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Tadeusz Zembrzuski*, LL.D. Hab.,
Full Professor,
Faculty of Law and Administration,
University of Warsaw,
Republic of Poland

DOI:10.5937/zrpfn1-53520
ORCID 0000-0001-8239-6827

RESTRICTIONS TO THE PRINCIPLE OF OPENNESS IN POLISH CIVIL PROCEEDINGS

Abstract: *The principle of openness, considered one of the fundamental procedural rules, is deeply rooted in Polish law. It is considered a basic safeguard of securing proper and impartial justice, and due access to the judiciary. It has been legitimated under Article 45 (§ 1) of the Constitution of the Republic of Poland, pursuant to which everyone has the right to a fair and public hearing without undue delay by a competent, independent and impartial court of law. The mechanism is reflected in systemic legal provisions regarding the organisation of justice, as well as in the Code of Civil Procedure. While the nature of the principle of openness is not absolute, it has been formally and universally accepted that the rule shall be subjected to no restrictions in judicial proceedings. Contrary to the above, changes to Polish procedural law over the years have resulted in a condition wherein the exception has become a de facto rule. Contemporarily, there are options of adjudicating with the openness principle set aside not only with regard to formal or procedural matters but merits of the case as well. The article is intended to present the evolution of the principle of openness in judicial proceedings in Poland, as something akin to a warning to other states against the risk of undermining the essence of that principle despite the formal preservation of the standard in question on systemic and statutory levels alike.*

Keywords: *principles of judicial proceedings, principle of procedural openness, closed sessions, internal and external transparency, restrictions on the openness of proceedings.*

* zembrzuski@wpia.uw.edu.pl

1. Introduction

Contemporarily, the need for openness and transparency in how the judiciary and other entities responsible for performing public tasks operate should trigger no doubt in any European state, history, tradition, or legal culture. The prominence and importance of the principle of openness is evidenced by its placement in international law instruments. Both under Article 6 (§ 1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] and Article 14 (§ 1) of the International Covenant on Civil and Political Rights[2], everyone is entitled to a fair and public hearing of their case within a reasonable time by an independent and impartial tribunal (Dziurda, Gołąb, Zembrzuski, 2021: 24). The aforementioned principle is also of considerable importance in European Union law, as well as to the legislation of individual EU member states (Kościółek, 2018: 68), Poland having been one of them since 2004.

Pursuant to Article 45 (§ 1) of the Constitution of the Republic of Poland, everyone is entitled to a fair and public hearing of their case[3] without undue delay by a competent, independent, impartial and autonomous court of law (Opaliński, 2019: 35). Regardless, the nature of the principle of openness is not absolute under Polish law. Pursuant to Article 45 of the Constitution of the Republic of Poland, judicial proceedings *in camera* may be decided upon for reasons of morality, state security, and public order, and/or for reasons of protecting private lives of parties to proceedings, or other significant public interests. In seeking an equilibrium amongst aforesaid interests, proper care was taken to ensure that guarantees of openness are reflected in systemic provisions[4] regarding the organisation of the judiciary in Poland and procedural acts of law alike, the Code of Civil Procedure included[5].

1 Drafted in Rome as of 4th November 1950.

2 Adopted by the General Assembly of the United Nations Organisation as of 16th December 1966.

3 Regulated in Article 61 of the Constitution of the Republic of Poland, the right to accessing information on how public authorities and public officials operate has been afforded dissimilar nature under Polish law.

4 Pursuant to Article 42 §2 of the Common Courts System Law of 27th July 2001 (consolidated text: *Journal of Laws* 2023, item 217, as amended), courts of law shall hear and resolve cases in open proceedings. Conversely, under Article 42 §3 of the same Law, hearing a case *in camera* or excluding procedural openness shall be allowable on basis of legal regulations only.

5 The Code of Civil Procedure of 17th November 1964 (consolidated text: *Journal of Laws* 2023, item 1550, as amended).

2. The principle of openness against the backdrop of other procedural principles

The principle of openness is pivotal to multiple areas of public life in Poland, as well as to Polish judicial law.[6] Interconnections between the form of judicial proceedings and the constitutional organisation of the state and prevailing axiology are evident. Procedural law codification is based on fundamental structural principles arising from the essence of regulated law. Either derived from the tradition or spirit of law or stated intuitively, individual principles are occasionally challenging in terms of definition. Contemporary Polish civil law proceedings have been structured i.a. by principles of truth, equality of parties, adversarialism, disposability, and procedural formalism; the Code of Civil Procedure is usually described as liberal (Kruszelnicki, 1931: 476; Zembrzuski, 2018: 5). All aforementioned principles secure the robustness of procedural law while preventing its ageing; they establish and contribute to legal culture.

Referred to by jurists in assorted ways as a principle of transparency, clarity, or publicness, the principle of openness is also recognised as a primary procedural rule (Broniewicz, Marciniak, Kunicki, 2020: 84). The evolution of values over the years notwithstanding (Zembrzuski, 2023: 7), openness has been acknowledged as a principal guarantee of proper and impartial justice conforming to the rule of law (Richter, 1924: 1; Miszewski, 1933: 11). It defines the contemporaneous standard of the right to be heard before a court of law, and ought to be recognised in tandem with other procedural rights: right of directness, and right of oral argument; as issues of openness may be subject to amendment or restriction through the application of other principles, their importance is also recognised as structural. It may be pointed out by way of example that even if principles of procedural openness and hearing cases under civil law in open trial are exercised, the option of submitting written positions by parties to proceedings is gaining weight (Dziurda, 2022: 125). One would be hard-pressed to imagine the course of judicial proceedings without the filing of respective statements of claim and defence, and/or the occasional preparatory document, the exchange of which precedes the setting of a public hearing with intent to assess the merits of the claim.

3. Openness of judicial sessions – internal and external openness

A hearing in open court is the primary expression of the principle of transparency in the civil law procedure (Kościółek, 2017: 232). Two aspects of procedural openness are identifiable: internal and external (general) openness (Rylski, Zembrzuski, 2006: 83). Referencing parties and participants of judicial

6 Applicable to proceedings under civil as well as criminal law.

proceedings, internal openness constitutes an indispensable component of procedural justice (Gołąb, 2020: 96). It is expressed in procedural regulations concerning the sequence of notifying parties of the course of proceedings, affording them options to be heard and informed of the other party's position, to participate actively in all procedural steps, and to be informed of grounds for the court admitting or dismissing the original claim.

External openness concerns third parties, or the so-called publicness of proceedings (Flaga-Gieruszyńska, 2016: 13), tying in with the capacity to access information regarding the proceedings and their course. Reinforcing safeguards of transparency of judicial operations and public monitoring of courts of law, it has been designed to exclude the option of exercising clandestine justice.

The difference between proceeding in open court and *in camera* (Zembrzuski, 2021: 8) ties in with the openness of said sessions both to parties directly engaged in the course thereof and entities concerned with securing knowledge regarding the same (Zembrzuski, 2021: 177).[7] Proceedings *in camera* are held in the absence of parties and/or their plenipotentiaries; potential access thereto may be granted only to summoned individuals (Article 152 §3 of the Code of Civil Procedure). The essence of closed (*in camera*) proceedings is irreconcilable with the right to have a case heard in open court, said right duly secured in the Constitution of the Republic of Poland. Yet, it is assumed that under specific circumstances, the presence of parties to proceedings is not essential (Miszewski, 1933: 15), and that they may be notified of the outcome of proceedings through duly served rulings.

Closed court sessions recognised as open proceedings are distinct in nature.[8] Such sessions may be attended by i.a. parties, their statutory representatives and plenipotentiaries, and two trusted persons appointed by each of the parties to judicial proceedings. Designating judicial proceedings as closed court sessions depends on the circumstances specified in the act of law. A court of law shall exclude external openness *ex officio*, should hearing a case in public constitute a threat to public order or morality, and/or if circumstances subject to classified information protection could be disclosed as a result. The court shall also be bound by a motion filed by a party to proceedings, if circumstances constituting a business (trade) secret could be disclosed otherwise. The court has the facultative right to proceed *in camera* pursuant to a motion filed by a party to proceedings, should grounds specified by said party be considered justified, and/or should family life details be examined.

7 Admission to open judicial sessions is granted to unarmed persons of age (bringing weapons, ammunition and/or other hazardous implements into judicial buildings is prohibited). Furthermore, any person in a condition in disaccord with solemnity of the court will be refused presence at judicial activities.

8 While restricting external openness.

Requiring examination of cases under civil law in open hearings concerns both aforementioned aspects of openness (Uliasz, 2019: 73). Examining cases under civil law in the presence of parties to proceedings and the public is a model solution. Excluding procedural openness shall be allowable in light of enumerative circumstances specified in legal provisions only (Gudowski, 2017: 119). Jurists generally agree that the matter should be subject to a comprehensive statutory regulation, whereby the scope of possible derogations from the principle of openness may be more extensive for external than internal disclosure openness.

4. The principle of open proceedings in civil procedural law provisions

Decisions to proceed in open court are made primarily with intent to try the case while allowing parties to present their positions with regard to the disputed issue or specific formal matter before a court of law (Zembrzuski, 2021: 8). Polish procedural law presumes that all judicial proceedings shall be held in open court; adjudicating courts are thus expected to hear civil law cases in trial.

In the Code of Civil Procedure (hereinafter: the CCP), the principle of openness has been reflected in Article 9 (the introductory title of general provisions) and 148 § 1 (included among provisions regulating issues of judicial sessions). Article 148 §1 of the CCP reads that "*unless a detailed provision specifies otherwise, judicial sessions shall be open, adjudicating courts examining all cases during hearings*". The provision concerns adjudication with regard to the justifiability of the action (merit of the dispute). Conversely, pursuant to Article 148 §3 of the CCP, courts may pass decisions (rulings on formal and procedural matters) in closed session. Notwithstanding the above, the mechanism provided for under Article 148 §2 of the CCP has to be accounted for as allowing the court to decide to the effect of moving any case to open session, and holding a hearing even if the given case could have been examined with the principle of openness excluded[9] (Kostwiński, 2019: 304).

Openness of judicial proceedings is primarily typical for litigious proceedings under civil law, the matter regulated differently for cases examined in non-litigious proceedings. Pursuant to Article 514 §1 of the CCP, hearings are to be held in cases distinctly identified in legal provisions. In all other cases, the court decides whether a case will be heard in open trial.[10]

9 With the exception of circumstances of issuing an order of payment. Respective adjudication is allowable in closed court only.

10 While not holding a formal trial, prior to examining a case, the court may hear participants in a judicial session, or demand that statements be submitted in writing.

The openness of enforcement proceedings – an executive stage of proceeding in civil law cases – is even more restricted in nature. In view of the diverse functions and purposes of judicial enforcement (Zembrzuski, 2022: 815), a specific solution has been adopted: courts of law will examine enforcement cases in closed session, unless there is a need for a trial – or for hearing parties to proceedings or other persons (Article 766 of the CCP).

5. Restrictions to the principle of openness

Changes involving the introduction of multiple derogations from the principle of openness in civil law proceedings have been observable in Poland over recent years. The 2019 reconstruction of the general norm ensconced in Article 148 of the Code of Civil Procedure[11] with regard to the scope of resorting to *in camera* proceedings was of particular importance. Pursuant to the aforesaid amendments, the structure allowing the court to rule in closed session if explicitly allowed by legal regulations only was abolished. The casuistically specified forum authorised to rule *in camera* (*numerus clausus*) was replaced with general judicial authority to issue any decision while side-stepping internal transparency (Zembrzuski, 2021: 13). Examining a specific litigious matter *in camera* is entirely different to introducing a rule of admissibility for passing any decision in closed session. The statutory rule regarding issues of openness in judicial proceedings has been completely reversed (Gołąb, 2020: 98). This gave rise to grave doubt whether constitutional safeguards of the right to have a case heard in open trial are still respected in proceedings under civil law (Walasik, 2017: 850).

Polish procedural law has introduced a broad spectrum of options for adjudicating *in camera*, extending beyond formal and procedural matters and/or interlocutory cases, and including merits of the case. These options are not limited to issuing aggregate decisions in *ex parte* dispute reversal-based proceedings or other so-called accelerated separate proceedings (Cieślak, 2011: 87; Zembrzuski, 2017: 543), such as payment order or writ-of-payment proceedings, simplified European payment order or European Small Claims procedures, or electronic writ-of-payment proceedings.[12] The admissibility of ruling *in camera* despite a preceding trial is the controversial point of contention, given the increased risk of moving the act of passing actual judicial decisions outside trial format. The natural trial-ruling interrelation may be severed, the activeness of parties and their direct influence on the course and outcome of proceedings distinctly undermined.

11 Law of 4th July 2019 on amending the Code of Civil Procedure and selected other laws (*Journal of Laws* 2019, item 1469).

12 Such solutions are typically found in the legislations of multiple European states.

The greatest objections by far have been triggered by a mechanism affording courts of law the capacity to issue a judgement *in camera* not only under conditions of the defendant having acknowledged the claim but also should the court conclude (once all pleadings and other documents have been submitted by respective parties), in view of all claims and motions for evidence filed, that a hearing is not essential (Article 148^1 §1 of the CCP) (Mendrek, 2017: 366; Skibińska, 2018: 151), in which case the scope of discretion is extremely extensive. Notably, while a party to proceedings may render the use of said mechanism inapplicable by including a motion to be heard in trial in its first pleading, that party will thus be required to take specific action, knowledge of procedural law standards notwithstanding.

The possibility of dismissing a claim in closed session in case the court finds to the effect of its blatant unjustifiability has triggered controversy as well. Pursuant to Article 191^1 of the Code of Civil Procedure, a negative substantive ruling may be passed should the court conclude – on basis of the content of the suit, in view of enclosures or circumstances of the suit having been filed, and/or common knowledge, or facts known to the judiciary *ex officio* – that claim unfoundedness is blatant. Under such circumstances, rather than serving the party identified as the defendant with a subpoena, the case will be examined in such entity's absence. The position of the other party is in no consequence under such conditions since the legislator believes there is no need to notify the said party that proceedings have been initiated. While the principle of openness has in this particular case been excluded with intent to simplify and accelerate proceedings in *prima facie* suits meriting no recognition, such exclusion does carry a threat of breaching fair trial standards (Błaszczak, 2021: 351). Some scholars refer to it as something akin to *"suit short-cuts"* (Zembrzuski, 2021: 169).

Even more extensive restrictions to the principle of openness are observable at the stage of examining measures of appeal designed to monitor judicial rulings. Appellate proceedings allow for cases to be heard in closed session, should a hearing be deemed non-essential (Article 374 of the CCP) (Zembrzuski, 2019: 55). Excluding the principle of openness in appellate proceedings is not possible, once a party to appellate proceedings or responding to an appeal files a pertinent motion (Kościółek, 2019: 1161). Having observed judicial practice, one can only reach the rather pessimistic conclusion that, in reality, the principle of examining appeals *in camera* prevails (Rylski, 2020: 133).

Conversely cassation complaint proceedings (categorised as extraordinary proceedings) before the Supreme Court are typically held *in camera*, hearings an exception rather than the rule (Zembrzuski, 2011: 458). The above pertains to circumstances involving a significant legal matter having been identified in a given case, the claimant having submitted a cassation complaint including a motion for its examination during a hearing. Regardless of such

motions, the Supreme Court may conclude that other factors are of importance to a decision in favour of having the measure of appeal examined in open trial (Article 398^{11} §1 of the CCP).

Both the herein-presented review of exceptions introduced over the years and a scrutiny of trends in procedural law transformation in Poland allow a conclusion that, albeit formally safeguarded in the Polish Constitution and affirmed in systemic and procedural provisions, the principle of openness in civil law proceedings has become superficial.

6. In closing

As emphasised herein, the principle of openness is by no means an absolute in Polish judicial proceedings. Supporters of respecting the principle in full will have to come to terms with the fact that the Constitution of the Republic of Poland and international legislation highlight the importance of openness in proceedings as well as the need for adjudication within a reasonable timeframe. One ought to further take into account that the principle of openness does not necessarily have to be exercised with identical intensity at every stage or phase of judicial proceedings.

Tying in with unfavourable statistics and the ever-extending court procedures, appeals for the swiftness and expedience of judicial proceedings have become pivotal in Poland in recent years. As a result, the principle of openness in judicial proceedings and related principle of oral argument have distinctly dwindled. Every procedural mechanism precluding the attendance of parties at trial and their right to have their oral argumentation heard undermines the constitutional principle of transparency. People in Poland seem to have forgotten that while swiftness is a value to be considered when moulding procedural structures, it should only be considered if not in collision with the right to a fair trial.

While provisions of the Constitution of the Republic of Poland have not been amended and the principle of openness not eliminated from the catalogue of primary rules of proceeding, an analysis of all legal solutions and scrutiny of judicial practice yields a conclusion that transparency of judicial proceedings is occasionally underestimated. Passing all decisions (rulings in formal matters) *in camera* devalues and undermines the rank and role of openness in civil proceedings and throughout the legal system. The public nature of judicial proceedings should not be reduced to formal declarations only, as the field tends to be subject to restrictions depending on the ebb and flow of needs and expectations. Eliminating the principle of openness from civil law proceedings in its entirety is fortunately impossible.

Preserving something akin to an equilibrium between the values and principles of procedural law is mandatory for the legislator and adjudicating practice alike (Rylski, Zembrzuski, 2006: 106). The upkeep of mechanisms following the principle of openness in judicial proceedings, designed to offer protection against possible errors and/or abuse on behalf of authorities, will not suffice. Any violations to the openness of proceedings in specific cases, taking on the form of unlawful examination in closed session, ought to be criticised. In particular, no justification should be sought for any breach of internal transparency, potentially resulting in a party being deprived of the capacity to defend its rights (Zembrzuski, 2017: 235). Polish procedural law qualifies such circumstances as the materialisation of grounds for nullity of proceedings (Zembrzuski, 2017: 235), in turn tying in with a necessity to annul the related judgement and seek re-trial.

Having the principle of openness restored ought to be postulated in Poland, the intent extending beyond the removal of controversial solutions introduced over recent years. Chances for the above would be significantly improved by a well-examined and consistent computerisation of legal proceedings, in the field of the ever-more popular remote court hearings in particular (Zembrzuski, 2023: 140). Remote hearings allow oral argumentation by parties and their plenipotentiaries, as well as evaluation of evidence (preparatory inquiries). Remote court hearings can distinctly improve the chances for a renaissance of the principle of openness of proceedings in Polish procedural law.

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Др Тадеуш Зембрзуски,
Редовни професор,
Факултет права и администрације, Универзитет у Варшави,
Република Пољска

ОГРАНИЧЕЊА НАЧЕЛА ЈАВНОСТИ У ПОЉСКОМ ГРАЂАНСКОМ ПОСТУПКУ

Резиме

Као једно од основних процесних начела, начело јавности поступка је дубоко укорењено у пољском праву. Сматра се да овај принцип представља основни механизам заштите правичности и непристрасности судског поступка, као и приступа правосуђу. Према члану 45 (став 1) Устава Републике Пољске, свако има право на правичну и јавну расправу, без непотребног одлагања, пред надлежним, независним и непристрасним судом. Овај механизам је регулисан у системским одредбама закона о организацији правосуђа, као и Законика о парничном поступку. Иако начело јавности поступка није апсолутно, универзално и формалноправно је прихваћен став да ово начело неће бити предмет ограничења у судским поступцима. Међутим, изменама пољског процесног закона изузетак је постепено постао de facto правило. Тренутно постоје законска решења која искључују примену принципа јавности, не само поводом одлучивања о формалним или процесним питањима већ и у погледу меритума. Овај рад има за циљ да представи еволуцију принципа јавности у правосудним поступцима у Пољској, што би требало да послужи као нека врста упозорења другим државама на потенцијалну опасност од подривања суштине овог принципа упркос формалном очувању стандарда како на системском нивоу тако и на нивоу индивидуалних закона.

***Кључне речи**: начела судског поступка, начело јавности поступка, затворене седнице, интерна и екстерна транспарентност, ограничења начела јавности поступка.*