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## **THE PRESENCE OF IUS COMMUNE PROCEDURE FEATURES IN MODERN POLISH CIVIL PROCEEDINGS**

**Abstract:** *Social dissatisfaction with the administration of justice in Poland is closely related to excessive delays in resolving civil disputes. However, this disadvantage is only an outcome of complex and outdated regulations. In recent years, the Polish legislator has introduced various new solutions which were supposed to modernize the civil procedure and accelerate the speed of proceedings. Some of them resemble the medieval ius commune procedure features. The main purpose of this paper is to identify them and discuss their reasonableness as well as their usefulness in modern civil proceedings from the historical perspective. The conducted research leads to the conclusion that the described reform efforts are contrary to the basic civil procedure principles developed over the years, such as orality, publicity or immediacy, and cannot contribute to the expected positive effect in terms of ensuring the right of access to court without undue delay. On the contrary, the efficiency of the proceedings can only be guaranteed by open and direct communication between a court and the parties, simplified procedural rules and increased number of court staff.*

**Keywords:** *ius commune; orality, publicity and immediacy principles; written testimony; in camera hearings; efficiency of civil proceedings; state of epidemic threat; COVID-19 pandemic.*

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## 1. Introduction

The efficiency of proceedings and justice of rulings play a key role in a good civil procedure. To achieve these goals, the legislator needs to correctly shape regulations allowing cooperation between a court and parties. This requires i.a. uninterrupted, open and direct communication between them. In the last years, the Polish legislator has passed several amendments to the Civil Procedure Code for the purpose of accelerating the speed of civil proceedings, but the objective has never been accomplished. On the contrary, some of the amendments have lowered the degree of respect for procedural rights and violated fundamental civil procedure principles. The added regulations not only resemble unique characteristics but also showcase disadvantages of the *ius commune* procedure.

The phrase “*ius commune*” used in this paper refers to the continental European legal system, formed by combining Roman law (*Corpus Iuris Civilis*) and canon law (*Corpus Iuris Canonici*) in the High Middle Ages<sup>1</sup>. It was primarily developed and established by Italian jurists which used the Bolognese legal method of *studium civile* (see Wieacker, 1981: 275 et seq.). This meant that they applied ancient Roman regulations (so-called Justinian’s law) to the situations not directly expressed in legal texts as a way to resolve social conflicts.<sup>2</sup> According to this doctrine, the decision-making was not based on the precedents (like in the common law system)<sup>3</sup> but on subsuming a case under the terms of an abstractly formulated authoritative text or statute (Wieacker, 1981:258). This system was common to all Western European countries<sup>4</sup> (especially Italy, France and Ger-

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1 Thus, this system is also called the Roman-canon law (Romano-canonical procedure/system), the Italian-canon law/procedure (Cappelletti, Perillo, 1965:33-34; Maciejewski, 2015: 457; Dębiński, 2010:149; Dziadzio, 2022:499; Sójka-Zielińska, 2022:214 et seq.) or *ius utrumque* (Wieacker, 1981:278; Castro Ayala, 2020:127).

2 For more, see: Gordley, 2013:28-81.

3 This system was developed in opposition to the civil (Roman-law) system between the 13<sup>th</sup> and 17<sup>th</sup> century in England and brought to North America and other parts of the world during British colonization. (See: Yntema, 1949:77-79; Subrin, 1987:914-918).

4 In English, its name “common law” implied that it was applicable everywhere in the absence of regional sources of law, either traditional or statutory (Wieacker, 1981: 259). However, this term should be distinguished from the present-day common law system as opposed to the civil law system. For this reason, in further considerations, the described system will be referred by its Latin name *ius commune*. Parallel to this doctrine, the Roman-Byzantine legal system (Byzantine law) developed and was in force in the Eastern European countries from the 15<sup>th</sup> century. The division into these two legal systems was a result of the division of the Roman Empire into the eastern and the western part, where the Roman Catholic Church had dominance in Western Europe and the Orthodox Church prevailed in Eastern Europe (see Yntema, 1949:86; Płaza, 2002:422; Litewski, 2003:112 et seq.; Kuryłowicz, Wiliński, 2021:58-59).

many) from the rediscovery and reception of Justinian's *Digest* in the 12th and 13th century until the great codification movement in the 18<sup>th</sup> and 19<sup>th</sup> century, and it superseded much of the original legal tradition of each nation (see Wieacker, 1981: 258; Maciejewski, 2015:457-462; Dziadzio, 2022:114-115, 499-500).

One may wonder why we should seek the comparison between the modern Polish civil proceedings and this medieval procedure. The answer is simple and clear: first, because it is always beneficial to see how certain, similar regulations worked out in the past; second, the *ius commune* procedure had many specific features that can be easily observed in the current Polish civil procedure; third, some procedural problems are of timeless meaning; fourth, specific traits of the *ius commune* procedure resulted in disadvantages (primarily evident in delays in resolving disputes) which also characterize the current Polish procedural law. Therefore, it can be assumed that the historical consciousness can give a great background for evaluating the ongoing trends in this area of law and formulating *de lege ferenda* postulates.

Due to the page limit in this paper, it is not possible to describe all characteristics of both the *ius commune* and the modern Polish civil procedure. Hence, references to the *ius commune* system made in this article refer only to some general features of this system. The following four out of five general traits of this system described in the literature were taken into account: increasing importance of written elements in proceedings; conducting proceedings in camera; segmental, piecemeal unfolding of the process; and long duration of the proceedings. The only one that is not applicable to the modern Polish civil procedure law is the formal (legal) system of proof (see Cappelletti, 1971:848-849)<sup>5</sup>. The paper will focus on selected legal provisions from the Polish Civil Procedure Code (CPC), which were introduced to the CPC recently, and other legislative acts regulating civil procedure. Some of them were introduced by the Act of 10<sup>th</sup> July 2015 amending the Civil Code, the Civil Procedure Code and certain other acts<sup>6</sup>, some by the Act of 4<sup>th</sup> July 2019 amending the Civil Procedure Code and certain other

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5 The Polish legislator has not used this principle thus far. Hence, the Polish procedure is based on the principle of free judicial evaluation of evidence (see: Article 233 of the Act of 17<sup>th</sup> November 1964 –Civil Procedure Code, consolidated text J.L. of 2021 r. item 1805 with further changes; hereinafter referred as: the CPC).

6 Act of 10<sup>th</sup> July 2015 amending the Civil Code, the Civil Procedure Code and certain other act, J.L. item 1311; (hereinafter: the Act amending the CC of 10<sup>th</sup> July 2015). The act came into force on 8<sup>th</sup> September 2016.

acts<sup>7</sup>, others by the so-called Anti-Covid Act (2020)<sup>8</sup> and others by the Act of 9<sup>th</sup> March 2023 amending the Civil Procedure Code and certain other acts<sup>9</sup>. Additionally, some regulations of the proposed Act of 31 March 2023 amending the of Civil Procedure Code, the Act on the system of common courts, the Criminal Procedure Code, and certain other acts<sup>10</sup> are also worth noting.

## 2. Increasing importance of written elements in civil proceedings

The *ius commune* procedure was characterized by a written form of proceedings which can be best described by the ancient Latin proverb “*quod non est in actis non est in mundo*” (what is not kept in the records does not exist). Thus, the judge would not usually meet with the parties, witnesses or even the lawyers. The judge was presented with a written claim and written evidences, and resolved the case without any personal contact with the parties and other participants in proceedings. Testimonies were taken not by a judge but by an *actuarius*, *notarius*, *protonotarius* or *cancellarius* at a separate session. Both the public and the parties were barred from it. Therefore, this procedure was based on the principles of documentation and formalism (Cappelletti, Perillo, 1965:36). Orality of the proceedings was almost nonexistent. For this reason, in the doctrine, this procedure is characterized as being predominated by the written element (Cappelletti, 1971:848). The consequences of such an approach were far-reaching. A judgement based on elements other than written ones was null and void (Cappelletti, 1971:848).

On the other hand, in Poland, even the first unified civil procedure rules from 1523 (called *Formula processus*) underlined the principles of orality and publicity of hearings (Fierich, 1921: 306), which first and foremost referred to the evidentiary proceedings. The same values were respected later on the Polish territory in all regulations of partitioning states (Russian from 1864, German

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7 Act of 4<sup>th</sup> July 2019 amending the Civil Procedure Code and certain other acts, J.L. item 1469 with further changes (hereinafter: the Act amending the CPC of 4<sup>th</sup> July 2019), which came into force on 7<sup>th</sup> Nov. 2019.

8 The Act of 2<sup>nd</sup> March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them (hereinafter: the Anti-Covid Act, 2020). This Act came into force on 8<sup>th</sup> March 2020 and has been significantly changed by the Act of 28<sup>th</sup> May 2021 amending the Civil Procedure Code and certain other acts, consolidated text J.L. of 2021 r. item 2095 with further changes.

9 The Act of 9<sup>th</sup> March 2023 amending the Civil Procedure Code and some other acts, J.L. item 614 (hereinafter: the Act amending the CPC of 9<sup>th</sup> March 2023); most of its provision came into force on 1 July 2023.

10 See: Project no. UD262, retrieved 17<sup>th</sup> April 2023 from: <https://legislacja.rcl.gov.pl/projekt/12354100>.

from 1877, and Austrian from 1896) as well as in the French Code of Civil Procedure from 1806 (see Fierich, 1921:310-318; *Wańkowski, 1931:291*) that was in force in the Duchy of Warsaw from 1808 and later in the Congress Kingdom of Poland.<sup>11</sup> Likewise, all Polish civil procedure regulations passed after the recovery of statehood in 1918 were based on the principle of orality, especially in contentious proceedings (see S. Gołąb, 1930:20 et seq.; Machnikowska, Stawarska-Rippel, 2016:81, 92-94, 98, 124), with some exceptions as it is not possible to form a procedure based solely on written or oral form.<sup>12</sup> This also relates to the CPC. Therefore, it is widely accepted that the main principle of the Polish civil proceedings is the principle of orality which manifests itself first and foremost in the orality of public court hearings (see e.g. Flaga-Gieruszyńska, Zieliński, 2022:511-512), whereas the written elements of procedure play a bigger role in non-contentious, securing claims and enforcement proceedings (Błaszczak, 2013:89). However, one cannot resist the impression that the legislator is increasingly introducing written elements to the contentious procedure in this area as well (see Skibińska, 2021: 758). As a result, in the Polish literature some concerns are arising whether the dominant principle of Polish civil proceedings is the principle of orality or the principle of written process (*Góra-Błaszczkowska, 2008:144*; Skibińska, 2021:758). This is evidenced above all by Article 271<sup>1</sup> of the CPC. This provision was introduced by the Act amending the CPC of 4<sup>th</sup> July 2019, and added another exception to the principle of orality in evidence proceedings<sup>13</sup>. According to this provision, the witness shall testify in writing, if the court decides so. The legislator justified this amendment by pointing out that “written testimony can significantly speed up the issue of a decision in the case and save the parties costs, and the court’s work”<sup>14</sup>. Before and after the introduction of this provision to the CPC, many scholars criticized it due to different

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11 It was replaced in 1876 by the Russian Act of 1864 (see e.g. Rylski, Weitz, 2014:80; Korobowicz, 2014:92 et seq.).

12 There is no doubt that all principles are restricted in some ways but one of the principles should always prevail. The elements of the other principle can be allowed as exceptions (see Jodłowski, 1974:68).

13 Other exceptions include: the possibility of taking a witness testimony in writing when a witness is dumb or deaf (Article 271 Section 2 of the CPC), admissibility of hearing a party in writing (Article 505<sup>25</sup> Section 2 of the CPC), awarding documentary evidence the rank of exclusive evidence in separate proceedings in commercial cases (Article 458<sup>11</sup> of the CPC), the possibility for non-participants in non-litigious proceedings to testify in writing (Article 515 *in fine* of the CPC).

14 Uzasadnienie do projektu nowelizacji kodeksu postępowania cywilnego, Druk 3137 p. 59 (Justification of draft act amending the CPC, Project no. 3137), retrieved 30<sup>th</sup> June 2023 from: <https://orka.sejm.gov.pl/Druki8ka.nsf/0/166CCC44490F3965C1258384003CD40A/%24File/3137-uzas.pdf>. This argumentation was also accepted by some authors (see: Klowski, 2018:195-196; Kotas 2019:108).

possible ways of its application, the inability to verify the identity of the witness, the possibility of influencing the content of the testimony by parties and their lawyers and negatively impacting the principles of truth and immediacy as well as the postulate of speedy proceedings (see e.g. Kotas, 2019:108-109; Skibińska, 2019:126-128; Mucha, 2020:78 et seq.; Ziemiański, 2021:445). Therefore, it was justly postulated in the doctrine to take testimonies orally (which may also be done remotely) as a rule and in written form only as an exception (see e.g. Skibińska, 2019:128; Homenda, 2019:369; Mucha, 2020:90).

Despite those concerns and postulates, the described regulation was widely used during the Coronavirus pandemic and gained acceptance of many judges and lawyers. On the one hand, it allowed many cases to be resolved during that period. On the other hand, due to the discretionary nature of the provision of Article 271<sup>1</sup> of the CPC and the lack of statutory prerequisites for its application, it has led to its uncontrolled and extensive use even in those cases where a witness can be heard directly by the court during a public hearing (or remote hearing). To summarize, the opportunity provided by the Article 271<sup>1</sup> of the CPC should be used wisely and carefully. In order to secure that, the legislator should formulate at least general prerequisites, such as the need to take a witness's testimony in the written form. Otherwise, this regulation will always cause controversies because the removal of a direct contact of the court with the procedural material deprives the judge of the opportunity to evaluate the essential content of the evidence. Moreover, it is extremely difficult to judge the witness's sincerity when the court panel does not meet directly with the witness. This can lead to the disqualification of such testimonies and can discredit the witness's testimony as evidence in general (Kotas, 2019:109). In this respect, the described provision can also cause delays in hearing of the case. Furthermore, this regulation in its current form also violates the principle of adversality because, in a classic adversary process, the decision is based on information presented orally by participants in open court and discussed during a contradictory debate (Jolowicz, 2003:283).

### **3. Conducting proceedings in camera**

The orality and publicity played a key role in Roman civil procedure and in the early stages of the medieval *ius commune* procedure but, over time, the principles of written process and *in camera* proceedings started to prevail (Maciejewski, 2015:335). Therefore, court hearings were basically held in camera. The *ius commune* procedure discouraged any personal, direct, open contact between the court and other participants in the process. The judge did not deal with the parties, witnesses, experts and lawyers but with papers. This was connected

with the aforesaid form of written process and the idea that the ruling should be based on records, not on judges' personal impressions (Cappelletti, 1971:848). Thus, only *actuarii*, *notarii*, *protonotarii* or *cancellarii* were eligible to take evidence from witnesses. Moreover, not only did they take testimony but also wrote and translated it (often into Latin) for the judge (Cappelletti, 1971:848). This resulted in prevalence of the principle of mediacy and insulation of the judge from facts and people.

Yet, Polish civil procedure was always based on the principles of immediacy, orality and publicity<sup>15</sup>. That meant that the procedure was conducted directly by judges themselves without intermediation of other persons and in open court hearings allowing not only parties and their attorneys (internal aspect of the rule of publicity) but also general public (an external aspect of the rule of publicity) to participate in proceedings (*Wańkowski*, 1932:103; *Broniewicz*, 1983:59; *Góra-Błaszczkowska*, 2008:132; *Kościółek*, 2018:161 et seq.). Only in some particular (mostly simple) proceedings was it possible to issue a judgement in camera when a special provision stated so (Article 9 of the CPC), and even then it was limited only to the first stage of proceedings while an appeal from such a ruling usually opened access to a public hearing of the case (see Articles 480<sup>4</sup>, 505<sup>17</sup>, 505<sup>23</sup> of the CPC).

Some substantial changes in this area started in 2015 when the Act amending the CPC of 10<sup>th</sup> July 2015 introduced the provisions of Article 148<sup>1</sup>, which opened a broad possibility of issuing a judgment in camera (see e.g. M. Skibińska, 2018:151 et seq.), and Article 151 Section 2 to the CPC, which introduced the possibility to conduct a public hearing by using technical devices enabling it to be held remotely. This first provision has already been modified twice, first by the Act amending the CPC of 4<sup>th</sup> July 2019 and, recently, by the Act amending the CPC of 9<sup>th</sup> March 2023. According to the current provision, the court may hear a case in camera when the defendant has recognized the action or when, after the presentation of statements and documents by the parties, as well as after filing an objection against an order for payment, opposition to an order for payment, a motion contesting a judgement in default, the court decides - having considered all of the quoted claims and submitted evidence motions - that holding a hearing is not necessary<sup>16</sup>. The second provision was newly modified by the Act of 5<sup>th</sup> August 2022 amending the act – Executive Penal Code and certain other acts<sup>17</sup>

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15 These principles often co-create a system of a civil procedure that is opposed to the system based on the principles of documentation, mediacy and secrecy ( see: Millar, 1923:150-151.)

16 The use of this provision was expanded by the Act amending the CPC of 9<sup>th</sup> March 2023 (see Article 205<sup>5</sup> Section 1<sup>1</sup> and Article 505<sup>1a</sup> of the CPC).

17 The Act of 5<sup>th</sup> August 2022 amending the act – Executive Penal Code and certain other act, J. L. item 1855.



which came into force on 1<sup>st</sup> January 2023. According to Article 151 Section 2 of the CPC, the chairman may order a public hearing to be held using technical devices enabling it to be held remotely. In such a case, the participants in the proceedings may participate in a court session when they are staying in another court building, or in a prison or a detention center when they are deprived of liberty, and perform procedural acts there. The hearing is broadcast from the courtroom of the court conducting the proceedings to the place of participants' stay during the proceedings, and from the place of participants' stay during the proceedings to the courtroom of the court conducting the proceedings. A representative of the administration of the penitentiary or detention center, a legal representative (if appointed), and an interpreter (if appointed) participate in procedural acts at the place of residence of the person deprived of liberty.

Further changes in the public hearing of the case were introduced by the the Act amending the CPC of 4<sup>th</sup> July 2019, which significantly changed the provisions of Article 374 of the CPC. According to the new provision, the court of second instance may hear the case in camera, if it is not necessary to hold a public hearing. As a result, restrictions in public hearing of the case relate not only to the first instance courts but also to the courts of second instance.

The process of limiting the principle of publicity was later strengthened by Article 15 zzs<sup>1</sup> of the Anti-Covid Act.<sup>18</sup> This provision allowed conducting remote hearings as a rule during the period of the state of an epidemic threat or the state of an epidemic proclaimed due to the COVID-19 pandemic and within a year from repealing the last of them in all civil cases. Moreover, it also provided an additional possibility of resolving a case in camera, thus, extending the possibilities provided in this respect in the CPC provisions<sup>19</sup>. Furthermore, the amendment of 28<sup>th</sup> May 2021 also introduced some other provisions allowing courts to hear a civil case in the second instance and before the Supreme Court in camera (see: Article 15 zzs<sup>2</sup> and Article 15 zzs<sup>7</sup> of the Anti-Covid Act of the Anti-Covid Act).<sup>20</sup> According to the Anti-Covid Act, it means that all cases in general should be heard in remote hearings. Public hearings and hearings in camera should remain an exception, with further exceptions in the second instance cases and cassation cases. This should be viewed as the restriction of the principle of publicity which

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18 See: R. Kulski, 2020: 447; Kościółek, 2021: 22 et seq.; Zembrzuski, 2021:3 et seq.; Gajda-Roszczyńska, 2022: 9 et seq.; Machnikowska, 2022: 80 et seq.; Dziurda, 2022: 125; Rzewuski, 2022: 273 et seq.

19 The provisions of this article were significantly changed by the amendment of 28<sup>th</sup> May 2021 and recently by the amendment of 9<sup>th</sup> March 2023.

20 From 1st July 2023 the state of an epidemic threat has been repealed; see Section 1 of the Regulation of 14<sup>th</sup> June 2023 of the Minister of Health on canceling the state of an epidemic threat in the territory of the Republic of Poland, J. L. item 1118.



occurs at two levels: 1) in an external way, whenever the remote hearings or hearings in camera take place: there is no dedicated system that allows the public to take part in proceedings held online; moreover, as the links to the hearings are not available on websites of courts, the public does not have access to hearings; 2) in an internal way, when the hearings in camera are ordered. What is more worrisome, the draft act of 31<sup>st</sup> March 2023 transfers the aforesaid temporal regulations to the CPC. According to the proposed modification of Article 151 Section 2 of the CPC, the chairman may order a remote hearing if this is not precluded by the nature of the activities to be performed at the hearing, and conducting a remote hearing will guarantee full protection of procedural rights of the parties and the proper course of proceedings. In such cases, the persons participating in the hearing, with the exception of the court and the recording clerk, do not have to be present in the courthouse. Propositions provided in Article 151 Section 6 of the CPC are even more interesting. According to them, while notified about a remote hearing, its participants are also informed (i.a.) about the address of the website and the method of joining the meeting, and instructed that the intention of using this form of participation in the meeting should be reported no later than 3 working days before the scheduled date of the hearing. Only the person deprived of liberty does not have the obligation to notify the court about the intention to participate in the hearing remotely. Furthermore, according to the proposed Section 7 of Article 151, in the absence of such notification, the party or another person notified or summoned to the meeting may submit a request to participate remotely no later than 7 days before the scheduled date of the hearing, indicating the e-mail address. This proposal remains fully opposed to the idea of an open court. No one should be forced to declare their participation in a public hearing. Therefore, this proposal should not be accepted. Article 45 Section 1 of the Constitution of the Republic of Poland guarantees that everyone shall have the right to a fair and public hearing. The exceptions to the public nature of hearings may be made only for reasons expressly stated in Section 2 of this Article. It is obvious that the Coronavirus pandemic indicated a need to expand the existing possibilities of conducting such hearings but this should not become a norm and be used as a way to deprive the public or even parties of their right to participate in public hearings. *De lege ferenda*, it is necessary to restore the standard of openness of civil proceedings as a principle, leaving the possibility of conducting remote hearings but with the participation of the public and only in cases requiring this form of hearings to secure at least some publicity, immediacy and speed of proceedings.

#### 4. Segmental, piecemeal unfolding of the process

The *ius commune* procedure allowed parties and their attorneys to have a great impact on the process of running the case. This resulted in postponents, usage of dilatory tactics and abuse of procedural rights by the parties (Cappelletti, 1971:850). Among others, these included: the right to separately appeal partial and interlocutory judgements ruled during the proceedings (see Dziadzio, 2022:502), which resulted in frequent suspension of the principal case, and the right to present new evidence and facts during the course of the trial, even in the second instance (Cappelletti, 1971:850). The system tried to cope with these problems by imposing series of formalities, consequently aggravating the already rigid and inflexible character of civil procedure.

The phenomena of postponents, usage of dilatory tactics and abuse of procedural rights by the parties are also present in modern Polish civil proceedings. Some measures to fight these phenomena were taken by the legislator, especially in the amendment Act of 4<sup>th</sup> July 2019 (see e.g. Articles 4<sup>1</sup> and 226<sup>2</sup> of the CPC) but other problems remain actual. When it comes to the possibility to appeal partial decisions of the court that can be verified within the course of proceedings, the CPC includes a wide range of possibilities (see Article 394 et seq. of the CPC). Furthermore, by the amendment Act of 4<sup>th</sup> July 2019, the Polish legislator introduced horizontal complaints in many cases before the first instance court. This allows the same first instance court that issued the ruling to evaluate complaints but in a different court composition. This has led not only to the accumulation of cases in the first instance court and further delay in managing them but also raised concerns about the social value of rulings issued by the colleagues of the judge that previously issued a decision. Some positive changes in that matter have been introduced recently by the amendment Act of 9<sup>th</sup> March 2023 (see e.g. Article 394 Section 1 Point 5<sup>1</sup> and Article 394 Section 4 of the CPC which came into force on 1st July 2023); however, general concerns about horizontal complaints still remain accurate as well as the need to allow complaints in such a wide range of cases. The general principle expressed in Article 78 of the Constitution of the Republic of Poland, allowing to appeal rulings of the court, has been specified in Article 176 Section 1 of the Constitution and relates only to decisions issued in the first instance. Therefore, it should be assumed that the absolute requirement of appealability applies only to judgments on the merits and decisions concluding proceedings in the first instance.<sup>21</sup> On the other hand, decisions issued in incidental cases are covered only by the guarantee provided in Article 78 of the Constitution, i.e. the possibility to exclude the right to complaint against them (Rzasa, 2008:214).

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21 See the decision of the Supreme Court of Poland (7) of 5<sup>th</sup> October 2004 r., III SZP 1/04, OSNAP 2005, no. 8, item 118; (Grzegorzcyk, 2007:201).

Moving on to the issue of presenting new evidence and facts during the course of the trial, it needs to be highlighted that some major changes in the Polish system of concentration of procedural material in civil cases have been introduced in recent years. It was shaped around the idea that all facts and evidences should be disclosed at the preparatory stage of the proceedings (see Article 205<sup>3</sup> Section 2 and Article 205<sup>12</sup> Section 1 of the CPC). The idea was to increase the importance of this stage and, when possible, to finish cases in a single hearing or in a few hearings. But the introduced provisions were far from perfect. The preliminary stage of the process was almost never ordered and the old way and habits of judges remained, thus allowing parties and their attorneys to present new evidence and facts in the latter stages of the proceedings as well (see e.g. Articles 205<sup>12</sup> Section 2 and Article 212 of the CPC). Moreover, it is also possible to present evidence and facts under specific circumstances in the second instance proceedings (Article 368 Section 1 point 4 and Section 1<sup>2</sup> and 1<sup>3</sup> of the CPC). The amendments introduced in this area by the amendment Act of 9<sup>th</sup> March 2023 will not be able to bring positive changes in that matter. Hence, it is expected that piecemeal unfolding of the process will still remain an issue of current Polish civil proceedings.

## 5. Long duration of the proceedings

The last trait of the *ius commune* procedure was the long duration of the proceedings, which was simply a natural consequence of other features. Therefore, it was not uncommon for the proceedings to last years or even be inherited from generation to generation (Cappelletti, 1971:850). The same feature is present in modern Polish civil proceedings to the extent that almost any major recent amendment to the CPC is justified by the need to accelerate the speed of civil proceedings. Unfortunately, this declared goal remains unfulfilled. As confirmed by the statistics, an average time of the first instance civil proceedings in Poland has almost doubled in the last ten years<sup>22</sup>. This comes as no surprise to Polish

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22 According to the Ministry of Justice, it was from 3,9 months to 7 months from 2011 to 2021 (Wiadomosci (2022): Ziobro-podal-dane-o-sprawnosci-postepowan-sadowych-jest-najwolniej-w-historii (Ziobro provided data on the efficiency of court proceedings. It's the slowest ever ), <https://wiadomosci.wp.pl/ziobro-podal-dane-o-sprawnosci-postepowan-sadowych-jest-najwolniej-w-historii-6769745671158656a>; Business insider (2021): Porażka reformy Ziobry. 'Tak nie da się dłużej funkcjonować' (Failure of Ziobro's reform. 'It can't work anymore'), <https://businessinsider.com.pl/firmy/ile-trwaja-postepowania-sadowe-w-polsce-w-2021-r-komentarz-biznesu-i-przedsiębiorców/gbw236w>; Konkret24 (2023): Obietnice minus. Sprawy w sądach miały trwać krócej. Trwają dłużej (Minus promises. Court cases were supposed to be shorter. They last longer), 3 April 2023, <https://konkret24.tvn24.pl/obietnice-minus/obietnice-minus-sprawy-w-sadach-mialy-trwac-krocej-trwaja-dluzej-6882301> (retrieved 17 April 2023).

scholars that have been underlining for years the need to remodel the procedure, reorganize the court system and emphasize a more active role of the court and parties in the process (see e.g. Litauer, 1919: 34; Ereciński, 2021: 23). The urgent need to deal with the problem can be simply and accurately supported by the legal maxim “justice delayed is justice denied”. Hence, all international legal acts and national regulations on human rights expressly guarantee the right to a hearing within a reasonable time or the right to hearing the case without undue delay<sup>23</sup>.

Therefore, in order to achieve this objective, the Polish legislator should simplify the procedure (e.g. limit the number of separate proceedings instead of introducing new ones) and increase the number of judges and their assistants. The first of the mentioned remedies to current problems seems to be completely overlooked by the Polish legislator. It can be viewed as paradoxical that the legislator’s basic way of dealing with delays is by adding new regulations and institutions, thus further complicating the existing regulations. This may be interesting for scholars because it keeps us busy, but it is ultimately devastating for the welfare of the society. It should be obvious that with such complex procedure even judges and lawyers (not to mention parties) struggle with applying and properly using the existing regulations to a particular case. In this sense, the CPC can be easily compared to a normative jungle. It is the most often amended act in Poland and, as such, it has lost its primary form, resulting in unclarity and internal contradictions. Thus, one of the main aims of future amendments should be to reduce the complexity of rules.

Furthermore, some of the recently introduced regulations directly lead to delays. For example, according to the amendment Act of 9<sup>th</sup> March 2023, a motion to exclude a judge will be considered inadmissible when a judge is not a member of the adjudicating panel (new Article 53<sup>1</sup> Section 1 Point 3 of the CPC). This seemingly minor change will definitely cause radical delays in examining the case because it means that the party cannot request (in one motion) the exclusion of more judges, especially those that have not been randomly picked by the system to adjudicate the case but who could be assigned the case later on. Thus, for example, when one of the parties is a judge adjudicating in the same court where the case is to be heard by their close colleagues, judges have to be excluded individually.<sup>24</sup> The same problem will occur when several judges in the

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23 See: Article 6 Section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 of the Charter of Fundamental Rights of the EU, Article 45 Section 1 of the Constitution of the Republic of Poland.

24 Previously, it was possible to exclude more or even all judges of the court by bringing one motion (see e.g. the resolution of the Supreme Court of Poland from 6 March 1998 r., III CZP 70/97, OSNC 1998, no. 9, item 132, p. 5; the decision of the Supreme Court of Poland

same court stay in a close relationship with a party's barrister. As long as judges are not individually picked by the system to hear the case, the party will not have the possibility to request their exclusion. Having in mind that the decision to dismiss the motion to exclude a judge from the panel is subject to complaints (Article 394<sup>1a</sup> Section 1 Point 10 of the CPC), this solution will prolong the already long time of proceedings in civil cases. Hence, this amendment should be viewed as contrary to the procedural economy.

The second of the proposed remedies to the extensive delays also seems to be ignored by the legislator. Even if it is costly to provide new posts for additional judges, there should be at least more supporting stuff in courts (e.g judges' assistants). At the moment, some judges do not have an assistant at all or, even if they have one, the assistant is assigned usually to many judges. Consequently, some judges, especially in the first instance courts, have an assistant once every six or more weeks. If the assistant takes days off or goes on sick leave, the judge can be left without any help for months. That situation is unacceptable, given the huge judge's case load/allocation counting 500 or more cases *per capita*. This solution requires increasing funds for the judiciary but it seems reasonable from the perspective of proportionality principle. When dealing with the administration of justice, it is clear that the legislator has to consider various values: costs, fair and just rulings, and time required for the decision to be made. Therefore, to cut down the duration of proceedings, the legislator has to sacrifice one of the other values. In this case, as it should not be the fair/just judgment, the only other option is to increase the funds for the judiciary.<sup>25</sup>

Without instituting these two substantial changes, the excessive duration of civil litigations in Poland will always be a problem and have a negative impact on the society and the country economy alike. This difficulty cannot be resolved otherwise, like in some common law countries, where a lot of cases were transferred to nonjudicial agencies or bodies because constitutions of civil law countries guarantee the right to a court (Cappelletti, 1971: 865-866). The current situation can easily be explained by imagining a self-propelling wheel. Overburdening judges with all sorts of civil cases leads to inaccurate rulings, which forces parties to appeal to the second instance courts. On the one hand, it further extends the overall time of proceedings because many rulings are set aside and remitted for reexamination by the first instance court. On the other

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from 21 April 2004, III CO 2/04, OSNC 2004 no. 12, item 207, p. 116. Compare the decision of the Supreme Court of Poland from 8 May 2019 r., I NSPO 1/19, Legalis no. 1920509 and the decision of the Supreme Court of Poland from 2 July 2010, II UO 1/10, Legalis no. 317034.

25 Concurrently, the need to reduce costs of proceedings and delays (perceived as a twin evil) in order to make access to justice a reality is a worldwide problem. (See e.g. Zuckerman, 1995:155 et seq.; Burbank, Silberman, 1997:676 et seq.; Jolowicz, 2000:3).

hand, it induces further excessive case overload, as a result of which judges do not have sufficient time to properly prepare for the next cases. This should be viewed as a procedural trap.

## 6. Conclusion

A historical approach should be a prerequisite to evaluating proposed legislation and passing new laws (Wieacker, 1981: 279). As the conducted research shows, the Polish legislator did not respect this rule and passed many amendments that left Polish society with unjust, slow and outdated civil procedure resembling an archaic *ius commune* procedure. This has had a huge impact on the model of civil proceedings in Poland and its fundamental principles. As shown in the paper, it limits not only the principles of orality and publicity of hearings but also the principle of immediacy as this situation causes insulation of judge from facts and people involved in the process. Likewise, it deprives the proceedings of several advantages. For example, direct and open hearings awake a social awareness of the legal system and enhance people's trust and confidence in the justice of this system. Moreover, it increases the communication and cooperation between the court and parties, leading to more efficient proceedings. Emphasizing the active role of the judge in civil procedure should not be misunderstood as being contrary to the adversarial proceeding system. Unlike criminal proceedings, it is obvious that civil proceedings should rely mostly on the active role of the parties but the judge should also have measures to direct the parties and the process so that the procedural material is gathered as soon as possible and the direction of the proceedings is revealed by the judge sooner rather than later. That should be a social aim of the legislature. For this reason, closed (*in camera*) or remote sessions as a way of dealing with civil cases should be an exception rather than a general rule. Most of all, the overuse of written testimonies should be restricted to using this method only under certain conditions. Lastly, if we want rapid, efficient, public, immediate and concentrated civil procedure, some substantial legislative steps need to be made to simplify the procedure. The existing regulations are way too formalized and include many exceptions to its rules, and exceptions from exceptions to its rules. It calls for more general evaluation of the code and principles on which the CPC is based. Undertaken efforts should also stress that the well-organized courts and efficient procedure are the backbone of the rule of law and play an essential role for a thriving society.

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## **ПРИСУСТВО ОБЕЛЕЖЈА *IUS COMMUNE* ПОСТУПКА У САВРЕМЕНОМ ПОЉСКОМ ГРАЂАНСКОМ ПОСТУПКУ**

### **Резиме**

*Друштвено незадовољство системом правосуђа у Пољској је чврсто повезано са прекомерним кашњењем код решавања грађанских спорова. Овај проблем је последица компликованих и застарелих прописа па је пољски законодавац последњих неколико година донео разна нова решења кроз амандмане на Законик о парничном поступку како би се убрзале процедуре и модернизовао грађански поступак. Нека решења својим особинама подсећају на средњовековни *ius commune* поступак. Главни циљ овога чланка је идентификација тих карактеристика, и разматрање њихове основаности и корисности за савремени грађански поступак са историјске тачке гледишта. Спроведено истраживање наводи на закључак да су наведене законодане измене у супротности са темељним начелима грађанског поступка који су развијани годинама уназад, као што су усменост, јавност или непосредност, и да не могу да доведу до очекиваног резултата у погледу обезбеђивања приступа правосуђу без неоправданог кашњења. Наиме, већа ефикасност грађанског поступка може се постићи искључиво кроз отворену и директну комуникација између суда и странака, поједностављивање правила поступка и повећање броја квалификованог особља у судовима.*

**Кључне речи:** *ius commune*, начела усмености, јавности и непосредности, писани искази, саслушање *in camera*, ефикасност грађанског поступка, стање опасности од епидемије, пандемија COVID-19.