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From Legislature to Code?

Goal-oriented Formalism in French and Dutch Cases about Marriage and Parental Authority in the 19th Century

Nineteenth century judicial interpretation in the Netherlands has been characterized as legalistic. This article deals with the question whether this legalistic interpretation witnessed a shift in emphasis during the nineteenth century: from the legislature's intention with a legal rule to focusing on the literal wording of a statutory rule. Such possible shift from legislature to code has been investigated for judicial decisions about the enforcement of marital duties and parental authority. It appears that in these cases, any judicial method of interpretation eventually sought to serve particular purposes identified by the judiciary itself, here the effective enforcement of marital cases, which did not coincide with either the legislature's intention or the literal wording of a provision.

1. Introduction[1]

Nineteenth century judicial interpretation of the Civil Codes of France and the Netherlands has been characterized as legalistic.[2] According to a legalistic interpretation the code is the only formal source of law and judges principally should limit themselves to a literal exegesis of the code.[3]

In the first decennia upon promulgation of the *Code civil* in 1804 and the *Burgerlijk Wetboek* in 1838 legal doctrine was nevertheless less strongly focused on the letter of the code but rather on the legislature's intention. However, as from 1830 in France and 1870 in the Netherlands the words of the code seemed to be given separate significance, even contrary to the legislature's original intention. Particularly as from 1880 this form of interpretation was considerably criticized and after 1880 the heydays of the Exegetical School in France were over. Twenty years later legalism in the Netherlands followed suit.[4]

In this paper I want to demonstrate the rise of a legalistic interpretation in *judicial* practice. More specifically I will try to trace down a shift from the legislature's intention towards the letter of the code, by examining a situation which was not laid down in the code: the enforcement of obligations to personally do something, particularly marital cohabitation and the exercise of parental authority.

First I will expand on the legal issues caused by the lack of measures to enforce obligations to personally do something. On the basis of several French and Dutch judicial decisions about marital cohabitation and parental authority I will subsequently examine whether judges – in France until around 1830 and in the Netherlands until 1870 – searched for the legislature's intention when reaching a verdict or that they al-

[1] See more generally and in greater detail about specific performance in French and Dutch law in the 19th century, OOSTERHUIS, Specific performance. In more detail about the rise of legalism in Dutch judicial practice, OOSTERHUIS, Legisme.

[2] See HALPÉRIN, Histoire nos. 21 and 171 (France) and KOP, Legisme 10–11 (the Netherlands).

[3] KOP, Legisme 2.

[4] KOP, Legisme 29–44.

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ready in these early periods stuck to a literal exegesis of the code. Next I analyze whether as from 1830 and 1870 respectively judicial interpretation focused more on the literal wording of the civil codes in France and the Netherlands. Finally I will compare French and Dutch judicial decisions on the enforcement of marital cohabitation and parental authority and draw a conclusion about the rise of legalism in French and Dutch judicial practice.

2. The enforcement of obligations to personally act

Non-performance of obligations to do something resulted in the duty to compensate the damages (the obligation 'resolved into damages'), as Art. 1142 of the *Code civil* in 1804 and Art. 1275 of the *Burgerlijk Wetboek* in 1838 laid down. The underlying principle was that nobody could be precisely forced to do something, *nemo praecise cogi ad factum*.[5] In any case for Arnoldus Vinnius (1588–1657), Robert Joseph Pothier (1699–1772), Félix-Julien-Jean Bigot-Préamenue (1747–1825) and Pierre Thomas Nicolaï (1763–1836) this principle had a certain normative value: enforcing a personal act was contrary to an individual's freedom.[6]

2.1. Generic acts

In case of the enforcement of obligations to perform a generic act – such as building a house – a conflict with a right to personal freedom did not occur. This kind of obligations could also be carried out by a third party, as foreseen in Art. 1143 and 1144 of the *Code civil* and Art. 1276 and 1277 of the *Burgerlijk Wetboek*.[7]

2.2. Unique Acts

The individual freedom was particularly threatened if a creditor claimed performance of obligations to do something of which the debtor was the only source of performance and the enforcement moreover interfered with his or her personal life – like acting in a theater play.[8] In French and Dutch judicial practice claims for actual performance of obligations to personally do something were not dismissed offhand. A debtor could be sentenced to actual performance and only if the execution of such verdict remained unsuccessful or if the debtor still refused to perform, he was obliged to pay damages. However, the enforcement of obligations to personally do or not do something was problematic, because neither the *Code de procédure civile* of 1807 nor the *Wetboek van Burgerlijke Rechtsvordering* of 1838 provided for general measures to enforce this kind of obligations.[9]

3. France

The lack of executionary measures to enforce personal obligations to do something is particularly problematic if these obligations are not contractual in nature but are rather a product of legislation, such as duties to cohabite during marriage or to bring back children under the remit of parental authority;[10] then no contractual penalties can be agreed upon beforehand to indirectly enforce performance. When a creditor

[5] See for the origins of this principle OOSTERHUIS, Specific performance 34–86.

[6] See OOSTERHUIS, Specific performance 46–47 (Vinnius), 71 (Pothier), 129–130 (Bigot-Préamenue) and 214–215 (Nicolaï).

[7] See OOSTERHUIS, Specific performance 151–154 (France), 456–472 (the Netherlands).

[8] See for the French and Dutch legal doctrine at the time OOSTERHUIS, Specific performance 148–151, 448–453.

[9] See OOSTERHUIS, Specific performance 140–141 (France), 451–454 (the Netherlands).

[10] Art. 214 and 373–374 CC.

– generally the man and father – claimed actual performance of these duties, judges had to order measures which were not foreseen by statute in case of a possible execution; generally they resorted to (civil) custody or cumulative amounts/penalties.

3.1. Direct enforcement of marital cohabitation

A few years upon promulgation of the *Code civil* courts would order the direct enforcement of marital cohabitation. In 1808 the *tribunal civil* Seine authorized a man, with the bailiff's assistance, to seize his wife and return her back home.[11] The *Cour d'appel* Pau had also endorsed a judgment of a lower court in which a wife was ordered to return to her husband, but had not provided any means of coercion. The *Cour* held that the Code (*la loi*) did not offer any guidance on the means of constraining someone to cohabit; rather it left that decision to the discretion of the magistrates' wisdom and prudence taking into account all the circumstances of a case. Thus the *Cour d'appel* authorised the man to take his wife home, eventually assisted by a bailiff.[12] According to the *Cour impériale* Turin (Torino) in 1810 the maxim *ad factum nemo compelli potest* and the principle that the obligation *quae in faciendo consistit* necessarily resolved into damages, did not apply to the marital obligation to live together. One had to distinguish between obligations whereby a person's act or industry was involved and which thus concerned the work itself, and obligations which only concerned a person's presence without requiring a positive act. Cohabitation fell under the latter category and the *Cour* therefore declared that *in casu* the wife should be constrained to return to her husband, by seizing her person; it noted that seizure of her income would be pointless in this case given that she did not have any.[13]

Although several of these courts referred to the legislature's presupposed intention – effective enforcement – their interpretation in effect resulted in a far-reaching violation of the wife's individual freedom. Rather a teleological interpretation than a grammatical one, it completely disregarded the legislature's meaning with the adagium *nemo potest cogi ad factum*, which was to refrain from any constraint against an individual, either directly or indirectly, according to Bigot-Préamenue.[14]

3.2. Indirect enforcement of parental authority

As from the mid-nineteenth century courts tended to avoid ordering the direct enforcement of obligations or duties which only the debtor could perform.[15] Courts rather condemned a plaintiff to a cumulative amount for delay in performance if he was not willing to comply at all, as is also illustrated by several cases pertaining to the turning over of children. On 1 March 1855 the *Cour* Angers pronounced the legal separation of a couple and ordered that their children should remain with the wife. After the man refused to comply with the verdict the same court, upon the wife's request, ordered the man to comply with the verdict within twenty-four hours of signification of the judgment being issued to him, or he would be forced to pay a penalty of 100 francs in damages for every day of delay.[16] On 25 March 1857 the *Cour de cassation* rejected the man's objections and upheld the discretion of the judiciary to deliver a sentence which is proportionate to the interests con-

[11] T.civ. Seine, 29. 3. 1808, confirmed CA Paris, 29. 5. 1808, S. 1808.2.199 (Ampère/Ampère).

[12] CA Pau, 12. 4. 1810, S. 1810.2.241(Latrille d'Abère/sa femme).

[13] CI Turin, 17. 7. 1810, S. 1812.2.414 (Vinardi/sa femme).

[14] Bigot-Préameneu, in: LOCRE, Législation 12, 329.

[15] See OOSTERHUIS, Specific performance 398–405.

[16] C Angers, 1. 3. 1855, D. 1857.1.213 (Perrault/Perrault).

cerned in order to overcome a debtor's resistance to fulfill his obligations. In respect of the condemnation to cumulative damages, the court opined that it did not concern the substitution for an obligation to do but, in maintaining the obligation intact, the allowance of damages as a way to obtain enforcement of the sentence to return the children.[17] In another case from 1865 a father was ordered to place and maintain his two daughters in a boarding school, the *couvent de l'Immaculée Conception* in Rouen, under penalty of 100 francs per day of delay.[18]

These courts no longer referred to the legislature's (presupposed) intention. Although the courts' interpretation of 'resolving into damages' as 'sentencing to penalties' stays within the literal wording of Art. 1142, this form of *indirect* enforcement also seems in contradiction with the original purpose of this Article, namely the protection of individual freedom.[19] These courts were thus indeed more focused on the literal text of Art. 1142 but disregarded the legislature's original intention – individual freedom – with this Article. Rather, they actually still pursued effective enforcement.

4. The Netherlands

Also in the Netherlands when a creditor claimed actual performance of marital cohabitation or the exercise of parental authority,[20] judges often resorted to civil custody or cumulative amounts or damages in case of a possible execution.

4.1. Indirect enforcement of marital cohabitation

In 1854 the *Rechtbank* Zutphen ordered a wife to return to her husband within eight days upon notice of the decision and, if she failed or refused to do so, to pay damages of 1.50 guilders per day as from the day of the writ until her return to the marital home. According to the court, these damages served also as enforcement measures to secure compliance with the court's order; otherwise the order would be passed in vain and always subject to the whim of the defendant. The court stated that a judge was at liberty to apply certain measures if there was no legislation governing the enforcement of a court order, which was in accordance with legal practice and judicial decisions based thereupon.[21] Particularly this last observation about judicial discretion did not focus on the words of the code or even the legislature's intent. Source of law is not the code, but legal and judicial practice, although it is unclear to which practice the court referred.[22]

However, a year later the *Hof* Gelderland nullified this part of the decision. The court stated that if a wife refused to live with her husband such an obligation could and should resolve into damages. Although a husband could obviously claim divorce due to abandonment, he also was entitled to force his wife in another way to perform her marital duties – here apparently by way of (cumulative) damages. However, the court deemed itself as yet unable to determine the husband's prejudice and thus refused to award any damages. The *Hof* nevertheless confirmed the order to cohabit itself and, if she refused, sentenced the wife to damages later to be established.[23]

Although these damages might constrain the wife to join her husband again, the *Hof*, contrary

[17] Cass. 25. 3. 1857, D. 1857.1.213 (Perrault/Perrault).
[18] Cass. 4. 4. 1865, D. 1865.1.387 (Burel/Burel).
[19] See Bigot-Préameneu, in: LOCRÉ, Législation 12, 329.
[20] Art. 161 and 355–356 BW.
[21] A-Rb. Zutphen, 21. 12. 1854, W. 1637. From a more detailed reading of the case it seems that both parties owned separate property; otherwise the penalty would have been pointless, OOSTERHUIS, Specific performance 476.
[22] OOSTERHUIS, Specific performance 451–452, 476.
[23] Prov. Gh. Gelderland, 27. 12. 1855, W. 1737; see OOSTERHUIS, Specific performance 476–477.

to the *Rechtbank*, did not seem to consider them as enforcement measures: the amount of damages should not exceed the real prejudice. Moreover, the *Hof* disregarded the judicial discretion of the *Rechtbank* to apply enforcement measures in the absence of statutory provisions about a possible enforcement. More than the *Rechtbank*, the *Hof* thus reasoned in accordance with Art. 1275 of the *Burgerlijk Wetboek*.

4.2. Direct enforcement of marital cohabitation?

If a wife no longer owned separate property, a sentence to (cumulative) damages was pointless as enforcement measure. In 1860 the *Rechtbank* Den Haag considered that it could not have been the legislature's intention to provide for duties such as cohabitation whilst failing to render courts competent to enforce their performance against unwilling parties. Thus the court authorized a man to compel his wife with their children to return, eventually assisted by police officers, and even admitted them to enter her residence.[24] With reference to the legislature's presupposed intention this interpretation resulted in a fundamental violation of the wife's individual freedom. It stood far away from the adagium *nemo potest cogi ad factum*, which can be considered as the legislature's intention in such a case.[25]

In 1863 another man, Mr. Cohen, claimed that his wife, Mrs. Helmstad, be ordered to return to their house, together with their son Henri and, if she failed to do so, that he be authorized to constrain her, eventually with police assistance. The *Rechtbank* Amsterdam held that a wife was indeed obliged to cohabit with her husband and that for such obligation a wife's cooperation was necessary. However, according to the court, due to the right of every Dutch citizen to individual freedom guaranteed by the Constitution, in conjunction with the now-familiar maxim, *nemo ad factum praecise cogitur*, the man's right to performance of the obligation necessarily resolved into damages.

The man also failed in his appeal to the terms of Art. 1277, since here the authorization for constraint would result in an unlawful sequestration which was not prescribed by any statutory provision. Thus the wife could confine herself to her offer to return. Here a court order to actually return would be idle as the man had not claimed penalties for non-performance discussed in Art. 1275, and such penalties could not be applied *ex officio* in civil matters. In relation to the turning over of the child, the *Rechtbank* Amsterdam stated that during a marriage only the father exercises parental authority and that children could not leave the house without their father's consent. Thus the court admitted the father's claim to return their minor, Henri, and ordered the wife to turn him over within eight days upon notification of the verdict and, if she failed to do so, authorized the father to constrain her to return the child with the assistance of the police if necessary.[26] Although the court denied the claim to performance of the marital cohabitation, this only concerned the *direct* enforcement of that duty as it would be in violation of the constitutional right to individual freedom.[27] But this right to freedom gave only protection against *direct* constraint, which apparently was the meaning of the adagium *nemo praecise cogi ad factum*, according to the court.[28] The rejection of the execution by a third party – the police – based on Art. 1277 was in line with the legislature's intention. Here custody would indeed result in unlawful imprisonment, because such

[24] A-Rb. s-Gravenhage, 8. 6. 1860, W. 2197; OOSTERHUIS, Specific performance 477.

[25] According to Nicolaï, in: VOORDUIN, Geschiedenis 5, 20–21.

[26] A-Rb. Amsterdam, 18. 3. 1863, W. 2493.

[27] Probably Art. 3 or 151 of the Constitution (1848).

[28] See OOSTERHUIS, Specific performance 513–514.

custody was not provided for in the Code of Criminal Procedure.

However, according to the court, nothing prevented a verdict ordering the return to the marital home, if this could be enforced *indirectly* by way of the 'penal sanction' of Art. 1275. Although the court's interpretation of 'resolving into damages' as 'sentencing to penalties' stays within the literal wording of Art. 1275, also this *indirect* enforcement seems to be in contradiction with the original purpose of this Article, namely the protection of individual freedom.[29] The court was thus more focused on the literal text of Art. 1275 in combination with the legislature's presupposed intention – effective enforcement – than on the legislature's original intention – individual freedom.

4.3. Direct enforcement of the parental authority

In the meanwhile the procedure between Mr. Cohen and Mrs. Helmstad continued. The wife appealed on the basis that the forced return – possibly with police assistance – under parental authority of their son was unlawful. However, in 1864 the *Hof* Noord-Holland held that, although the law did not provide any enforcement measures to return children, this did not mean that enforcement was impossible or unlawful. It felt that the legislature had not intended to leave judicial decisions unfulfilled, especially not concerning legal provisions like Art. 356 of the *Burgerlijk Wetboek* on parental authority, which were in the interest of minors and the public interest more generally. Moreover, the court held that if the law failed to prescribe any enforcement measures then it necessarily fell to the judge to make that decision, and, providing one did not want to render Art. 356 illusory, a court was therefore entitled to authorize the man to take his children back and support him with the limb of the law if met with any resistance.[30]

The exercise of parental authority thus justified the use of direct constraint against children and their mother. However, in the same procedure the duty to cohabit in a marriage did not justify such direct constraint. This constraint was denied with a similar, typically legalistic argument: it would result in civil custody, which had to have a statutory basis. The use of this very argument to substantiate the opposite point illustrates the manifest ambiguity caused by the lack of a statutory basis for measures to enforce obligations to personally do something.

A few years later, in 1869, the *Rechtbank* Groningen found in Art. 1277 of the *Burgerlijk Wetboek* a statutory base for an order to bring back children under parental authority. The court ordered a mother to surrender the children to their father within eight days of pronouncement and, if she failed to comply, authorized the father, on the basis of Art. 1277, to take custody of his children himself, accompanied by a bailiff, eventually supported by the limb of the law.[31]

This interpretation of Art. 1277 of the *Burgerlijk Wetboek* is peculiar. The return of children can only be done by one person, the parent or custodian. It is very hard to consider the return of children as a generic act, such as building a house. Here the literal wording of Art. 1277 was used as a statutory base for the direct enforcement – the authorization of a third party to perform the act – while the legislature's intention was disregarded – the enforcement of a generic act.[32] This court thus seemed indeed to shift from the legislature's intention towards the words of the code. The result – effective enforcement – remained nevertheless the same.

[29] See again Nicolaï, in: VOORDUIN, Geschiedenis 5, 20–21.

[30] Prov. Gh. Noord-Holland, 23. 6. 1864, W. 2667.

[31] A-Rb. Groningen, 28. 5. 1869, confirmed Prov. Gh. Groningen, 5. 4. 1870, W. 3244.

[32] See Nicolaï, in: VOORDUIN, Geschiedenis 5, 20–21.

5. Effective enforcement as purpose

In all of the above cases about marital cohabitation and parental authority the enforcement became an issue. Both French and Dutch courts were focused on an effective enforcement of judicial orders to cohabite in marriage as well as to exercise parental authority. In France before 1830, effective enforcement was explicitly mentioned as the legislature's alleged intention to justify the *direct* enforcement of marital cohabitation. In the Netherlands until around 1870, effective enforcement was also explicitly mentioned as the legislature's alleged intention but here to justify the *indirect* enforcement of marital cohabitation by way of cumulative damages. In this same period Dutch courts admitted *direct* constraint to enforce the return of children under parental authority, again with reference to effective enforcement as the legislature's alleged intention. At the same time – in both France and the Netherlands – courts disregarded the legislature's original intention with Art. 1142 of the *Code civil* and Art. 1275 of the *Burgerlijk Wetboek*, namely the protection of an individual's personal freedom.

After 1830 French courts seemed to stick to a more literal exegesis of Art. 1142 of the *Code civil*: in cases about the return of children under parental authority they would only allow for *indirect* enforcement by way of cumulative damages. Although Dutch courts after 1870 admitted *direct* constraint to enforce the return of children under the remit of parental authority, they eventually did so on the basis of a literal exegesis of Art. 1277 of the *Burgerlijk Wetboek*. In both France and the Netherlands courts thus disregarded the legislature's original intention with Art. 1142 of the *Code civil* and Art. 1277 of the *Burgerlijk Wetboek*, namely the protection of an individual's personal freedom and third party performance of generic acts respectively. At this point references in either jurisdiction to the legislature's alleged intention failed, but both French and Dutch courts still pursued effective enforcement of their sentences.

Therefore, in judicial decisions about marital cohabitation and parental authority indeed a shift from the legislature's intention towards the words of the code can be discerned. However, this is a relative shift. In France before 1830 and in the Netherlands until 1870 effective enforcement would be explicitly mentioned as the legislature's presupposed intention. After 1830 and 1870 respectively effective enforcement also remained the ultimate purpose, regardless a more literal exegesis.

The picture of judicial practice regarding marital cases during the nineteenth century is thus subtle. Judges had a keen eye for the social function of the law, here the effective enforcement of their decisions. If they at some point applied a literal exegesis, that was primarily to pursue such societal goals.

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Abkürzungen:

A-Rb.	Arrondissements-Rechtbank
BW	Burgerlijk Wetboek
C	Cour
CA	Cour d'appel
Cass.	Cour de cassation
CI	Cour imperial
Prov. Gh	Provinciaal Gerechtshof
T.civ.	Tribunal civil

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