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PRINCIPLE OF OPENNESS: SOCIAL EFFECTS OF RECKLESS LEGAL CHANGES IN THE POLISH LEGAL SYSTEM

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Abstract

Polish civil procedure has recently suffered from reckless legislative changes. At the same time, the protractedness of proceedings in Poland reach its peak: the simplest cases are being handled for years. The Polish legislature, looking for solutions, increasingly seeks to speed up proceedings at the expense of the guiding principles of civil procedure, including the principle of openness. This results in a demolition of many institutions of civil procedure that have taken years to shape. The paper presents an analysis of the changes that have taken place with regard to the principle of openness in civil proceedings, as well as the dilemmas that have arisen due to the restriction of openness. The considerations revolve around the subject of the guiding principles of the trial, in particular the principle of openness, the institutions that limit the principle of openness, and the conflict between the principle of openness and the demand for fast proceedings. The basic question is: how will ill-considered changes to the openness of proceedings affect citizens' perception of the judiciary? What will be social effects of reckless legal changes in order to speed up proceedings?

***Keywords**:* Polish procedure, civil procedure, reckless legal changes, principle of openness, protractedness of proceedings.

1. Introduction

The period of the epidemic is characterized by bypassing the standards of proper legislation (Izdebski, 2021, p. 29 et al; Zembrzuski, 2022, p. 59 et al). It would seem that Covid Law (Law on special solutions related to prevention, counteraction and eradication of COVID-19, other infectious diseases and emergencies caused by them, 2020) abounded in ill-considered legislative changes that could be accepted - albeit not without concern - as temporary and exceptional solutions. In reality, however, legislation that is incompatible with supreme procedural principles dates back to the pre-pandemic period (Gudowski, 2023, p. 20 et al). We are observing a revolution disguised under the guise of pandemic strictures, which changes the role of the supreme procedural principles in order to speed up proceedings.

Raised on a pedestal, the desire to speed up and streamline proceedings is the keynote of recent legislative changes in Poland. The perception of speed as a principle, let alone a supreme procedural principle, is contrary to the prevailing body of doctrine (Siedlecki, 1959, p. 188 et al). The favoritism of

speed and efficiency of proceedings comes at the expense of the supreme procedural principles, including the principle of openness.

2.Supreme procedural principles - selected issues

Procedural principles are overarching norms that protect a particularly valuable good (Muliński, 2017, p.683 et al) and safeguard the legal system from statutory lawlessness, described vividly by G. Radbruch, among others (Radbruch, 2009, p. 244 et al). Principles determine the content of procedural law (Berutowicz, 1975, p. 35 et al). Procedural principles introduce restrictions on the legislator, while indicating what state of affairs should be achieved (Kordela, 2007, p. 12 et al). They serve to make a proper interpretation and application of the law (Skorupka, 2021, p. 224 et al). According to the procedural principles, the content and form of individual procedural institutions are shaped so that the functions of civil procedure are realized as fully as possible (Berutowicz, 1957, p. 18 et al). Procedural principles are interrelated, harmoniously coexist and complement each other (Siedlecki, 1977, p. 52 et al). They constitute norms that contain an order for the realization of certain values (Kordela, 2014, p. 276).

The essence of supreme procedural principles can be described according to two different positions: descriptive and directive. According to the descriptive view, procedural principles are models for resolving specific issues of procedural law. On the other hand, the perception of procedural principles as general norms, which are of fundamental importance in a particular branch of law, is characteristic of the directive approach (Dołecki, 2015, p. 50 et al). It is indicated that in the field of civil procedure the descriptive approach is the most useful (Dołecki, 2015, p. 50 et al).

According to the majority view, the principle of openness is the supreme principle of procedural law. Openness of civil proceedings is considered both as an element of the right to a fair trial (Gajda-Roszczynialska, 2022, p. 9 et al), and as a separate supreme principle of civil procedure (Berutowicz, 1975, p. 27 et al). In addition, the principle of openness is sometimes also included in the catalog of the supreme principles of justice (Kościółek, 2018, p. 103 et al).

1. Destruction of the principle of openness in civil proceedings in Poland

The principle of openness is a supreme procedural principle, one of the fundamental social values protected by law (Stawecki, 2004, p. 215 et al), a standard of civil procedure (Zembrzuski, 2021, p. 3 et al), and an essential element of the justice system (Rzewuski, 2022, p. 273 et al). The fundamental role of this principle in civil proceedings has been unquestioned for many years (Rafacz, 1925, p. 5 et al). The purpose of the principle of openness is to ensure the fairness of civil proceedings and the impartiality of judges (Zembrzuski, 2021, p. 7 et al). Open proceedings mobilize the court to diligently and conscientiously perform procedural acts, making the principle of openness one of the basic guarantees of lawful proceedings (Zembrzuski, 2021, p. 7 et al). The principle of openness has a strong impact on other principles, in particular the principles of equality, adversarial, directness and oral procedural actions (Machnikowska, 2022, p. 80 et al). The hearing of cases in camera should be an exception to the rule. The rank of the principle of openness is emphasized by Article 45 of the Constitution of the Republic of Poland, accordingto which everyone has the right to a fair and public proceedings without undue delay by a competent, independent, impartial and independent court.

There are two aspects of the principle of openness: internal openness and external openness. Internal openness concerns the parties and participants in the proceedings who are directly interested in the resolution of the case. The external aspect of openness concerns third parties, i.e. those who may participate in the proceedings as an audience (Broniewicz, 1954, p. 83 et al; Flaga-Gieruszyńska, 2016, p. 13 et al). Deviations from external openness are permissible, while openness to the parties should be limited as little as possible (Misztal-Konecka, 2012, p.97 et al). Internal openness is a guarantee of a fair trial. The effect

of violating internal openness may be to deprive a party of the opportunity to defend its rights, which will lead to the invalidity of the proceedings (Zembrzuski, 2021, p. 7 et al).

The reform of the openness of proceedings was particularly increased during the pandemic, but it actually began much earlier. A 2015 amendment of the Civil Procedure Code (Law on Amendments to the Law - Civil Procedure Code and Some Other Laws, 2015) introduced Article 148(1), under which the court may hear a case in closed session in two cases. First, the case will be heard in closed session if the defendant has acknowledged the claim. Second, after the parties have filed their pleadings and documents, including the filing of pleas or objections to a payment order or opposition to a default judgment, the court may decide that a hearing is not necessary. The court has broad authority as to the possibility of hearing the case in closed session. The parties may effectively object to hearing the case in closed session if they request a hearing in their first pleading. Despite the fact that the right to open proceedings derives from the Constitution and should be ensured, it is required increased care of the parties to exercise their right to open proceedings.

In the latest amendment of the Civil Procedure Code (Law on Amendments to the Law - Code of Civil Procedure and Some Other Laws, 2023), the legislator proposes to change the wording of Article 148(1) § 3 to make the hearing of a case in closed session dependent on whether a party requests to be heard at the hearing in the first pleading, or on exceptions that are introduced by special provisions. The proposed change was viewed as an extension of the premise for hearing a case in closed session and was criticized as violating the principle of openness.

The provisions of the 2019 amendment of the Civil Procedure Code introduced Article 374. The cited regulation applies to appellate proceedings and allows cases to be heard in closed session if a highly discretionary criterion is met, i.e. if a hearing is not necessary. Consideration of the case in closed session is not allowed if a party in the appeal or response to the appeal has requested an open hearing (unless the lawsuit or appeal is withdrawn or the proceedings are invalid). At the same time, the court does not instruct the appellant to request an open hearing in the appeal (Kościółek, 2019, p. 1161 et al; Zembrzuski, 2021, p. 12 et al). Prior to the 2019 amendment, Article 374 of the Civil Procedure Code contained a clearer mechanism that allowed the case to be heard in closed session if the lawsuit or appeal was withdrawn, or if the proceedings were invalid. Moreover, juxtaposition of the norm under Article 374 of the Civil Procedure Code with the content of Article 375 (due to this article to the cases specified in Article 391(1), Article 373 and Article 374 of the Civil Procedure Code, the chairman shall schedule a hearing) of the Civil Procedure Code leads to the conclusion that in appeal proceedings the principle of hearing the case in closed session applies (Zembrzuski, 2021, p. 12 et al). Article 148 of the Civil Procedure Code was also changed by the 2019 amendments. The previous wording of the article did not allow the issuance of a decision in closed session, but today it is possible under Article 148 § 3 of the Civil Procedure Code. All legislative changes were made to speed up proceedings

During the pandemic there was an apogee of limiting the principle of openness. Amendments to Article 15zzs(1) and Article 15 zzs(2) of the Covid Law limit the principle of openness both in its internal and external aspects (Gołaczyński, Kotecka-Kral, 2020, p. 637 et al); Kulski 2020, p. 442 et al). Pursuant to these provisions, during the period of either an epidemic or a state of epidemics declared due to COVID-19 and within one year after the last one is revoked, the chairman may order a closed session to be held whenever a remote session cannot be held and it is not necessary to hold a hearing or open session. In addition, the covid provisions allow for the issuance of a ruling in a closed session if the evidentiary proceedings have been conducted in their entirety. The principle of openness proceedings has been significantly reduced. It can even be said that the rule now is to hear cases in closed sessions.

4. Inadmissibility of abandoning the principle of openness in favor of the acceleration of proceedings

The right to trial without undue delay is the right of an individual to have a case heard within a reasonable time. This right is a component of the right to a fair trial in Poland (Pietrzkowski, 2005, p. 37 et al; Pogonowski, 2005, p. 251 et al). Striving to streamline proceedings serves the realization of the right to a court and is desirable. However, speeding up proceedings should not be opposed to other components of the right to a fair trial. Institutions aimed at speeding up proceedings should be necessary and proportionate to the importance of the proceedings (Zieliński, 2009, p. 112 et al). At the forefront, not coincidentally, is the need to ensure a fair trial. The hearing of a case without undue delay is an important but not a priority element of the right to a fair trial. Speed of proceedings is neither an intrinsic nor an absolute value and should be implemented in accordance with the supreme principles of civil procedure.

At the same time, it is questionable whether the changes introduced by the legislature actually promote the efficiency of the proceedings. There are increasingly frequent claims that the number of cases pending before the courts has increased significantly. Procedural haste is a negation or even a degeneration of the postulate of efficiency of the civil process (Zembrzuski, 2022, p. 73). To hear a case without undue delay does not mean to hear the case quickly. It is in the interest of the state to strive to fulfill its duty to administer justice as quickly as possible, which, however, should be done in a rational and thoughtful manner. When creating the law, speed and efficiency of the proceedings should be taken into account, but this should not interfere with the right to a fair trial (Zembrzuski, 2022, p. 71 et al) and the guiding principles of the process, including the principle of openness.

Destroying the principle of openness can lead to serious social consequences. Will people still trust a justice system whose actions they have no insight into? It seems not. Restricting the principle of openness in favor of speeding up the proceedings should be viewed negatively. The affliction of the Polish justice system is the lengthiness of proceedings. The legislature is making ill-considered legislative changes in an attempt to fix this affliction. The changes introduced violate fundamental procedural principles, including the principle of openness of proceedings. The legislature's actions do not appear to be justified and proportionate. The impact of the introduced legislative changes on society will be such that people will begin to lose confidence in the judiciary. Without insight even into their own case, people will stop trusting the courts (with the fact that we have been in a crisis of citizens' trust in courts for several years anyway).

Openness is a constitutional principle and a guarantee of a fair trial. The principle of openness, as a supreme procedural principle and an element of the right to a fair trial, for many years has been (or was?) the backbone of civil proceedings in Poland. The supreme procedural principles play a very important role in the legal system for several reasons. They form the axiological basis of the norms of procedural law, indicate how the law should be created and interpreted, and serve the purposes and functions of the proceedings. In addition, procedural principles are linked to general political goals, so they are the concretization of current political ideas (Berutowicz, 1975, p. 30 et al). Principles make it possible to decode the most important political postulates that prevail in a given period. In this way, it can be said that the overriding role of the principle of objective truth in the socialist period testified to the sovereign's desire to control every aspect of social life and protect the public interest. What is evidenced by today's legislature's focus on pushing the idea of proceeding as quickly and cheaply as possible? There seems to be nothing more behind it than financial considerations combined with incompetent lawmaking.

In a 2006 the Constitutional Court in Poland (judgment of 30 June 2003, P 1/03) formulated the concept of "exceeding a critical mass," which means that a cumulative violation of several procedural principles (e.g., the principle of collegiality and the principle of openness) can lead to a violation of constitutional principles and freedoms. It seems that it is already outdated to consider whether a critical mass has been exceeded. Now it is worth considering how to level the effects of this transgression and stop further destruction. One must agree that "the mechanisms developed over decades, the standards of civil procedure and the social values protected by the law are collapsing before our eyes" (Zembrzuski, 2022, p. 74 et al). The supreme procedural principles, including the principle of openness, deserve the constant

concern of legislation, doctrine and jurisprudence. At a time when the legislature has become an anonymous production of rules, and the judicature is poisoned by a crisis of the rule of law, hope is left for the voice of the doctrine.

Reference List

1. Berutowicz, W. 1975. O pojęciu naczelnych zasad postępowania cywilnego, Studia Cywilistyczne, t. XXV-XXVI
2. Berutowicz, W. 1957. Zasada dyspozycyjności w postępowaniu cywilnym, Warsaw
3. Broniewicz, W. 1954. Jawność jako konstytucyjna zasada procesu cywilnego Polski Ludowej, Nowe Prawo 5-6
4. Dołecki, H. 2015. *Postępowanie cywilne. Zarys wykładu*, Warsaw
5. Flaga-Gieruszyńska, K. 2016. Jawność zewnętrzna procesu cywilnego – wizja przyszłości, [w:] Zasada postępowań sądowych w perspektywie ostatnich nowelizacji, red. D. Gil, E. Kruk, Lublin
6. Gudowski, J. 2023. Kodeks postępowania cywilnego A.D. 2022. Esej o postmodernizmie, obskurantyzmie prawnym i niekompetencji, Przegląd Sądowy 2
7. Gołaczyński, J. Kotecka-Kral, S. 2020. Elektronizacja pism procesowych, doręczeń i posiedzeń jawnych w postępowaniu cywilnym w okresie pandemii COVID-19, Polski Proces Cywilny 4
8. Gajda-Roszczynialska, K. 2022. Przebudowa wymiaru sprawiedliwości w czasach pandemii COVID-19 ze szczególnym uwzględnieniem postępowania cywilnego, „Polski Proces Cywilny" 1
9. Izdebski, H. 2021. Legislacja dotycząca COVID-19 i ustawowy nihilizm prawny, [w:] Pandemia COVID-19 a prawa i wolności obywatela, red. T. Gardocka, D. Jagiełło, Warsaw
10. Jakubecki, A. 2006. Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego, [w:] Czterdziestolecie kodeksu postępowania cywilnego. Zjazd katedr postępowania cywilnego w Zakopanem (7-9.10.2005 r.), red. I. Ratusińska, Zakamycze
11. Kordela, M. 2007. Możliwość konstruowania ogólnej teorii zasad prawa. Uwagi do koncepcji Roberta Alexy'ego, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2
12. Kordela M. 2014. Zasady prawa. Studium teoretycznoprawne, Poznań
13. Kulski, R. 2020. Wpływ stanu zagrożenia epidemicznego lub stanu epidemii ogłoszonego z powodu COVID-19 na postępowanie cywilne, Monitor Prawniczy 9
14. Kościółek, A. 2018. Zasada jawności w sądowym postępowaniu cywilnym, Warsaw
15. Kościółek, A. 2019. Regulacja prawna apelacji w świetle nowelizacji KPC, „Monitor Prawniczy" 21
16. Muliński, M. 2017. Pojęcie „zasada" w kodeksie postępowania cywilnego, [w:] Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu, red. T. Ereciński, J. Gudowski, M. Pazdan, M. Tomalak, Warsaw
17. Mączyński, M. 2000. Ograniczenie prawa podmiotów gospodarczych do sądu, „Państwo i Prawo" 5
18. Misztal-Konecka, J. 2012. Jawność postępowania cywilnego ze szczególnym uwzględnieniem elektronicznego postępowania upominawczego, „Kwartalnik Prawa Publicznego" 3
19. Machnikowska, A. 2022. Zasada jawności w postępowaniu procesowym - modernizacja czy marginalizacja? Wybrane zagadnienia, Polski Proces Cywilny 1

20. Pietrzkowski, H. 2005. Prawo do rzetelnego procesu w świetle zmienionej procedury cywilnej, Przegląd Sądowy 10
21. Pogonowski, P. 2005. Realizacja prawa do sądu w postępowaniu cywilnym, Warsaw
22. Radbruch, G. 2009. Filozofia prawa, Warsaw
23. Rzewuski, M. 2022. Realizacja zasady jawności w postępowaniu odrębnym w sprawach gospodarczych w świetle noweli KPC z dnia 4.07.2019 r. i ustaw antycovidowych, [w:] Realizacja zasad postępowania cywilnego na tle aktualnych zmian KPC, red. M. Skibińska, Zielona Góra
24. Rafacz, J. 1925. Dawny proces polski, Warsaw
25. Siedlecki, W. 1959. Podstawy rewizji cywilnej, Warsaw
26. Siedlecki, W. 1977. Postępowanie cywilne. Zarys wykładu, Warsaw
27. Skorupka, A. 2021. Pojęcie zasady prawa, [w:] Dopuszczalność dowodu sprzecznego z prawem w sądowym postępowaniu cywilnym, red. A. Skorupka, Warsaw
28. Stawecki, T. 2004. Jawność jako wartość prawna, „Studia Iuridica" 43
29. Zembrzuski, T. 2022. Przeciwdziałanie i zwalczanie epidemii COVID-19 w postępowaniu cywilnym, czyli pożegnanie z kolegialnością orzekania, Polski Proces Cywilny 1
30. Zembrzuski, T. 2021. Ograniczenie jawności postępowania w sprawach cywilnych w dobie pandemii – potrzeba chwili czy trwałe rozwiązanie?, Forum Prawnicze 3-18
31. Zieliński, A. 2009. Zasada formalizmu procesowego w nowelizacji Kodeksu postępowania cywilnego. Zagadnienia wybrane, [w:] Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych, red. H. Dolecki, K. Flaga-Gieruszyńska, Warsaw