

# POLISH CIVIL PROCEDURE: YESTERDAY, TODAY AND TOMORROW – SOME REMARKS ABOUT RECENT CHANGES OF PROCEDURAL LAW IN POLAND

*Piotr Rylski*

*University of Warsaw, Faculty of Law and Administration*

**Abstract:** Polish civil procedural law is still the subject of numerous legislative changes. Only in recent years the Code of Civil Procedure has been amended over 30 times. These changes resulted from various reasons. Firstly, from the need of implementation of EU procedural law. Secondly, they were the result of the introduction of provisions aimed at adapting the code to modern technologies. Thirdly, changes aimed at speeding up the hearing of a civil case and at introducing some instruments to strengthen the protection of public interest in judicial proceedings. This article focuses on three selected examples and presents the discussion of the disputable issues that they have already arisen. Firstly, the topic of electronic process activities. It presents electronic pleadings, electronic delivery in trial, electronic judicial protocol and the possibility of presenting grounds of judgment in electronic form. Secondly, the new institution of a judgement rendered at closed session (*in camera*) was discussed. Thirdly, the article describes a new extraordinary complaint against final judgement, which can challenge any final judgment of a common court as a result of a prosecutor's or other public-interest entity's initiative.

**Key words:** civil procedure, electronic pleadings, extraordinary complaint, Code of Civil Procedure, amendments, reform of procedural law

## 1 INTRODUCTION

Polish civil procedural law has undergone numerous legislative amendments, while the Code of Civil Procedure (CCP) of 1964 is the most frequently amended piece of legislation in Poland. Since 1989, the year Poland moved from the communist system to the democratic system, it has been amended over 200 times. Initially, intensive amendments to the CCP resulted mainly from the need to adjust them to the effects of economic and political transformation, yet it seemed that over time their number and intensity should go down. However, that was not what happened. Alone over the last three years (2015 – 2018), the Polish Code of Civil Procedure has been amended over 30 times.

This was conditioned by various reasons. First, the amendments followed the need to implement procedural law of the European Union (such as provisions on the European Certificate of Succession and European Account Preservation Order). In consequence, the legislator incorporated into the Code of Civil Procedure the provisions supplementing EU Regulations: No. 650/2012 (Article 1142<sup>1</sup> to Article 1142<sup>7</sup> of the CCP as regards the European Certificate of Succession) and No. 655/2014 (Article 1144<sup>3</sup> to Article 1144<sup>13</sup> of the CCP as regards the European Account Preservation Order). These amendments are quite clear and do not give rise to any specific concerns about their appropriateness.

Secondly, some of the most recent amendments were intended to adjust the CCP to the modern technologies we have now. It applies in particular to introducing the option of performing procedural actions electronically, admissibility of electronic evidence or making an audio/video recording of the trial. This need has never been questioned<sup>1</sup>, since the Polish civil procedure is still largely based on the actions made in writing (paperwork). With the development of modern means of communication, this had to be accounted for in the civil procedure. However, it was clear from the very beginning that at least some of the implemented amendments gave rise to serious concerns about their practical applicability.

Thirdly, a number of amendments to the Code of Civil Procedure is being made with the intention to expedite civil proceedings (such as the option of giving the verdict without a hearing, simplification of the service process, changes to recusal of a judge). The need to shorten lengthy court proceedings in Poland itself must be beyond any doubt, but the question is to what extent these changes may interfere with the basic procedural principles and rights of the parties to have their case heard in public.

Fourthly, recently, following turbulent political changes, we could also notice a tendency to introduce instruments into court proceedings that strengthen public interest. It concerns the introduction of a new remedy for civil and criminal cases as of 3 April 2018, namely an extraordinary complaint against final judgments.

This paper addresses in detail three selected topics that exemplify the above noted legislative trends and indicates practical and theoretical issues emerging from them.

First, the focus was on electronic procedural actions. The paper will discuss electronic filing of pleadings, electronic deliveries, electronic minutes and the electronic statement of reasons for a judgement (item II). Secondly, a new power of the court to issue judgements *in camera* will be discussed (item III). Thirdly, a new extraordinary remedy – extraordinary complaint – was presented. It allows for repealing almost each final judgment of a common court on the initiative of the prosecutor or another entity acting in the public interest (item IV).

## 2 ELECTRONISATION OF PROCEDURAL ACTIONS

### 2.1 Filing of pleadings via the ICT system

Until 8 September 2016, there was no high-level regulation in the Polish civil procedure that would enable filing of pleadings *via* modern means of communication. The only exceptions existing since 2010 were the electronic procedure by writ of payment (Articles 505<sup>28</sup> – 505<sup>39</sup> of the CCP)<sup>2</sup> and register procedure. It meant that on top of these procedures, the parties could communicate with the court almost exclusively in writing or orally during a hearing. Introduction of provisions that enable performance of actions electronically should be then deemed a true technological revolution in the Polish civil procedure.

<sup>1</sup> From comparative perspective, see KAWANO M. Electronic Technology and Civil Procedure – Applicability of Electronic Technology in the Course of Civil Procedure. In KENGYEL, M. Electronic Justice – Present and Future. Colloquium of the IAPL, Pecs, 2010.

<sup>2</sup> See about these regulations: KULSKI R. Some Remarks on the Course of Polish Electronic Proceedings by Writ of Payment. In KENGYEL, M. Electronic Justice – Present and Future. Colloquium of the IAPL, Pecs, 2010, p. 17.

These provisions provide that, save for exceptional circumstances, filing of pleadings via the specially created ICT system should be voluntary (Article 125.2<sup>1</sup> sentence 1 of the CCP). The party will be able to select this option or, as practiced so far, file pleadings traditionally in writing (in paper). A statement on the selection of or resignation from filing pleadings via the ICT system shall be submitted through that system. The statement shall be binding only on the person who has submitted it (Article 125.2<sup>1</sup> sentence 1 of the CCP). However, if the party made a choice, then the pleadings that were not filed via the ICT system are ineffective (Article 125.2<sup>1</sup> sentence 2 of the CCP). Not only pleadings are to be filed electronically but also documentary evidence. Pursuant to Article 128.2 of the CCP, pleadings filed *via* the ICT system shall be accompanied by certified electronic copies of enclosures.

In the case of filing pleadings via the ICT system, the court performs the service via that system (electronic service) – Article 131<sup>1</sup>.1 of the CCP. In the case of the electronic service, a pleading shall be deemed effectively served as at the time indicated in the electronic confirmation of receipt. If such a confirmation is missing, the pleading shall be deemed effectively served 14 days after the date on which the pleading was entered to the ICT system (Article 131<sup>1</sup>.2 of the CCP). Pursuant to Article 131<sup>1</sup>.2<sup>1</sup> of the CCP, the addressee who has opted for filing pleadings *via* the ICT system may resign from the electronic service. For the electronic service, pleadings and rulings shall have the form of documents containing data from the ICT system (Article 140.3 of the CCP).

These solutions are assessed differently. First, it is claimed that courts still do not have the necessary infrastructure and the system does not really function, even though the act has been adopted. In keeping with the law, the system should operate at all courts in Poland by September 2019 at the latest. It is still uncertain whether this will happen. Secondly, the vulnerability of this solution is that the option of filing pleadings via the ICT system is facultative, also for professional representatives (attorneys). A party may opt out of that manner of pleading filing or from electronic service during a trial. It can be assumed that the party that is planning to protract the proceedings (e.g. the defendant) will not be interested in having the correspondence delivered fast electronically and they will opt for far less effective traditional delivery *via* mail. Thirdly, it is a disadvantage that each participant in the proceedings takes an independent decision whether they will perform actions via the ICT system or not. In consequence, the court will often be required to communicate in a different manner with each participant in the proceedings. One will receive communications electronically, while the other will be sent communications traditionally in writing. This creates huge problems with keeping court records (in two versions – electronic and paper-based) and for the operations of the secretariat to communicate properly with each participant of the proceedings.

## **2.2 Electronic minutes and electronic statement of reasons for a judgement**

The Polish legislator implemented a requirement to take electronic minutes of the hearing as of January 2010. In keeping with Article 157.1 of the CCP, minutes shall be taken by recording a session on an audio or audio/video recorder and in writing, as instructed by the presiding judge. The content of the written record is limited though; it does not detail the course of the session (Article 158.1 of the CCP). It means that the audio or audio/video recording is the only evidence of the evidentiary hearing (e.g. hearing of the witness). Electronic records shall not be subject to correction (Article 160.2 of the CCP).

In keeping with Article 158.4 of CCP, where it is necessary in order to ensure that a case is properly adjudicated, the presiding judge may order a transcript to be made of a relevant part of the minutes reported on an audio or audio/video recorder. In practice, a problem has arisen as to the signifi-

cance of the transcript of the electronic minutes. This doubt was resolved by the Supreme Court in its resolution of 23 March 2016, ref. no. III CZP 102/15 assuming that the transcript of the minutes recorded on an audio or audio/video recorder was not an official document and did not form a basis for determining the course of the session. Following this resolution, the transcript ceased to have any practical meaning since the court may base its decisions on the content of the audio/video record.

Functioning of the electronic minutes is assessed very negatively. It stems from the fact that in case of technical problems with the recording, actions performed in evidentiary proceedings need to be repeated given that the recording is the only evidence of their course. Using the electronic minutes in appellate proceedings is also very problematic. In the Polish legal regime, the appellate court is a court that adjudicates the subject matter (the merits of the case) and it is required to determine the actual and legal state of affairs. Therefore, it needs to rely on the electronic minutes, which, from the perspective of practical usability, is more difficult than using the written minutes. The judges of the appellate court often need to review long hours of recorded evidentiary hearing even if not all its elements are relevant from the appeal perspective. Hence we may hear accurate demands that apart from an audio or audio/video recording – the evidentiary proceedings should also be recorded in the written minutes, which is not the case at present. Although as of September 2016, written minutes should also contain the summary of evidentiary proceedings (Article 158.1 sentence 2 of the CCP), this solution does not seem sufficient to familiarise oneself with the course of the proceedings.

In 2014, a new form of statement of reasons for a judgement appeared in the Polish legal regime. So far it was only drafted in writing at the request of a party in general, within one week of the announcement of the operative part of the judgment or of the day it was served (Article 328.1 of the CCP). At present, pursuant to Article 328.1<sup>1</sup> of the CCP, if the course of a hearing is recorded with the use of an audio or audio/video recorder, the statement of reasons may be provided after the operative part of the judgment is announced, and recorded with the use of the recorder, whereof the presiding judge shall warn before providing the statement. In this case it means that the court does not draft a written statement of reasons. The court only presents the statement orally during a hearing and it is recorded with the use of an audio or audio/video recorder. Should a party apply for the issue of the statement of reasons within one week of the announcement thereof, they will only receive the transcript of the statement of reasons (Article 329 of the CCP).

The institution of the announced statement of reasons gives rise to many doubts as in practice a lot of transcripts made are of poor quality. They are hard to understand and often, due to interference in the recording, they are incomplete. What is worse, the transcript is made neither by the judge nor the court clerk, but only by a third party. Moreover, the judge that announces the statement of reasons has not impact on the final shape of the transcript. Should there be any problems with the recording or transcript, the appellate review proves difficult or almost impossible, which additionally prolongs the proceedings. This means that a large number of judges in Poland do not decide to orally pronounce the statement of reasons even though the hearing is recorded with the use of an audio/video device.

### **3 ADJUDICATING *IN CAMERA***

Pursuant to Article 45 of the Constitution of the Republic of Poland, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and

independent court. The principle of openness expressed in that provision is treated very seriously in the doctrine of Polish procedural law; especially as it is a repetition of the rule provided for in Article 6 of the European Convention of Human Rights. The application of that regulation leads to a conclusion that the court may not adjudicate a civil case without a hearing, except for clearly defined circumstances.

Until 8 September 2016, the court of first instance could adjudicate *in camera* the subject matter of the case in the first instance only for the order for payment procedure, procedure by writ of payment and non-contentious proceedings. In a regular civil case, it was practically impossible. The appellate court has more options here. It may hear the appeal *in camera*, should the proceedings be deemed invalid (Article 374 of the CCP) and also in summary proceedings, unless one of the parties requested a trial in the appeal or answer to the appeal (Article 505<sup>11</sup>.2 of the CCP). A cassation complaint before the Supreme Court is an exception and is applicable generally if there is a major legal issue involved and the appellant has petitioned for the case to be heard in trial (Article 398<sup>11</sup>.1 of the CCP).

The real revolution came in 2016 with the introduction of Article 148<sup>1</sup> of the CCP. Pursuant to that provision the court may examine a case *in camera* if the defendant has acknowledged the action or if, after pleadings and documents are lodged by the parties, including after bringing of charges, an objection against a writ of payment or an appeal against a judgment rendered *in absentia* (default judgment), the court finds – considering all the presented statements and submitted motions for evidence – that it is not necessary to conduct a hearing (Article 148<sup>1</sup>.1 of the CCP). At the same time, under Article 148<sup>1</sup>.3 of the CCP, a case may not be examined *in camera* if a party, in the first pleading, submitted a motion for hearing, unless the defendant has acknowledged the action.

In the light of the procedural provisions, the Court of the first instance may issue a judgement *in camera* (without the participation of the parties) if the following positive conditions have been met: 1) the defendant acknowledged the action or 2) both parties filed pleadings and the court recognised at the same time that the hearing was not necessary. The negative trigger is though that none of the parties files a motion for hearing in the first pleading.

It follows from the wording of this provision that the judgement may be issued *in camera* only if the court considers open hearing as not necessary. It seems that it should happen at the initial stage when the court has collected all the case material (factual and evidentiary) and the hearing will bring nothing new to the case. Both parties then need to file pre-trial pleadings before the hearing and take a stance on the case. It is impossible to issue a default judgement *in camera* (i.e. without participation of the defendant). It will be possible in particular when the court obliges the defendant before the trial to file an answer to the complaint (Article 207.1 of the CCP) or both parties to exchange further pre-trial pleadings (Article 207.3 of the CCP). Thus the possibility of issuing a judgement *in camera* may be regarded as a harmonious development of the judge's case management implemented to the Polish Code of Civil Procedure in 2012.<sup>3</sup>

However, this provision gives rise to serious practical and constitutional doubts. It sets forth that the issue of a judgement *in camera* is totally dependent on the court's decision and will be possible in each category of cases (under civil law, commercial law, labour law, or family law). In fact, each party may demand a hearing, which will block such an option, but in view of a lack of the obligation in

---

<sup>3</sup> About case management system in Poland see GOLAB A. New rules regarding the concentration of procedural material. Available at <<http://polishprivatelaw.pl/new-rules-regarding-the-concentration-of-procedural-material-in-the-polish-code-of-civil-procedure/>> [q. 2019-02-10].

the Polish civil procedure to be represented by an attorney it may prove illusory, as citizens may not know their rights. It is also dubious whether the new solution will actually expedite hearing of civil cases. The application of that construction will be then limited to simple, undisputable cases based on documents, which do not require the taking of evidence from the testimony of the witness, i.e. those that are adjudicated quite effectively this way or another. Still, it will not accelerate the hearing of cases where it is necessary to have a complicated evidentiary hearing.

## 4 EXTRAORDINARY COMPLAINT

On 3 April 2018, the new Supreme Court Act took effect. On top of organisational and personal changes, its purpose was also to establish a new remedy for civil and criminal matters, namely the extraordinary complaint (Article 89 – 91 of the Supreme Court Act). Extraordinary complaint-related provisions, although applicable only for a few months now, have already been subject to a number of significant amendments.<sup>4</sup> They are also an important element in the dispute between Poland and the European Commission, stirring a vivid interest in the doctrine.

In the current legal regime, if it is necessary to ensure compliance with the principle of the democratic state of law that satisfies the principles of social justice, the extraordinary complaint may be lodged against a final judgement of a common court or military court that closes its proceedings provided that: 1) the judgement violates the principles or rights and freedoms of a human and citizen defined in the Constitution or 2) the judgement grossly violates the law by its erroneous interpretation or improper application, or 3) if there is an obvious contradiction between significant findings of the court and the content of the evidence collected for the case – and the judgment may not be repealed or changed by way of other extraordinary remedies (Article 89.1 of the Supreme Court Act). The extraordinary complaint shall be lodged within 5 years from the effective date of the contested ruling and if cassation or an cassation complaint<sup>5</sup> were lodged – within a year from identification thereof (Article 89.3 of the Supreme Court Act). The extraordinary complaint may be lodged only by public entities listed in Article 89.2 of the Supreme Court Act, out of which the widest powers are vested in the General Prosecutor and Ombudsman for Civil Rights. It means that it may not be applied by the parties to the proceedings that resulted in the contested final judgement.

Should the extraordinary complaint be approved, the Supreme Court repeals the contested judgement in full or partially and in line with the results of the proceedings it adjudicates on the merits of the case or refers the case for review to the competent court. On the other hand, the Supreme Court dismisses the extraordinary complaint if it identifies no grounds for repealing the contested ruling (Article 91 of the Supreme Court Act). However, the legislator provided that if there were reasons for the complaint, and the contested ruling provoked irreversible legal effects, in particular if 5 years lapsed from the contested ruling effective date, and also if the act of repealing the ruling violated international commitments of the Republic of Poland, the Supreme Court would only confirm that it had issued the contested ruling against the law and indicate circumstances due to which such judgement was issued, unless the principles or rights and freedoms of a human and

<sup>4</sup> See: amendments of the CCP by the Law of 12 April 2018 (O.J. No. 847) and by the Law of 10 May 2018 (O.J. No. 1045).

<sup>5</sup> 'Cassation' is the name of extraordinary appellate measure in criminal cases; 'cassation complaint' – in civil cases.

citizens defined in the Constitution support the issue of the judgement to repeal the contested ruling (Article 89.4 of the Supreme Court Act).

Adjudicating the extraordinary appeal was reserved for the newly established Chamber of Extraordinary Control and Public Affairs of the Supreme Court.

The presented extraordinary complaint gives rise to serious concerns in the doctrine, in particular as regards civil cases. The transitional provisions made it possible to appeal with it for 3 years from the effective date of the Supreme Court Act (i.e. until April 2021) against all final judgments issued after the entry into force of the Constitution of the Republic of Poland, i.e. since 2 April 1997 (Article 115.1 of the Supreme Court Act). It means that it is theoretically possible to repeal each final judgment issued in Poland for over the last 20 years. Even though Article 115.2 of the Supreme Court Act provides for the fact that the Supreme Court may only announce that the contested ruling was issued against the law and indicate the reasons therefor, without the need for the ruling to be repealed, but such an option does not exist if the Supreme Court comes to a conclusion that a cassation judgment should be issued or rights and freedoms of a human and citizen defined in the Constitution support it.

This law leads then to far reaching uncertainty in the legal regime for at least the next 3 years. It should also be stressed that the need for a remedy that could re-open especially faulty judgements was called for many years now, but it was not expected that it would be available on such a wide scale. The relation of that remedy to the existing cassation complaint and complaint for declaring a final judgment contrary to law<sup>6</sup> also gives rise to concern. In keeping with Article 90.2 of the Supreme Court Act, the extraordinary complaint may not be based on charges that were adjudicated in the cassation complaint adopted for adjudication by the Supreme Court. So it may be filed in case it is refused by the Supreme Court on the same grounds. In consequence, the same judgment may be reviewed many times. This may lead to uncertainty of the parties to the proceedings even for 5 years from the effective date of the judgement. It gives rise to the feeling of threat, especially of the party that won and intends to pursue further legal activities in reliance on the non-appealable judgement.

There are also concerns about the fact that the complaint may be filed by public entities, including the General Prosecutor, which in Poland is represented by a politician, notably the Minister of Justice. It gives rise to concerns about the instrumental use of that remedy, following the extraordinary appeal effective in Poland in the socialist period<sup>7</sup>. This legal construction was rather notorious as it was used to pursue the current policy. One cannot foresee how the discussed complaint will function (so far no complaint has been lodged with the Supreme Court), but its practical application will condition whether the hopes pinned on it will come true or whether the expected concerns will be prove correct.

## 5 CONCLUSIONS

Summing up the discussed examples in the Polish civil procedural law, we may arrive at the following conclusions: In recent years, the number of amendments to the Code of Civil Procedure has

---

<sup>6</sup> About these two extraordinary measures in Polish Civil Procedure see ERECINSKI T. Civil Procedure. In Introduction to Polish Law. FRANKOWSKI, T. (ed.) Hague: Kluwer Law International, 2005, pp. 140 – 141.

<sup>7</sup> About historical background of CCP see ERECINSKI T. Civil Procedure. In Introduction to Polish Law. FRANKOWSKI, T. (ed.) Hague: Kluwer Law International, 2005, pp. 117 – 118.

increased significantly, instead of decreasing gradually. While, objectively speaking, those amendments were often justified, their quality and consistency with the entire legal regime give rise to concerns. The amendments made are very often quite chaotic and underdeveloped, which is proven by their subsequent fast revisions. Often, they do not take account of the practical functioning of provisions and do not provide sufficiently for the effects of their implementation. Probably, the reason behind it is the fact that the provisions are established following the initiatives of multiple entities and do not take account of the entire system of civil procedural law.

A new, consistent code taking account of the actual state of knowledge and research would be a much better step rather than those numerous, incidental amendments to the Code of Civil Procedure. The Code of Civil Procedure that meets the requirements of the 21 century. Such a decision was taken a few years ago by the Civil Law Codification Commission acting under the Prime Minister of Poland that prepared preliminary assumptions. However, the Commission was dissolved in 2015 and no new composition has not been announced so far. It seems to hamper creation of a new, consistent legal act that would be resistant to numerous legislative changes.

The foregoing does not change the fact that the representatives of the Polish doctrine do not have a clear-cut vision about the future direction of the civil procedural law. On the one hand, there is a visible need to adjust it to the contemporary requirements, on the other it is necessary to strengthen public interest. Higher effectiveness of actions is also emphasised. It is also important that these changes do not limit the rights of parties to the proceedings to a public and reliable hearing. However, it does not seem to be sufficient to create a vision of further development of civil procedural law in Poland.

## Bibliography:

- ERECINSKI T. Civil Procedure. In Introduction to Polish Law. FRANKOWSKI, T. (ed.) Hague: Kluwer Law International, 2005, pp. 117 – 152.
- GOLAB A. New rules regarding the concentration of procedural material. Available at <<http://polishprivatelaw.pl/new-rules-regarding-the-concentration-of-procedural-material-in-the-polish-code-of-civil-procedure/>> [q. 2019-02-10]
- KAWANO M. Electronic Technology and Civil Procedure – Applicability of Electronic Technology in the Course of Civil Procedure. In KENGYEL, M. Electronic Justice – Present and Future. Colloquium of the IAPL, Pecs, 2010, 356 p.
- KULSKI R. Some Remarks on the Course of Polish Electronic Proceedings by Writ of Payment. In KENGYEL, M. Electronic Justice – Present and Future. Colloquium of the IAPL, Pecs, 2010, 356 p.

### Contact information:

Dr hab. Piotr Rylski  
prylski@wp.pl  
University of Warsaw, Faculty of Law and Administration  
Krakowskie Przedmieście st. 26/28  
00-927 Warsaw  
Poland