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External Openness of Court Hearing and Trial in Polish Criminal Proceedings

Abstract

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The subject of this dissertation is the external openness of court hearing and trial in Polish criminal proceedings. Being one of the guiding procedural principles, openness has been analysed by the doctrine and the jurisprudence of national as well as international courts. Still, no unified position on this concept has been reached to date. This is because it is understood as either a principle of openness or a principle of publicity. Also in the definition of openness itself, a distinction has been made between external openness – referring to the public and representatives of the mass media – and internal openness – referring to the litigants and other participants. As the nature of external openness has not been sufficiently defined, this dissertation aims to clarify the concept of external openness in criminal proceedings, how it operates both at a trial and at a hearing, and whether the existing legislative solutions are complete. The research relied on historical, dogmatic-legal, empirical, and comparative-legal methods.

The starting point for considering openness as a universal value of criminal proceedings is to present its evolution throughout the history of mankind, covering the period from ancient times to the enactment of the Constitution of the Republic of Poland in 1997. During the origins of the judiciary in Athenian democracy and ancient Rome, a principle was established that proceedings were conducted openly. The procedure was similar in medieval times until the introduction of inquisitorial proceedings, which became secret proceedings, inaccessible to the public. And such a state of affairs lasted actually until the Enlightenment, when openness in the proceedings came to be treated as a principle. The author discusses the evolution of the openness of criminal proceedings that has taken place in Poland. Poland was one of the few countries in Europe where, even during the Inquisition, the proceedings remained open. The interwar period and the reign of communism in Poland permanently introduced openness of criminal proceedings into the legal order, giving it constitutional status.

Further in the dissertation, the concept of openness as a procedural principle is analysed. Since Article 45(1) of the Constitution of the Republic of Poland prescribes that everyone has the right to a public hearing of one's case by a competent, impartial, and independent court, the concept of 'case' should be clarified in the first place. This is relevant to the interpretation of openness in the constitutional sense because the constitutional legislature linked openness to the examination of a case, in other words, it determined that it is only when there is the consideration of a case (in the constitutional sense) that the principle of openness is accomplished. Given the lack of a legal definition of a 'case,' the author has to refer to the jurisprudence of the Constitutional Tribunal, which has not only

developed a position on this issue but also set out the parameters to be applied in order to determine whether we are dealing with a case within the meaning of Article 45(1) of the Polish Constitution. The Supreme Court stated in a similar vein in a resolution of seven judges of 28 March 2012. The same scheme is used to decode the concept of 'openness.' Having clarified the meanings of the two concepts – case and openness, the author could proceed to analyse the compatibility of those solutions with sources of international law. The views of representatives of the doctrine are also discussed. The focus is on the presentation of various definitions, including those that negate external openness as a procedural principle. These considerations are contrasted with the concept of openness operating at the level of international law as well as in the Polish Constitution. As a result, it is possible to distinguish three different standpoints on openness: the first approaching openness in a broad sense, i.e. comprising external and internal openness; the second, where both types of openness should be treated as separate procedural principles; and the third, where openness is equated with publicity. Relying on these findings, it is possible to identify the addressees of the principle of (external) openness. These are persons who are not legally involved in the proceedings as well as participants and other persons involved in the proceedings. Thus, publicity performs an educational and monitoring function and, in the case of the mass media, also an information function. On the other hand, participants in the proceedings have the opportunity to present their arguments and have them assessed by the public.

Open examination of a case may interfere with the rights and freedoms protected under the Constitution. Therefore, the author analyses the protection of personal data and the right to privacy, where there may be a collision of interests. What is more, new areas of risk – limiting openness – have emerged as a result of the COVID-19 pandemic. They revealed an alarming trend related to the exploitation of this extraordinary situation, which consisted in limiting or even excluding the openness of a trial and a hearing, despite the absence of a legal basis. To prove this thesis, the author discusses a number of decisions taken by court presidents that imposed restrictions on movement in court buildings. As a consequence, both the public and the media were deprived of the opportunity to attend trials in which openness was not excluded. Another result of the pandemic was the introduction into the legal order of the possibility of conducting a remote trial using technical devices that allow remote participation with simultaneous direct video and audio transmission. This had certain effects on the openness of a trial or hearing since the provisions concerning openness are not adapted to such a formula of a trial, given that it takes place in several locations at the same time.

Another element of this dissertation is the identification of the entities authorised to participate in an open trial and hearing. The first group includes those participating in the proceedings and the public. The second group includes representatives of the mass media. The legislature sets out specific rules that either allow or prohibit them from taking part in a trial or hearing, to name a few, age, possessing weapons, and being in a condition disrespectful to the court's authority. The introduction of such restrictions does not violate the principle of openness, as this serves to ensure solemnity and order in the courtroom. In the case of the mass media, due to their special role in society, a separate regulation is provided to prescribe the rules for their participation in a trial and a hearing. The author discusses the rules of procedure in this regard and the limitations that may arise in connection with the recording of the proceedings. The instruments available to the court in the event of participants, the public, and representatives of the mass media disturbing a hearing are also presented. The author uses this opportunity to refer to the possibility of recording a trial and a hearing in real time, pointing out the problems such transmission entails. Apart from that, there are other forms of recording, made either ex officio or by authorised entities. Ex officio recording of a criminal trial is not yet common, while it is prevalent in misdemeanour cases, where the rules of recording, also with respect to sentencing and substantiation, are set out in detail. The reference to the solutions prescribed by the Code of Misdemeanour Procedure is intended to show the direction in which this form of trial recording has been developing and whether and to what extent it will be used in the Criminal Procedure Code.

The principle of external openness is then discussed in the context of the forum for hearing a case. The legislature has decided that, depending on the type of forum, its openness takes different forms. The trial, for instance, as the main forum for hearing a criminal case, is, in principle, open. This is regulated differently with regard to hearings. It has been accepted as a rule that hearings are held in camera. What is common for them, however, are the rules on the exclusion of openness. In this respect, three modes may be distinguished. The first is the exclusion of openness *ex lege;* the second is optional exclusion; and the third provides for exclusion for the time a particular piece of evidence is being examined. The premises providing the legal basis for the exclusion of openness as well as the relevant procedure are analysed, taking into account the role of the public prosecutor, who is authorised to object to the exclusion of openness. As a result of such objection, a trial has to be conducted in open court, even if the premises for exclusion are met. The different rules on the openness of hearings derive from the catalogue of ex officio open hearings and from the authority of the president of the court or the court to decide any case to be heard in an

open hearing. The doubts in this regard relate to cases heard by the court as part of procedures within the preparatory proceedings, where secrecy is the predominant form. Similar problems apply to court registrars, whose adjudicatory powers do not include the ability to rule on the openness of a hearing. The provisions regulating openness in the Code of Criminal Proceedings are checked for compliance with the Polish Constitution. In terms of meaning, the reasons for the exclusion of openness set out in Article 45(2) of the Constitution of the Republic of Poland coincide with the premises prescribed in Article 360 of the Code of Criminal Proceedings. The same conclusions may be drawn from their confrontation with the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The question of the exclusion of openness in the case of an accused under 18 years of age and a witness under 15 years of age, which under the current state of the law are optional and not obligatory, is considered on this occasion.

The exclusion of the open hearing of a case has specific consequences for sentencing. It is a principle of constitutional status that a judgment must be publicly announced and no exceptions to this are provided. This principle is reproduced also in the Code of Criminal Proceedings. Nevertheless, certain situations are prescribed where the constitutional standard is not fully met. This applies, in particular, to judgements that are made at hearings. The legislature proposes methods for announcing the judgment depending on whether a hearing was held in camera or in public and on the appearance of the parties. If it is held in camera and in the absence of the parties, the judgment is not announced but made available to the public in such a way that its copy is filed for 7 days with the registry of the court. Where the hearing is held openly and no one has appeared, the court may consider the rendered judgement as announced. Both solutions are criticised primarily on the grounds of inconsistency with the requirement to make a judgment public. In this respect, it must be emphasised that, despite the constitutional concerns raised, the strong arguments in favour of adopting the solution of considering a judgment to be announced when no one appears cannot be ignored.

The final element of the dissertation is the empirical research conducted at the District Court Lublin-Zachód in Lublin. This concerned cases related to the application of a preventive measure in the form of pre-trial detention at the stage of preparatory and court proceedings. The minutes of hearings and trials contained in relevant files were examined. The aim was to check whether the legislature's objective of regulating the openness of hearings was achieved and whether and to what extent the courts were applying these provisions. The results of this research leave no doubt that the introduction of the regulation

concerning the principles of openness of court hearings did not cause increase in the accessibility of hearings from the point of view of external openness. This was also due to the inconsistency between the provisions of the Code of Criminal Proceedings and the provisions regulating the organisation of hearings (Regulation of the Minister of Justice of 18 June 2019 – Rules of procedure of common courts). The latter provisions make the decor of the court room dependent on whether the meeting is held in public or in camera. This means that if a decision is taken to hear a case in public at the hearing, the room will have to be fitted with a judge's table and the national emblem will have to be hung on the wall. As a consequence, regulating the principles of openness of hearings has not resulted in increase in the accessibility of hearings from the point of view of external openness. The performed analysis and research lead to the conclusion that the principle of external openness is of rudimentary importance for exercising the right to a fair trial. By participating in the proceedings, the public monitors the activities of the court. The mass media exercise the right to information on the activities of the judiciary. The parties to the proceedings can make their case in public, which promotes the exercise of the right of defence. Openness also applies to the court, whose activities should be transparent and understandable to citizens.