

THE DISADVANTAGES OF ORALITY

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Since more than a hundred years ago, authors have been telling us how suitable orality was for the procedures. In the Latin area it was CHIOVENDA¹ who passionately defended that opinion, and influenced the authors that came after him. But the idea was actually coming from the German experience, which was observed by the above mentioned author and penetrated to the Latin area. The above mentioned experience, maybe not as pleasant as CHIOVENDA was thinking², was influenced by the procedural Napoleonic laws of the beginning of the 19th century. Nevertheless, since CHIOVENDA wrote his doctrine, authors have been practically unanimous in favour of orality³. As a result, the principle has been incorporated even in fundamental laws, such as art. 120.2 of the Spanish Constitution. And the authors who have discussed some of the presumed virtues of orality, have been immediately accused of being reactionaries, not always with scientific criteria.

Nevertheless, CHIOVENDA writes at the beginning of the 20th century. In that moment the main purpose was fighting against the persistence of an odious, tedious and inefficient written procedure that had been based on a well-meaning text of 1215 (and not of 1216 as it has been repeatedly said), a Decretal of the Pope Innocentius III⁴, which introduced the obligation of writing the procedural acts, with the noble purpose of bringing juridical safety in the trials⁵.

¹CHIOVENDA, Giuseppe, *Principios de Derecho Procesal*. Translation by Casais of "*Principii di Diritto Processuale*". Madrid 1977, p. 143.

²Vid. PRIETO CASTRO, Leonardo, *translation of SCHOCH, la reforma del procedimiento civil en Alemania*, Revista de Derecho Privado, 1931, p. 113.

³But not always: Vid. PRIETO-CASTRO FERRÁNDIZ, Leonardo, *Oralidad y escritura en el proceso civil*, "Trabajos y orientaciones prácticas de Derecho Procesal", Madrid 1964, p. 209: "...ha pasado el tiempo en que, incondicionalmente, se atribuía la preferencia a la oralidad." CAPPELLETTI, Mauro, *La oralidad y las pruebas en el proceso civil*, translation by Sentís Melendo, Buenos Aires, 1972, p. 5: "el interés y el antiguo entusiasmo por la oralidad procesal se han ido amortiguando en los años alrededor de la mitad de nuestro siglo."

⁴MANSI, Joannes Dominicus, *Sacrorum conciliorum nova et amplissima collectio*, Vol 22, Graz 1961, pp. 1023-1026. Lateranensis IV, Innocentius P.III, Cap. XXXVIII, anno Christi 1215.

⁵"Quoniam contra falsam assertionem iniqui iudicis innocens litigator, quandoque non potest veram negationem probare, cum negantis factum per rerum naturam nulla sit directa probatio: ne falsitas veritati praeiudicet aut iniquitas praevaleat aequitati, statuimus ut tam in ordinario iudicio quam extraordinario, iudex semper adhibeat aut publicam (si potest habere) personam, aut dos viros idoneos, qui fideliter universa iudicii acta conscribant, videlicet citationes et dilationes, recusationes et exceptiones, petitiones et responsiones, interrogationes

Notwithstanding, in the future centuries the principle of written form was exaggerated, up to the point of causing a paralysis in almost any process. This situation brings us to the beginning of the 20th century, when CHIOVENDA writes as it has already been said. And unfortunately, it is still possible to find nowadays that situation in many places: an absolutely ineffective written procedure, full of phases, so many interlocutory steps, interlocutory appeals, and a pathological separation of the judge from the procedure. The judge, in fact, only approached to the process at the moment of pronouncing the judgment. He was absolutely unaware of what had been happening before, specially –and this was the most grievous thing– the evidence.

All this constituted the perfect situation to make authors claim for the introduction of orality, as a way of making procedures efficient, improving them and making them more accessible. In several places the doctrinal claim was successful and orality was actually brought in the processes.

Nevertheless, the results have not been optimal, and this is something that should not be ignored by Governments and Parliaments of those States which have not still introduced orality in procedural laws. It has been repeatedly said that orality would bring immediacy to the processes, publicity and concentration of judicial acts. This would cause, respectively: the awareness of the Judge of the whole process; the availability of the procedures to the parties; the briefness of processes.

But on the contrary, the immediacy that brings orality is not always real. In long or even boring hearings, or after multiple trials celebrated in the same day, the Judge, as any other human being, is not able of paying the same attention at any time. In addition, as the Judge attends all the hearings, he tries quite often to build opinions that cause prejudices, not paying much attention to the allegations, oral or written, of the defenders of the parts. This produces superficialness in the jurisdictional judgments. All this makes of immediacy, when this happens, a completely useless principle.

On the other hand, real publicity is not always brought by orality. Parties do not come to the trials, if they can avoid it. And if they come, they are not used to deal with judicial matters and, as a result, they don't understand what's happening. Furthermore, if publicity is aimed to the "people" in general, as it has been very often demagogically said, it must be admitted that citizens do not usually attend hearings, as everybody knows. And therefore, publicity turns into a kind of sly secret, confirming the old journalistic sentence: if there is something you want to remain secret, just publish it.

Finally, orality does not always make procedures shorter. Trials must be often suspended due to procedural faults or unexpected problems that can compromise the principles of fair trial. In such situations the trial is postponed to another day, but it is not always easy to find a blank in the tribunal's agenda so as the trial can take place soon. While the trial takes place, the Judge cannot obviously do anything else as attending it. As a result his/her efficiency in doing

et confessiones, testium depositiones et instrumentum productiones, interlocutiones, apellationes, renunciaciones, conclusiones et cetera quae occurrunt competenti ordine conscribenda, designando loca, tempora et personas...”

other things, i.e. writing judgments, decrease remarkably. All this, unfortunately, partially contradicts the supposed virtues of orality that many authors have assumed as obvious.

This is not only my opinion. All this is reality in Spain, a country where orality was introduced definitively in the year 2001 in civil processes. At the beginning, an acceleration of the procedures was observed. But today, in the year 2008, in cities like Barcelona or Madrid the first hearing of a process is celebrated after a year of the presentation of the claim, and this is completely disastrous. Orality needs a considerable increase of personal means, i.e., it requires the existence of many judges. As the public budget does not normally consider this to be possible, courts are overloaded, being close to collapse some day if some solution is not adopted before.

In spite of everything that has been said, it shall not be considered, in any case, that orality is a dreadful principle. Obviously it is not. It is just necessary to know very well where to introduce it, as it is also necessary to know where a written phase is more suitable.

Writing is convenient for pleadings, and of course for the judgment. In civil processes, for example, writing will allow to elaborate the claim and the defendant's answer in a better way. After the evidence, some written conclusions would allow the judge to analyze more precisely the details of the case. This would avoid the ambiguities and losses of attention that not rarely cause the attorney's speeches. Nevertheless, orality is completely necessary in the evidence that need the appearance of a person, such as the depositions of parties and witnesses, and declarations of experts, in order to be questioned. Orality, likewise, is fundamental in appeals, in which it is often forgotten: the oral allegations of the barristers criticizing the judgment will allow the judge to make questions to them. Through these questions the judge will be able to analyze the details of the legal or factual errors that they invoke.

Therefore, orality is not rejectable as a principle of the procedure. It is just necessary not to insist on the ingenuous fascination for old ideas (hundred years old) pretending that they were recent. We must observe the reality of the processes and precise in which moments orality can really bring efficiency to the procedures.