

## ORAL AND WRITTEN PROCEEDINGS IN POLISH CIVIL PROCEDURE

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I. Polish civil procedure is becoming increasingly characterized by written proceedings. It is noticeable that a growing percentage of civil cases requires application of proceedings that can, should, or must be carried out in a written form. Also, the majority of law suits are carried out through written proceedings. Computerization of court proceedings and the introduction of civil proceeding forms, lead to limitation in the use of oral proceedings<sup>1</sup>.

A question arises whether this trend helps to provide parties an appropriate protection of their rights in civil procedure. It should be taken into consideration that the majority of people form their thoughts and views better in an oral way rather than in writing, and that in some situations it is easier for the court to understand requests and positions of the parties, if they present their case orally. An oral exchange of views is the best way of revealing contradictory stands; confrontation of those stands and explanation, it is also the simplest way of conveying information<sup>2</sup>. The oral proceeding allows parties to defend their rights to a higher degree than is possible in written proceedings. Therefore, the growing importance of written proceedings in comparison to oral proceedings in civil procedure might be raising doubts about the appropriate protection of rights of the parties' point of view.

II. It is necessary to employ oral proceedings in order to observe other rules of Polish civil procedure, e.g. the rule of adequate directness, as oral proceedings allow the court to examine witnesses personally, ask questions and confront witnesses. Oral proceedings play a substantial role in discovering the truth in a trial<sup>3</sup>. An open trial, which is carried out in an oral way, guarantees objectivity of the judge and proper administration of justice<sup>4</sup>. The principle of open trials, and in consequence also oral proceedings, allow the society to control the whole administration of justice and are the most reliable means of control of the court, parties, witnesses, and experts. The society cannot build real trust towards the court and its administration of justice without the principle of an open trial. An open trial limits the number of unjustified civil actions brought to court, or actions that only aim to persecute the defendant. Open trials contribute towards building a sense of justice in the society<sup>5</sup>.

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<sup>1</sup> see Piasecki K., *Postępowanie cywilne rozpoznawcze*, Warszawa 2004, p.89

<sup>2</sup> Berutowicz W., *Postępowanie cywilne w zarysie*, Warszawa 1984, p. 298

<sup>3</sup> Resich W., *Poznanie prawdy w procesie cywilnym*, Warszawa 1958, pp.115-116, see also Jodłowski J., Siedlecki W., *Postępowanie cywilne. Część ogólna*, Warszawa 1958, p. 166

<sup>4</sup> Siedlecki W., Świeboda Z., *Postępowanie cywilne. Zarys wykładu*, Warszawa 2004, p..63;

<sup>5</sup> At this topics see more Kruszelnicki F., „Zasady procesu cywilnego według polskiej procedury cywilnej”, *Głos Sądownictwa*, 1931, nr 9, p.476; the same Siedlecki W., Świeboda Z., *Postępowanie cywilne, Zarys wykładu*, Warszawa 2004, p.63

The application of oral proceedings in a particular proceeding might be used as evidence in assessment of fairness of the process. Undoubtedly it is more likely that a party would accept proceedings in their case as fair, if they had a chance to present their requests, stand in the case and present evidence personally in an oral way. The fact whether the whole proceeding has been accepted as just or unjust, depends to a substantial degree on the assessment of the procedure and the course of the proceeding, and not just the final result of the proceeding<sup>6</sup>. This issue had been taken to consideration by the European Court of Human Rights in the verdict from 15 February 2005 in the case of Steel and Morris v. Great Britain (no 68416/01, LEX no 148018) recognizing that it is crucial for the concept of a fair trial in both civil and criminal proceedings, not to prevent a party in a dispute from having a possibility to present their case effectively in court. According to the European Court of Human Rights, it is difficult to “present a case in court” other than orally.

The application of oral and written proceedings is closely linked to the fundamental need to listen to what the parties have to say, and the principle of equal defense, as stressed by the European Court of Human Rights in the verdict from 5 of July 2005 in the case of Lomseita Oy and others vs. Finland, (no 45029/98, LEX no 154354). The principle of equal defense – one of the elements of a broader understanding of a fair process – requires all parties to be given a reasonable opportunity to present their case in conditions that would not put one party in a significantly disadvantageous position in comparison to the opposite party. It is only parties that can make a valid decision whether they need to take a position on certain statements. The parties’ confidence in the work of the administration of justice is based, inter alia, on the awareness that parties had a possibility to express their views in relation to all documents belonging to the dossier. The principle of listening to the parties will be executed not only when a party makes an oral statement in an issue considered by the party as important, but also when a party has an opportunity to express their stand in writing. Then, the court and the other party will have a chance to read the document and take it into consideration<sup>7</sup>. The right to be heard, which applies to parties in civil proceedings corresponds to the court’s duty to properly consider explanations presented by a party in a proceeding<sup>8</sup>.

Therefore, in order to protect parties, unconditional application of oral proceedings is not the only indicator of proper application of the principle of listening to parties and the principle of the equal defense. However in some cases, e.g. taking into account personal characteristics of a particular party, it is necessary for the court to listen to oral explanations of the party in order to state that the party has indeed fulfilled their right to be listened to, and consequently this would enable the court to decide the case correctly. The European Court of Human Rights made an accurate comment on this issue, stating that each case requires an individual assessment in relation to the application of oral or written proceedings. The European Court of Human Rights made a statement in the verdict from 20 October 2005 in the case of Özat v. Turkey (19578/02, LEX no 157837) that the

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<sup>6</sup> Bogucka- Arctowa M., „Sprawiedliwość proceduralna a orzecznictwo Trybunału Konstytucyjnego jego rola w okresie przemian systemu prawa”, *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, editors Trzeciński J., Jankiewicz A., Warszawa 1996;

<sup>7</sup> See more Góra- Błaszczkowska A., *Zasada równości stron w procesie cywilnym*, Warszawa 2008, p. 225 and next.

<sup>8</sup> Czeszejko- Sochacki Z., „Prawo do sądu w świetle Konstytucji RP (ogólna charakterystyka)”, *Państwo i Prawo* 1997, no 11-12, p.105;

complainant should be given a possibility to make an oral explanation in court in her country in relation to her personal damage, related to experienced suffering and fear following her arrest. In principle, it was necessary to have the complainant appear in court in order to decide an appropriate level of compensation in relation to the personal character of the complainant's experiences. One cannot accept that those issues were of technical character and could have been appropriately decided merely on the basis of the case records. Contrary to this, the administration of justice and responsibility of the state would have been served better if the complainant in this case had been given the right to explain her personal situation during a court hearing, controlled by the public.

III. The nature of oral proceeding in Polish civil procedure lies in allowing parties to appear in court personally in order to present their stand in a particular case. The principle is to hear civil proceedings during a court hearing. According to the content of article 210 § 1 of the Polish Civil Procedure Code the hearing of a case starts with the complainant's and then, the defendant's oral presentation their requests and proposals and then, they present statements and evidence in support of them. Additionally, parties can indicate the legal grounds of their requests and proposals. Each of the parties is bound to submit a statement in relation to the claims of the opposite party in regards to the factual circumstances (article 210 § 2 of the Polish Civil Procedure Code). The hearing also involves evidence proceedings and examination of the results of those proceedings, as appropriate in relation to circumstances.

The principle of oral proceeding, as a means of providing appropriate protection for the parties, is reflected in the article 212 of the Polish Civil Procedure Code. In accordance with this article, even before the evidence proceeding starts, the Chair of Civil Procedure (Judge who is in the bench) asks the parties questions in order to find out which are the main matters of conflict between them, and aims to clarify them. The Chair of Civil Procedure can give necessary advice to the parties, if there is a justified need to do so. According to the circumstances, the Chair informs the parties about the advisability of appointing a proceeding attorney. In cases regarding maintenance, repair of damage that was caused by an unlawful action, the Chair informs the complainant appearing in court without a solicitor or legal adviser about the claim arising from the quoted facts. It is obvious that the advice given by the Chair, as specified in the article mentioned earlier, cannot concern any factual issues, the advice can only relate to the issues of the proceeding. Also, the advice cannot constitute any legal advice, so the principle of equality of the parties does not get contravened.

The existing right to make oral statements during hearings by parties in Polish civil procedure should not be considered equivalent with a duty to appear personally in court. According to the article 216 of the Polish Civil Procedure Code, the court can decide that the parties, or one of the parties needs to appear personally in court, or through an attorney, in order to clarify the matter of the case. The court decides whether the character of the case requires that the parties, or their attorneys, appear in court. The court decides whether this possibility should be used. According to the rules, Polish court does not have a duty to collect evidence from the hearing of the parties. The evidence is considered as final and subsidized, carried out when there are remaining conflicting circumstances in the case, and the court decides that the evidence is necessary (see article 299 of the Polish Civil Procedure Code).

It needs to be remembered that according to the regulations of the Polish Civil Procedure Code, parties need to be properly informed about the date of a hearing. A case must be adjourned if the court finds that the summons had not been appropriately delivered (article 214 of the Polish Civil Procedure Code). Polish regulations and the Supreme Court

judicature fully correspond to the European Court of Human Rights' stand in this matter, as specified in the verdict from 20 October 2005 in the case of Groshev v. Russia (69889/01, LEX no 157787), in which the European Court of Human Rights decided that the right to have a fair and public hearing (article 6 of Act 1 of the European Human Rights Convention) would be meaningless, if the party was deprived of a hearing in such a form that would give the party a possibility to participate in the hearing, if only the party decided to use their right to appear in court, which is guaranteed by the law of the country.

As indicated earlier, in many situations it is only arranging a hearing in court and enabling parties to be heard in court about the important matters of the case, that enables the real application of the principle of listening to the parties, as often the parties cannot properly form their proposals, statements, and accusations in proceeding documents. It is typical of court hearings that they give a possibility to parties to present proposals, statements and factual circumstances – court hearings should be taking place in circumstances that guarantee directness, equality, and concentration of the proceeding's material. Appropriate preparation of the hearing, carrying out of the hearing and making a record of the hearing in the form of a record of court proceedings, are all a means of application of the right to appear in court and the principle of being heard in court<sup>9</sup>. Consequently, all of those factors make it possible to see that the trial has been carried out in a fair way.

The issue of the way parties are treated by court is closely related to the way hearings are carried out. The way parties and participants in a hearing are treated in court proceedings makes a significant impact on the assessment of the proceeding – assessment made by the parties, that do not always have any influence on the results of the proceeding. A party is more likely to accept an unfavorable verdict, if they are convinced that they have been treated in an appropriate and fair way and that the evidence given by the party has been examined in a way that does not leave any doubts regarding objectivity of the court. The proceedings that lead to the court's decisions are considered just, when each person, who is concerned by the decision, had been appropriately treated during the proceeding in accordance to the suitable rules of the procedure<sup>10</sup>. As it was noted by the European Court of Human Rights in the verdict from 15 July 2005 (71615/01, LEX no 154358) in the case of Mežnarić v. Croatia, “*Justice has not only to be done, it has to be seen, to be done*”. Hearing a case during a hearing that is not open, instead during an open hearing, despite of the lack of a statutory permission in this matter, might cause invalidity of the proceeding, because that would have prevented parties from having a possibility to defend their rights, or employ appropriate actions. Invalidity, caused by passing a verdict in a case that the parties had not been appropriately informed of, hearing a case during a hearing that is not open, without a statutory permission, or unlawful dismissal of the party or their attorney from the court room, gives a reason to appeal to the decision of the court through the ordinary and extraordinary means of appeal. (see article 379, subsection 5 of the Polish Civil Procedure Code, article 401, subsection 2 of the Polish Civil Procedure Code)<sup>11</sup>.

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<sup>9</sup> Pogonowski P., *Realizacja prawa do sądu w postępowaniu cywilnym*, Warszawa 2005, p.103.

<sup>10</sup> Ziemiński Z., „O pojmowaniu celu, zadania, roli i funkcji prawa”, *Państwo i Prawo* 1987, no 12, p.175.

<sup>11</sup> Broniewicz W., „Jawność jako konstytucyjna zasada procesu cywilnego Polski Ludowej”, *Nowe Prawo* 1954, no 5-6, p.92; the same Hanausek S., „Ochrona praw jednostki

Polish regulations and judicature are unanimous in this matter with the ideas expressed by the European Convention of the Human Rights. The European Court of Human Rights indicated in the verdict from 8 February 2005 (55853/00) in the case of *Miller v. Sweden* (LEX no 148012) that the right to “have a public hearing” in a court proceeding on the basis of the article 6, Act 1 of the Convention, leads to the right to “oral hearing”, unless there are special circumstances, which justify a decision not to have an oral hearing. Also, there are cases that need to be heard in an appropriate court, depending on the character of the matter. For example, disputes in relating to the system of social security are normally of technical nature, they often concern large volumes of calculations, and the result of those disputes normally depends on a written opinion from an expert- a doctor. That is why, according to the European Court of Human Rights, many of such disputes can be resolved better in a written way rather than orally. Country authorities should take into account efficiency and economy of the proceeding in this matter. Having systematic oral hearings could be a handicap in providing this special type of care, which is required in cases relating to social security. The European Court of Human Rights have also decided in the verdict from 15 March 2005 in the case of *Yakovlev v. Russia* (72701/01, LEX no 148937) that carrying out a court hearing might not be necessary taking into consideration specific circumstances of a particular case, for example when factual or legal circumstances of a dispute can be properly decided on the basis of the case dossier and written statements of the parties.

Having mentioned the issue of hearings in civil procedure, as a manifestation of the principle of oral proceedings, it needs to be stressed that the above quoted regulations apply directly to proceedings in courts of first instance. According to the Polish civil procedure, higher courts can decide some cases during hearings that are not open. According to the article 374 of the Polish Civil Procedure Code, higher courts can decide a case during a hearing that is not open, in case of invalid proceedings. In relation to simplified proceedings, the Polish legislation authorized higher courts to the following: according to article 505 § 2 of the Polish Civil Procedure Code, higher courts can decide an appeal (in all cases, whatever the type of appeal it is) during a closed hearing, unless a party in the appeal, or a party replying to the appeal requested a hearing. As mentioned earlier, the majority of people form their thoughts (expresses their opinion) better orally rather than in writing. The lack of constraints to use a solicitor when submitting an appeal confirms the intention of the legislators, which is to give every party a possibility to make an appeal to a verdict in question at a higher court, including parties who are not well educated, or not wealthy enough to use a solicitor. Hearing of an appeal during a closed hearing might contravene the principle of hearing to the parties and the principle of equal defense, when a party is not able to orally present all of their reservations to the verdict passed by a court of first instance, and the accusations contained in the appeal (in writing) have not been fully presented.

The solutions accepted by the Polish legislator, which allow higher courts to decide a case without the application of the principle of openness and the principle of an oral proceeding, as it can be seen in the regulations regarding simplified procedure, rise justified doubts regarding compliance with the principle of the parties having the right to be heard<sup>12</sup>. However, also the European Court of Human Rights (see decision from 14

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w cywilnym postępowaniu dowodowym”, *Zeszyty Naukowe Uniwersytetu Jagiellońskiego Prace Prawnicze* 1979, no 85, pp.15- 16.

<sup>12</sup> See more Góra- Błaszczkowska A., *Zasada równości stron w procesie cywilnym*, Warszawa 2008, p. 137 and next.

January 2003, in the case of P.O. v. Polska, 42618/98, LEX nr 56985) does not require the court of appeal to decide a public hearing in the presence of the party. In order to make an assessment of this issue, one needs to take into consideration specific characteristics of a particular proceeding and the way that the parties' matters are presented and protected in the court of appeal. According to the European Court of Human Rights, if a case had been heard in a public hearing in court of the first instance, less strict standards apply to the proceeding of appeal, during which the lack of a public hearing might be justified by specific characteristics of a particular proceeding. That is why appeal proceedings and proceedings only relating to legal issues, unlike proceedings establishing factual circumstances, can be in accordance with the requirements of the article 6 of the European Convention of Human Rights, although the complainant did not have an opportunity to be heard personally by the court of appeal. The European Court of Human Rights (verdict from 8 February 2005, in the case Miller vs. Sveden, 55853/00, LEX nr 148012) stresses that the assessment of the appropriateness of the situation, in which the verdict of a higher court had been passed without a hearing in court, depends on the character of the appeal system in a particular country, the scope of the competence of the court of appeal, and the way in which the matters of the complainant are present and protected in the appeal procedure, especially in the light of the issues, that need to be resolved by the court.

It was stressed by The Polish Constitutional Tribunal in the verdict from 15 October 2002 (SK 6/02, OTK-A 2002/5/65) that openness of a proceeding has never been recognized as an absolute requirement that would not allow any exceptions in order to aid efficiency and speed of a proceeding. Any exceptions from the principle of oral and open proceedings that have been allowed by the Polish Civil Procedure Code must be applied with respect to the principle of equality, especially in the aspect of the principle of the parties' right to be heard. If hearing a case during a closed hearing could significantly limit or handicap presentation of the position of a party or a participant of a proceeding, it needs to be considered whether a hearing should be arranged, if possible and if the course of action in the proceeding and the type of a particular case allows. Also, this should only be considered if it would not lead to an unnecessary prolongation of the case. The Constitutional Tribunal noticed that the limitation of the principle of directness in the court of appeal does not determine it is impossible to decide an appeal in an appropriate and fair way, because the party appealing a verdict of the court of the first instance still has a possibility to present their arguments and evidence for those arguments. The court of appeal might decide which evidence they would like to examine "personally", and which evidence does not need to be examined again.

IV. Polish civil procedure, as indicated earlier, is becoming increasingly characterized by written proceedings; however, at present the oral and written proceedings co-exist and complement each other. The wider introduction of written proceedings and the resignation from the principle of oral proceedings in civil cases in Polish civil procedure is dictated by the desire to speed up and simplify court proceedings, at least in those cases, where the type and specification of a particular case allows.

The manifestation of the principle of written proceedings is the fact that the majority of actions of the subjects of the proceeding can be realized not only orally, but also in a written way (e.g. filing evidence proposals), although some proceeding actions require the written form (e.g. filing the means of appeal). Some actions of the proceeding, e.g. rulings passed during open hearings, require the oral and written form to be used in conjunction (meaning that the ruling is put in writing first, and then it is read). The oral proceeding is used for making the record of court proceedings, which lists all the proceedings and actions. Outside of the court, parties communicate with the court and the

other parties through proceeding documents; the written form is necessary for the preparation of the oral hearing<sup>13</sup>.

The principle of written proceedings in Polish civil procedure is fully expressed in the fact that the petition is filed in a written form (see article 187 of the Polish Civil Procedure Code), but in some cases, some complainants (e.g. employees and insured people, acting in a proceeding without a solicitor), can file a petition orally (see article 466 of the Polish Civil Procedure Code). In some types of a case, the party has a duty to file a petition on a court form, e.g. in cases where the complainant, who was a service provider or a seller makes a claim in relation to the contracts with providers of mail and telecommunication services, also providers of electricity, gas and heating oil, and water, as well as contracts with companies disposing of sewage and waste and companies providing thermal energy (see article 187 of the Polish Civil Procedure Code).

An example of application of the principle of written proceeding is proceeding in economic cases. In economic cases, according to the article 479 § 1 of the Polish Civil Procedure Code, the court can pass a verdict during a closed session, when a defendant had accepted the action, or if the court decides that it is not necessary to carry out a hearing. The possibility to pass a verdict during a closed session in a situation, when the court arbitrarily decides that carrying out a court hearing is not necessary, limits to a significant degree binding of the principle of written proceedings in favor of the principle of economy, speed and efficiency of the proceeding. The legislator, having introduced the quoted regulation, consciously accepts that the truth might not be found and that the passed verdict might only confirm the state of things indicated by the complainant. According to the article 479 § 2 of the Polish Civil Procedure Code, the court might pass a verdict in absentia during a closed session, when the defendant had not replied to the petition. The quoted regulation allows the court to pass a verdict, which is based only on the complainant's statements. Passing the verdict during a closed session is only possible during the introductory examination of the case, and not after the hearing had started, even if the defendant accepted the action after the hearing had started<sup>14</sup>.

V. The proceedings mentioned above, show the primacy of the principle of written proceedings to the principle of oral proceedings, and are applied to a large percentage of civil cases that find their way to Polish courts. That is why an average person, who would hardly ever have anything to do with a court, would find written proceedings in civil procedure the most realistic or just obvious possibility.

The Polish, and not only Polish, legislator must deal with the problem of finding the balance between oral proceedings and written proceedings in civil procedure. The legislator needs to use all the facilities given by technical developments, but it needs to be made sure that the most important foundation does not get forgotten, and that is the need for courts to pass just verdicts, following fair proceedings, which protect the rights of the parties involved in proceedings. Computerization of court proceedings must not be an obstacle in making just decisions.

The legislator must take into consideration that putting limits on oral proceedings in favor of written proceedings might lead to assessment of the whole procedure as difficult

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<sup>13</sup> Broniewicz W., *Postępowanie cywilne w zarysie*, Warszawa 2006, p. 62, the same Jodłowski J., Siedlecki W., *Postępowanie cywilne. Część ogólna*, Warszawa 1958, pp. 167-168.

<sup>14</sup> See verdict of Polish Supreme Court from 13 December 1991, II CR 67/91, OSP 1992, no 7-8, position 175.

to understand, and therefore dishonest and unjust. The judiciary executed in the written form, meaning not in an open way, might be assessed by parties as discriminatory. Therefore, considering that the legislator is moving towards an even greater imbalance in favor of written proceedings in comparison to oral proceedings, it must be taken into consideration that the process economy issues, as well as speed of proceedings should not have a priority over the basic human right to an open and just trial started<sup>15</sup>.

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Mączyński M., „Ograniczenie prawa podmiotów gospodarczych do sądu”, Państwo i Prawo 2000, no 5, p.64.

