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The nature and dynamism of civil procedure – rights, rules and judges – comparison between common law and civil law systems

Abstract:

The subject matter of this article is the comparative outlook for the civil procedure in common law tradition and continental law family – throughout the three various viewpoints – citizen's, court's and finally – the prospective aspects for civil proceeding. Therefore, my aim is to construct a storied composition that embarks on individual's level, goes over the structural grade and reaches the towering rung – the global perspective.

To begin with, we will focus on the right to court and due process as the supreme guarantees both in the United States of America and in Poland. We will plot the right in terms of procedural restrictions, for instance pleading standards – i.e. something which gathers all of actors in a courtroom together – especially – the plaintiff with the defendant and the judge. Afterwards, it will be the civil judge who has been put under the spotlight – his role in the system. Finally, we will take a peek at the idea of harmonization in civil procedure field – analysis of prospects.

Key words: civil procedure, comparative analysis, Polish law

Introduction – the question about comparison

If plaintiff summons defendant to court, he shall go. If he does not go, plaintiff shall call witness thereto. Then only shall he take defendant by force. (...) When the parties compromise the matter, an official shall announce it. If they do not compromise, they shall state the outline of the case in the meeting place (*in comitio*) or market

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(*in foro*) before noon. They shall plead it out together in person. After noon, the judge shall adjudge the case to the party that is present. If both are present, sunset shall be the time limit (of the proceedings)².

This is a fragment of Table I of *Lex Duodecim Tabularum* (c. 450 B.C.), but it relevantly shows the meaning of civil procedure. For those who were living in ancient Rome these preliminaries and rules concerning trial appeared as the first warranty and the beginning of a new approach to law. Since then, laws have adopted a written and enacted form so that all citizens could be treated equally before the governing management. There is no doubt that the system was hardly codified. However, it was a first stride which could be considered as a core that begun the protection process of the rights for citizens and, on the other hand, gave a legal permission to redress wrongs based on precisely-worded written laws known (assumedly) to everybody. In consequence, the Roman perception of law would afterward become the model followed by many sequent civilizations right up to nowadays.

Now, when the beginning of tangible civil proceeding has been located in time and space, it is desirable to look at present days. Article 6 section 1 of European Convention on Human Rights stipulates: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”³. Between these two landmark points in history of civil procedure expired thereabout 2 400 years. Looking back and forward let us take a forensic walk through this time axis. The gait might appear to be sometimes uncertain – the line needs to be divided into two systems – the common law and civil one. Not only this approach fosters comparative study but it is also a research-challenging manner – as far as the civil procedure and its specific nature is concerned. The points of our timeline which shall boning these two limbs – common and civil systems in comparative perspective – are the questions posed beneath. The answers will measure the time – that bygone and that still awaiting to be filled up.

However, before proceeding to address these questions, another inquiry is forestalling. Forasmuch as civil procedure is seen to be notably connected with local culture and social heritage, is there either a desire or disutility in comparative studies of this legal field? Was Oscar G. Chase right when he said: „court procedures reflect the fundamental values, sensibilities and beliefs (the ‘culture’) of the collectivity that employs them”⁴. *Prima facie* civil procedural law might be seen as so separate and peculiar sphere that it come across with too many obstacles to fruitfully perform the comparative study goal.

The primary aim of comparative law, as of all science, is knowledge. If one accepts that legal science includes not only the techniques of interpreting the texts,

² S. Kreis, *The History Guide. Lectures on Ancient and Medieval European History. The Laws of the Twelve Tables, c. 450 B.C.*, <http://www.historyguide.org/ancient/12tables.html>, 20.10.2016.

³ http://www.echr.coe.int/Documents/Convention_ENG.pdf, http://www.echr.coe.int/Documents/Convention_ENG.pdf, 29.10.2016.

⁴ O.G. Chase, *American „Exceptionalism” and Comparative Procedure*, 50 AM.J.COMPL., p. 277-278, cited in S. Dodson, *The Challenge of Comparative Civil Procedure* (2008), Faculty Publications, Paper 165, <http://scholarship.law.wm.edu/facpubs/165>, 26.10.2016.

principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled on his own system⁵.

Furthermore, while presenting the dynamism of civil procedure, its significant changes and fluctuations become more visible⁶. This is a desirable question – is the law at issue suitable for this type of analysis so that we could draw conclusions and apply new solutions to the national legal order?

The choice of systems that have been selected to compare is highly representative due to the differences between common law originated family and Romano – canonical one. It is widely acknowledged that the common law family is the consequence of expansion of British Empire. Incipiently, the divergence between common law and equity, which nowadays plays the most important role in the area of substantive law, was also relevant in the field of procedure. The traditional approach of the common law is to place remedies before rights in private law – *ubi remedium ibi ius*. This contrasts with civil law legal systems where codifications have logically put rights before remedies – *ubi ius ibi remedium*. In the 19th century, common law system in this area transformed considerably. It was 1848 when in the United States of America the Code of Procedure of the State of New York was brought out. There we could find some influences from the civil family law approach – hence the first step to abolish the distinction between common law and equity in the field of procedure was taken. If we are reflecting on this issue, we must not forget that the basic principles of jurisprudence of New York State were adopted from English Common Law. However, what makes the legal system of United States even more unique is this mixture – remains of the Spanish and French Civil Codes, American codification and already mentioned English Common Law⁷. What is distinctive concerning nowadays, even wholly within America, there is still a parallel administration of justice provided in a host of different models – both by states courts and federal ones. Therefore, not only do precedents make the American's system specific but also its federal structure and intricate history. One the one hand, there are states in number of almost half that have modeled their procedures in the vein of the Federal Rules of Civil Procedure. On the other hand, local customs maintain discrepancies. However, procedural system in U.S. have approached a kind of harmony between internal harmonization and autonomous individuality. Do those changes make America and its federalist model much more prone to participate in the discussion about comparative civil procedure?

Issues that have been outlined above will be expanded in following chapters. The particular emphasis is going to be placed on distinction between the U.S. and Poland

⁵ K. Zweigert, H. Kötz, *Introduction to Comparative Law*, Clarendon Press, Oxford 1993, p. 15.

⁶ *he Dynamism of Civil Procedure – Global Trends and Developments*, ed. C.B. Picker, G.I. Seidman, TSpinger International Publishing, Switzerland 2016, p. 46.

⁷ *Cases – Test – Materials. Comparative law*, ed. R.B. Schlesinger, H.W. Baade, P.E. Herzog, E.M. Wise, New York 1998, p. 175-176.

as the representatives of both legal systems. The questions to pose in comparative perspective are:

1. How the right to court appears in the context of the constitutional guarantees and how it differs from its procedural dimension?
2. What are the main rules of civil proceedings and how does it translate into a court reality?
3. What is the future of civil procedure – should we expect the common code?

Comparative analysis

1. The question about constitution – civil liberties dimension

Nowadays, as far as democratic countries are concerned, when we are thinking about a human in the court, the first idea that comes to our mind is the right. Right, which expresses fundamental value that person has been given the power to be protected – against infringement from another individual as well as from the state. Access to justice means something more than right to the court. While not easily defined, it alludes to the approach to legal tools including but not restricted to courts. The citizens' dispute resolution needs must be weighted against the justice system – only from this point of view we are able to talk not merely about the access to justice but about the effective access to justice.

It is widely acknowledged that there can be no legal right without a remedy. Though, it is still not enough. To be purposeful, the remedy must be accessible. Effectively, even though, the pragmatic concerns connected with efficient access to justice have appeared to be complicated. Rule of Law recognize and protect the rights which create the interest of the individuals. On the one hand, it is the state that would intervene whenever the right to access to justice is threatened. On the opposite side it is the citizen who has the legitimate expectation to believe in this custodial behavior. How the situation appears from the comparative perspective? Let us begin with Poland.

The legal and organizational status of court authorities, proceedings before courts and legal position of the judge are safeguarded by the constitutional principles of organization and functioning of the judiciary in Poland. The Constitution of Poland, that came into force on 2nd April 1997, set the right to trial in the article 45 section 1: „Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. 2. Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly”. Moreover, article 77 in section 2 of Constitution stipulates that „statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights”⁸.

Had the right to trial existed before the Constitution was established? At this point, the role of Polish Constitutional Tribunal is disclosing. Having started with supposition

⁸ The Constitution of Republic of Poland, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>, 1.11.2016.

that fundamental rights can be unwritten and adding the very significant idea incorporated in the article 2 of Constitution that Poland is ruled by law and, as a democratic state, implements the principles of social justice – Tribunal shouldered the duty to discover the right by interpretation the previous constitution from the period of Polish People’s Republic in current spirit – what is a common attitude for most constitutional courts in Europe (for instance, the decision dated 7 January 1992; signature mark K8/91). Poland exemplifies the dualism system of the judiciary authority – it is composed of courts and tribunals.

Under the binding Constitution of 1997, the Tribunal could interpret the right to trial in a very broad context. The following aspects were *inter alia* examined: 1. the contents of right to trial, 2. subjective and objective scope of the right, 3. the terms and scope of acceptable limitation, 4. the interdiction to deprive a citizen of possibility to claim his or her rights and freedoms through legal proceedings, 5. differentiation of „right to trial” and the second instance legal proceedings. The Tribunal recognized also the issue of independence and objectivity of judges. It shall be also added that the Tribunal most often interpreted a right to trial as the access to a court and appropriate procedure pending before such a court⁹.

Both constitutions, Polish and American, define its own primacy at the apex of sources of law. What is interesting, the annotated editions of the U.S. Constitution, based primarily on Supreme Court case law, set forth each clause followed by digests of judicial decisions that have interpreted the clause. There we can see, like in the lens of the eye, that the U.S. Supreme Court’s decisions demonstrate pivotal interpretations of the Constitution’s provisions. The role of judiciary significantly differs in these two legal systems. Hitherto only outlined, but later on we will try to take the discussion forward on this distinction.

In the U.S., differently than in Poland, there is no explicit provision of right to use the courts given for citizens. Characteristically, both article III of the Constitution and title 28 of the U.S. Code define the federal courts’ jurisdiction. Article III, section 2 states that

judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority — to all Cases affecting Ambassadors, other public Ministers and Consuls — to all Cases of admiralty and maritime Jurisdiction — to Controversies to which the United States shall be a Party — to Controversies between a State and Citizens of another State — between Citizens of different States — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects¹⁰.

Constitution embeds the outer extent for federal courts jurisdiction. Congress has been left to decide about the actual scope of subject matter jurisdiction. Courts are open to anyone from anywhere as long as the court would have jurisdiction over the claim and over the defendant. As long as these things are satisfied a person or entity may institute a lawsuit. This is the same for state courts governed by state constitutions and state laws and rules.

⁹ J. Oniszczyk, *The right to fair trial in the decision of the Polish Constitutional Tribunal*, Science and technique of democracy, No. 28, Council of Europe Publishing, Germany, 2000, p. 142.

¹⁰ The Constitution of the United States, <http://constitutionus.com/>, 1.11.2016.

2. The question about trial – procedural and juridical dimension

Civil trial was created to facilitate the investigation and resolution of disputes. This is its core function. As recent studies have observed, the day in American courtroom with a trial or final hearing has become more and more limited and exclusive episode¹¹. Thus, does the civil procedure in the U.S. fulfill its role effectively?

Before 1938, the procedural rules in the U.S. district courts varied from circuit to circuit. Generally, the judiciary itself issues court rules dealing with procedural matters under of a constitutional or statutory provision. However, for some concerns courts have their individual inherent prerogative. The U.S. Supreme Court has congressional authority to issue rules of civil procedure for courts of appeals and district courts. The American fusion movement culminated in the twentieth century with the Federal Rules of Civil Procedure (FRCP) located in appendices to the title 28 of the U.S. Code.

In American legal world, so influenced by attorneys, the first step to take, after the dispute has been occurred, is the question about the proper court. When it appears that preliminary efforts to settle his client's dispute are futile, the attorney has to consider whether more than one forum is available to resolve it. Not only is it the question of the proper court but also about the forum that present the best economic and technical benefits. After the judicial determination has been selected, our lawyer needs to decide between state court and federal one (each of the 50 States and the District of Columbia has its own court system). Subsequently, from among the various federal and district or state courts available, he has to choose a proper court, which will have subject matter jurisdiction and the power to obtain territorial jurisdiction over the defendant and will meet venue requirements¹². As venue relates to place where judicial authority may be exercised, it differs from jurisdiction in the default judgment consequences – it retains its enforcement when entered by a court lacking in venue and becomes void without territorial jurisdiction over a defendant.

Obviously, the attorney's role does not finish at this stage. In the jurisdiction of common law there is a need, unlikely to Continental system, to prepare the prospective witness for counsel's questions during the examination-in-chief and cross-examination. What is more, when the trial is about to be set, most courts will conduct a pre-trial conference with the attorneys. The purpose of this conference is to file a joint or separate pre-trial memorandum. This memorandum principally is composed of a short statement of the case to be read to the jury pool, a list of outstanding motions, lay witness and expert witness lists for each party, an exhibit list for each party, proposed jury instructions, and a proposed verdict form.

Since the judge customarily has little contact with pre-trial investigation, he has no opportunity to signal what information he thinks relevant to his decision. As a result, litigators must strain to investigate and analyze everything that could possibly

¹¹ R. Stürner, *The Role of Civil Procedure in Modern Societies*, *Ritsumeikan Law Review* 2015, p. 73, <http://www.ritsumeikai.ac.jp/acd/cg/law/lex/rlr33/007rolfsturner1.pdf>, 23.10.2016..

¹² D.S. Clark, T. Ansary, *Introduction to the Law of the United States*, Kluwer Law International, The Hague–London–New York 2002, p. 380.

arise at trial. They tend to leave no stone unturned, provided, of course, as is often the case, that they can change their fees by the stone. Because of their active role in the pre-trial phase, lawyers have a greater understanding of the case than does the judge when the controversy is presented at the trial¹³.

It can be said that the better the system investigates and clarifies the facts, the more it promotes settlement and reduces the need to adjudicate. Clarification promotes pacification. But before the transformation established by The Federal Rules appeared, it had been a pleading that occurred as the only significant component of pretrial procedure. At the primary phase of lawsuit, the litigants were expected to disclose their several positions so that the trial matter could be in advance identified. It was indissolubly connected with principle of concentration, which derived from the jury system. In favor of jury, composed of layman, it seemed to be impractical or even completely impossible to reconvene jurors for a number of short hearings held over an extend period of time¹⁴. The jurisdiction differentiates the number of jurors on a civil trial between five or twelve. In most jurisdictions, including federal courts, the jury's decision must be unanimous. However, some jurisdictions approve a decision made by less than unanimity, e.g. an agreement among nine of twelve jurors could be enough. What should be taken under consideration is the fact that the right to jury proceedings is a constitutional right that should be relevant in many cases. The reality is different. Juries decide less than one percent of the civil cases that are filed in court. This lack of jury trials may seem curious, as the Seventh Amendment guarantees the right to jury trial in certain civil cases.

Charles Clark, the principal architect of the Federal Rules, was convinced that the line between facts, evidence, and legal conclusions was impossible to draw coherently. Clark argued for years against for fact pleading requirement of the nineteenth century Field Code because it led to unproductive disputes about what was a fact, evidence, or legal conclusion. Consequently, the drafters of the Federal Rules refused to put the word „fact” in the pleading rules. Trial judges now explicitly have enormous discretionary power to dismiss complains, both through their power to excise what they find to be a conclusive allegation and the addition of a plausibility requirement. (...) it has become even easier than in the past for judges who disfavor such cases to dismiss them prior to discovery. The same is true for any lawsuit, such as tort and antitrust cases, in which the most important evidence is in the minds and files of defendants. Many cases that were entitled to a jury trial – or any trial for that matter – and that would be found meritorious after discovery, will now be dismissed to the pleading stage. So much for historic role of juries to decide factual issues and thus check judicial power¹⁵.

Where can we find the current provision concerning this matter? Title III, Pleadings and motions, Rule 8 of FRCP contains general rules of pleading. „A pleading that

¹³ H. Kötz, *Civil Justice Systems in Europe and the United States*, Duke Law School Journal, 2003 Vo. 13, No. 3, p. 74, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=471241, 30.10.2016.

¹⁴ J.H. Langbein, *The Disappearance of Civil Trial in the United States*, The Yale Law Journal, Public Law Working Paper No. 256, 2012, p. 529, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123386, 3.11.2016.

¹⁵ S.B. Burbank, S.N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, Harvard Civil Rights-Civil Liberties Law Review 2011, Vol. 46, p. 405.

states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief"¹⁶. Meanwhile, the Rule 7 sets forth what types of pleadings are allowed – a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a cross-claim, a third-party complaint, an answer to a third-party complaint, and if the court orders one, a reply to an answer. Under these rules, pleading is purely orientated to perform the other party adequate notice of the claim or defense. However, the new civil proceedings system veered towards the discovery techniques (*inter alia* sworn depositions, interrogatories, documentary discovery). Judge Simon H. Rifkind said that „[a] foreigner watching discovery proceedings in civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment"¹⁷. As a result of this new edition of discovery idea, common law, afflicted by the information deficit, became able to settle or dismiss almost all cases without trial.

What also discourages plaintiffs to seek the legal remedy in court trial is money. Discovery is a proper example here again. Discovery is costly. Costly to that extent that the perspective of having to bear those costs is able to deter the potential litigant from moving forward with his claim. Discovery also imposes costs on the other side. Moreover, American civil procedure is unique among the major Western European legal systems due to the lack of loser-pays regime for the allocation of litigation pretrial costs as well as trial ones. ‘

The broad scope of permitted discovery, together with the failure of the Federal Rules to institute a „loser pays” cost-shifting regime, invites cost-inflicting abuse. The fear of discovery abuse is what motivates the Supreme Court's recent effort to tighten pleading standards in *Bell Atlantic Corp. v. Twombly*, in which the Court spoke of the danger that *the threat of discovery expense will push cost-conscious defendants to settle even anemic cases*. Although cases of abuse are thought to be infrequent, when they occur, they transform discovery from a truth-serving to a truth-impairing device¹⁸.

Further, or perchance at the very beginning, the issue that have to appear is a court fee. The fee to pay differs from district courts, courts of appeal and federal ones. For instance, according to the U.S. Court of Federal Claims Fee Schedule, the party to file a civil action or proceeding needs to pay \$350. As claimed by District Court of Southern Florida, filing fee for opening civil action (includes \$50.00 Administrative Fee for Filing a Civil Action, Suit or Proceeding in a District Court) amounts to \$400. Those sums are beyond the orbit of man of the street with no noticeable difference between Polish and American.

¹⁶ Federal Rules of Civil Procedure, <https://www.federalrulesofcivilprocedure.org/frcp/title-iii-pleadings-and-motions/rule-8-general-rules-of-pleading/>, 5.11.2016.

¹⁷ S.H. Rifkind, *Are We Asking Too Much Of Our Courts?*, ABA Journal 1976, p. 96, 107, cited in H. Kötz, *op.cit.*, p. 74.

¹⁸ J.H. Langbein, *op.cit.*, p. 552-553.

Literally before our eyes the trial in the U.S. is disappearing. Since the 1930s, the proportion of civil cases concluded at trial has declined from about 20% to below 2% in the federal courts and below 1% in state courts¹⁹. Its disappearance arises from the lack of need to go to court and formal requirements which have been made higher and higher. The specific role plays also the fact. Common law trial was never seen as an excellent instrument of resolving fact disputes. The defeat to form suitable means of investigating the fact was a deep-seated problem that came from the Middle Ages. The discovery transformation of the Federal Rules, by vanquishing that investigation shortage, initiate modifications that have made trial obsolete.

In Poland, as in an unitary state, reigns procedural homogeneity. Polish civil procedure is regulated in a single statute – the Code of Civil Procedure of 1964 (CPC), which spanned whole of judicial civil proceedings, and what was seen at the time as meaningful legislative achievement. Over 1200 articles of this voluminous title, amended many times, regulate *inter alia* contentious and non-contentious procedures, the enforcement proceedings and also the domestic rules regarding arbitration. The Polish civil procedure was divided into fact-finding legal proceedings, interlocutory proceedings and enforcement one.

To hear the case a statement of claim must be filed with a proper court. The proper court is that one with territorial and subject-matter jurisdiction. The general rule derives from Ancient Rome and functions to this very day in sentence *actor sequitur forum rei*. This means that the actions should begin in the court for the area of defendant's activities center (depending on case matter – his residence or registered office). However, provisions of CPC give some exceptions to this rule. In certain cases the Code provides exclusive jurisdiction of a particular court. That is happening for alternative jurisdiction cases where CPC performs the right to choose the most convenient forum to initiate the claim. Article 34 of the Code provides an example – in case of contractual agreement and its performance, invalidation, termination or liability for inadequate execution of contract, an action may be brought in the place where the obligation was to be performed (as an alternative for the place where the debtor resides).

The procedure is predicated on written pleadings. The main pleading is a statement of lawsuit and should contain all the causes of action that are presented to be justified as well as motions linked to pieces of evidence. The oral part that takes place in front of the judge is a standard feature of the proceedings, under which the parties are able to present their position to the judge, review evidence contained in the files of the matter and examine witness and experts. Depositions are not recognized by Polish civil procedure. It is the court's session where all witnesses and experts can be testified in front of the judge. As professor Hein Kötz has noticed

the examination of witnesses in the Continental style may not be free from certain risks. One might say, for example, that the technique of inviting the witness to tell this story in narrative form and without undue interruption provides an incentive, in the interest of presenting a conclusive, logically coherent, and convincing story, to fill in gaps by half-truths or fiction. There is also a danger that the judge, in acting as chief-examiner

¹⁹ *Ibidem*, p. 522.

of the witnesses, may sooner or later appear to favor one side over the other. By putting questions to the witness, in the words of Lord Denning, he *drops the mantle of the judge, and assumes the robe of an advocate*. In general, however, a competent judge in questioning witnesses knows how to play his cards close to his chest. If he pursued one line of questioning with undue vigor or in some other way revealed his evaluation of the testimony this would at any rate have no influence on a jury as the sole trier of facts because there are no civil juries on the Continent, and not even in the United Kingdom²⁰.

What is important, the parties are able to nominate witnesses in support of specific factual allegations so that no party could be allowed to call as many witnesses as he wishes. The court make an evidential order recognizing the witnesses to be heard. Supposing they had been nominated for a factual assertion, which the judge legally believed that is immaterial with regard to the party's claim or allegation, he would not permit the witness to be called. The same applies to situation when the judge thinks that a witness has been nominated in support of a factual allegation, which is beyond dispute between the parties.

Nevertheless, there is limitation in time for parties to substantiate their position in civil dispute. Generally, the plaintiff is obliged to present all the accessible evidence in the initial statement of claim. Additional evidence are allowed to be handed over at further phase of the proceedings only provided that the party is either able to justify that the need to refer those pieces of evidence appeared subsequently or the evidence itself was not available earlier. The same applies to the defendant's response (article 207 par. 6 of CPC). Nevertheless, there are situations when civil proceeding is impermissible and leads to non-suit or nullity of proceeding (article 199 and 379 of the Code of Civil Procedure – that should be considered cumulatively). As an example, a claim shall be rejected if the legal course is unacceptable (e.g. it is an administrative court that has authority to issue a decision – civil court has no jurisdiction over the matter). Moreover – when there is a pending action between the same parties or legal action has been already validly adjudicated (*res iudicata*).

The plaintiff when consider to file an initial statement of claim, must also take into account the court fee. Proportional court fee, which is applied in case of pecuniary claim, equals 5% of the claim amount, albeit no less than 30 zloty and no more than 100 000 zloty. In numerous, listed and specific issues covering mostly non-pecuniary claims, the fees are fixed and generally range between 50 and 2000 zloty. It should be highlighted that not in every single case it will be the truth that the courts fees are recoverable from the defendant if the plaintiff wins the legal dispute. It could happen, despite the fact that the opposite side acknowledges a claim, it will be a plaintiff who bears the duty to pay the court fee. This situation is regulated in article 101 of CPC. As a petitioner you need to firstly call on the opposite party to voluntary satisfy the request before you go to court. Ultimately the costs of litigation are determined by the court in a judgment closing the proceedings in a particular instance. Generally, the party that loses the case shall pay the other party for the costs. The costs may include those

²⁰ H. Kötz, *op.cit.*, p. 65.

incurred and those which were necessary in purposeful pursuit of the rights and defense. However, the party might petition for exemption from the obligation to bear the legal costs in full or in part if it demonstrates his inability to bear the legal costs. The court can appoint a professional attorney *ex officio* if the party applies for this and successfully proves that: 1) he does not have sufficient funds to pay the costs of advocate or legal adviser fees; or 2) participation of an advocate or a legal adviser in the proceedings is necessary, e.g. because of the complexity of the matter.

While remaining in Polish procedure (and generally – into its European context), let us look at the trial from the outside perspective. What is characteristic, we are unfamiliar with the idea of a „trial” as a single affair that lasts with regard to temporal order. Alternatively, Polish proceedings in a civil action might be illustrate as a sequence of isolated forums before the judge (some of which may span only a few minutes). During these conferences relevant documents are exchanged and discussed, procedural rulings are made and both evidence and testimony are introduced and taken – up to the time of adjudication.

As can be seen above, it is the judge who mainly bears the responsibility during the proceeding. Does it influence on the efficiency of judiciary? Surprisingly enough, the report of the European Commission for the Efficiency of Justice, Edition 2016, states in figure 5.4. contained number of 1st instance incoming and resolved, that the courts of first instance received on average 2,7 (for Poland: just over 3) civil litigious cases per 100 inhabitants and managed to resolve the same amount of cases during the year²¹.

When we keep our ears open, we can hear the Polish legal community’s voices. Voices that are more and more tired and overwhelmed. According to the newspaper article from April 2016 posted in „Rzeczpospolita”²² – in civil court, first instance judge has to operate with 2600 cases and during 1 year he is able to adjudicate cir. 2200. The rest of them awaits for next year. Another article from October²³ that treats about recent novelization of the Code of Civil Procedure has pointed out some of substantial problems that are affecting Polish civil procedure. Some remarkable points should be unearthed. Firstly, our perception of civil proceeding needs to be changed. In Polish reality it is the judge who carries the whole burden related to the evidential hearing. On the other hand, in Anglo-American reality it is the clerk. Judge only reviews witnesses’ protocols and if he finds that any of their testimony could be vital for the case, only then he will call the witness to the courtroom. What is more, Polish court has to have the minimum volume of cases in docket for one session, resulting in the trial’s depiction

²¹ European judicial systems Efficiency and quality of justice, CEPEJ STUDIES No. 23, <https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>, 28.10.2016.

²² P. Wierzbicki, *Przemysław Wierzbicki o nowelizacjach procedury cywilnej* [P. W. about the amendments of civil procedure]. Published online on “Rzeczpospolita” 1.10.2016, <http://www.rp.pl/Rzecz-o-prawie/310019992-Przemyslaw-Wierzbicki-o-nowelizacjach-procedury-cywilnej.html#ap-1>, 28.10.2016.

²³ A. Łukaszewicz, *Reforma sądownictwa: ponad dwa tysiące spraw na jednego sędziego w rejonie* [Judicial reform: over 2000 cases for one judge at district court’s level]. Published online on “Rzeczpospolita” 20.04.2016, <http://www.rp.pl/Sedziowie-i-sady/304209881-Reforma-sadownictwa-ponad-dwa-tysiace-spraw-na-jednego-sedziego-w-rejonie.html#ap-1>, 28.10.2016.

mentioned before – instead of processing one case for one week, day by day, judge gets back to the case after three months. And he needs to bethink its previous details.

3. The question about future – harmonization dimension

Our forensic walk is drawing to a close. Let us slacken our pace. We are about to take a step into future. The future of harmonization in civil procedure's field.

In determining the next steps we take, we need to start from something common. From common principles in civil procedure. Perhaps it will appear that these fundamental rules perform like a bound which ought to transcend the very distinction between the two disparate legal systems. The second possible result to occur is summarized in the sentence: „Notably, the law at issue, civil procedure, has been universally considered the most difficult candidate for worldwide harmonization”²⁴. How the situation presents itself with regards to formalities and provisions? Let us take a look into the Principles (and Rules) of Transnational Civil Procedure.

This international-scale interesting document is being prepared and sponsored by American Law Institute and UNIDROIT (intergovernmental organization on harmonization of private international law; composed of 59 members, includes all European Union members).

The legal field that is to be operated by this framework are international commercial disputes. But not only. The drafters of these Principles in Introduction state that also most of other kinds of civil disputes may be resolved by same-structured resolutions and can be treated as the basis for future initiatives in reforming civil procedure. Its implementation could be done by a statute, set of rules or international treaty. The drafters obviously are aware of significant differences between legal orders and do not impose on members-to-be any determined legal measure. The linguistic issue has also been taken into consideration. „The adoptive document may include a more specific definition of «commercial and «transnational». That task will necessarily involve careful reflection on local legal tradition and connotation of legal language”²⁵. These Principles, in the number of 31, are thought to be the summary of the best values for Anglo – American law and Romano – canonical law. Apart from that, annotated provisions are worthy of notice as an excellent source of knowledge about the common core that is functioning in legal systems. Common core that can lead us to common procedure.

The Principles could not fail to essentialize the right to be heard and due notice. It is set forth in Rule 5. The commentary points out that specific procedure for communicating notice varies somewhat among legal systems. As an example, it states that in some systems it is a court that bears the responsibility and provides the party with notice and copies of the pleading; in other systems that responsibility is imposed on the parties. Coming back to very beginning of Principles we can discover preliminary and essential

²⁴ M. Reimann, R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford University Press, New York 2006, p. 1345.

²⁵ Principles of Transnational Civil Procedure, ALI/UNIDROIT, 2006, P-B, <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>. 5.11.2016.

rule: Independence, Impartiality, and Qualifications of the Court and Its Judges. Nothing which is stated there is a stupefaction. The following rule treats of jurisdiction over parties. As the transnational character of relations between parties is concerned, the interesting and much more complicated filed is presented there. A court may exercise jurisdiction upon the parties' consent. What is also vital is a fair opportunity given the parties to challenge jurisdiction. The crucial term here is a „substantial connection” between the forum state and the party or the transaction or occurrence in dispute. „That standard excludes mere physical presence, which within the United States is colloquially called «tag jurisdiction». Mere physical presence as a basis of jurisdiction within American federation has historical justification that is inapposite in modern international disputes. The concept of «substantial connection» may be specified and elaborated in international conventions and in national laws”²⁶.

Above and beyond, we are drawing among the values as procedural equality, right to engage a lawyer, access to information and evidence, public proceedings. Finally, the last rule states the duty of international judicial cooperation. The factual cooperation is able to happen only when the assistance to the courts of other state, provided by the courts of a state that has already adopted the Principles, is occurred. This is an essential condition, though doubtlessly, not sufficient. Nonetheless, when we move beyond the rules and rights' issue and focus on pure procedural layer, before our eyes will appear the gap. The reason why it appears is that the Principles are limited in their scope. Moreover, the built-in exceptions and omissions are showing rather divergence than similarity. Hence all this calls into question whether the Principles truly offer an adoptable body of law, prove inspirational for future legislative processes, or simply represent a kind of restatement of the law of civil procedure²⁷.

The ALI\UNIDROIT Project is not the only one example of attempt to harmonize the civil procedure. Another illustration is presented in more narrow context – the European Union conditions. Article 65 of the Treaty Establishing the European Community gives a legal ground, however not precise enough, for the harmonization of civil procedural law. What is rising by some authors is a prospective function of this article – it may become relevant not only in cases which are currently qualified as purely national, but especially with regards to measures that eliminate obstacles in order to proper functioning of civil procedure²⁸.

Apart from the propositions and projects mentioned above, one thing seems to be certain. To some extent, the gap between common law and civil law countries is more and more narrowing. This natural movement of legal systems is due to their interaction caused by progressive globalization process. As an example, the very distinction between inquisitorial approach, which is widely known as a synonym of civil law countries, and adversarial system – concerned with common law system – is disappearing. In both systems it is not a judge who gathers the facts of a case. Definitely, continental judge (the Polish judge is an excellent example) has fairly strong control over the procedure.

²⁶ *Ibidem*, P-2B.

²⁷ M. Reimann, R. Zimmermann, *op.cit.*, p. 1347.

²⁸ J.M. Smits, *Elgar Encyclopedia of Comparative Law*, Edward Elgar, UK, 2006, p. 129.

Nevertheless, it is the parties and their lawyers who investigate and consider the facts, select them and indicate means of proof. In both systems it is the lawyers who keep track of the parties' position from first pleading to final arguments. In both systems the parties' factual contentions are the line which cannot be crossed by the court²⁹. It follows that in their own ways, both Polish and American legal structures are adversary systems of civil procedure. To what extent these systems are flexible? Perhaps the better to ask – is this flexibility really needed?

Conclusions

Right to court is grown into the various visions of „nation”. What follows, principles of civil procedure are immanently bound up with fundamental right to court and, to broaden the perspective, with requirements of Justice. Not only is it the right to be heard, but primarily – to be heard in public, to show the piece of evidence, to speak on your issue, to defend yourself. This is the core of fair trial. We have already analyzed two differently originated proceedings to show how the principles covered by constitutional level are proceeding when we are climbing down, through procedure and courts towards our aim – the people.

Access to justice is something that was given to us complete with present-perception democracy. Notwithstanding this fact, both the law as a system and particular rights are alive. They are associated with fluctuations and succumb the interpretation with the times. These changes are expressed by transformations in civil procedure provisions. No matter if they are introduced by legislature or judiciary body. What matters is the fact that when we look at currently determined aspect of civil procedures, and having in mind their history, we are able not only to judge the nowadays' course but also we can have a look into future.

At the very end of our legal comparative reflection, we meet again the human being. European Convention on Human Rights has been founded upon the humanity and dignity – indivisible ideas which form the buckle of our journey. Convention, modeled on the United Nations Declaration, constitutes the European bastion of Rule of Law and humanity. Right to court, pushed in this essay to the very forefront, derives from human dignity. Among the constitutions we can strike various articulations; among the codes – different proceedings resolutions that come from altered nations' conceptions and diverse traditions. But as long as in the center exists the human being, and as far as it is possible in the current context, wisely tailored civil procedure is constantly the synonym of the liberty. In one of his sentence, Felix Frankfurter, a prominent figure in the Supreme Court's bar said: „The history of liberty has largely been the history of the observance of procedural safeguards”³⁰. Such a laconic sentence is this, though as the substantive evaluation of procedures meaning is still real not only with regards to the U.S. of America. It has common value. Looking back throughout Polish procedure's story we can see how true

²⁹ H. Kötz, *op.cit.*, p. 67.

³⁰ M. Kammen, *Spheres of Liberty. Changing Perceptions of Liberty in American Culture*, University Press of Mississippi, Manufactured in the United States of America, 2001, p. 11.

implication these words possess. Having regain the independence in 1918, in the territory of Poland, there were applied three different civil procedures – Russian statute from 1864, German code from 1877 and Austrian code from the end of XIX century. In the same time United States of America celebrated 142 anniversary of the *Declaration of Independence*. Procedural rules in the U.S. differed from circuit to circuit. The rules in western states were generally less complex than those in the East. Congress was about to create coherent rules and did so in 1934. Both of Poles and Americans were born of conglomerates. Nonetheless, access to the court in the U.S. has been growing since the beginnings of American democracy and first worldwide constitution.

Yet let us not run away from history. Nor from the inherent differences which are certainly the core of sovereignty. Land of homogeneity versus earth of vast contrasts; principles codified into a referable system serving the primary source of law versus case law developed by judges; legal syllogism versus experience and precedent; grammar of law versus case method of instruction. Nowadays, access to court across the pragmatic United States of America has taken the form which people in Poland are unfamiliar with. These days the U.S. is deviating from its founding values towards – towards unspecified goal. Is it the procedure without undue delays, runs by judge–manager, who rarely meets seekers because of emphasis on pre–trial proceedings? In Polish reality, where democracy is so unfledged and young, we put up on a pedestal our right to court. And we are using it. Perhaps sometimes in too litigious manner. Undoubtedly, one of the reason is that we are the involuntary successors of communism period which last over 40 years. Those years taught us how does the lack of this primary right taste. Now we are clinging to the access to court and court's daily docket is clung to the judge. My objective is not to say that one of described approaches is better or worse. I do not know it. But let us stop now and take a look around. Are we standing in the point of our liberty in which we are able to say – yes, we are open to harmonization? To shake off some of our inherent importance? Are we enough free to unite? Isaiah Berlin in *Two concepts of liberty* brought in two different natures of liberty – do we manage to make use of our positive liberty so as to face the tasks that are being posed before us by projects such as UNIDROIT? These types of venture have made it abundantly clear in terms of what brings us together. These are rules and values – shared in democratic tradition. In my opinion, if we opt for building something real common, then standard values are not enough – this is today's primer. „All this is not to say that transplants are impossible... But any such transplant must be limited in scope and sensitive to context”³¹. When we talk about common structure, we have to go into concrete things. The more we coming down, the more it becomes visible – from the constitution level, through codes into the courtrooms – the differences are too sizable or even unbridgeable. Certainly, more and more questions can be posed – to narrow our perspective down. Yet there is still one unanswered question – question about the process technique, acceptable by all parties concerned.

³¹ S. Dodson, *The Challenge of Comparative Civil Procedure*, 2008, p. 143.

Comparative law shows that the law, rather than being written in stone, is a construct driven by diverse social structures and fluid cultural norms. Furthermore, it emphasizes that things can be done differently in other countries, as well as in our own. This speaks to one of the most important aims of comparative law: to help us gain a better understanding of our own legal system and, ultimately, ourselves. However, regarding the very specific civil procedure connotation and influences, it shows through various comparative perspectives that civil proceedings close future is rather stable itself. Since „all that concerns the technique of legal practice is likely to resist change” – Otto Kahn-Freund concluded that – „comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organization and procedure may lead to frustration and may thus be a misuse of the comparative method. (...) Procedural law is tough law, said”³². Too tough to be clipped together by our two different lines of legal systems.

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Analiza komparatystyczna: Natura oraz dynamizm procedury cywilnej - prawa, zasady, sędziowie - porównanie systemów common law i kontynentalnego

Przedmiotem artykułu jest analiza porównawcza procedury cywilnej w kontekście różnic procesowych pomiędzy krajami o tradycji *common law* oraz tymi z rodziny prawa kontynentalnego. Porównanie następuje na trzech płaszczyznach – pierwsza sfera dotyczy obywatela i jego praw w sądzie. Następnie, po porównaniu systemu sądownictwa, pod rozważę zostanie wzięta kwestia przyszłości procedury cywilnej. Moim celem jest zatem zbudowanie piętrowej kompozycji, która swój początek bierze na poziomie jednostki, rozszerza tematykę o obszar systemowy, by na końcu osiągnąć swój wierzchołek – perspektywę globalną.

Artykuł we wstępnej fazie koncentruje się na prawie do sądu i do sprawiedliwej, zgodnej z prawem i jego zasadami, procedury – jako najwyższymi gwarancjami tak w Stanach Zjednoczonych Ameryki, jak i w Polsce. Wspomniane prawo zostało poddane analizie pod kątem proceduralnych ograniczeń – m.in. wymogów pism procesowych, czyli materii, która, jeśli dochodzi do fazy rozprawy, łączy w jednej sali sądowej wszystkich aktorów sprawy – w szczególności powoda, pozwanego oraz osobę sędziego. Następnie w centrum analizy umieszczony został sędzia – jaką rolę odgrywa w każdym z systemów? Na zakończenie zastanowimy się nad ideą harmonizacji procedury cywilnej oraz konsekwencjami, które wypływają z tej koncepcji.

Słowa kluczowe: postępowanie cywilne, analiza komparatystyczna, prawo amerykańskie, prawo polskie

³² O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) cited in H. Kötz, *CivilJustice Systems in Europe and the United States*, p. 7.