PROHIBITION OF EXCESSIVE FORMALISM AND JUDICIAL PRACTICE: COMMENTS BASED ON CIVIL CASE LAW OF POLISH COURTS IN THE CONTEXT OF ARTICLE 6 ECHR

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1. INTRODUCTION

This paper aims to draw attention to the fact that the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) is implemented through the correct application of the principle of formalism and the court's duty of loyalty and integrity, based on the rules of fair play.

However, this issue is not given proper consideration in the Polish judicial practice. The matter at hand remains problematic in Poland, as evidenced by the recent European Court of Human Rights (ECtHR) judgments in cases brought against Poland: *Parol v. Poland* (11 October 2018) and *Adamkowski v. Poland* (28 March 2019).[1] In both cases, the Court found a violation of Article 6 para. 1 ECHR resulting from a disproportionate restriction of access to a court.[2] The *Parol* and *Adamkowski* judgments are examples of an incorrect judicial practice concerning the application of the provisions laying down formal requirements. Admittedly, the excessively

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1 The ECtHR judgments: of 28 March 2019 in *Adamkowski v. Poland*, application no. 57814/12; and of 11 October 2018 in *Parol v. Poland*, application no. 65379/13, https://www.echr.coe.int.

2 In *Borkowski v. Poland* (application no. 67743/17), the applicant complained of violations of Article 6 ECHR on the facts similar to those of *Parol*. The Government offered to pay to the applicant EUR 3,000 under the heading of just satisfaction, the Court accepted the Government's proposal on 5 December 2019 and struck *Borkowski* off its list of cases; https://www.echr.coe.int.

formalistic approach of Polish courts is not a unique phenomenon, which is reflected, for example, in other cases recently brought before the ECtHR.[3] This issue becomes particularly important in a situation where a defective court practice leads to the deprivation of the right to a court in first or second instance exercisable by a party to the proceedings, which was the case in *Parol* and *Adamkowski*. As a consequence of the above, the standard applying to courts' obligations to communicate the form of procedural steps is crucial. However, even if such obligations are properly performed, the mere fact of passing this information to a party may not be the sole reason for making the party account for a failure to keep the required form if this would result in the party being deprived of his right to a court.

2. THE RIGHT TO A FAIR TRIAL (ARTICLE 6 ECHR)

The right to a fair trial is exercisable by every human being as a meta clause, the principle of principles and the guarantee of justice. Under Article 6 para. 1 ECHR, 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. Individual elements of this right, such as access to court, the definition and characteristics of the court, the guarantees of a fair hearing and the guarantee that the case should be heard without undue delay have already been discussed extensively in the case law and scholarship.[4]

The guarantees of access to a court should now be seen in correlation with Article 6 para. 1 ECHR, which gives everyone the right to present any claim concerning 'civil rights and obligations' or any criminal charge to the court. It implies the 'right to a court', an aspect of which is the possibility of access to a court.[5] In the light of the case law of the Strasbourg bodies, the concept of the right to a fair trial stemming from Article 6 ECHR also includes the right to a court, despite the said right not being explicitly expressed in this provision. It would be incomprehensible, as underlined by the ECtHR in its judgment of 21 February 1975, if Article 6 para. 1 ECHR described the procedural guarantees granted to the parties to a dispute and did not protect what makes these guarantees available in the first place, namely access to a court.[6] The principle stating that it must be possible to

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[3] For a similar case, see the ECtHR judgment of 16 February 2017, *Karakutsya v. Ukraine*, application no. 18986/06, § 53–§ 54, https://www.echr.coe.int.

[4] C.A. Miller, *The Forest of Due Process of Law. The American Constitutional Tradition*, [in:] *Due Process*, J.R. Pennock, J.W. Chapman (eds), New York 1977, pp. 8–12; D. Dörr, *Faires Verfahren*, Kehl am Rhein–Straßburg 1984, p. 7; J.I.H. Jacob, *The Fabric of English Civil Justice*, London 1987, pp. 5–6; K.H. Schwab, P. Gottwald, *Verfassung und Zivilprozessrecht*, Bielefeld 1984, pp. 61–62; L.H. Leigh, *The Right to a Fair Trial and the European Convention on Human Rights*, [in:] *The Right to a Fair Trial*, D. Weissbrodt, R. Wolfrum (eds), Berlin 1998, p. 650; J.A. Frowein, W. Peukert, *Europäische Menschenrechtskonvention. EMRK – Kommentar*, Kehl am Rhein 2009, p. 189.

[5] M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2009, p. 404.

[6] L.H. Leigh, *supra* n. 4, p. 649.

bring a civil claim to a court is deemed a basic principle of law guiding the proper interpretation of Article 6 ECHR.[7] The effective exercise of the right of access to a court is a prerequisite and necessary condition for the observance of the rights that make up the right to a fair trial. The right of access to a court is an essential component of the right to a fair trial in the broader sense. The guarantees of a fair trial would be illusory without free access to a court. Conversely, any proceedings that would indeed meet the requirements laid down in the Convention on Human Rights but would not be available to everyone could hardly be considered fair.[8]

The Convention on Human Rights guarantees not only access to a court but, above all, the right to obtain effective judicial protection.[9] Therefore, the Convention attaches particular importance to the conclusion of proceedings within the reasonable time-limits[10] and the prohibition of excessive formalism. It follows from the ECtHR case law that Article 6 para. 1 ECHR guarantees the right to effective, efficient and fair legal protection. This guarantee pertains not only to the outcome of individual proceedings but also ensures a fair course of proceedings. However, the right to a fair trial rests on the assumption that a fair judgment is primarily and ultimately a consequence of the preservation of procedural guarantees. At the same time, this right is one of the most fragile instruments: any attempt at contesting or undermining the right to a fair trial may effectively dismantle the protection of other Convention rights.

One aspect of a fair trial is the prohibition of excessive formalism or flexibility. Excessive formalism is a real threat to a fair trial and access to a court within the meaning of Article 6 ECHR.[11] The court is the guarantor of a fair trial. Its role is, on the one hand, to balance and maintain a balance between the values of certainty and foreseeability of law and, on the other, to ensure that substantive law is effectively applied.

3. PURPOSE OF THE PROVISIONS LAYING DOWN FORMAL REQUIREMENTS

Formalism is an essential feature of all procedural rights. Civil litigation cannot exist without formalism; the latter ensures that judicial proceedings are a strictly regulated duel between the parties subject to the necessary procedural guarantees, in which

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[7] The ECtHR judgment of 21 February 1975 in *Golder v. the United Kingdom*, application no. 4451/70, LEX No. 80789, § 35, https://www.echr.coe.int.

[8] C. Nowak, [in:] A. Błachnio-Parzych, J. Kosonoga, H. Kuczyńska, C. Nowak, *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych*, P. Wiliński (ed.), Warszawa 2009, p. 135.

[9] The ECtHR judgment of 4 July 2006, *Rylski v. Poland*, application no. 24706/02, LEX No. 187204; M.E. Villiger, *Handbuch der Europäischen Menschenrechtskonvention (EMRK)*, Zürich 1993, pp. 275–286; A. Haefliger, F. Schürmann, *Die Europäische Menschenrechtskonvention und die Schweiz*, Bern 1999, p. 179 et seq.

[10] T. Rauscher, [in:] *Münchener Kommentar zur Zivilprozessordnung*, T. Rauscher, P. Wax, J. Wenzel (eds), München 2008, p. 39.

[11] A. Łazarska, *Rzetelny proces cywilny*, Warszawa 2012, pp. 211–212.

only authorised combat measures are permitted. The duel takes place in a strictly defined order, and the parties may fight only with the weapons listed in the inventory of law.[12] On the other hand, procedural formalism[13] is a characteristic of every legally organised human activity that involves the obligation to comply with specific requirements imposed on individual elements (manifestations) of this activity.[14]

Procedural formalism implies that parties are obliged to perform all steps in judicial proceedings in the form imposed and specified by law, at a specific place and within a specific time, and to observe a strict, declarative and formal interpretation of procedural law. The formalism is a prerequisite for the rule of law, and the strict application of pre-established rules of procedure is an essential element of procedural justice.[15] A lack of specific formal rules governing procedural law clearly impedes recourse to judicial protection. Moderate formalism introduces a certain degree of order which facilitates the conduct of procedure, prevents abuses of procedural rights and increases the certainty and foreseeability of laws.

4. ECTHR STANDARD OF FORMAL REQUIREMENTS

The ECtHR perceives the provisions on formal requirements above all as a source of guarantees. The provisions governing the formalities related to the bringing of an appeal are intended to ensure the proper administration of justice and, in particular, respect for the principle of legal certainty. Interested parties should be able to expect that laws are enforced.[16]

The ECtHR has issued many decisions setting the standards of a fair trial and prohibiting excessive formalism.[17] The notion of 'excessive formalism' may refer to a particularly strict interpretation of procedural time limits, procedural rules or rules of evidence, which may lead to the deprivation of access to a court.

According to the Court's well-established case law, courts are prohibited from adopting an approach that is excessively formalistic or excessively flexible. For example, in the context of appeal proceedings, the Court notes that the right of appeal is clearly subject to certain legal conditions, but emphasises that the courts

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[12] E. Waśkowski, *Podręcznik procesu cywilnego*, Wilno 1930, p. 80.

[13] E. Waśkowski, *supra* n. 12, p. 81; S. Cieślak, *Formalizm postępowania cywilnego*, Warszawa 2008, p. 100.

[14] S. Cieślak, *supra* n. 13, p. 100.

[15] J. Gudowski, *O kilku naczelnych zasadach procesu cywilnego – wczoraj, dziś, jutro*, [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana profesorowi Stanisławowi Sołtysińskiemu*, A. Nowicka (ed.), 2005, p. 1032.

[16] The ECtHR judgments: of 26 July 2007, *Walchli v. France*, application no. 35787/03, § 29; of 20 March 2008, *Alvanos and Others v. Greece*, application no. 38731/05, § 25; and of 8 December 2016, *Frida, LLC v. Ukraine*, application no. 24003/07, § 33; https://www.echr.coe.int.

[17] The ECtHR judgments: of 16 February 2017, *Karakutsya v. Ukraine*, application no. 18986/06, § 53–§ 54; of 15 December 2011, *Poirot v. France*, application no. 29938/07, § 46; of 19 February 1998, *Edificaciones March Gallego S.A. v. Spain*, § 34; of 16 November 2000, *Sotiris and Nikos Kouras ATTEE v. Greec*e, application no. 39442/98, § 22; https://www.echr.coe.int.

applying the rules of procedure must avoid both excessive formalism which could undermine the fairness of the procedure, and excessive flexibility which would result in removing procedural requirements established by law.[18]

5. ECTHR JURISPRUDENCE IN CASES AGAINST POLAND IN THE CONTEXT OF EXCESSIVE PROCEDURAL FORMALISM

The issue of excessive formalism can be analysed at two levels: one involving the actual norms on formal requirements and the other concerning the application of the provisions on formal requirements. In *Parol v. Poland* and *Adamkowski v. Poland*,[19] the cases involving the appellant's submission of a copy of the notice of appeal, the ECtHR did not find the requirements for pleadings per se to be excessively stringent.

The rule that parties must submit several copies of pleadings in the course of judicial proceedings is an accepted formal requirement. This rule originates from Article 128 § 1 of the Code of Civil Procedure (CCP), which stipulates that a pleading should be accompanied by its copies and copies of its annexes, which are to be served on participants in the case. Since this provision applies *mutatis mutandis* to appeal proceedings, it is equally applicable in proceedings before courts of both first and second instance (Article 368 § 1 CCP). However, a separate issue at the heart of the aforementioned ECtHR cases is the provision of instructions about such formal requirements to the parties.

The facts of *Parol* and *Adamkowski* were similar, and the problem was that the instructions as to when and how to lodge an appeal, which had been given to a self-represented defendant, had not contained information about the obligation to file the said pleadings in duplicate. Furthermore, the applicants were not otherwise informed of the obligation to send all pleadings to the court in duplicate. The ECtHR concluded that there had been a violation of Article 6 para. 1 ECHR resulting from a disproportionate restriction of access to a court. In the Court's opinion, the requirement for the applicant to lodge an appeal together with a copy for the other party – based on Article 368 § 1 CCP read in connection with Article 128 § 1 CCP – was not, in and of itself, excessively strict or formal. In the ECtHR's view, this requirement is to ensure the proper functioning of the justice system, as its purpose is to notify the opposing party of the appeal in order to facilitate the participation of that party in appeal proceedings.

In both cases, however, the actual reason for dismissing the applicant's notice of appeal was the absence of its duplicate. The ECtHR held that the national courts should take into account that the applicants were incarcerated and were not legally represented. While being detained, they were unable to go to court to

[18] The ECtHR judgments: of 26 July 2007, *Walchli v. France*, application no. 35787/03, § 29; of 20 March 2008, *Alvanos and Others v. Greece*, application no. 38731/05, § 25; and of 8 December 2016, *Frida, LLC v. Ukraine*, application no. 24003/07, § 33; https://www.echr.coe.int.

[19] The ECtHR judgments: of 28 March 2019, *Adamkowski v. Poland*, application no. 57814/12; of 11 October 2018, *Parol v. Poland*, application no. 65379/13; https://www.echr.coe.int.

make copies of the pleadings on their own. The court received the original of the notice of appeal, while a duplicate required by procedural provisions is nothing more than a photocopy of the original document. The manner in which the national courts proceeded in the *Parol* and *Adamkowski* cases was thus extremely formalistic, especially since each applicant asked the court to make and send a copy of their own notice of appeal. The courts denied their requests. However, even if the courts had granted their requests and sent the copies, it would still have been rather unlikely for the applicants to meet a seven-day deadline for rectifying formal deficiencies of their notices of appeal given the realities of the service of judicial documents in the prison setting. In any case, their appeal would have been dismissed on formal grounds.

6. COURT'S OBLIGATIONS TO PROVIDE PARTIES WITH RELEVANT PROCEDURAL INSTRUCTIONS

In *Adamkowski v. Poland* and *Parol v. Poland*, the ECtHR drew attention to the irregular performance of national courts in providing procedural instructions. Procedural instructions may not be used in a manner that is routine, mechanical or careless. The instructions are intended to facilitate access to the courts for individuals without the knowledge of law.

Under the Code of Civil Procedure, the court has general (Article 5 CCP) and, in certain circumstances, specific (Articles 327 § 2, 331 § 2 CCP) obligations to provide instructions to a party not represented by a lawyer.

The court's general obligation to provide procedural instructions existed as early as during the communist era. However, in the wake of the post-1989 democratic transition, the scope of this obligation was severely restricted.[20] The courts were no longer generally required to provide instructions; the performance of this obligation became discretionary. The courts could freely decide as to whether to instruct a party and to what extent. Procedural instructions were given solely in respect of the procedural steps taken by the parties and only to the extent necessary in a given procedural situation. Pursuant to the wording of Article 5 CCP, which was effective until 6 November 2019,[21] where a justified need arose, the court could provide the parties to (and participants in) the proceedings who were not represented by an advocate or attorney-at-law with necessary instructions concerning procedural steps.

The scope of, and need for, procedural instructions have therefore been significantly reduced. Moreover, the courts and scholarship developed the standard according to which instructions should only be provided in a situation where procedural steps are taken by a person who is incapable or has insufficient knowledge of the law[22] and only as regards the required procedural steps. The

[20] A. Łazarska, *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji*, Warszawa 2012, p. 126 et seq.

[21] On 7 November 2019, Articles 5 CCP and 327 CCP were amended by the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts (Dz.U. 2019, item 1469).

[22] T. Ereciński, *Komentarz do Kodeksu postępowania cywilnego*, Vol. 1, Warszawa 2006, p. 92.

instructions used in the post-1989 period never took a more 'user-friendly' (accessible) form, despite the increasingly frequent demands for the creation of a system of straightforward judicial communication.[23] The legislator usually obliges the courts to provide information 'about the wording' of specific provisions and the courts interpret this obligation literally, providing the parties with quotes from the applicable provisions of the Code of Civil Procedure, often without any wider context. Instructions have never been given on forms. Overwhelmed by workload, the courts replaced detailed instructions for parties by letters with scanned sections of the Code. All this was possible because the Code of Civil Procedure did not specify the form in which instructions are to be given. Nor did the Code require instructions to be understandable. In consequence of the above, the courts do not even try to explain, in an accessible manner such as through diagrams or forms, how to lodge an appeal. There is no doubt that many provisions of the Code of Civil Procedure are complex. When quoted verbatim, such provisions, even using their terminology as an instruction, may be understood by a lawyer but not necessarily by a layman.

A somewhat different legislative approach to instructions is taken in the Code of Administrative Procedure. However, the Code of Administrative Procedure (CAP) does not provide for the exact tenor of instructions on the appeal against the merits of an administrative decision (Article 107 CAP). Nevertheless, Article 112 CAP provides guarantees for the party to the effect that improper instructions may not prejudice the party that has followed such instructions. This rule is a consequence of an obligation stemming from Article 9 CAP, according to which public administration bodies are required to inform the parties, in a proper and exhaustive manner, about the factual and legal background that may affect the determination of their rights and obligations covered by administrative proceedings. Public administration bodies are also required to ensure that the parties and other persons involved in the proceedings are not prejudiced by the ignorance of the law; to this end, the bodies should provide them with necessary explanations and guidance.[24]

Exhaustive instructions formulated in the criminal trial follow the models set out in a regulation of the Minister of Justice.[25] In accordance with Article 16 § 1 of the Criminal Procedure Code, in a situation where the authority conducting the

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[23] W. Świerczyńska-Głownia, *Komunikowanie z perspektywy sali sądowej*, Kraków 2019, p. 185 et seq.; J. Gwizdak, *Dlaczego media nie rozumieją sądów, a sądy nie rozumieją mediów?*, 15.10.2016, https://wszystkoconajwazniejsze.pl/jaroslaw-gwizdak-dlaczegomedia-nie-rozumieja-sadow-a-sady-nie-rozumieja-mediow/.

[24] The Supreme Administrative Court judgment of 29 January 2008, II OSK 211/07, Legalis: 'under Article 112 CAP, a party cannot suffer the negative effects of improper instructions which are an integral part of the administrative decision for a number of reasons, in particular due to the fact that the administrative law does not follow the doctrine of constructive knowledge of law, and hence does not strictly apply the *ignorantia iuris nocet* principle.' It should also be noted that Article 112 CAP plays an important role in the implementation of the principle of general protection of the trust of participants to administrative proceedings in public authorities (Article 8 CAP).

[25] For example, the Regulation of the Minister of Justice of 13 April 2016 on the determination of a model Letter of Rights and Obligations for suspects in criminal proceedings (Dz.U. 2016, item 512) or the Regulation of the Minister of Justice of 14 September 2020 on the determination

proceedings is obliged to instruct the participants in the proceedings about their rights or obligations, the absence of such instructions or the provision of improper instructions may not trigger any adverse procedural consequences for the participant or other persons concerned.

In *Parol* and *Adamkowski*, national courts failed to comply with the information obligation because upon effecting the service of a copy of the reasoned judgment on each applicant, the court did not inform the applicant about the requirement of submitting an appropriate number of copies of the notice of appeal (the instructions given by the courts were thus incomplete). In each of the above cases, the court was obliged to provide instructions, because under Article 327 § 2 CCP, if a party not represented by an advocate, attorney-at-law or trademark and patent attorney is absent at the time of the judgment being pronounced in the consequence of their detention, the court must serve *ex officio* on the party a copy of the operative part of the judgment with the instructions on when and how to file avenues of challenge, within one week from the day when the judgment is pronounced. Consequently, this type of instructions is used in a relatively rare (and exceptional) situation where a detained party is absent at the time of the judgment being pronounced. As a rule, a party present at the time of the judgment being pronounced is given these instructions verbally by the court (Article 327 § 1 CCP). In another special situation, namely where the court issues a judgment in camera, upon serving the judgment on the parties *ex officio*, the court must instruct any party not represented by a lawyer on how and when to file the notice of appeal (Article 331 § 3 CCP).

Given the above, Article 327 § 2 CCP was applicable in the national proceedings referred to in *Parol* and *Adamkowski*. The national court provided information about the type of the available avenues of challenge and time limit for lodging the appeal, while failing to provide specific instructions concerning the necessity of filing copies of the notice of appeal. Moreover, the court refused to appoint a lawyer for the applicant. The ECtHR correctly concluded that the applicant had the right to act in confidence in the court and generally rely on the information on the operative rules of procedure provided by national courts. At the same time, although the instructions were incomplete, the applicants' failure to observe formal requirements led to the courts' holding the applicants liable for these failures.

In another case, *Kunert v. Poland*,[26] the ECtHR did not find a violation of Article 6 ECHR because the applicant was informed by the court during the proceedings that all pleadings should be filed in duplicate. The ECtHR held that the provision of such instructions sufficed to avoid the violation of Article 6. In other words, no violation of Article 6 ECHR will occur if the court provides more detailed and specific instructions as to the manner of lodging a pleading, its enclosures and the required number of copies, etc.

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of a model Letter of Rights and Obligations for aggrieved parties in criminal proceedings (Dz.U. 2016, item 514).

[26] The ECtHR judgment of 4 April 2019, *Kunert v. Poland*, application no. 8981/14.

7. PROCEDURAL FORMALISM AND PARTY'S DUTY OF CARE

Procedural formalism precludes arbitrariness and discretion. It is emphasised in the ECtHR's case law that a party should exercise the utmost care and take active steps to defend their rights.[27] According to the rules of civil procedure, as well as under substantive law, the parties should exercise all reasonable care required in their case, as the law is written for the vigilant whereas the sluggish, careless and shiftless have to bear the consequences of their negligence.[28] Since Roman times, civil law has been familiar with two principles: *vigilantibus iura scripta sunt* and *iura vigilantibus non dormientibus prosunt*. The former states that 'civil law is written for the careful and vigilant', while the latter means that 'the laws serve the vigilant, not those who sleep'.[29]

In the case of *Parol v. Poland*, the ECtHR also considered what measure of due care should be applied to the applicant (who incidentally was detained) since the Government argued that the applicant knew how many copies were required, as he had already filed the statement of claim (the first pleading). In the Court's view, it could not be concluded that the applicant was aware of the requirement to lodge the notice of appeal in duplicate. Nor could adverse consequences be drawn from this fact for the applicant, since the case involved a failure to comply with a legal obligation imposed on a judicial authority under Article 327 § 2 CCP, i.e. the already discussed obligations to provide instructions on how to lodge an appeal to a detained person on whom the court serves a copy of the judgment. The ECtHR also stressed that Mr Parol was a vulnerable person on account of his incarceration. In addition, the applicant tried to follow the instructions of a regional court. Since he did not have a copy of the submitted notice of appeal, he requested the court to send him a copy of the same at his expense in order to fulfil his obligation to rectify the formal deficiencies. His request having been left unconsidered, the applicant complied with the court's obligation by making a handwritten copy of the notice of appeal. However, the copy was not identical to the original document submitted by the applicant – the applicant reproduced the wording from memory, which was not accepted by the court.

8. COURT'S OBSERVANCE OF THE RULES OF A FAIR TRIAL

Article 6 ECHR clearly establishes guarantees of a fair trial, understood, inter alia, as court proceedings conducted with respect for the rules of fair play and good manners. The right to a fair trial implies the court's obligation to conduct the proceedings in a manner anticipated by (and foreseeable to) the parties. This

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[27] The ECtHR decision of 4 October 2001, *Teuschler v. Germany (dec.)*, application no. 47636/99; the ECtHR judgment of 10 February 2005, *Sukhorubchenko v. Russia*, application no. 69315/01, § 48; https://www.echr.coe.int.

[28] M. Sawczuk, *Problem aktywności stron („vigilantibus iura scripta sunt") w postępowaniu cywilnym*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego 1, 1974, pp. 115–127.

[29] *Prawo rzymskie. Słownik encyklopedyczny*, W. Wołodkiewicz (ed.), Warszawa 1986, p. 155.

means that the court itself should not take any contradictory actions or surprise the parties. Moreover, the court's own mistakes or negligence may not trigger any negative consequences for the participants in the proceedings. It is unacceptable to hold the parties liable for the defective operation of the court.

However, the court's duty of loyalty is not reflected in any provision of the Code of Civil Procedure. Although Articles 3 and 4[1] CCP establish an obligation to act honestly and prohibits abuses of procedural rights, this obligation and prohibition rest on the parties.[30] The Code of Civil Procedure was originally enacted in 1964, during the period of the Polish People's Republic. The original Code was based on the principle of the court's overarching authority and took account of no good practices of building a partnership arrangement based on the principle of trust. Nevertheless, there is no doubt that the duty of fair play is imposed not only on the parties but also on the court, based on the direct normative directive stemming from Article 45 para. 1 of the Constitution.[31]

In *Parol*, the ECtHR found that, on the facts, the applicant – by sending a handwritten letter to the regional court which he considered compliant with the requirements established for a copy of the notice of appeal – has acted with a degree of care normally required of a party to civil proceedings. Moreover, it may be argued that the national court failed to perform the duty of loyalty in its procedural aspect: after all, the court had refused to send his original pleading back to the applicant, effectively preventing the applicant from fulfilling the obligation imposed. Under Article 9 § 1 CCP, the applicant was entitled to have access to the case files and to receive copies, transcripts and extracts from the same.

Consequently, it is correct to conclude that, in the circumstances of the case at hand, the national courts were responsible for a series of actions which deprived the applicant of access to a court. After all, the national court of first instance ultimately held that the applicant's appeal was inadmissible because a copy of the notice of appeal was not identical to the original document lodged by the applicant. The applicant's case was therefore not examined on the merits but dismissed on purely formal grounds. The above decision, subsequently affirmed by the court of second instance, prevented the applicant from bringing proceedings as to the merits of his case before the appellate court.

9. PROPORTIONALITY

In its case law, the ECtHR draws attention to the need for an effective appellate remedy. According to the ECtHR, the right to a court is not absolute. It may be subject to restrictions imposed by Member States which have a margin of appreciation in this respect. These restrictions must not, however, hinder access to a court in a way that would undermine the very essence of this right. The restrictions must

[30] M. Plebanek, *Nadużycie praw procesowych w postępowaniu cywilnym*, Warszawa 2012, p. 1 et seq.

[31] A. Łazarska, *Zaufanie jako kategoria prawa w procesie cywilnym*, Polski Proces Cywilny 2, 2011, p. 25.

be proportionate and must not affect the principle of legal certainty.[32] Moreover, any restrictions are admissible if they pursue a legitimate aim and there is an appropriate balance between the means used and that aim. If national jurisdiction guarantees a certain measure, such as the possibility of bringing a legal action, the basic guarantees set out in Article 6 ECHR must apply to that measure.[33]

Effective legal protection is most often equated with ensuring actual access to a court. The right to a court cannot be merely formal but must be guaranteed in fact.[34] Effective judicial protection means guaranteeing 'real' protection, not just 'apparent' or 'abstract' protection. Access to a court should not only mean the mere availability of legal proceedings but also the actual possibility of asserting one's rights in court.[35] The ECtHR case law obligates courts, on the one hand, to balance values and uphold formal requirements and, on the other hand, not to deprive anyone of the right of access to the courts, i.e. to maintain an appropriate balance in terms of access to a court.[36] When interpreting procedural provisions, courts should always weigh the implications of their decisions and take into account the stage of the proceedings and the guarantee of the right to a court.

When making decisions motivated by formal law, courts should take into account whether they are not actually closing access to a court. Furthermore, these restrictions are in keeping with Article 6 para. 1 ECHR only where they pursue a legitimate aim and if there is a reasonable relationship of proportionality between the measures applied and the objective pursued.[37] In addition, when assessing the proportions, it must be borne in mind that the aim of the Convention is to protect rights that are not theoretical or illusory, but concrete and effective. This applies in particular to the guarantees laid down in Article 6, given the importance of the right to a fair trial.

In *Parol* and *Adamkowski*, the ECtHR found a violation of the Convention resulting from the closure of access to a court, noting that the applicants were, in fact, deprived of the right to an effective appellate remedy due to a decision dismissing their appeals on formal grounds. Their appeals were not examined on the merits but formally dismissed without examining their legitimacy.

The ECtHR was right in finding no analogy with the case of *Siwiec v. Poland*.[38] Both cases differ in terms of both the subject matter and on the facts. In *Siwiec*, the

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[32] The ECtHR judgment of 21 February 1975, *Golder v. United Kingdom*, application no. 4451/70, § 35, https://www.echr.coe.int.

[33] The ECtHR judgment of 2 October 2008, *Atanasova v. Bulgaria*, application no. 72001/01, LEX No. 457447; M.A. Nowicki, *European Court of Human Rights. Wybór orzeczeń 2008*, Warszawa 2009, pp. 137–138.

[34] K.H. Schwab, P. Gottwald, *supra* n. 4, pp. 38–39.

[35] H. Miehsler, T. Vogler, [in:] *Internationaler Kommentar zur Europäischen Menschenrechtskonvention*, W. Karl (ed.), Köln 2009, p. 82.

[36] The ECtHR judgments: of 19 February 1998, *Edificaciones March Gallego S.A. v. Spain*, § 34; and of 17 January 2012, *Stanev v. Bulgaria* [GC], application no. 36760/06, § 230; https://www.echr.coe.int.

[37] The ECtHR judgment of 19 February 1998, *Edificaciones March Gallego S.A. v. Spain*, § 34, *Recueil* 1998-I, https://www.echr.coe.int.

[38] The ECtHR judgment of 3 July 2012, *Siwiec v. Poland*, application no. 28095/08, https://www.echr.coe.int.

Court found that the national courts' strict interpretation of Article 128 § 1 CCP did not, in and of itself, violate Article 6 para. 1 ECHR, as the case had been examined on its merits by courts of two instances each of which had full jurisdiction and no doubts arose as to the exercise of the right of access to a court. The ECtHR also noted that in *Siwiec* the applicant did not respond to a court's request to rectify the formal deficiencies. Finally, the case of *Siwiec v. Poland* concerned civil proceedings in a commercial case, which are subject to more stringent procedural requirements than standard civil proceedings, and the court made a substance-based ruling and dismissed the applicant's requests for evidence.

Another important issue is the assessment of the content of the copy of the notice of appeal. Despite the lack of response from the national courts, the applicants took steps to draw up a handwritten copy of the document in question, whose content was not – in the court's opinion – identical to the wording of the originally submitted notice of appeal. However, the courts made only a general remark that the wording of the handwritten notices of appeal was different. They failed to examine the documents in detail to specify whether the differences related to the layout of the appeals or their wording. Meanwhile, there is no doubt that the courts should assess the merits of the appeals in accordance with the principle that 'equity looks to the intent, rather than to form'.[39]

In the context of, e.g. translation of documents, it follows from the ECtHR case law that the accused's right to be assisted by an interpreter/translator does not include the possibility of requesting the translation of all documents constituting evidence in a case or official documents from the case file.[40] This means that the role of the court is to strike the right balance between the formalism and efficiency of the proceedings.

In the circumstances of the case at hand, the courts should have assessed to what extent differences between the handwritten copy and the original would prevent the other party from defending their case, given that the written procedure is supplemented by an oral argument where the court and the parties have the opportunity to discuss and exchange their views. The fact that the copy was not identical should not lead to such a severe sanction as the dismissal of the appeal and deprivation of access to a court. The court should initially review these discrepancies with a view to guaranteeing the other party's right to a defence and respecting the principle of the equality of arms. Formal deficiencies should not lead to the dismantling of substantive rights.

10. CONCLUSIONS

The extreme procedural formalism of Polish courts results, among other things, from the excessive workload they cope with. For this reason, the courts tend to choose a formalistic (and the shortest) route to bring the proceedings to an end.

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[39] J.E. Martin, *Modern Equity*, Hanbury and Martin, 1957, p. 48.

[40] The ECtHR judgment of 19 December 1989, *Kamasinski v. Austria*, https://www.echr.coe.int.

However, the choice of such a 'shortcut' route cannot be accepted, especially when it involves excessive formalism and denial of access to a court. The ECtHR makes it clear that formalism is generally admissible but must always remain subordinate to the principle of proportionality.

Furthermore, the cases of *Parol*, *Adamkowski* and *Borkowski* reveal systemic defects in the operation of courts related to improper judicial practices regarding the provision of procedural instructions. The courts tend to apply the rules on the formal requirements in an extremely rigorous and careless manner, while disregarding the consequences of the absence of access to a court. Some judicial officers treat formal requirements as a 'dense sieve' used to dismiss cases on formal grounds: often, as soon as a case lands on a judge's docket, the judge not only checks if their court is a proper venue and has jurisdiction or if the case was properly allocated but also actively searches for formal deficiencies in the claimant's pleadings. In this way, procedural law, or rather its practical application, sometimes resembles a minefield or *trous de loup*.

Arguably, the Hippocrates' motto *primum non nocere* should apply not only to doctors but also to judges.[41] Procedural law, including the rules on formalities, is to be a means facilitating the implementation of substantive law and safeguarding substantive rights. Procedural rules are designed to keep the balance between two values: legal certainty and fairness. However, the application of procedural law must not distort the very essence of a fair trial. Moreover, procedural law should not be instrumentally used to eliminate incoming cases and prevent litigants from exercising judicial remedies.

The application of provisions on the form of proceedings must not lead to injustice. It is, therefore, necessary to maintain a proper balance between the type of established infringement and the sanction applied. A minor and negligible formal violation must not lead to a loss of the party's rights, and a 'good' right should not be defeated by the party's ineptitude.[42]

Importantly, the discussed judgments led to a legislative action taken at the national level to change the method of providing instructions in civil matters, which took the form of an amendment to the Code of Civil Procedure adopted on 4 July 2019[43]. The amended Article 5 CCP authorised the Minister of Justice to specify, in a regulation, model forms of the instructions which must be provided in writing under the Code of Civil Procedure. Such model instructions must be complied so as to ensure that their content is communicated in an accessible way.

Article 327 § 4 CCP was also amended. The new wording of this provision, set out in the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts, is as follows: 'A party receiving a judgment served *ex officio*, who is not represented by an advocate, an attorney-at-law, a trademark and patent attorney or by the General Counsel to the Republic of Poland, shall also receive instructions on the method of, and time limit for, submission of the application for the delivery

41 J. Esser, *Not und Gefahren des Revisionsrechts*, Juristenzeitungen 17, 1969, p. 515.

42 A. Łazarska, *supra* n. 11, pp. 211–212.

43 Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts (Dz.U. 2019, item 1469).

of the reasoned judgment and on the conditions and method of, and time limit for, filing avenues of challenge.' Furthermore, Article 205[2] CCP, a new provision added to the Code, sets out an extensive list of instructions related to the service of initial pleadings. Such instructions concern, among other things, the possibility of resolving the dispute by settlement, obtaining a default judgment issued in camera or the right to have a legal representative appointed in the proceedings.

However, as always, a 'Convention-friendly' judicial interpretation of these rules by the courts is much more important than the rules, forms or the wording of letters with instructions. Such interpretation matters most in cases of detained persons or litigants not represented by a lawyer. It is impossible to include detailed instructions for all possible situations in the Code of Civil Procedure. Courts should provide instructions in a way ensuring a fair trial for the parties. Here, the overarching directive should be that the instructions must be accessible, clear, and transparent and that the courts should strike a proportional balance between formal requirements and the guarantee of access to a court.

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PROHIBITION OF EXCESSIVE FORMALISM AND JUDICIAL PRACTICE: COMMENTS BASED ON CIVIL CASE LAW OF POLISH COURTS IN THE CONTEXT OF ARTICLE 6 ECHR

Summary

The guarantee of the right to a fair trial (Article 6 ECHR) in the light of the Strasbourg case law implies the need for the court to fulfil all disclosure obligations that have a guarantee significance in terms of the right to a court and the prohibition of excessive formalism. The Strasbourg Court in the ECtHR judgments of 11 October 2018 in the case of *Parol v. Poland*, and of 28 March 2019 in the case of *Adamkowski v. Poland*, on the background of concurrent facts, stated that the rejection by civil courts of appeals of the applicants, persons deprived of liberty, was a manifestation of excessive formalism inadmissible under Article 6 ECHR. This decision was influenced by the fact that the applicants were not duly instructed by the court about the formal requirements related to lodging an appeal. These judgments are a clear signal to the courts that, when applying procedural law, one must make its interpretation friendly in terms of substance and in line with Convention on Human Rights so as not to violate the fair trial guarantee. Perhaps these judgments will become an important contribution to a wider discussion on the interpretation of procedural law and effective judicial protection. The problem lies not only in the law itself, but also in the lack of sufficient guarantees of its pro-Convention interpretation by the courts. Despite the upgrading of court buildings and their adaptation to the needs of clients, a meticulous attachment to the mechanical and routine application of procedural rules often prevails in courts.

Keywords: excessive formalism, fair trial, procedural instructions, obligation of loyalty, obligation of diligence, proportionality, right to a court

ZAKAZ EKSCESYWNEGO FORMALIZMU A PRAKTYKA SĄDOWA – UWAGI NA TLE ORZECZEŃ POLSKICH SĄDÓW W SPRAWACH CYWILNYCH W ŚWIETLE ART. 6 EKPC

Streszczenie

Z gwarancji prawa do rzetelnego procesu (art. 6 EKPC) na tle orzecznictwa strasburskiego wynika konieczność dopełnienia przez sąd wszelkich obowiązków informacyjnych, które mają gwarancyjne znaczenie w aspekcie prawa do sądu, oraz zakaz ekscesywnego formalizmu. Trybunał strasburski w wyrokach ETPCz z 11 października 2018 r. w sprawie *Parol przeciwko Polsce*, z 28 marca 2019 r. w sprawie *Adamkowski przeciwko Polsce* na tle zbieżnego stanu faktycznego stwierdził, że odrzucenie przez sądy cywilne apelacji skarżących, osób pozbawionych wolności, stanowiło przejaw niedopuszczalnego na gruncie art. 6 EKPC nadmiernego formalizmu. Na takim rozstrzygnięciu zaważył fakt, że skarżący nie zostali należycie pouczeni przez sąd o wymogach formalnych, związanych z wnoszeniem apelacji. Wyroki te stanowią wyraźny sygnał dla sądów, że stosując prawo procesowe, trzeba dokonywać jego materialnoprzyjaznej, prokonwencyjnej wykładni, aby nie naruszyć gwarancji *fair trial*. Być może orzeczenia te staną się ważnym przyczynkiem do szerszej dyskusji na temat wykładni prawa procesowego oraz efektywnej ochrony sądowej. Problem leży bowiem nie tylko w samym prawie, lecz także w braku dostatecznych gwarancji jego prokonwencyjnej wykładni przez sądy. Mimo unowocześnienia budynków sądowych i przystosowania ich dla potrzeb interesantów, w sądach nierzadko dominuje skrupulatne przywiązanie do mechanicznego i rutynowego stosowania przepisów proceduralnych.

Słowa kluczowe: ekscesywny formalizm, rzetelny proces, pouczenia procesowe, obowiązek lojalności, powinność starannego działania, proporcjonalność, prawo do sądu

PROHIBICIÓN DE FORMALISMO EXCESIVO Y LA PRACTICA JUDICIAL – COMENTARIOS DE SENTENCIAS POLACAS EN ASUNTOS CIVILES A LA LUZ DEL ART. 6 CEDH

Resumen

De la garantía al derecho a un proceso equitativo (art. 6 CEDH) desde la perspectiva de la jurisprudencia del TEDH nace la necesidad de cumplir por parte del Tribunal con todas las obligaciones de información que garanticen el derecho a un proceso y la prohíban el formalismo excesivo. El Tribunal de Estrasburgo en sus sentencias de 11 de octubre de 2018 en el caso *Parol contra Polonia*, de 28 de marzo de 2019 en el caso *Adamkowski contra Polonia*, en vista de similares antecedentes de hecho, ha declarado que la desestimación de apelación por parte de los Tribunales civiles, presentada por partes que estaban privadas de libertad, constituye exceso de formalismo inadmisible conforme con art. 6 CEDH. Las sentencias se basan en el hecho de que los recurrentes no fueron debidamente informados por el Tribunal sobre los requisitos formales del recurso de apelación. Estas sentencias es una señal evidente para los Tribunales, ya que a la hora de aplicar el derecho procesal hay que interpretarlo de manera pro convencional amigable, para no violar la garantía *fair trial*. Tal vez estas sentencias serán un pretexto importante para la discusión profunda sobre la interpretación de derecho procesal y la tutela efectiva judicial. El problema no está en el derecho en sí, sino en la falta de garantías suficientes de su interpretación pro convencional por los Tribunales. A pesar de

la modernización de los edificios judiciales, su adaptación a las necesidades de los ciudadanos, es muy frecuente que se apliquen los preceptos procesales de forma mecánica y rutinaria.

Palabras claves: formalismo excesivo, proceso equitativo, advertencias procesales, obligación de lealtad, deber de actuar con diligencia debida, proporcionalidad, derecho a la tutela judicial

ЗАПРЕЩЕНИЕ ЧРЕЗМЕРНОГО ФОРМАЛИЗМА И СУДЕБНАЯ ПРАКТИКА: ЗАМЕЧАНИЯ ПО ПОВОДУ РЕШЕНИЙ ПОЛЬСКИХ СУДОВ ПО ГРАЖДАНСКИМ ДЕЛАМ В СВЕТЕ СТ. 6 ЕКПЧ

Аннотация

Основываясь на судебной практике ЕСПЧ, можно сделать вывод, что из гарантированного права на справедливое судебное разбирательство (ст. 6 ЕКПЧ) следует, что от суда требуется выполнение всех обязательств по информированию обвиняемого с целью обеспечить его право на справедливое разбирательство; отсюда же следует и запрет на чрезмерный формализм. В решениях по делам «Пароль против Польши» от 11 октября 2018 г. и «Адамковский против Польши» от 28 марта 2019 г., схожим между собой с точки зрения фактической стороны дела, Европейский суд по правам человека постановил, что отклонение гражданскими судами апелляций, поданных вышеуказанными лицами, находящимися в местах лишения свободы, являлось проявлением чрезмерного формализма, противоречащего ст. 6 ЕКПЧ. Такая позиция ЕСПЧ основана на том факте, что апеллянты не были должным образом проинструктированы судом касательно формальных требований к подаче апелляции. Данные судебные решения дают судам четкий сигнал о том, что при применении процессуального права необходимо толковать его с учетом материального права и положений Европейской конвенции о правах человека с тем, чтобы не нарушить гарантию справедливого судебного разбирательства (*fair trial*). Можно ожидать, что эти решения ЕСПЧ приведут к активизации дискуссии о вопросах толкования процессуального права, а также эффективной судебной защиты. Проблема заключается не столько в самом процессуальном праве, сколько в отсутствии достаточных гарантий того, что при его толковании суды будут руководствоваться положениями ЕКПЧ. В то время как здания судов модернизируются с целью лучшего приспособления к нуждам посетителей, в самих судах зачастую превалирует слепая привязанность к механическому и рутинному применению процессуальных норм.

Ключевые слова: чрезмерный формализм; справедливое разбирательство; процессуальное информирование; обязанность защиты прав обвиняемого; обязанность проявлять надлежащую тщательность; соразмерность; право на судебное разбирательство

DAS VERBOT DES ÜBERSPITZTEN FORMALISMUS UND DIE GERICHTSPRAXIS – ANMERKUNGEN VOR DEM HINTERGRUND DER URTEILE POLNISCHER GERICHTE IN ZIVILSACHEN IM LICHTE DES ARTIKELS 6 DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION

Zusammenfassung

Aus der Garantie des Rechts auf ein faires Verfahren (Artikel 6 EMRK) ergibt sich vor dem Hintergrund der Straßburger Rechtssprechung die Notwendigkeit, dass die Gerichte allen Informationspflichten nachkommen, denen im Hinblick auf das garantierte Recht

auf gerichtliches Gehör und das Verbot des überspitzten Formalismus Schlüsselbedeutung zukommt. Der Straßburger Gerichtshof hat in den Urteilen des EGMR in der Rechtssache *Parol gegen Polen* vom 11. Oktober 2018 und der Rechtssache *Adamkowski gegen Polen* vom 28. März 2019 vor dem Hintergrund des übereinstimmenden Sachverhalts festgestellt, dass die Abweisung der von den inhaftierten Klägern eingelegten Berufung durch die Zivilgerichte Ausdruck eines nach Artikel 6 der Europäischen Menschenrechtskonvention unzulässigen, übertriebenen Formalismus war. Die Entscheidung wurde durch die Tatsache beeinflusst, dass die Beschwerdeführer nicht hinreichend über die formalen Anforderungen im Zusammenhang mit der Einlegung von Rechtsmitteln belehrt worden waren. Die Urteile senden eine klare Botschaft an die Gerichte, dass bei der Anwendung des Prozessrechts eine materiellrechtsfreundliche, konventionsfreundliche Auslegung gefordert ist, um nicht gegen das garantierte Recht auf ein faires Verfahren zu verstoßen. Möglicherweise leisten diese Urteile auch einen wichtigen Beitrag zu einer breiteren Diskussion über die Auslegung des Verfahrensrechts und einen effektiven gerichtlichen Rechtsschutz. Das Problem liegt nicht nur im Gesetz selbst begründet, sondern ist auch auf die unzureichende Garantie einer konventionsfreundlichen Gesetzesauslegung durch die Gerichte zurückzuführen. Trotz Modernisierung der Gerichtsgebäude und einer Anpassung an die Bedürfnisse der Beteiligten ist in den Gerichten häufig ein akribisches Festhalten an der mechanischen und routinemäßigen Anwendung der Verfahrensvorschriften zu beobachten.

Schlüsselwörter: überspitzter Formalismus, faires Verfahren, Verfahrensbelehrungen, Loyalitätspflicht, Sorgfaltspflicht, Verhältnismäßigkeit, Recht auf gerichtliches Gehör

L'INTERDICTION DU FORMALISME EXCESSIF ET LA PRATIQUE JUDICIAIRE – COMMENTAIRES DANS LE CONTEXTE DES JUGEMENTS DES TRIBUNAUX POLONAIS DANS LES AFFAIRES CIVILES À LA LUMIÈRE DE L'ARTICLE 6 DE LA CEDH

Résumé

La garantie du droit à un procès équitable (article 6 de la CEDH), au regard de la jurisprudence de Strasbourg, implique la nécessité pour le tribunal de remplir toutes les obligations d'information dont la pertinence est garantie au regard du droit à un procès équitable, ainsi que l'interdiction d'un formalisme excessif. La Cour européenne des droits de l'homme de Strasbourg dans ses arrêts du 11 octobre 2018 dans l'affaire *Parol c. Pologne*, du 28 mars 2019 dans l'affaire *Adamkowski c. Pologne*, sur fond de faits concordants, a déclaré que le rejet par les juridictions civiles des recours des requérants, personnes privées de liberté, était une manifestation d'un formalisme excessif, inacceptable au regard de l'article 6 de la CEDH. Une telle décision était influencée par le fait que les requérants n'avaient pas été dûment informés par le tribunal des conditions formelles liées à l'introduction d'un recours. Ces arrêts sont un signal clair aux tribunaux que lors de l'application du droit procédural, il est nécessaire d'en faire une interprétation favorable au matériel et pro-convention, afin de ne pas violer la garantie d'un procès équitable. Ces jugements deviendront peut-être une contribution importante à un débat plus large sur l'interprétation du droit procédural et une protection juridictionnelle efficace. Le problème ne réside pas seulement dans la loi elle-même, mais dans le manque de garanties suffisantes de son interprétation pro-convention par les tribunaux. Malgré la modernisation des bâtiments des tribunaux et leur adaptation aux besoins des clients, les tribunaux se heurtent souvent à un attachement scrupuleux à l'application mécanique et routinière des règles de procédure.

Mots-clés: formalisme excessif, procès équitable, instructions procédurales, devoir de loyauté, devoir de diligence, proportionnalité, droit à un procès équitable

DIVIETO DI ECCESSIVO FORMALISMO E PRASSI GIUDIZIARIA: OSSERVAZIONI SULLO SFONDO DELLE SENTENZE DEI TRIBUNALI POLACCHI NELLE CAUSE CIVILI ALLA LUCE DELL'ART. 6 DELLA CONVENZIONE EUROPEA PER LA SALVAGUARDIA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI

Sintesi

Dalla garanzia del diritto a un equo processo (art. 6 della CEDU) sullo sfondo della giurisprudenza di Strasburgo, deriva la necessità di adempimento, da parte dei tribunali, di tutti gli obblighi informativi essenziali sotto l'aspetto della garanzia del diritto alla giustizia e del divieto di eccessivo formalismo. La Corte di Strasburgo, nelle sentenze della Corte europea dei diritti dell'uomo dell'11 ottobre 2018 nel procedimento *Parol contro la Polonia*, del 28 marzo 2019 nel procedimento *Adamkowski contro la Polonia*, sullo sfondo dei fatti convergenti, ha dichiarato che il rigetto del ricorso dei ricorrenti, persone detenute, da parte dei tribunali civili, ha costituito un'espressione di eccessivo formalismo, inammissibile sulla base dell'art. 6 della CEDU. Ha determinato tale decisione il fatto che i ricorrenti non fossero stati correttamente istruiti dal tribunale circa i requisiti formali legati alla proposizione del ricorso. Tali sentenze sono un chiaro segnale per i tribunali, che applicando il diritto processuale bisogna interpretarlo in maniera sostanziale amichevole, nello spirito della convenzione, per non violare la garanzia di equo processo. Forse queste sentenze contribuiranno significativamente a una più ampia discussione sul tema dell'interpretazione del diritto processuale e dell'efficace tutela giuridica. Il problema non è infatti nel diritto in se, ma nell'assenza di garanzie sufficienti della sua interpretazione nello spirito della convenzione da parte dei tribunali. Nonostante l'ammodernamento degli edifici dei tribunali, il loro adattamento alle necessità degli interessati, nel tribunali non di rado domina uno scrupoloso attaccamento ad una applicazione meccanica e di routine delle norme procedurali.

Parole chiave: eccessivo formalismo, equo processo, istruzioni procedurali, dovere di lealtà, dovere di sollecitudine, proporzionalità, diritto alla giustizia

Cytuj jako:

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