

**MORE VOICE, LESS PRINT – WHY COURT PROCEEDINGS
SHOULD BECOME MORE ORAL**

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FOREWARNINGS

Two of the world's greatest thinkers, Socrates and Jesus Christ, never put pen to paper. One should therefore not be surprised to find Plato expressing a preference for the spoken word. He was quoted as saying that only words and personal contact could enable us to learn the truth, adding: "*L'écriture produira l'oubli dans l'âme de ceux qui l'auront appris parce qu'il cesseront d'exercer leur mémoire*".¹

Here, we can do no better than recall the celebrated dialogue featured in the most impressive tragedy in theatrical history:

“Creon

And you dared anyway to transgress these laws.

Antigone

Yes, Zeus was not the one who issued these proclamations for me, nor did Justice, who dwells with the gods below, define such laws among mankind. I did not think your proclamations so strong that you, a mortal, could overstep gods' unwritten and unshakable traditions. Not today or yesterday but always they live, and no one knows when they appeared. I was not about to pay the penalty before gods for neglecting them out of fear for a man's thought.”

Although it is no longer possible to claim that discussions on orality “*ont agité la moitié de l'Europe le siècle dernier*”², it nevertheless occurs to me that the subject remains topical today.³

It was at the latter conference that Mauro Cappelletti drew up the General Report on “Written and Oral Proceedings”, which was published separately in Milan in 1971. From that point onwards, the issue of orality has remained an aspect of civil procedure which has featured in all recent symposia on the subject: N. Trocker and V. Varano, *The reforms of civil procedure in comparative perspective*, Torino 2005; *Actes des colloques à l'occasion du bicentenaire du*

¹ Phèdre, quoted by G STEINER, *Lessons of the Masters*, (2003) London, and by E. JEULAND, *La place de l'écrit dans la procédure orale*, *Rencontres de procédure civile Université-Cour de cassation*, Bull. Inf. C. cass. no. special 2005, p. 45.

² See G. CHIOVENDA, *Saggi di diritto processuale civile*, II, Roma 1931, p. 138.

³ The International Academy of Comparative Law has included this topic in two of its international conferences: the one held in London in 1950 and the one which took place in Pescara in 1970.

code de procedure civile à Gand (26-27 October 2006) et à Paris (16 November 2006).

I. WHAT DOES THE TERM “ORALITY” MEAN?

It is obvious that, from our procedural perspective, the term “orality” does not refer to “*l’art oratoire du palais*”. Piero Calamandrei describes, with much humour, this art of oratory in his magisterial work *Elogio dei giudici*⁴. More particularly, he advocates a dialogue with the judge to replace the monologue of the closing speeches, in the following terms:

“For it to be truly effective, the defendant’s speech should consist not in a continuous monologue, but in a lively dialogue with the judge, who is actually the addressee of the speech and should respond by means of facial expressions, gestures and interruptions.

Interruptions by the judge should please the lawyer, since they provide evidence that the former does not remain cold and impassive during the speech. To interrupt means to react, and what better evidence of a stimulating effect is there than a reaction?

The trial will reach perfection when it makes possible the kind of interaction, based on questions and answers, between judges and lawyers which normally takes place between people who respect each other, when sitting round the table and seeking to clarify their ideas in a way which serves everyone’s interest.

Breaking up the closing speeches and converting them into a dialogue might diminish the level of rhetoric, but it will increase the level of justice. The lawyers’ closing speeches are regarded by many judges as a mental recess – their thoughts return to the case once the lawyer sits down”.⁵

Naturally, orality also covers the production of certain items of evidence, such as the examination of the witnesses, personal appearance, and the swearing of the oath. I will not deal with these types of oral procedure at any length, but merely wish to stress that all these items of evidence lose the essence of their value where they have not been produced before the same judge as the one who will adjudicate on the merits of the case.

I would regard it as more appropriate to restrict my analysis to examining orality in its procedural sense. This should, as is emphasised by Mauro Cappelletti, enable the procedure to be qualified as oral or as written: “*le sens de la procédure orale est double: d’une part procédure plus rapide, concentrée, efficiente, de l’autre procédure plus fidèle à une méthodologie concrète et empirico-inductive dans la recherche des faits et dans l’appréciation des preuves*”⁶. Such orality should also enable the ordinary citizen to be associated with the proper functioning of the system of justice, and thus helps to socialise the civil trial.

⁴ Translated into Dutch on the occasion of the 40th anniversary of the *Tijdschrift voor Privaatrecht*, private edition, 2004: Lof van de rechter, geschreven door een advocaat.

⁵ Op. cit. p. 54.

⁶ Op. cit. p. 92.

This notion that court proceedings also have a social role was superbly defended and developed by one of the most brilliant craftsmen of civil procedure, to wit Franz Klein, the author of the Austrian Code (1895), which has served as a model for so many modern codes⁷. In his view, the civil trial should be conceived as a “*Wohlfahrtseinrichtung*”, i.e. a social welfare institution⁸.

By way of conclusion, one is tempted to say that the question of deciding whether court proceedings should be oral or written remains a delicate one. It is clear that, with a few exceptions, for example conciliation, there is no such thing as purely oral proceedings. Rather what is at stake here is which type of procedure should predominate.

Personally, I would tend to advocate striking a happy medium between the written and oral aspects, whilst highlighting the importance of the oral procedure. In so doing, I would endorse the idea which has already been expressed by Hébraud, where he writes “*L’instruction écrite apparaît ainsi comme utile pour soutenir le débat oral, par un échange de pièces fixant, sur les points essentiels, la position de chaque partie. L’écrit favorise l’assise sur laquelle pourra se développer ensuite le débat oral*”⁹.

If we add the current technology of audio-visual and sound recording, of which our Portuguese colleague Alessandro Pessoa Vaz was a prominent advocate¹⁰, the last remaining inconvenient aspects of oral proceedings are removed.

Moreover, striking this balance makes it possible to optimize the expediency and efficiency of the manner in which the civil trial is conducted.

II. ORALITY AS A MEANS OF IMPROVING PROCEDURAL EFFICIENCY

Let us recall first of all that Article 6 of the European Convention on Human Rights (ECHR) states that “*everyone is entitled to a fair and public hearing*”. In the same way that our late Belgian colleague Albert Fettweis was fond of referring to Recommendation No. R(84)5 of the Council of Ministers within the Council of Europe, it is useful also to re-read Rule 1.1 of the Principles of Civil Procedure Designed to Improve the Functioning of Justice (Appendix to the Recommendation):

“Normally, the proceedings should consist of not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible, giving judgment. The court should ensure that all steps necessary for the second hearing are taken in good time and, in principle, no adjournment should be allowed except when new facts appear or in other exceptional and important circumstances.”

⁷ Proceedings at the International Symposium of Kyoto, September 2006: Export and import of civil procedural rules.

⁸ See also M. CAPPELLETTI, *op. cit.* p. 93.

⁹ Quoted by G. COUCHEZ in *La parole et l’écrit en droit judiciaire*, Reims (1985), p. 61.

¹⁰ See STORME, M., *Rapprochement du droit judiciaire de l’Union européenne*, Dordrecht (1994) p. 98-102 – as from 1st January 1997 every court hearing in Portugal will be recorded.

As early as 1979, I had attempted to sketch out a “Ghent model” for the acceleration of court proceedings ¹¹ which, moreover, was inspired by the Stuttgarter Modell of 1976 and the CNA procedure in the Netherlands (appearance following reply).

III. WRITTEN STAGE

During the introductory hearing, the two litigants apply for measures of immediate investigation (Article 19 Belgian Judicial Code) or for the retention of the case on the date of that hearing or its postponement to the earliest possible date (Article 735 Belgian Judicial Code) or fix, together with the judge, the trial agenda in such a way that the case can be heard within a period of three months.

The case file, as well as all the documents and pleadings involved, should be completed and made available to the judge eight days before the hearing.

IV. ORAL STAGE

At this hearing, the parties, assisted by their counsels, shall address the court. At this point all procedural issues must have been resolved. A conciliation procedure may be proposed; if not, the hearings on the merits of the case will take place on the earliest possible date.

The model I proposed in 1979 has, in the meantime, been introduced in part (albeit in an excessively convoluted manner) by the Law of 3rd August 1992. However, it is a matter of regret that a proposal under which the judge could, once the defendant’s first pleadings had been submitted, order the parties to appear in person, was not adopted.

In the world of civil proceedings, we have noted a distinct tendency towards a two-stage system, consisting of two successive stages, which strongly resembles the common law procedure, with its pre-trial and trial.

The best example of this two-stage system on the European continent can be found in the new Spanish Code of Civil Procedure ¹². The ordinary trial allows for two types of procedure: the “*juicio ordinario*” and the “*juicio verbal*”.

In the case of the former, a preliminary hearing (“*audiencia previa al juicio*”) takes place following the exchange of documents and pleadings. This preliminary hearing has a variety of objectives aimed at investigating the lawfulness of the proceedings, the court’s jurisdiction, the possibility of an out-of-court settlement, the need for additional evidence, etc. At the same time, a new hearing will be fixed for the trial dealing with the merits of the case (“*juicio*”).

The second type is aimed at disputes of lesser importance (less than 3000 euros). After the introductory session, the judge will fix the date of the hearing during which the parties will address the court ¹³.

¹¹ Pleidooi voor een Gents model ter versnelling van de procedure: edition available commercially D 1979-0069-7.

¹² Ley de Enjuiciamiento Civil, 2000.

¹³ See I. DIEZ – PICAZO GIMÉNEZ, Procedural reform in Spain, in N. Trocker and V. Verano, op. cit. p. 43 et seq.; see also the extremely positive report on the new orality: F. Ramos-Mendez, La conception du procès civil hors de

If the relevant statistics are to be believed, the average duration of trials in Spain for the years 2003 to 2004 was 7.96 months for civil proceedings at first instance!¹⁴.

It was Franz Klein who, writing in Austria, and taking as his starting point the notion of a “*Arbeitsgemeinschaft Zivilprozess*”, laid the first foundations for a modern civil procedure which would be characterised by “*ein mündliches, unmittelbares, öffentliches und konzentriertes Verfahren, in dem beide Parteien ausreichend rechtliches Gehör gewährt wird*”¹⁵. Here also, the two way-stage procedure has been embedded in the Austrian ZPO (Code of Civil Procedure)¹⁶.

In a less pronounced manner, and even slightly amended by the 2002 reform, the German ZPO also provides for a written stage followed by the oral stage¹⁷.

In France, on the other hand, this two-stage approach does not appear to have been adopted. The French system makes provision for two types of procedure: a written procedure before the district courts (*tribunaux d'instance*) and most of the divisions of the Courts of Appeal, and an oral procedure, at first instance, before all the exceptional courts.

If I have understood correctly the writings of certain excellent French proceduralists, such as Jacques Normand¹⁸, the objective of achieving orality in civil proceedings as described by Mauro Cappelletti is not a priority concern of French civil procedure. Moreover, there are many who decry its inadequacies and dangers.

It is somewhat dangerous to associate the oral nature of civil proceedings with an increase in efficiency. Nevertheless, I would venture to presume that the systems based on oral proceedings, such as Austria, Germany, the Netherlands and Spain, have a better record of accelerated proceedings and, in general, higher

France: le cas espagnol, in Actes du colloque à l'occasion du bicentenaire du code de procédure civile, Paris, 16 novembre 2006.

¹⁴ Revised survey for the assessment of court proceedings 2004, Spain; for an analysis of the relationship between the rules of civil procedure and the duration of the trial, see A. UZELAC, Turning civil procedure upside down, From judges' law to users' law, in Actes du Colloque de Gand à l'occasion du bicentenaire du Code de Procédure civile, 26-27 October 2006; by the same author, Accelerating civil proceedings in Croatia, a history of attempts to improve the efficiency of civil litigation, in Effizienz der Justiz (2004) Warsaw.

¹⁵ W. RECHBERGER, D.-A. SIMOTTA, Grundriss des österreichischen Zivilprozessrechts, Erkenntnisverfahren, Wien (2003), p. 175-176.

¹⁶ See also E.-M. BAJONS, Civil procedure for Austria revisited, an outline of recent Austrian civil procedure reforms, in N. Trocker and V. Varano, op. cit., p. 115 et seq.

¹⁷ ROSENBERG – SCHWAB – GOTTWALD, Zivilprozessrecht, 16th edn., München 2004, p. 501-505; for a critical assessment of the most recent reform, see G. Walter, The German civil procedure reform act 2002: much ado about nothing, in N. Trocker and V. Varano, op. cit., p. 67 et seq.

¹⁸ In an annotation with which he was kind enough to provide me – see also E. Jeuland, op. cit.

levels of satisfaction on the part of their users. On the other hand, the costs associated with these systems are initially higher (Austria, Germany), but can be reduced, either through the more widespread use of ADR (Netherlands) or through other gains, particularly economic savings, resulting from a sound system of justice administration.

Et ceterum censeo... I remain convinced that judicial reforms remain useless without a judicial culture based on the duties of the judicial players. “What is therefore needed is the articulation of a duty-based litigation culture, and the adoption of a principle that timely party compliance with rules and directions is a pre-condition to participation in the litigation process”¹⁹.

Ghent, 11th May 2008

Pentecost

¹⁹ A. ZUCKERMAN, Court Control and Party Compliance – The quest for effective litigation management, in N. Trocker and V. Varano, op. cit., p. 160.