COUR DE CASSATION

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The role of judge: stating the law to resolve a conflict

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Summary of the roundtable discussion between S. Kass-Danno, S. Perdriolle and B. Bernabé
Atendees:
G. Shotten, Judge attached to the District Court of Cologne
F. Ferrand, Professor of Law, Lyon III University
Ph. Flores, Judge attached to the Employment Division of the Court of Cassation and former district court judge

What does it mean to "state the law" (or "dire le droit")? If one applies the intrinsic value of the words, the French verb "dire" (to say) finds its source in two very closely related Latin verbs: dicere and dicare. In the difference between their endings, one finds what grammar experts call the "aspect value" of the verbs. Dicere corresponds to a manner of "saying" which integrates into a movement or process; dicare designates an affirmation, a declaration, a state. So that jus dicere relates to "stating the law" throughout the proceedings, whereas jus dicare means "stating the law" at the moment the decision is handed down itself, in the judgment. So, the role of judge consisting of "stating the law" must be understood in the full meaning of the word given the depth of the vocabulary: both during the proceedings and in the judgment.
What does it mean to "resolve a conflict"? It clearly does not simply consist of "resolving a dispute", i.e. settling the disagreement on the basis of the legal classification which has been given. Resolving a conflict, in the much wider meaning, is "pacifying discord". The French Code of Civil Procedure may well set out as a guiding principle that the judge is responsible for reconciling the parties (art. 21). But does not this same Code reduce the case brought before the judge to the simple "dispute" which the parties have decided to submit to the court under the terms and within the limits defined by their choice? Article 12 in fact entrusts the judge with the task of "settling" this dispute, not "resolving" it. Stating the law simply to settle a dispute might perhaps mean forgetting that the involvement of the judge is aimed, above and beyond the limits of the dispute that has been submitted to him, at restoring the peace between the parties and among the people. And if one admits that this peace-making end purpose underlies the action taken by the judge, the question relating to the powers available to him in order to "state the law" then takes on its full meaning. From this point of view, should the judge remain passive in the debates which take place in court and examine the merits of the claims of the parties against the yardstick of the legal grounds put forward by them only? Or should he play a more active role, having the option or even the obligation to reach a decision by raising of his own motion the rules of law applicable to the dispute, while respecting the inter partes principle at all times?

In a well-known decision handed down by France's Court of Cassation sitting in a Plenary Assembly dated 21 December 2007, the option available to the judge to raise grounds based on law of his own motion has upheld. And, in certain areas such as consumer rights law and also employment law, this

is even an obligation for the judge. Philippe Flores sets out the reasons for this obligation and the prerogatives of the judge in these two areas. He notes that, in these two fields, the Court of Justice of the European Union has upheld the action taken by the judge in order to ensure the effectiveness of the rights set out by the legislator and to put right the imbalance that exists between the parties. In relation to consumer rights law in particular, disputes were previously regarded as being purely individual and the raising of points of law of the court's own motion was excluded for all questions other than those of public policy. Since then, via the Act of 3 January 2008 and article L.141-4 of the French Consumer Code, the French legislator has allowed that the judge may of his own motion raise any of the provisions of the said Code in disputes arising from its application. The "raising of the court's own motion" was less controversial in employment law on condition that this was being applied while upholding the inter partes principle. So, action taken by the judge of his own motion is limited by the purpose of the dispute whose definition is given by the elements of the law and the facts. The Employment Division of the Court of Cassation has therefore considered that precondition of mediation is a judicial act which implies the active participation of the mediation office with a view to seeking an agreement requiring the judge to verify whether the parties have indeed been informed of their respective rights.

Can one envisage going further still than the decision of 21 December 2007 by imposing an obligation on the judge to raise grounds based on a point of law of his own motion in all areas of law (other than specific rules)? Foreign legal systems accept that the judge has such an obligation. This was introduced many years ago in Germany and, in the context of the reform of the civil procedure rules in 2001, the German legislator even reinforced the obligations incumbent upon the judge. Gabriele Schotten presents two essential aspects of civil law court cases in Germany: on the one hand, the intellectual consideration of the case by the judge who, during the course of his investigations, must ask the parties for all explanations of fact and law that he deems necessary to reach a solution to the dispute (in France, this is simply an option) and who must also raise of his own motion the rules of law applicable to the dispute; on the other hand, the mandatory mediation phase which, in Germany, is often carried out on the basis of a preliminary draft judgment which the judge submits to the parties while allowing the discussions to continue. This is the most notable difference from the judge in the civil courts in France. This means that, in Germany, the primary obligation of the judge consists of clarifying the dispute: this is not an option. Moreover, the judge must raise of his own motion any issues of law that obviously arise. Here again, this is an obligation which, in France, goes beyond the changes in interpretation of article 12. In proceedings in Germany, the judge, although bound by the facts as presented to him, has joint responsibility in the conduct of the trial which can lead directly to the reconciliation of the parties. This active participation by the judge in Germany, the consequence of the fundamental right of the parties to have their case heard by a judge, implies increased use of the oral debates. Critics in Germany have been able to focus precisely on the preponderant position of the judge in the case. In France, such an extension of the right to raise one's own motions has been open to criticism on the grounds of being contrary to the principle of impartiality. However, it appears that this kind of dynamism in the oral debates enhances the effects of the inter partes principle. Frédérique Ferrand emphasises these latter elements and puts forward his reflections and responses based on a comparison of the French and German court and legal systems. Whereas in France, the well-known (and incorrect) adage which states that a court case is the "affair of the parties" has contributed to French judges becoming judges of proceedings conducted

in writing, in Germany, the activity of the judge in the extended performance of his duties has contributed to maintaining the social function of the trial focused on the oral nature of the debates.

When, in 2007, the Plenary Assembly of the Court of Cassation handed down a decision on the matter of the powers of the judge based on article 12 of the French Code of Civil Procedure, the Attorney General Régis de Gouttes had upheld grounds based on judicial policy arguing for a simple option enabling the judge to raise his own motions. Other than the need to respect the principle whereby, according to him, "the parties remain the masters of their case which the judge must settle as submitted by them to him", he referred to three risks that could be triggered by a general obligation for the judge to examine all of the grounds based on the law intended to act as the basis for the claim: the risk of opening the way to an almost unlimited number of appeals to set aside, the risk of the judge becoming liable for any failure to comply with this obligation and, finally, the risk of damaging the effectiveness and speed of the administration of justice. These arguments, with regard to the meagre resources allocated to justice and with regard to French legal and judicial culture, are worth taking into consideration and must not be under-estimated. Are they however prohibitive? The report by Agostini-Molfessis entitled Amélioration et simplification de la procédure civile [Improvement and simplification of civil procedure] (2018) had contemplated an ambitious reform of civil procedure rules which, "based on the conviction that the judge cannot remain external to the law when this is deduced from the facts expressly cited by the parties making submissions, would consist of returning to the initial spirit of article 12 of the French Code of Civil Procedure in order to impose an obligation on the judge (unless otherwise stipulated) to raise of his own motion any grounds based on the law, whether a matter of public policy or not, and without stopping at the distinction between legal grounds and purely legal grounds".