COMMENTS

SEARCHING FOR TRUTH IN CIVIL PROCESS: THE NETHERLANDS AND RUSSIA

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This article examines the search for truth by the civil law courts in The Netherlands and Russia, and elucidates three basic questions in that respect: 1) should civil law courts seek for truth in civil process; 2) how must this truth be perceived; and 3) how do courts seek for truth? The Dutch approach to these questions is basically that no justice can be done when there has not at least been undertaken a serious effort to find out the truth, while at the same time acknowledging that seeking for truth has less to do with the final result than with the attitude of the court in its quest for a just decision. In their search for truth – by establishing the correct facts – Dutch courts apply a balanced methodology. Russian civil courts take the position that, although are not required to, they think they should search for truth in the sense that it correctly reflects objective reality. It may well be that Russian civil procedure puts in theory a goal of finding objective truth but, while having no objective instrument for that, does so in the most subjective way possible. Dutch methodology may well be the one needed for the Russian courts.

Keywords: civil process; courts; search for truth; importance of true facts; judicial reasoning; objective truth; Dutch approach and Russian mirror.

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But you shall hear from me the whole truth
Plato, Apology of Socrates

1. Introduction

Veritas, veritatum, omnia veritas.[1] It is an inescapable fact that truth and the search for truth are at present very much *en vogue* in civil litigation. Indeed, truth is something we cannot easily have enough of: no sensible human being will be against it. The question however *what is* and *how* to find 'the truth' is not so easy to answer, even for jurists who have no affinity with philosophy. Truth in the opinion of many belongs to the exclusive domain of procedural law. Substantive law does not have much in common with 'truth' and 'search for truth.' The question arises whether this trend always increases the quality of the outcome of a civil procedure. On the one hand we may consider as positive that the courts do not content themselves with the cold result of facts that are asserted and challenged in a civil lawsuit. On the other hand we must face the fact that more often than not it is merely an illusion to expect that in a civil lawsuit the truth – that is: the real facts, as they happened in reality between the parties – can be established beyond reasonable doubt. Nietzsches cynicism: „Die Wahrheit ist eine Illusion, von der man vergessen hat, das sie eine ist"[2] is to be avoided at all times in civil litigation, while on the other hand the parties involved, the court and society need to realize that seeking the truth has less to do with the final result than with the attitude of the court in its quest for a just decision. For this reason and against this background the interest for evidence in civil litigation in Russia and in The Netherlands is fully justified. Not so much in the sense that it suggests that the truth can be found, but mainly in the context of the courts' *attitude* that is *aimed* at finding out the truth.[3] No justice can be accomplished in a civil procedure in which there has not been at least undertaken a serious effort to find out the truth in the conflict at stake. Evidence

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1 V. van den Brink, *De waarheid is van iedereen*, 2014(5) Nederlands Tijdschrift voor Burgerlijk Recht; Eric Tjong Tjin Tai, *Waarheid in het burgerlijk proces, bespreking NJV preadvies*, 87(22) Nederlands Juristenblad (2012), available at <https://pure.uvt.nl/portal/files/1486706/Bespreking_De_Groot_NJV_2012.pdf> (accessed Mar. 11, 2015).

2 Friedrich Nietzsche, Über Wahrheit und Lüge im aussermoralischen Sinne (1873), Kap. 1, <http://www.uni-erfurt.de/fileadmin/public-docs/Literaturwissenschaft/ndl/Material_Schmidt/Nietzsche_%C3%9Cber_Wahrheit.pdf> (accessed Mar. 11, 2015): „Was ist also Wahrheit? Ein bewegliches Heer von Metaphern, Metonymien, Anthropomorphismen, kurz eine Summe von menschlichen Relationen, die, poetisch und rhetorisch gesteigert, übertragen, geschmückt wurden, und die nach langem Gebrauch einem Volke fest, kanonisch und verbindlich dünken: die Wahrheiten sind Illusionen, von denen man vergessen hat, daß sie welche sind, Metaphern, die abgenutzt und sinnlich kraftlos geworden sind, Münzen, die ihr Bild verloren haben und nun als Metall, nicht mehr als Münzen, in Betracht kommen."

3 G. van Rijssen & R.A. van der Pol, *Civiel deskundigenbewijs*, 2013(4) Tijdschrift voor Civiele Rechtspleging; Willem D.H. Asser, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, 3 Procesrecht: Bewijs 71 (Kluwer 2013).

law chiefly concerns itself with the methods by which facts are being established in a civil lawsuit. It is the facts that make up for the basis of the parties' claims and the court's decision, and it is from this point of view that there is reason to assume that facts are taken seriously both by the parties and by the courts. However, this is not self-evident and is often depending on the perspective one takes when looking at a civil lawsuit. Dutch lawyers often have a different opinion when it concerns the importance of seeking the truth than many judges have, and scholarly opinions tend to go in various directions. In this essay I will limit myself to briefly sketching a few basics of the Dutch civil procedure, seen from a judges' perspective, in the course of which I will also touch on a few aspects of the present discussion concerning the importance of facts and truth in the Dutch civil procedure: seeking the truth, the importance of establishing the facts[4] and, in this context, the question how active judges may behave in their pursuit for true facts. Subsequently the issue will be addressed from the Russian perspective.

2. We Need Facts

Charles Dickens begins his XIXth century novel of social injustice 'Hard Times' with 'The One Thing Needful:'[5]

> Now, what I want is, facts. Teach these boys and girls nothing but facts. Facts alone are wanted in life. Plant nothing else, and root out everything else. You can only form the minds of reasoning animals upon Facts: nothing else will ever be of any service to them. This is the principle on which I bring up my own children, and this is the principle on which I bring up these children. Stick to facts, Sir!

This 'principle' more or less applies to any civil procedure. The principle of seeking the truth can be used as an umbrella that includes all activities of the parties and the court that have as objective the establishment of the relevant facts, that is those facts that the court needs to ground its decision on. It includes the relation between facts and law, the division of tasks between parties and court, but also third-party duties such as the obligation of witnesses to supply the court with relevant information.[6] In this context it is worth mentioning that the Dutch Supreme Court ruled in several of its recent judgments that it is a weighty social interest that in a court of law the

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[4] *See* on this subject from the comparative perspective Remme Verkerk, Fact-Finding in Civil Litigation: A Comparative Perspective (Intersentia 2010).

[5] Charles Dickens, Hard Times (Vintage Classics 2012).

[6] R.H. de Bock, Tussen waarheid en onzekerheid: over het vaststellen van feiten in de civiele procedure (= 9 Burgerlijk Proces & Praktijk) (Rob Rutgers et al., eds.) (Kluwer 2011).

truth can be found.[7] A just judicial decision can be realized only on the basis of a correct application of legal norms based on facts that are true. The distinguished Dutch jurist Paul Scholten in his *Algemeen Deel* (General Part) phrased it briefly as follows: 'It is in the facts that the law is to be found.'[8] It is generally accepted that the examination of the facts in a civil procedure is aimed at finding the material truth of these facts:[9] did they happen in reality? Seeking the truth by the courts is, however, not mentioned in the overriding objectives of the 1999 English Civil Procedure Rules (CPR), for the mere reason that 'seeking the truth is so obviously part of the court's role that it does not need to be stated expressly in the Rules.' The procedural rules do not exist 'to establish the court's basic constitutional purpose: namely, to decide cases in accordance with the facts and applicable law.'[10] I can but fully agree with Asser that this can be said for all jurisdictions.[11] As mentioned before, seeking the truth aims mainly at establishing facts that are relevant for the court's decision and takes place in a procedure in which rules are guiding the division of roles between the court and the parties, as well as the acquiring of information and the verification thereof (by way of evidence, assessment of evidence, expert-reports, discovery and exhibition duties). Before highlighting some aspects of the procedural debate in The Netherlands – establishing of facts and evidence – it seems to make sense to roughly sketch a few important aspects of Dutch civil procedure.

3. In Short: The Dutch Procedural Model

In the Netherlands the administration of justice in all civil and commercial law cases is in the hands of eleven courts of the first instance (district courts (rechtbanken)), four courts of appeal (gerechtshoven) and the Supreme Court (Hoge Raad). Only the district courts and the courts of appeal examine facts; the Supreme Court's authority is limited to supervising the correct application of norms of substantial law and procedural law – norms of international law included – by the courts of appeal. The

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7 Uitgeversmaatschappij De Telegraaf B.V. / De Staat der Nederlanden, HR 11 juli 2008, NJ 2009/451 (ann. EJD), available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2008:BC8421> (accessed Mar. 11, 2015); [De man] / [De vrouw], HR 10 april 2009, NJ 2010/471 (ann. CJMK), available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BG9470> (accessed Mar. 11, 2015); [Eiser] / Nederlandse Israëlitische Hoofdsynagoge, HR 18 maart 2011, NJ 2012/315 (ann. CJMK), <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2011:BP0571> (accessed Mar. 11, 2015).

8 Paul Scholten, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Algemeen deel 9 (W.E.J. Tjeenk Willink 1974).

9 Jan B.M. Vranken, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Algemeen deel ****, Een synthese 62–82 (Kluwer 2014).

10 Adrian Zuckerman, Zuckerman on Civil Procedure: Principles of Practise ¶ 1.15 (Sweet & Maxwell 2006).

11 Asser, *supra* n. 3, at 75 (with many references).

Supreme Court also supervises the unity of the law and legal development.[12] As far as the appeal instance is concerned it suffices to mention that – contrary to many other jurisdictions – the appeal procedure may include a whole new assessment of the case in which the parties can bring forward new facts, new or additional claims, legal grounds and / or new challenges. The task of the appeal court is therefore not restricted to a mere assessment of the judgment of the district court, as is the case in some jurisdictions. For practical reasons however, this is not the place to go into the particulars of the appeal procedure.[13] I will therefore limit myself to relevant aspects that apply both to first and second instance civil procedures.[14]

The characteristics of the Dutch procedural model find their roots in the Roman-canonic law tradition: a mainly written procedure with a dominant role of the court concerning the examination of the facts and an important role for professional lawyers.[15] Legal representation before the court is mandatory in all cases that exceed an amount of € 25,000, whereas in the appeal instances and in the cassation instance legal representation by lawyers is mandatory in all cases. Recent reforms have strengthened the dominant role of the courts, particularly where it concerns fact-finding. Article 21 of the Dutch Civil Procedure Code [hereinafter DCPC] obliges the parties to bring forward all those facts that are relevant for the court's decision *'complete and in accordance with the truth.'* Furthermore the court has it in its power to oblige the parties at any moment to clarify particular assertions as well as to submit certain documents (Art. 22 DCPC).

Next to this since the 2002 reforms[16] an oral hearing (comparitie) takes place in practically every first instance case, but only after both parties have submitted their respective court documents, the plaintiff: a writ of summons (containing the plaintiffs' allegations), and the defense: its statement of answer (eventually containing a counter-claim).

Given the dominant role of the courts with respect to the examination of relevant facts, it will not come as a surprise that Dutch legal culture requires a high degree

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12 E. Korthals Altes & H.A. Groen, Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, 7 Procesrecht: Cassatie in burgerlijke zaken (Kluwer 2005).

13 A great survey on the Dutch style appeal procedure is given by F.B. Bakels et al., Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, 4 Procesrecht: Hoger beroep (Kluwer 2009).

14 There exists only one„Wetboek van burgerlijke rechtsvordering" (Civil Procedure Code), that contains the rules of civil procedure for the district courts, the courts of appeal and the Supreme Court. Apart from that, many (sub)rules are to be found in the Supreme Courts' jurisprudence.

15 Asser, *supra* n. 3, at 2.

16 *See* for an overview of the reforms C.H. (Remco) van Rhee & Remme Verkerk, *The Netherlands: A No-Nonsense Approach to Civil Procedure Reform*, in Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties (= 31 Ius Gentium: Comparative Perspectives on Law and Justice) 259–280 (C.H. (Remco) van Rhee & Fu Yulin, eds.) (Springer 2014).

of professional, cooperative, behaviour between the parties and the court. The reason behind it lies in the awareness that the parties and the court both bear equal responsibility for a speedy, efficient and effective process. Both the parties and court therefore are required to actively participate to ensure procedural (Art. 6 of the European Convention on Human Rights [hereinafter ECHR]) and substantial justice. This implies that parties may have a duty not only to inform the court completely and correctly, but also that they inform the other party equally. One might even conclude that the parties have an obligation to cooperate in revealing the truth, that they must lay their cards on the table. Non-cooperative, even oppositional, behaviour must be sanctioned. If we try to formulate a standard by which to assess the parties' procedural behaviour, it should be the central open norm of Dutch civil procedure law, that is 'the requirements of a good process order,' from which the courts can concretize a duty to cooperate in any particular situation. Moreover, from this viewpoint the risk that both parties, and the court, construe their own reality can be substantially minimized.[17]

4. How Civil Judges Reason

Two core legal provisions should not be overlooked because they emphasize the division of roles between the court and the parties in the procedural debate that focuses on the claimants' demands and the challenges by the defense. Article 24 DCPC orders the court to examine and decide each case on the basis of what is asserted by the plaintiff and the defense, while Art. 25 DCPC orders the court to *ex officio* supplement the legal foundation. In other words: the courts' decision must be firmly grounded in the parties' positions and the law. Article 24 DCPC thus emphasizes the party autonomy and restricts on reasonable grounds the courts' freedom to freely give a decision the court may find the most reasonable one. Fundamental procedural principles – such as the parties' autonomy and hearing both parties – result in the basic assumption that the court does not ground its decision on facts that are not asserted or have not been established, and that it neither supplements the claim or defense with a legal foundation that has no basis in the parties' positions.[18] It is this fundamental starting point regarding the division of roles between the courts and the parties' (that is: their lawyers) that regularly causes difficulties in daily practice.[19] It all comes down to the question of how much freedom is given to the courts in

[17] Asser, *supra* n. 3, at 80.

[18] Vranken, *supra* n. 10, at 68 (seeking truth versus party autonomy).

[19] There is almost a boundless amount of literature and Supreme Court jurisprudence on this subject. *See, e.g.,* A.C. van Schaick, Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, 2 Procesrecht: Eerste aanleg (Kluwer 2011) (Ch. 6 'The Procedural Debate. The Division of Roles between the Parties and the Courts' with many footnotes); *see also* Asser, *supra* n. 3 (Ch. 4 'The Boundaries of the Search for Truth' also with many references in footnotes).

their search for truth. Can a clear boundary be established in general terms? I will go into this debate in the next section. For the time being it suffices to realize that the starting point as far as facts and legal foundation is concerned is upon the parties.

Let us face the question of how the court establishes those facts that it finds to be relevant for its decision? In other words: when does an asserted fact become an established fact? To answer this question we must distinguish between the following seven stages:[20]

1) asserting;
2) challenging;
3) burden of proof;
4) offer to proof;
5) order to furnish evidence (parol evidence and / or documentary evidence);
6) produce evidence;
7) assessing the evidence by the court.

It is of essential importance – every qualified lawyer should realize this – that these consecutive stages are being followed in the process of analyzing; none should be missed. It goes without saying that the transition from stage 2 to stage 3 is the most important one in the limited context of this article, that is the stage from 'asserting and challenging' to 'evidence.' Let us therefore focus on three important stages.

Stage 1. On the plaintiff who files a claim rests the obligation – on pain of rejection of the claim – to assert facts that support the allegations made in the writ of summons and that may support the relief sought to be awarded by the court. The mere assertion 'I want the defendant to be condemned to pay € 50,000' will clearly not suffice. The plaintiff will have to assert sufficient facts to substantiate all elements prescribed by the substantial law. For instance: the party that claims € 50,000 – damages for breach of a contractual obligation, will have at least to start asserting the elements a) 'contract,' b) 'breach,' c) 'damages,' and d) 'causality.' Furthermore, he will also have to substantiate – that is: concretize – these respective elements. In the same example: what is the obligation the other party supposedly has breached, on what contract is this obligation based (have the parties used a written contract or an oral one?), and what specific damages were caused by this breach? The plaintiff therefore has to make sure that his claim is given sufficient substantiation, both in terms of the invoked elements of substantial law and with regard to the substantiation with alleged facts of these respective elements. If the court finds that the plaintiff has not fulfilled its obligation in either way, the claim will be rejected. Stage 2 will not be reached.

Stage 2. Only when the court has affirmed that the plaintiff has fulfilled his obligation under Stage 1, Stage 2 is entered. In that stage the court has to ask itself

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[20] V. van den Brink, *Stellen, betwisten bewijzen – een handleiding*, 2008(4) Praktisch Procederen; Margreet J.A.M. Ahsmann, De weg naar het civiele vonnis (Boom Juridische uitgevers 2011).

the question whether the defense has sufficiently challenged the facts asserted by the plaintiff in his court document. If the court comes to the conclusion that this is not the case, it has to establish these facts as uncontested (Art. 149(1) DCPC).[21] If however an asserted fact is challenged, the court will carefully direct the 'magnifying glass' on the quality of both sides' assertions. Both parties must sufficiently substantiate and concretize their respective assertions and challenges. The more concrete the assertions of one party are, the more the other party may be expected to substantiate and concretize his assertions / challenges and *vice versa*. It is difficult to formulate hard and fast standards of what in general may be expected of both parties, as this will depend on the specific circumstances of each case. What can be said however is that the court, before it rules that one of the parties has not sufficiently fulfilled its obligation to substantiate and concretize facts stated in the context of the claim or the challenge thereof, must ask itself the question: what else could – and therefore: should – this party have come up with? As it is considered a fundamental principle of fair trial that each judicial decision is reasoned at least to the extent that it gives sufficient insight into the court's line of reasoning in order to ensure that its decision is 'verifiable and acceptable'[22] both for the parties, the higher courts and third parties alike, the court should also explain why it finds that one party could and should have substantiated its assertions or challenges more extensively, before it rejects either the claim or the position taken by the defense. Here lies anyway an important task for the more active judge during a court hearing.

To round off: only when the court finds that both the substantiation of asserted facts by the claimant and the substantiation of the challenges by the defense are of sufficient quality, does the question of the burden of proof arise. That is the third stage.

Stage 3. Article 150 DCPC contains the basic rule that on the party that calls upon the legal effects of certain asserted facts or rights, rests the burden of proof of these facts or rights. Consequently it is *this* party that bears the risk that the court is not able to establish these facts or rights ('non liquet') and that the claim, insofar as it is grounded on these facts or rights, must be rejected. Therefore we may conclude that the party who asserts facts to substantiate his appeal to a certain legal effect must prove those facts to be truthful. Asserting facts / rights and evidence therefore go hand in hand. Let me go back to the example given in Stage 1. It is clear that the burden of proof of the asserted facts that substantiate the above-mentioned

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21 This must be seen as an example of the party autonomy.

22 *See* the constant jurisprudence of the Supreme Court: Vredo / Veenhuis, HR 4 juni 1993, NJ 1993/659 (ann. DWFV); Finkenburgh / Van Mansum, HR 16 oktober 1998, NJ 1999/7; [Eiseressen 1–5] / [Verweerders 1–6], HR 25 oktober 2002, NJ 2003/171 (ann. MVS), available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2002:AE4364> (accessed Mar. 11, 2015). It shows the influence of Art. 6(1) ECHR on civil procedure law. *See* A. Hammerstein, *De invloed van artikel 6 lid 1 EVRM op het burgerlijk procesrecht*, in Europeanisering van het Nederlands recht: opstellen aangeboden aan Mr. W.E. Haak 220–233 (G.J.M. Corstens et al., eds.) (Kluwer 2004).

elements a)–d) is on the claimant, taken that they are sufficiently challenged by the defense.[23] However, if the defense not only challenges these facts by denying that any breach of contract has been committed by her, but also files a counterclaim asserting that, on the contrary, it was not the defense but the claimant who has committed a breach of contract and is therefore liable to pay damages, the burden of proof of the facts that support that argument is on the defense.[24] The ratio thereof lies in the basic rule of Art. 150 DCPC.

There remains much more to be said about the burden of proof and all its complicated side-alleys, as it is the hinge around which the court's decision turns: the one who has to prove facts or rights also bears the risk that they can not be established. This goes beyond the scope of this article, and deserves a separate publication.

I will leave the Stages 4–6 but will instead say a few words about Stage 7, the assessment by the courts of the evidence.

Stage 7. When it comes to the question 'true' or 'not true,' one would expect that either the law or the jurisprudence would set the clear standards by which the courts have to assess and decide whether evidence of a fact has been produced. This is not the case. Dutch law takes the so-called free assessment of evidence by the courts in Art. 152(2) DCPC as a principle, where it stipulates: 'The assessment of evidence is left to the court's judgment, unless prescribed otherwise by the law.' The law therefore does not give the court much support when faced with the central question as to when it may, or must, assume a certain fact has been proven. Over the years literature and jurisprudence have developed the standard of a *'reasonable degree of certainty'* by which to assess evidence and to assume a fact proven. It is clear that such a standard gives the courts a wide margin of appreciation when it comes to assessing evidence. When is a court convinced, and when is it not?[25] For this reason some jurists assert with some justification that the decision whether a certain fact has been proven depends to a high degree on the subjective judgment of the members of the court *in the concrete case*. This certainly has ground, in particular when it comes to assessing witnesses' statements as so often is the case in Dutch courts where evidence by witnesses' is allowed in many situations. It is hard to predict in advance how much 'reasonable certainty' a court needs to reach the conclusion that evidence of a fact has been produced. This means there exists a high degree of legal uncertainty for those who have to decide whether to start a lawsuit or to start a defense. It is against this background that the Amsterdam Court of Appeal judge Ruth de Bock in her recent thesis[26] argued that a more serious reasoning may

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[23] And if not, the court has to establish them on the basis of Art. 149 DCPC.

[24] Asser, *supra* n. 3, has a lot to say about this important issue in Ch. 9.

[25] Vranken, *supra* n. 10, at 76 (with a reference to Art. 21.1 ALI / Unidroit Principles of Transnational Civil Procedures 2004: 'Facts are considered proven when the court is reasonably convinced of their truth').

[26] De Bock, *supra* n. 7.

be expected with regard to the court's judgment that evidence of a certain fact or right has been produced. In this context she proposes the following standard:

> A fact is proven by the civil law courts when it can reasonably be concluded from the available evidence that said fact has taken place, while at the same time the available evidence does not leave open the possibility that the version of the facts as asserted by the other party has taken place, while just as little can be said that evidence, that reasonably may have been expected, is lacking.

It may be argued that the latter standard leaves as much subjectivity to the courts as the former one. However, the value of the point she makes lies primarily in the notion of the importance of the court's task to reason its judgment that evidence of a certain fact or right has, or has not, been produced in the best possible way. At the same time it makes us realize the limitations the court faces while reaching the point on which it has to decide: 'true' or 'not true.'[27] More in general it can be said that De Bock's thesis provides insight into every-day dilemmas of legal practice around the theme of 'seeking the truth' and it is certainly stimulating to reflect on how and where judges can do better.

5. (Too) Active Judges?

There remains one interesting issue to be briefly touched on, and that is the difference of opinion between those who are advocating a strictly maintained party autonomy and the court's passiveness where facts and rights are concerned, *versus* those who are advocating a more inquisitorial, active, role of judges when it comes to seeking the true facts.

The oral hearing ('the parties day in court') I mentioned in sec. 2, which takes place in practically every first instance case, marks a very important moment in the procedural debate between the parties and the court (mostly a one-judge panel). As a rule, no further exchange of court documents is permitted after this moment, although exceptions do exist. After the oral hearing the court sets a date for its written judgment, usually six weeks later. This can be either an interlocutory judgment – *e.g.*, ordering one of the parties to produce (further) evidence – or a final judgment, awarding or rejecting the claim.

In the opinion of those jurists who are adherents of a strictly maintained party autonomy and the courts' passiveness, the responsibility for asserting legal grounds, challenges, and the necessary facts that support these grounds and challenges rests exclusively on the parties; in their vision the court's role in the debate should be strictly

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[27] *See also* the interesting review of De Bock's thesis by Prof. Mr. G. de Groot, *De vaststelling van feiten in de civiele procedure*, 2012(2) Tijdschrift voor Civiele Rechtspleging.

limited to those facts and grounds that are in dispute and to the sustainability of the claim and the challenges thereof by the defense. In other words: the parties have a dispute, they both want to 'win their case' and this does not correspond with the idea that the parties, together with the court, bear a common responsibility for 'the best possible outcome.' As a consequence this vision is opposing the very idea of judges actively collecting grounds and facts from the court documents which he or she finds reasonable for reaching a just decision. This rather formal approach is necessary in the eyes of its adherents, because active and helping judges create sloppy litigators and this, in turn, stands in the way of the realization of existing civil rights.[28]

Many judges will agree that the extent to which the court can actively participate in the procedural debate between the parties is limited. However, the rather formal and one-sided view of the adherents of a strict party autonomy should be criticized on (at least) the following grounds.[29]

First, this view starts from the incorrect assumption that as a rule, the parties are represented by highly qualified lawyers / litigators. For matters with damages up to € 25,000 the parties are not required to retain legal representation – parties can therefore appear in person – and many lawyers tend to be sloppy litigators. This often has the consequence that court documents lack clear legal grounds and challenges, and that hardly any attention is paid to the facts that have in reality occurred and that should form the foundation of the asserted legal grounds and challenges thereof. Shouldn't one then, given this reality, expect judges to do their best to try to examine and clarify the facts that took place in reality and ask questions about the legal grounds that are invoked and the challenges thereof?

Second, judges, unlike many lawyers, consider a civil dispute *not* from the perspective of a tactical match between two equally equipped parties and their respective lawyers, but from the perspective of seeking the truth because – as I argued in the foregoing – seeking truth is the natural orientation of judges in the examination of the facts. This orientation demands active judges. Giving up on seeking truth as a principle that serves as a guideline for any civil law judge will have as a consequence that the establishment of facts will become an arbitrary business and that procedure will be merely procedure.[30]

Last but not least, dysfunctioning lawyers tend to create a judges' dilemma: will he or she decide the case exclusively on the basis of the facts, grounds and arguments presented to him in often nicely composed court documents – and 'reprimand' the

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[28] A strong adherent of this 'doctrine' is prof. Mr. A.C. van Schaick in his oration „Het burgerlijk recht de baas? Over de verwevenheid van burgerlijk recht en burgerlijk procesrecht" (Kluwer 2009); *see also* Schaick, *supra* n. 20.

[29] *See* R.A. van der Pol & D.T. Boks, *Boekbespreking van A.C. van Schaick, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Procesrecht, Deel 2, Eerste aanleg, 2011*, 2012(2) Tijdschrift voor Civiele Rechtspleging.

[30] De Bock, *supra* n. 7.

sloppy lawyer – or will he actively examine the facts of the case? The first option is not very attractive, as it is not the task of the court to point out to lawyers and their clients that the judgment was partly due to a 'wrong procedural attitude.' Furthermore, it must be kept in mind that the court's effort is aimed at achieving the purpose of the procedure, namely the clarification of facts, grounds, and challenges in order to be able to decide as much as possible the true conflict that keeps the parties divided, instead of a more or less hypothetical dispute. However it remains important for judges to keep in mind the limits of being (too) active, more in particular where it concerns so-called 'untouched issues.' According to Supreme Court jurisprudence the judge is not free to base his decision on legal grounds or challenges that could be deduced from certain facts and circumstances, but that have not been asserted by the plaintiff as a basis for his claim or by the defense as a basis for his challenge, because by doing so *the other parties fundamental right to be heard* could be violated.[31] This fundamental principle of Art. 6 ECHR and Art.19 DCPC[32] has become the bottom line for active judges.

6. Russian Mirror

My learned co-author in this article, Judge Ruth van der Pol, elucidated three basic questions that arise in regards to the truth in the civil process. They are as follows: 1) whether courts should or have to seek for truth in civil process; 2) what is the truth that they should or have to seek in the process; and 3) how do courts seek for truth? This way to analyze our topic seems to be reasonable. For Russia, all three questions are problematic.

6.1. Should Russian Courts Seek for Truth in Civil Process?

It can be firmly said at the outset that civil courts in Russia are not expressly required by law to find the truth. This word, truth (or *istina* in Russian), is not even mentioned in Russian primary law. Nevertheless, it is used very actively in the doctrine, which still influences the conscience of judges and revives what has been expressly abdicated in black letter law.

A separate issue is whether the courts actually *have to* seek for truth even if they are not required to do that by law. This way to formulate the first question in our analysis refers not to the law but to the realities of our life, in which the court just *cannot avoid* seeking for truth in order to carry out its judicial function. My learned co-author mentioned this argument and it seems quite strong so long as we consider that the civil process can reveal and actually does reveal truth. This is already the

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[31] E.ON Benelux Generation N.V. / [Verweerder], HR 31 maart 2006, NJ 2006/233, available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2006:AV0646> (accessed Mar. 11, 2015).

[32] Article 19 of the DCPC codifies the parties' right to be heard equally and stiputales *expressis verbis* that the judge does not ground his / her decision, detrimental to one of the parties, on documents or other evidence the other party has not been able to sufficiently react on.

area of the second question of our analysis, namely as to what is truth, and we will discuss it below. For now, let us still concentrate on the first question.

Russia has a long track of debate as to whether a court must find the truth in the process. This debate is a part a larger struggle between the so-called inquisitorial and adversarial models of process which has been in place in Russia since the XIX century until now. It is assumed that the inquisitorial system requires a court to use every opportunity available to find truth, while the adversarial system concentrates more on the procedural balance of the parties in trial.[33] However, the courts of Imperial Russia, before they underwent the famous reforms of 1864, were criticized for being both inquisitorial and ineffective in searching for the truth at the same time: the process was mostly written and was based on the formalistic approach as to evidence.[34] After the reforms, the courts started being criticized for being too adversarial, 'since an inexperienced party might build his position in a wrong way, might not provide necessary evidence, and thus fail in even the most *righteous* case' (emphasis added).[35] This line of movement from the adversarial process back to the inquisitorial process received its complete realization in Art. 5 of the 1923 RSFR Civil Procedure Code and, consequently, in Art. 14 of the 1964 RSFSR Civil Procedure Code; both rules required courts to discover all actual circumstances and facts of a case irrespective of the positions of the parties thereto. In other words, Soviet courts stuck to the facts as hard as Dickens demanded in the novel mentioned by my learned co-author. After the dissolution of the Soviet Union, the inquisitorial approach has been again abdicated.

Currently Russia has two instruments regulating civil procedure: Civil Procedure Code [hereinafter CPC], applied by courts of general jurisdiction in most civil cases, and Arbitration Procedure Code [hereinafter APC], applied by arbitration courts in commercial cases. Both of those instruments in identical language (Art. 12 CPC and Art. 9 APC) require as follows:

> While retaining its independence objectivity and impartiality, the court shall lead the process, shall explain to the persons taking part in the case their rights and duties, shall warn of the consequences of the performance or non-performance of the procedural acts, shall render to the persons taking

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[33] *Малышев К.И.* Курс гражданского судопроизводства. Т. 1 [Malyshev K.I. *Kurs grazhdanskogo sudoproizvodstva. T. 1* [Kronid I. Malyshev, 1 Course of Civil Proceedings]] (2nd ed., Tipografiya M.M. Stasyulevicha 1876]] (*cited in* Гражданский процесс: Хрестоматия: Учебное пособие [*Grazhdansky protsess: Khrestomatiya: Uchebnoe posobie* [Civil Procedure: Chrestomathy: Textbook]] 207–208 (Mikhail K. Treushnikov, ed.) (2nd ed., Gorodets 2005) [hereinafter Civil Procedure: Chrestomathy]).

[34] *Гессен И.В.* Судебная реформа [Gessen I.V. *Sudebnaya reforma* [Iosif V. Gessen, Judicial Reform]] 7 (Tipolitografiya F. Waisberga i P. Gershunina 1905).

[35] *Яблочков Т.М.* Учебник русского гражданского судопроизводства [Yablochkov T.M. *Uchebnik russkogo grazhdanskogo sudoproizvodstva* [Tikhon M. Yablochkov, Textbook on Russian Civil Proceedings]] (2nd ed., Knigoizdatel'stvo I.K. Gassanova 1912) (*cited in* Civil Procedure: Chrestomathy, *supra* n. 33, at 213).

part in the case assistance in exercising their rights, shall *create conditions* for an all-round and complete study of the proofs and *for the establishment of actual circumstances* and for the correct application of the legislation in the consideration and the resolution of civil cases.[36]

The legislative intent is quite obvious if we compare this rule with Art. 14 of the 1964 RSFSR Civil Procedure Code: courts are not any more obliged to reveal all actual circumstances by themselves, they only provide conditions for their establishment in an adversarial trial. It is quite clear as well, why the search for truth was relinquished. Soviet inquisitorial process was formalistic and ineffective; moreover, in criminal area it led to the repressions that are well-recorded in history. The changes in law were driven by the intention to make the process less formalistic and revive it by introducing competition in a dispute.

This novation, however, can hardly be considered effective.[37] First of all, the Code preserved certain elements of inquisitorial process, such as an obligation of a court to establish certain specific facts (otherwise the judgment may not survive on appeal).[38] Moreover, the doctrine remained largely the same. Analyzing the changes, some authors stated cautiously that under the new law, Russian courts do not have to seek for truth outside of what is posed by the parties to a dispute and the opposite would violate Art. 123 of the Constitution of the Russian Federation.[39] Yet the others, including the acting judges of Russian arbitration courts, disagreed and insisted that finding the truth, on the contrary, is essential for justice.[40] Of course, what

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[36] Russian Civil Procedure Code, translated by the WIPO, available at <http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru081en.pdf> (accessed Mar. 11, 2015).

[37] *Решетникова И.В.* Тенденции развития гражданского процессуального законодательства // Российский юридический журнал. 1999. № 1(21). С. 7 [Reshetnikova I.V. *Tendentsii razvitiya grazhdanskogo protsessual'nogo zakonodatel'stva // Rossiiskii yuridicheskii zhurnal.* 1999. No. 1(21). S. 7 [Irina V. Reshetnikova, *Tendencies of Development of the Legislation on Civil Procedure*, 1999(1) Russian Juridical Journal 7]].

[38] For example, for the purposes of damages claims it is specifically established by both the Supreme Court and the Supreme Arbitration (Commercial) Court that the calculation of damage must be confirmed by specified types of documents (Joint Resolution of the Plenums of the both Courts No. 6/8 of Jule 1, 1996). This type of rules is, in fact, one of the most effective guarantees against arbitrary decisions. For further discussion, *see, e.g.,* Гражданский процесс: Учебник [*Grazhdanskii protsess: Uchebnik* [Civil Procedure: Textbook]] 32–33 (Valery A. Musin et al., eds.) (Prospekt 1998).

[39] *Сапожников С.А., Устюжанинов В.А.* Принцип состязательности и судебной истины в новом АПК РФ // Арбитражная практика. 2003. № 2. С. 31–34 [Sapozhnikov S.A., Ustyuzhaninov V.A. *Printsip sostyazatel'nosti i sudebnoi istiny v novom APK RF // Arbitrazhnaya praktika.* 2003. No. 2. S. 31–34 [Sergey A. Sapozhnikov & Vladimir A. Ustyuzhaninov, *The Principle of Adversarial Process and the Judicial Truth in the New Arbitration Procedure Code of the Russian Federation*, 2003(2) Arbitration Practice 31–34]].

[40] *Шумилова Л.Ф.* Принципы состязательности и объективной истины как фундаментальные начала правоприменительной практики // Журнал российского права. 2005. № 11 [Shumilova L.F. *Printsipy sostyazatel'nosti i obyektivnoi istiny kak fundamental'nye nachala pravoprimenitel'noi praktiki // Zhurnal rossiiskogo prava.* 2005. No. 11 [Lyudmila F. Shumilova, *Principles of Adversarial Process and Objective Truth as Fundamentals of the Law Enforcement Practice*, 2005(11) Journal of Russian Law]].

seems to prevail in the doctrine and jurisprudence is a somewhat middle-ground position saying that both the search for truth and adversarial process can perfectly live together. While this idea looks great on paper, this suggestion may take strange forms in reality of life: after all, both of these concepts meet each in the head of one and the same person, the judge. The outcome of this meeting depends on his or her professionalism, experience, conscience and, frankly, imagination.

In Russia there are no jury trials in civil cases. The Russian judge is not only an administrator of an adversarial trial, he is also the one who examines the evidence (as Russian law requires, 'in accordance with his inherent conviction'), and renders a judgment based upon the facts that he himself considers established or proven. Possessing all these powers, he can simply tailor both the process and the judgment in order to reach the outcome that he considers fair and corresponding with the truth he believes. Judges admit that they are subjective in revealing objective facts and do not see any contradiction in that.[41] The problem is that a judge might be mistaken in what exactly he considers the truth and where he found it.

However, it would be a mistake to think that Russian civil process always entails searching for the truth, whatever it is meant to be. In fact, sometimes courts use the formality of adversarial process proclaimed in Russian procedural law in order to refrain from reality. For example, in 1997 a district court in Moscow sustained the lawsuit by Yury Luzhkov, then the mayor of Moscow, against the party 'Democratic Choice of Russia' and newspaper 'Russian Telegraph' for publicly calling the mayor 'the richest businessman in the city, who took over everyone.'[42] At the same time, it was a matter of common knowledge that Luzhkov's wife was one of the major Russian tycoons and that she earned all of her fortune within his years in office.[43] In 2011, when Luzhkov left the office, the same court dismissed his claim against the Duma head Sergey Naryshkin who characterized Luzhkov's management of city as 'incompetent' and 'corrupt.'[44]

Therefore, the answer to the first question seems to be as follows: courts are not required to search for the truth in the process, but they usually think that they should, and sometimes they really do.

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41 Judge Shumilova, currently serving in the 14th Appelate Arbirtation Court puts that as follows: 'In order to have justice done in the case, the court's findings must be based on undoubtly established facts. The judge, evaluating the evidence and taking measures to establish the truth in the case, is to some extent subjective, stating in its decision the arguments that led him to resolve the legal dispute on the right so and not otherwise. There are reasons of objective nature for that. It is clear that law enforcement agents act by perceiving and applying only the formal law, which contains general characteristics of the permissibility of a particular social behavior and, as a rule, not recognizing the individuality of the situation in which there may be a deviation from the normal social behavior. And this is understandable: the legislator cannot account for the diversity of life.' Shumilova, *supra* n. 41.

42 *Боннер А.Т.* Проблемы установления истины в гражданском процессе: Монография [Bonner A.T. *Problemy ustanovleniya istiny v grazhdanskom protsesse* [Alexander T. Bonner, Problems of Finding the Truth in Civil Proceedings: Monograph]] (Yuridicheskaya kniga 2009).

43 *Id.*

44 *Id.*

6.2. What is Truth?

When Pilate asked Jesus, 'What is truth?', Jesus answered nothing, and Pilate went to the Jews and said to them, 'I find no guilt in Him.'

Philosophy offers several types of answers as to what the truth is. Some authors thought that truth is what corresponds to objective reality, what exists as itself and irrespectively of anyone to perceive it (Aristotle, Hegel, Descartes). Others opined that something becomes a matter of truth, only when it is confirmed empirically (Locke, Schlick). Yet, others think that truth is always a subjective thing and that it is constructed on the basis of one's specific knowledge, previous experience, psychic features (Avenarius, Mach), or that it is a product of social agreement (Kuhn, Poincare). Finally, there are also interesting, although maybe quite marginal, views that truth cannot be expressed or found (Tarski) or even it does not exist at all (Derrida). The way in which you perceive truth determines your journey in seeking the truth. It is quite easy to notice that only the first and the second views on truth make it possible to require courts to search for it.

Soviet theory of legal process traditionally looks at the concept of truth-seeking through the prism of Lenin's celebrated essay 'Materialism and Empirio-Criticism.'[45] In that piece, Lenin argued that truth is an objective thing and it is fully cognizable through the use of the methods of dialectical materialism and elucidated those methods. Lenin was, indeed, not the first person that who used the term 'objective truth;' this stems from the works by Marx and Engels and, before them, Descartes. Still, it is in Lenin's interpretation that the materialist theory received reflection in Soviet procedural law.

The historical context of the essay is quite remarkable and yet important for our topic: it was written as a reaction to the work 'Empiriomonism' by Alexander Bogdanov, Lenin's political rival within the Bolshevik party.[46] Some commentators suggest that the only aim of the essay was to destroy Bogdanov and his supporters in the political struggle, and that Lenin's analysis could not be well-founded, because for the three weeks that were spent on the essay he was physically unable to read all

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[45] *Клейнман А.Ф.* В.И. Ленин о законности, суде и прокуратуре [Kleinman A.F. *V.I. Lenin o zakonnosti, sude i prokurature* [Alexander F. Kleinman, V.I. Lenin on Legality, Courts and Prosecution]] 22 (Moscow State University Press 1961); *Карева М.П.* Учиться у В.И. Ленина разоблачению буржуазной идеологии и ревизионизма. (К 50-летию выхода в свет труда В.И. Ленина «Материализм и эмпириокритицизм») // Советское государство и право. 1959. № 6. С. 13–30 [Kareva M.P. *Uchit'sya u V.I. Lenina razoblacheniyu burzhuaznoi ideologii i revizionizma. (K 50-letiyu vykhoda v svet truda V.I. Lenina 'Materializm i empiriokrititsizm')* // *Sovetskoye gosudarstrvo i pravo.* 1959. No. 6. S. 13–30 [Mariya P. Kareva, *To Study from V.I. Lenin as to How to Unmask the Bourgeios Ideology and Revisionism. (To the 50th anniversary of publication of V.I. Lenin's 'Materialism and Empirio-Criticism')*, 1959(6) Soviet State and Law 13–30]].

[46] Bogdanov, now forgotten, was one of the eminent figures of his time; apart from being a socialist politician, he wrote science fiction and works on philosophy, culture and economics, he created his own science of 'tectology' and, in a way, provided a foundation for the systems theory. His death matched perfectly to the way he lived: he killed himself during a blood transfusion experiment that he carried out in the search for eternal youth. Further Reading: Zenovia A. Sochor, Revolution and Culture: The Bogdanov-Lenin Contraversy (Cornell University Press 1988).

the cited sources.[47] The polemist language that Lenin employed in the essay provided a considerable hindrance in discerning the actual arguments in support of the Marxist views (but surely made the text attractive for any reader). Lenin concentrates on showing why his opponents are not Marxists, while the fact that Marxist views are right does not need any proof, in his opinion. This, of course, affected the later philosophy and legal practice.

Lenin shows why Bogdanov and some other Marxists authors are idealist, reactionist, and anti-Marxist and for that he needed to formulate what was Marxist to him. He bases the truly Marxist approach to material, knowledge and truth as follows: 1) absolute objective truth exists and it is fully cognizable; 2) our knowledge about the absolute truth is relative (meaning relative truth), but it is getting more absolute with time and effort; 3) nature is governed by objective causality and necessity; 4) human behavior is a product of objectively determined factors and not a free choice; 5) there is no place for presumptions and fictions such as 'economy of human thought;' 6) human thought is 'economical' only when it correctly reflects objective truth, and the criterion of this correctness is practice, experiment, and industry; and 7) space and time are objective phenomena and not products of human mind. This formed the 'new testament' for our academic thinking.

These postulates received implementation in Soviet philosophy and Soviet law; for example, a major law professor Olimpiad Ioffe wrote: 'Legal scholarship does not create any special theory of causality, but generates, basing itself upon the categories of Marxist-Leninist philosophy, the rules that would allow in their application to discern the causal link in every particular case.'[48] Started as a basis for cognition in Soviet criminal process, the 'Leninist testament' then was adopted in the civil process as well.[49]

It is not the topic of this article to discuss the advantages and disadvantages of materialism. Moreover, Lenin's ideas shown above seem to be rational and productive for judicial cognition. What was probably missing is the methodical body or protocol of procedures that would help a judge to achieve the stated goals. Without the latter, this Leninist theory was at risk of dwindling into a vicious circle: requiring the proper evidence to reflect objective truth (which, in its turn, was to be discerned on the basis of proper evidence). We will look into the methods in the third part of this analysis.

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47 Robert Service, Lenin: A Biography 193 (Macmillan Pub. 2000).

48 *Иоффе О.С.* Обязательственное право [Ioffe O.S. *Obyazatel'stvennoe pravo* [Olimpiad S. Ioffe, Law of Obligations]] 113 (Yuridicheskaya literatura 1975).

49 *Гурвич М.А.* Принцип объективной истины советского гражданского процессуального права // Советское государство и право. 1964. № 9. С. 98–107 [Gurvitch M.A. *Printsip obyektivnoi istiny sovetskogo grazhdanskogo protsessual'nogo prava // Sovetskoye gosudarvstvo i pravo.* 1964. No. 9. S. 98–107 [Mark A. Gurvitch, *Principle of Objective Truth of Soviet Civil Procedural Law*, 1964(9) Soviet State and Law 98–107]].

So far, we have discussed what was truth for Soviet civil procedure. But our main goal here is to provide the answer that the Russian theory expects as to the question 'what is truth?'. We have observed above that Russian law does not any more require the court to establish all the actual circumstances of a concrete case at bar; therefore, it might be wise to assume that the truth is understood differently in modern Russia. This assumption becomes even more plausible given the modern developments of cognition in science, such as the experiments of knowledge representation by Bartlett and word superiority by Krueger. Nevertheless, most modern publications on Russian civil procedure do not show that there is any substantial change in regards to the concept of 'objective truth:' although most of the authors admit that the objective truth principle must yield to the needs of the adversarial process, they still believe that the truth is objective and cognizable. The main area of discussion is whether the truth that a court is seeking is an 'objective truth' or 'relative truth,' or a combination of those two Marxist-Leninist terms.[50]

Professor Anatoly Vlasov in his textbook mentions the 'principle of judicial truth,' according to which 'a court may legally apply juridical norm not to some abstractions but to concrete legal facts, fully and correctly established in the order prescribed in the law.' He expressly refuses to employ a term 'objective truth' in the beginning, but the more you read, the more you discern the Marxist discourse:[51]

> In legal literature, the results of judicial cognition were taken as the objective truth. In this case, one can hardly agree with this statement, because truth cannot be 'objective' or 'non-objective' – either there is truth or it is no truth . . . Primarily, the results of the assessment of the materials of a case cannot be considered as absolute truth and be opposed to relative truth. Between these types of objective truth, there can be no impassable boundary. The simplest truth is always incomplete . . .
>
> Could a result of judicial cognition be a true reflection of reality, *i.e.* whether it has a true character? This question should receive an affirmative answer. Judicial investigation of the facts of a case can and should lead to the full and correct knowledge of a particular set of facts relevant to the proper resolution of the case.

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[50] *Бех К.А., Гривас О.Я.* Принцип судебной истины в гражданском процессе и способы ее познания // Материалы V Международной студенческой электронной научной конференции «Студенческий научный форум» (15 февраля – 31 марта 2013 г.) [Bekh K.A., Grivas O.Ya. *Printsip sudebnoi istiny v grazhdanskom protsesse i sposoby ee poznaniya // Materialy V Mezhdunarodnoi studencheskoi elektronnoi nauchnoi konferentsii 'Studencheskii nauchnyi forum' (15 fevralya – 31 marta 2013 g.)* [Kseniya A. Bech & Olga Ya. Grivas, *The Principle of Judicial Truth in Civil Procedure and the Means of Cognition Thereof*, in Materials of the 5th International Student Electronic Scientific Conference 'Students Scientific Forum' (February 15 – March 31, 2013)]], <http://www.scienceforum.ru/2013/pdf/3622.pdf> (accessed Mar. 11, 2015).

[51] *Власов А.А.* Гражданское процессуальное право: Учебник [Vlasov A.A. *Grazhdanskoe protsessual'noe pravo: Uchebnik* [Anatoly A. Vlasov, Civil Procedural Law: Textbook]] (Velbi 2003).

> Is it possible to call the outcome of legal knowledge an absolutely complete study of the circumstances of the case? In the theory of knowledge of dialectical materialism every act of cognition is seen as a dialectical combination, as the unity of the absolute and relative truths.

A prominent professor of civil procedure of Moscow State Law Academy, Maria Shakaryan in her textbook also uses a term 'judicial truth' and appears to be more formalist and practical in her argument. She opined that there is no reason to spend state money on trial if it does not establish the truth, and, interestingly, the fact is truth is cognizable in principle flows from the law (and not from the nature, as one would think):[52]

> Is such a tremendous change in the language of procedural norms [as opposed to the Soviet procedural law – our addition] a ground to say that now the principle of objective (judicial) truth in civil procedure does not exist any more or at least is seriously limited?
> In general terms, we would answer this question in the negative for the following reasons. It seems that the truth as the ultimate goal of civil procedure remains unchanged. Only referring to the need to establish the actual circumstances of civil cases, the law establishes a rather complicated, time-consuming and costly procedure as civil proceedings.
> In case if we agreed that the establishment of the truth as a goal of the process no longer exists, we would therefore have to abandon the civil proceedings as established by the procedural law the order of resolution of civil cases . . .
> It is extremely important to underline that notwithstanding that the changes in the law, many procedural theorists still think that it is possible to establish a truth in court. And this view is fully based upon the law.

Professor Mikhail Treushnikov of Moscow State University opined in the most direct and clear way as to what the truth is (that the truth is the truth):[53]

> If a court did not establish fully and correctly the real factual circumstances in the case, rights and obligations of the parties, *i.e.* the truth, then it cannot make a lawful decision. A true statement is a statement that correctly reflects objective reality. The truth in civil procedure means a correct statement of judge (judges) as to the really factual circumstances of a case in the right legal qualification.

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[52] Гражданское процессуальное право: Учебник [*Grazhdanskoe protsessualnoe pravo: Uchebnik* [Civil Procedural Law: Textbook]] (Mariya S. Shakaryan, ed.) (Prospekt 2004).

[53] Гражданский процесс: Учебник [*Grazhdanskii protsess: Uchebnik* [Civil Procedure: Textbook]] (Mikhail K. Treushnikov, ed.) (2nd ed., Gorodets 2007).

There are, however, certain Russian professors who do not seem to adhere to the majority's Marxist truth discourse, such as Valery Musin of St. Petersburg State University (and his colleagues and pupils)[54] as well as Vladimir Yarkov[55] and Irina Reshetnikova of Urals State Law Academy. But keeping silence as to the dialectical-materialist concept of civil procedure, they do not appear to come up with something else that would form a philosophical foundation of the civil process for new Russia. As a result, the Marxist-Leninist approach is still the most influential in the Russian civil procedure doctrine.

Consequently, the answer to the question posed, *i.e.* 'what is truth?' in Russian civil procedure is what correctly reflects the objective reality. Or, more specifically, *truth is what, in a judge's correct statement, reflects the objective reality*.

6.3. How to Find out the Truth?

My co-author provided an extensive account of the methodology as to how the Dutch judge searches for truth. This methodology is not only extremely interesting; it may be the one that is so needed in the Russian judicial system.

Under the CPC, in every case a court must determine the ambit of circumstances to be established in the process. Some of those circumstances are stipulated by the law or binding decisions of higher courts. These circumstances shall be proven as facts by the parties through the evidence they provide. Every party must prove what it refers to (unless another distribution of burden of proof is established by law). A judge assesses the evidence in accordance with his or her inherent conviction based on an all-out, complete, objective, and direct investigation of all of the evidence in the case, and no evidence has a predetermined value for a judge. Every piece of evidence must receive a finding as to its admissibility, relevance, and accuracy, and the evidence as a whole must be sufficient for a judgment to be rendered on its basis. In a judgment, a court must explain why it preferred certain evidence against an opposing piece of evidence. This, in very general terms, concludes the legal framework of judicial truth-seeking.

Following the adoption of the new CPC in 2002, Russian Supreme Court issued a celebrated Resolution No. 23 of December 19, 2003, 'On Judicial Decision.' In this binding resolution, the Supreme Court specified the general characteristics that any judgment must satisfy. They are not many. Under Art. 195 CPC, the judgment must be lawful and well-established. The Supreme Court clarified these two terms and stated that a judgment is well-established when the facts relevant for the case are confirmed by the evidence assessed by the court that made the judgment. It also stipulated that a judgment must be divided into two parts, the motivation and the

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[54] Civil Procedure: Textbook, *supra* n. 39.

[55] Гражданский процесс: Учебник [*Grazhdanskii protsess: Uchebnik* [Civil Procedure: Textbook]] (Vladimir V. Yarkov, ed.) (6th ed., Wolters Kluwer 2006).

resolution, and that the facts established in the motivation must correspond to the conclusions made in the resolution. Finally, it stated that courts are not bound by the expert opinions submitted to them and they may look into the contents and methods of an expert examination. It must be noted that the Resolution 'On Judicial Decision' proved itself as an extremely useful tool to lower the level of arbitrariness in Russian courts. But a tool against arbitrariness can hardly ensure that a court finds the truth that, in the terms of Russian doctrine, reflects objective reality.

Russian courts lack concrete methods of searching for truth. Professor Mark Gurvitch, one of the most famous Soviet jurists, argued, in a sense, that the objective truth will undoubtedly be found in the process, if the regular procedural guarantees are established, such as: equality of arms in adversarial process (although in the Soviet Union there was no adversarial process), as well as the menace of criminal liability for false testimony and appeals mechanisms, nothing else.[56]

Russian judges are supposed to determine the accuracy of evidence (including the words of the parties) by assessing it 'in accordance with their inner conviction' and comparing various pieces of evidence taken together. They may also refer to experts, if the parties ask for that, but an expert opinion is not binding for them either. This provides enormous freedom of actions and, in the end of the day, leads to one basic question: *which of the parties does a judge believe?*

Subjective belief takes considerable space in Russian civil process. Referring back to certain features of the basic philosophical foundation of the Soviet civil process, Lenin's 'Materialism and Empirio-Criticism,' Lenin was so sure that Marxism was right that he put it as an a priori truth outside of any discussion. An acting judge of an arbitration court in Russia, also mentioned above, admits that she is sometimes subjective when she is looking for objective truth.

The third question posed in this article is as follows: *how do Russian courts find the truth?* The answer to this question will evidently require an all-out sociological survey, which is not an object of this comparative legal analysis. Therefore, there will be no answer to this question now. However, a hypothesis, subject to future confirmation or disproof, would be as follows: It may very well be, that Russian civil procedure puts as a theory a goal of finding objective truth, but, having no objective instruments for that, does so in the most subjective way possible: by putting a judge in a middle of indeterminacy and letting him or her make any decision without any meaningful guidance.

7. Conclusion

The search for truth in civil courts is an area of fierce debate both in The Netherlands and in Russia. Yet, in Russia it is much less settled. The Dutch legal system shows a more or less consolidated view as to whether the courts should seek for truth, how the truth should be perceived and sought in civil process. On the other

[56] Gurvitch, *supra* n. 50.

hand, Russian law in this regard is still in transition from old Soviet approaches to something new and quite unclear. The article shows a peculiar dominance of Marxist-Leninist concepts in the modern Russian doctrine and their practical implications. The approaches adopted in The Netherlands, a continental legal system just as Russia itself, might be of use for the new Russian civil procedure.

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