Nº 9

REVISTA DE LA ASOCIACIÓN DE PROFESORES DE DERECHO PROCESAL DE LAS UNIVERSIDADES ESPAÑOLAS

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CORAL ARANGÜENA FANEGO

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ÍNDICE

THE PRINCIPLE OF ORALITY AS A MECHANISM AND GUARANTEE OF TRANSPARENCY AND LEGITIMACY OF JUDICIAL DECISION-MAKING

El Principio de oralidad como mecanismo y garantía de transparencia y legitimidad en la toma de decisiones judiciales

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Abstract: The perception of the proceedings as fair is inextricably linked to publicity, transparency, and access of the parties to the court. The principle of orality acts as a counterpart to the principle of literacy, although at present we encounter rather a combination of these elements, and correlates with the other principles of the process. The application of the oral principle in the civil process has obvious advantages, it is worth pointing out that in principle, it must be applied in the phases and activities in which it is effective; without necessarily excluding the document from the process as an instrument helpful, sometimes even necessary. Orality on its own is not a guarantee of fair procedure. And if there is an oral element in the proceeding, it does not automatically mean that it is an orality. Currently, the principle of orality is confronted with the use of modern technical means of communication and we can see an inclination to written form in the proceedings, either in our country or on a European scale.

Keywords: immediacy, orality, civil procedure, public hearing, written procedure, principles of civil trial.

Resumen: La percepción de que el proceso es justo está indisolublemente ligada a la publicidad, la transparencia y el acceso de las partes al tribunal. El principio de oralidad actúa como contraparte del principio de literalidad, aunque en la actualidad encontramos más bien una combinación de estos elementos y se correlaciona con

los demás principios del proceso. La aplicación del principio oral en el proceso civil tiene evidentes ventajas, cabe señalar que en principio debe aplicarse en las fases y actividades en las que resulta efectivo; sin excluir necesariamente el proceso el documento como instrumento útil, necesario, a veces incluso necesario. La oralidad por sí sola no es garantía de un procedimiento justo. Y que haya un elemento oral en el procedimiento, no significa automáticamente que sea oral. Actualmente, el principio de oralidad se enfrenta al uso de medios técnicos modernos de comunicación y podemos ver una tendencia a la forma escrita en los procedimientos, ya sea en nuestro país o a escala europea.

Palabras clave: inmediatez, oralidad, procedimiento civil, audiencia pública, procedimiento escrito, principios del juicio civil

Abbreviations

ALI	American Law Institute
CCP	Code of the civil contentious proceedings of the Slovak Republic
ECtHR	European Court of Human Rights
ELI	European Law Institute
EU	European Union
LEC	Ley de Enjuiciamiento Civil
TJEU	Court of Justice of the European Union
UN	United Nations

I. INTRODUCTION

According to scientific research, the tone of voice, body language, and position of partners represent 93% of the communication power of human beings[1]. "Orality is understood as a communication system that determines the ways of organizing culture, society, and the ways of thinking of its members. Each socio-cultural group that preserves and transmits the memory of its history, based on oral systems (with possible mnemonic aids), extends this memory to all its members. A collective memory is created, which includes not only knowing the group's past but also learning about the futur[2]".

The principle of orality is a tool and rule of civil procedure. However, its scope goes beyond the legal order. After all, it must be recognized that for a human being, the spoken word includes knowledge of the facts, traditions, and norms of a certain group. As far as the civil process is concerned, oral

1 REBRO, K. and BLAHO, P. *Roman law*. Bratislava: Obzor, 1991, 448p.

2 HERRERA, M., DIEGO A., and JAIME A. C. M. *La oralidad en el proceso civil: realidad, perspectivas y propuesta frente al rol del juez en el marco del Código General Del Proceso*. Universidad del Rosario, 2018. https://doi.org/10.12804/lj9789587840384

proceedings before the court are not an end in themselves. It is rather a means or an instrument that seeks to guarantee the right to a fair trial. The principle of orality provides greater flexibility in judicial proceedings. In the search for truth, orality is an ideal means of reproducing past events, as it allows direct verification of facts reveals false attitudes and, of course, promotes communication between all process subjects. Of course, we are not thinking of elevating this principle to the category of a directive without which the judicial process is not correct, because it is necessary to equally value written acts and their advantages.

The perception of proceedings as fair is associated with publicity, transparency, control of the activities of the judge and the parties, concentration of procedural actions, immediacy, and morality in the discussion. It is related to the requirement of public proceedings, which is perceived as a real guarantee of independent and fair proceedings. Many international treaties also directly refer to the principle of orality when they enshrine and guarantee the "right to be publicly heard", namely "based on the justification of any charge" (Article 10 of the Universal Declaration of Human Rights; Article 14 of the UN International Covenant on Civil and Political Rights 1976).

The requirement that witnesses give evidence orally, under oath, in public, and that we test it through vigorous cross-examination, are thus important symbols of open justice and contribute to the overall legitimacy of the system. In civil proceedings, the principle of orality focuses on public discussion and presentation of evidence related to the dispute before the court. In criminal proceedings, orality is aimed at ensuring the rights of the accused to publicly and properly defend their position before the court and refute accusations. The principle of orality is about more than the court receiving oral evidence. It is also a mechanism through which to uphold the other principles and rights on which it rests or represents. These include (a) open and public justice; (b) confrontation – and the ability to observe the demeanor of the witness as a result; (c) factual accuracy and protection of the innocent; (d) public acceptability of the process and its outcome; and thus, ultimately, the trial's legitimacy. The traditional adversarial story tells us that our commitment to the principle of orality, as it is upheld through our traditional approach to securing evidence, also upholds the legitimacy of the verdict. This is because it is the publicly accepted and most transparent way in which to do justice. Roberts notes that the living oral tradition will

retain its legitimacy – which is rooted in public confidence and trust in the integrity of officials – for as long as it retains its cultural authority[3].

Trials can be oral or written. The principle of orality stands as the opposite of the principle of writing, it is a principle that is based on positive law, in which procedural acts are mainly performed orally, under normal circumstances by questioning and reducing written documents only to the strictly necessary. It is evident that nowadays there are no "pure" exclusively oral or written processes; all combine features of both of these approaches to court proceedings. Despite the above, we could say that when orality prevails, the process could be identified as oral, especially when the process is organized in the presence of the public. Let us recall the Latin winged statement*, verba volant, scripta manent* - words fly, written remain (probably uttered by senator Gaius Titus before the Roman Senate, the era of Hadrian and Antonius Pius), which rather refers to the advantage of the written form, especially in legal contact, writing contracts, but another meaning can also be felt here. But perhaps it was meant that the spoken word can fly and soar, and be something winged and sacred as Plato presented it in his teaching. He is also credited with saying "Knowledge of words leads to knowledge of things." In any case, word and writing are not in opposition, on the contrary, they are just different forms of expressing an idea. After all, writing itself, following orality, which requires the presence of communicators and dialogue, was developed to preserve ideas and spread them further.

II. A LOOK AT THE HISTORICAL DEVELOPMENT AND SITUATION IN SLOVAKIA

According to historical sources, the first sketches of the trial were oral. In fact, in ancient Rome, even the very roots of the words *judicare* and *vindicare* represent a predominantly oral system of legislative measures, which can be seen during formula proceedings (2nd century BC to 3rd century AD). Only in the imperial era, in the phase corresponding to cognitive action (3rd century AD until Justinian's codification, 527 AD) can we observe the preference of documentary evidence over oral testimony in the process of state power in resolving conflicts, and decisions are also written[4]. The Roman process was oral, and only gradually passed into written form, which

[3] ROBERTS, P. Roberts and Zuckerman's Criminal Evidence. 3rd edition Oxford: OUP. 521-522 p.

[4] MEROI, A. Oralidad y Proceso Civil. *Revista de la Universidad de Medellín*, Vol. 3, Num. 1 2009, p. 27-48. available at https://www.academia.edu/33176039/ORALIDAD_Y_PROCESO_CIVIL

changed definitively in the 13th century by decree of Pope Innocent III. (1216), which through the Fourth Lateran Council brought a canonical code, based on a written procedure. This contributed to increasing the influence of the religious sphere, creating an opportunity for rational decision-making on the evidence. The need for stability and security of the proceedings brought writing into the proceedings.

Germanic law preserved its tradition of public and oral process, which was characterized by formalisms, symbols, and a certain mystical color. The process of the Germanic peoples was essentially oral and public because they did not use a written form. Let's also remember that at this time the process was carried out primarily based on ordeals or before a popular assembly. The late Middle Ages (approx. 1000 to 1453 or 1492) was subsequently a moment of fusion of both traditions through the consolidation of the Italian-canonical process, one of the most striking features of which was the respect for the principle *quod non est in actis, non est in mundo*. This procedure had signs of writing, formalities seemed complicated, slow, and expensive[5]. The proceedings were closed to the public and lasted quite a long time. It was also influenced by the system of legal evaluation of evidence, and decisions were very difficult to review. Until then, the set of live-action turned into a de facto dead action, which no longer focused on the search for truth, but on convincing the disputing parties that the decision is exact and correct.

The dominance of the old written procedure in the sense of the *ius commune* traditions in the civil process was broken only after a long and difficult struggle that lasted almost three hundred years and culminated in the adoption of national codes of civil procedure in the nineteenth century, in some countries, in fact, only at the beginning of the twentieth century.

Strong criticism was raised against the written process, which was based on the ideals of the French Revolution. Revolutionary voices proposed a set of rules that encouraged a series of practical judicial reforms. One of the central themes of the convention reform movement was the orality of proceedings. According to the reformists, orality represented a new doctrine of procedure, which mainly included oral hearings, but also related principles such as publicity, concentration of proceedings, evaluation of evidence, and expansion of judicial authority, which were enshrined in legal provisions

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5 MEROI, A. Oralidad y Proceso Civil. *Revista de la Universidad de Medellín*, Vol. 3, Num. 1 2009, p.27-48. available at https://www.academia.edu/33176039/ORALIDAD_Y_PROCESO_CIVIL

at various levels[6]. The elimination of the secret process and the system of legal evaluation of evidence were benefits of the French Revolution. To this extent, the process designed in France became a radically different process from the rest of European countries, so that at the time when the term oral process was used, it referred to the French process.

Continental Europe took a new direction and in the 19th century, there was a strong pan-European movement in favor of the oral system of proceedings, which produced a great movement of historical-comparative analysis, protest, and reform. It culminated in the reform of the old rigid system characterized by a written procedural scheme in which only what was written existed for the judge. In 1806, the Code de procédure civile was published in France, which served as a model for most European countries. Fast plenary procedures were preferred[7]. The subsequent development had an important milestone in 1895 in the form of the adoption of the Austrian Zivil Prozess Ordnung. Its author, Franz Klein, believed that the previous perception of the written process was a waste of time and money and negatively affected the country's economy. Therefore, he designed the oral part of the proceedings with a significant increase in the judge's discretionary power[8]. It should be remembered that the approach of this reform was not radical and did not mean the introduction of a purely oral process. Rather, one can speak of a process that retained the elements of writing, especially in the preparatory phase, but then the oral and public phases of discussing the matter were dominant. Austrian and German law subsequently influenced the development of the legal order in Europe in a series of historical events (in Spain the procedural code LEC was adopted in 1855, in Italy the reform was enforced at the beginning of the last century in 1919 and to this day orality is perceived to a limited extent, which resulted from the strong influence of the canonical process). The medieval postulate and written maxims were replaced by the slogan -*quod non in ore, non in mundo.*

1. Legal adjustment in the Slovak republic

The principle of directness and oral presentation of evidence as one of the basic principles of civil court proceedings in the legal order of the Slovak

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6 HOMBURGER, A. *Functions of orality in Austrian and American civil procedure, 20Buff. L. Rev. 9 (1970)*". Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol20/iss1/6

7 Sections 402 and 407 provide that in all summary and commercial cases the depositions of the parties must be heard at a hearing.

8 CIPRIANI, F. *Batallas por la justicia civil*, trad. Eugenia Ariano Deho, Lima: Cultural Cuzco, 2003, 552p.

Republic is not only guaranteed by the Constitution (Article 48, paragraph 2). The principle of orality is specifically formulated in the Act on Judges and Associates in Article 8, paragraph 1, which stipulates that "as a rule, proceedings are oral and public unless the law provides otherwise". Orality as well as the general principle of civil court proceedings is enshrined in Section 6 par. 1 of Act No. 335/1991 Coll. on Courts and Judges, which clearly defines that proceedings before the courts are oral and public, and exceptions can only be established by law.

Until recently, the valid Code of Civil Procedure stipulated (Section 115, valid till 2016) that "the court shall order an oral hearing in the presence of the participants and other persons if their presence is necessary unless the law provides otherwise." An oral hearing is not necessary if it does not conflict with public interests if the matter can be decided based on written evidence and if the parties have expressly waived their right to an oral hearing. An oral hearing is not ordered (Section 115 par. a) Civil procedural Code CPC Act 99/1963 Coll.*)* in disputes about small claims, or proceedings in matters of low value, which means that the court usually decides in written proceedings, unless it deems it necessary to order an oral hearing[9]. The oral form is dominant, even written evidence is accepted by the court at the hearing - the judge reads the document or summarizes its content.

In 2015, a major recodification of civil process standards took place in Slovakia. The new Code of the civil contentious proceedings of the Slovak Republic (Act.160/2015 Coll.) also reflects the traditional principle of orality (Section 176). On the other hand, however, the law provides for cases in which it is not necessary to order a court hearing and the court can only refer to the written form. In this context, the procedural criterion of the value of the dispute (*valoris causae*) is being introduced instead of the previously used term frivolous disputes. The court does not have to order an interrogation if the subject concerns only a legal assessment, the claims of the parties to the proceedings are not disputed and the value of the claim does not exceed 2,000 euros. (Section 177). Cumulative fulfillment of the stated conditions must occur. In such a situation, there is no need to order a hearing or take evidence. The court decides based on the undisputed claims of the parties and it is only a legal assessment of the matter. Evidence needs to be carried out only if there are disputed claims of the parties.

The court does not have to order a hearing when the parties agree that the hearing should not take place and the court can therefore decide on the

[9] Resolution of the National Assembly of the Slovak Republic 7Cdo 305/2015

matter even without a hearing. This provision reflects the fact that evidence must be admitted only if it contradicts the findings of the parties. An oral hearing may not be held in certain specified cases, such as summary proceedings, default judgment, payment order[10], etc.

Based on the above, it can be confirmed that the oral principle dominates the Slovak civil process. An oral hearing is generally the rule and is not necessary unless the written form is not contrary to the public interest the case can be decided based on written evidence and the parties have expressly waived their right to an oral hearing. An oral hearing is not ordered in small claims or proceedings in matters with a low dispute value. However, it is true that as part of the recodification of procedural regulations, there has been a significant increase in cases where the court does not have to order a hearing and therefore decides without oral contact.

Exceptions to the principle of orality are therefore given mainly by the very nature of the proceedings. This is mainly a situation in proceedings where the facts are clear, such as when the payment order is issued, and in the event of the defendant's disagreement, the latter has the simple possibility of using the opposition and canceling the decision. If the parties do not consider the asserted facts to be contradictory and agree to discuss the matter without a hearing or do not show interest in the course of the proceedings. Also when discussing remedies and their admissibility, it is clear that the procedural conditions for its submission have not been met. Even with these facts in mind, it can be concluded that it has an inherent position in the general principles of the judiciary, and together with the principle of the publicity, their meaning and mission can be seen mainly in the fact that they are the only guarantees of such a judicial process that respects the social function of the courts as an independent body[11].

However, the recent procedural reforms have expanded the instances where courts can decide without oral hearings, emphasizing efficiency over traditional orality principles. While these exceptions may streamline certain proceedings, they potentially undermine transparency and the parties' right to present their case verbally, raising concerns about the fairness and accessibility of the judicial process. Therefore, while acknowledging the need for procedural flexibility, it's essential to ensure that these changes uphold

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10 VNUKOVÁ, J. Evidence in civil law - Slovakia. *Institute for Local Self-Government and Public Procurement Maribor*, 2015, https://doi.org/10.4335/978-961-6842-57-0.

11 ZOULÍK, F. *Courts and judiciary*. Prague: C.H.Beck, 1995, 263p.

the fundamental principles of justice and safeguard the integrity of the legal system.

III. ON THE CONCEPT OF PRINCIPLES, CORRELATION WITH OTHER PROCESS PRINCIPLES

Legal principles can be understood as supporting ideas of the legal order, which are a kind of skeleton and supporting pillars, basic postulates, and the highest values on which the legal order stands. Certainly, in addition to the universal rules, which are generally respected, each branch of law has its specific principles that characterize and distinguish it from other branches of law.

These are rules of a general nature, which express the basic values enforced by the legal system. According to Dr. Holländer, the principles act as regulatory ideas having the nature of axioms, which are characterized by a high degree of generality of subsumption conditions and are associated with value, moral, and teleological starting points[12].

And therefore countries that belong to the same cultural space usually have similar legal traditions and values, which is also reflected in the functioning of the same legal principles and principles. In the last one, observe the approximation and joint creation of these basic theses within the European Union countries. And it should not be underestimated, on the contrary, we attach great importance to coherence in value systems. As Jean Monet, one of the creators of the idea of a common European state, said, " *If* it has to be redone, I *would start* with the *culture" - that is if I had to start building the EU project from scratch, I would start with culture and values.* If it were not for the historically given general legal principles of continental law as part of EU law, but especially for newly formulated EU legal principles (principle of loyalty, principle of priority, principle of direct effect, etc.), there could be no connection and unification of EU law with the national legal order of a member state[13]. We observe that in the field of justice, the development is not towards unification, but taking into account the particularities of judicial proceedings in individual countries, there is rather a striking ten-

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12 HOLLÄNDER, P. *Philosophy of law*. 1st edition. Pilsen: Aleš Čeněk, 2006, 30p.

13 LEVRINC, M. The principle of autonomy of the will in procedural relations with an international element. In: *Collection from II. of the international scientific conference BANSKOBYSTRICKÉ DNI PRÁVA on the topic Quality of the normative and application side of legality as a determinant of the rule of law* 23. – November 24, 2016, Vígľaš Castle. 2017, p.253-261.

dency towards the convergence of the principles on which the organization of the judiciary is based (and there is a discussion about the Brussels III regulation, which should create the framework for their functioning).

Dr. Večera qualifies legal principles as "certain reference points, expressing in a concentrated form the mechanisms of the functioning of legal relations as a manifestation of the normative force of social life, which are common to the legal system of the same legal culture, or even going across several legal cultures. They facilitate the understanding of the law of other countries and the mutual understanding of lawyers. They contribute to the spontaneous unification of law, which is an important moment concerning the advancing globalization and Europeanization of law."[14]

Legal principles are not only part of legal theory and the subject of academic debates. In jurisprudence, the issue of legal principles is perceived primarily in the context of the interpretation and application of law, although it also has its place in issues related to legislative activity[15]. The right question is who ultimately applies the principles in law - it is probably the judge himself, deciding the case. Indeed, searching for these principles is not only a task of legal theory, but of practice, when the judge is entrusted with this responsible task, who decides as the legislator would have decided, having in mind the given case?[16] According to Dr.Telec, legal principles "express the eternal truth (*maxima iuris*) and help us not to go astray in finding it."[17]

Large civil codifications in terms of legal principles meant that even legal principles had to be standardized in law as legal constructions and their perception was considerably narrowed. Thanks to the emphasized natural law nature of legal norms, they nevertheless maintained their influence on the legal order.

The principle of orality does not exist in isolation in a civil process. Its action and application are connected to other process principles. It has the most striking connection to the principles of immediacy, with which it is connected, the principle of concentration of action, the principle of public action, but also the principle of speed and economy.

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14 VEČEŘA, M. The nature and sources of legal principles, *Principles in Law, Proceedings of the International Scientific Conference*, Pan-European University, Faculty of Law, 14 May 2015, Bratislava: SAP p.45-53.

15 HARVÁNEK, J. Principles in law. In: MACHALOVÁ, T. (eds.). *Current issues of methodology of legal thinking*. Prague: Leges, 2014, p.119-146.

16 KUBEŠ, V. Natural legal principles and "good morals" in the general civil code. In: Krčmář, J. (ed.*): Randa's jubilee memorial. To the centenary of the birth of Antonín Randa*. Prague: Faculty of Law of the Charles University, 1934, p.395-423.

17 TELEC, I.: Legal principles and some other things. *Pravník*., no. 6, 2002, p. 621-663.

1. The principle of directness

The principle of directness consists in the requirement that the court come into direct contact with the parties to the proceedings, other procedural subjects, and individual means of evidence. Of course, this principle as well as others has its exceptions. The principle of directness means that the parties to the proceedings and the court act personally and directly in their interactions with each other. We remember the institution of representation, because the party does not always have to act alone in the process. However, this does not change the fact that the subject, if necessary, should personally participate in the hearing. In some cases, the evidence is conducted indirectly, through the requested court. A breakthrough in the principle of orality and directness is the decision of the court without ordering a hearing - the so-called written proceedings (schriftliches Verfahren), which the court can conduct, provided that the parties have expressly waived the right to a public hearing of the matter, or agree to the decision of the matter without the order of a hearing, and the decision of the matter without its discussion is not contrary to the requirement of public interest. The principle of orality is also not applied in the so-called abbreviated proceedings, the result of which is the issuance of a payment order (or an order for performance), in proceedings for safekeeping, for cancellation of a deed, etc. The same is true in cases of so-called *minor disputes*.

The essence of the principle of orality is the preference for oral presentations of disputing parties at the hearing. The principle of orality means that the procedural acts are performed under the direct control of the court, and the judicial authority directly perceives the procedural acts and thus has the necessary facts to resolve the dispute.

2. The principle of immediacy

The principle of immediacy in civil proceedings emphasizes the direct interaction between the court and the parties or their representatives during hearings, ensuring firsthand observation of evidence and testimony. On the other hand, the principle of directness underscores the absence of intermediaries or procedural hurdles, allowing for straightforward communication and engagement between the court and the involved parties without undue delay or complexity. Both principles aim to foster transparency, efficiency, and fairness in civil court proceedings but focus on distinct aspects of procedural conduct.

The principles of orality and immediacy is crucial in understanding their distinct roles in civil proceedings. While orality pertains to the verbal exchange and presentation of evidence during hearings, immediacy emphasizes the direct interaction between the court and the parties, ensuring firsthand observation of testimony and evidence, thus facilitating a thorough and fair adjudication process. Clarifying these differences helps ensure a balanced and effective application of both principles in legal proceedings.

The judge should have as much direct, personal contact as possible with the object of the proceedings, be it persons, documents, or places. Mediated information should be as little as possible and mainly refer to the execution of evidence. Such proximity is intended to provide a better basis for making a decision based on what happened or occurred; that is, to obtain a just judgment. That is why the principle of orality is directly linked to this principle and they are often seen as synonyms and stated as one common principle. Although this is not completely accurate and correct, since the court can have direct contact with the evidentiary material even without oral proceedings. In an objective sense, the principle of directness means that "the court must primarily use such evidentiary means that allow its knowledge of disputed facts to be as immediate as possible[18]".

The principle of immediacy is maximized in an oral trial because it allows judges to make contact with the evidence. This principle is usually used in the context of witness testimony, as it allows the judge to conclude. However, this principle does not apply only to processes with a predominance of orality, but can also be manifested in processes where the written form prevails. Even if the judge reads files and documents, he also acts directly. The judge's contact with written documents also does not pass through any filter, nor does the judge access it through other persons. The term "immediacy" originally meant only that the judge no longer entrusted the practice of testimony or parties to the employees of his judicial office, but ensured it himself[19].

The principle of immediacy does not necessarily imply the requirement of orality, because understanding orality as a condition sine qua non for the realization of the principle of immediacy would mean that in the absence of oral presentations, the court cannot decide what is a misconception. Immediacy is not synonymous with orality, it is only a sign of direct contact of the

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18 STAVINOHOVÁ, J. and HLAVSA, P. *Civil process and organization of the judiciary*. Brno, Masaryk University, 2003, 660p.

19 NIEVA-FENOLL, J. Los problemas de la oralidad. *Justicia: Revista de derecho procesal*. Madrid: Editorial. Bosch, no. 1-2, 2007, p. 101-130.

subject with information, whether oral or written. It is based on the very nature of the processes of human cognition and the subsequent reproduction of facts. There is no orality without immediacy, and directness.

3. The principle of concentration

This principle represents an effort to ensure that court proceedings end with the smallest possible number of procedural actions. We speak of the concentration of proceedings if, under certain circumstances, various procedural actions are concentrated or combined[20]". He tries to avoid dispersion of proceedings. This principle is also directly inherent to the principle of orality. There is a tendency to limit various activities in a time-limited period, which at the same time facilitates the speed and fairness of the decision. This connection is logical: only a process that has an oral structure can fully incorporate the principle of concentration.

It requires that procedural acts be carried out as close as possible to each other, preferably in one hearing. The judge should keep in mind the facts presented and form a comprehensive view of the case without fragmentation. The purpose is to prevent unnecessary, unforeseen, and unjustified interruptions in the process. Orality, however, is not presented as a solution to the dispersion of procedural acts, nor can it be said that written proceedings ipso facto create this dispersion. The truth is that there can be procedural acts in which the application of the orality principle makes the process more dispersed, and on the other hand, there are procedural acts in which the predominance of the written form makes the process more concentrated.

Oral hearings of expenses and other parties involved should be developed in the shortest possible time because the closer the procedural activities are to the judge's decision, the less danger there is that the impression that the judge has acquired will be erased and distorted. Indeed, the principle of concentration is the main consequence of orality and the one that most affects the course of litigation. This will simplify the procedures, and speed up the stages of the process, in which the questioning is carried out in a concentrated manner, and the end it means the fastest possible course of the process in court.

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[20] HURTADO REYES, M. *Estudios de derecho procesal civil.* Lima: Editorial Idemsa. 2nd edition, 2014. 925 p.

4. The adversarial principle (*contra dicere*)

The essence of the adversarial principle of civil litigation is the existence of two legally opposing parties with conflicting interests in the outcome of the civil process. The plaintiff and the defendant naturally develop procedural activity towards the outcome of the proceedings, which will be favorable for them. Adversarial means above all a discussion of disputed claims and the merits of the case. The party to the dispute should have space for its statements against the presentations of the opposing party. The party has the right to comment on the facts presented by the opposing party and the evidence presented. The adversarial nature is therefore reflected in the implementation of procedural actions, the clarification of the factual situation, the scope of authorizations, and the possible activity of the court in the proceedings. Oral proceedings also ensure the implementation of the principle of adversariality concerning the parties, witnesses, and experts through confrontations, which work effectively in oral proceedings, because they lose their value in written contact. Although, of course, written documents also fulfill this role, even if they do not allow for any direct discussion.

The principle of publicity towards third parties in civil proceedings ensures that court proceedings are open to the public, allowing anyone to attend and observe the proceedings, thus promoting transparency and accountability within the legal system. Conversely, regarding the parties involved, the principle of contradiction emphasizes their right to be heard and to actively participate in the proceedings, including the opportunity to present evidence, cross-examine witnesses, and challenge opposing arguments, thereby ensuring a fair and balanced adjudication process. While publicity ensures the openness of court proceedings to the general public, contradiction guarantees the parties' procedural rights and safeguards their interests within the legal framework.

Considering the principle of publicity, it's paramount to acknowledge the significant role played by the media in disseminating information about court proceedings. Media coverage not only broadens public access to legal matters but also promotes transparency and accountability within the judicial system. Furthermore, the media acts as a vigilant watchdog, uncovering potential injustices or irregularities and thereby bolstering public confidence in the fairness and integrity of the legal process.

5. The principle of economy and procedural economy

It is related to the saving of time, costs, and effort, which is not necessarily dependent on the oral nature of the process. The principle is connected with what represents the reduction of administrative costs in each specific case, the maximization of the resources with which a certain procedural system is calculated. For example, for some foreclosure proceedings, it is expedient to suppress the oral hearing if the reasons for the foreclosure are exhaustive and undisputed. Saving costs cannot prevent the parties from ensuring that all their rights are effectively exercised and the matter is thoroughly heard. The saving of time is related to the fact that the process should not develop so slowly that it seems immobile, nor so fast that it means giving up the necessary formalities. The principle of discussing the matter without unnecessary delays and procedural speed includes the obligation to "execute procedural acts quickly, not only procedural acts that must be performed by the party but also by everyone involved in the process (including experts, lawyers, interpreters), as well as the judge." This set of efforts for the timely implementation of the activities related to the process will make this principle tangible[21].

Although the resources available to the justice system are not always the most optimal, and in this regard, orality can sometimes cause more inconvenience than benefit if not used appropriately. Ultimately, it depends on the limited number of judges, staff, premises, or material that allow the case to be heard orally.

As the saying goes: "slow justice is no justice" or nothing is as unjust as late justice. Excessive delays in proceedings are contrary to the essence of the jurisdictional function, which was established as a constitutional principle - obtaining a decision on the matter within a reasonable time - excessive delay in justice means a violation of the human rights of individuals. The existence of oral proceedings generally forces judges to issue a decision-sentence after the end of the oral hearing. Unlike the written system (where you have to wait a long time for a decision to be made), oral proceedings are faster and more efficient.

However, in the search for speedy justice, the guarantees of due process should not be forgotten, so that there is a threshold to eliminate or reduce procedures that would not guarantee the rights of the parties in court. In applying specific solutions to each case, we must take into account the

[21] HURTADO REYES, M. *Estudios de derecho procesal civil.* Lima: Editorial Idemsa. 2nd edition, 2014. 925 p.

principles of expediting and maintaining the necessary safeguards so that due process of law can be claimed to exist. In general, the guarantee of due process of law is presented and recognized, which requires that the parties be heard, that is, that they have the opportunity to object and have a reasonable time to present and present their evidence and to defend their claims.

6. The principle of the public and the publicity of the process

The principle of publicity is based on the fact that justice and the way it functions are a matter of interest to the whole society and not only to the litigants. It stands in opposition to the secrecy of processes and arbitrariness in previous historical periods. In this sense, the public is a guarantee of transparency to enable a careful view and supervision of citizens on the justice system. This transparency is in itself a value that, on the one hand, suppresses arbitrary or abusive actions and, on the other hand, gives a sense of security to those who are part of the process.

The principle of orality is connected with the principle of the public. Also, like the principle of publicness, it does not refer to the proceedings, but rather to the hearing. Oral proceedings guarantee a more thorough discussion of the matter. During oral presentations, the court as well as the other party have the opportunity to immediately react to what is presented and thus contribute to the dynamism and economy of the process. Personal contact of the court with other persons participating in the proceedings takes precedence over written contact. There is no public without word of mouth.

The written procedure can logically be public concerning the use of modern technologies, even paradoxically more so than the oral procedure. Certainly, if we consider the publication of documents on the Internet. In our opinion, the publicity of the process is no longer limited to people who have access to the hearing or hearing room but is related to the existence of appropriate means of dissemination that allow the general public to become familiar with the proceedings. In this sense, access to the Internet is the most appropriate means of guaranteeing the publicity of the process and the presentation of information[22].

[22] NIEVA-FENOLL, J. Los problemas de la oralidad. *Justicia: Revista de derecho procesal*. Madrid: Editorial. Bosch, no. 1-2, 2007, p. 101-130.

7. Proper occupancy of the court

Oral proceedings ideally require that the court be occupied from the beginning of the trial until the decision is issued by the same natural persons, which prevents the delegation of powers, which, although useful, can complicate the effective administration of justice if used excessively or incorrectly. By orality, we specify immediacy, that is, personal contact, face to face, between the judge and the parties, without any mediation. The statements of the parties and witnesses and the explanations of the experts take place before the judges, who freely hear. The opportunity for the judge and other subjects in the proceedings to observe who is presenting the statements, his tone of voice, facial expressions, and the opportunity to confront him with questions is a basic tool for discovering the truth.

8. The principle of independence and impartiality

Are oral proceedings related to the independence of the judge, can it guarantee it? For some time now, the ideal image of a utopian character, the "absolute model of impartiality" of a judge has been limited, and we are thinking about the mechanism of the optimal search for a judge "as impartial as possible". This legally qualified assessor and decision-making subject, which the judge is, regardless of how much he tries to be objective, is always conditioned by the circumstances of the external environment in which he acts, by his subjective feelings, perceptions, perhaps affection, emotions, and ethical-political values.

For this reason, impartiality is not a descriptive expression, but a normative obligation of the judge to maintain an impartial attitude to the interests of the parties in conflict and the facts they presented, as well as to the relevant arguments for the legal classification of the facts that he considers proven.

The independent position of the judge in assessing the facts and the applicable law applicable to them is not guaranteed just because he was able to hear all the approaches of the parties and witnesses in the oral proceedings and directly participate in the evidence presented before him. But it is also justified because he knew all the factual arguments presented by the parties and the evidence to prove them. In this sense, the best position of the judge in the proceedings who decides on the case does not apply only to oral proceedings, but also to those governed by the principle of writing. Two qualities compete before judges: the completeness of knowledge and possibly its immediacy. The first is the required value; the second is rather

an added value depending on whether or not there is an oral procedure. In other words, the oral nature of the proceedings does not in itself guarantee the impartiality of the judge and the proceedings. The only thing that matters is whether the judge has enough evidence to make a decision and how he approaches it, which does not depend on whether the proceedings are oral or written. Sometimes even the judge's judgment can be distorted by emotional influences during oral contact. The oral process requires replacing the observer judge with an intervening judge, which also brings the social dimension of greater interaction of relationships.

IV. PREFERENCE OF ORAL OR WRITTEN PROCEEDINGS?

Orality in civil law matters and its need is undisputed except in cases that are based solely on documentary evidence (executions, bankruptcies) that have special procedures (mental illness, adoption) or require less evidentiary work.

The oral process is understood by modern legal doctrine as the predominance of the word as a means of expression with the use of preparatory and documentary files in civil proceedings. If you look only at the external element of orality and written proceedings, it can be misleading as to the nature of the process, because it is difficult to imagine a written process that does not admit to some degree of orality and an oral process that does not admit of any degree of writing.

When the legislator decides on the predominance of oral or written, it is a fact that there is no pure system. In doing so, he decides not only for these rules but also for the entire series of procedural consequences with which these procedural forms are configured. Currently, we find manifestations of more or less mixed models that collect the most useful elements from both systems. As for orality, without a doubt, its characteristic element is the spoken word, which serves as a means of expression and communication between procedural subjects. However, it is not the only element, as we have stated, we must also analyze other related procedural forms: immediacy, concentration, and publicity of the proceedings.

Of course, this does not mean that written presentations have less weight. On the contrary, in some cases, the written form is more appropriate and required. Every submission to the court must be in writing, nowadays more likely electronic, or must be recorded in the minutes. Both the oral principle (examination of a witness, party to the proceedings, an expert) and the

written principle (document, expert opinion, reports from public administration bodies, legal entities, and natural persons) are applied in the course of evidence. As we can see, there is no doubt that the proceedings conducted according to the principle of orality have their indisputable advantages. However, this does not mean that the document should be deleted from the process. We will quote Mauro Cappelletti, who said: "The problem of orality and writing is often described as a problem of dominance or coordination, not of complete exclusion"[23]. Therefore, we currently encounter a combination of both systems in the vast majority of countries.

The principle of orality does not exclude writing. In the process, orality is harmoniously complemented by written proceedings. Modern procedural systems try to combine them, taking advantage of each form. Orality is important in the actual execution of evidence, and assertions; however, writing is useful and more appropriate for the preparation of the justification (lawsuit and response to the claim), everything also depends on the type of process in question. It can be considered a significant distortion of orality in which every action is dictated verbally to the court clerk to be recorded. Such a model is a disguised writing process in which one dictates, not speak, and dictates to be read, not to be heard. For this model, it is not the procedural activity performed at the important hearing, but the act itself, which supports the saying *quod non est in actis non est in mundo*.

Determining the prevalence of the oral or written form must depend on exogenous and internal factors of the justice system; a) the budget that the state grants to the judicial system, which will depend on the number of judges, the necessary infrastructure and resources, b) the complexity of the procedural acts to be performed; and c) the existence of sufficient information that will allow the judge to optimally know the dispute.

Although the paradigm to be followed should be "oral discussion", the complexity of the matter at hand must be a factor to be considered in deciding between oral and written media facts. For example, in processes of high complexity and complexity, orality must prevail, as this will allow the judge to face the positions of both sides and dialectically define the essence of the dispute. Finally, the arrangement of oral proceedings must take into account the preparation and immediacy with which the judge has to make a decision. The judge can't hear the parties if he is not aware of the case beforehand and prepared, otherwise the hearing will be only a formal act and a ritual.

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[23] CAPPELLETTI, M. *La oralidad y las pruebas en el proceso civil*. Buenos Aires: Ediciones Jurídicas. Europa – América, 1972, 482 p.

The development of civil proceedings is conditioned by the requirement for greater simplicity of procedural actions due to the nature of the issues that are the subject of the proceedings, the need to increase the publicity of the process, simplify the access of the parties, and mitigate the social impacts of the proceedings.

To characterize the process as oral, the evidentiary phase of the process is crucial. Oral is a process in which only oral material presented orally can be evaluated within the framework of a court decision and forms its basis. Also in connection with the taking of evidence, the current trend in many countries is for the means of evidence, even when it comes to witness statements, to be presented as much as possible through a document and subsequently taken orally[24]. Such a procedure of presenting witness evidence through a written document has the following advantages, above all, the lawyer and the judge can prepare in advance and think about the questions for the testimony.

Of course, there are also **disadvantages of oral proceedings**, where the main argument is that the lack of written documents leads to problematic reproduction of facts in a higher court. The possibility of errors or omissions also increases due to the lack of a written record of the proceedings. Another argument against oral proceedings is the higher costs. But this is not accurate, because it is not a comparison of two different extremes: a bad written system with an ideal oral regime, in which all means and a large number of judges should be available.

It is often criticized that this system is more prone to superficial and hasty or surprising decisions. In addition, they require a large increase in the number of workers in the judiciary. Indeed, the preference for oral proceedings has always brought about the need for more judges, but fewer officials are required, and less bureaucracy, which is a significant advantage.

Among the recognized **advantages of oral proceedings,** we can mention less formalities and administration and faster discussion of the matter, where there is no need to wait for the delivery of documents.

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[24] For example the International Bar Association (IBA) Rules on Evidence Procedures in Arbitration provide in Articles 2.2 and 4.5 that a witness may give his statement in two procedures. One of them is before presenting the claim, which, if it is written, should be attached to the claim or the answer to it, and the other is when discussing the evidence that is provided orally. - IBA Rules on the Taking of Evidence in International Arbitration, *Adopted by a resolution of the IBA Council 29 May 2010, International Bar Association, London United Kingdom,* available on https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

Oral proceedings increase the publicity and thus the preventive function of the process, and at the same time represent a certain control of the work of the courts by the public. As activities are focused and concentrated, notifications, subpoenas, and other actions are reduced. Better communication between the parties leads to greater use of conciliation, agreements of the parties, and remedies are applied to a lesser extent. Orality gives the civil process a human dimension, the parties present their presentations most naturally and feel more interested in solving their situation.

It enables a direct relationship between the court and the parties, which leads to the elimination of ambiguities and the possibility to immediately clarify discrepancies. The judge becomes the real protagonist in this process. The principle of immediacy in the practice of evidence, allows the judge to more easily understand who is right in the debate. As they say - Paper lies, without blushing "Das papier lügt, ohne zu eroten." Orality makes it possible to quickly reveal motives and clarify spontaneous attitudes with direct questions.

In oral proceedings, procedural delays are suppressed (most of them are resolved within one hearing), there are fewer remedies, and many more agreements between the parties that preclude further proceedings.

Finally, in this sense, the mere application of the principle of orality does not mean that the process will be faster, more concentrated, and more public as such, but in principle, it will also depend on other factors. Verbality alone will not ensure a fair trial. Orality, chosen in the wrong form and scope, can harm the civil process, as well as writing. The principle of orality must be considered as one of the means to achieve a fair trial, but not as the only one, nor as the main or most urgent necessity[25].

What is the position of the parties in comparison between oral and written proceedings? Oral proceedings require considerable mental maturity, experience, and legal training from judges and lawyers as they have to react immediately. A radical insistence on the written system would probably be a mistake due to the already mentioned shortcomings, therefore it is appropriate to highlight some principles of the oral system, such as immediacy, concentration; but also the division of the process between oral actions and

[25] ALCALÁ, Z. and CASTILLO, N. *Estudios de teoría general e historia del proceso (1945-1972*), México: UNAM, 1992, 615 p.

written actions, because it is more suitable for the correct development of the process and the effective application of justice[26].

Orality and procedural concentration are closely related to the role of the judge and, in particular, to the powers he exercises and to the tasks he assumes during the trial. The transcendent purpose of the jurisdictional activity is to ensure justice and to achieve this goal, the judge "must not passively attend the process, at the end give a decision, but must participate in the dispute as a living and active force[27]".

The powers and duties that the legal order prescribes and imposes on judges must be exercised to protect not a particular individual interest, but the interest of the entire society that wishes and intends to comply with legal norms. On the other hand, only the duty entrusted to the judge to autonomously search for the substantive truth makes him truly independent of the parties, since his passivity makes the judge an instrument of the parties and separates him from the superior interest he is supposed to protect. The current legislation supports the active intervention of the judge in the process and in clarifying the disputed powers of judges in matters of evidence. This power of judges to direct the process becomes an obligation and the judge must do everything that leads to the best outcome of the process because this is a function that is given by the very nature of public service.

In oral proceedings, the judge has real disciplinary powers in the area of management of the proceedings and instructions, which enable him to maintain order in each of the hearings, to help the parties correctly define the purpose of the trial, to limit the scope of the discussion, to reject inadmissible evidence and to admit that which he considers necessary to dispute resolution; which is hard to imagine in written systems. The judge ceases to be a simple spectator and becomes truly the director and protagonist of the process.

The principle of orality cannot be understood as an oral discussion at a hearing. For Chiovenda, "orality, weakened by the writings that prepare the discussion, on the contrary, guarantees a truly better justice; it makes the judge a participant in the case and allows him to better control it, avoiding the misunderstandings that are so frequent in the written process; it excites

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[26] RAMIREZ BEJERANO, E. E. *La oralidad en el proceso civil. Necesidad, ventajas y desventajas, en Contribuciones a las Ciencias Sociales*, January 2010, available at www.eumed.net/rev/cccss/07/eerb3.htm

[27] CHIOVENDA, J. *Principios de derecho procesal civil*, Madrid: REUS 1925, p.136. available at https://www.scribd.com/doc/97757461/Giussepe-Chiovenda-Principios-Del-Derecho-Procesal-Civil -Tomo-II

the spirit of the judge and the lawyer and makes him more clever, faster and sharper[28].

The question arises whether the oral discussion is more effective in some conflicts and in which lawsuits would the oral discussion be more appropriate. Of course, there are proceedings that by their nature are suitable for oral proceedings, and in other cases, oral proceedings are not justified and necessary. Above all, in proceedings in which questions of fact prevail (e.g. liability relationships, family conflicts, questions related to ownership) or with a focus on the dispute about how the events occurred (those that would lead to a breach of contract or relate to the employment relationship). Similarly, orality can also be recommended for those family conflicts whose solution is largely left to the discretion of the courts (the mode of contact between parents and children), as well as where oral discussion makes it possible to know the life circumstances of the parties, and even better, their intervention when building a court decision.

However, there are also lawsuits where an oral discussion would not be entirely appropriate. Typically, we might think of conflicts in which questions of law predominate over questions of fact. In this type of judgment, oral proceedings can cause a loss of precision and depth in the discussion of legally sophisticated issues for which reflection on the writing itself is necessary. These are cases in which it is not always possible to assert and provide a counter-assertion "immediately" for the parties and leave the complexity of the assessment for the judge.

Finally, in what legal proceedings is oral argument counterproductive? In addition to the above, it is possible to think of those lawsuits that are classified as "purely legal", in which there is no "personal" background and which narrow the dispute to a purely legal issue. In addition, and in general, orality is not compatible with enforcement judgments bankruptcy proceedings, and so on. Not all systems can support full system orality. The flexibility and choice of facts to be taken orally can therefore become an extremely important tool.

Depending on the type of conflict being resolved and the degree of its complexity, it seems clear that orality can affect the epistemological quality of the knowledge a judge has acquired. The possibility of categorizing conflicts and the conclusion that some of them are more suitable for oral

[28] CHIOVIENDA, G. Ensayos de derecho procesal civil. Vol. II. Ediciones Jurídicas Europa – América, Buenos Aires: Bosch y Cía, 1949.

negotiation and others are not is formulated in the broader perspective of conflict theory.

V. ORALITY IN CIVIL PROCEEDINGS OF EUROPEAN COUNTRIES AND BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Throughout Europe, we find a mixture of the principle of orality and writing with the predominance of one approach or the other. In any case, orality is the dominant principle of the civil process, that is, at least in the courts of first instance. We present some countries for your interest.

Word of mouth has a strong long-standing tradition in Nordic countries such as Sweden. Today the procedure in the general courts is dominated by the principle of orality, while in the administrative courts, procedure chiefly takes the written form. This being said, the types of communication procedures used in courts today are constantly changing, the reason being, in part, the advent and advancement of new communication tools such as telephone, video and the internet[29].

A weakened form of the orality principle is typical for civil proceedings in Greece. A mandatory oral hearing of the case is established for the first-instance proceedings. In principle, the discussion of evidence takes place in front of the entire panel of the court. But the testimony of the witness takes place in front of only one member of the senate, who is designated as the judge-reporter.

It seems that in Estonia, after the last reforms, the principle of orality no longer has such weight. It points to its impracticality and inefficiency because of the current development of communication systems. Rather, the focus is on thorough preparation for the oral hearing, with the preliminary hearing taking a written (or electronic) form. Although the matter is to be heard orally, the parties can always agree to a written procedure themselves. In principle, the court should not hold an oral hearing in the pre -trial phase, although courts do this in practice, but in practice, they prefer that the parties submit their positions in writing. This means that written proceedings prevail over oral proceedings in Estonia.

The principle of orality is criticized in France, and therefore the importance of orality is rather reduced and lawyers in practice use the written

[29] BYLANDER, E. The Principle of Orality: A Legal Study of Procedural Communication Forms in Swedish Law, Thesis. 2006, Available at https://core.ac.uk/display/36305380

form. Even in oral proceedings, judges tend to prefer written motions to oral ones, which become just a formality and lose weight, but the parties always have the option of oral proceedings. The court is also entitled to end the oral hearing if it considers that it already has enough information to decide the case[30]. The French system of evidence and procedural law, as outlined in the Code de procédure civile, emphasizes a balance between adversarial and inquisitorial principles, where the judge and the parties have defined roles in the taking of evidence. Since 1976, this balance has become increasingly complex, potentially leading to criticisms regarding the rigidity of the system, especially concerning the predominant reliance on written evidence over oral evidence[31].

Orality or directness of civil proceedings is not a categorical requirement of the Convention on Human Rights and Fundamental Freedoms (*Rome*, 4 November 1950, hereinafter referred to as the Convention). Oral hearing and physical presence in ECtHR jurisprudence under Art. 6 of the Convention are seen rather as part of the right to a fair trial (in addition to the right to effective participation in the proceedings, the public, and the right to publish and publish the decision). In principle, civil proceedings should be oral, only if exceptional circumstances justify writing. The participant has the right to request an oral hearing, but the court can refuse it due to the nature of the dispute and the relevant reasons (Martinie v. France, April 12, 2006). In the jurisprudence of the ECtHR, there is no significant difference between situations where only a legal representative was present at the proceedings (Kremzow v. Austria 1 September 1993), although these aspects may be relevant for Article 6 para. 3 letters c); and cases that were conducted only by written procedure in the complete absence of the parties (Axen v. Germany 8 December 1983). The essence of this right lies in the situations in which Article 6 of the Convention guarantees the applicant the right to personal participation. Attendance presupposes an oral hearing, although not every oral hearing must necessarily be public. If the matter is to be heard before only one instance and if the questions are not "highly technical" or "purely legal", an oral hearing must be held, and written proceedings will not be satisfactory and sufficient (Koottummel v. Austria 10 December 2009).

Not holding an oral hearing is justified only by the existence of exceptional circumstances that justify not ordering an oral hearing. Exceptional-

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30 RECHBERGER, W. H. The principle of oral and written presentation. *Dimensions of evidence in european civil procedure, European monographs,* Netherlands: Wolters Kluwer, 2015, p. 71-87.

31 OUDIN, M. Evidence in Civil Law – France, Institute for local self-government and public procurement Maribor, 2015, DOI10.4335/978-961-6842-48-8. ISBN 9789616842488, 55 p.

ity is assessed concerning the nature of the issues forming the subject of the proceedings, and not concerning the frequent occurrence of situations (Miller v. Sweden, May 2005 - failure to assess factual but legal issues by the appeals court results in the non-ordering of appeal proceedings being following Article 6 ECHR).

The requirement to be present at the first instance proceedings is close to absolute, although it has been hypothesized that "exceptional circumstances" may justify non-compliance (Allan Jacobsson (n. 2) v. Sweden 19 February 1998). In cases of a minor offense (speeding or other road traffic offenses), if there were no doubts about the credibility of the witnesses, the Court recognized that an oral hearing was not necessary and the proceedings could be in writing (Suhadolc v. Slovenia, 7 May 2011). The non-ordering of an oral hearing at a higher instance can be justified by the special features of the proceedings, provided that the oral hearing took place at the first instance Helmers v. Sweden, 29/10/1991.) The physical presence of the parties is required:

a) if it is necessary to obtain evidence from them if they are witnesses of events important for the given case (Kovalev v. Russia 10 May 2007);
b) if it allows the court to assess the party's personality, abilities, etc. (Shtukaturov v. Russia 7 March 2008).

While Article 6 of the Convention does not guarantee a right of appeal in civil or criminal matters, it applies to appeal proceedings through a non-autonomous rule - ie if the right to appeal is guaranteed under national law; if the presence of the claimant before the court of appeal is required, which depends on the nature of the proceedings and the position of the court of appeal (Ekbatani and b.), which is at stake for the applicant (Kremzow v. Austria 1 September 1993).

In contrast, written appeal procedures are generally accepted as compatible with Article 6 of the Convention. An oral hearing is not required on appeal if:

a) no questions arise regarding the credibility of the witnesses,
b) facts that are not disputed, a
c) the participants in the proceedings have adequate opportunities to present their cases in writing and have the opportunity to defend themselves against the evidence.

At the same time, it belongs to the ECtHR to determine whether the proceedings before the Court of Appeal were really "highly technical" or "purely legal" (Schlumpf v. Switzerland 8 January 2009; Equal Coll v. Spain). The jurisprudence establishes the requirement that the party is present at least at one level of the court proceedings, ie the instance (Göç v. Turkey 1 July 2002).

Presence before the Court of Appeal will be required if it deals with questions of fact and law and if the court has full power to overturn or modify the decision of the lower court (Ekbatani 6 May 19884). Presence before the Court of Appeal will also be required if the applicant risks serious harm to his situation in the appeal proceedings, even if the Court of Appeal deals only with questions of law (Kremzow), or if, for example, an assessment of the applicant's character or state of health is directly relevant to the formulation of the legal opinion of the Court of Appeal (Salomonsson v. Sweden 2 November 2002).

Physical presence is also required when the appellate court changes the court's acquittal and re-evaluates the evidence, especially if the defendant himself is an important source of factual evidence (García Hernández v. Spain 6 November 2010).

The court of first instance was held without the presence of the plaintiff, which can be remedied at the appellate level only if the appellate court is authorized to assess questions of law and fact and to fully review the decision of the lower court (Diennet v. France 6 September 1995).

A person may waive the right to be present at the proceedings, but this waiver must be made unquestionably and there must be minimum guarantees commensurate with its importance (Poitrimol v. France 3 November 1993).

However, the right to be present does not mean the authorities are obliged to hear the applicants orally at the hearing if they do not show sufficient effort and interest to participate in the proceedings (Nunes Dias v. Portugal, 10 April 2003.). Authorities are required to inform applicants of future hearings; However, Article 6 does not guarantee the parties to the dispute an automatic right to a special form of delivery of court documents, such as delivery by electronic mail (Bogonos v. Russia, February 2004.)

Trials in absentia are only allowed if: a) the authorities have made every effort to track down the accused and inform them of the upcoming hearings, and b) the defendants have a guaranteed right to a full retrial in the event of

the rediscovery of these persons (Colozza v. Italy 2 February 1995; Krombach v. France 3 February 2001)[32].

As we can observe from the decisions of the ECtHR, even here the oral discussion of the matter and the direct presence of the parties at the proceedings is not perceived as absolute. The absence of an oral hearing does not contradict Article 6 para. 1 of the European Convention. Jurisprudence has established certain rules from the point of view of which exceptions to the oral hearing of the case are compatible with the right to a fair trial. The judicial body of the Council of Europe admits that proceedings in absentia are tolerated mainly in appeal proceedings, in cases where only the legal circumstances of the case or technical aspects are discussed. In the same way, if the party does not use the opportunity to participate directly in the proceedings and does not show interest in its course, proceedings without his presence and oral hearing cannot be considered a violation of his rights.

The dynamics of today's world are influenced by migration, population mobility, and globalization, which naturally lead to an increase in the number of so-called transnational civil processes, where the parties are also located in different places.

The significant increase in international trade led to proposals for harmonization or approximation of legislation, i.e. efforts to reduce the differences between each state's regulations to apply similar or even the same rules.

Slovak courts have generally interpreted the European Court of Human Rights (ECtHR) jurisprudence regarding the right to a fair trial, particularly Article 6 of the European Convention on Human Rights, with attention to the principle of orality. While the ECtHR emphasizes the importance of oral hearings as part of a fair trial, Slovak courts have adopted a pragmatic approach, considering factors such as the nature of the dispute and the parties' participation. They have recognized that exceptions to oral hearings, particularly in appeal proceedings and cases involving technical aspects, can be compatible with the right to a fair trial, aligning with the ECtHR's jurisprudence. However, the courts also ensure that parties are adequately informed and have the opportunity to participate, maintaining fairness and due process in civil proceedings.

With such an intention, the American Law Institute ALI (1923, Philadelphia) and the International Institute for the Unification of Private Law

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[32] VITKAUSKAS, D. and DIKOV G. Protecting the right to a fair trial under the European Convention on Human Rights, *Council of Europe human rights handbooks.* Strasbourg: Cedex, 2012, p.115, p. 55 and following, Available at https://rm.coe.int/168007ff57

- UNIDROIT (1926, Rome) developed a set of principles and rules of transnational civil procedure (Transnational Principles of Civil Procedure 2004) intending to serve as general guidelines for jurisdictions dealing with civil or commercial disputes. ELI European Law Institute joined this initiative in 2013. The stated principles try to use the common starting point existing between continental law or civil law on the one hand and Anglo-American law or common law on the other so that the differences between the two legal systems do not stand as an insurmountable obstacle in the resolution of conflicts.

Principle no. 9, which refers to the structure of the process, assumes the division of the process into three phases. First, the initial stage, in which the claim and the response to the claim are submitted in writing and the main means of evidence are determined. Second, an intermediate step to order proceedings and establish a timetable to be followed, deal with procedural issues, and present evidence. At this stage, the court may, if it deems it necessary, order a hearing which would be like a preliminary hearing. The third and final phase, in which the concentrated evidentiary proceedings will take place.

However, Principle No. 19, which refers to the method of presenting evidence, could appear to be a step against the oral form by allowing witnesses to give written statements. Witness statements are traditionally taken orally. In modern practice, however, there is a tendency to replace the testimony with a written statement, which also reflects the aforementioned provision. Principle 19 allows flexibility in this regard. He considers that statements may be submitted initially in writing, while oral proceedings must subsequently begin after additional questioning by the court and opposing parties.

This provision is not an obstacle to direct questioning, as it is only a preparation for oral statements. Interestingly, efforts to exploit the similarities between Roman and common law suggest an oral model. This proves that there is also an international consensus on the suitability of an oral public process for achieving better results in dispute resolution[33].

Another important aspect of the electronization of the process, both from the point of view of the search for the real truth and also from the point of view of process dexterity, refers to the radicalization of orality in the pro-

[33] Transnational principles of civil procedure, available e.g. on the UNIDROT website https://www.unidroit.org/instruments/transnational-civil-procedure

cess[34]. In the electronic process, orality can be completely preserved and one can talk about radicalization since all presentations can be recorded in their entirety.

More than simple orality, we can think about a certain hyperreality of process actions, which is created and simulated by image and sound data. It should be remembered that orality has always been highly valued because it has the capacity and potential to search for real truth (in contrast to the perception of fact that characterizes a statement - paper can bear anything) but also in terms of the flexibility that concentration provides to actions. If the oral principle can support and complement written proceedings so well, then what about its potential, which brings an immediate electronic discussion of the matter?

Recently, we have had the opportunity to record and shape reality with technical means. The written process has always been limited by the medium, as a carrier, and represents rather a static reality, while modern technical means mean a virtual reality. Rebirth of the principle of orality in the 19th century aimed to reveal the truth in the process, which the process in the written mode of operation began to move away from. Also, the goal of the new perception of the process was to find and restore the lost flexibility of action. It is also necessary to perceive the fact that in electronic proceedings it is possible to limit, although of course not exclude, the representation of persons (rather, those where the representation is chosen due to reluctance to participate in the proceedings, and there is no necessity for legal representation in the case of capacity limitation). Technologies can replace even a witness through a recording.

It can be said that orality was represented by a set - real truth - representation - speed (flexibility) of action and what I am aiming for today through technology is characterized by terms - online or on the network. Finally, the electronic reality enhanced by the principle of orality is not only important from the point of view of the hearing, but also in legal hermeneutics. The judge would actually make a decision orally in a direct and interactive way, he can immediately correct any errors and irregularities in the procedure. In this light, the concept of assertion and counter-assertion takes on a different dimension if we think of it as an immediate reaction.

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[34] RESENDE CHAVES J., JOSDÉ, E. Electronic technology and civil procedure: New paths to justice from around. Proceedings on the web, Editors: Miklós Kengyel, Zoltán Nemessányi, New York: Springer, 2012, p. 131.

Currently, the key issues are digitization. The European Union has adopted the current Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation. Certainly, the dogma or paradigm of digitization cannot be advocated as a magic formula to solve all the problems that our justice system suffers from. It is possible to introduce useful technical tools to improve the processing of procedures and access to justice, but we must remember the basic principles such as the immediacy and publicity of proceedings, so we cannot be advocates of digitization that includes all procedural acts. Defended procedural efficiency can paradoxically have an undesirable effect on the threat of effective jurisdictional protection of rights, making access to the process more difficult, and suppressing of procedural acts. It must be required in all cases to do so by means that allow authentic and effective judicial protection. New technologies in the administration of justice, despite contributing to transparency and closeness to citizens, among other benefits, will lead to the necessary adjustment of certain guarantees and procedural principles[35]. So far, the direction suggests that digitalization will favor formulaic written processes. But digital video conferences, on the other hand, contribute to the development of orality. The meaning of oral proceedings will certainly remain preserved and will have an irreplaceable meaning.

VI. CONCLUSION

The principle of orality seen from the perspective of modern history was the result of the reform process. It was a strong voice of philosophers, scholars, and legal practitioners who sought to replace the dominant written procedure of *ius commune* with modern systems based on publicity, direct assessment of evidence, and direct oral communication between the court and the litigants. Thus, from a historical point of view, the procedural nature of orality was created as a reaction to a written system based on formalities, which caused delays in proceedings and created a distance between the parties and the judge. Thus, the oral system is designed as a correction of the imperfections presented by the written system, as it tries to prioritize the immediacy and concentration of the process. In the equilibrium of these ele-

[35] KACZMAREK-TEMPLIN, B. 2023. Digitalization of Civil Proceedings in the Light of Openness, Equality and Immediacy in the Polish Legal System. *European Journal of Economics, Law and Politics*. European Scientific Institute, ESI. https://doi.org/10.19044/elp.v9no4a8.

ments, therefore, the oral system seeks something that does not exist in the written system: the judge's direct contact with the parties and the evidence.

These efforts ended with the predominance of the principle of oral proceedings in most European countries. However, it should be noted that in recent years, in many countries, the intention to move closer to written civil proceedings has reappeared. The broad approach to the principle of orality in the past, which even attributed ideological significance to it, seems to have been overcome. Today, we can afford to soberly look at one of the two alternative forms of process communication, each of which serves to improve the quality of the process in its way. As we have seen, the application of the principle of orality in the civil process has obvious advantages, it is appropriate to point out that, in principle, it must be applied in the stages and activities in which it is effective; without this implying the exclusion of writing from the process as a helpful, necessary, sometimes even necessary means.

No one disputes that due process depends, at least in part, on files that have the advantage of permanence, ease of verification, and review, and no one disputes their importance. The principle of orality is a widely applicable concept whose usefulness in proceedings has a large scope. The oral course of evidence is far from exhausting the potential of this principle. It is necessary to take into account the purpose and impact on other governing principles of civil procedure. Oral or written are the two external forms that procedural acts can take. We are talking about forms because a process is primarily a form that points to the external aspect of process actions and process activity as a whole. As a result, the principles of orality and writing could be defined as the principle that a decision should be based only on procedural materials provided orally or in writing.

Currently, however, there is no complete oral or written process, so it is necessary to look for an element that makes it possible to determine when the process is inspired by the principle of orality - or writing. We have mentioned the advantages and disadvantages of both approaches and it can be concluded that the ideal is a combination of both to provide the best possible legal protection, respecting the suitability of writing and speaking for specific types of proceedings and specific procedural actions.

As we found out when following the conclusions of the research, it is possible to identify two different dimensions of orality:

a) on the one hand, it is a means and technique of receiving and presenting evidence in legal proceedings;

b) orality acts as a means of communication between the court, the parties, and their lawyers in connection with the legal proceedings and thus also the form of their procedural acts

While these functions overlap in some respects, it is useful to distinguish them for analytical purposes because they serve different purposes and are emphasized to varying degrees in legal orders.

Incorporating the orality in the civil process is relatively simple from a legislative point of view. However, if its real implantation in the judicial system is required, because it is understood as an element of the quality of the judiciary, characterized by direct contact between the judge and the parties, it is essential that there are minimum objective conditions that must be met. However, there must be the necessary number of judges to make such proceedings possible and efficient, because conducting oral proceedings requires time to properly devote to the study of cases in all those proceedings in which there is direct contact between the judge and the parties. And finally, it is necessary to introduce mechanisms of control and sanctions that will make it possible to deter violations of the principle of orality, such as the recording of oral hearings or the invalidity of proceedings when the principle of orality is violated. In legal doctrine, it is customary to consider an oral process a situation where the spoken word predominates as a means of expression, although it can be mitigated by the use of documentation.

In conclusion, it should be noted that the definition of the term oral proceedings is not entirely simple and unambiguous. It is a very deceptive matter. Not every proceeding that takes place orally and there is oral communication can be described as an oral proceeding with the principle of orality, and this can be misleading. When we talk about orality, we do not mean exclusively oral action. It also does not exist nowadays and is only an illusion. If we talk about orality today, we rather mean an action mixed with the predominance of orality over written form.

To determine whether it is an oral or written action, we cannot only note the amount and number of oral and written actions established in the relevant procedural norm, but also the role that each communication mechanism globally plays in this process. And the fact that oral actions are included in the process does not mean that the process is oral. Just as if there are actions in written form, it does not have to be a written process. To create a certain comprehensive view, it can be argued that it is an oral process under the condition that there is at least one stage of the process in which the court is in direct contact with the parties and other persons participating

in the process with the possibility of a real confrontation of their views. The judge who will make the decision is the same as the one who was present at the oral hearing, and the proceedings should be concentrated as much as possible so that the oral actions can be presented at once. If the facts were presented in writing, there should be an opportunity to comment on them orally, and oral statements must have the same weight as written ones, and the court decision itself must be based on oral statements.

Orality is therefore more than the bare presence of the parties before the court in one place on the same day. One could talk about orality in a narrower sense - it represents only the use of the spoken word in an action concerning a procedural act and its form, and orality in a broader sense - which is already a more complex term, including the direct application of other subsequent procedural principles of immediacy, concentration, to the public.

In summary, the above definitions emphasize that orality is a means to obtain certain ends rather than a procedural system. This approach inevitably makes orality an additional element or attribute of the current procedural system. It can be defined as a process structure in which the acts of the process are carried out orally in front of the court and there is room for oral statements. Wording no. 12 of the Code of Civil Procedure reflects this traditional principle, which, however, is broken in several places in the modern concept of the civil process. Let's mention for all only abbreviated forms of proceedings or a decision on the fulfillment of procedural conditions for filing a remedy.

We cannot close our eyes to the shift, which is noticeable here, towards written proceedings, which also dominate European judicial institutions. In all spheres of life, there is a trend to save time and a rapid sequence of events, supplemented by the rapid development of modern technologies, which will lead to the use of forms aimed at the rapid provision of justice, where even oral contact with the court will be enabled by technology, otherwise, it would not correspond with current reality.

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