until the reform of 1976 introduced New Code of Civil Procedure (NCCP).

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4 Van Rhee 2006 p. 129.
5 Cadet 2008 p. 263.
7 Van Rhee 2006.
The NCCP was the result of a codification movement that had been carefully preparing the reform for decennia. The promotors of the justice reform wanted a fundamental restructuring of the law of civil procedure to create a faster and more efficient system of civil justice. The NCCP introduced a more modern conception of civil litigation that became embedded in the so-called fundamental principles of court proceedings (Principes directeurs du procès), which could be found in the first twenty-four articles of the NCCP. The principles were aimed to reflect the general idea behind French litigation. Henri Motulsky, the drafter of the Code, described the objective of the principles as to ‘trace in light […] the essential boundaries of the judge’s mandate and the distribution of procedural functions between the judge and the parties’. Whereas the French civil judge traditionally had a relatively neutral and passive role in the proceedings, the reform of 1976 changed this equilibrium by (re)creating the pre-trial judge and by providing him with more procedural powers. The pre-trial judge would ‘supervise the loyal conduct of the procedure […]’ and ‘fix, progressively, the time-limits necessary for the examination of the matter, in relation to the nature, urgency and complexity of the case, and after having heard the opinion of the advocates.’ The regular court judge, in his turn, was also given a more active role with regard to delay in the procedure. The NCCP states that the judge supervises the proper progress of the proceedings and that he has the authority to define the time-limits and to order necessary measures. The NCCP is therefore offering the judge numerous broadly defined opportunities to play a more active role, all the more since the position of the judge was further strengthened in later reforms.

The reception of the NCCP was very positive and this was not surprising. The NCCP could easily meet the expectations, as the 1806 Code was old and due for a change. The enthusiastic reception, however, did not translate into a full use of all the competences that were introduced. According to Ménabé, the NCCP offers more possibilities to the judge than

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8 Cadiet 2005 p. 51.
9 Ménabé 2005 p. 54.
11 Jeuland 2014.
12 Art. 763 and 764 NCCP.
13 Art. 3 NCCP.
15 Beigner 2006 p. 2.
are currently being used to accelerate the civil proceedings. The competences of the pre-trial judge are often used on a reactive basis, as the court does not often take the initiative for a hearing, to fix a term or to take evidence. The judge only exercises his power when there is an incident to establish the true nature of the dispute. The planning of cases furthermore to date takes place online and therefore the planning powers have fallen into disuse too. The positive attitude of the legal profession and the judiciary has therefore not resulted in a fully-fledged implementation of the NCCP. The judge apparently does not need to make use of all the competences that are available to him.

3. The Netherlands

The Dutch Code of Civil Procedure (DCCP) entered into force in 1838. To a large extent, the DCCP was a translation of the French Code of 1806, and, similar to its French counterpart, the DCCP came under heavy criticism shortly after its introduction. The DCCP was said to be prone to defects and offered plenty of opportunities to slow down the proceedings. The lack of immediacy and the passive role of the judge could be used to prolong a case endlessly and to postpone the final judgement. Despite several proposals for amendments and recodifications to accelerate the civil procedure, the DCCP remained nearly unaltered for many years. The majority of the civil trials continued to be inefficient paper trials in which the exchange of statements remained a slow process and parties often saved their best arguments for the last round. The court was not given a clear idea of the dispute in question and the proceedings were prolonged extensively.

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16 Ménabé 2005 p. 53.
17 Jeuland 2014 p. 3.
19 Jeuland 2014 p. 11.
20 The complexity of the French statistical data makes it furthermore difficult to determine whether the changed role of the (pre)trial judge has resulted in a more efficient system of civil justice. The French courts have been collecting data uninterruptedly for over two-hundred years, but the constantly changing calculation methods and varying fields of research have made it difficult to do a before-and-after comparison. The statistical data concerning the years before 1981 are said to require a cautious approach due to constantly changing interpretations of the concept of a new case (Serverin 1999, p. 284). This is precisely the period that could be of relevance for the reform. The existing statistical data on the French system of civil justice, therefore cannot be used for a comparison of the efficiency of the French judiciary prior to and following the reform.
21 Van Rhee 2008 p. 196.
22 Van Rhee 2008 p. 196.
23 Van Rhee 2008 p. 196.
24 Jongbloed 2005 p. 70.
The relatively slow through-put times launched a debate in the beginning of the 90s, which resulted in the ‘Accelerated Regime’ experiments. The experiments were designed by a mixed committee of judges and lawyers and were aimed at increasing the efficiency of civil proceedings. The ‘Accelerated Regime’ entailed that in specific cases, in which the parties and the court had given their consent, there was only one written round in which there were high requirements imposed on the content of the documents submitted. The parties had to describe the possible defences of the other party and needed to state the evidence they had at their disposal and the possible witnesses. The written round would be followed by a hearing of the parties after which the judge would immediately pronounce his judgement.²⁶

The success of the experiment stimulated the Dutch legislature to reform the Code of Civil Procedure by codifying the ‘Accelerated Regime’. The objective of the reform of the DCCP (2002) was to make civil justice more accessible, more efficient and less formal.²⁷ There were five central principles: simplifying the law of civil procedure, dispensing with some of the formalities, modernising the relationship between the court and parties, more efficiency, and harmonising the law of civil procedure.²⁸ The most important change concerned the hearing of the parties, which was given a more central role following the success of the ‘Accelerated Regime’ experiment. This means that, prior to the hearing, the parties submit only one document to the court in which they lay all their cards on the table to explain the core of the dispute, the possible defences of the other party, the evidence which will be submitted in the proceedings and the witnesses that could be heard. Following this written round, the court could order a personal appearance of the parties and (often) a judgement is given directly afterwards. The emphasis on the oral element of the proceedings was introduced in order to enable the court to perform its duty to prevent undue delay.²⁹ The idea is that the court needs a complete picture of the case as early as possible to play an active part in the proceedings.³⁰ To further strengthen the active role of the judge, the court was attributed the competence to take measures to accelerate the procedure.³¹ The court could, for example, fix

²⁶ Eshuis 2005.
²⁷ Eshuis 2007 p. 90.
²⁹ This duty can be found in art. 20 DCCP.
³⁰ Art. 132 DCCP.
time limits or take away the right to state a claim.\textsuperscript{32} The court thus won considerable procedural powers at the expense of the parties and was enabled to play a more active role.

The increase of court efficiency was one of the central aims of the revision of 2002, and, in this respect, the reform of 2002 was considered to be a success by the evaluation commission that was appointed by the Dutch Ministry of Justice.\textsuperscript{33} The commission concluded that the model providing for one written round and a central position for the hearing, was generally considered to be a positive change and furthermore led to an acceleration of civil proceedings.\textsuperscript{34} The evaluation commission was supported in this conclusion by scholarly research that shows that in nearly sixty percent of the proceedings, the hearing of the parties was directly followed by a judgement of the court.\textsuperscript{35} The statement of reply after the personal appearance of the parties, which used to be an important source of delay, was needed in only around five percent of the cases.\textsuperscript{36} This means that the time-consuming steps of the statement of reply and the rejoinder have (to a large extent) been eliminated from the court proceedings and more emphasis is put on the court-directed hearing of the parties. It is difficult to say, however, if the more preponderant role of the court hearing has resulted in a more active role for the judge. The obligation to provide sufficient information in the statement of claim and the statement of defence does not require a judge to make extensive use of its judicial competences. The biggest part of the necessary information is already presented in the very beginning of the procedure and theoretically speaking the judge does not need to ask for it. The active role of the judge could therefore be overestimated.

\textsuperscript{32} Kamerstukken II 1999-2000, 26855, 3, p. 51.
\textsuperscript{33} Asser et al. 2006.
\textsuperscript{34} The quantitative improvements regarding efficiency were confirmed by a large study on the effectiveness of measures that had been taken between 1996 and 2003 to accelerate civil proceedings (Eshuis 2007). This analysis of 25,000 court cases leads to the conclusion that \textquoteleft[f]or all nineteen courts together, the median case processing time in defended cases dropped by 20\%, from 525 days (in 1996) to 413 days (in 2003). The percentage of cases terminated within one year rose from 34\% to 49\%. Seventeen out of nineteen courts reduced case processing time between 1996 and 2003. At four courts the median duration of a defended case dropped by 50\%\textquoteright.\textsuperscript{35} Van der Linden 2008 p. 7.
\textsuperscript{36} Van der Linden 2008 p. 48.
**4. Germany**

The German Code of Civil Procedure is a product of the proclamation of the German Empire in 1871.\(^\text{37}\) Bismarck considered codification of the legal system an essential element of the unification of the German states.\(^\text{38}\) Therefore, following the establishment of the German Empire, considerable legal activity took place to achieve both legal and political unity.\(^\text{39}\) The Zivilprozessordnung (ZPO) of 1877 was among the most important enactments of that time.\(^\text{40}\) The intellectual origins of the Code could be found in three sources: the ‘ancient’ law of civil procedure (\textit{ius commune}), the French Code of 1806 (which was in force in the states of Rheinhessen, Rhein Bayern and Westphalia) and the different civil procedural codes that were in force in several German States.\(^\text{41}\) The ZPO was highly-praised after its introduction.\(^\text{42}\) The codification was characterised by a liberal approach, which meant that the judge in civil proceedings only played a passive role, whereas the litigating parties had a stronger position. The parties were given unlimited freedom in conducting the proceedings and therefore the ZPO became an almost ideal instrument to delay the proceedings.\(^\text{43}\)

Following the change of government in 1998, the new coalition decided to comprehensively reform the judicial system. Part of this reform was the modernisation of the ZPO. The new Zivilprozessordnung was adopted on 27 July 2001 and entered into force on 1 January 2002. The so-called ‘große Justizreform’ was designed ‘to prepare the German judiciary for the 21\(^{\text{st}}\) century [...] and to enhance efficiency and transparency by reducing the duration of civil proceedings’.\(^\text{44}\) The system of civil procedure was made more consumer-friendly, more efficient, and more transparent through a comprehensive modernisation and structural reform of the justice system.\(^\text{45}\) The reform radically restructured the Law of Civil Procedure and involved the following features: (1) strengthening the court of first instance, (2) reducing the value limits for access to appeal, (3) specialisation of appeal courts, (4) introducing a simplified procedure for insubstantial appeals, and (5) introducing single judge-panels.\(^\text{46}\) The

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\(^{37}\) Prütting 2008 p. 251.  
\(^{38}\) Foster & Sule 2010 p. 29.  
\(^{39}\) Foster & Sule 2010 p. 30  
\(^{40}\) Foster & Sule 2010 p. 30.  
\(^{41}\) Oberhammer & Domej 2005 p. 103.  
\(^{42}\) Hommerich et al. 2007a p. 15.  
\(^{43}\) Gottwald 2004 p. 122.  
\(^{44}\) Ruhl 2005 p. 941.  
\(^{45}\) Drucksache 14/4722, p. 1/61  
\(^{46}\) Drucksache 14/4722, p. 61.
consolidation of the first instance courts implied, amongst other things, an extension of the judicial competences and the introduction of an obligatory conciliation hearing.\textsuperscript{47} The provision on judicial competences (§139 ZPO) was modified in order to put more emphasis on court powers and court management. The objective of this legislative change was to ‘remind judges of their duty, especially judges who had refrained from giving adequate court assistance to the parties’.\textsuperscript{48} The amicable settlement procedure was furthermore introduced (§278 ZPO) to oblige the parties to try to negotiate an agreement under the direction of the court.\textsuperscript{49} The judge was therefore stimulated to take a more active part in the procedure.

The German Ministry of Justice published an enthusiastic press release following the impact assessment of the reform of civil procedural law on judicial practice, claiming that the evaluation was predominantly positive.\textsuperscript{50} A close reading of the evaluation report shows, however, that there are important fields in which the expectations of the legislature have not been met.\textsuperscript{51} According to the impact assessment, the promotion of judicial and extrajudicial dispute resolution, which was a central goal of the reform, was successfully implemented.\textsuperscript{52} There was a considerable reduction in the percentage of contentious judgements and a simultaneous increase in court settlements.\textsuperscript{53} The problem is that these numbers do not provide a complete picture. There are scholars who believe that the court settlement procedure did not at all result in the desired effects. Bahlmann argues that the courts have implemented the obligatory conciliation hearing by summoning the parties for both the obligatory ‘conciliation hearing’ and the ‘normal hearing’ at the same time. As this is not a real change compared to the situation that had existed before the reform, Bahlmann argues that this element of the reform has not been successful.\textsuperscript{54}

\textsuperscript{47} Bahlmann 2006 p. 41.
\textsuperscript{48} Stadler 2003.
\textsuperscript{49} Drucksache 14/4722, p. 1/62.
\textsuperscript{50} See: http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/15_wp/Zivilprozessreformgesetz/pm_bmj_17_05_06.pdf (consulted 28/5/2016).
\textsuperscript{51} Hommerich et al. 2007b.
\textsuperscript{52} Hommerich et al. 2007b p. 3.
\textsuperscript{53} Hommerich et al. 2007b p. 3. Regarding contentious judgements in Amtsgerichte, there was a reduction from 21,8\% to 17,9\% between 2000 and 2004. In the Landgerichte there was a reduction from 27,9\% to 23,9\% within the same time span. There was also an increase of court settlements: from 9,9\% to 17,6\% in Amtsgerichte and from 13,1\% to 21,5\% in Landgerichte between 2000 and 2004.
The second important element of the reform was the enhancement and the strengthening of the position of the courts of first instance in which §139 ZPO was the central provision. The evaluation claims that two thirds of the judges declared that they made more use of their competence to give instructions following the reform.\textsuperscript{55} There is, however, some controversy about the evaluation of this §139, as the changes have not been evaluated positively by every court.\textsuperscript{56} There are scholars who argue that the restructuring of §139 ZPO has had little actual impact on the court proceedings and did not change the conduct of the court at all.\textsuperscript{57} According to these commentators, the content of the article changed, but legal practice remained largely the same. The implementation of the reform has therefore caused mixed reactions. The judges held varying opinions on the reform: only 20% found the reform generally positive, 8% deemed the reform overall negative and more than two thirds of the judges saw both positive and negative aspects.\textsuperscript{58}

5. Analysis

The discussion of the countries shows that a legal reform regarding the competences of the judge does not necessarily change the behaviour of a court organisation. In all three countries the competences of the judge are used in varying degrees. There could be different reasons for this, but a possible explanation could be found in the following. Theories on change in professional systems often emphasise the active participation of professionals.\textsuperscript{59} The judges need to support and understand the importance of reform to make it work. This support was there when the Dutch legislature introduced the legislative reform. The courts had initiated the restructuring of civil procedural law with the ‘Accelerated Regime’ experiments and therefore approved of the underlying principle of the legislature’s plan. The codification was (in a way) the confirmation of a court practice that already existed.\textsuperscript{60} The German reform, on the other hand, was received with less enthusiasm by the German judiciary. The German

\textsuperscript{55} Hommerich et al. 2007b p. 4.
\textsuperscript{56} Hommerich et al. 2007b p. 4.
\textsuperscript{57} Ruhl 2005.
\textsuperscript{58} Hommerich et al. 2007b p. 5.
\textsuperscript{59} Eshuis 2007 p. 8.
\textsuperscript{60} Eshuis 2007 p. 8.
courts were relatively fast already prior to the reform. It is possible that the judges therefore did not feel an urgent need to change court practice. The French reform provides the most interesting case study. The reticence of the French judges to actively use case management competences cannot be explained by a lack of enthusiasm for the reform. The NCCP has always been very popular and it seems therefore unlikely that a lack of participation is the reason behind the reactive use of case management tools. More research is necessary here. It would be interesting to know what the exact reasons behind the sometimes limited use of case management powers are. Further studies could treat, for example, the following questions: what makes a reform of case management powers successful? Does such a reform always require the support of the courts in order to be effective? Would this apply to other fields than civil procedure as well?

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