GREEK AND FOREIGN CIVIL PROCEDURAL SYSTEMS

Vol. 5

RELATIONS BETWEEN JUDGE AND PARTIES IN GERMAN AND GREEK CIVIL TRIAL

Case management and "Aufklärungspflicht"

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Series Editors' Foreword

It was in 2012 when we had the idea of organizing every other year an international conference on Greek procedural law in comparison to a different each time foreign procedural system. It was the Anglo-american law in 2012, the Swiss law in 2014, the Italian law in 2016, the Spanish procedural law in 2018 and the German procedural law this year. Our attempt is based on the idea that comparison among different procedural systems prevents the isolation of legal orders and leads to the improvement of institutions.

Unfortunately, the Covid pandemic left us no other choice but transfer the conference to a written basis. Despite this new and strange reality, which changed dramatically our lives, we should like to thank all rapporteurs for their contributions to this book. We hope that the topic, which is of special importance for the conduct of litigation and the high quality of the contributions will reward us for this joint effort.

We are very pleased to welcome our colleagues from Germany, Professor *Christoph Kern* from the Karl-Ruprecht University Heidelberg, Director of the Institute for Comparative Law, Conflict of Laws and International Business Law, and Professor *Fabian Klinck*, Professor of Civil Procedure at the Ruhr University Bochum. They both honour us with their contribution to our conference and this (fifth) volume. We would also like to thank our Greek colleagues Professors *Spyros Tsantinis*, Associate Professor of Civil Procedure at Democritus University Thrace and Vassilios *Hadjioannou*, Assistant Professor of Civil Procedure at Democritus University Thrace for their participation in the conference and of course the President of the Greek Association of Procedural Law, Emeritus Professor *Constantin Calavros*, for his presidency.

Thessaloniki, November 2020

Prof. *Kalliopi Makridou* - Prof. *Georgios Diamantopoulos*

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Prof. Dr. Vassilios A. Hadjioannou
Democritus University of Thrace

I. General context

1. The role of the judge and the parties in Greek civil procedure: An introduction

Greek civil procedure is genuine child of the continental law tradition[1]. All crucial issues pertaining to the role of the judge and the parties in civil trial might be part of a wider discussion connected with the corresponding fundamental questions: who is responsible to initiate actions, facts and evidence in civil proceedings? Are the parties alone responsible or does the judge share responsibility with the parties as well? Given that application of law lies undoubtedly with the court, which facts are relevant, and which are not, can only be answered based on the court's legal assessment. Furthermore, if the parties have not brought forward all relevant facts, the question arises whether the judge may "patronize" the parties in presenting their case more clearly or effectively with a view to respecting moral duties or higher social purposes. One could go further and wonder to what extent a civil judge is permitted to evaluate facts not previously brought forward by the parties.

1. The Code of Civil Procedure of 1835 was equally influenced by the Bavarian procedural drafts of 1825, 1827 and 1831 and by the French Code of Civil Procedure of 1806 due to the cultural and legal orientation of its creator, Ludwig v. Maurer (1790-1872); See *Yessiou - Faltsi,* Civil Procedure in Hellas, 2nd Revised Ed., Athens - The Haag, 2020, p. 35 [:*Yessiou - Faltsi,* Civil Procedure in Hellas[2], p.]

Reflecting on the role of the judge and the parties in civil proceedings nowadays, necessarily we focus on the modern international trends which, in the name of transparency, efficiency and rapidity, enhance the role of the judge and question supremacy of the parties in defining the object of civil proceedings. The issue appears to be legal but, instead, it is purely ideological: A liberal society, emphasizing self-responsibility of the parties, restricts the court's role. Contrarywise, a welfare state society aims at protecting the parties from their own negligence, by increasing the court's role accordingly. However, in this brave new world of 21st century there are neither purely liberal nor purely welfare states. Rather a mixture of both systems is adopted by most societies in an attempt to adjust themselves in the needs of a digital and globalized era. This very ascertainment leads to revisiting traditional conceptions and long-established practices. Barely would dispute resolution and civil procedure escape from this affliction.

The aim of this paper is to present the Greek experience[2] on the "judicial duty for guidance of the parties" (i.e. the Greek version of substantive judicial case management) in the light of the legislator's goals and theoretical discussion to date. Following that we aspire to explain why Greek courts are reluctant in performing and have actually very seldom performed said duty.

2. Fundamental principles: «The rules of the game»

a) Why observance of fundamental principles matters?

First and foremost, the civil judge is called to perform the duty for guidance while being bound by a series of fundamental principles which at first sight form an environment rather restrictive to any judicial initiative. These principles, which are expressly legislated, constitute guidelines for the interpretation of all individual provisions such as the duty under discussion[3]. For the

2. This paper focuses on Greek experience given that a comparative perspective was presented by Professors *Kern, Klink* and *Tsantinis.* By exception, for purposes of further comparison with the Greek experience, in chapter III a concise presentation of transnational projects of ELI/UNIDROIT and ALI/UNIDROIT is included.

3. Cf. *Asimakopoulou,* The modern approach of party presentation principle *(Η σύγχρονη φυσιογνωμία της συζητητικής αρχής),* Athens-Thessaloniki 2017, p. 31 *[: Asimakopoulou,* The modern approach of party presentation principle, p.].

completeness of the analysis the principles concerned are concisely described herein below.

b) Fundamental principles in more detail

The civil trial serves the protection of private-law rights. The Greek Code of Civil Procedure (ΚΠολΔ, CCP) is based on the consideration that the litigant parties must remain free to begin a trial, to determine its object and to declare its termination[4]. The course of the trial is dependent on the parties' motion[5]. Civil courts have jurisdiction to rule on private disputes only upon relevant motion of the claimant (nemo iudex sine actore)[6]. Said fundamental conception is aligned with the substantive private law's equivalent doctrine of private autonomy of the litigant parties involved pursuant to which a person is entitled to acquire, exercise, transfer, protect, preserve or alienate himself from a civil right[7]. Said paramount conviction is embodied in CCP through the following fundamental procedural rules:

4. *Yessiou-Faltsi*, Civil Procedure in Hellas[2], p. 66; Areios Pagos 902/1982, in plenary session, Legal Tribune (NoB) 1983. 209; Areios Pagos 11/2003 Hellenic Justice (ΕλλΔνη) 2003. 407; Areios Pagos 22/2005 Hellenic Justice (ΕλλΔνη) 2005. 715; Areios Pagos 38/2005 Hellenic Justice (ΕλλΔνη) 2005. 1047.

5. *Nikas,* Civil Procedure I (Πολιτική Δικονομία Ι) 2nd ed., Athens -Thessaloniki 2020, 563 § 41, nr.2, p. 563 [:*Nikas,* Civil Procedure I[2],§ ,nr., p.]; *Diamantopoulos,* The Guidance Power of the Judge in the civil proceedings according to art. 236 CCP (Η κατ' άρθρο 236 ΚΠολΔ καθοδηγητική εξουσία του δικαστή στην πολιτική δίκη), Hellenic Justice (ΕλλΔνη) 2014, p. 680 et seq., 680 [:*Diamantopoulos, The Guidance Power of the Judge, p.*]; Kerameus/Kondylis/*(-Nikas),* CCP I[1], art. 106 n. 1 et seq.; *Paisidou,* Presumptions in civil procedure (Τα δικαστικά τεκμήρια στην πολιτική δικονομία), Thessaloniki 1991, p. 22 (with further references in f.n. 41) [: *Paisidou,* Presumptions, p.].

6. *Nikas,* Civil Procedure I[2] § 41, n. 1, p. 563; *Diamantopoulos,* The Guidance Power of the Judge, p. 680 with further reference to the Court of Auditors (Ελεγκτικό Συνέδριο) 895/2005 in plenary session, NOMOS: «*there can be no comparison with CCP according to which, as a rule, the progress of the trial depends on the parties' motion.*» (cf. f.n.1)

7. *Nikas,* Civil Procedure I[2], § 41, nr. 2, p. 563; *Mantzouranis,* Fundamental Procedural Principles under Re-evaluation (Οι θεμελιώδεις δικονομικές αρχές υπό επαναξιολόγηση), Athens - Thessaloniki 2019, pp. 149-156 [: *Mantzouranis*, Fundamental Procedural Principles, p.]

(a) The principle of *Party Disposition* (art. 106[8]) as per which the litigants control civil litigation by determining the scope of the judicial examination and the subject-matter of the dispute, while the court is not permitted to exceed the parties' petitions (*ne eat iudex ultra petita partium);* the parties can decide on whether or not to commence and to end a civil trial by settling or by declaring that there is no longer any need to have a ruling on the action filed; still they are entitled to bring forward or not a specific claim or defence and to specify the extent of the contested claims. Except for some very limited cases of non-contentious ("voluntary") proceedings (i.e. art. 826§1, 831§1, 838§1) in which the inquisition principle fully applies (art. 744,747,751,759 §3), a civil court may not launch a civil trial on its own motion (*ex officio)*. Party disposition is crucial in defining the scope of the duty for guidance, for, in principle, the judge is not permitted to guide the parties to resolve a dispute that is not submitted to the court for ruling.

(b) Civil trial is conducted in terms of debate between the litigants. This very adversary element of the proceeding refers to a procedural structure based on *party presentation*. Unlike in German law[9], this principle is laid down in a single provision (art. 106). According to this principle, it is the parties' responsibility to present the court with all relevant facts; the court may not base its decision on facts that were not introduced by at least one of the parties. The principle of party presentation does not allow the court to introduce facts to the trial that the parties have not already referred to; a responsibility of the court to ascertain the factual basis of the trial by itself, introducing new facts to the trial, would indeed be opposed to this principle, unless otherwise provided[10]. Party presentation is crucial in defining the scope of the duty for guidance, for, in principle, the judge is restricted to assess and subsequently, to ask for clarifications of facts that have been presented by the parties.

8. All articles (art.) refer to the Greek Code of Civil Procedure (Κώδικας Πολιτικής Δικονομίας) if not indicated otherwise.

9. In this volume cf. *Klinck,* Clarification Duties of the Courts- Basis and Limits, chapter II.3(a)

10. Art. 744, 606 §2; the court is provided with limited inquisitorial authorities pursuant to art. 469 §2, 691 and 597.

(c) The principle of *parties' motion* (art. 108 CCP) incorporates in Greek law the system of party prosecution and departs from the contrary system of the court's motion. Hence, all procedural acts must be carried out on the initiative of the parties, unless otherwise provided. As a result, advancement of civil proceedings depends entirely on any party's diligence and initiative[11]. This principle is also crucial when discussing about the duty for guidance, since the judge, although not allowed to substitute the parties' initiative in the proceedings, is exceptionally under duty to abandon his «inactivity» by intervening to the litigation and ask for supplementation or clarification of facts submitted by the parties. It remains to be examined whether said judicial initiative goes beyond this principle.

(d) The principle of *concentration*, as is currently effective after the extensive reform of CCP in 2015, provides that in ordinary proceedings within one hundred (100) days[12] as from the filing of their legal action the parties are obliged to file their pleadings and put forward all factual allegations (exceptions, defence etc.) and evidence in support of their claims (237§1). Addenda (submissions for rebuttal) may be filed within the next fifteen (15) days as from the date of expiry of the previously mentioned deadline (237 §2). Submissions filed after the above time limits are inadmissible and cannot be taken into account by the court (237 §1γ)[13]. The hearing[14] is "fictitious", i.e. it can take place without the presence of the litigants

11. *Yessiou-Faltsi*, Civil Procedure in Hellas[2], p. 54 et seq.

12. Prolongation of this time limit of one hundred days for thirty (30) more days is allowed to all the parties, in case the defendant or one of the co-defendants has a residence abroad or is of unknown residence; See *Yessiou-Faltsi*, Civil Procedure in Hellas[2], p. 266.

13. On the structure of ordinary proceedings since 2016 see in this volume *Tsantinis,* Case Management in the Modern Civil Procedure – International trends and the Greek Model, chapter VI.2

14. According to art. 237 § 4 within fifteen (15) days as from the closing of the file the judge or the multi (three)-member court when being competent, is appointed for the trial of the case. In this latter case, the rapporteur is appointed by the President of the multi-member court. The hearing of the case is set at this same time pursuant to an explicit order, this hearing must take place not later than within thirty days after the expiry of the abovementioned time limit of fifteen days. Exceptionally, the appointment of a judge and the time of hearing of the case shall be made as soon as possible.

and constitutes the starting point of the eight-month deadline provided to the court to issue its judgment (308). In particular proceedings[15] the parties are obliged to file their pleadings and bring forward all factual allegations, exceptions, defences etc. and supporting evidence at the date of the hearing (591 §1 γ,ε)[16]. Addenda may be filed until 12 noon of the third working day as from the date of hearing (591 §1 στ)[17]. The principle of concentration has become stricter in first instance proceedings, since no exceptions are provided[18], while in appellate proceedings specific exceptions provided in art. 527 are applicable[19]. When examining the duty for guidance the principle of concentration should be also observed, since facts and defences that have not been brought forward on time are excluded from being taken into consideration, thus affecting the scope of the court's duty accordingly.

15. Particular proceedings include family law disputes, disputes emerging from negotiable instruments, from lease and condominiums, from the use of cars, from labour contracts, from contracts involving the remuneration of certain professionals (lawyers, engineers etc.): *Yessiou-Faltsi,* Civil Procedure in Hellas[2], p. 444.

16. As opposed to ordinary proceedings the reform of 2015 (Law 4335/2015) maintained oral hearing in particular proceedings; see infra, chapter VII.2.a).

17. Cf. workflow schedule of particular proceedings as provided for by art. 591 in chapter VII.2.a) (b).

18. The former art. 269 which provided for the exceptions now provided in art. 527 was abolished by virtue of Law 4335/2015.

19. Exceptional late submission is admissible in the following cases: (a) Factual allegations in defence of the appeal, provided that they do not result in (significant) amendment of the action or intervention (527 §1); (b) allegations pertaining to facts that have occurred after the deadline for filing of first instance pleadings (527 §2); (c) the so called "privileged" allegations, which may be either considered any time on the court's own motion (i.e. procedural prerequisites, art. 73 of the Code of Civil Procedure) or taken into account throughout all the stages of the proceedings by virtue of a particular statutory substantive provision (527 §3); (d) factual allegations not submitted to the court through pleadings were admissible if the court on its own discretion deemed that delayed presentation was justified (527 §4); (e) facts on which the allegation is based, had occurred later (527 §5); (f) facts having been proven through a judicial confession or documentary evidence and the court deemed that the interested party was not or could not be informed about the existence of the given document (527§6); See *Yessiou-Faltsi*, Civil Procedure in Hellas[2], p. 60-61.

(e) The traditional passive role of civil courts at the proceedings stems from the principle of *judicial neutrality* which is closely related with the principles of procedural equality of arms and the right to a legally appointed judge. The former is based on art. 4 §1 of the Constitution and art. 110 §1, while the latter on art. 8 of the Constitution. Apart from the above provisions, judicial impartiality is safeguarded expressly in CCP where art. 52 στ provides that the judge may be challenged on grounds of suspicion of partiality. Judicial neutrality must be observed as well, since the more active the role of the judge, the greater the risk that the judge may raise suspicion of partiality to one party[20].

(f) Furthermore, civil courts are empowered with some *inquisitorial powers* with a view to clarifying unclear submissions or inconsistencies and remedying minor inadmissibility rather than to truth finding. Hence, the court even after the hearing of the case, must communicate with the parties, or their lawyer, through a written invitation or a telephone call, for the correction of eventual typical omissions in their pleadings (227). Moreover, the court may act on its own motion to use any legal means of evidence proper for the case, even if that means was not proposed or submitted by the parties (107). In this respect, a newly introduced provision by virtue of Law 4335/2015 (232 §1β,γ) permits the judge to demand any document possessed by governmental officials, even before the hearing of the case, or to order the parties to present such documents during oral hearings[21]. Moreover, the court can *ex officio* or after motion of a

20. Cf. *Makridou,* The vague lawsuit and the possibilities of its completion (Η αόριστη αγωγή και οι δυνατότητες θεραπείας της), 4th ed., Athens – Thessaloniki, 2006, p. 312 [: *Makridou,* The vague lawsuit[4], p.]; *Asimakopoulou,* The modern approach of party presentation, p. 31; *Apostolakis,* The Guidance intervention of the Judge as per art. 236 CCP in first instance (new ordinary and particular proceedings), appeal and cassation trials [Η κατά το άρθρο 236 ΚΠολΔ καθοδηγητική παρέμβαση του Δικαστή στον πρώτο βαθμό (νέα τακτική διαδικασία και ειδικές διαδικασίες), στον δεύτερο βαθμό και στην αναιρετική δίκη], Review of Civil Procedure (ΕΠολΔ) 2020, pp. 105 et seq., p. 107 [: *Apostolakis,* The Guidance intervention of the Judge, p.].

21. The court may use such means of proof only to produce evidence of factual statements already presented by the parties. Hence, the above exceptional provisions do not put the parties' motion principle into question, since the submission of evidence is always carried out by the parties, even if the judge has indicated *ex officio* the use of certain means of evi-

party order anything that can contribute to the determination of the dispute and in particular the personal appearance of the parties or their legal representatives at the hearing for posing questions to them and for their clarifications concerning the case (245)[22].

c) An interim conclusion

In the light of the above body of principles a traditional conviction that civil proceedings must preserve and protect private-law rights, interests and liberties remains dominant, thus not allowing the prevailing conception of the parties being *domini litis* to be easily disputed[23]. Nevertheless, in parallel an unlimited control of the parties over proceedings may lead them to procedural abuses and possible defects that lead to waste of judicial resources and obstruct speedy dispute resolution. Hence, party presentation is restricted by

dence; See *Yessiou - Faltsi*, Civil Procedure in Hellas[2], p. 65. As to the exact scope of this rule see infra, chapter VI.3. In interim measures' proceedings (art. 682 et seq.) art. 691 provides that the judge may act on his own motion and select all the necessary material. However, according to the prevailing opinion in Greek case law and theory (recently Kerameus/Kondylis/Nikas (-*Kranis*), CCP[2] 2020, art. 691, nr. 1; *Katiforis,* Powers of the Judge and of the Parties in the civil trial (Εξουσίες του δικαστηρίου και των διαδίκων στην πολιτική δίκη) Athens-Thessaloniki 2020, p. 63 et seq. [: *Katiforis,* Powers of the Judge, p.] as well as Prof. Yiannopoulos' contribution in this volume) inquisitorial authority of the court does not extend to facts that the parties did not put forward [Piraeus One-member First Instance Court 2393/1992, Hellenic Justice (ΕλλΔνη) 1993.1549; Athens One-member First Instance Court 5217/1999, Dike (Δ) 1999.759; Dissenting *Beys,* Civil Procedure, Interim measures (Πολιτική Δικονομία, ασφαλιστικά μέτρα), Athens 1983, art. 691, pp. 102- 103]; nor is the court permitted to take into consideration private cognizance (Areios Pagos 1509/1982 Dike (Δ) 1984. 322; Grevena One-member First Instance Court 258/2008 Harmenopoulos (Αρμ) 2008.1678); Under said reservations the court can collect all necessary elements to determine the case even *ex officio* [Athens Multi - member First Instance Court 6961/1990 Harmenopoulos (Αρμ) 1991. 63; Elefsis Magistrate Court 2/2018 Theory and Practice of Civil Law (ΕφΑΔ) 2018. 324] without the parties being taken by surprise and without their right of defence being restricted. Said discretion of the court is in line with the limited release of the court from the principle of party disposition over the relief sought, since the court is permitted to order a provisional remedy other than the one sought by the petitioner (692 §1).

22. As to the difference between art. 245 and art. 236 see infra chapter V.3.

23. *Yessiou-Faltsi*, Civil Procedure in Hellas[2], p. 66.

the inherent duty of the litigants to present their case truthfully[24] and completely (i.e. without deliberate omissions)[25], for only under said conditions party presentation is rightfully applied[26]. In other words, liberty of the parties is subjected to self – responsibility. In this regard, the idea that civil trial, apart from fulfilling civil claims, should be also possessing a social welfare function, is enhanced in Greek theory of civil procedural law[27]. Given the need for some legitimate confinement of party presentation and the limited room for judicial initiative in CCP the duty for guidance was viewed as an exceptional rule rather than a judicial power fully integrated in the entire structure of the law. As will be described immediately hereafter, this was due to a long-established practice favoring limitless party presentation and looking upon active civil judge as undesirable embarrassment.

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24. *Diamantopoulos,* The inconsistent conduct of the litigant parties in civil trial (Η αντιφατική συμπεριφορά των διαδίκων στην πολιτική δίκη), Athens, 1996, pp. 129-130 [: *Diamantopoulos,* The inconsistent conduct, p.]; *Paisidou*, Presumptions, p. 24 and references in f.n. 50. See also art. 116 §2 introduced by Law 4335/2015 (infra, f.n. 93).

25. The duty for completeness is supplementing the duty for truth. Not only is the latter breached when untruthful or inaccurate facts are submitted, but also when true and accurate facts are deliberately omitted; Cf. *Diamantopoulos*, The Guidance Power of the Judge, pp. 681-682.

26. *Diamantopoulos*, The Guidance Power of the Judge, p. 682; *id.,* The inconsistent conduct, p. 128 et seq. with further references in f.n. 359 et seq.

27. *Kerameus,* Civil Procedural law I² (Αστικό Δικονομικό Δίκαιο Ι), Athens-Thessaloniki 1983, p. 7; *Beys/Calavros/Stamatopoulos,* Procedure of civil disputes (Δικονομία των ιδιωτικών διαφορών), Athens 1999, p. 174; *Nikas*, Civil Procedure I², §1, nr. 26, p. 17 and § 42, nr. 20, p. 580; *Podimata,* Judicial Duty for Guidance and Adversarial System. The delicate balance between desirable and feasible after L. 3994/2011 (Καθήκον δικαστικής καθοδηγήσεως και συζητητικό σύστημα. Η ευαίσθητη ισορροπία μεταξύ ευκταίου και εφικτού μετά τον ν. 3994/2011) Review of Civil Procedure (ΕΠολΔ) 2013 [: *Podimata,* Judicial Duty for Guidance, p.], p. 4 et seq., 21, 26; *Diamantopoulos,* The Guidance Power of the Judge, p. 682 · *Asimakopoulou,* The modern approach of party presentation principle, p. 14 et seq.; See also relevant consideration of the legislator of Law 4335/2015: *"the civil trial may be in the interests of the parties, but as a social phenomenon it cannot to be considered as a case dependent purely on the parties. There is a public interest in rapid rendition of justice and for establishment of the trial as an effective institution for rendition of justice and dispute resolution".* (Explanatory Report of Law 4335/2015, chapter B.II.7 available at https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-epeigon-eis-new.pdf).

II. The (in)active judge: A long-established cumbersome reality

The Code of Civil Procedure of 1835 was influenced by the liberal tradition of 19th century. It was for the parties to put forward to the court the facts on the basis of which a certain civil dispute is determined *(da mihi facta, dabo tibi ius),* thus establishing amongst courts and lawyers a long practice which was obvious. In this cultural context Greek civil judges were acting like an umpire of the litigation between the parties. A potential judicial guidance of the parties on the factual material of the case was a "terra incognita", for under the Code of Civil Procedure of 1835 there was no provision identical to art. 236. Indeed, art. 171[28] of that Code provided for the court's discretion to interrogate parties and witnesses, while art. 172[29] of the same provided for the general rule that the court was empowered to determine *ex officio* evidence, to proceed with judicial inspection, to order examination of the parties in person and any other measure necessary for the clarification of the facts put forward by the parties and the rules of law under application[30].

For the first time in 1912[31] it was provided that the civil (magistrate and first instance) judges being competent for resolving labor law disputes in respec-

28. Identical provision with the one of art. 234.

29. Although said provision was identical to the one of art. 245 CCP, the scope was limited to the production of evidence: *Makridou,* The vague lawsuit[4], p. 241 with references in f.n. 170; *Mitsopoulos*, The Court's Duty to Guide the Parties for Completion or Clarification of their allegations (Το καθήκον του δικαστηρίου καθοδηγήσεως των διαδίκων προς συμπλήρωσιν ή διασάφησιν των ισχυρισμών των) Legal Tribune (NoB) 1986, pp. 753 et. seq., 754 [: *Mitsopoulos,* The Court's Duty to Guide the Parties, p.].

30. Areios Pagos 145/1964 Legal Tribune (NoB) 1964. 597; *Mitsopoulos*, The duty of the court as per L. ΓΨΟΔ/1912 for clarification of the presented allegations (Το υπό του ν. ΓΨΟΔ/1912 καθιερούμενον καθήκον του δικαστηρίου προς διασάφησιν των προβαλλομένων ισχυρισμών), Studies of Legal Theory, Civil and Civil Procedural Law (Μελέται γενικής θεωρίας δικαίου και αστικού και αστικού δικονομικού δικαίου), Athens-Komotini, 1983, pp. 585 seq., 590; *Diamantopoulos,* The Guidance Power of the Judge, pp. 682-683 with further references in f.n. 19; *Asimakopoulou*, The modern approach of party presentation principle, p. 27. See also *Simantiras,* The Judge in civil trial (Ο δικαστής εν τη πολιτική δίκη), Athens 1916, nr. 1: "*At first glance, little and insignificant is the judge's participation at the collection of the factual material of the dispute as per the current civil procedure".*

31. Art. 4 and 11 of Law ΓΨΟΔ/1912 enacted by the first government of *Eleftherios Venizelos* (1864-1936) in a context of widespread social reforms at that time.

tive particular proceeding, were under duty to guide the litigants so that to articulate their claims in a more complete and procedural manner and to defend their case more effectively. This provision appeared to be necessary, not only because in said particular proceeding the litigants were entitled to represent themselves without engaging a lawyer, but also because of the welfare character of the judicial judgment[32]. The seed for the more activist judicial role in civil proceedings had been just sowed but altogether courts and law practitioners were still reluctant to promote judicial activism. In the year 1955 an individual judgment of Areios Pagos[33] "rocked the boat" for a while but had no practical influence afterwards.

As a result of lack of any short of substantive case management, vague civil actions were rejected as inadmissible without any prior attempt of the court to have incomplete factual allegations supplemented[34] strictly abiding by the party presentation rule, while contradictory procedural acts were usually[35] rejected as inadmissible too[36].

A turning point in the history of case management in Greece was the CCP enacted in 1968. Said draft, apart from serving private rights and interests, echoed a pro-social welfare function of civil trial[37]. Following proposal made

32. For the latter reason see *Makridou*, The vague lawsuit[4], p. 242.

33. 72/1955 Legal Tribune (NoB) 1955. 379: «*the judge is entitled and ought to consult the parties so that they articulate in a more complete and juridical manner their contentions and guide them towards more expedient defence*».

34. *Makridou,* the vague lawsuit[4], pp. 96, 102-104; *ead.*, A valuable weapon in the hands of the Judges - Judicial Guidance according to Art. 236 CCP (Ενα πολύτιμο όπλο στα χέρια των δικαστών - Η δικαστική καθοδήγηση του άρθρου 236 ΚΠολΔ), Hellenic Justice (ΕλλΔνη) 2011, pp. 953 et seq., 958 (f.n. 33) [: *Makridou,* A valuable weapon, p.]; *Diamantopoulos,* The Guidance Power of the Judge, p. 685.

35. Only exceptionally, if the party had dropped one of the more inconsistent procedural acts, the lifting of inconsistency was admitted: *Diamantopoulos,* The Guidance Power of the Judge, p. 685 with references to case law (f.n. 35).

36. *Diamantopoulos,* The inconsistent conduct, p. 58 et seq.

37. *Makridou*, A valuable weapon, pp. 953-954; *Diamantopoulos,* The Guidance Power of the Judge, p. 683-684.

by the rapporteur, *Georgios Rammos*[38] to the CCP Advisory Committee a provision of art. 244 was introduced[39]. Subsequently, thanks to said new provision, supporters of judicial activism increased in legal theory over the years[40]. Nevertheless, within three years as from its enactment, CCP/1968 was extensively amended by virtue of Law Decree 958/1971 and said legislative initiative was proved to be a missed opportunity for Greek Justice because of the "bureaucratic denial" by the judiciary to assume more duties in civil trials. As a result, in the CCP/1971 judicial control over the proceedings was significantly restricted by the then amended art. 236[41].

The fact that Greek procedural law encompassed at last -despite legislative diffidence at that time- a comprehensive provision for substantive case management in all civil proceedings, should not be overestimated, since in the next forty years it was proven in practice that art. 236 remained obsolete and unused[42] and relevant case law was extremely rare[43]. Reluctance of civil courts

38. *Georgios Rammos* (1902-1987), Professor Emeritus of Civil Procedure, University of Athens' Law School.

39. The provision red as follows: "The judge moderating the hearing must take care, by means of questioning or by other means, that the persons taking part at the hearing express themselves clearly on the crucial facts, that they submit the necessary pleadings and requests, that they complete vague or imperfect submitted allegations, determine the means of evidence and in general that they provide the necessary clarifications in order to verify the truth of the presented allegations. Likewise, he must draw their attention to the facts or investigated issues that are taken into consideration *ex officio*".

40. *Diamantopoulos,* The Guidance Power of the Judge, p. 685 (f.n. 36).

41. Infra chapter V.1.

42. The latter conclusion as articulated by *Mitsopoulos,* Reflections on the Vagueness of the Grounds of the Lawsuit (Σκέψεις ως προς την αοριστίαν της βάσεως της αγωγής) Hellenic Justice (ΕλλΔνη) 1995. 1 et seq., 8. This was another indication of the general inertia of Greek judicial system that made ECHR to issue repeated rulings condemning Greece; see infra chapter IV.1.

43. Athens One-member First Instance Court 7375/1984 Hellenic Justice (ΕλλΔνη) 1985. 1415; Thessaloniki Court of Appeal 1278/2001 Harmenopoulos (Αρμ) 2002. 225 with consenting commentaries by *Makridou*; Thessaloniki Court of Appeal 683/2004 Harmenopoulos (Αρμ) 2005. 1583; Thessaloniki Court of Appeal 438/2008 Harmenopoulos (Αρμ) 2009. 384; Cf. Areios Pagos 263/2005 Hellenic Justice (ΕλλΔνη) 2006. 1345 affirming Piraeus Court of Appeal 202/2003: «*By virtue of the provision of art. 224 combined*

to apply the rule persisted, thus perpetuating inevitably civil disputes due to rejection of claims as vague and subsequently, leading to denial of justice due to considerable delay[44].

III. International trends: ALI/UNIDROIT Principles and ELI/UNIDROIT Rules[45]

1. History and aims of the Project

Contrary to Greek standstill on case management, transnational attempts to bring together different schools of procedural law were impressive. In 2004 the UNIDROIT Governing Council adopted the ALI/UNIDROIT Principles of Transnational Civil Procedure[46] having been prepared by a joint American Law Institute (ALI)/UNIDROIT Working Group. Their goal was to reduce the impact of differences between legal systems in litigation involving transnational commercial transactions through a model of universal procedure in line with the essential elements of due process of law. They were accompa-

with the one of art. 236 CCP the plaintiff can supplement through his pleadings at the first hearing of the case the incomplete presentation of his factual contentions, thus curing vagueness of the facts underpinning the action". Additionally, a series of Areios Pagos' case law referred often to the provision of art. 236 in conjunction with the one of art. 224 (admissible alterations and clarifications of the action's factual basis), thus successfully separating supplements on a vague lawsuit as opposed to a legally unfounded which are forbidden (see also infra f.n. 69). However, said reference to art. 236 was made not because art. 236 was applied but, contrariwise, in order for the application thereof to be excluded; see *Makridou,* the vague lawsuit[4], pp. 103-104, n. 354; *ead.*, A valuable weapon, p. 954; *Diamantopoulos,* The Guidance Power of the Judge, p. 686 with references to the relevant Areios Pagos' case law (f.n. 42).

44. *Makridou,* A valuable weapon, p. 954.

45. Relevant literature (in Greek): *Podimata*, Judicial Duty for Guidance, p. 14-15; *Diamantopoulos*, The Guidance Power of the Judge, p. 689-690; *Makridou,* A valuable weapon, p. 958; *Asimakopoulou,* The modern approach of party presentation principle, p. 53-54; *Katiforis,* Powers of the Judge, pp. 23-25.

46. (as Adopted and Promulgated by the American Law Institute at Washington D.C. in May 2004 and by Unidroit at Rome in April 2004), 2006 (Cambridge University Press). Available also at https://www.unidroit.org/fr/franchisage-guide-2nd-autre-langues/91-instruments/transnational-civil-procedure/1331-ali-unidroit-principles-of-transnational-civil-procedure

nied by a set of "Rules of Transnational Civil Procedure"[47]. The Rules might be considered either for adoption "or for further adaptation in various legal systems" and along with the Principles can be considered as "a model for reform in domestic legislation"[48].

With the aim of resuming work in this area, UNIDROIT focused on the promotion and implementation of the ALI/UNIDROIT Principles through the development of regional rules. A joint European Law Institute (ELI)/ UNIDROIT project on developing European Regional Rules on Civil Procedure was proposed and launched in 2013 and on 23-25 September 2020 a set of Rules, accompanied by Comments, available both in English and in French, were approved[49].

2. Main features related with judicial duty for guidance

a) Co-operative case management

One of the important features in both sets of principles and rules concern the court's role in conducting the proceedings as a broader duty of co-operative case management by parties and court[50]. The ALI Transnational Rules of Civil Procedure recommend that the courts ought to actively manage the proceedings (to the extent it is practically possible in consultation with the parties), exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. The ELI/UNIDROIT Rules in Part III (Rule 47-50) provide for extensive co-operation between the parties and the court in order to ensure procedural expedition. Rule 49 explicitly equips the court with eleven means of case management thus upgrading the court's role in conducting the proceedings. A series of rules of identical content distinguishes the role of the parties from the court's responsibility to control the proceedings.

47. Available at https://www.unidroit.org/instruments/transnational-civil-procedure

48. Reporters' Study, Rules on Transnational Civil Procedure, Introductory Note, in ALI/ UNIDROIT Principles of Transnational Civil Procedure, Cambridge University Press, 2006, p. 99.

49. Available at https://www.unidroit.org/cp-eli-unidroit-overview

50. Rules 2, 3(b),(e) ELI/UNIDROIT Rules; Principles 7.1,7.2, 11.1, 11.2,11.5 ALI/UNIDROIT Principles.

b) The role of the parties

The parties' role is confirmed by the party disposition and party presentation principles which remain the cornerstones of civil trial. Hence, the subject matter of the dispute is determined by the claims and exception of the parties[51], while the court must decide only on the relief claimed[52]. Proceedings may only be instituted and terminated in whole or in part by the parties. The court cannot institute proceedings on its own motion[53]. Likewise, it is for the parties to put forward such facts as support their claim or defence, while the court must not consider facts not introduced by the parties[54].

As to the standards of specificity of the claim, both sets of rules[55] provide that the action should state in reasonable detail[56] the relevant facts on which the claim is based, the available means of evidence in support of factual allegations, the legal grounds that support the claim and the relief requested[57].

The principle of concentration is another critical feature expressly contained in ELI/UNIDROIT rules, since it is provided that the court shall disregard factual allegations, modifications of claims and defences that are introduced by the parties later than permitted[58], although exceptions are also provided[59].

c) The role of the court

The court's role in conducting the proceedings is not limited to its adjudicative function but is also required to take an active part in the proper administration of justice. For the proper management of proceedings, both ALI/UNIDROIT

51. Rules 23 (1) ELI/UNIDROIT Rules; Principle 10.3 ALI/UNIDROIT Principles.
52. Rules 23 (2) ELI/UNIDROIT Rules.
53. Rules 21 ELI/UNIDROIT Rules; Principle 10.1 ALI/UNIDROIT Principles.
54. Rule 24 ELI/UNIDROIT Rules.
55. Principle 11.3 ALI/UNIDROIT Principles; Rule 53.2 ELI/UNIDROIT Rules.
56. Principle 11.3 ALI/UNIDROIT Principles; as to time, place, participants and events see Rule 53.2(a) ELI/UNIDROIT Rules.
57. Including the monetary amount or the specified terms of any other remedy sought: Rule 53(2d) ELI/UNIDROIT Rules.
58. Rule 27 ELI/UNIDROIT Rules.
59. Rules 168 (1) b, 27(1) ELI/UNIDROIT Rules; principle 27.3 ALI/UNIDROIT Principles.

Principles and ELI/UNIDROIT Rules provide for the court's duty to guide the parties to consider amendments to the pleadings or offers of evidence in the light of the parties' contentions[60]. Hence, the court may invite the parties to clarify or supplement only facts that have been put forward by them[61]. The scope of the dispute is determined by the claims and defences of the parties in the pleadings, including amendments[62].

d) ALI/UNIDROIT and ELI/UNIDROIT trends in Greek practice

The aforementioned principles and rules reflect international trends in civil procedure in the United States and Europe as elaborated in the turning of 21st century and for this reason Greek practice can be provided with useful guidance when delineating the role of the parties and the court in civil proceedings.

IV. The legislator's approach: The "uninvolved" judge as a structural problem of Civil Justice

1. "The lifeless course of Hellenic Justice": The impact of consecutive ECHR rulings

In the year 2012, coincidentally a few months after the rule on judicial duty for guidance (art. 236) was amended, *Panagiotis Tsoukas*, Judge of Conseil d' État[63], selected sixty seven texts published in the years 1880-2011 by prominent Greeks of their time, referring to the dragging judicial system. Said papers were collected in a single volume under the self-explanatory title "the lifeless course of Hellenic Justice"[64]. It is sad to discover that for more than 140 years the core of the problems discussed remained identical: Heavy caseload, lack of efficiency, lack of adequate human and economic resources, selfish and abusive everyday conducts by law practitioners and their clients have been obstructing the rendition of Justice.

60. Rules 49(9), 21(1), 53(2), 168(1)b ELI/UNIDROIT Rules; Principle 11.3, 22.2.1 ALI/UNIDROIT Principles.

61. Rule 24 (2) ELI/UNIDROIT Rules.

62. Rules 23 (1) ELI/UNIDROIT Rules; Principle 10.3 ALI/UNIDROIT Principles.

63. The Supreme Administrative Court of the Hellenic Republic.

64. Athens 2012, passim.

In the same year (coincidentally again) the legislator depicted graphically and all the more dramatically the effect of the inertia of Greek judicial system in the Explanatory Report of Law 4055/2012[65]: *"Unfortunately, today's reality in Greece does not respond neither to the Hellenic Constitution's provisions nor to the expectation of the European legal culture. There is no greater proof than the following statistics: Since 1997 until today (2012), Greece has been condemned by the ECHR in 360 cases on excessive delays in the rendition of Justice (…) It has been noted that Greece was condemned for a case that judgment was delayed for twenty seven years. Due to said condemnations Greece was forced to pay compensations for material and moral damages of 8.420.822 euros by virtue of ECHR judgments. Greece has the dubious distinction to be in the fourth place amongst forty-seven member states of the Council of Europe that systematically and repeatedly violates the right to trial within reasonable time[66] under Article 6 ECHR."*

A few months later, in 2012 the ECHR in its pilot judgment on *Glykantzi v. Greece*[67] that concerned the length of pay-related proceedings in the civil courts that lasted more than twelve years, confirmed that the excessive duration of civil proceedings in Greece is a "chronic" and "structural" problem that needed to be addressed through pilot judgement proceedings.

2. The legislative considerations of 2011 amendment

a) The Explanatory Report of Law 3994/2011

The timing for the showing up of the abovementioned inconvenient truths was not accidental. Since April 2010 when Greek government-debt crisis erupted, the Greek state was forced to elaborate rapid solutions to chronic inefficiencies of the public sector including justice administration. Law

65. Available at https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/g-dikaidi-eisig.pdf.

66. More detailed analysis in *Roagna,* The right to trial within reasonable time under Article 6 ECHR - A practical handbook, 2018 available at https://rm.coe.int/the-right-to-trial-within-reasonable-time-eng/16808e712c

67. (No. 40150/09) Judgment of October 30, 2012, nr. 58, 67, 74, 77 available [in French] at https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22FRE%22],%22appno%22:[%2240150/09%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-114100%22]}; See also *Mantzouranis* Fundamental Procedural Principles, p.110.

4055/2012 and - a few months earlier- Law 3994/2011 were amongst those pieces of legislation enacted at that period in a desperate effort to redress efficiency in rendition of Justice. In particular, Law 3994/2011 was the one that, amongst other amendments in CCP, proceeded also with amendment of the provision on judicial duty for guidance (art. 236) by enhancing the role of the judge[68] as part of a wider reform of civil proceedings.

The legislator reinforced the court's duty for guidance so that to minimize disruption in prompt rendition of justice; At a first glance the latter was attributed to massive dismissal of vague actions and the re-initiation of the same claims for trial upon their refiling so that to be determined in substance. By taking a closer look at the considerations laid down in the Explanatory Report of Law 3994/2011, curing vague actions was rather a motive and not an objective in itself. In fact, it was the means to achieve further objectives.

For reasons of completeness the considerations made during the legislative process that led to the reform of art. 236 are quoted herein below verbatim as set out in the Explanatory Report of Law 3994/2011, since they address a whole range of crucial aspects of broader interest.

"At the acceleration of the proceedings and the saving of judicial labor aim in particular the provisions permitting remedy of vague action rather than legally groundless action[69] through oral statement at the hearing, by charging the judge with the duty to indicate the parties the supplementation of allegations

68. *Makridou,* Greek Case Management in light of other European Civil Justice Systems, The Journal of Comparative Law, VII (2012), 227 et seq.; *Yessiou-Faltsi*, Civil Procedure in Hellas[2], p. 63 et seq.

69. The Greek text refers to terms used by Greek case law and legal theory, namely "πραγματική αοριστία" (literally translated "factual vagueness") and "νομική αοριστία" (literally translated "legal vagueness"). However, the above literal translation does not convey the exact meaning of the above terms in English. The former ["factual"] vagueness refers to an action which includes the facts required by law to be initiated, although insufficiently or unclearly presented. This is a literally vague action which can be corrected, supplemented and clarified on the claimant's motion or after same being guided by the court. The latter ("legal vagueness") refers to an action in which the facts required by law are not presented at all. In fact, this is a legally unfounded action which by no means can be corrected, supplemented or clarified; Cf. *Yessiou-Faltsi*, Civil Procedure in Hellas[2], pp. 216 and f.n. 10.

that have been articulated incompletely and vaguely" […] "the issue of vagueness causes significant disruption in rendition of Justice and troubles excessively the parties and their representing lawyers. This common ascertainment imposes the treatment of the matter with a view to sustain a reasonable balance between party presentation and judicial intervention. The duty of the judge to guide the parties operates supplementarily to party presentation, creating conducive conditions for the latter's proper application. The more active role of the judge, being already the rule in other European jurisdictions, is supported by reasons of sound judgment and cost and labor savings."[70]

b) Remedy of vagueness as a motive

It is not further explained why "the issue of vagueness" causes so much trouble to the proceedings and to proper rendition of Justice, since it was rather regarded by the legislator as self-explanatory. Indeed, it is known that rejection of the lawsuit as vague (due to lack of specificity on the prerequisites of art. 118 and 216 §1) and thus, as inadmissible, brings about a binding effect (procedural res judicata) extending only insofar as the procedural question (e.g. vagueness) handled and decided (322 §1b)[71]. Said binding effect on such a procedural defect does not preclude re-initiating of the action duly rectified[72], meaning that a dispute having already been subject matter of a trial, may be re-tried upon filing of a new corrected action. To be more precise, the legislator when referring to "disruption" and "troubles" had in mind that the more the disputes re-initiated for re-trial due to previously dismissed vague actions, the greater the disruption for judicial administration and the bigger the denial of justice to the parties involved.

70. Explanatory Report on Law 3994/2011 (under para. A and art. 22) available at: https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-expol-eis.pdf .

71. *Yessiou- Faltsi,* Civil Procedure in Hellas[2], p. 216 with further references in f.n.11 and pp. 284-285; *Kondylis*, Res Judicata as per the CCP (Το δεδικασμένο κατά τον ΚΠολΔ), 2nd ed., Athens - Komotini 2007, pp. 344-345.

72. *Calavros,* Civil Procedure (Πολιτική Δικονομία), 4th ed., Athens-Thessaloniki, 2016, p. 149 [: *Calavros,* Civil Procedure[4] p.]; *Makridou,* The vague lawsuit[4], p. 151 with references in f.n. 503.

However, as evidenced by the legislator's admittance[73], delayed justice is due to various reasons and of course not to vagueness solely. Re-initiation of proceedings for the same dispute due to dismissal of earlier vague actions on inadmissibility is one of the many reasons of delayed civil justice. Hence, the issue of vagueness was nothing but an appropriate motive for the legislator in order to revisit the court's role, as part of a wider reconsideration of efficiency and rapidity of rendition of justice in Greece.

c) Inherent problems addressed by the amendment

(a) "significant disruption in rendition of Justice" ("justice delayed")

The legislator's considerations imply that civil trial fulfils social functions such as rapidity, predictability, and acceptability of judgments by the parties[74]. In fact, a lengthy trial tends to aggravate the dispute between the parties. More specifically, in the example under discussion, whenever an action is rejected on procedural grounds, the dispute is not resolved on the merits thus forcing the claimant to re-file the action and have the case retried. The longer it takes the court to reach a decision on the merits, the more difficult it becomes for the losing party to predict that a judgment will be definitely issued, let alone accept it once it is issued. This is because, the latter may hope that no judgment will be issued against him and if it is issued after many years of pendency it will take him by surprise. The legislator considered that, to the extent dismissal of vague actions can be avoided following proper action, it is the court's duty to guide the party concerned to have his action duly rectified, thus minimizing the risk[75] of dismissing actions on procedural grounds and delaying dispute resolution respectively. Still though said duty should be performed in case the party

73. Supra, chapter IV.2.a).

74. Said considerations were expressly laid down in the Explanatory Report of Law 4335/2015; infra, chapter VII.2.a).

75. The legislator still considers that there is no certainty but rather likelihood of a judgment on the merits. *"Even when the judge instructs the party to cure vague allegations, (the judge) is not excluded to subsequently dismiss the action or exception due to vagueness. This is because his obligation, as follows from art. 236 is in any case a duty of diligence and not of result"*; cf. Explanatory Report of Law 3994/2011 (under art. 22), op. cit. (f.n. 70).

himself or herself failed to rectify the action through pleadings on his or her own motion (art. 224).

(b) Judgment based on "excessive formalism" ("justice denied")

The legislator by considering that *"the more active role of the judge is supported by reasons of sound judgment",* implies that an inactive judge may deliver judgment not acceptable by the parties. Indeed, the action's rejection due to vagueness disappoints the claimant who tends to believe that justice was denied to him. To this respect, it is of importance to note that the right to justice is a right of constitutional rank (art. 20 of the Constitution) but it is further regulated in detail by statutory law, i.e. the CCP. Hence, although in legal theory right to justice comprises the right to a judgment on the merits of the dispute[76], case law of Areios Pagos does not adopt such an interpretation[77]. Hence, pursuant to the latter opinion on the matter, there is no constitutional obligation towards the state to oblige courts to clarify the subject matter of the dispute in law and in fact beyond the admissibility requirement posed by procedural law. However, said opinion should be examined also in the light of the ECHR case law on excessive formalism[78]. Indeed, to the extent that justice was practically

76. *Nikas,* Civil Procedure I[2], §2, nr. 2, p. 22; *Mitsopoulos,* Civil Procedure A' (Πολιτική Δικονομία Α'), Athens 1972, p. 37; *Klamaris*, The right to justice as per art. 20 §1 of the Constitution 1975 (το δικαίωμα δικαστικής προστασίας κατά το άρθ. 20 §1 του Συντάγματος 1975), Athens 1989, pp. 155-159.

77. Areios Pagos 1611/2008 Dike (Δ) 2008.1131: Procedural provisions on vagueness are not contrary to constitutional rules since the latter do not provide legal basis for the court to disregard any vagueness of the action whatsoever.

78. Cf. *Lionarakis vs Greece* (No. 1131/05) judgment of October 5, 2007 available [in French] at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-81434%22] nr. 26: *"The "right to a court", a particular aspect of which is the right of access, is not absolute and is subject to indirectly admitted restrictions; In particular, as regards prerequisites for admissible access the State which regulates said prerequisites, has a wide margin of appreciation. These restrictions should not, however, prevent the citizen from gaining access in a manner or to a point where his or her right to a court is substantially infringed. Finally, (these restrictions) are incompatible with Article 6 par. 1 when they do not tend to a legitimate aim and there is no reasonable relationship of proportionality between the means used and the aim pursued (…). Indeed, the right of access to a court is affected when its regulation ceases to serve the purposes of legal certainty and the proper administration of justice, and constitutes a kind of obstacle which prevents its case from being heard on the merits".*

denied in an individual case on the grounds of excessive requirements on concretization of the facts and of strict compliance to principle of party presentation, the Greek state was under the obligation to deal with the matter by putting emphasis to the duty of the court for guidance to the claimant and by limiting accordingly the parties' excessive dominance upon the proceedings.

(c) acceleration of the proceedings and the saving of judicial labor ("fiscal unsustainability")

Pursuant to the legislator's primal consideration, increased judicial duty for guidance aims at expediting proceedings and saving cost and judicial labor[79]. Although not expressly endorsed, said consideration was linked with the overall policy of the Greek state at that time (2011) to restitute fiscal sustainability, which in the years of debt crisis, was upgraded into overriding reason relating to the public interest[80]. Consequently, a legislative attempt to increase the court's role so that dismissal of actions due to excessive formalities is minimized was a purpose of constitutional rank.

V. Particular features of art. 236

1. Art. 236 before and after the 2011 amendment

Since 1971 when initially introduced, art. 236 red as followed: «The judge moderating the hearing must take care, by means of questioning or by other means, that the persons taking part at the hearing express themselves clearly on the crucial facts, that they submit the necessary pleadings and petitions

79. Cf. *Makridou*, Introductory speech *in* Civil trial at a turning point (η πολιτική δίκη σε κρίσιμη καμπή, επιστημονικό συμπόσιο προς τιμήν του Καθηγητή Νικολάου Νίκα), Athens - Thessaloniki, 2016, p. 7 et seq., 9: « *Judicial review of the proceedings goes hand in hand with a new philosophy of "distributive justice". The operation of the courts is not limited to a judgement on the law and the facts, but at the same time ensures that the limited financial resources of the judiciary are fairly distributed among those who resort to it, namely they are proportionate to complexity and importance of the cases. In this regard, not only the interests of the specific parties are evaluated, but also those who are waiting in line. In this way, assessments are made regarding the effective management of public resources, as it is the case with other public services*».

80. Conseil d' État 668/2012 in plenary session, Legal Tribune (NoB) 2012. 384; Conseil d'État 1620/2011 Legal Tribune (NoB) 2011. 1339.

and generally that they provide the necessary clarifications in order to verify the truth of the presented allegations".

After its amendment by virtue of art. 22 §5 of Law 3994/2011 it was added that the judge moderating the hearing must take care that the persons taking part at the hearing "supplement vague or imperfect submitted allegations, by oral statement recorded in the minutes of the hearing". In fact, the legislator expressly legislated as statutory duty of the court something that Greek legal theory considered as implied but self-evident integral part of the judicial duty for guidance even before 2011[81].

2. Duty, obligation, or discretion?

According to the wording of article 236 the judge "must take care that…"[82]. The law does not expressly refer to obligation or duty. Nevertheless, because of using the verb "must", it is evident that the rule does not provide for discretion. Hence, already before enactment of Law 3994/2011 it was accepted that art. 236 provided for an obligation or, more precisely, a judicial "duty of care"[83] for guidance of the parties[84]. The moderating judge[85] is rendered co-responsible with the parties in configurating the material of the proceedings

81. *Mitsopoulos,* The Court's Duty to Guide the Parties, p. 753 et seq.,762; *Makridou*, the vague lawsuit[4], pp. 258 et seq.; *Nikas,* Civil Procedure I, 1st ed., Athens Thessaloniki, 2003, §42, nr. 22, p. 495.

82. "*πρέπει να φροντίζει ώστε…*" [in Greek].

83. Cf. Explanatory Report (under art. 22), op. cit (f.n. 70): *"… the obligation (of the court) deriving from art. 236 constitutes in any case duty of care".*

84. *Mitsopoulos,* The Court's Duty to Guide the Parties, p. 753 seq., 761; *Makridou,* the vague lawsuit[4], p. 241 et seq.; *Rigas*, The Guidance Function of the Court for the Supplementation of the Vagueness of a Lawsuit, Allegations, Appeals etc. According to Art. 236 CCP after its Amendment through L. 3994/2011 (Η καθοδηγητική λειτουργία του δικαστηρίου προς συμπλήρωση της αοριστίας αγωγής, ισχυρισμών, ενδίκων μέσων κ.λπ. κατά το άρθρο 236 ΚΠολΔ, μετά την τροποποίησή του διά του ν. 3994/2011, NoB 2011.1793) Legal Tribune (NoB) 2011, 1793 et seq., 1795 [:*Rigas*, The Guidance Function of the Court, p.]; *Apostolakis,* The Guidance intervention of the Judge, p. 105.

85. It was supported that in multi-member courts not only the moderating judge, but also the remaining judges of the panel are under the duty for guidance since the incomplete allegations should be complete, clear and adequately specified to all judges so that they are able to assess them on the merits; cf. *Rigas,* The Guidance Function of the Court, p. 1795.

insofar as specification of presented allegations is concerned[86]. However, the judge is neither the sole nor the main responsible for the latter. The parties are the ones who are primarily responsible for putting forward all necessary allegations with adequacy, specificity and completeness. Only if the parties do not fully comply with said obligation, judicial guidance is activated on a supplementary basis[87]. This is so, because art. 236 is interpreted in the light of party presentation principle (106) according to which it is for the parties to put forward all relevant factual contentions[88].

The legislator expressly endorsed the abovementioned predominant opinion by mentioning in the Explanatory Report that art. 236 introduced a "duty"[89]. As a result, the court's failure to comply with art. 236 has legal consequences[90].

3. Distinction of judicial guidance from judicial order for personal appearance of the parties (245) and examination of the parties (415)

Art. 236 is not the sole provision providing the judge with the power to communicate with the parties. In art. 245 it is provided that «the court may ex officio or at the request of a party, order anything that may contribute to the determination of the dispute and in particular the appearance of the parties in person or their legal representatives at the hearing to ask questions and provide clarifications on the case"[91].

86. *Makridou,* the vague lawsuit[4], p. 270.

87. *Makridou,* the vague lawsuit[4], pp. 270-271; *Apostolakis,* The Guidance intervention of the Judge, p. 107.

88. On the balance between party presentation and the duty for guidance cf. infra, chapter VI.1.b).

89. Op. cit. (f.n.70) under chapter A. " *[the law] charges the judge with the duty to suggest the parties that they supplement the allegations imperfectly and vaguely articulated";* (under art. 22) […] *"the duty of the judge to guide the parties is performed supplementarily to party presentation"* […]

90. Infra, chapter VII.2.b) and f.n. 175.

91. It is also provided that the court may exercise same discretion prior to the hearing by inviting the parties or their representatives to be questioned and provide with clarifications on the case (232 §1 α). However, said discretion is not exercised in practice.

Commonplace of both provisions is the comprehensive examination of the facts so that the court delivers its judgement on the merits. However, the former provides for an obligation, while the latter introduces a discretion[92]. In addition, the prerequisites provided for are different. As per the former provision the duty for guidance, in order to be duly performed, does not require prior order of the court. Clarification or supplementation of allegations are not necessarily made by the party himself, especially when being represented by a lawyer, who is charged to proceed with relevant statement to the court. On the contrary, the latter provision requires an order so that the parties appear in person and clarification needs to be made by the party him- or herself.

In art. 415 it is provided that "The court may examine one or more parties for the truth of the facts", while according to the provision of article 416 "the examination of the parties is ordered at the request of one of the parties or ex officio and is conducted according to the provisions for witness examination". The judicial duty on the grounds of art. 236 is not directed at the taking of evidence, while art. 415-416 provides for taking of evidence, since examination of the parties is amongst the means of evidence provided for in art. 339. Consequently, through examination of the parties the court is looking for evidence on given facts of the case which are deemed to be clear as submitted; it does not direct itself towards guiding the examined party to clarify or supplement his allegations.

4. Rectification of vagueness: Co - responsibility of the court and the parties

Dismissal of actions due to vagueness can be restricted if actions are timely supplemented or clarified. To this end the law provides for two options: The one following judicial guidance at the hearing, the other upon initiative of the party him- or herself[93]. Indeed, given the principle of party presentation,

92. *Mitsopoulos*, The Court's Duty to Guide the Parties, p. 765.

93. See also art. 116 §2 introduced by virtue of Law 4335/2015: "The court, the parties, the attorneys and the legal representatives of the parties must contribute to expediting litigation and to speedy resolution of the dispute through their general procedural conduct and in particular through diligent conduct, timely proceeding of procedural acts, timely presentation of allegations and production of evidence".

it would be bizarre for the court to make sure that a virtually vague action is duly rectified, while the party would not be entitled to do the same on his own motion.

According to the legislator's consideration[94] *"The amendment of Article 236 makes amendment of art. 224 imperative. Since the party is entitled to complete vague allegations at the hearing after being encouraged by the court, it will be entitled too, without doubt, to do so voluntarily"*. By said thesis the legislator stressed the responsibility of the claimant to amend its factual allegations within the limits of art. 224 and reaffirmed the consideration mentioned also in the Explanatory Report that the judicial duty for guidance of the claimant to rectify the vague action is performed on a supplementary basis. The law aiming at decreasing dismissal of actions due to vagueness, weaponed all persons involved in the trial with adequate tools to contribute to this purpose.

In the light of the above remarks, by virtue of Law 3994/2011 also art. 224 was amended so that to provide that as long as the basis of the action is not altered[95], the claimant can supplement, clarify or rectify his allegations not only through his pleadings, as was provided for before the amendment, but also through an oral statement that is recorded in the minutes.

5. Reduced duty towards a party represented by a lawyer?

Guidance of the court would make more sense in proceedings which parties were not required to engage a lawyer[96]. Before the reform of 2015 (Law 4335/2015) said discretion was provided for interim measures proceedings as well as for claims up to 12.000 euros falling within the competence of magistrate courts. As from January 1, 2016 the litigant parties are required to have legal representation except for small claims up to 5.000 euros (art. 94 §1 as amended by Law 4335/2015). Since legal representation is compulsory in almost all civil proceedings, the issue whether judicial duty for guidance is reduced or even excluded if the party concerned is represented by a lawyer, has

94. Explanatory Report (under art. 22) op. cit. (f.n. 70).

95. Infra chapter VI.1.b).

96. Cf. *Podimata,* Judicial Duty for Guidance, p. 18; *Beys* commentary on Thessaloniki Court of Appeal 2199/2001 Dike (Δ) 2002. 1018.

come to the forefront[97]. The underlying idea is that if a party is represented by a lawyer, the court may generally assume that it is under no duty to guide a lawyer, since the latter is by definition familiar with requirements for a conclusive action or exception.

It is important to note that art. 236 does not distinguish in that regard. Thus, it is construed that the court is under duty to perform guidance in either case. After all, the objectives pursued by the legislator when amending art. 236 (i.e. accelerating the proceedings and saving judicial labor, by decreasing actions dismissed due to vagueness) are relevant in every civil trial regardless of the particular applicable rules. Certainly, if the matter in dispute was not dealt with as fully as possible by the court or if the court rejects action as vague after having omitted to guide the parties as per art. 236, then the aforementioned objectives are missed, regardless of whether the party was represented by a lawyer or not. Invitation through dialogue is of course feasible through the lawyers representing the parties[98], since the lawyer is the only authorized organ to appear before the court in the name and on behalf of the party. Said invitation, though, cannot be regarded as the court deputizing the lawyer. Any omissions or negligence of the latter still lie with the represented party who remains responsible for the presentation of his or her case.

Therefore, there is no legal ground to support that the scope of judicial duty for guidance depends on whether the party is represented by a lawyer or not. The fact that a party is represented by a lawyer does not change the degree of the court's guidance, since the relevant judicial duty also exist towards a party who is represented by a lawyer.

6. Reduced duty in a default trial?

When discussing about the judicial duty for guidance, it is asserted that said duty can be performed by the court "by means of questioning" when the

97. Even before the 2011 amendment and the reform of 2015 *Makridou* (the vague lawsuit[4], p. 316) delt with the issue and concluded that judicial duty for guidance exists towards a party being irrelevant whether he is represented by a lawyer or not.

98. As pointed out (supra, chapter V.3.) this is a major distinction between duty for guidance and discretion of the court to order personal appearance of the party.

party concerned[99] entered an appearance at the hearing of the case[100].

More precisely, in civil trial[101] a claimant's default while his opponent entered an appearance results in the rejection of the action (272 §§1,2) on substantive grounds, regardless of whether it was potentially well grounded or not. In this case, default of the claimant renders art. 236 inapplicable not only for guidance through questioning is impossible[102], but also because the lawsuit was fictitiously regarded as dropped by the claimant. By contrast, a defendant's default results in the rendition of a judgement for the claimant (art. 271 §3) provided of course that the latter entered an appearance, all procedural prerequisites have been met and the action is legally founded. This is effectuated on the basis of an assumed confession from the defendant's absence with regard to the grounds of the action provided that such a confession is generally permitted[103] . This very case is of interest as to the matter discussed, since the issue that arises is whether the court is required to guide the claimant regardless of the defendant appearing at the trial or being in default. According to art. 236 and legal theory[104] the absence of the defendant does not affect the duty of the court to guide the claimant, since questioning of the claimant does not require the presence of his absent opponent. Said duty is still of relevance in the event the action contains facts that should be clarified or completed by

99. i.e. the claimant (whenever facts of the action are viewed as incomplete) or the defendant (whenever facts of the exception are in a similar way regarded as incomplete).

100. Or in ordinary proceedings through timely filing of pleadings; cf. infra, chapter VII.1.b).

101. Except for matrimonial (art. 595), labor (art. 621 §2) and small claims proceedings up to € 5.000 (art. 469§1) in which special superseding rules apply: if anyone of the parties failed to enter an appearance at the hearing, a judgement is given by the court in the sense that the proceeding was conducted as if all parties were present. In this respect, the appearance of the absent party is fictitious, and the court is obliged to examine the merits of the case [see *Makridou*, Particular Proceedings in CCP after Law 4335/2015 (Ειδικές διαδικασίες στον ΚΠολΔ μετά το Ν. 4335/2015), Athens -Thessaloniki, 2017, pp. 41 et seq. [:*Makridou,* Particular Proceedings, p.]. This differentiated regulation of the default in the above exceptional cases does not affect the scope of application of art. 236. This is so, for the court remains under duty to assess the action and subsequently guide the claimant to complete or clarify the action, regardless of the absence of the defendant.

102. *Makridou*, the vague action[4], pp. 294 and n. 369.

103. *Yessiou-Faltsi,* Civil procedure in Hellas[2], pp. 307-308.

104. *Makridou*, the vague action[4], pp. 292 et seq.

the claimant before the court proceeds with rendition of a judgement for claimant as per art. 271 §3. Once the claimant complies with the court's invitation to clarify the factual points raised by the court, the action will be admissible, and rendition of the judgment for claimant will be possible.

In matrimonial (art. 595), labor (art. 621 §2) and small claims proceedings up to € 5.000 (art. 469 §1) special superseding rules on parties' default[105] apply: if anyone of the parties failed to enter an appearance at the hearing, a judgement is given by the court in the sense that the proceeding was conducted as if all parties were present. In this respect, the appearance of the absent party is fictitious, and the court is obliged to examine the merits of the case. This differentiated regulation of default in the above exceptional cases does not affect the application scope of art. 236, for even then the court remains under duty to assess the action and subsequently guide the claimant to complete or clarify facts presented therein, regardless of the absence of the defendant. In the opposite case, namely when the claimant is in default, the court, although obliged to assess the action, cannot perform the duty for guidance due to the claimant's absence, as no questioning can be made and subsequent clarifications or completions cannot be given to the court.

VI. The scope of judicial duty for guidance in more detail

1. Facts presented by the parties

a) General remarks

The goal of the court's discovery procedure is not to establish objective truth, but to enable the court through evidence, to gain a conviction as to which facts brought forward by the parties are true[106]. In order for evidence pro-

105. *Makridou*, Particular Proceedings, pp. 41 et seq.; *Podimata*, Disputes from family, marriage and free cohabitation - General procedural framework and special remarks on the provisions of new articles 592-613 CCP (as in force after Law 4335/2015)] [Διαφορές από την οικογένεια, τον γάμο και την ελεύθερη συμβίωση – Γενικό διαδικαστικό πλαίσιο και ειδικές παρατηρήσεις στις διατάξεις των νέων άρθρων 592-613 ΚΠολΔ (όπως ισχύουν μετά το ν. 4335/2015)], Chronicle of Private Law (ΧρΙΔ) 2015, p. 641 et seq.; *Babiniotis*, Particular proceedings of property disputes as per the new CCP (Η ειδική διαδικασία των περιουσιακών διαφορών κατά το νέο ΚΠολΔ) Review of Civil Procedure (ΕΠολΔ) 2014, pp. 222 et seq., 227.

106. The maxim "*quod non est in actis, non est mundo*" along with the rule of party pre-

ceedings to be launched, the factual material of the case should be clear, specific, and sufficient. Hence, the objective of judicial duty for guidance is the formation (through clarification or supplementation) of the case's factual material as brought forward by the parties, so that, subsequently, the court is enabled to gain conviction through evidence.

b) Actions and exceptions

All incomplete factual contentions and arguments of the parties that falling within the ambit of the action's minimum content as per art 216 §1[107] or exception as per art. 262 §1[108] are covered by the scope of art. 236. Moreover, since art. 236 refers to "allegations" without providing for any further distinction, defendant's denial of the action, if supported by facts initiated through his or her pleadings, is also subjected to guidance under art. 236[109].

Defects can be attributed to various reasons. Vagueness refers to an action which includes the facts required by law to be presented, although insufficiently or unclearly presented. This is a literally "vague" action which can be corrected, supplemented and clarified on the claimant's motion (224) or after same being guided by the court provided said amendment does not entail an alteration of the cause of the claim (236, 224). On the contrary, an action in which the facts required by law are not presented at all, is a legally unfounded

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sentation (106) apply; Cf. *Yessiou - Faltsi*, Law of Evidence (Δίκαιο Αποδείξεως), 3rd ed., Thessaloniki, 1986, p. 43; The topic of objective as opposed to procedural truth in civil proceedings is recently revisited by *Mantzouranis,* Fundamental Procedural Principles, pp.142 et seq; See also *Delikostopoulos,* The pursuit of truth in civil trial (Η αναζήτηση της αλήθειας στην πολιτική δίκη), Athens -Thessaloniki, 2016, p. 37 et seq.

107. "The action, in addition to the information provided for in art. 118 or 117, must contain a) a clear statement of the facts which, in accordance with the law, justify the action and justify its initiation by the plaintiff against the defendant, b) an accurate description of the object of the dispute, c) a specific relief".

108. "The exception must contain a specific relief and a clear statement of the facts underlying it. The opponent may supplement, clarify or rectify his allegations with an oral statement recorded in the minutes (of the hearing)"; Cf. *Makridou,* A valuable weapon, p. 961 referring to examples of exceptions usually dismissed as vague, instead of being rectified on time; See also *Diamantopoulos,* The Guidance Power of the Judge, p. 690 (f.n. 78 and 79).

109. *Alapantas*, commentary on Thessaloniki One – member Court of Appeal 2096/2018 Hellenic Justice (ΕλλΔνη) 2019. 1100.

action which by no means can be corrected, supplemented or clarified. Vagueness entails defect in the factual basis of the action or the exception[110] initiated before the court. In essence, this means that the court's duty is directed to have vagueness lifted[111]. Since party disposition, party presentation, party prosecution and concentration principles are integral part of CCP, not being superseded by art. 236[112], they apply in parallel with the duty of guidance. Hence, the court's duty is limited to guide the parties to rectify allegations having been timely put forward[113].

The duty for guidance is also directed to any incomplete factual allegation whatsoever, including ambiguities e.g. on the description of a movable or immovable asset that is the object of the dispute. Then the judge may look for adequate clarifications by the parties[114] as to the asset's identity or whereabouts.

Furthermore, it was asserted that inconsistent factual contentions, which lead to inadmissibility[115], may be also subjected to guidance for clarification[116].

110. *Makridou,* A valuable weapon, p. 960; *Diamantopoulos,* The Guidance Power of the Judge, p. 694.

111. Explanatory Report on Law 3994/2011 (under art. 22), op. cit. (f.n. 70); *Makridou*, the vague lawsuit[4], pp. 96 and 102-104; *ead.*, A valuable weapon, p. 958. This thesis is congruent with standard case law of Areios Pagos on the matter; see Areios Pagos 910/2017; 517/2017 NOMOS; 263/2005 Hellenic Justice (ΕλλΔνη) 2006.1345; 300/2002 Hellenic Justice (ΕλλΔνη) 2003. 152; 1374/1994 Hellenic Justice (ΕλλΔνη) 1996.683; 1510/1992 Hellenic Justice (ΕλλΔνη) 1994. 368; See also Thessaloniki Court of Appeal 628/2009 Theory and Practice of Civil Law (ΕφΑΔ) 2009. 828; Athens Court of Appeal 6001/2000 Harmenopoulos (Αρμ) 2001.1093 commentaries by *Makridou*; Thessaloniki Court of Appeal 628/2009 Theory and Practice of Civil Law (ΕφΑΔ) 2009. 828; One - member Court of Appeal 2096/2018 Hellenic Justice (ΕλλΔνη) 2019. 1098 commentaries by *Alapantas*.

112. Supra I.2.a).

113. See infra, referances in f.n. 127.

114. *Diamantopoulos,* The Guidance Power of the Judge, p. 695.

115. *Nikas,* Civil Procedure I[2], §51, nr. 20, pp.652-653; *Diamantopoulos,* The inconsistent conduct, p. 464-469 with references in f.n. 80; *Kolotouros*, Inconsistent procedural conduct, duty of truth, confession and accumulation of various invalidities (legal opinion) (Αντιφατική δικονομική συμπεριφορά, καθήκον αλήθειας, ομολογία με υποφορά και συρροή μορφών δικονομικού ανίσχυρου, γνμδ) Review of Civil Procedure (ΕΠολΔ) 2013.

However, said opinion is challenged by an opposite opinion rather predominant on the matter in Areios Pagos' case law; in the event of multiple inconsistent contentions, the court considers the first in a row and dismisses the rest[117]. Consequently, if the latter solution is followed, there is no room for rectification as per art. 236 since inconsistency is lifted in the latter way.

As already pointed out[118], vague factual allegations can be either supplemented, corrected or clarified voluntarily by the party that initiated them provided said amendments do not entail an alteration of the cause of the claim (224). The judicial duty for guidance comes up supplementarily if the party does not proceed on his own motion with proper supplementation of his contentions[119]. Only then the court is performing the duty for guidance by pointing out through dialogue with the party concerned obvious clerical errors and by expressing reservation as to completeness or clarity of crucial factual allegations put forward. It is about a mere invitation of the court, not an order to the party concerned. The court is restricted to invite the party to make all necessary actions so the facts under discussion to be duly clarified or

187 et seq., 187-191; Athens Court of Appeal 8511/2005 Hellenic Justice (ΕλλΔνη) 2006. 534; Thessaloniki Court of Appeal 447/2002 Harmenopoulos 2002. 1621 commentary by *Ompesi;* Thessaloniki Multi-member First Instance Court 1210/2016 Harmenopoulos 2016.998 = Review of Civil Procedure (ΕΠολΔ) 2017.50 commentary by *Rollis;* Athens Multi-member First Instance Court 3831/2005 Chronicles of Private Law (ΧρΙΔ) 2006.422; Piraeus Multi-member First Instance Court 48/1985 Piraeus Case Law (ΠΝ) 1985.390, 392; Evros Multi-member First Instance Court 122/1978 Hellenic Justice (ΕλλΔνη) 1978.371;

116. *Diamantopoulos,* The inconsistent conduct, p. 468 n. 80; *Nikas,* Civil Procedure I², §51, nr. 20, p. 653.

117. Areios Pagos 439/2013 NOMOS; Areios Pagos 771/2010 Chronicles of Private Law (ΧρΙΔ) 2011. 111 commentary by *P. Yiannopoulos* = Business and Company Law (ΔΕΕ) 2011. 1070; Areios Pagos 160/1969 New Law (ΝΔ) 1970.15; Athens Court of Appeal 7798/1984 Hellenic Justice (ΕλλΔνη) 1985.483; Patras Court of Appeal 726/1986 Achaic Case Law (ΑχΝομ) 1987.461; Thessaloniki Court of Appeal 2856/1990 Harmenopoulos (Αρμ) 1991.59; Samos One-member First Instance Court 178/2012 Business and Company Law (ΔΕΕ) 2012. 939 = Harmenopoulos (Αρμ) 2013. 68; *Margaritis/Margariti*, CCP I², art. 116, nr. 14, p. 227.

118. Supra chapter VI.1.b).

119. Supra chapter IV.2.a).

completed[120]. To this end, the desirable balance between party's unlimited control over the case and his responsibility to present his pleas truthfully and completely is fulfilled only if the court involves more actively in the litigation process[121]. Moreover, said duty is not limitless but obliges the judge to focus on allegations that have been already put forward by the party concerned, since the court cannot be transformed into legal consultant of the party concerned[122]. Subsequently, it is up to the party concerned to assess his legal position and subsequently determine whether he should follow said recommendation or not[123]. Hence, a limited judicial active involvement within the scope of art. 236 aims at fulfilling the desired purposes of art. 236, without affecting the core of the fundamental principles[124]. In this regard, the legislator expressly considered that *"the duty for guidance has supplementary function to the party presentation, by establishing appropriate conditions for the proper application thereof"*[125].

The duty for guidance aims, inter alia, at the necessary clarifications in order for the judge to verify the truth of the presented allegations. It remains to be seen whether judicial clarification is necessary once the opposing party has drawn attention to an allegation vaguely articulated. In practice, usually lawyers objecting to a claim on the ground of vagueness without specifying which allegation needs to be clarified. In these cases, should the court find that the point raised by the opponent exists indeed, it remains under duty to guide the party concerned to clarify the matter. Same applies if a crucial vague allegation of a

120. *Nikas,* Civil Procedure I[2], §42, nr. 22, p. 581; *Podimata,* Judicial Duty for Guidance, p. 21; *Makridou*, A valuable weapon, p. 958; *Diamantopoulos*, The Guidance Power of the Judge, p. 698.

121. Explanatory Report (under art. 22), op. cit. (f.n. 70).

122. Infra (f.n. 128).

123. *Makridou,* the vague lawsuit[4], p. 273; *ead.*, A valuable weapon, p. 955; *Podimata,* Judicial Duty for Guidance, p. 21; *Asimakopoulou,* The modern approach of party presentation principle, p. 32.

124. *Diamantopoulos*, The Guidance Power of the Judge, pp. 682; Cf. *Asimakopoulou,* The modern approach of party presentation principle, p. 32: the duty for guidance signifies neither departing from party presentation principle nor approaching inquisition principle.

125. Explanatory Report (under art. 22), op. cit. (f.n. 70); *Rigas,* The Guidance Function of the Court, p. 1795.

party is clarified or supplemented by the opponent through his own allegations. According to the rather predominant opinion vagueness of the action cannot be lifted by the allegations put forward by the opponent[126]. As a result, duty of guidance remains necessary, so that clarifications are made by the party concerned, being indifferent to the court his opponent clarified same facts.

c) Suggesting new allegations?

The legislator is quite clear on this issue by stating that *"on the basis of the wording* (of the then newly introduced addition to art. 236) *it is clear that supplementation permitted under Article 236 concerns… a factual allegation that, however, has been put forward*"[127]. Hence, the amendment of art. 236 was not intended to amend the rule that the court may not introduce new claims, defences or reliefs that are not presented or at least hinted at in the pleadings. Law 3994/2011 did not amend the fundamental principles of civil procedure and, hence, it is still up to the parties to present all relevant facts to the court. Art. 236 merely provides for a co-responsibility of the parties and the court with the aim at accelerating the proceedings and saving judicial labor, by avoiding dismissal on procedural grounds (e.g. vagueness). The duty

126. Areios Pagos 457/1989 Δ (Dike) 1990.180 commentary by *Beys*; *Calavros*, Civil Procedure[4] pp. 155-162; *Nikas,* Civil Procedure I[2], §42 nr. 12, p. 575; *Makridou,* the vague lawsuit[4], pp. 239. Contra- *Beys,* commentary on Areios Pagos 457/1989 Δ (Dike) 1990.180; *Kousoulis,* Factual allegations in civil proceedings (Οι πραγματικοί ισχυρισμοί στην πολιτική δίκη) Athens-Thessaloniki 2003, pp. 15 et seq., 21; *Anthimos,* The alteration of the basis of the action in civil proceedings (Η μεταβολή της βάσης της αγωγής στην πολιτική δίκη), Athens-Thessaloniki, 2012, p. 126-137 [*Anthimos,* The alteration of the basis of the action, *p.*]

127. Explanatory Report of Law 3994/2011 (under art. 22), op. cit. (f.n. 70). Said consideration reflects the dominant opinion of legal theory: *Nikas,* Civil Procedure I[2], § 42, n. 22, pp. 582,584; *Makridou,* A valuable weapon, p. 958; *ead.*, Ordinary proceedings before first instance courts (Τακτική διαδικασία στα πρωτοβάθμια δικαστήρια), art. 208-320 CCP, Athens - Thessaloniki 2019, art. 236, nr. 5, p. 115 [: *Makridou*, Ordinary proceedings, art. nr. p.]; *ead.*, the vague lawsuit[4], pp. 264-265; *Podimata*, Judicial Duty for Guidance, p. 21; *Rigas*, The Guidance Function of the Court, p. 1797; *Apalagaki,* the right to be heard in civil trial (το δικαίωμα ακροάσεως των διαδίκων στην πολιτική δίκη), Thessaloniki 1989, p. 136 [: *Apalagaki,* the right to be heard in civil trial, p.]; *Diamantopoulos,* The Guidance Power of the Judge, p. 698; *Anthimos,* The alteration of the basis of the action, p. 201; *Apostolakis,* The Guidance intervention of the Judge, p. 109. Dissenting *Mitsopoulos,* The Court's Duty to Guide the Parties, p. 762.

for guidance does not serve to fill in gaps in the party's presentation or to consult a party to make further presentations[128].

As a consequence, it is beyond the court's duty to imply (neither directly nor by asking questions), let alone invite the party to initiate a new factual basis of the action[129] or relief not previously sought or exception not previously presented[130]. Likewise, the court may not invite a party to amend the existing factual basis beyond the scope of art. 224 or rectify a legally groundless action by introducing facts not previously brought forward; or amend petition beyond the limits of art. 223. From a technical perspective, by doing so the court does not put forward itself the relevant new factual material (facts, exceptions) or reliefs, thus not violating the principles of party presentation, party disposition and parties' motion per se. Nevertheless, such judicial activism is illegitimate as directly contrary to judicial neutrality. It further constitutes discriminatory treatment violating the principle of equality of arms[131].

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128. *Nikas* put it emphatically: *"This duty must be handled with care. Neither must the court transform itself into a protagonist of the proceedings nor must it converted into consultant of the parties (the latter responsibility still lies with the lawyers);* See Civil Procedure I², §42, nr. 22, p. 582 (f.n. 35). See also Apalagaki (-*Triantafilides*), CCP I⁶, art. 236, nr. 2, p. 774; *Asimakopoulou,* The modern approach of party presentation principle, p. 34. Case law clarifying the above scope of judicial duty as per. art. 236; Areios Pagos 127/2016 ΝΟΜΟΣ; Areios Pagos 1323/2010 ΝΟΜΟΣ; Thessaloniki Court of Appeal 628/2009 Theory and Practice of Civil Law (ΕφΑΔ) 2009.828; Athens Multi-member First Instance Court 1247/2010 ΝΟΜΟΣ; Athens One-member First Instance Court 3863/2014 ΝΟΜΟΣ.

129. Said rule of Greek law is more strict than the one of ALI/UNIDROIT principle 22.2.1 of the UNIDROIT Principles "The court may ... permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly". Compering to the ELI/UNIDROIT rules Greek law is identical with rule 24.2 ("The court must not consider facts not introduced by the parties"), however attention should be also drawn to rule 53(3) of ELI/UNIDROIT "If a claimant does not fully comply with the requirements of Rule 53(2) [i.e. on the minimum content thereof], the court must invite the claimant to amend the statement of claim". To the extent that said amendment may encompass facts not previously put forward by the claimant, the latter rule provides with broader scope of amendment than the one provided for in Greek law (art. 236 and 224).

130. Supra (f.n. 127).

131. Explanatory Report (under art. 22), op. cit. (f.n. 70); *Nikas,* Civil Procedure I², §42, nr. 22, p. 584-585; *Podimata,* Judicial Duty for Guidance, p. 21; *Diamantopoulos,* The Guidance

2. Petitions

Under art. 236 the judge must take care that the persons taking part at the hearing "submit the necessary pleadings and petitions" and that "supplement vague or imperfect submitted allegations". Following said wording, if strictly construed, the court's duty covers only submission of necessary petitions since supplementation or clarification of relief is restricted to allegations. However, pursuant to art. 223 "When lis pendens is established, amendment changing the relief sought is inadmissible. Exceptionally, through his pleadings or a statement in the minutes by the conclusion of the proceedings in first instance, the claimant may limit the relief or request: 1) the ancillary claims of the main object of the action and 2) instead of what was initially requested, another object or the difference due to a change that occurred".

As pointed out, a basic aim of judicial duty for guidance as laid down in art. 236 is to promote acceleration of the proceedings and the saving of judicial labor. Since dismissal of the action due to vagueness of the relief is always a contingency, the above aim is fulfilled when reliefs are also included in judicial duty. Hence, it is accepted that the court, may also invite the claimant to clarify the relief of the action, e.g. in case there is lack of clarity in the amount sought or in case of joinder of defendants, the person from whom a certain amount is sought, is unclear[132]; said clarification should be made provided that the party being invited does not exceed the restrictions of art. 223. Same applies with the defendant's reliefs, especially if the defendant, having initiated an exception, sought an unclear relief[133].

Moreover, when a court is called to assess more than one inconsistent reliefs in the same action, it may order the procedural separation and a separate hearing for each one of them (art. 218 § 2)[134]. However, in order to avoid de-

Power of the Judge, p. 698; Apalagaki (-*Triantafilides*), CCP I[6], art. 236, nr. 3, p. 775; Areios Pagos 127/2016 NOMOS; Athens Court of Appeal 6001/2000 Dike (Δ) 2001. 449 commentary by *Beys* = Harmenopoulos (Αρμ) 2001. 193 with commentary by *Makridou*; *Alapantas,* commentary on Thessaloniki One – member Court of Appeal 2096/2018 Hellenic Justice (ΕλλΔνη) 2019. 1100; *Rigas,* The Guidance Function of the Court, pp. 1796-1797.

132. *Makridou,* A valuable weapon, pp. 960-961.

133. *Diamantopoulos,* The Guidance Power of the Judge, pp. 695, 696.

134. *Mitsopoulos,* The Court's Duty to Guide the Parties, p. 762; *Makridou*, Factual allegations

lay resulting from said separation, the court, instead of separating reliefs, may invite the party to drop one of the inconsistent reliefs[135] and proceed with judgment on the basis of the remaining one.

3. Evidence and legal allegations?

Pursuant to art. 107 the court may order *ex officio* taking of evidence by any appropriate means of evidence, even if not presented and invoked by the parties. However, this rule is restricted on tangible or direct evidence (355, 356) expert report (368, 384, 388) examination of parties (416). The above rule excludes inviting the parties to propose witnesses or ordering the production of other documents not being submitted and invoked by the parties. However, the court may (not being obliged to) proceed with said *ex officio* taking of evidence, while even then it is restricted only to factual allegations having already been presented by the parties. This means that art. 107 does not introduce the inquisition principal but a certain mitigation of the party presentation rule to the extent the court is granted the above powers and discretions in spite of the parties' initiative on evidence[136]. Consequently, inviting the parties to submit evidence would be inconsistent with the above rules. Presumably, that is the reason why the legislator did not include evidence in the ambit of art. 236.

The maxims *iura novit curia* and *da mihi factum dabo tibi ius* apply in Greek civil proceedings. In this respect, legal contentions, or arguments (legal basis) are neither required to be brought forward for the subject matter of the proceedings to be disposed nor for an action or exception to be complete[137]. As a result, legal arguments, even if being unclear, ambiguous, or inconsistent, do not cause vagueness of the action or exception. In fact, the legislator cleared

and Fundamental Procedural Systems (Πραγματικοί ισχυρισμοί και θεμελιώδη δικονομικά συστήματα), Hellenic Justice (ΕλλΔνη) 2008. 321 et seq; *Nikas,* Civil Procedure I² ,§ 42, nr. 22, p. 582; *Podimata,* Judicial Duty for Guidance, p. 20.

135. *Diamantopoulos,* The Guidance Power of the Judge, p. 694-695.

136. *Nikas,* Civil Procedure I² §42, nr. 14-15, pp. 576-577; Kerameus/Kondylis/Nikas (-*Orfanides*), CCP I, art. 107, n.1.

137. *Yessiou-Faltsi*, Civil Procedure in Hellas², p. 215; *Kerameus,* Civil Procedural law (Αστικό Δικονομικό Δίκαιο), Athens-Thessaloniki, 1986, pp. 153-154; *Nikas,* Civil Procedure I² §42, nr. 4-6, pp. 572-573.

out that only factual allegations falling within the scope of art. 236[138] thus implying that legal arguments are excluded. However, this does not exclude the parties on their own motion or following relevant invitation of the court upon its discretion to supplement, clarify or amend legal assertions anytime since the latter are regarded as "privileged" ones escaping the rule of concentration, provided though they are not construed in a sense that imply prohibited amendment of factual basis of the action.

VII. Judicial power for guidance through dialogue

1. Is orality a prerequisite for applying the rule?

a) The legislator's view: Guidance through dialogue with the parties

Art. 236, as in force prior to Law 3994/2011, provided that the court "must take care, by means of questioning or by other means…" to perform the requisite obligations falling with the scope of the above provision. The 2011 amendment did not change this basic parameter, since the legislator considered expressly that *"following amendment of art. 236 rectification of vagueness is possible and correct to be made only at the oral hearing of the case. (…) For reasons of economy and acceleration of the trial, it is also provided that the completions and clarifications, which until now were admissibly attempted only through pleadings, are now considered admissible even through an oral statement of the party at the hearing recorded in in the minutes."*[139]

Following the above, it is clear that the co-responsibility of the parties and the court to fulfill the aims of the law can be materialized through a discussion of the matters in dispute between them through questioning, which can only take place in an oral hearing. Oral hearing constitutes a procedural stage during which said discussion should be officially recorded in the minutes as a means of legal certainty and fairness[140], so that both the opponent's defence against the court's alleged illegitimate initiative to guide the party and/or the

138. Explanatory report (under art. 22), op. cit. (f.n. 70): *"the permissible supplements or clarifications concern a factual allegation"*.

139. Explanatory Report (under Art.22), op. cit. (f.n. 70).

140. *Rigas*, The Guidance Function of the Court, p. 1795.

party's right for appeal due to judicial failure to guide the party are equally safeguarded.

However, such a hearing requires an adequate preparation by the moderating judge which entails taking cognizance of the facts constituting the subject matter of the trial at a time prior to the hearing[141]. The question is whether performance of the duty for guidance and relevant preparation of the hearing by the moderating judge is feasible after the comprehensive reform of 2015 by virtue of Law 4335/2015 which set aside oral hearing in ordinary proceedings and retained very short schedule for closing of the file in particular proceedings.

b) Orality "under persecution": The 2015 comprehensive reform of civil procedure

In the summer of 2015, a new law on civil procedure was enacted (Law 4335/2015) which brought about extensive amendments in the entire structure of civil proceedings. The legislator's approach is clearly against orality: *"The hearing is treated … as empty but also an aggravating formality. If this is the case, then the distance to a trial based, as a matter of principle, on the written procedure is not long. […] As a rule, however, the written procedure also involves the taking of written evidence." … [The Law] is prioritizing the written procedure and the reservation of the possibility [of the court] to opt for the oral hearing and the taking of evidence thereat at a later stage of the trial taking into account the results of the trial so far"*[142].

As far as ordinary proceedings are concerned a new model of trial was adopted exclusively based on the written pleadings of the parties. Prof. *Tsantinis* elaborated in detail the timetable of parties' submissions as set out by the law since January 1, 2016[143]. At the same time, it is provided that the hearing

141. Cf. *Apalagaki,* The right to be heard in civil trial, p. 136-137: As long as a pre-trial preparation of the case is not provided, absence of co-operation between the parties and the court will be anticipated and reasonable.

142. Explanatory Report of Law 4335/2015 (under art. 1) chapter B. III.5.5 and 8, op. cit. (f.n. 27).

143. See in this volume, Case Management in the Modern Civil Procedure - International trends and the Greek Model, chapter VI.2.

may take place even without the physical presence of the parties and their lawyers (art. 237 §4), thus rendering physical appearance of the parties at the hearing not compulsory. The court is expected to issue a judgement exclusively based on the written contents of the case file. Only by way of exception is the court allowed to order an oral hearing, although limited to the examination of witnesses, one for each of the parties, being chosen amongst the affiants of the already submitted written sworn affidavits (237 §6 CCP)[144]. Moreover, it has been ruled individually[145] though that the court may order accordingly said exceptional oral hearing with a view to receiving clarifications by the litigant parties themselves on specific unclear issues of the dispute at hand[146].

Contrariwise, oral hearing was maintained in the remaining first instance civil proceedings (art. 115 §2) (i.e. particular proceedings, small claim up to 5.000 euros proceedings, interim measures, non-contentious ("voluntary") jurisdiction proceedings, opposition to enforcement proceedings) and in appellate proceedings of any kind (including ordinary proceedings) provided that the appellant was tried in default in the first instance (524 §2).

Even though orality was not abandoned in all civil proceedings, the abolishment of mandatory oral hearing in ordinary proceedings was not only a major technical but also a significant cultural change[147] which had numerous impacts on various peripheral issues like the one of adjustment of art. 236 in the new proceedings. This issue will be discussed below.

144. *Yessiou-Faltsi*, Civil Procedure in Hellas[2], p. 269-270.

145. Kalamata Multi-member First Instance Court 51/2016, Review of Civil Procedure (ΕΠολΔ) 2017, p. 186 with commentaries by *P. Yiannopoulos*.

146. This discretion of the court is also provided in art. 245 which is still applicable in ordinary proceedings.

147. *Tsantinis*, Case Management in the Modern Civil Procedure –International trends and the Greek Model, para. VI.3.1. on the decline of orality. Pursuant to *Mantzouranis* (Fundamental Procedural Principles, pp.107 et seq.,110), by setting aside oral hearing, as a rule, the law (art. 237) may be contrary to right of fair trial following case law of ECHR.

2. Revisiting the duty for guidance in the light of Law 4335/2015

a) Scope of application in first Instance proceedings

(a) Ordinary proceedings

Despite the extensive amendment brought about by virtue of Law 4335/2015, not only was art. 236 left unamended, but also it was not adjusted to the new procedural reality arising from said extensive reform. In fact, abolishment of mandatory oral hearing in ordinary proceedings renders performance by the court of its duty for guidance virtually impossible[148]. It has been advocated that, even during the "fictitious" hearing the parties are still entitled either voluntarily as per art. 224 or upon invitation of the court as per art. 236 to complete their allegations through oral statement in the minutes of that hearing[149], under the condition that the opponent's right of defence is safeguarded[150]. The latter prerequisite is difficult to be met, not only because appearance of all parties, not being mandatory, is random, but also because there is no procedural stand available to the opponent to defend against the completion or amendment attempted at the hearing by the party concerned. This is so, because the case file is closed already before the hearing and there is no provision for submitting new addenda thereafter[151]. Alternatively, it was also supported that, should the court find out after completion of the "fictitious" hearing that clarification or completion is necessary, it may well establish an oral resumed hearing as per art. 254 by ordering appearance of the parties; Again though there is no provision for submission of addendum after the hearing. Hence, if a resumed hearing is ordered, the court should make sure that the opponent is not taken by surprise and is entitled to defence through written addendum to be filed after the hearing. In order for this solution to be materialized, art. 237 §7 must apply accordingly[152].

148. *Margaritis/Margariti*, CCP I[2], art. 236, nr. 6, p. 415

149. *Makridou,* Ordinary proceedings, art. 236, nr. 5, p. 115; *Apostolakis,* The Guidance intervention of the Judge, p. 110.

150. *Nikas,* Civil Procedure I[2], §42, nr. 24, p. 585.

151. *Katiforis*, Powers of the Judge, pp. 132-133.

152. *Katiforis*, Powers of the Judge, p. 133; art. 237 §7 referring to a resumed hearing ordered

Following the above analysis, it is obvious that ordinary proceedings as currently regulated have no room for the court to apply art. 236, since such application would constrict the right of defence or cause delay in adjudicating the action.

In view of this new reality, which practically leaves no room for the court's performing the duty for guidance in ordinary proceedings, the question which arises is whether the legislator, although not expressly excluding art. 236 from ordinary proceedings, downgraded judicial case management tacitly by attempting to accomplish inherent legislative aims of art. 236 otherwise.

Indeed, a reasonable answer to the latter question is given by the legislator of Law 4335/2015[153] whose considerations on judicial case management are blunt: *"The Advisory Committee has moved within the context of what was considered feasible from a procedural point of view in the light of the legal conditions prevailing in the country. It was held that the conditions for recognizing to the court a significantly active role in the trial – as this role is found in in many foreign jurisdictions consisted in an obligation for guiding the parties following a legal dialogue between them (…) - is not met. This issue is crucial in many respects, including the elimination of the unpleasant phenomenon of rejecting many actions as vague or legally unfounded, which entails consequences for the workload of the courts as well as for the administration of justice in general…"*

Likewise, *Tsantinis* looks for a comprehensive answer in his paper published also in this volume[154]. The whole idea of the new Greek ordinary proceedings is based on a *workflow system* with timelines and delays pre-fixed by the law. This is essentially a regulation referring to case management primarily and almost exclusively defined by the law, so that one could speak of "law-guided" or "pre-pack" case management[155]. Hence, the comprehen-

by the court for witness examination reads: "The parties are then allowed within eight (8) days after the examination of these witnesses to proceed, through an addendum, to the evaluation of this evidentiary proceeding. Nevertheless, eventual further allegations of the parties or new means of evidence may not be taken into consideration".

153. See Explanatory Report of Law 4335/2015 (under art. 1) chapter B. III.5.6 op. cit. (f.n. 27).

154. See (in this volume) Case Management in the Modern Civil Procedure – International trends and the Greek Model, chapters VI.2, VI.3.

155. *"thus, admittedly, not meriting the label "judicial""* according to *Tsantinis*.

sive reform of 2015 resulted in the virtual elimination of the court's role[156] in managing ordinary proceedings. The above legislative option is not surprising if we take into consideration how irresponsibly the parties exercised their control over proceedings in the past and how the courts viewed in practice their duty (not) to intervene. Indeed, even before 2015 co-responsibility of the judges and the parties to accelerate proceedings and to save judicial labor was an illusion[157]. On one hand the parties in most of the cases were exploiting ways of prolonging the trial especially by requesting postponement of the hearing for cause (241)[158]. On the other hand, the judges had practically given up any attempt to actively intervene in the content of the trial, while to cure a vague lawsuit by means of judicial intervention has proven to be wishful thinking for the Greek civil procedure[159]. Consequently, although the CCP does not theoretically deprive the parties and the judge of any possibility to actively manage the litigation (by choosing not to exclude expressly art. 236 from ordinary proceedings), nevertheless, in practice it left said possibility aside (by choosing "law-guided" or "pre-pack" case management).

(b) Other proceedings

Since as per art. 236 oral hearing is a prerequisite for the necessary questioning of the parties by the court, the rule continued to be applicable in proceed-

156. The remaining freedom for the judge, e.g. to reschedule the delays for the submission of the written pleadings (art. 148), to order a witness examination (art. 237 para. 6) or the personal appearance of the parties (art. 245 §1) or an examination of the parties as a means of proof (art. 415 et seq.) has been used rarely since 2015. In the notion of case management in a wider sense, following discretions of the court are to be mentioned: the discretion of the court to order the stayings of the procedure in order to wait for the outcome of another pending litigation or a penal procedure connected to the civil litigation (art. 249 and 250); the discretion of the court to order (on its own motion) the joinder of more pending claims (Art. 246) or the opposite, to order the separation of jointed claims (art. 247): *Tsantinis,* Case Management in the Modern Civil Procedure –International trends and the Greek Model, para. VI.2.

157. This is implied by the legislator of Law 4335 as already mentioned.

158. Said discretion of the court was abolished in ordinary proceedings by virtue of Law 4335/2015.

159. Supra, chapter II and f.n. 42.

ings in which oral hearing survived[160], especially the trials of particular proceedings and non-contentious ("voluntary") jurisdiction (art. 739 et seq)[161]. In said trials the schedule provided by art. 591[162] is as follows:

(i) Once the lawsuit is filed with the secretariat of the court before which it is brought, the court fixes the date of hearing not earlier than 30 days (or 60 days if the defendant resides or is domiciled abroad), so that the claimant has sufficient time to serve the action upon the defendant.

(ii) At the date of hearing the parties are obliged to appear and submit their written pleadings (591 §1 γ)[163]. Along with pleadings the parties produce all available evidence and suggest, if they wish so, that a witness is examined. In parallel, the parties can introduce and refer to up to five sworn affidavits executed before a magistrate judge ("a Judge of

160. *Nikas,* Civil Procedure I[2], § 42, nr. 24, p. 585; *Alapantas,* commentary on Thessaloniki one-member Court of Appeal 2096/2018 Hellenic Justice (ΕλλΔνη) 2019. 1100; Contrariwise, *Makridou* (Ordinary proceedings art. 236, n. 5, p. 115) considers art. 236 still applicable in ordinary proceedings, despite abolishment of mandatory orality by Law 4335/2015. However, in interim measures proceedings art. 236 cannot be applied since, as a rule, no minutes are kept (690 §2), thus recording of statements of clarifications or corrections of the parties cannot be made. In small claims up to 5.000 euros proceedings the parties are not obliged to submit written pleadings (115 §3). Hence, art. 236 can be applied in an oral hearing unless the court finds it necessary for the parties to file pleadings and addenda so that the right of defence is adequately safeguarded.

161. In non-contentious proceedings in which the inquisition principle applies (744), the duty for guidance extends even to suggesting new facts and relevant allegations that the parties have not previously presented: *Makridou*, the vague lawsuit[4], pp. 298 et seq., 303-304; *Diamantopoulos,* Commentary on Athens Court of Appeal 6322/1995 Hellenic Justice (ΕλλΔνη) 1998. 613; *Apostolakis*, The Guidance intervention of the Judge, p. 109.

162. Although not expressly provided, same schedule applies in non-contentious ("voluntary") jurisdiction trial; cf. *Hadjioannou*, Proceedings of bankruptcy and provisional measures on the bankrupt estate (Η δίκη της πτώχευσης και των προληπτικών μέτρων της), Athens-Thessaloniki, 2016, p.162.

163. Before the 2015 reform in particular proceedings filing of written pleadings was not compulsory and the parties were obliged to present their factual allegations orally. After the 2015 reform the parties are obliged to file written pleadings at the date of the hearing (115§3, 591 §1 γ). Said amendment facilitated voluntary clarification or completion of the action as per art. 224: *Makridou*, Ordinary proceedings, art. 236, nr. 5, p. 115; *ead*., Particular Proceedings, p.37-38.

Peace" ειρηνοδίκη) or a Notary Public or another Attorney. As a rule, no evidence can be admissibly produced or introduced at a later stage.

(iii) At the oral hearing the claimant may proceed with clarification or completion of the action as per art. 224 or limitation of the relief sought as per art. 223[164]. On the other hand, the hearing is of paramount importance for the defendant since this is the only stage at which he can raise exceptions or any ground for defence against the action. Apart from the pleadings to be filed, same allegations of the defendant must be put forward orally to be recorded in the minutes (591 §1 δ CCP).

(iv) By 12 noon of the third working day as from the hearing date the parties are obliged to submit addenda in which they are allowed to clarify (on their own motion) minor issues or to rebut allegations of the opponent raised at the hearing and contained in the written pleadings already filed (591 §1 στ). Then case file is closed.

A single session is sufficient for the trial to be concluded. At this single hearing the court[165] should perform the duty for guidance on vague points of the action, while said duty is supplemented by a provision (591 §3) empowering the judge to interrogate the parties (415) and request that they provide the court with all necessary information and clarification[166].

As workflow schedule of particular proceedings is scheduled, there is some room for the court to invite the claimant not having clarified the action on his own motion to do so through oral statement as provided for in art. 236. If the latter occurs, the opponent's right to defence is intact, for he is entitled to defend against such amendment and/or challenge the court's initiative to guide the claimant by submitting an addendum.

However, the above tight workflow schedule leaves no room for the court to perform its duty for guidance as to allegations of the defendant, since, unless

164. *Makridou,* Particular Proceedings, pp.38-39.

165. A copy of the action is handed over by the Secretariat prior to the hearing, so that the necessary preparation of the hearing is made; However, this is not a pre-trial stage offering enough time for a proper preparation of the questioning of the judge; Supra, chapter VII.1.a).

166. Cf. supra, art. 245 in chapter V.3.

missing points can be discovered at the hearing and clarified on the spot, there is no time neither for the court to assess their clarity and consistency and subsequently to question the defendant nor for the defendant to reflect on necessary amendment of his pleadings[167].

If same amendment is attempted through addendum, it is inadmissible, for apart from being contrary to the rule of concentration[168], it cannot be contested by the claimant[169]. As a result, the only way out for the court is to order a resumed hearing (254), in which the court will perform its duty[170]. As already pointed out, unlike the provision of art. 254 before the 2015 reform, which had provided for the parties to file addenda after the resumed hearing, the current provision does not provide for such filing, thus suspending the right of defence. Therefore, when ordering a resumed hearing as per the above provision, the court should apply accordingly art. 591 §1 στ providing for the parties' submission of addenda after the hearing, in order to make sure that the right of defence is duly fulfilled.

b) Scope of application in appellate proceedings

(a) Preliminary remarks

It has been pointed out that first instance proceedings are the natural environment for the duty of guidance to be performed[171]. Nevertheless, art. 236 does not

167. Cf. *Makridou,* A valuable weapon, p. 961; *Diamantopoulos,* The Guidance Power of the Judge, p. 697; *Podimata,* Judicial Duty for Guidance, pp. 22-23.

168. *Makridou*, Particular Proceedings, p. 39.

169. The court file is closed and there is no counter-addenda provided; See point (d) of the above workflow schedule.

170. Explanatory Report (under art.22) op. cit. (f.n. 70); *Makridou,* Ordinary proceedings, art. 236, n. 5, p. 115; *Makridou,* A valuable weapon, p. 960; *ead.,* commentary on Athens Court of Appeal 6001/2000 Harmenopoulos (Αρμ) 2001. 1095; *Nikas,* Civil Procedure I², §42, nr. 24, p. 585; *Anthimos,* The alteration of the basis of the action, p. 205; *Alapantas,* commentary on Thessaloniki one-member Court of Appeal 2096/2018 Hellenic Justice (ΕλλΔνη) 2019. 1100; *Apostolakis*, The Guidance intervention of the Judge, p. 110; Athens' Court of Appeals 5700/1999 Legal Tribune (NoB) 2000. 281; Piraeus' Court of Appeals judgment 900/1994 Hellenic Justice (ΕλλΔνη) 1995. 430.

171. *Makridou,* A valuable weapon, p. 958; *Diamantopoulos,* The Guidance Power of the Judge, p. 692.

provide any distinction of proceedings in which said duty should be performed. The only tacit criterion seems to be that an oral hearing is held so that the moderating judge can question the parties and invite them to clarify or complete vague or unclear points through oral statement duly recorded at the minutes.

Moreover, the duty for guidance is not restricted to a trial with purely factual subject matter, since a need for clarification or completion of allegations may emerge even in relation with a ground for appeal or cassation under the distinctions specified below.

(b) Guidance over incomplete or ambiguous ground(s) of appeal

Art. 236 is included amongst the rules of first instance trial that are applied accordingly in the appellate proceedings (art. 524 §1)[172]. However, this rule should be interpreted in the light of the overall function of the appeal trial and be cautiously applied. A rather easy case relates with the party's appeal in which the court found a ground as incompletely of ambiguously articulated. Then, on the basis of art. 236 the court may invite the appellant to clarify or supplement said ground[173].

(c) Guidance over appeal attacking a default judgment

If the first instance court renders a default judgement and the party who failed to appear at the proceeding appeals the default judgment, then oral hearing is compulsory (CCP 524 § 2, 528) and the court of appeal is rehearing the case, thus in essence operating as a first instance court. The appellant may put forward all contentions he would have invoked, should he had appeared in the first instance proceedings. Since the court of appeal conducts an oral hearing, art. 236 CCP is applicable without impediments[174].

(d) Guidance over appeal for violation of art. 236

A court's neglect to perform duty for guidance entitles the party concerned to appeal the above judgment[175] on the ground that the court erroneously

172. Apalagaki (-*Triantafilides*), CCP I[6], art. 236, nr. 4, p. 775.

173. *Diamantopoulos*, The Guidance Power of the Judge, p. 692; *Rigas*, The Guidance Function of the Court, p. 1796.

174. Cf. *Diamantopoulos,* The Guidance Power of the Judge, p. 692;

175. *Mitsopoulos,* The Court's Duty to Guide the Parties, p.764; *Nikas,* Civil Procedure I[2], § 42,

rejected the requisite action or exception, instead of inviting the appellant to rectify it[176].

In the event the first instance court failed to guide the claimant, thus his action being dismissed as vague, the claimant may attack said judgment by bringing forward an appeal ground for alleged breach of first instance court's duty for guidance[177]. By doing so, the appellant must proceed with all necessary completions already through his appeal statement[178]. The appellate court

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nr. 22, pp. 583-584; *Makridou,* A valuable weapon, p. 961-962; *ead*., Ordinary Proceedings, art. 236, nr. 6, p. 116; *Diamantopoulos,* The Guidance Power of the Judge, pp. 699; *Asimakopoulou,* The modern approach of party presentation principle, pp. 34-35; Areios Pagos 1892/2006 Chronicles of Private Law (ΧρΙΔ) 2007.338 commentaries by *Katiforis*; Piraeus Court of Appeal 1439/1990 Legal Tribune (NoB) 1991. 418; Thessaloniki One-member Court of Appeal 2096/2018 Hellenic Justice (Ελλδνη) 2019. 1098 commentaries by *Alapantas*. By contrast, breach of art. 236 does not provide the party concerned with legal ground for cassation; See Areios Pagos 1892/2006 Chronicles of Private Law (ΧρΙΔ) 2007.338; *Mitsopoulos,* The Court's Duty to Guide the Parties, p. 764 (f.n. 32); *Nikas,* Civil Procedure I[2], §42, nr. 22, p. 583-584; *Makridou,* The vague lawsuit[4], p. 280; *ead*., A valuable weapon, p. 962; *ead*., Ordinary proceedings, art. 236, nr. 6 p. 116; *Podimata,* Judicial Duty for Guidance, p. 24 (f.n. 122); *Diamantopoulos,* The Guidance Power of the Judge, pp. 700-701; *Margaritis/Margariti*, CCP I[2], art. 236, nr. 2, p. 415; *Alapantas,* commentary on Thessaloniki One - member Court of Appeal 2096/2018 Hellenic Justice (Ελλδνη) 2019, p. 1100; Contra- *Beys,* Civil Procedure, 1973, art. 106, p. 548; Apalagaki (-*Triantafilides*), CCP I[6], art. 236, nr. 3, p. 775; *Karakitsos,* Is the amendment of Art. 236 CCP a legal wish or a legal rule? (Δικαϊκή ευχή ή δικαϊκή ρύθμιση η τροποποίηση του άρθρου 236 ΚΠολΔ), Harmenopoulos (Αρμ) 2012, pp. 1829 et seq., 1834; *Apostolakis,* The Guidance intervention of the Judge, p. 113.

176. Supreme Court 1892/2006, Chronicles of Private Law (ΧρΙΔ) 2007. 338; *Mitsopoulos,* The Court's Duty to Guide the Parties, p. 764; *Nikas,* Civil Procedure I[2], § 42, nr. 22, f.n. 42, p. 583; *Makridou,* The vague lawsuit[4], p. 278; *ead.,* A valuable weapon, p. 961-962; *ead.,* Ordinary proceedings, art. 236, n. 6, p.116; *Stamatopoulos*, The cost-efficiency principle in civil proceedings (Η αρχή της οικονομίας τη δίκης), Athens- Komotini 2003, p. 387.

177. To this end, after the 2011 amendment it was argued that the first instance court rejecting an action as vague is under an implied duty to provide reasoning why it did not perform the duty for guidance or in case it performed it why refused to accept the clarifications presented by the party; See *Makridou*, A valuable weapon, p. 959; *Asimakopoulou,* The modern approach of party presentation principle, p. 33; *Apostolakis,* The Guidance intervention of the Judge, p. 110.

178. *Nikas,* Civil Procedure I[2], §42, nr. 24, p. 584 (f.n. 42).

will examine the admissibility and, subsequently, the substantiation of the appeal and the grounds thereof (533 §1). If any of the grounds is found substantiated, the attacked judgment will be reversed and the appellate court will proceed with the case and determine it on the merits (535 §1)[179] thus substituting the first instance court within the scope set out by the devolutive effect of the appeal (522)[180].

However, there have been opposing opinions on whether the appellate court is under duty to apply art. 236 when determining the case on the merits. First, it was advocated that the claimant's (i.e. appellant's) right to rectify vague allegations is in principle limited in first instance proceedings[181] by virtue of the principle of concentration. As a vague action cannot be rectified by the claimant on his own motion after the conclusion of first instance hearing (224)[182], likewise such a rectification cannot take place by same party following guidance of the appellate court[183]. Consequently, the appellant, not being entitled to amend his action in appellate proceedings, lacks legal interest to appeal first instance judgment on the ground of neglect

179. Athens' Court of Appeals 5700/1999 Harmenopoulos (Αρμ) 2000, p. 535.

180. *Nikas,* Civil Procedure I², §42, nr. 24, pp. 583-584 (f.n. 42); *Makridou,* A valuable weapon, p. 962; *Diamantopoulos,* The Guidance Power of the Judge, p. 699;

181. Art. 236 is applied in combination with art. 527 (see supra f.n. 19) and art. 526 which reads: "Any alteration of the basis, the subject matter and the relief of the action is inadmissible in the appeal proceedings, even if the opponent consents. The inadmissibility is taken into account ex officio. Due to events that occurred after the issuance of the first instance judgment, instead of the object that was initially sought, it is allowed, another or its value or the difference to be requested".

182. Cf. *Makridou,* Guidance of the appellate court so that the claimant completes vague lawsuit as per art. 236 CCP (Καθοδήγηση του ενάγοντος από το δευτεροβάθμιο δικαστήριο για συμπλήρωση της αόριστης αγωγής κατ' άρθρ. 236 ΚΠολΔ) Harmenopoulos (Αρμ) 2000, p. 584 et seq., 587; *Arvanitakis,* Determination of the dispute on the merits following reversion of first instance judgment as per CCP (Η κατ' ουσία έρευνα της διαφοράς μετά την εξαφάνιση της πρωτόδικης αποφάσεως κατά τον ΚΠολΔ), Athens-Thessaloniki 2001, p. 212; *Asimakopoulou,* The modern approach of party presentation principle, p. 36; Contra- Athens Court of Appeal 6001/2000 Harmenopoulos (Αρμ) 2001.1093; Athens Court of Appeal 5700/1999 Harmenopoulos (Αρμ) 2000.535;

183. *Asimakopoulou,* The modern approach of party presentation principle, p. 35.

to apply art. 236[184]. Although said thesis is accurate from a dogmatic perspective, by contrast it was noted that the claimant's incapability of bringing forward such an appeal would result in deprivation of any legal consequence and, subsequently, in potential inapplicability of art. 236 by first instance courts. Such a development would be to the detriment of efficiency due to perpetuation of actions' rejection on vagueness. Hence, an exceptional application of art. 236 in the appeal proceedings was viewed as necessary[185]. Since guidance of the appellate court requires an oral hearing[186] which is not always the case in appellate trial[187], the court should first reverse first instance judgment and subsequently, order a resumed hearing (254) during which it should perform its duty to guide the appellant to clarify or complete the factual allegations concerned. At the same hearing it will admit defence of the opponent[188], which can be initiated through addenda being filed with the court by 12 noon of the third working day as from the hearing (524 §1).

On the other hand, if the first instance court neglected to guide the defendant to complete an incomplete exception, launching of appeal by the defendant on the ground of art. 236 is not barred by art. 224, since the defendant can lawfully bring forward allegations that had been dismissed in substance or not examined in the first instance. Also, exceptions that had been

184. *Podimata*, Judicial Duty for Guidance, pp. 24-25; See also *Makridou*, A valuable weapon, p. 962: Judicial guidance cannot take place at the hearing of the appeal, since the need for guidance on the merits comes up subsequently, i.e. after reversion of first instance judgment;

185. *Nikas,* Civil Procedure I[2], pp. 583-584 (f.n. 42); *Makridou*, A valuable weapon, p. 962; *ead.*, The vague lawsuit[4], p. 279; *Diamantopoulos*, The Guidance Power of the Judge, pp. 699-700; *Asimakopoulou,* The modern approach of party presentation principle, p. 37.

186. Supra, chapter VII.1.a).

187. Supra, chapter VII.2.b) under (c).

188. *Nikas,* Civil Procedure I[2], §42, nr. 24, p. 585; *Makridou,* Ordinary Proceedings, art. 236, nr. 5, p. 115; *ead.,* A valuable weapon, p. 962; *Asimakopoulou,* The modern approach of party presentation principle, p. 37-38; *Rigas,* The Guidance Function of the Court, p. 1798; *Diamantopoulos,* The Guidance Power of the Judge, p. 697 who also suggests that *a de lege ferenda* solution would be the one provided for in art. 244 CCP/1968, i.e. the court sets a deadline for the party to defend.

rejected as vague can be put forward under the restrictions of art. 527[189]. Moreover, if the first instance court found an action as well founded, instead of finding it vague, the defendant, who failed to put forward any factual contention in defence of the action, may do so admissibly in the appellate trial (527 §4)[190].

If first instance court rejected the action as vague, despite the fact that the claimant had completed it through his pleadings, there is no procedural barrier for the claimant to appeal the judgment[191].

3. Scope of application in cassation and reopening of judgments proceedings

In cassation proceedings art. 236 may be applied by Areios Pagos whenever it ascertains that a ground for cassation is articulated incompletely (art. 573 § 1 and 236). It is required though that both parties appear at the oral hearing which is not mandatorily oral[192]. In the event of inconsistent grounds for cassation, Areios Pagos may invite the petitioner to waive the one of the inconsistent grounds[193]. Contrariwise, since reviewing of facts presented by the parties falls outside the scope of the Areios Pagos' jurisdiction, there is no room for art. 236 to be applied on factual contentions[194]. Exceptionally, though, Areios Pagos may review the case in substance, provided the judg-

189. *Nikas,* New factual contentions in the appeal trial (Οι νέοι πραγματικοί ισχυρισμοί στην κατ' έφεση δίκη) Thessaloniki 1987, p. 161 et seq. [: *Nikas,* New factual contentions in the appeal trial, p.]; *id.*, Civil Procedure I², §42, nr. 24, p. 585; *Diamantopoulos,* The Guidance Power of the Judge, p. 697; *Asimakopoulou,* The modern approach of party presentation principle, p. 37 with reference to Areios Pagos 127/2016 NOMOS (f.n. 129);

190. *Nikas,* New factual contentions in the appeal trial, pp. 151-152; *Diamantopoulos,* The Guidance Power of the Judge, pp. 699-700; *Rigas,* The Guidance Function of the Court, p.1798.

191. *Nikas,* Civil Procedure I², §42, nr. 24, p. 584; Thessaloniki Court of Appeal 2529/2008 Review of Civil Procedure (ΕΠολΔ) 2009, p.222 commentary by *Makridou.*

192. As provided for by virtue of art. 115 §2, 242 §2, 574.

193. *Diamantopoulos,* The Guidance Power of the Judge, p. 692; *Alapantas*, commentary on Thessaloniki one-member Court of Appeal 2096/2018 Hellenic Justice (ΕλλΔνη) 2019. 1100; *Apostolakis,* The Guidance intervention of the Judge, p. 111.

194. *Rigas*, The Guidance Function of the Court, p. 1798.

ment has been reversed already twice (art. 580 § 3). In this occasion, Areios Pagos may perform the duty for guidance as an oral hearing is provided (art. 574)[195]. Defence can be initiated through addenda submitted by 12 noon of the third working day as from the hearing[196].

In reopening of judgments[197] proceedings (αναψηλάφηση) the competent court[198] may apply art. 236 (art. 548) whenever it determines that a ground for reopening is articulated incompletely (art. 547) provided that an oral hearing is mandatory (or both parties appeared at an oral hearing which is not mandatory)[199]. As per art. 549 the court first decides whether the grounds for reopening are admissible and legally founded. In the affirmative case, after rescission of the attacked judgment, the court proceeds to the merits. In this occasion, the scope of art. 236 depends on the proceedings under which the attacked judgement was rendered. For example, if a final judgement of the court of appeal is attacked, the abovementioned remarks and restrictions when applying art. 236 in the appellate proceedings, are *mutatis mutandis* applicable in the reopening proceedings[200].

195. *Rigas,* The Guidance Function of the Court, pp. 1796-1797; *Diamantopoulos,* The Guidance Power of the Judge, p. 692; *Apostolakis,* The Guidance intervention of the Judge, p. 111.

196. In cassation proceedings there is no express provision regulating submission of addenda after the hearing. However, the above is considered as a tacit standard practice of Areios Pagos.

197. Reopening of judgements is a procedural devise quite sparingly utilized; See *Yessiou – Faltsi,* Civil Procedure in Hellas[2], p. 341

198. A reopening must always be initiated in the same court that rendered the judgment (art. 21).

199. The hearing is mandatory should the attacked judgment was issued as per the rules of proceedings providing for mandatory oral hearing. That would be the case if attacked judgment was rendered by a first instance court in particular proceedings [supra chapter VII.2.a) under (b)] or by a court of appeal following an appeal against a default judgment [supra chapter VII.2.b) under (c)].

200. *Rigas* (The Guidance Function of the Court, p. 1798) rejects entirely judicial guidance over facts in cassation and reopening of judgments proceedings.

VIII. Epilogue

The idea of a managerial judge who closely co-operates with the parties and in this way contributes to efficient, transparent, and speedy dispute resolution is distant from the prevailing long-established role of Greek court as uninvolved umpire of the debate between the parties. Although by virtue of statutory provisions the judicial duty for guidance was established already since the early 70's and the legislator further enriched it by virtue of the 2011 amendment, Greek judges kept on abstaining from actively intervening in the presented content of the trial.

The underlying reasons are primarily structural: Greek justice has been suffering from lack of resources and from heavy caseload. The latter makes rather impossible for a judge having undertaken to rule on a considerable number of cases per year, to assess each and every action prior to the hearing and to get prepared for the necessary dialogue with the parties thereat. In addition, reluctance of the judges to perform the duty for guidance derives from their concerns that their integrity may be challenged due to claim of partiality. Since the duty for guidance often requires delicate handling of the dialogue between the court and the parties, it is inevitable that said concerns will persist. In this regard, the idea of an inactive judge is being viewed as the lesser of two evils.

Said observations are relevant with the basic assumption of the 2015 legislator that in view of the abovementioned prevailing conditions in Greek judicial system, there is no room for recognizing to the court a significantly active role in the trial in the way it is recognized in many foreign jurisdictions.

Hence, in the light of said observations it is of no surprise that Greek civil procedure that came out from the 2015 extensive reform has adopted a two-fold system of case management. The one (the so - called "law-guided" or "pre-pack" case management system) which is applicable in ordinary proceedings; the other (a substantive judicial case management system) is applicable in the remaining (especially the particular) proceedings and rarely in review proceedings where a single mandatory oral hearing is maintained and the rule of art. 236 can be implemented. To what extent the courts of the latter proceedings are willing to overcome the aforementioned concerns and give the rule of art. 236 a real chance to serve its purpose, remains to be seen in the near future.