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EMERGENCE OF THE PROCEDURAL PROTEUS TO THE SURFACE OF CIVIL JUSTICE: NAVIGATING THE SPECTRUM OF PROPORTIONALITY IN CIVIL PROCEDURE

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Abstract: The article delves into the concept of proportionality within civil proceedings, recognizing it as the guiding procedural principle encompassing a multifaceted nature that extends far beyond the mere efficiency in resolving civil cases. Throughout the text, the author delineates five distinct dimensions through which this principle operates within civil proceedings. Finally, the article draws conclusions regarding the present status of proportionality in civil court proceedings and its prospective trajectory amidst ongoing socio-economic changes, technological advancements, and other trends impacting both private and public law within civil proceedings.

Keywords: proportionality, guiding principles of civil procedure, fundamental rights, case-management, procedural efficiency, procedural justice.

tionality Test: Resolving Conflicts Between Key Procedural Principles and Expressed Values in Procedural Law's Interpretation and Application. V. Proportionality as a Persuasive Tool: Guiding Judicial Discretion in Applying the Law. VI. Proportionality as the Foundation of Individual Procedural Institutions. VII. Conclusions: Reflecting on the Current Status and Future Prospects of Proportionality in Civil Proceedings.

I. SETTING THE SCENE: PROPORTIONALITY AS A WELL-ENTRENCHED GENERAL PRINCIPLE OF LAW AND ITS EMERGENCE FROM OBSCURITY IN CIVIL PROCEDURE

Proportionality has long been established as one of the guiding legal principles of EU law, public international law, as well as the constitutional and administrative laws of many European (and non-European) states[1]. Similarly, it has also found its way into private law. Its roots can be traced back to early antiquity, with strong support in Aristotelian philosophy[2]. Multiple connections have been broadly recognized between proportionality and basic concepts of paramount importance to contemporary legal systems of democratic states, such as the rule of law, fairness, justice, pluralism of values, and rationality[3].

On the contrary, in the field of civil procedure, proportionality remains a relatively new concept with apparent, albeit still limited, recognition. Over the last two decades, its international prominence has been on the rise, notably due to the Woolf and Jackson reforms of English civil procedural law in the late 1990s and early 2000s.[4]. This trend is clearly evident in the ELI/UNIDROIT Model European Rules of Civil Procedure[5], where proportionality accompanied by the principle of loyal cooperation between the

1 A clear indication of the remarkable ascent of the principle of proportionality, historically derived from administrative law along with the related concept of balancing legal norms and the rights and freedoms enshrined therein in constitutional law, is the growing recognition of this principle as a manifestation of the globalization of constitutional law (the emergence of global constitutionalism). Simultaneously, it is noted that this principle has become the preeminent constitutional doctrine worldwide, with the capacity to rapidly disseminate across different jurisdictions; see e.g. A.S. Sweet, J. Mathews, *Proportionality, Balancing And Global Constitutionalism*, Columbia Journal of Transnational Law 2008/47, p. 162 i n.; E. Engle, *The History of the General Principle of Proportionality: An Overview,* „The Dartmouth Law Journal" 2012/10 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431179 (accessed on 4.04.2024), p. 2–3; E. Nas, *Rezeption des Verhältnismäßigkeitsprinzips in der türkischen Rechtsordnung*, Berlin 2015, p. 65 *et seq.*; J. Saurer, *Die Globalisierung des Verhältnismässigkeitsgrundsatzes*, Der Staat 2012/1, p. 3 *et. seq*.; M.C.-Eliya, I. Porat, *Proportionality and Constitutional Culture*, Cambridge 2013, p. 10 *et seq.*; K. Möller, *The Global Model of Constitutional Rights*, Oxford 2012, p. 1-23., 99 *et seq.*

2 See e.g. F. Wieacker, *Geschichtliche Wurzeln...,* p. 874 *et seq.;* E. Engle, *The History...*, s. 3–4 i 10; A. Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge 2012, p. 208.

3 See e.g. E. Engle, *The History…,* p. 10-11; M.C. Eliya, I. Porat*, Proportionality...,* p. 13–14.

4 On these reforms see extensively J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis*, Cambridge 2014, *passim.*

5 ELI-UNIDROIT Model European Rules of Civil Procedure. From Transnational Principles to European Rules of Civil Procedure, Oxford 2021, https://academic.oup.com/book/41165 (accessed: 4.04.2024). Hereiafter referred to as „MERCP".

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judge, the parties and their lawyers, has become one of the guiding procedural principles shaping the entire model of civil procedure proposed by those principles[6].

The principle of proportionality, as established in the Civil Procedure Rules of 1996[7] and adopted in MERCP, may be perceived as integral to the so called "three-dimensional strategy of justice" or "a new theory of justice" also known as "proportionate justice". According to the former, courts and other dispute resolution entities dealing with civil matters must not only strive to achieve the correct outcome on the substance of the dispute but must also do so within a reasonable time and with reasonable and proportionate use of resources [8]. At the core of the notion of proportionate justice is the belief that the administration of justice is a high priority public service delivered by the states to individuals and other legal entities[9]. However, this task can only be effectively executed within the limited means and resources available, necessitating effective rationing. Therefore, the principle of proportionality serves primarily as an imperative directive to ensure that the costs of court proceedings are justified relative to the nature, importance, and complexity of each case, while also fulfilling the general management duty in all proceedings with due regard for the proper administration of justice[10]. Recognizing that justice delayed is justice weak, relatively simple problems should be addressed using equally simple methods[11].

As highlighted in the literature, the principles of proportionality and loyal cooperation between the court and parties have emerged as key concepts in civil litigation over the past two decades. These principles have significantly influenced the traditional dispositional and adversarial model of the process supplemented by some inquisitorial elements, owing to the widespread adoption of influential ideas put forth by the Austrian reformer Franz Klein[12]. According to C.H. van Rhee, the essence of the principle of proportionality is to maintain an appropriate balance between the procedural means employed in a given case, the significance of the claims being pursued (the subject

6 Interestingly, in the 2004 ALI/UNIDROIT Principles of Transnational Civil Procedure the principle of proportionality was not expressly mentioned.

7 Supreme court of england and wales county courts the Civil Procedure Rules 1998 (1998 No. 3132 (L.17)), hereinafter referred to as "CPR".

8 See: A. Zuckerman, *Compliance with Process Obligations and Fair Trial*, [in:] M. Andenas, N. Andrews, R. Nazzini, *The Future of Transnational Civil Litigation: English Responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure*, London 2006, p. 134-135 and some critics from J. Sorabji, *English…,* p. 142 *et seq.*

9 See: J. Sorabji, *English…,* p. 2, 101, 135 *et seq.*; J. Sorabji, *The Road to New Street Station: fact, fiction and the overriding objective*, European Business Law Review 2012/1, p. 89*;* R. Susskind,, *Online courts and the Future of Justice*, Oxford 2019, p. 73, 82.

10 This idea is derived from the overriding objective of the CPR established in its Rule 1.1 and expressly embodied in Rule 5 (2) MERCP.

11 R. Susskind, *Online courts….,* p. 82.

12 See: C.H. Van Rhee, *Covid-19 pandemic and the Role of Orality and Writing in Civil Litigation* [in:] *Impact of the COVID-19 Pandemic on Justice Systems. Reconstruction or Erosion of Justice Systems – Case Study and Suggested Solutions*, ed. K. Gajda-Roszczynialska, Göttingen, 2023, p. 282–283.

matter of the trial), and the overall caseload burdening the court[13]. The application of this principle justifies refraining from utilizing the most optimal means based solely on specific procedural values or goals (such as the likelihood of achieving substantive truth or the fullest implementation of the principle of immediacy/directness) if doing so enhances procedural efficiency and reduces process costs. An illustrative example often cited is that of remote hearings. While remote hearings may have certain drawbacks compared to traditional in-person hearings conducted in a courtroom, their numerous advantages—particularly in terms of time and cost savings—generally outweigh these disadvantages. Given that the fundamental guarantees and procedural principles are not significantly compromised, remote hearings are positively evaluated not only in extraordinary circumstances, such as during a pandemic (where there is a need to ensure the continuity of the judicial system under social distancing measures), but also in ordinary conditions[14].

A similar perspective is offered by F.G. Inchausti, who highlights the prevailing influence of English reforms and the longstanding dominance of proposals advocating for civil dispute resolution systems grounded in efficiency and proportionality paradigms[15]. According to these propositions, states should establish and maintain systems that facilitate dispute resolution while balancing values such as costs, duration of proceedings, and the quality of justice dispensed, resolving inherent tensions through the lens of proportionality criteria. This often entails curbing the oral nature of proceedings and striving for optimal utilization of modern digital technologies in the judiciary[16]. Furthermore, as the author astutely observes, the pursuit of effective proceedings within the bounds of proportionality is no longer solely the responsibility of legislators, who are expected to outline general guidelines in procedural regulations for reconciling conflicting values. Instead, ensuring the effectiveness and proportionality of civil proceedings becomes the domain of the courts, which should actively manage each proceeding to implement these values. Consequently, these assumptions necessitate a shift towards greater procedural flexibility, facilitated not only by the court's appropriate discretionary powers but also by the cooperation among parties and with the court, facilitated by the use of suitable technological tools. Consistent with these principles is the promotion of alternative dispute resolution methods, whose wider adoption helps alleviate the burden on courts, leading to more effective utilization of the judicial system where needed[17].

13 C.H. Van Rhee, *Covid-19…,* s. 283.

14 C.H. Van Rhee, *Covid-19…,* s. 283.

15 F. G. Inchausti, *The impact of Covid-19 pandemic on Spanish civil justice: remote hearings as a new tool for the effectiveness of the system,* (in:) *Impact…*(supra 13), p. 201.

16 See also: C. Piché, *The 'New Normal' of Civil Procedure in Canada: Technological Efficiency over Proportionality and Accuracy of Outcomes*, (w:) *Civil Courts Coping with Covid-19,* red. B. Krans, A. Nylund, Hague 2021, p. 35 *et seq.*

17 F.G. Inchausti, *The impact...,* p. 202.

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One might argue that the notion of proportionality described above can be largely equated with the concepts of procedural efficiency[18] and effectiveness[19] , placing special emphasis on the judicious utilization of time, costs, and other resources, along with a focus on amicable dispute resolution and the appropriate application of proportionate sanctions for breaches of procedural obligations or abuse of procedural rights. Against this backdrop, in the Polish doctrine of civil procedure, proportionality has not been explicitly named or extensively discussed among the fundamental procedural principles significantly shaping the entire system of civil procedure. Its significance has been rather subtly acknowledged in the context of specific institutions directly or indirectly referencing the proportionality test or its individual elements, such as e.g. regulations governing the allocation of costs[20], the selection of interim protective measures granted by the court[21], and the enforcement measures implemented by competent enforcement authorities[22]; right to demand stay of excessive enforcement proceedings[23]. Additionally, in separate proceedings concerning intellectual property matters introduced into Polish civil procedural law as of July 1, 2020[24], proportionality, understood as the proper balance of adverse party interests, has been established as a de-

18 Understood as the ability to accomplish prescribed tasks using the least amount of resources, such as time, money, and effort.

19 Understood as the varying fitness for producing a desired results / achieving goals / performing prescribed tasks.

20 Pursuant to Art. 98 § 1 of the Polish Code of Civil Procedure (Act of November 17, 1964, Code of Civil Procedure (consolidated text: Journal of Laws of 2023, item 1550, as amended), hereinafter referred to as "CCP") the losing party is obliged to reimburse the opponent, at his request, for the costs necessary for the purposeful pursuit of rights and purposeful defence (litigation costs). Article 100 CCP stipulates that if the claims are only partially granted, the costs will be mutually abolished or relatively shared. However, the court may impose on one of the parties the obligation to reimburse all costs if the opponent yielded only to an insignificant part of his demand or if the determination of the amount due to him depended on mutual calculation or the court's assessment. Pursuant to Art. 109 § 2 CCP when deciding on the amount of litigation costs awarded to a party, the court takes into account the purposefulness of the costs incurred and the necessity of incurring them due to the nature of the case. When determining the amount of costs incurred by the party represented by a professional lawyer, the court takes into account the necessary workload of the attorney and the actions taken by him in the case, including actions taken to amicably resolve the dispute, also before filing a lawsuit, as well as the nature of the case and the attorney's contribution to its clarification and resolution.

21 Pursuant to Art. 730^1 § 3 CCP when choosing the method of security, the court will take into account the interests of the parties or participants in the proceedings to the extent that the entitled person is provided with appropriate legal protection and the obligated party is not burdened beyond the need.

22 The creditor may indicate the method or methods of enforcement chosen by him. The enforcement authority applies the enforcement method that is least burdensome for the debtor (art. 799 § 1 sentence 3 and 4 CCP). Additionally when determining the amount of the compulsory sum of money which shall be paid by the debtor to creditor for each day of delay in the debtor's performance of an action that another person cannot perform for him and whose performance depends solely on his will, the court will take into account the interests of the parties to such an extent as to ensure the enforceability of the obligation specified in the writ of execution and not to burden the debtor beyond the need (art. 1050^1 § 4 CCP).

23 If enforcement against one part of the debtor's assets is obviously sufficient to satisfy the creditor, the debtor may request a stay of execution against the remaining part of the assets (art. 799 § 2 CCP).

24 See the Act of February 13, 2020 amending the Act - Code of Civil Procedure and certain other acts.

cisive criterion for the use of procedural instruments aimed at securing evidence, its disclosure, or provision, as well as the obligation to disclose information necessary to pursue a claim[25].

Nevertheless, a more thorough look at the issue reveals that proportionality significantly impacts contemporary Polish civil procedure in a more comprehensive and multifaceted manner than merely focusing on concepts of efficiency and effectiveness emphasized by the CPR and MERCP. Its influence extends across numerous spheres. While the scope of this article precludes exhaustive or extensive analysis of all aspects of proportionality, which may also prove relevant for other contemporary jurisdictions embracing principles of democracy and the rule of law—particularly those rooted in traditions of ancient Roman law and great codifications of the 19th century—the following paragraphs aim to provide a succinct overview. The objective is to persuade readers that proportionality in civil proceedings encompasses far more shades and shapes than one could assume at first glance. In their commentary on Rule 5 of MERCP, L. Cadiet and S. Amrani-Mekki aptly describe proportionality as a 'protean notion,' possessing qualities that are both ancient and contemporary, substantive and procedural[26]. As demonstrated below, proportionality exhibits its multifaceted nature not only from a historical perspective or within the substance-procedure dichotomy, but also within the confines of modern civil procedural law.

II. PROPORTIONALITY AS A PROCEDURAL VALUE, A CRITERION FOR THE AXIOLOGICAL ASSESSMENT OF PROCEDURAL REGULATION AND ONE OF THE DETERMINANTS OF THE EFFECTIVENESS OF CIVIL PROCEEDINGS

Polish legal scholarship has rightly pointed out that legal literature generally does not deal explicitly with the axiology of the judicial process. Instead, they primarily develop various catalogs of procedural principles guiding judicial practice[27]. This pattern also applies to civil procedural law. While institutions of substantive civil law have long been subjected to research on the axiological level, the study of civil procedural law regarding the realization and safeguarding of approved values has not received particular attention thus far. Agreeing with the view that the perception of law can never be devoid of assessing its compliance with the system of moral values accepted in a given community[28], and recognizing that these values should be implemented and protected, this state of affairs must be considered highly unsatisfactory.

25 Art. 479^{95} applied in conjunction with arts. 479^{97}, 479^{109} and 479^{113} CCP.

26 L. Cadiet, S. Amrani-Mekki [in:] *European Rules of Civil Procedure. A Commentary on the ELI/UNIDROIT Model Rules*, A. Stalder, V. Smith, F.G. Inchausti eds., Cheltenham 2023, p. 28.

27 J. Helios, *Aspekt systemowy i aksjologiczny „procedur"*, Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji 2008/77 , p. 126.

28 See e.g. B. Wojciechowski, *Dyskrecjonalność sędziowska. Studium teoretycznoprawne*, Toruń 2004, p. 307.

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Recognizing the lack of systematic research on legal values originating from sources external to procedural regulations but significantly impacting civil procedural law, the Center for Research on the Axiology of Civil Procedures (CBAPC) was established in 2019. Affiliated with the First Chair of Civil Procedure at the Faculty of Law and Administration of the University of Lodz, under the leadership of Professor Sławomir Cieślak, this center aims to intensify scientific research in this area. Its mission is to continuously evaluate the axiological justifications for existing or proposed rules governing civil proceedings, particularly during periods of heightened legislative activity that influence the evolution of the civil proceedings model in Poland[29]. As part of a paper outlining the manifesto for the future activities of CBAPC, Sławomir Cieślak proposed a catalog of values that should be embodied by civil procedure[30]. Drawing on insights from the theory and philosophy of law, as well as procedural law doctrine, these values serve as precise criteria for evaluating civil procedural regulations in terms of their adherence to values external to the legal framework, which are deemed essential for procedural justice. Prof. Cieślak identified proportionality, along with internal coherence and logical correctness of procedural mechanisms, as integral components of procedural rationality —one of the five fundamental criteria for assessing procedural regulations in terms of their axiological value Proportionality, in particular, is associated with the functional alignment of procedural means with the intended objectives of civil procedure[31].

As the author correctly highlights, the fundamental sources of procedural values safeguarded in civil proceedings encompass the provisions of the Constitution of the Republic of Poland[32] and relevant international agreements binding on Poland. Of particular significance are Article 6 of the European Convention for the Protection of

29 https://www.uni.lodz.pl/wydzialy-i-jednostki-ul/centrum-badan-nad-aksjologia-procedur-cywilnych (access: 10.04.2024).

30 S. Cieślak, *Założenia aksjologiczne postępowania cywilnego – propozycja sformułowania kryteriów aksjologicznej oceny regulacji procesowej*, [in:] *Założenia aksjologiczne nowelizacji KPC z 4 .07. 2019 r.,* red. S. Cieślak, Łódź 2020, p. 13 *et seq.*

31 *Ibidem,* p. 25. The author considered the following to be reliable criteria for the axiological assessment of procedural regulation : (1) respect for the dignity and freedom (in terms of asserting rights or defending against the claims) of persons participating in the proceedings; (2); ensuring equality of participants – *audiatur et altera pars/audi et altera partem*; (3) procedural rationality, i.e.: (a) proportionality and functionality of the means deployed to achieve the assumed objectives, (b) internal consistency and logical correctness of procedural mechanisms, including ensuring the predictability and internal logic of procedural rules, e.g. ensuring the predictability of court decisions thanks to the full availability of the proper reasons (motives) that guided the court in making them; (4) maintaining an appropriate level of procedural formalism - as a result, predictability of procedural steps of parties to the proceedings is ensured; this level is determined by: (a) equality of participants, (b) rationality and (c) efficiency of the procedure; (5) real verifiability of procedural decisions - through the appropriate development of the system of appeals, in particular the adequate relations between the subject of the appeal and the use of specific appellate measures with different characteristics.

32 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended), hereinafter referred to as "Polish Constitution".

Human Rights and Fundamental Freedoms[33], Article 14 of the International Covenant on Civil and Political Rights[34] as well as Art. 47 of the Charter of Fundamental Rights of the European Union[35]. This extends to proportionality as a procedural value. According to the author, the primary source of proportionality as a procedural value lies in Article 31(3) and Article 2 of the Constitution, which establish the principle of a democratic state governed by law. Building on the insights of Italian scholar and practitioner Giuseppe Tarzia, the author emphasizes that the principle of proportionality dictates that proceedings should be conducted in a manner commensurate with their intended purpose. Furthermore, this principle permits the balancing of conflicting interests within proceedings[36]. Conversely, the absence of proportionality in procedural regulations leads to their incommensurability—wherein the solutions adopted in procedural acts are inadequate in light of the values, objectives, and means of their implementation.

In Polish legal discourse, proportionality, understood as the adequacy of procedural costs and, more broadly, the administration of justice, is closely linked to the effectiveness of civil proceedings. Effectiveness is regarded as a crucial factor in ensuring procedural justice, which constitutes an essential component of the right to access to courts[37]. The efficiency of proceedings is therefore fundamental to judicial processes and is indispensable for ensuring a fair trial. It is widely acknowledged that ensuring procedural effectiveness necessitates reconciling the core objective of the process—issuing a fair judgment—with the imperative to resolve cases as expeditiously as possible, without undue delay. The adage "justice delayed is justice denied" underscores the critical importance of promptly granting judicial protection. It falls upon the court to ensure that proceedings are conducted efficiently, with due respect for procedural safeguards. Achieving this requires adept application of the provisions governing civil proceedings.

Consequently, the effectiveness of civil proceedings should primarily be measured by the accuracy of court decisions (or settlements between parties), attained without unnecessary delay and at proportionate costs[38]. In assessing the effectiveness of civil

33 Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on November 4, 1950 (Journal of Laws of 1993, item 284, as amended) hereiafter referred to as "ECHR".

34 International Covenant on Civil and Political Rights of December 19, 1966 (Journal of Laws of 1977, No. 38, item 167, as amended) hereiafter referred to as "ICCPR".

35 (2000/C 364/01).

36 S. Cieślak, *Założenia aksjologiczne…* (supra 20), p. 20; G. Tarzia, *Lineamenti del processo civile di cognizione*, Milano 2002, p. 5-6.

37 See in particular: E. Gapska, *Konkretyzacja stanowisk procesowych stron przed rozprawą i jej wpływ na efektywność postępowania* [in:] *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego*, rd. K. Markiewicz, A. Torbus, Katowice 2014, p. 589 *et seq.*; K. Flaga-Gieruszyńska, *Szybkość, sprawność i efektywność postępowania cywilnego – zagadnienia podstawowe*, „Zeszyty Naukowe KUL" 2017/3, p. 14.

38 K. Flaga-Gieruszyńska, *supra* 34, p. 14 This approach seems quite close to the concept of the Italian scholar A.P. Pisani, who, as part of his draft of the new Code of Civil Procedure from 2009, included among the main procedural principles (It. *principî fondamentali dei processi giurisdizionali*) the principle of efficiency (It. *efficienza del processo civile*), the essence of which is expressed in Article 0.8 of this project is to ensure proportionate

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proceedings, priority should be given to the reliability and precision of these proceedings, achieved through the prudent allocation of necessary and justified costs. It is essential to differentiate between the State Treasury's obligation to sustain the common court system, even if costs outweigh revenues from court and administrative fees, and instances of unjustified resource wastage within the justice system, such as excessive financial and organizational expenditures in minor and straightforward cases[39].

The significance of proportionality in civil proceedings becomes evident when considering the concept of "effective justice," which is regarded as one of the cornerstones of fair civil proceedings[40]. This notion of justice encompasses achieving the objectives of proceedings and fulfilling their functions in the shortest possible time, utilizing proportionate means—financially sound and up-to-date to the broadest extent—while remaining consistent with the systemic foundations of the law and fulfilling the function of administering justice[41]

Drawing from Michele Taruffo's perspective, it is emphasized that a purely economic (financial) approach to efficiency would prioritize procedural outcomes that are both swift and cost-effective, regardless of their alignment with principles of procedural justice and the fairness of judgments[42]. However, endorsing such an approach would run counter to constitutional and international requirements regarding the guarantee of the right to access to courts and other fundamental rights, which are to be upheld by the judicial system[43]. The imperative to uphold fundamental rights and standards of a democratic rule of law necessitates the provision of procedural guarantees to parties, inevitably leading to prolonged proceedings and increased costs, both individual and societal[44]. In essence, the concept of procedural efficiency and effective justice, as advocated in Polish legal doctrine following Taruffo, is intrinsically linked to proportionality. Proportionality, understood as the optimal balance between the speed and cost-effectiveness of proceedings and the fulfillment of requirements of formal and substantive justice, emerges through the process of weighing conflicting values and goals—a very essence of the notion of proportionality. This approach bears striking

use of judicial resources to resolve the dispute fairly within a reasonable time, taking into account the need to secure court resources for other matters.

39 K. Flaga-Gieruszyńska, *supra* 34, p. 15.

40 Zob. P. Pogonowski, *Efektywność filarem sprawiedliwego postępowania cywilnego*, „Polski Proces Cywilny" 2021/3, p. 357 *et seq.*.; P. Pogonowski, *Efektywne postępowanie zabezpieczające jako gwarancja efektywności wymiaru sprawiedliwości w sprawach cywilnych*, „Przegląd Sądowy" 2021/1, p. 27 *et seq.*

41 P. Pogonowski, *Efektywne postępowanie...,* p. 40.

42 P. Pogonowski, *Efektywność...,* p. 360; M. Taruffo, *Orality and writing as factors of efficiency in civil litigation* [in:] *Oralidad y escritura en el proceso civil eficiente,* ed. F. Capri, M. Ortells, Valencia 2008, p. 187.

43 P. Pogonowski, *Efektywność...,* p. 360; This problem was also understood by M. Taruffo himself, considering that a truly effective procedure is one that combines two features: it results in legal protection provided as quickly and cheaply as possible while maintaining procedural justice and fairness of the judgment; see: M. Taruffo, *Orality and writing...,* p. 187.

44 P. Pogonowski, *Efektywność...*, p. 360.

resemblance to the concept of proportional justice underpinning the Woolf/Jackson reforms of English civil procedure at the turn of the 20th and 21st centuries, suggesting a convergence of ideas across different legal contexts, cultures and traditions.

III. THE PRINCIPLE (TEST) OF PROPORTIONALITY: ENSURING HIERARCHICAL COMPLIANCE IN RULES GOVERNING CIVIL PROCEDURE

The cornerstone of Poland's legal and political transformation, initiated in the mid-1980s and reaching its apex with the adoption of the 1997 Polish Constitution, was the establishment of the principle of a democratic rule of law. This principle, deeply rooted in the concept of fundamental rights and civil liberties grounded in the inherent, inviolable, and inalienable dignity of the individual, finds its theoretical underpinnings in Polish constitutional law strongly influenced by the German notion of the rule of law (*Rechtsstaat*) and fundamental rights (*Grundrechte*), as enshrined in the Basic Law of the Federal Republic of Germany of 1949 and expounded upon in the jurisprudence of the Federal Constitutional Court established in 1951. In line with these foundational principles, the constitutional principle of proportionality (*Verhältnismäßigkeitprinzip*)—understood as the state's obligation to employ proportionate means for legally justified purposes—was integrated into the Polish legal system, including the absolute prohibition of the abuse of state power (*Übermassverbot*). The operationalization of this principle takes the form of the three-element proportionality test, utilized to evaluate the permissibility of state authorities' use of measures that restrict fundamental freedoms and rights to achieve legislative goals. Article 31, section 3 of the Polish Constitution stipulates that restrictions on the exercise of constitutional freedoms and rights may only be established by statute and must be necessary in a democratic state for reasons such as security, public order, environmental protection, public health, morals, or the freedoms and rights of others. Moreover, these limitations cannot encroach upon the essence of freedoms and rights. Similar to German constitutional law, the Polish legal system recognizes the fundamental role of the principle of proportionality in safeguarding individual freedoms and rights against encroachments by state authorities, not only in the realm of legislation but also in its application by executive bodies and courts. Beyond the legislative domain outlined in Article 31, section 3 of the Constitution of the Republic of Poland, the principle of proportionality finds its basis in Article 2, which embodies the concept of a democratic rule of law, implementing the principles of social justice.

Polish constitutional law, drawing from the jurisprudence of the German Federal Constitutional Court, has embraced the concept of the indirect horizontal effect of fundamental rights (*Mittelbare Drittwirkung*)[45]. This theory posits that since fundamental

45 See a comprehensive monograph on that subject:, M. Florczak-Wątor, *Horyzontalny wymiar praw konstytucyjnych,* Kraków 2014, *passim.*

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civil rights and freedoms embody the most crucial objective values of the legal system—such as human dignity, the right to life, freedom, equality, justice, and legal certainty—pervading the entire legal framework and constituting a libertarian democratic constitutional order (*Freihetliche democratische Grundordnung*), their scope cannot be confined solely to vertical relations (state-citizen) [46]. Therefore, these overarching objective values enshrined in fundamental rights also exert influence on relationships governed by private law, serving as "fundamental interpretative guidelines for resolving disputes between private entities to fairly balance conflicting interests"[47]. As the bedrock of the legal system, they also exert indirect effects in horizontal relations, that is, between citizens themselves. Consequently, the impact of the principle of proportionality as a tool for safeguarding these rights cannot be restricted to vertical relations but must extend to horizontal relations between individuals. Such a perspective almost invites the consideration of the constitutional principle of proportionality in the realm of civil procedural law. Given its fundamental purpose and function to adjudicate civil cases—primarily those pertaining to civil law relations—it serves to provide legal protection to rights and other legally protected interests governed by private law regulation (substantive civil law in the broader sense). In light of the indirect horizontal effect of fundamental rights, the principle of proportionality in civil procedural law may thus influence not only the vertical procedural relationship between the competent authority of the proceedings, acting as a manifestation of state power in administering justice, and individual parties (participants in the proceedings) but also horizontal procedural relations among the parties involved in ongoing proceedings.

The enactment of the Polish Constitution marked the constitutionalization of civil procedural law, which was previously governed by the Code of Civil Procedure (CCP) of 1964. This process entailed aligning the provisions of the CCP with the requirements outlined in the new constitution, incorporating and, in some cases, elevating standards for the protection of human rights and citizens' rights, including the right to access to courts and a fair trial as enshrined in ECHR and ICCPR. In this transformative process, besides legislative initiatives, the Constitutional Tribunal—tasked with overseeing the compatibility of laws, regulations, local ordinances, and international agreements with

46 The judgment of January 15, 1958 in the Lüth case (I BvR 400/51, NJW 1958, p. 257.) is generally considered to be the first judgment of the Federal Constitutional Court that gave rise to the doctrine of indirect horizontal impact of fundamental rights, which stated that the fundamental rights guaranteed in the German Basic Law radiate into all areas of law, and therefore no legal provision may be interpreted in contradiction with the system of values established by these rights. Significantly, the same ruling is considered to be the beginning of the application of the proportionality test (weighting mechanism) in its currently known form; see on this topic, especially: M. Florczak-Wątor, *Horyzontalny wymiar…*, p. 218 *et seq*.; E.H. Morawska, *Zasada proporcjonalności jako konstytutywny element paradygmatu zasady państwa prawnego* [in:] *Minikomentarz dla Maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego*, rd. M. Zubik, Warszawa 2017, p. 75-76 and the literature and case-law cited therein; J. Limbach, *„Promieniowanie" konstytucji na prawo prywatne, „*Kwartalnik Prawa Prywatnego*"* 1999/3, p. 408; A. Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Warszawa 2009*,* p. 49.

47 E.H. Morawska, *Zasada proporcjonalności…,* p. 75 and the literature and case-law cited therein.

higher-ranking legal acts—played a pivotal role. Throughout the period of the Constitution's enforcement, the Constitutional Tribunal scrutinized numerous provisions of the CCP for their constitutionality. In its assessments of procedural norms, the Constitutional Tribunal frequently employed the constitutional test of proportionality[48].

The analysis of Constitutional Tribunal jurisprudence unmistakably illustrates the significant role played by the principle of proportionality as a tool for assessing the hierarchical conformity of norms. This principle serves as a crucial mechanism for ensuring that individual components comprising the Polish system of civil procedural law adhere to constitutional standards regarding the right to access to courts. Furthermore, it facilitates the alignment of procedural norms and institutions with other fundamental rights and freedoms guaranteed in the Constitution of the Republic of Poland. These include the freedom of the individual, equality before the law and equal rights, as well as the right to appeal against first-instance court decisions in accordance with the principle of at least two instances of proceedings.

The jurisprudence of the tribunal regarding the constitutionality review of civil procedure provisions is firmly grounded on endorsing the state's broad regulatory autonomy within civil procedural law. The tribunal maintains the stance that its role does not encompass evaluating the appropriateness of legislative solutions but rather intervenes only when the legislature exceeds the bounds of its regulatory freedom to such an extent that it results in a significant violation of constitutionally protected values. The parameters of this freedom are delineated by constitutional standards pertaining to the right to access to courts in a democratic state governed by law, alongside other constitutional principles directly or indirectly relevant to judicial justice. Furthermore, they are shaped by the rights and freedoms guaranteed by the Constitution, including those subject to protection and implementation within the civil judicial system. Given that these principles, rights, and freedoms are not inherently absolute, defining the precise scope of this freedom necessitates recourse to the constitutional test of proportionality. This test, in conjunction with other constitutional norms, delineates the boundaries of legislative authority's regulatory autonomy within civil procedure.

48 See in particular the following judgments of the Constitutional Tribunal: of March 7, 2007, K 28/05, OTK-A 2007, No. 3, item 24 (on the violations of human dignity and personal freedom); of July 10, 2000, SK 12/99, OTK 2000, No. 5, item 143; of September 7, 2004, P 4/04, OTK-A 2004, No. 8, item 81; of January 9, 2006, SK 55/04, OTK-A 2006 No 1, item 1; of May 30, 2007, SK 68/06, OTK-A 2007, no 6, item 53; of June 26, 2007, SK 29/05, OTK-A 2007, no. 6, item 54; of May 20, 2008, P 18/07, OTK-A 2008, no. 4, item 61; of June 16, 2008, P 37/07, OTK-A 2008 No 5, item 80; of July 1, 2008, SK 40/07, OTK-A 2008, no. 6, item 101; (on the limitations of the right to a court and fair trial vs the principle of proportionality); of June 9, 2003, SK 12/03, OTK-A 2003, no. 6, item 51 (on the principle of protecting trust in the state and law it makes vis-a-vis the principle of proportionality); of November 16, 2004, P 19/03, OTK-A 2004, no. 10, item 106 (the principle of equality before the law and the right to equal treatment by public authorities and the principle of proportionality); of April 12, 2012, SK 21/11, OTK-A 2012, no. 4, item 38; of October 30, 2012, SK 20/11, OTK-A 2012, no. 9, item 110 (the right to appeal against the judgments of the court of first instance and the principle of two instances *vis-a-vis* the principle of proportionality).

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From the perspective of the principle of proportionality, it's crucial to underscore the unique status held by human dignity within the framework of constitutional principles and values. Serving as the foundation for other rights and freedoms, and owing to its inherent and inalienable nature, human dignity stands as the sole constitutional freedom and right not subject to any limitations. Consequently, human dignity evades "balancing" under Article 31 section 3 of the Constitution of the Republic of Poland with other principles, values, and rights affirmed therein[49]. As a result, any regulation within the realm of civil procedural law that would lead to the objectification of an individual in civil proceedings, thereby directly infringing upon their dignity, should be deemed categorically unacceptable. This holds true even if such objectification is purportedly justified by the necessity to safeguard other legal rights and values.

IV. UTILIZING THE PROPORTIONALITY TEST: RESOLVING CONFLICTS BETWEEN KEY PROCEDURAL PRINCIPLES AND EXPRESSED VALUES IN PROCEDURAL LAW'S INTERPRETATION AND APPLICATION

The concept of fundamental or guiding/formative principles of civil procedure (French: *les principes directeurs du process*), akin to the general notion of legal principles in the realms of theory and philosophy of law, remains ambiguous and subject to controversy within Polish doctrine. Given the plurality of perspectives, there appears to be little prospect of definitively resolving disputes concerning the precise meaning of this concept[50]. In this paper, I reserve the term "fundamental principles of civil pro-

49 To properly understand this position, it is necessary to distinguish between a human dignity (dignity as a value) and a personal dignity understood as personality. Human dignity, according to the preamble and Article 30 of the Constitution, is a fundamental category in the legal order, natural, transcendent, and inherent to every human being by virtue of belonging to human-kind. This understanding of human dignity is inviolable and entitled to absolute protection. Therefore, it cannot be weighed against other values, which excludes the application of the principle of proportionality to it. Personal dignity, understood as a good name, honor (external aspect), and self-esteem (internal aspect), is protected under Article 47 of the Constitution as a personal right. Personal rights, in this sense, are subject to restrictions that meet the requirements of proportionality. Constitutional norms prohibiting torture, cruel, inhuman, or degrading treatment and punishment (Article 40 of the Constitution) and establishing an unconditional prohibition on forcibly subjecting people to scientific or medical experiments without freely given consent (Article 39 of the Constitution) and ensuring legal protection of life (Article 38 of the Constitution) directly protect human dignity in the personal aspect. Protection of human dignity through these prohibitions sets insurmountable limits to the application of the proportionality test. As noted in the legal doctrine, these constitutional norms must be included in the category of rules within the meaning of Robert Alexy's concept. Therefore, they are not subject to optimization—they can be implemented in full or not at all. Meanwhile, standards such as Article 47 (protection of private and family life, honor, and good name, as well as making decisions about one's personal life), Article 49 (protection of freedom and secrecy of communication), and Article 50 (inviolability of the home), which protect personal dignity, are qualified as principles. These principles, by their nature, can be implemented to a greater or lesser extent and are thus subject to a weighting mechanism - see: A. Skorupka, *Dopuszczalność dowodu sprzecznego z prawem w sądowym postępowaniu cywilnym*, Warszawa 2021, p. 250.

50 See however, attempts made in recent years to harmonize the understanding of the concept of guiding procedural principles in the civil procedure doctrine with the approach to the principles of law in the general

cedure" for those norms within civil procedure that wield significant influence over the prevailing procedural model. These norms impact a substantial array of procedural institutions or those of fundamental significance to the structure or dynamics of proceedings. Moreover, they serve as crucial interpretative guides in deciphering the content of procedural law norms from applicable provisions, acting as navigational aids for their proper application in procedural practice. These primary guiding principles of conduct, shaping a distinct procedural model, embody a specific conception of justice and the procedural framework in which it unfolds. They delineate the interaction between the court and the parties, reflecting the broader relationship between individuals and the state within a given legal order. Additionally, they define the interplay between private interests and the public interest[51]. To illustrate, if the corpus of civil procedure law were akin to a building, its rules would not only form its foundation but also be emblazoned in capital letters on the pediment, ensuring they are unmistakably acknowledged before entering this legal edifice[52].

Despite the absence of a consensus on the catalog of primary procedural principles applicable in Polish civil procedure law, it becomes apparent that most of these principles—such as the principle of party disposition, the adversarial principle (principle of parties' presentation), and the principle of immediacy/directness—are inherently directive in nature, consistent with the concept of legal norms articulated by Ronald Dworkin[53] and adapted in Robert Alexy's theory of fundamental rights[54]. They function as directives of an optimizing nature, rather than definitive rules. They instruct the addressees to execute certain actions (such as the behavior of parties and other participants in the proceedings or procedural authorities) to the greatest extent feasible, op-

legal theory: S. Cieślak, *Formalizm postępowania cywilnego,* Warszawa 2008, p. 67 *et seq.*; M. Muliński, *Zasada nieobciążania ponad potrzebę strony biernej postępowania zabezpieczającego i egzekucyjnego*, Sopot 2007, p. 29 *et seq.*; A. Kościółek, *Zasada jawności w sądowym postępowaniu cywilnym*, Warszawa 2018, p 86 *et seq.*; M. Uliasz, *Zasada jawności sądowego postępowania egzekucyjnego w dobie informatyzacji*, Warszawa 2019, p. 83 *et seq.* On the notion of guiding procedural principles in the Polish doctrine: see also e.g. H. Mądrzak, *O pojmowaniu naczelnych zasad postępowania cywilnego*, [in:] *Proces i prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci Profesora Jerzego Jodłowskiego*, ed. E. Łętowska, Warszawa 1989, p. 387; J. Gudowski, *O kilku naczelnych zasadach procesu cywilnego – wczoraj, dziś, jutro* [in:] ed. A. Nowicka, *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Prof. Stanisławowi Sołtysińskiemu*, Poznań 2005, p. 1015 *et seq.*; A. Jakubecki, *Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego*, [in:] *Czterdziestolecie kodeksu postępowania cywilnego. Zjazd katedr postępowania cywilnego w Zakopanem (7–9.10.2005 r.)*, Kraków 2006, p. 350 i n.; A. Torbus, *Zarys teoretyczny zasad postępowania cywilnego* [in:] *Kodeks postępowania cywilnego z perspektywy pięćdziesięciolecia jego obowiązywania: doświadczenia i perspektywy*, ed. Ł. Błaszczak, I. Gil, E. Marszałkowska-Krześ, Sopot 2016, p. 89 *et seq.*

51 Tak: L. Cadiet, S. Amrani-Mekki [in:] A. Stalder, V. Smith, F.G. Inchausti ed., *European…,* s. 16.

52 According to G. Cornu, the guiding principles of civil procedure as an expression of the ideological, political or doctrinal concept of this procedure constitute the spirit of the code (*l'esprit du code*) and its quintessence;: G. Cornu, *L'élaboration du Code de procédure civile,* Revue d'histoire des facultés de droit et de la science juridique 1995/16, p. 252.

53 R. Dworkin, *Taking Rights Seriously*, Harvard 1977, *passim.*

54 R. Alexy, *A Theory of Constitutional Rights*, Oxford 2002, *passim.*

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erating on a spectrum of "more or less" rather than a categorical "either-or" scheme. As a result, these principles may be adhered to (or conversely, breached) to varying degrees, and the partial implementation of a specific procedural principle (and thereby the procedural values they embody) often stems from the necessity to uphold other important values, the realization of which may conflict with a given principle. Furthermore, numerous classical procedural principles can be readily paired into dialectical opposites, where one serves as the antithesis of the other (e.g., the principle of orality versus the principle of writtenness, the principle of disposition versus the principle of the court acting ex officio, the adversarial principle versus the inquisitorial principle). Of course, there exist procedural rules that do not embody the nature of optimization directives but are instead definitive (e.g., the principle of two instances of proceedings[55]), akin to rules in Dworkin and Alexy's theory of legal norms. When doubts arise concerning the validity of norms that deviate from these principles, the classic conflict rules (*lex superior, derogat legi inferiori, lex specialis derogat legi generali; lex posteriori, derogat legi priori*) suffice for resolution.

The observation that several key primary procedural principles share a structural resemblance with the principles underlying fundamental rights, as per Robert Alexy's theory, underscores the author's contention regarding a stringent, bidirectional logical correlation between Alexy's theory of principles and the principle of proportionality. According to this perspective, the theory of principles inherently implies the principle of proportionality, and vice versa. At the core of the requirement of proportionality (the principle of proportionality) lies the imperative to implement the protected principle in a manner that minimizes any adverse impact on the realization of competing principles. To assess whether this requirement is fulfilled, a three-part proportionality test is employed, aimed at balancing conflicting principles and the values they safeguard.

There appear to be no compelling reasons why the proportionality test, as developed theoretically by Robert Alexy, which has demonstrated its effectiveness in numerous constitutional, administrative, and common law courts across many European countries (and beyond), as well as in international tribunals and supranational organizations adjudicating disputes over law, cannot be successfully applied in the practice of Polish courts. This would especially hold true in cases where the resolution of specific procedural law issues necessitates the balancing of conflicting primary procedural rules.

Furthermore, the principle of proportionality can effectively guide the interpretation of procedural provisions structured as ordinary rules, by seeking and selecting an

55 Under Article 176, Section 1 of the Polish Constitution, there is an explicit guarantee that legal proceedings must consist of at least two instances, and this rule does not permit any statutory exceptions. Unlike Dworkin's and Alexy's principles, this norm cannot be subject to any weighting operations. In other words, the rule requiring at least two instances in legal proceedings under Polish law is binary in nature: either the proceedings consist of at least two instances and thus conform to the rule, or they must be deemed in breach of the constitutional norm.

interpretative solution optimized in accordance with the system of guiding principles. Undoubtedly, the general principle of proportionality has emerged as a cornerstone of contemporary legal thought, embodying the methodological fusion of post-positivist and neo-naturalistic conceptions of law, synthesizing elements inherent in both legal positivism and natural law[56]. This development can be attributed to a shift in the prevailing paradigm of its application within the realm of legal theory and philosophy, characterized by a transition from the syllogistic model to the argumentative model, also known as the argumentative-interpretive or discursive model[57]. Central to this argumentative and interpretive model is the act of balancing legal principles, which lies at its core[58]. Consequently, methods of balancing rooted in the principle of proportionality have now attained the status of fundamental legal reasoning in the judicial application of law. There are no compelling reasons why civil procedural law, as a result of embracing the principle of proportionality, should remain a "lonely island" within a legal system oriented towards praxeological and axiological rationality. Hence, the principle of proportionality should inform all decisions, particularly those arising from conflicts between principles, values, and legally protected interests.

Indeed, it is a well-worn truism that the act of "weighing," symbolized by the scales held by Themis, is deeply ingrained in the imagery of justice administration. This symbolism not only serves as a visual identifier for many institutions and entities involved in dispensing justice but also constitutes an integral component of legal culture and the collective consciousness of modern societies. There is no justification for confining the concept of proportionality, which permeates all branches of law, to the realm of mere symbolism and ornamentation within the civil justice system.

V. PROPORTIONALITY AS A PERSUASIVE TOOL: GUIDING JUDICIAL DISCRETION IN APPLYING THE LAW

The Polish Code of Civil Procedure, akin to most contemporary legal codifications governing court procedures in civil cases, encompasses numerous scenarios wherein judicial authorities are vested with discretionary powers regarding procedural conduct. This discretion entails the ability to choose among multiple permissible alternative actions, such as deciding to undertake a specific procedural step or abstaining from it, or selecting from various mutually exclusive actions or procedures[59]. Depriving judges of

56 See e.g. A.S. Sweet, J. Mathews, *Proportionality...*, p. 72; E. Engle, *The History...,* p. 2..

57 B. Wojciechowski, *Model zakresu swobody interpretacyjnej prawa administracyjnego* [in:] *System Prawa Administracyjnego*, t. 4, *Wykładnia w prawie administracyjnym.* ed. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2015, p. 483 *et seq.*; B. Wojciechowski, *Dyskrecjonalność...*, p. 242. On this pehenomenon see also: L. Morawski, *Argumentacje, racjonalność prawa i postępowanie dowodowe,* Toruń 1988, p. 95 i n.; L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2000, p. 151.

58 B. Wojciechowski, *Model zakresu...,* p. 490 *et seq.*

59 B. Wojciechowski, *Dyskrecjonalność...,* p. 185.

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this necessary margin of discretion would render the creation of a rational model for judicial case management implausible. Such case management (*Materielle und Formelle Prozessleitung*), constituting a cornerstone of modern civil procedures, aims to combat the perennial adversary of the justice system—manifested, over centuries and across various jurisdictions, as a "three-headed hydra" comprising delays, costs, and vexation/complexity[60].

The statutory authorization for judicial discretion in court proceedings primarily stems from the imperative of expediting and economizing trials[61]. In pursuit of expediency, it becomes essential to grant judges a certain latitude in shaping the proceedings, especially in cases where a rigid procedural framework is neither feasible nor advisable. This discretion allows for the necessary flexibility in adapting the proceedings to the specific circumstances of each case, thereby ensuring a fair and efficient administration of justice.

It is evident that judicial discretion does not imply unfettered discretion, including arbitrary actions. Rather, it's bounded by the need to balance statutory objectives and legal principles, thus defining its limits in the judicial application of the law[62]. In this regard, the process of balancing principles and values encapsulates the essence of the proportionality principle. An important interpretative tool applicable to provisions of civil procedural law utilizing permissive language, such as "may," involves a "weighting interpretation." This approach, rooted in the theory and philosophy of law, as well as constitutional law dogmatics, entails weighing reasoning to discern the boundaries of permissible constraint on constitutional freedoms and rights.

Employing the proportionality test in procedural decisions grounded on judicial discretion serves as a safeguard against arbitrariness, rendering these decisions more rational. Simultaneously, its application facilitates rational and efficient oversight of such decisions, enhancing the uniformity of law application and, consequently, its predictability. The principle of proportionality, functioning as a mechanism for weighing values in civil trials, offers precise stages for its application. This enables the refinement of approaches to utilizing judicial discretion to ensure uniform law application, enhancing certainty and predictability. Judges' choices within their discretionary powers must be accompanied by convincing justifications that balance conflicting principles and legal objectives[63]. Granting procedural authorities the necessary freedom within judicial

60 See in that regards e.g. J. Jacob, *Justice between man and man*, Current Legal Problems 1985, No 1, p. 226; M Storme, *Introductory Address,* (in:) *The Law's Delay: Essays on Undue Delay in Civil Litigation*, ed. C.H. van Rhee, Cambridge 2004, p. iv (introduction); M. Storme, *A Single Civil Procedure for Europe: A Cathedral Builders' Dream*, Ritsumeikan Law Review 2005, No 20, p. 96.

61 B. Wojciechowski, *Dyskrecjonalność…,* p. 185. The author observes that judicial discretion is more restricted in criminal proceedings, a reflection of the punitive nature of criminal law. This limitation is linked to the imperative to maximize legal certainty, ensuring predictability in the procedural realm.

62 B. Wojciechowski, *Dyskrecjonalność…,* p. 226 et seq.; *idem, Model zakresu…,* p. 490 *et seq.*

63 B. Wojciechowski, *Dyskrecjonalność…,* p. 290.

discretion, coupled with the principle of proportionality to rationalize its use, alongside a culture of reasoned justifications for procedural decisions, fosters the realization of seemingly conflicting values: flexibility in judicial procedures and their predictability and transparency.

A prime example of applying the principle of proportionality to practical procedural issues is the evaluation of the admissibility of so-called illicit evidence, *i.e.* obtained in violation of the law or social norms. According to Article 237 of the Code of Civil Procedure (CCP the subject of evidence are facts that are important for resolving the case. While this regulation is subject to specific prohibitions and evidentiary privileges explicitly addressed in other CCP provisions, its plain language generally allows for the consideration of evidence obtained through illegal or unethical means—such as civil torts or even criminal offences —as long as it pertains to significant case issues and its credibility and probative value are deemed sound upon judicial assessment. Conversely, a more legalistic approach, grounded in the "fruit of the poisonous tree" doctrine rooted in common-law traditions, holds that courts, as public organs administering justice, must adhere strictly to the law in its entirety. Thus, they cannot condone or entertain evidence obtained illicitly , let alone authorize and as a result encourage their use in proceedings.

The aforementioned extreme viewpoints find reconciliation through a flexible approach grounded in the principle of proportionality[64]. According to this approach, the prohibition against admitting evidence obtained in contravention of the law or societal norms (in particular the duty of good faith conduct) is inherently relative, owing to the potential conflict between legally protected values that may warrant the introduction of such evidence in court proceedings. The resolution of such conflicts necessitates the application of the three-pronged constitutional test of proportionality. This test consists of the following elements (criteria):

1) usefulness, appropriateness; or suitability of the measure (*Geeignetheit*) - this criterion requires that the means used must be suitable and appropriate to achieve the intended goal (fit for its purpose);
2) necessity or indispensability (*Notwendigkeit, Erforderlichkeit*) - his criterion stipulates that the measure must be necessary, meaning that the objective

64 This approach is taken in particular by the following scholars: K. Knoppek [in:] *System Prawa Procesowego Cywilnego, t. 2, cz. 2, Postępowanie procesowe przed sądem pierwszej instancji*, ed. T. Ereciński, T. Wiśniewski, Warszawa 2016; p. 108 *et seq.*; idem, *Wstęp do badań nad problemem dowodów uzyskanych sprzecznie z prawem w procesie cywilnym* [in:] *Problem dowodów uzyskanych sprzecznie z prawem w procesie cywilnym,* ed. K. Knoppek, Poznań 2018*,* p 7 *et seq.*; K. Gajda-Roszczynialska, *Ograniczenia dopuszczalności dowodów nielegalnych w postępowaniu cywilnym – granica czy fundament dążenia do prawdy w postępowaniu cywilnym?,* „Polski Proces Cywilny" 2016/3, p. 393 *et seq;* eadem, *Kilka uwag o dopuszczalności dowodów nielegalnych na tle prawnoporównawczym w polskim postępowaniu cywilnym*, [in:] *Sine ira et studio. Księga pamiątkowa dedykowana Sędziemu Jackowi Gudowskiemu*, ed. T. Ereciński, P. Grzegorczyk. K. Weitz, Warszawa 2016, p. 70 *et seq.*; A. Skorupka, *Dopuszczalność… op. cit.,* p 245 *et seq.*

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cannot be achieved without it, or through alternative measures that cause less interference with protected rights, values or other legitimate interests;

3) proportionality in the strict sense (*Verhältnismäßigkeit im engeren Sinne* also referred to as the adequacy or rationality of the measure of interference (*Angemessenheit, Zumutbarkeit*) - this criterion involves balancing the benefits of achieving the legally protected good against the costs of the measure's application.

Following the proportionality test, as described above, the admission of illegal evidence must be deemed necessary to establish the factual basis of the claim. This arises when the evidence pertains to facts crucial for case resolution—particularly in meeting specific substantive law requirements for the claim or the foundation for an allegation based on substantive law—and when alternative means of proving these facts are unavailable to the party[65]. In essence, the chosen measure must be both useful and indispensable to achieve the objective of providing due legal protection to the parties (subjective approach), or to accomplish the objective of the legal process by correctly adjudicating the case and authoritatively determining the existence or non-existence of a specific norm in line with the actual circumstances (objective approach). Secondly, the protected interest (subjective rights or interests sought for protection in the pro-

65 For instance, one may consider a scenario where an injured employee installs a "hidden camera" in the supervisor's office where acts of mobbing or sexual harassment occurred in circumstances excluding the presence of witnesses. Similarly, a parent seeking to limit parental authority and contact with a child may use a hidden camera to reveal acts of violence or other inappropriate behavior towards the child. As K. Knoppek astutely points out, in the first example, granting legal protection to the employee and determining whether there has been a severe violation of labor law by the director are goods with higher axiological value than condemnation for the perpetrator of the illegal recording and for the employee (plaintiff) who used the evidence obtained in this manner. Concerning the second example, the author is correct in asserting that: "It is difficult to imagine that the guardianship court in this situation would prioritize rejecting evidence obtained by a crime over discovering the truth and protecting the child's best interests; K. Knoppek [in:] *System...*, ed. T. Ereciński, T. Wiśniewski, p. 125–126. It is also well established in case law that the admissibility of using a secretly recorded material arises when, given the circumstances of the case, the party is unable or faces excessive difficulty in proving its decisive arguments through other means of evidence. In such instances, employing evidence obtained contrary to the law or social principles becomes the sole avenue to defend the rights of the injured party in civil proceedings; see among others judgment of the Supreme Court in Poznań of January 23, 2013, I ACa 1142/12, LEX No. 1289497; judgment of the Court of Appeal in Łódź of August 12, 2016, I ACa 1653/15, LEX no. 2114020; judgment of the Court of Appeal in Katowice of November 3, 2016, III APa 32/16, LEX No. 1271921; judgment of the Court of Appeal in Łódź of June 8, 2021, III APa 3/21, LEX No. 3230518. It is important to note that the Polish Penal Code (Art. 267) penalizes specific offenses against the protection of confidential and private information, which are punishable by a fine, restriction of liberty, or imprisonment for up to two years. These offenses include: gaining access to information not intended for the accessing party by opening a closed document, connecting to a telecommunications network, or breaking or bypassing its electronic, magnetic, IT, or other special protections; unauthorized access to all or part of an IT system; unauthorized installation or use of a wiretapping device, a visual device, or any other device or software to obtain information to which the offender is not entitled. Thus, merely recording a particular event by its participant (active or passive, e.g., a passer-by) without the knowledge and consent of other participants (e.g., a principal during a conversation with an employee) does not constitute a criminal offense under Polish law. However, it may amount to a civil tort against the personal rights of the injured party if the conditions established in the relevant provisions of the Civil Code are met.

ceedings and the effective right to a fair trial), within the specific case context, must outweigh the interest sacrificed due to the admission of evidence[66]. Thus, the measure used must also be strictly proportionate. As rightly noted in the literature, 'the potential admission of illegally obtained evidence always involves the sacrifice of one good to protect another'[67]. The protected interests in such cases primarily include the right of every individual to access the courts, obtain effective judicial protection, and a fair trial (Article 45(1) of the Constitution of the Republic of Poland and Article 6(1) of the ECHR), as well as, at times, the protection of the best interests of the child, the right to essential necessities, labor and social rights protection, family protection, and health protection. In considering the admission of illegally obtained evidence, the court must weigh the relationship between the aforementioned protected interests and the interests sacrificed due to the admission of such evidence. The condition for admitting evidence obtained unlawfully is that the protected interest clearly outweighs the sacrificed interest, which typically involves the exploitation of someone else's prohibited act. Furthermore, the type of case and the nature of the claim pursued therein must also be considered when contemplating the admission of evidence obtained contrary to the law. Additionally, the pursuit of substantive truth in civil proceedings supports the admission of evidence obtained in contravention of the law.

In the aforementioned context, it is notable how the proposed solution in Polish doctrine aligns with the regulation adopted in MERPC. According to Rule 90(1) of the MERPC, evidence obtained illegally is generally excluded from proceedings, except where Rule 90(2) applies. This exception allows the court to admit illegally obtained evidence only if it is the sole means to establish crucial facts for case resolution. In exercising its discretion to admit such evidence, the court must consider the conduct of the other party or non-parties involved and the severity of the breach. As clarified in the official explanations to the MERPC, Rule 90(1) emphasizes the general inadmissibility of illegally obtained evidence, particularly when it violates the fundamental rights of a party or non-party[68]. The exclusion of evidence entails that the court cannot base its decision on the evidence in question under any circumstance. Exceptions to this general rule echo the approach often employed by the European Court of Human Rights, emphasizing the protection of the right to evidence[69]. These exceptions come into play when illegally obtained evidence is the sole means to establish facts necessary to meet the party's burden of proof. However, the authors of the MERPC emphasize that exceptions outlined in Rule 90(2) should be rare. The mere legal possibility of admit-

66 For example, the welfare of a minor child in relation to the protection of privacy and home security of an inappropriately behaving parent who has been fitted with a listening device; dignity, sexual freedom and other personal rights, as well as the basic employment rights of the harassed or mobbed employee in relation to confidentiality of communication and protection of the employer's privacy.

67 K. Knoppek [in:] *System...*, ed. T. Ereciński, T. Wiśniewski, p. 133.

68 See: ELI-UNIDROIT Model..., p. 139, Rule 90, comment 2.

69 See: ELI-UNIDROIT Model..., p. 139, Rule 90, comment 1.

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ting evidence obtained unlawfully should not incentivize the violation of legal norms during evidence collection. Instead, the relative prohibition on the procedural use of such evidence should deter resorting to unlawful activities, encouraging the effective utilization of procedural instruments provided for in these rules to ensure fair, reasonable, and appropriate means of obtaining evidence and relevant information[70]. The admission of unlawfully obtained evidence necessitates a meticulous balancing act, considering all pertinent issues and conflicting interests, including the right of access to evidence, the protection of fundamental rights—especially those concerning privacy, good faith, and the principle of fair play[71]. Within the aforementioned rules, different standards may be permissible depending on the areas of substantive law concerned, as well as the specific methods of unlawfully obtaining evidence. Notably, evidence obtained through torture[72] or other forms of inhuman or degrading treatment should be deemed strictly inadmissible.

VI. PROPORTIONALITY AS THE FOUNDATION OF INDIVIDUAL PROCEDURAL INSTITUTIONS

The principle of proportionality, as a component of the *ratio legis* of procedural institutions, can be aptly illustrated by two Richard Susskind's witty remarks: "we should not be using a sledge- hammer to crack (or miss) a nut" and "you do not need a Rolls Royce to haul a water cart"[73]. In Polish, the equivalent of the above sayings is the commandment "not to shoot a sparrow with a cannon". However, this humorous analogies only partly captures the essence of the issue at hand. It is essential to recognize that if one aims to achieve desired outcomes, resorting to disproportionate measures is akin to using a revolver against a tank. Taking a culinary perspective, the key to a delectable dish lies not only in the quality of ingredients but also in their proper balance. Just as one shouldn't over-salt soup, neither should they under-season it.

Applying the aforementioned truisms to the realm of civil procedure, it becomes apparent that to effectively fulfill the objective of proceedings—namely, providing timely and equitable legal redress, conducting proceedings diligently, and avoiding disproportionate costs relative to the dispute's value or significance—it is crucial to shape the procedural framework in a manner that maximizes the realization of these values. This includes designing procedural mechanisms and institutions that facilitate the optimal implementation of these objectives, while also allowing for their proper reconciliation in the event of conflicting interests.

70 See: ELI-UNIDROIT Model..., p. 139, Rule 90, comment 5.

71 See: ELI-UNIDROIT Model..., p. 139, Rule 90, comment 3.

72 See: ELI-UNIDROIT Model..., p. 139, reguła 90, comment 4.

73 R. Susskind, *Online Courts...,* p. 82.

The analysis of Polish civil procedural law reveals numerous provisions aimed at ensuring the proportionality of proceedings. While some have been recently introduced or significantly reinforced, others are longstanding features of domestic civil procedural law. Among the new measures implemented in 2019[74] are the concept of preparatory proceedings centered around a conciliatory preparatory meeting, aimed at resolving cases without the need for a hearing and, if necessary, preparing cases for hearing[75]; the court's authority to inform parties about the likely outcome based on statements and evidence, including offering interpretations of applicable legal provisions or undisputed facts[76]; the acceptance of written witness testimonies as evidence[77]; the admissibility of an opinion prepared at the request of a public authority in other proceedings[78]; the admissibility of combination of witness and expert roles in simplified proceedings[79]; the possibility of dismissing a manifestly unfounded claims in summary proceedings at a closed session without the participation of the defendant[80]; and the introduction of sanctions for procedural abuse [81]. Significantly reinforced, particularly in terms of feasibility, are remote court hearings, including evidence collection[82], as well as judicial discretion in simplified proceedings to replace expert opinions with the court's own assessment[83].

It should be noted, however, that the aforementioned changes, aligned with the principle of proportionality in proceedings, were often implemented in a disorderly and unprepared manner. There was a lack of proper dialogue with the scientific com-

74 Act of July 4, 2019 amending the Act - Code of Civil Procedure and certain other acts (Journal of Laws, item 1469, as amended).

75 Art. 205^{1}-205^{12} CCP.

76 Art. 156^{1} and art. 156^{2} CCP.

77 Art. 271^{1} CCP.

78 Art. 278^{1} CCP.

79 Art. 505^{7} § 3 CCP.

80 Art. 191^{1} CCP.

81 Art. 226^{2} CCP.

82 Art. 151 § 2-9, art. 235 § 2-3, 235^{1}, 263^{1}, 284 § 3 CCP as provided for pursuant to Act of July 7, 2023 amending the Act - Code of Civil Procedure, the Act - Law on the Organization of Common Courts, the Act - Code of Criminal Procedure and certain other acts (Journal of Laws, item 1860). Previously, during the times of COVID-19 pandemic remote hearings were routinely used on the basis of episodic provisions included in the special statute Act of March 2, 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them (consolidated text: Journal of Laws of 2024, item 340, as amended). In pre-covid era, remote hearings required presence of all involved persons in the courtroom (either of the court seized or another courts assisting in conducting the remote hearing) and as such were not used at all. More on the impact of COVID-19 pandemic on the civil proceedings in Poland see: P. Rylski, *Transformation of Polish Civil Procedure in Light of Covid-19,* (in:) *Civil Courts Coping with Covid-19,* ed. B. Krans, A. Nylund, Hague 2021,p 155 *et seq.*; K. Markiewicz, *The role of courts in enforcing the right to fair trial in post-pandemic reality,* [in:], *Impact of the COVID-19 Pandemic on Justice Systems Reconstruction or Erosion of Justice Systems - Case Study and Suggested Solutions.,* ed. K. Gajda-Roszczynialska, Göttingen 2023, p. 47 *et seq.*

83 Art. 505^{7} § 1-2 CCP.

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munity and legal professionals, as well as insufficient preparation of judicial staff for the new solutions. This included a shift in adjudication philosophy from passive to active judges and from a purely adversarial system to a culture of open dialogue and cooperative interaction between parties, their lawyers, and judges. Consequently, the legislative quality of the new measures was often low, leading to inadequate harmonization with existing procedural regulations[84]. Additionally, there was a poor level of actual implementation, particularly evident in the marginal utilization of preparatory sessions and hearing plans, despite almost five years since the introduction of the new regulations. Furthermore, during the same period, several clearly disproportionate measures were adopted, such as the extensive expansion of closed-session adjudication in first and second instance proceedings and the limitation of collegiality in appeal proceedings. These measures aimed to streamline and expedite proceedings but did not yield significant success, and in some cases, led to worsening performance in terms of case management and duration. These challenges primarily stemmed from organizational and staffing issues and the continued high influx of new cases into the courts. Ultimately, these ill-advised or poorly-implemented changes risk compromising the core procedural principles and the values they safeguard, including the right to a fair trial and access to justice.

VII. CONCLUSIONS: REFLECTING ON THE CURRENT STATUS AND FUTURE PROSPECTS OF PROPORTIONALITY IN CIVIL PROCEEDINGS

The multitude of contexts in which proportionality influences civil proceedings and civil procedural law prompts me to reconsider my previous position that the level of integration of the idea of proportionality into the provisions of the Code of Civil Procedure has not yet reached the "critical mass" necessary for it to be acknowledged as one of the primary procedural principles[85]. Advocating for a dynamic, pro-constitutional, and pro-conventional interpretation of the provisions comprising the civil procedural

84 In this context, due to the huge number of changes in domestic civil procedure over the last 25 years, and especially since 2016, the literature increasingly talks not only about decomposition and disintegration, but even destruction and collapse of the Code of Civil Procedure; see e.g. K. Weitz, *Współczesne problemy kodyfikacji prawa postępowania cywilnego,* "Forum Prawnicze" 2020/3, p. 34; J. Gudowski, *Kodeks postępowania cywilnego A.D. 2022. Esej o postmodernizmie, obskurantyzmie prawnym i niekompetencji*, [in:] *Non Omne Quod Licet Honestum Est. Studia z prawa cywilnego i handlowego w 50-lecie pracy naukowej Profesora Wojciecha Jana Katnera*, eds. S. Byczko, A. Kappes, B. Kucharski, U. Promińska, Warszawa, p. 20 *et seq.*; R. Kulski, *Upadek polskiego Kodeksu postępowania cywilnego*, „Monitor Prawniczy" 2023, No 8, p. 463 *et seq.*; A. Olaś, *Podstawa zarzutu potrącenia po nowelizacji Kodeksu postępowania cywilnego z 9.03.2023 r. jako exemplum prawnego obskurantyzmu w najnowszej praktyce polskiego prawodawcy*, „Przegląd Sądowy" 2023, No 9, p. 18 *et seq.*

85 See: A. Olaś, *Czy zasada proporcjonalności? Uwagi na tle wybranych zmian w KPC wprowadzonych ustawą z 4.07.2019 r. o zmianie ustawy Kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz. U. z 2019 r. poz. 1469) w świetle Modelowych Europejskich Reguł Postępowania Cywilnego ELI/UNIDROIT*, [in:] *Realizacja zasad postępowania cywilnego na tle aktualnych zmian KPC (Acta Iuridica Lebusana 2022, vol. 21)*, ed. M. Skibińska, Zielona Góra 2022 , p. 135.

law system, which acknowledges the status of proportionality as a constitutional principle and a fundamental principle of European law critically important for the entire normative framework of a democratic rule of law, founded on the principles of respect for inherent human dignity, pluralistic values, and the pursuit of the common good within the boundaries set by these criteria, it should be acknowledged that the strength and breadth (multi-dimensionality) of proportionality's impact on civil procedural law are sufficient to designate it as the primary procedural principle.

In the above context, it is imperative to recognize the strong interconnections between the concept of proportionality and influential notions of justice, spanning from ancient to modern times, as well as rationality, both in pragmatic and axiological terms. Civil procedural law, designed to uphold the administration of justice and adhere to rationality, cannot concurrently flout the demands of proportionality or inadvertently foster disproportionate and abusive actions due to leniency or ineffective sanctioning of such behavior. As underscored by the Polish Constitutional Tribunal in one of its judgments, "the rule of law is premised on the legislature's rationality, and adherence to proportionality in the legislative process is a necessary condition for fulfilling this premise. A rational legislature crafts just laws, thereby linking the principle of justice to the principle of proportionality." In addition to this assertion, it can be inferred that the foundation of the rule of law also rests on the rationality, both praxeological and axiological, of the actions taken by other public authorities, including judicial bodies tasked with dispensing justice. Compliance with proportionality in the application of the law by these entities is a requisite for upholding this assumption. A rational court, in fulfilling its constitutional mandate to administer justice, applies the law equitably, thus reinforcing the principle that justice serves as the bedrock for the application of both substantive and procedural law.

To fortify the principle of proportionality within the doctrinal framework of civil procedural law, and potentially consider its explicit codification, especially in the context of drafting a new Code of Civil Procedure, it is essential to underscore its interconnections with active judicial management of proceedings. This approach has become prevalent in most modern legal systems, extending beyond civil law jurisdictions to encompass various common-law systems such as England and Wales, Cyprus[86], the Ca-

86 The solutions outlined in the English CPR served as a benchmark for the recent reform of civil procedural law in the Republic of Cyprus. Notably, Lord John Anthony Dyson, a former judge of the Supreme Court of the United Kingdom, led the codification committee responsible for drafting the new rules of civil procedure (Greek: Κανονισμοί Πολιτικής Δικονομίας) for Cyprus. These rules were adopted by the Cypriot Supreme Court in May 2021 and came into effect in September 2023. They fully embraced the principles of the English CPR, particularly regarding the significance of the principle of proportionality in civil proceedings. For further details on the reform of Cypriot civil procedural law, refer to N. Mouttotos, *Reform of civil procedure in Cyprus: Delivering justice in a more efficient and timely way,* „Common Law World Review" 2020/2, p. 99 *et seq.*; N. Kyriakides, *Cyprus Civil Justice System Reform: Developing a National Identity,* „The Cyprus Review" 2019/1, p. 31 *et seq.*

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nadian province of Ontario[87], and Australia[88]. These jurisdictions, despite historically adhering to a strictly adversarial and availability-oriented approach, have increasingly recognized the necessity of positioning the court as an active participant in the dispute resolution process. This procedural model aims to achieve reliable, fair, and efficient resolution of civil matters, thereby maintaining a delicate balance between safeguarding private interests and serving the public interest in the proper functioning of the justice system. It acknowledges the finite nature of the resources allocated to the judiciary and seeks to optimize their utilization. Central to this management approach is the attribution of primary responsibility to the court, while also emphasizing the shared responsibility of the parties and their representatives. They are expected to engage in loyal cooperation, adhering to established procedural norms and good practices. The court is empowered to employ a wide array of procedural tools and instruments, guided by judicial discretion, to ensure the proceedings' proper conduct and alignment with their intended goals.

The principle of proportionality, alongside other fundamental procedural principles shaping the fairness of proceedings and enhancing the likelihood of a just outcome, serves as a crucial guiding principle for courts exercising discretionary powers. It provides a compass for courts to tailor their decisions appropriately to the specifics of each case, including the type of dispute, the interests at stake, the socio-economic significance, the complexity of facts and law, the conduct of the parties, the anticipated costs, and the caseload burden on the court. Given the increasing prominence of active judicial management of proceedings in Polish civil procedural law, which draws inspiration from, among others, English reforms such as those initiated by Woolf and Jackson, as well as practices from arbitration, it is prudent to intentionally align individual procedural tools with the overarching principle of proportionality. By employing a weighing approach, courts can ensure the rational and effective utilization of these tools while considering their impact on conflicting procedural principles and values. Therefore, a conscious and deliberate linkage between procedural instruments and the principle of proportionality enables courts to navigate the complexities of litigation and uphold the integrity of the judicial process, ensuring that justice is served efficiently and equitably in each case.

87 Pursuant to Rule 1.04(1) of the Ontario Rules of Civil Procedure (R.R.O. 1990, Reg. 194) which constitutes part of the Courts of Justice Act 1990 (R.S.O. 1990, c. C.43), the provisions of that Act shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. Pursuant to Rule 1.04 (1.1.), in applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. For more information on the principle of proportionality in Canadian civil procedural law, see: C.M. Hanycz, *More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform,* „Civil Justice Quarterly" 2008/1, p. 98 *et seq.*; C. Piché, *Figures, Spaces and Procedural Proportionality*, IJPL 2012/1–2, s. 145 i n.; C. Piché, *The 'New Normal'…*, p. 36 *et seq.*

88 See: S. Campbell, *Proportionality in Australian civil procedures: a preliminary review,* „Journal of Judicial Administration" 2005/3, p. 144 *et seq.;* H. Genn, *Judging Civil Justice,* Cambridge 2010, p. 61–62.

Undoubtedly, the necessity to maintain proportionality between means and objectives in civil proceedings has been underscored by the COVID-19 pandemic and the consequential changes in civil procedural law. Many of these changes, particularly the widespread adoption of remote hearings, have become integral components of the justice system in numerous jurisdictions[89]. It appears that in the "post-COVID" era, the imperative for a broad application of the principle of proportionality has not diminished but rather intensified, given the challenges and opportunities posed by the inevitable integration of modern digital advancements, such as artificial intelligence, into civil court proceedings[90].. Despite advancements in science and technology aimed at resolving conflicts between values under legal protection while upholding fundamental principles and rights, no tool in jurisprudence has proven as effective and universal as the constitutional test of proportionality, reminiscent of the "age of coal and steel." Thoughtfully designed and properly implemented regulations and organizational strategies leveraging these innovations, while adhering to the requirements of proportionality, not only align with traditional procedural norms but also enhance the efficient realization of procedural objectives and functions. At times, these principles may necessitate reinterpretation, as evidenced by the adaptation of the principle of immedia-

89 On the experience of Council of Europe member states in this area, see: A. Sanders, *Video-Hearings in Europe Before, During and After the COVID-19 Pandemic,* International Journal for Court Administration 2021, No 2, p. 1 *et seq.* (https://doi.org/10.36745/ijca.379, (access: 15.04.2024)). See also in this respect e.g. F.G. Inchausti, *The impact…* (supra 16), p. 199 *et seq.*.; C.H. Van Rhee, *Covid-19 pandemic and the Role of Orality and Writing in Civil Litigation,* (in:) K. Gajda-Roszczynialska ed., *Impact…* op. cit., p. 284 *et seq*. These solutions have been implemented to varying degrees in many countries for years. However, the COVID-19 pandemic acted as a catalyst for their widespread adoption, presenting challenges in maintaining continuity in the justice system while upholding fundamental rights and procedural guarantees, and safeguarding the health and safety of individuals involved in judicial proceedings to prevent the spread of the SARS-CoV-2 virus. Looking back, it can be assessed that the option to conduct public hearings, including remote ones, emerged as a crucial tool in achieving these goals. The objective and universal advantages of remote hearings, regardless of pandemic-related issues, are evident in terms of streamlining and expediting proceedings, reducing costs, and minimizing the compromise to classic principles, guarantees, and procedural values such as transparency, oral nature, adversarial nature, and directness. This stands in contrast to alternative solutions like extending the written format of proceedings, resolving cases at closed sessions without a hearing, or extensive use of legal assistance in evidence-taking by designated judges or requested courts. Moreover, the relative advantages of remote hearings, such as eliminating geographical and communication barriers to accessing the court—especially for disabled and elderly individuals, facilitated by increasing internet accessibility—and reducing digital exclusion, suggest that this solution has undeniably become an integral aspect of modern civil procedure. Looking ahead, given the ongoing trend towards digitalization of public services, including the judicial system, it's foreseeable that remote hearings will become the default method of proceedings in many jurisdictions, especially for minor and simple cases. Traditional hearings, on the other hand, may remain prevalent in certain categories of civil cases, particularly those involving family and guardianship law, where physical interaction between the judge and participants could be crucial in achieving the case's objectives. In such cases, opting for traditional hearings would require justification based on weighing the values supporting this choice.

90 On the prospects and limits of using artificial intelligence in the administration of justice in civil matters in light of the standards and guarantees of fundamental rights, including standards of the right to a court and a fair trial from a European perspective, see: A. Olaś*, Looking beyond Covid-19 pandemic: does Artificial Intelligence have a role to play in preparing the justice system for the next global pandemic or similar hardship? The European perspective* [in:] *Impact of the COVID-19 Pandemic on Justice Systems Reconstruction or Erosion of Justice Systems – Case Study and Suggested Solutions,* ed. K. Gajda-Roszczynialska, Göttingen 2023, p. 249 *et seq.*

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cy in light of remote proceedings. However, such reinterpretations do not compromise the essence of these principles or their underlying values.

In the foreseeable future, it's unlikely that the human element, represented by judges, will be supplanted from the core of decision-making in court proceedings, including civil cases. This human factor is intrinsically linked to judicial discretion, distinguishing human decision-making from purely algorithmic processes utilized by "robot judges" to analyze data forming the basis of their decisions (or rather recommendations, given the current acceptable advisory model for AI in court proceedings). As emphasized in Polish legal doctrine, "in the act of administering justice, it is one person who judges another person. Man is therefore the object and subject of the process. Therefore, the process of administering justice cannot be separated from the special value of humanism"[91]. This statement, contextualized within discussions on human dignity as a cornerstone of the fair trial concept, serves as a manifesto for the humanistic and anthropocentric approach to legal proceedings, which is deserving of full endorsement. It appears that the principle of proportionality will not only endure the ongoing fourth industrial revolution but will also see its role within the legal system, including civil justice, strengthened. This is due to the imperative of maintaining the right balance between the human element and modern technologies that support the adjudication of civil cases and resolution of legal disputes.

Weighing reasoning stemming from the constitutional principle of proportionality stands as an essential component in rationalizing all decisions, be they procedural or substantive, that involve an element of judicial discretion. Acting as an intersubjectively controllable mechanism for balancing values in civil trials, the principle of proportionality enables the development of approaches to leverage decision-making flexibility to enhance the consistency of legal application, thereby ensuring its certainty and predictability. Consequently, the deliberate application of these reasoning methods in procedural decision-making, alongside their scrutiny within the appellate system, is imperative for fostering genuinely rational and transparent proceedings grounded in an anthropocentric paradigm. Within this framework, human dignity stands as a paramount and inviolable value, setting an insurmountable boundary for any potential encroachment on individual rights and freedoms resulting from the application of the proportionality test.

The element of discretion inherent in judicial decisions need not be viewed as a drawback in the application of the law. On the contrary, decision-making flexibility, including the discretionary authority vested in judges, when guided by the principle of proportionality, serves to optimize the entire legal process. Indeed, "weighed reasoning naturally favors a more complete realization of legal objectives and the consideration of moral values in its application"[92]. However, ensuring legal flexibility through

91 A. Łazarska, *Rzetelny proces cywilny,* Warszawa 2012, p. 312.

92 M. Araszkiewicz, *Rozumowania prawnicze i schematy argumentacyjne w sądowym stosowaniu prawa* [in:] A*rgumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz,* ed. M. Florczak-Wątor, A. Grabowski, Kraków 2021*,* p. 148.

the reinforcement of institutions reliant on judicial discretion must be coupled with the obligation to provide thorough justifications for each decision, rooted in judicial discretion[93]. Upholding the principles of certainty and predictability in proceedings and court rulings necessitates full disclosure by the court of all factors influencing decisions on legal application. This entails transparency regarding both factual and legal foundations, encompassing not only relevant legal statutes but also the legal principles, goals, and values underpinning the decision-making process.

The argument for recognizing proportionality as the primary procedural principle is further supported by the normative and aspirational nature of legal principles. These principles not only describe "how things are" but also prescribe "how they should be," thereby delineating the desired direction for the interpretation and application of norms in civil procedural law. Proper consideration of this aspect of proportionality in the development of civil procedural law is crucial for crafting a modern legal framework that aligns with the standards of a democratic rule of law in the mid-21st century and addresses the needs of civil society for effective legal protection through fairly conducted proceedings. This necessitates ongoing amendments to the Code of Civil Procedure and other relevant legal instruments, and ultimately, the drafting of a new civil procedural codification. Such a codification would replace the existing code, which has become outdated and distorted due to numerous, often hastily implemented changes that are sometimes underdeveloped or internally contradictory. In this regard, the "three-dimensional" strategy of justice underlying the English reforms of Woolf and Jackson presents an appealing approach. This strategy emphasizes that courts must not only strive for fair case resolution through thorough procedures but also aim to achieve this within a reasonable timeframe and with proportionate utilization of available resources and funds.

Finally, it is crucial to recognize that the effectiveness of proportionality in shaping the practice of justice in civil matters hinges not only on well-crafted provisions of civil procedural law and the organization of courts but also on broader changes in the legal culture of society, including the cultivation of a culture of due process. This sentiment resonates with the reasoning articulated by the Supreme Court of Canada in its judgment of 21 January, 2014[94], which duly noted that "(…) Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compro-

93 As highlighted by B. Wojciechowski, the requirement to justify each decision represents a fair exchange for enhancing the judge's freedom to decide. A judge's freedom is constrained not only by the content of applicable provisions but also by the responsibility to appropriately balance the values, principles, and objectives guiding their judgment. This balancing act must adhere to specific criteria, ensuring optimization and coherence in the weighing of reasons. In conjunction with meeting criteria for rationality, correctness, normativity, truthfulness, and justifiability, this approach not only prevents accusations of arbitrary decision-making but also guarantees objectivity, certainty, impartiality, and justice to the fullest extent achievable in resolving disputes. It ensures that court decisions are based on reasoned deliberation rather than mere chance, fostering trust in the judicial process and upholding the principles of fairness and equity; see: B. Wojciechowski, *Dyskrecjonalność...,* p. 308–309.

94 Hryniak v. Mauldin, 2014 SCC 7.

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mised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result"[95]. . These insights serve as a fitting conclusion to this discourse.

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