UNIVERSITY OF BIAŁYSTOK
FACULTY OF LAW

BIAŁOSTOCKIE STUDIA PRAWNICZE

BIAŁYSTOK 2016 VOLUME 21

Ministry of Science and Higher Education

Republic of Poland

Creation of the English-language versions of the articles published in the „Białostockie Studia Prawnicze" [Białystok Legal Studies] funded under the contract no. 548/P-DUN/2016 and 548/1/P-DUN/2016 from resources of the Minister of Science and Higher Education dedicated to the popularisation of science.

Stworzenie anglojęzycznych wersji wydawanych publikacji w "Białostockich Studiach Prawniczych" finansowane w ramach umowy 548/P-DUN/2016 i 548/1/P-DUN/2016 ze środków Ministra Nauki i Szkolnictwa Wyższego przeznaczonych na działalność upowszechniającą naukę.

BIAŁOSTOCKIE STUDIA PRAWNICZE

VOLUME 21

ISSN 1689–7404

Language Editors: Ewa Brajczewska (Polish), Richard Tykocki-Crow (English)
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Publisher: Faculty of Law, University of Białystok; Temida 2
All volumes can be purchased from Wydawnictwo Temida 2, address ul. A. Mickiewicza 1, 15-213 Białystok, e-mail: temida2@uwb.edu.pl, tel. 85 745 71 68

Contents

Introduction

21 Volume of "Białostockie Studia Prawnicze" [Białystok Legal Studies] focuses on the presence of social factors in the justice system. Scientific articles published herein are the continuation and development of the research initiated under a scientific project "Pilot implementation of the 'Community Court' model in Poland as an institutional bridge between the judiciary, self-government bodies and social organizations facilitating the implementation of restorative justice in practice" carried out in 2014-2015 and funded by the Polish National Council for Research and Development within the framework of the programme "Social Innovations".

A purpose of the project was the creation and pilot implementation of the model of cooperation between social organizations and courts, and in particular working out the procedure of establishing restorative programs for defendants which may be applied by the court when imposing a penalty. The project was based on the Anglo-Saxon model of the community court characterized by close cooperation between the justice system and social organization as well as a wide application of the principles and procedures of restorative justice to increase a role of non-custodial sentences, probation and compensatory measures.

The authors of texts submitted to "Białostockie Studia Prawnicze" are not only direct contractors of the above mentioned project but also acclaimed scientific experts in the field of criminal and restorative justice from leading scientific centres in Poland. The studies included in this volume reflect the state of discussion on key issues depicted in "Białostockie Studia Prawnicze".

The issue of a social factor in the justice system is extremely important because it embraces a possibility of community participation in the criminal procedure, which entails democratization of judicature. Responding to expectations and discussions about the role of a social factor in the criminal procedure, general assumptions of restorative justice and model assumptions of community justice have been analyzed. They introduce further considerations on detailed issues providing a reader with theoretical foundations to a more effective analysis of subjects presented in this volume. The participation of a social factor in the justice system has been thoroughly depicted with regard to the following perspectives: historical and legal comparative studies,

constitution, case-law, the principle of audience (open trial), juvenile and executive proceedings. Moreover, considerations herein have been focused on specific issues regarding participation and role of non-governmental organizations in the criminal procedure and implementation of probation as well as social factor in the context of victim-offender mediation in labour law cases.

We sincerely hope that the subsequent issue of "Białostockie Studia Prawnicze" and articles published herein will considerably contribute to scientific studies and considerations on social factor in the justice system whereas our readers will find inspiration for further scientific reflections.

Cezary Kulesza, Dariusz Kużelewski, Stanisław Burdziej
Volume Theme Editors

Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.01

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Community Justice – Reconstruction of Assumptions and Critique of a Criminal Policy Model

Abstract: The article attempts to reconstruct basic assumptions of community justice – an emerging paradigm of penal policy, which gains popularity in Western Europe and the USA. The model assumes the empowerment of citizens in matters related to criminal justice, including various forms of public participation, aimed at reclaiming conflicts thus far appropriated by professionals and institutions. The article discusses both advantages and disadvantages of this "democratization" of penal policy.
Keywords: criminal policy, justice system, courts, civil society

1. Introduction

The concept of a closer connection between the justice system and local community life, which is a descriptive explanation of the English term 'community justice', has continued to gain popularity for several decades now. It takes various forms and embraces different areas; community policing being the most common example thereof, including such initiatives and methods as neighbourhood watch or restorative conferencing. Nevertheless, it also implies experimenting with closer "embedment" of work performed by prosecutors, courts and probations officers in the local community.

The origin of the above idea can be found in the perceived non-effectiveness of traditional solutions manifested, among others, in the prison population growth (often accompanied by concurrent crime rates decline, as it occurred in the United States[1], high reoffending rates and the ensuing phenomenon of revolving-door justice, where the same perpetrators constantly come back into contact with the justice

1 R. Wilkinson, K. Pickett, Duch równości. Tam gdzie panuje równość, wszystkim żyje się lepiej, Warszawa 2011, p. 162-174.

system being incapable of getting back on the straight and narrow, as well as the phenomenon of McJustice (coined by the critics) where required effectiveness on the one hand, and ever growing burdens on the other hand, practically limit the defendants' rights. Furthermore, general trends connected with greater expectations of citizens to participate in public and political life have played their role too. In his famous article published in 1977, Nils Christie wrote about professional attorneys monopolizing the handling of conflicts, which leads to the alienation of the justice system from the society as well as its invalidation[2]. The effect thereof was a series of initiatives aimed at the "recovery" of conflicts by their stakeholders, which were frequently inspired by the examples of dispute resolutions by traditional communities.

Within the realm of the justice system, this participation has assumed specific forms, mostly connected with a widespread and common use of alternative dispute resolutions (hereinafter ADR)[3] and restorative justice[4]. They are also closely related to the so called problem-solving justice[5]. It emphasizes the necessity to stop focusing on punishing a perpetrator and concentrating on the complete treatment of a crime instead – starting from circumstances which have led to it, through the elimination or mitigation of its direct consequences, and finally taking steps to prevent its commitment in the future. The authors of this proposal presumed that perpetrators of a considerable number of misdemeanours and offences in the USA need help themselves in many ways. Obviously, it does not exclude the element of restitution, nevertheless, it is often connected with the penalty embracing the element of compensation with some form of the perpetrator's therapy. It involves, in particular, addiction treatment therapy or treatment because many perpetrators commit crimes in order to get money for intoxicating substances . Another imprisonment sentence will not make them quit their addiction or refrain from further offending at all. Hence most initiatives based on the problem-solving justice approach assume not only the use of the justice system to make a perpetrator undertake therapy but complete education and actively search for a job too. Similar to restorative justice, it has been assumed here that a "therapeutic" impact of the justice system is necessary because a perpetrator will anyway return to their local community and continue to function there anyhow. Stigmatization due to imprisonment (even though apparently inevitable in serious cases), efficiently hampers perpetrators' positive reintegration, which will obviously benefit the entire community. This seems to confirm a close connection between the idea of community justice and the concept of problem-solving justice.

2 N. Christie, Conflicts as Property, "British Journal of Criminology" 1977, vol. 17, No. 1, p. 1-15.

3 Comp. N. Vidmar, Procedural Justice and Alternative Dispute Resolution, "Psychological Science" 1992, vol. 3, No. 4, p. 224-228.

4 G. Johnstone, Restorative Justice: Ideas, values, debates, Portland 2002.

5 Comp. G. Berman, J. Feinblatt, Problem-Solving Courts: A Brief Primer, "Law and Policy" 2001, vol. 23, No. 2, p. 125-140; A. Mansky, Problem-solving justice: responding to real problems, real people, "Criminal Justice Matters" 2004, vol. 57, No. 1, p. 30-31.

Thus the notion of community justice may be treated as a collective name for a certain paradigm involving a wider than in traditional western justice systems inclusion of entire local communities (or their representatives) in the processes of dispute resolution, among others through the use of ADR and restorative justice. Although initiatives undertaken thereon are most often grassroots and local – just in accordance with their own philosophy – i.e. they are greatly diversified, we may list several common features they typically share. These are, *inter alia*, the following principles:

- recognizing a local community as the most important and final "recipient" of services and a partner of the justice system;
- exerting pressure on imposing penalties embracing community service;
- imposing penalties including the element of assistance provided to the perpetrator in order to eliminate or mitigate circumstances which have led him or her to commit a certain act.

David R. Karp proposes his own, more elaborate characteristics of the model; he lists the following six core elements of community justice: it

a) operates at the local level;
b) is information-driven;
c) entails a pro-active approach focused on problem-solving contrary to the responsive approach of the traditional system (acting in response to the committed offence);
d) decentralizes authority and accountability;
e) requires citizen participation, and
f) is process-oriented – grassroots evolution of programmes in accordance with locally agreed priorities and strategies; slow consensus building[6].

Considered jointly, these principles reflect the passage from the objectives of a traditional system of justice (most of all crime control) to a considerably wider formulated mission of enhancing the quality of life in a given community[7]. In practice, it is, among others, manifested by the fact that a community determines their own security priorities and deems certain projects successful. According to the author, a purpose of many such operations is a gradual replacement of formal mechanisms of social control by informal ones or, at least, supplementing the first by the latter as widely as possible. Such an informal local control efficiently impedes "the broken windows effect"[8] while not generating unfavourable side effects that are connected with extended police activity.

6 D.R. Karp, Community justice: Six challenges, "Journal of Community Psychology" 1999, vol. 27, No. 6, p. 751-769.
7 *Ibidem*, p. 752.
8 J.Q. Wilson, G.L. Kelling, Broken Windows: The police and neighborhood safety, "Atlantic Monthly", 1982, vol. 249, No. 3, p. 29-38.

The community paradigm is rooted in A. Etzioni's communitarian vision of a human being[9]. Contrary to the traditional, individualistic model which perceives an offence mostly as a matter between people – a perpetrator and victim – communitarians believe that every man is a member of different communities: family, neighbourhood, religious and others, which are significant elements of one's individual identity. You cannot perceive a man disregarding his membership in such communities. Therefore each offence entails consequences beyond a single individual's life. Hence to handle crime effects efficiently and prevent offences, it is necessary to engage a wider group of community members where the law has been violated.

2. Examples of community justice initiatives

Overwhelming majority of community justice initiatives is undertaken systemically (with a wide support of the state) in Anglo-Saxon countries: the United States, Australia and Great Britain. Even though such initiatives are also implemented in a few countries of continental Europe (among others by prosecutors in Sweden or probation officers in Norway), I mainly focus here on the initiatives implemented in the USA, including those that are connected with the operation of justice system institutions (police, prosecutor's office, judiciary and probation officers). Hence I deliberately omit several interesting initiatives in other institutional contexts, among others in schools. A possibility of adapting community justice assumptions outside the common law system is subject to a debate. Generally, most scholars conclude that despite significant differences between Anglo-Saxon and continental legal systems and culture, exportation of community court elements into continental European states is possible and desired[10].

Police. Community policing dates back to the 1980s; first initiatives were undertaken in the USA. They sparked the development of the whole concept of community justice. In Great Britain the police were first to start experimenting with a wider engagement of local residents in taking care of the neighbourhood security. Today such actions take various forms and it is difficult to list them all. One example are numerous programmes of neighbourhood watch and patrols. Such patrols are composed of local residents patrolling the streets in their neighbourhood to prevent crimes and protect property. In case of actual or suspected breach of law, patrols inform the police while not intervening themselves. This distinguishes them from civil militias whose activity, especially in the United States, arises a great deal of heated controversy. In Europe neighbourhood watch operates, among others, in Great Britain (named Neighbourhood Watch) and Scandinavian countries (*inter alia* Natteravnene

9 A. Etzioni, Społeczeństwo aktywne: teoria procesów społecznych i politycznych, Kraków 2012.

10 E.R. Vîlcica, V. Rely, S. Belenko, F.S. Taxman, M. Hiller, Exporting Court Innovation from the United States to Continental Europe: Compatibility between the Drug Court Model and Inquisitorial Justice Systems, "International Journal of Comparative and Applied Criminal Justice" 2010, vol. 34, No. 1, p. 139-172.

in Norway). Furthermore, policing operations as such are endowed with a community element. In 2012 a reform of the organizational structure of British police was implemented, which abolished previously existing local police authorities and replaced them with Police and Crimes Commissioners appointed directly by citizens. Although local police authorities were composed of local community representatives, they were basically responsible before central police authorities. Hence a decision was made to create a mechanism of more direct communication between citizens and police authorities to notify them about community needs and preferences[11]. Since 2005 British police have been pursuing the strategy called Neighbourhood Policing, which emphasizes operations and activities focused on a specific community. The main principles of this approach are based on establishing police activities within a given area and undertaking common actions or operations by the police and residents[12].

The concept of community policing is sometimes translated into Polish as neighbourhood policing (*policja środowiskowa*). Activities inspired by this concept are systematically undertaken by, e.g., Municipal Police in Krakow. In 2002, former New York City Police Commissioner William Bratton[13] was invited by Helsinki Foundation for Human Rights to present the idea of community policing. He told Polish police officers about, *inter alia*, community councils operating in New York at every police station.

Prosecutor's Office. In the American practice, a community court model assumes participation of a prosecutor or prosecutor's office representatives in regular meetings of court staff and cooperating entities including justices themselves, which is particularly important in case of offenders serving suspended sentences. Moreover, a prosecutor can influence the proposal of a type of penalty to be presented to the judge on the basis of a thorough interview with the defendant.

This participation is additionally institutionalized in the form of penalty catalogues: punishment is proposed depending on the burden of a committed wrong. In the first stage of cooperation between these institutions, according to the discussed model, a prosecutor participates in preparing a grid which helps to match a penalty to the burden of an act. The use of such catalogues facilitates cooperation; as a result, court teams are able to propose promptly and adequately a penalty which will be adapted to the act's legal classification and perpetrator's possibilities and needs. What is more, such a penalty will be acceptable for a prosecutor and judge[14].

Other methods of engaging communities by prosecutors embrace, among others: setting up advisory councils participated by local community representatives

11 Home Office, Policing in the 21st Century: Reconnecting police and the people, London 2010, https://www.gov.uk/government/uploads/system/uploads/attachment_data/fi le/118241/policing-21st-full-pdf.

12 L. Casey, Engaging Communities in Fighting Crime: A Review, London 2008, p. 23.

13 K. Burnetko, Komisarz Bratton i komisarz Kowalski, "Tygodnik Powszechny" No. 14 of 7 April 2002.

14 R. Curtis, C.G. Lee, F.L. Cheesman II, D. Rottman, R. Swaner, S. Hynynen Lambson, M. Rempel, A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center, New York 2013, http://www.courtinnovation.org/sites/default/fi les/documents/RH Evaluation Final Report.pdf.

who inform prosecutors about the main problems of residents, prosecutors participating in local events and open meetings with residents, or locating prosecutor's offices in easily noticeable and frequently visited places[15]. In return, prosecutors may expect, *inter alia*, that community representatives will help identify perpetrators or find witnesses ready to testify, or indicate places where illegal activity is carried out (drug trafficking or prostitution). In 2000 approximately half American Prosecutor's Offices declared conducting such actions. Apparently, even though such cooperation takes place in the traditional model of Prosecutor's Office operation, "community" model additionally presumes the element of prevention: acting on the basis of information from the community, prosecutors actively (rather than only in response to the crime) attempt to solve problems before they escalate. This system is further supported by assigning individual prosecutor's teams to specified areas or districts. Thanks to this, prosecutors are able to familiarize themselves with local specificity well and establish reasonable relations with local community representatives.

In Europe, the Prosecution is relatively least willing to incorporate solutions focused on the "local" aspect. Sweden introduced some elements of the problem-solving approach to prosecutors' work already in the 1990s. In 2002 twenty "community" prosecutors in several Swedish cities were employed; they focused on repeat offenders cooperating with police and probation officers. A similar solution functions in Holland too[16]. "Community" Prosecution focuses on minor misdemeanours which happen to be disregarded in the traditional system of justice, i.e. more often than not perpetrators do not face any penalty due to "insignificant harm caused by their act". Community justice is based on the assumption formulated in a form of the so called broken window theory, according to which impunity of minor tortfeasors leads them to commit more serious offences; that is why it is necessary to pay more attention to such wrongdoers, including consistent and possibly prompt sanctioning[17]. This theory implies that broken windows and other visible signs of disorder are a signal for offenders that there is no host in the area. Consistent fulfilment of the strategy is recognized as one of the causes of crime rates reduction as well as improved living standards and sense of security of New Yorkers. Even though the very concept itself is considered controversial (critics indicate, among others, that in practice it entails stigmatization of minorities' representatives[18]), most initiatives assuming closer cooperation of Prosecutor's Office with courts and local community focus on combating relatively minor misdemeanours and minor offenses.

15 A review of initiatives can be found in the study: R.V. Wolf, J. L. Worrall, John, Lessons from the Field: Ten Community Prosecution Leadership Profiles, Alexandria 2004, http://www.courtinnovation.org/sites/default/fi les/cp_lessons_from_the_field.pdf. See also R. Wolf, Using New Tools: Community Prosecution in Austin, Texas, New York 2000.

16 R.V. Wolf, Community justice: An international overview, "Judicature" 2008, vol. 91, No. 6, p. 306-309.

17 J.Q. Wilson, G.L. Kelling, Broken Windows…, *op. cit.*, p. 29-38.

18 Comp. B.E. Harcourt, J. Ludwig, Broken Windows: New Evidence from New York City and a Five-City Social Experiment, "The University of Chicago Law Review" 2006, vol. 73, No. 1, p. 271-320.

In 2009 British government prepared guidelines determining an appropriate way of involving local communities in administration of justice in criminal cases. In the introduction to the study, authorities' representatives notice that the last two decades were a period of considerable and objective improvement of a safety level: the crime rate decreased by one third in comparison to 1997 whereas a threat of becoming a victim of a crime was the lowest in 25 years; the authorities increased funding initiatives supporting crime victims three times[19]. Despite this, they say that objective improvement does not contribute to citizens trust the system more. They assure the government is committed to change this because the system of justice serves citizens and is based on their support. Citizens trusting the justice system "will be more willing to report a crime, give evidence as a witness, participate as volunteers and jurors, or consider a career in the justice system"[20]. The proposed activities focused on three areas: a) strengthening relations between communities, the Prosecution and courts; b) increasing operational response of these institutions as well as their "visibility" in the public opinion; c) facilitating communication between local communities and representatives of justice system institutions. The authors recommended, among others, increasing cooperation of Prosecution Service with local communities following the example of police (which is efficiently implementing the idea of Neighbourhood Policing). One of the tools of such strengthened cooperation are Community Impact Statements, i.e. studies including information about the nature of crimes committed in a given neighbourhood and their impact on local community life; it has been declared that the authorities will respond to these documents. The authors also declare further implementation of the elements of the idea of implementing problem-solving courts to the traditional system.

The above cited study lists over a dozen pilot projects connected with wider engagement of citizens in the justice system operation. These are, among others, citizen panels where citizens express their opinions, e.g., about types of socially useful community service works that should be carried out by convicted offenders, a wider application of restorative justice in the context of juvenile delinquency, or further support for crime victims. An interesting police project is connected with publicly accessed interactive maps available in the Internet showing statistics on crime rates in individual districts. Further completion of police maps to include statistics showing work carried out by judicial bodies has been suggested (such a map has been recently made available to Krakow residents; yet the presented data are shown on the level of police stations not streets). Such information has direct impact on the real estate prices in a given area, therefore its residents are keenly interested in the cooperation to improve security therein. The authors of the recommendation assume that

19 L. Casey, Engaging Communities in Criminal Justice, 2009, Cm 7583, https://www.gov.uk/government/uploads/system/uploads/attachment_data/fi le/228540/7583.pdf, p. 5.

20 *Ibidem,* p. 6.

improved access to information will enhance the courts' image. As it results from Luisa Casey report[21], citizens mainly acquire negative information criticizing functioning of the system whereas in reality most perpetrators are appropriately punished and penalties are imposed justly and effectively. A wider and direct access to information is to convince citizens that the justice system is generally efficient whereas perpetrators face punishment they deserve. One of the measures satisfying this objective is, e.g., a characteristic and easily recognizable outfit worn by perpetrators carrying out community service[22].

Courts. A prime example of local community justice are community courts. The first court of this type (Midtown Community Court) was established in 1993 in Midtown Manhattan. Soon afterwards another court was opened, this time in a much more problematic district – Red Hook Community Justice Center in Brooklyn. Both these projects, established and pursued by the consortia of many partners under the auspices of the New York think tank, Center for Court Innovation, have become a source of inspiration for numerous similar projects in other common law countries[23]. In 2005, the first court of this type – North Liverpool Community Justice Centre – was opened in Great Britain. It mainly followed the Red Hook model, i.e. a problem-solving approach based on the expertise and esteem of one judge, localization of many services (judicial, social and educational) in the same building, providing services addressed not only to perpetrators but the entire community, and active engagement of a local community already in the planning phase. Soon afterwards a similar centre of justice was opened in Salford and 11other locations in Great Britain; yet they operated there on the basis of already existing Magistrates' Courts. The latter courts deserve a short commentary here as they themselves are an example of engaging lay citizens in the process of justice administration – these courts adjudicate in approximately 95% of all criminal cases as well as in some family and civil cases. Magistrates may be ordinary citizens who volunteer to do this service satisfying certain conditions. Apparently, another opportunity to exert direct impact on the shape of the justice system for British citizens is a possibility (or rather a duty) to perform a jury service. Despite these opportunities, the most recent reforms assume further extension of a democratic element, among others by increasing the community's impact on the procedure of appointing justices. So far judges have been appointed at a national level and they have not been assigned to a specific court. According to L. Casey, it mostly concerns recruitment of magistrates from the groups that have been poorly represented by them so far[24].

21 *Ibidem*, p. 81.
22 *Ibidem*, p. 56.
23 See K. Henry, D. Kralstein, Community Court: The Research Literature, New York 2011, http://www.courtinnovation.org/sites/default/fi les/documents/Community Courts Research Lit.pdf. See also S. Burdziej, Wykorzystanie kary ograniczenia wolności w modelu problem-solving justice, (in:) A. Kwieciński (ed.), Teoretyczne i praktyczne aspekty wykonywania kary ograniczenia wolności, Wrocław 2016, p. 11-24.
24 L. Casey, Engaging Communities..., *op. cit.*, p. 44.

3. A critique of the concept

Even though the concept of community justice has been more and more often recognised as a new paradigm of the justice system process in many western countries, it is not without some weaknesses. In the above cited study, David Karp indicates numerous problems and doubts connected with the idea of "justice in the local community"[25]. He observes that the very definition of a local community ensues problems. What criteria should be used: geographical, social bonds and networks, or a subjective definition of community boundaries established by their members themselves? Today's communities are less spatially concentrated than before, thus it is more difficult to launch activities addressed to such "communities". On the other hand, seldom does the entire community, or even most of its members, actually undertake any action defined anyhow. Therefore who decides what is important for the community and how should a common goal be achieved? Who controls leaders and what are their responsibilities? Moreover, strong local communities may actually be based on informal control and be able to solve many conflicts by reaching an agreement without engaging external institutions. Too strong bonds, however, may be connected with exclusion and suppression of individual freedom of community members. Who will take care of the wrongdoers' rights, including their right to presumed innocence and fair trial? Of course, vast majority of initiatives assume a close cooperation with traditional institutions. What is more, they are limited to minor misdemeanours which do not require court involvement, or require it only to a small degree. It may also be claimed that informal social control works anyhow, independent of systematic efforts, and in contemporary western societies too strong communities generally do not exist. Yet the problem is a decline of informal control leading to weakened bonds and greater vulnerability to victimization. More often than not, most members of a local community are passive and not interested to participate actively in actions aimed at common well-being. Although apparently everyone would like to live in a safe and well maintained area, it is a well-known fact that members of any big community tend to be fare dodgers[26]. On the other hand, it has been observed that crimes committed in the districts where local community was able to organize themselves efficiently moved to less organized areas, that is initially even more disadvantaged. Hence a victim of the success of a better organized community may become its neighbour who is merely less organized.

Another problem is anticipated remodelling of the roles pursued by the justice system officials, from policemen to judges, which is connected with the demand for new competences. For instance, the community justice model expects police officers to be mediators whilst judges – addiction experts and therapists. Will it not ensue

25 D.R. Karp, Community justice… *op. cit.,* p. 752-755.
26 M. Olson, Logika działania zbiorowego. Dobra publiczne i teoria grup, Warszawa 2012.

negligence of other more traditional functions and areas of operation? Will not police officers and judges become social workers? Furthermore, at least at the beginning, due to limited resources, alternatives like community justice will be available only to some defendants: some of them will, for example, be tried before a "community court", which will offer them a favourable ruling in return for their consent to undertake treatment, or under other conditions; most of them, however, will be prosecuted in an "ordinary" court. This may evoke concerns of unequal treatment. Social problems which community justice wants to solve are very complicated whereas appropriate diagnosing or evaluation of successful projects will always be difficult. Many social problems derive from complex causes (e.g. social inequalities, pathologies of a social welfare system, etc.), which are independent of a local context and possible impact. High-crime areas are often a "product" of not individual susceptibility of their inhabitants to crime as much as a result of spatial or social policy of city authorities. For instance, city authorities not infrequently decide to place social housings or works or plants causing nuisance (e.g. sewage treatment plants) in slums. Ghettoization contributes to crime rates increase. If the issue of high-crime areas is resolved without systemic and political solutions, it will merely be a "plaster cast for a fracture", i.e. alleviation of symptoms of a more serious problem. Another risk is too tight or problematic community engagement, e.g. in the form of neighbourhood patrols when they themselves commit violent acts "in defence" of the community, or just the opposite, they become victims of violence committed by offenders.

One of the frequent objections against community justice-oriented projects is their cost. Actually, some projects do ensue considerable initial investment (it may result, e.g., from the need to build or reconstruct a building to house a court) whereas its financial consequences for the justice system are not always easily discernible. Nevertheless, the final result of evaluation depends on the applied assessment criteria. The balance becomes clearly positive if victimization cost is taken into account, i.e. a potential loss the society would suffer from if the crimes which were most likely prevented by the launch of innovative projects like community courts were committed[27]. D.R. Karp and T.R. Clear[28] offered an interesting solution to this problem. They calculated that imposing penalties alternative to incarceration on merely 50 offenders who did commit violent acts would have generated as much as 114 million dollars savings only in Washington. They proposed a system of vouchers held by both a perpetrator and victim as well as community representatives which could be used for "buying" an alternative to a prison sentence. Since alternative solutions (e.g. community service connected with therapy or educational elements) are cheaper than

27 R.Curtis, C.G. Lee, F.L. Cheesman II, D. Rottman, R. Swaner, S. Hynynen Lambson, M. Rempel, A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center, New York 2013, http://www.courtinnovation.org/sites/default/fi les/documents/RH Evaluation Final Report.pdf.

28 D.R. Karp, T.R. Clear, Community Justice: A Conceptual Framework, (in:) C.M. Friel (ed.), Boundary Changes in Criminal Justice Organizations, Washington 2000, p. 323-368.

incarceration, money saved this way could be used by the local community for development projects which, later on, would help to solve some social problems causing crime[29].

It should be added that some effects of the above mentioned projects are difficult to measure, or occur only after a longer time. A. Lanni lists such potential measure instruments: an improved quality of life, a sense of safety, cohesion and activity of a local community, court case law, the crime rates and tendencies to change crime, satisfaction of the assessed programmes participants, or their attitude to the state and justice system[30]. For instance, a comprehensive assessment of the Red Hook Community Justice Center in New York established that the main success of the project is an increased level of the justice system validity in the eyes of neighbouring residents as well as the district revitalization. On the other hand, no significant decrease of recidivism was observed. These issues are not taken into account in many other assessments which are limited to traditional measure instruments such as recidivism rate or direct costs. Practitioners and scientists do not agree on the criteria of the project assessment; the inclusion of all the above listed ones is difficult and very expensive.

Apart from these theoretical objections and doubts, numerous problems already emerge in practice. The main problem is the fact that we rarely deal with a wide and authentic public participation in any sphere, including the justice system. Those representatives of a local community who actively participate in activities for the "common good" are generally richer and better educated than an average member of the community. This problem is particularly apparent in strongly racially or ethnically diverse communities. The "common good" the activists will struggle for may actually be beneficial only to a narrow group rather than all residents. For this reason, financial engagement of external partners have also been criticized. For instance in Minneapolis, the foundation set up by the US supermarkets chain Target pays a salary for a "community" prosecutor (even though the relevant agreement envisages mechanisms of avoiding the conflict of interest, i.e. such a prosecutor will not, e.g., deal with shoplifters) whereas in Portland a similar post is financially supported by a group of entrepreneurs interested in "cleaning" the shopping centre[31]. Finally, in practice, experts such as social workers and therapists play an important role in community courts. They recommend a judge a type of sanctions to be imposed while judges usually rely on such advice. There is specifically not too much place here for direct engagement of local community representatives.

Another set of problems is connected with the principle of a fair trial. Community justice initiatives frequently ensue the launch of mechanisms of informal social control. Thus in practice they may restrict the defendant's right to a trial. An example

29 *Ibidem*, p. 361
30 A. Lanni, The Future of Community Justice, "Harvard Civil Rights-Civil Liberties Law Review" 2000, vol. 40, p. 379.
31 R.V. Wolf, J.L Worrall, Lessons from the Field…, *op. cit.*, p. 23-25.

of the above limitation are initiatives assuming "proactive" operation of the prosecution or police, e.g. by attempting to hold liable individuals identified as wrongdoers by the residents themselves. Informal proceedings more often than not lead to disproportional penalties perpetrators of similar misdemeanours may be sentenced to. Moreover, others point out the issue of a partial departure from the principle of adversarial proceedings: defendants first deal with social workers who may acquire from them information indicating their guilt and next, theoretically, pass the word to a judge thus hampering the defence or exerting effective pressure on the defendant to plead guilty (even if they are innocent). Due to relative mildness and benevolence of sanctions that the defendants may face in community courts, public defence counsel may be less committed to defend their clients. Although Lanni perceives that, currently, participation in community justice programmes is optional and the defendants may always choose traditional litigation, he concludes that community justice principles cannot be directly applied in case of serious crimes. Therefore in his opinion, the community justice model may solely complement but not replace the traditional model.

4. Summary

In West European and many other countries (particularly in the United States) we can see a systemic reorientation of activities pursued by judicial institutions such as the police, courts and prosecution into closer cooperation with local communities. After the period of professionalization and centralization of operation, these institutions start to perceive concrete benefits coming from wider openness to the citizens' needs. Models of wider engagement of citizens in the justice system operation elaborated so far aim at increasing social belief in the validity of these entities' operation thus leading to their greater efficiency. On the one hand, a possibility of such engagement appears indispensible due to growing expectations of citizens to participate in governance. The belief in the validity of authority, including legitimization of the justice system, is a mechanism persuading citizens to cooperation and obedience much more efficiently than a show of force or even instrumental efficiency of operation. On the other hand, wider participation of citizens evokes numerous doubts. Will not the idea of community justice jeopardize the right to a fair trial? Will it not undermine the equality before the law? These are substantive questions. It seems, however, that they pose rather theoretical dangers in the present Polish reality. A lack of trust and citizens believing that the justice system has become alienated are much more serious consequences.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.02

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Restorative Justice – a Form of Deliberative Democracy?

Abstract: Modern democracy is in crisis. Citizens feel alienated, overlooked and unappreciated. The way out of the crisis, in the opinion of many, is increasing the public role in democratic processes through civil participation. Citizens want to be involved not only in the process of legislation, but also in the application of the law. Today the court is no longer Dworkin's "capital of the law". There are alternatives to judicial resolutions, including restorative justice. Restorative justice is one of the modern forms of implementation of deliberative democracy's postulates.
Keywords: restorative justice, deliberative democracy, criminal law

Each government system must be legitimized, that is authorized to act. Legitimization is considered as "ruling authority's entitlement to take binding decisions approved of by the citizens"[1]. Seymour Martin Lipset states that legitimization embraces the system's capacity to create and maintain the belief that existing political institutions are good for the society. Individual groups find a political system legitimate if the system's values correspond to their values[2]. Legitimization to punish may derive from various sources: it was once believed it came from God, through inheritance or conquest. Currently, however, people expect rationality in punishing and legitimizing authority[3]. Authority is, most of all, requested to be justified by a social agreement and democracy.

Jean Jacques Rousseau pointed out that legitimate authority means something different from merely power or compulsion. He claimed that "The strongest is never strong enough to be always the master, unless he transforms strength into right, and

1 E. Zieliński, Nauka o państwie i polityce, Warszawa 2001, p. 156.
2 S.M. Lipset, Homo politicus: społeczne podstawy polityki, Warszawa 1995, p. 81 et seq.
3 O erozji uzasadnienia metafizycznego karania zwłaszcza B. Wróblewski, Penologia. Socjologia kar. Vol. I, Vilnius 1926, p. 254 et seq.

obedience into duty". Furthermore: "Since no man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men"[4]. Freedom, however, is not given away for free. Freedom is inherent to man. "To renounce liberty is to renounce being a man, to surrender the rights of humanity and even its duties". Rousseau believed the Social Contract (*contrat social*) provided a solution to the problem of finding such a form of association which would "defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before". The clauses of the Social Contract may actually be reduced to one and fundamental issue – total alienation of each associate, together with all his rights, to the whole community; for, in the first place, as each gives himself absolutely, the conditions are the same for all; and, this being so, no one has any interest in making them burdensome to others[5]. Rousseau believed the alienation being without reserve, the union is as perfect as it can be, and no associate has anything more to demand[6]. The contract is clear, though absolute: all for everything.

Recalling philosophical pillars of contemporary democracy is necessary because they also entail essential conclusions about sources, boundaries and justification of state punishment[7]. No better system of making and applying law than a democratic state has been conceived so far. Furthermore, democracy is based on a society following a specific system of values. 20th century experiences, which are often very painful, confirm that there is no law and democratic state without the society believing in and defending them. As Hannah Arendt noticed: "Not the loss of specific rights but the loss of a community willing and able to guarantee any right whatsoever has been the calamity"[8]. At present, it is accurately claimed that democracy allows to implement values crucial for a social life. What is more, it happens so because democracy is not a neutral political system. Democracy institutionalizes in politics a more ethical treatment of individuals than the political alternatives to democracy, in particular autocracy and oligarchy[9]. Lack of citizens' engagement in democratic processes threatens democracy. People feel alienated and ignored[10] because their opinion counts only during the election. It is a considerable threat. Democracy is not a system given for ever. We must cherish it and toil to build social capital. As John Braithwaite accu-

4 Comp.: J.J. Rousseau, Umowa społeczna, przełożył i objaśnił dr Antoni Peratiatkowicz prof. Uniw. Poznańskiego, Poznań 1920, p. 14-15.
5 Comp.: J.J. Rousseau, Umowa społeczna, *op. cit.,* p. 20-21.
6 *Ibidem*.
7 Comp. A. Peretiatkowicz, Filozofia prawa Jana Jakóba Rousseau'a, Kraków 1913, p. 218 et seq. (particularly Chapter V titled Criminal Philosophy).
8 H. Arendt, Korzenie totalitaryzmu, vol. 1, Warszawa 1993, p. 325.
9 Comp. A. Gutmann, Identity in Democracy, Princeton 2004, p. 27; Comp. more: B. Wojciechowski, Interkulturowe prawo karne. Filozoficzne podstawy karania w wielokulturowych społeczeństwach demokratycznych, Toruń 2009, p. 128 et seq.
10 Comp. Particularly: R.D. Putnam, Samotna gra w kręgle. Upadek i odrodzenie wspólnot lokalnych w Stanach Zjednoczonych, Warszawa 2008.

rately noticed "people are not born democrats"[11] but they learn various forms of democratic participation. History knows many forms of legitimacy but in today's world democracy is its only serious source[12].

Francis Fukuyama also confirms obvious truth that there is no democracy without democrats[13]. The malaise of the contemporary model of a democratic state can be abandoned by larger participation of citizens themselves through deliberative participation in governance. We need "democracy as cooperation"[14] and "democracy of partnership"[15].

Citizens should participate not only in legislative and executive power but judicial power as well, i.e. in the administration of justice and application of law by the courts. Each pillar of power requires participation of citizens. Mere check and balance principle is not sufficient to maintain balance. According to Braithwaite , we currently need a more pluralistic vision of democratic balance: "grassroots" built democracy which will be hybrid-like, that is taking citizens' opinion into account, thus being deliberative, but also contestatory (contestatory democracy). Contestatory democracy is democracy open to debate, not excluding anyone[16].

Braithwaite is right emphasizing wide importance of democracy because the so called punishment normative legitimacy derives just from democracy, human rights and the rule of law[17].

Currently, the meaning of the term "criminal law" is more and more arbitrary[18]. Nearly a century ago J. Makarewicz claimed that "the name "criminal law" corresponds to the previous social perception of the issue: a crime committed must be punished. Modern culture takes us away from this attitude[19]. The author indicated general mitigation of sanctions and more and more frequent renouncement of punishment. Even though he did not mean restorative justice yet, he accurately paid attention to these developing threads which turned out to be solid and which are presently referred to as well. Questions about social benefits of punishment itself are still up-to-date in penal sciences. All advantages and drawbacks of imposing punishment *in concreto* are considered while the importance of criminal prevention is emphasized.

11 J. Braithwaite, Deliberative Republican Hybridity Through Restorative Justice, Raisons politiques. Etudes de pensée politique 2015, No. 59, p. 42.

12 F. Fukuyama, Budowanie państwa. Władza i ład międzynarodowy w XXI wieku, Poznań 2005, p. 42.

13 F. Fukuyama, Koniec historii, Kraków 2009, p. 201 et seq. Contemporary democracy has many committed opponents, comp., e.g., H.-H. Hoppe, Demokracja – bóg, który zawiódł. Ekonomia i polityka demokracji, monarchii i ładu naturalnego,Warszawa 2006.

14 Comp.: J. Dewey, The Public and Its Problems. An Essay in Political Inquiry, Penn State University Press, 2012.

15 Comp.: R. Dworkin, Is democracy possible here? Principles for a New Political Debate, Princeton University Press, 2006, p. 131 et seq.

16 Comp.: J. Braithwaite, Deliberative…, *op. cit.,* p. 33 et seq.

17 Comp.: S. Snacken, Legitimacy of Penal Policies. Punishment between normative and empirical legitimacy, (in:) A. Crawford, A. Hucklesby (ed.), Legitimacy and Compliance in Criminal Justice, London – New York 2013, p. 61 et seq.

18 Comp. more: W. Zalewski, Sprawiedliwość naprawcza, (in:) T. Kaczmarek (ed.), System Prawa Karnego. Vol. 5. Nauka o karze. Sądowy wymiar kary, Warszawa 2014, p. 177 et seq.

19 J. Makarewicz, Prawo karne ogólne, Kraków 1914, p. 1.

As early as more than a century ago, using a more adequate term than "criminal law" was suggested. For instance, "the law of crime combating" was proposed[20].

Changes in criminal law entail changes in the perception of justice. Retaliatory justice based on the retributive perception of "to each his own" or "may all get their due" (*suum cuique*), or the law of talion ("an eye for an eye") has already played its role and it is rightly becoming obsolete. The need of a different perception of justice has been expressed for a long time now. Nils Christie postulated justice based on co-participation[21], which elicited a wide and positive response[22]. This model of justice perceives a crime mainly as defiance of social values which must be restored and redressed (value restoration). This process may be implemented through the restoration of social approval with regard to the principles and values. It considers Durkheim's revalidation of values through social approval[23]. According to this concept, justice means redressing values and shaping social attitudes.

In contemporary society, individual freedom has acquired such a great value that a crime and ensuing conflict must be resolved by the parties themselves rather than the State. Such thinking is based on civil law rather than previously applied criminal law approach. In this perspective, freedom is opposed to the State. As N. Christie claims: "the State has stolen the conflict from the parties and now it must give it back[24]. According to N. Elias, this exclusion of State coercion from the structure of penalty is an element of civilizing process in the a form of refined social control. Along this path, from penalties against life and liberty through fines we head for redress and compensation of wrongs[25].

Restorative justice (hereinafter RJ) defines the issue of justice through the process and result of a specific case. RJ embraces people whose voice has been ignored so far in the criminal justice. Apart from a perpetrator, an active role therein is played by the victims, the parties' families and neighbours and sometimes representatives of local communities as in restorative justice conferencing. The success of the process is measured by a degree of satisfaction of those for whom the door has been opened. Restorative justice is faultfinding which is, most of all, expressed in the lack of trust in professional representatives of the justice system and traditional formalized proce-

20 Comp.: A. Thomsen, Grundriss Des Deutschen Verbrechensbekämpfungsrechtes, Enthaltend Das Deutsche Straf- Und Sonstige Bekampfungsrechts: Besonderer Teil, Struppe & Winckler, 1905 (according to 2010 edition).

21 Comp.: N. Christie, Granice cierpienia, Warszawa 1991, p. 112 et seq.

22 Only English scientific studies on this subject are counted in thousands. Comp., e.g., publications listed at: http://restorativesolutions.us/resources/best-restorative-justice-books.

23 Comp.: M. Wenzel, I. Thielmann, Why We Punish in the Name of Justice: Just Desert versus Value Restoration and the Role of Social Identity, Social Justice Research, 2006, Vol. 19, No. 4, p. 450 et seq.

24 Comp.: N. Christie, Conflicts as property, The British Journal of Criminology 1977, No. 17, p.1 et seq.

25 Comp.: N. Elias, Über den Prozeß der Zivilisation, Band 1 and 2, 16, 1991, after: D. Dölling, Der Täter – Opfer – Augleich – Möglichkeiten und Grenzen einer neuen kriminalrechtlichen Reaktionsreform, JZ 1992, No. 10, p. 495.

dures. Nevertheless, restorative justice refers to an individual criminal case; if it is satisfactorily closed, it is assumed that presumed objectives have been achieved[26].

Many publications emphasize the relation between restorative justice and the republican ideals[27] and depict RJ's enormous potential in promoting democracy. It is underlined that "one reason why restorative justice is popular is that it hands a little piece of power back to ordinary people"[28]. In this sense, restorative justice advocates limitation of the *ius puniendi* of states and thus the state authority's role in punishment. It implies a justice system based on a wide and active participation of differently understood communities as it turned out that there are strong relations between the model of governance and the justice system. If they are based on participation and consensus, they develop responsibility and citizenship. A punitive system does not teach democracy; it does not teach how to be a citizen. It requires people to be passive; passively accept responsibility and tolerate justice rather than participate in it. Forms of restorative justice such as circles and conferencing as RJ procedures teach active responsibility. They provide hope that the situation can be changed and cured. Here everyone has a voice which means something. They teach an ABC of democracy – direct participation[29]. Restorative justice is presented as grassroots example of civil deliberation in practice. The analogy between RJ procedures and deliberative democracy[30], which has been recently so earnestly discussed, has been pointed out. In both cases, the need of conscious participation, mutual respect and amicable agreement prevails[31].

Restorative justice is justice that refreshes and strengthens the parties thereto. The strategy of strengthening through reconciliation enables local communities face their need to live in peace. Strengthening a victim allows them to face their need of control and order. Strengthening a perpetrator enables them to accept liability and become responsible. The strategy of strengthening creates a possibility of inventing dynamic and innovative solutions to the problems caused by the crime, including the creation of social norms. RJ derives from specific experiences; it emphasizes the necessity to carry out research and experiments confirming legitimacy of its ideals. Despite a critique of the old paradigm, nobody, in general, pleads for the need of a total

26 A. Crawford, T.R. Clear, Community Justice: Transforming Communities through Restorative Justice?, (in:) E. Mc-Laughilin, R. Fergusson, G. Hughes, L. Westermarland (ed.), Restorative Justice. Critical Issues, 2003, p. 215.

27 Comp.: J. Braithwaite**,** P. Pettit, Not Just Deserts: A Republican Theory of Criminal Justice, Oxford University Press, 1990; J. Braithwaite, Restorative Justice and Responsive Regulation, New York 2002; J. Braithwaite, Relational republican regulation, Regulation and overnance 2013, No. 7(1), p. 124-144.

28 J. Braithwaite, Encourage Restorative Justice*,* Criminology and Public Policy 2007, No. 6, p. 689.

29 Comp.: J. Braithwaite, Democracy, Community And Problem Solving, http://www.realjustice.org /Pages/vt99papers/vt_brai_html.

30 Comp.: J. Parkinson, D. Roche, Restorative Justice: Deliberative Democracy in Action?, Australian Journal of Political Science 2004, No. 39(3), p. 506 et seq.

31 Comp. more: K. Kim, Restorative Justice and Deliberative Democracy: Connecting and Clarifying Foundational Norms Paper presented at the annual meeting of the MPSA Annual National Conference, Palmer House Hotel, Hilton, Chicago, IL, Apr 03, 2008, http://www.allacademic.com/meta/p265841_index.html.

rejection of old institutions. A margin of cases which should be resolved according to the old model has been preserved[32]. It is obvious that restorative justice differs a lot from our repressive and punitive system of justice based on obedience. A crime is perceived as a conflict. It is underlined that a size, nature and causes of nearly every criminal conflict indicate that previous strategies of strengthening through the inclusion of the injured parties into the system of criminal justice, e.g. mediations and restitutions, must reach further and cannot be limited to the facilitation of reaching a settlement by the parties to the dispute. A structural size of a conflict indicates the need to adopt a more ambitious concept of justice. The essence of the restorative model implies deep interest not only in the redress of a wrong committed in the past but the creation of a better future as well. The future where people live in proper material, social and spiritual relations with one another. Such future requires profound insight into the factors contributing to a crime and creating conflict and injustice; it requires action which will mitigate or eliminate these factors.

Based on almost twenty years of research, Robert Putnam proved that democracy is founded on civic engagement: "to be a citizen in a community most of all means active participation in public matters"[33]. Full civic engagements is guaranteed by deliberative democracy, which is also called participative democracy, where citizens co-decide about every socially important issue[34].

Similar to restorative justice programmes, deliberative democracy is multifaceted too. The following programmes can be enumerated here: 1. Citizens Juries, 2. Deliberative Opinion Polls, 3. consensus conferences, 4. Standing panels: interactive panels, 5. Community Issue Groups, 6. Standing panels: research panels, 7. Electronic democracy & methodology, 8. Future search conferences, 9. Planning for Real, 10. Children, Young People & Public Involvement[35]. All these programmes are characterized by: 1) innovation, 2) informativity (they search competent and well-informed public opinion), 3) deliberativeness (decisions and opinions are reached in an interactive discussion), 4) independence, 5) democrativeness – consulting opinions of ordinary citizens (not politicians or experts)[36]. Some of them are applied in Poland

32 Even H. Bianchi abandoned his primary radicalism and declares a principle of "mutual limitation" of both systems. Comp. more: H. Bianchi, Justice As Sanctuary. Toward a New System of Crime Control, Eugene,Oregon,1994.

33 R.D. Putnam, Demokracja w działaniu. Tradycje obywatelskie we współczesnych Włoszech, Kraków 1995, p. 133 et seq.

34 Comp. most of all: P.W. Juchacz, Idea demokracji deliberatywnej, (in:) M.N. Jakubowski, A. Szachaj, K. Abriszewski (ed.), Indywidualizm, Wspólnotowość, Polityka, Toruń 2002; P.W. Juchacz, Obywatelstwo, tożsamość, partycypacja: o idei demokracji deliberatywnej na szczeblu lokalnym, (in:) R. Piekarski (ed.), Lokalna wspólnota polityczna a zagadnienie tożsamości zbiorowej, Kraków 2002.

35 *Ibidem,* p. 66.

36 Presented as in: *ibidem*. Also comp. data available at the website of the Institute for Public Policy Research: www.ippr.org. uk. Recently A. Krzewińska, Deliberacja. Idea – metodologia – praktyka, Łódź 2016. The author discusses more: 1/ deliberative polls, 2/community courts, 3/ city meetings of the 21st century, 4/ open space techniques, 5/ deliberative cafes – *ibidem*, p. 115 et seq.

– probably deliberative meetings most often, e.g. "Zszywanie miasta" (*"Sewing Up the City"*) in Łódź[37].

Thus it is apparent that restorative justice and deliberative democracy are closely related. The above mentioned relations are even stronger when we realize that the subject of a democratic debate may become and does become punishment as well[38]. Wide participation of citizens in criminal justice is postulated. As Albert W. Dzur noticed: "*Normal, regular and active citizen* action inside and outside is required for contemporary publics to consciously recognize and accept public accountability for criminal justice"[39]. Not every crime can be closed with the parties' reconciliation; in some cases punishment is necessary[40] whereas restorative justice is not possible. Nevertheless, participation of community justice is possible. Its main interest is focused on a different level; above all, it considers how a criminal case or specific act have influenced the community life, which is mainly understood as neighbourhood. Undertaken action strategies are assessed with regard to the impact they exert on the local community[41]. Community justice takes advantage of a wider range of strategies than restorative justice schemes, including prevention. One of the preventive methods engaging citizens is, for example, Crime Prevention Through Environmental Design[42].

However, the following question may arise here: if we continue to punish perpetrators but just with a wider participation of citizens than before, what is the difference between the two models? Well, the difference is significant and it implies a degree of law acceptance by all involved parties. Full acceptance may only be achieved in result of an open and free debate[43]. Broadly speaking: moving on to consensual positions is typical of a contemporary democratic state. According to Nicholas Thimasheff, we observe the extension of an ethical element (consensus) for the sake of a power element (coercion). In contemporary concepts of a state, this course becomes apparent in the process of democratization. If we placed the concepts of a state on a scale where a role of criminal law coercion is treated as a structuring criterion, they would create a certain continuum ranging from the concept of a totalitarian state, where violence is omnipresent, through different concepts of authoritarian state to democratic concepts of a state, that is a "welfare state", which minimizes a role of criminal law coer-

37 Comp. *ibidem*, p. 165 et seq.

38 Comp. P. de Greiff, Deliberative Democracy and Punishment, "Buffalo Criminal Law Review" 2002, vol. 5; A.W. Dzur, Participatory Democracy and Criminal Justice, Criminal Law and Philosophy, June 2012, p. 115 et seq., A.W. Dzur, Punishment, Participatory Democracy, and the Jury, Oxford 2012.

39 A.W. Dzur, The Priority of Participation: a Friendly Response to Professor Gargarella, "Criminal Law and Philosophy", September 2016, p. 476.

40 Comp. W. Zalewski, Przestępca „niepoprawny" – jako problem polityki kryminalnej, Gdańsk 2010.

41 A. Crawford, T.R. Clear, Community Justice…, *op. cit.,* p. 216.

42 Comp. especially: J. Czapska (ed.), Zapobieganie przestępczości przez kształtowanie przestrzeni. Teoria. Badania. Praktyka, Kraków 2012.

43 P. de Greiff, Deliberative democracy…, *op. cit.,* p. 377. Further comp. P. Pettit, Deliberative Democracy and the Doctrinal Paradox and R.E. Goodin, Democratic Deliberation Within, articles prepared for Deliberating about Deliberative Democracy Conference at the Law School, University of Texas, 4-6 February 2000.

cion replacing it with new forms of coercion[44]. On top of this, in the contemporary computerized world, direct democracy takes advantage of new forms of communication. Citizens communicate with each other not only "above" the media but also political divisions. A new quality is emerging: participatory democracy, where a debate is grassroots and citizens are free[45].

It is time for certain conclusion. The answer to the question asked in the title of this text should be positive. Restorative justice is a form of implementation of participatory democracy.

Accountability for a criminal act does attract and will attract social interest. It can be differently used. It may be idle curiosity or thirst for sensation some media feed on[46] as we pessimistically speak today about tabloid justice created by the media and influencing the shape and application of the law[47]. Nevertheless, interest in criminal cases may be used in a positive way by establishing deliberative framework to fulfil the objectives of justice based on co-participation.

The above outlined process does not separate an individual from the community looking after him or her; it does not distinguish between rationality and emotions, or justice and needs. It also does not rely on experts' opinions. When criminal conduct created a perpetrator and victim, RJ rather provides the most severely harmed parties with a possibility of seeking solutions. They are granted a chance they fully deserve. Aiming at a peaceful resolution of a conflict, restorative justice attempts to personalize the conflict, responsibility and the participants thereto in order to express and transform strong emotions experienced by the victim, perpetrator and community due to the committed crime. Such a way out of the crime envisages effort and involvement of the involved individuals. On the other hand, it also requires social background and the community's engagement. In a society with values emphasizing citizen participation in the affairs of state, increasing citizen participation does not require further justifications[48]. As Lode Walgrave somehow poetically said: "All in all, the widening *river of* restorative justice is becoming a delta, which irrigates the

44 A. Gryniuk, Przymus prawny. Studium socjologiczno-prawne, Toruń 1994, p. 76.

45 Comp.: D. Morris, Direct Democracy and the Internet, "Loyola of Los Angeles Law Review", April 2001, p. 1033 et seq.

46 Comp.: Y. Jewkes, Media i przestępczość, Kraków 2010, p. 36 et seq. The author points out that: "Even the most superficial study of media coverage of crime reveals that information about crime departs both from the "reality" of crime and its share in official statistics".

47 Comp.: R.L. Fox, R.W. van Sickel, T.L. Steiger, Tabloid Justice. Criminal Justice in an Age of Media Frenzy, London 2007. The authors pessimistically conclude: "Any reform efforts that are aimed simply at regulating media behaviour or restricting press access to the courts and to police activities undoubtedly would have little impact on the tabloid justice environment. Many of the dynamics of the situation are far more complicated than simply the irresponsible conduct of the news media. Popular culture, commercial imperatives, and a complacent and unengaged citizenry have all converged to produce this set of problems" (p. 206).

48 B. Galaway, Informal justice: Mediation between offenders and victims, (in:) P. Albrecht, O. Backes (ed.), Crime Prevention and Intervention: Legal and Ethical Problems, New York 1989, p. 112.

parched democracy with the participatory potential of citizens who take up responsibility to find constructive solutions"[49].

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.03

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Restorative Justice in post-Penitentiary Assistance in Poland. The Case of the „Mateusz" Readaptation Centre in Toruń[1]

Abstract: The article discusses social policy as a way to implement restorative justice. Based on the experience of "Mateusz" Reintegration Centre in Toruń, the "Dąbrowski method", a new approach to people leaving penitentiary institutions, has been presented. This approach involves the so-called "post-penitentiary first-aid" which embraces creating conditions that enable the so-called positive adaptation characterized by: 1) clear and simple rules, 2) individual approach, 3) a small number of single-sex residents, 4) empowerment of residents, 5) special personal traits of the person leading the centre, and 6) a particular style of leadership.
Keywords: restorative justice, social policy, post-penitentiary assistance, "Dąbrowski method", adaptation

1. Introduction

Restorative justice embraces the entire social problem of crime, that is causes of crime, socialized process of punishment, punishment administration and application, establishment of conditions to redress harm, circumstances of punishment execution, and social integration of offenders. The article focuses on the last of the above elements and presents a social policy institution ("Mateusz" Reintegration Centre) as a way of restorative justice implementation during post-penitentiary assistance, which has become an interesting direction of searching new welfare systems in Poland.

1 The article includes fragments of the author's previously published study: K. Piątek, Sprawiedliwość naprawcza jako przestrzeń dla nowej opiekuńczości w ramach lokalnej polityki społecznej, (in:) W. Anioł, R. Bakalarczyk, K. Frysztacki, K. Piątek, Nowa opiekuńczość? Zmieniająca się tożsamość polityki społecznej, Toruń 2015, p. 153-195.

2. Restorative justice

Among many definitions of restorative justice, the one proposed by Thomas F. Marhsall deserves our attention. He described restorative justice as "[…] a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future"[2]. This definition implies the need to provide a victim of a crime with the position of a fully empowered partner in the proceedings. At the same time (importantly enough), the definition lacks anything which might imply that restorative justice eliminates the traditional system of retributive justice. It is by all means seriousness of a crime which decides how restorative justice may replace retributive justice[3].

Key features of restorative justice include the following properties:

- punishment is not imposed externally (by a court) and a perpetrator distances himself or herself from the offence; they redress harm, e.g., voluntary compensating the victim or a third party (e.g. charity) by working for a local community or by humble apology[4];
- restorative justice is mainly implemented by: negotiations, mediations and restorative justice conferencing[5];
- local community plays a vital role, which mostly involves creating as favourable conditions to "repair" both an offender and victim as possible; it supports the process of recovery providing mediators, negotiators, judges, etc., and organizing community service[6];
- a comprehensive approach to the problem of crime focused on the causes of crime, socialized process of punishment, establishment of conditions to redress harm and conditions of punishment execution, and social integration of offenders[7].

Restorative justice offers an opportunity for an effective solution of a complicated social problem of crime. It results from the fact that it does not merely focus on the issue of punishment administration and application but it is interested in all aspects of this problem, that is the causes of crime, socialized process of punishment, establishment of conditions to redress harm and conditions of punishment execution, and social integration of offenders. In restorative justice, a perpetrator, victim and local

2 T.F. Marshall, as cited in: B. Czarnecka-Dzialuch, D. Wójcik, Mediacja w sprawach nieletnich w świetle teorii i badań, Warszawa 2001, p. 14.
3 A.E. Wdzięczna, Warunkowe umorzenie postępowania karnego w świetle koncepcji sprawiedliwości naprawczej, Toruń 2010, p. 48.
4 *Ibidem.*
5 *Ibidem*, p. 85-106.
6 J. Consedine, Sprawiedliwość naprawcza. Przywrócenie ładu społecznego, Warszawa 2004, p. 207.
7 K. Piątek, Problem przestępczości – zapomniany i niedoceniany obszar polityki społecznej, "Polityka Społeczna" 2015, No. 9, p. 23.

community are in the foreground whereas the state is sidelined. Thus we can say that restorative justice means a passage from the state authority to social authority[8].

3. Social policy as a manner of restorative justice implementation

A social nature of the problem of crime, and a social character of the causes of this pathology in particular, ensues the need to take advantage of social institutions in the process of its resolution. One of them is undeniably social policy, which plays an important role both in the process of crime prevention and commission. The first case involves general social and fundamental prevention which impacts sources of crime and should remove its deeper causes such as inequality, discrimination of poverty, unemployment, disease, lack of educational opportunities, alcohol and drug addiction, families disintegration, etc. On the other hand, the second case involves activities undertaken when a specific crime is committed. Activities aimed at social integration of a perpetrator, which thus fulfil the idea of restorative justice, may be divided into three stages and be limited to pre-penitentiary, penitentiary and past-penitentiary assistance[9].

The pre-penitentiary phase embraces a period from the moment a crime is committed to putting a convicted offender (of this crime) to prison, or executing another punishment against him or her. One of the institutions applied during this stage is a community court (in common law countries), that is a court cooperating with local social organizations in order to solve problems of the local community. This purpose of fulfilled, among others, by increasing a share of intermediate sanctions and non-custodial sentences in the courts case law, which eventually positively affect the quality of life of the entire community[10].

The penitentiary phase takes advantage of many correction or rehabilitation tools including, among others, education of inmates in prison and external schools, paid and unpaid employment of inmates, inmates preventive support, application of a "liberty programme" within the last six months of a sentence, etc.[11]

A relatively new social policy tool used in the penitentiary phase is inmates electronic monitoring programme (in Poland since 2009). This measure may be applied against offenders sentenced to short imprisonments, usually up to one year, who have been classified as not dangerous to others. This system is mostly used with juvenile offenders who are very likely to become demoralized in prison while a loss of family

8 *Ibidem*, p. 208.
9 K. Piątek, Problem…, *op. cit.,* p. 21.
10 K. Piątek, Sprawiedliwość…, *op. cit.*, p. 172.
11 A. Kacprzak, I. Kudlińska, Praca socjalna z osobami opuszczającymi placówki resocjalizacyjne i ich rodzinami, Warszawa 2014, p. 24-29.

and professional relations may have particularly negative consequences for their future life and their relatives' situation[12].

Social policy tools fulfilling restorative justice ideas during the post-penitentiary phase include both traditional methods, such as assistance provided by Prison Service, and new ones (at least in Poland): social employment (since 2003) and Victims of Crime Support and Post-Penitentiary Assistance Fund (since 2012).

The institution of social employment is an important part of the so called active social policy in Poland. Its aim is, among others, facilitation of social integration of individuals leaving prison by providing them with the following services:

- development of skills necessary to fulfil social roles and achieve social positions available to those who are not subject to social exclusion,
- acquiring vocational skills and completing vocational trainings, retraining or enhancement of professional qualifications,
- learning to plan one's life and satisfy needs by oneself, particularly by a possibility to earn one's living through employment or business activity,
- learning skills of rational management of one's financial assets[13].

The newest tool of financing post-penitentiary assistance in Poland is Victims of Crime Support and Post-Penitentiary Assistance Fund, i.e. a state special purpose fund whose means are transferred mainly to funds, associations and other institutions providing post-penitentiary assistance to inmates leaving prison and their families within the following scope of:

- organizing and funding vocational trainings,
- organizing and funding courses enhancing social competence (including costs of addiction treatment therapies),
- temporary subsidy for the rent,
- paying costs of temporary accommodation or providing shelter in homeless shelters,
- providing in-kind support (e.g. clothes, medicaments, food vouchers, necessary house appliance devices, etc.),
- paying costs of specialist medical treatment or rehabilitation,
- assisting in obtaining disability degree certificates or unfit for work certificates,
- paying costs of legal assistance,
- paying travel expenses to the place of residence,
- paying costs connected with obtaining important personal documents,
- providing financial benefits for the purpose indicated by the entity providing support[14].

12 K. Piątek, Sprawiedliwość…, *op. cit.*, p. 176-181.
13 K. Piątek, Oblicza polityki społecznej. W kierunku autonomizacji polityki socjalnej, Toruń 2012, p. 258-259.
14 A. Kacprzak, I. Kudlińska, Praca…, *op. cit.*, p. 35-36.

A serious problem connected with the use of social policy to support wrongdoers is its limited range, inefficiency, or even counter-efficiency (e.g. re-education in prison), insufficient funding, etc. The same applies to the operation of post-penitentiary assistance, which is important from the perspective of this study. For instance, inmates leaving prison in Poland are beneficiaries of social employment at a minimal level. According to the Centre of Social Integration in Toruń, individuals released from prison who faced difficulties with social integration constituted merely 3% of integration classes participants in 2013 as compared to 62% of the long-term unemployed and 10% of the disabled[15]. On the other hand, relatively low financial means of Victims of Crime Support and Post-Penitentiary Assistance Fund do not allow to tailor the assistance offer to actual needs of (ex) convicts and their families applying for help[16].

Nevertheless, third sector initiatives emerging in Poland evoke certain hope that post-penitentiary assistance will improve; and one of them will be the subject of further considerations herein.

4. Waldemar Dąbrowski and his Reintegration Centre "Mateusz"[17]

Thanks to talent and endurance, Waldemar Dąbrowski, a young hockey player in Toruń, quite quickly won recognition of both experts and mates. First successes encouraged him to further work and opened the door to a professional career in Western Europe. Growing fame and frequent boozy parties became everyday reality. In consequence, he became addicted to alcohol and all efforts to quit this abuse failed; he carried on drinking. The effects were obvious and inevitable – he played hockey more and more seldom and his family fell apart (divorce). He started to lack everything: family, job, money, friends, etc.

Waldemar Dąbrowski returned to Poland and started to "fight" for his life undertaking alcohol rehabilitation treatment. With enormous effort he succeeded in breaking his own fall and, step by step, he rebuilt his (bio-psycho-social) system. Return to Toruń became an important element of his endeavour as well as building foundations of his place on Earth from scratch, i.e. both a place of residence and a place of his future unique life activity, widely speaking.

At the beginning, he lived in a small vacant barrack (sleeping on Styrofoam) together with other sportsmen who quickly "woke up" and returned to their homes. Their place was taken by other people, most often addicts and ex convicts who lacked a sense of life or willingness to struggle, often suicidal. Together with them Waldemar adapted the barrack to a place of living. At the beginning, there were no basic housing

15 The report of the Centre of Social Integration to Kujawsko-Pomorskie Province Governor in 2013 (manuscript).
16 A. Kacprzak, I. Kudlińska, Praca…, *op. cit.,* p. 36.
17 A source of information used here are direct conversations of the author with Waldemar Dąbrowski and the so called participant observation carried out as a part of cooperation between the author and "Mateusz" Centre.

facilities there like furniture or sanitary devices, only so called "rough walls". These works were more and more often accompanied by the idea to create a house (centre) for ex-sportsmen, ex-convicts and ex-alcohol addicts who were abandoned and left without any support.

Eventually, on 6 August, 2009 Association of Prophylactics and Re-education "Mateusz" was registered in the National Court Register, and a few days later Reintegration Centre "Mateusz" commenced its activity. Both institutions were called Mateusz after Waldemar Dąbrowski's disabled son whom he attempted to help in all possible way to cure his illness. The Centre housed men who served time in Polish prisons, often after alcohol rehabilitation therapies. The Centre focused on prophylactics, i.e. preventing re-offending, and widely understood re-education, i.e. social reintegration. W. Dąbrowski's colleagues and friends contributed greatly to the Centre's establishment, starting from ex-hockey players "scattered" all over the worlds, through "homies", and finishing with those whom he quickly "infected" with his passion. There were many, many ordinary people among them as well as therapists, politicians and scientists.

Centre residents were most often ex-inmates coming straight from the "street" and looking for existential help and more widely understood support whom Waldemar Dąbrowski had met. In time, they were people leaving therapeutic centres, addicted to alcohol and referred to "Mateusz" by colleagues-therapists. Recently, the Centre has been more and more often housed by people sent here by probation officers or those who learnt about "Mateusz" in prison.

Centre residents are men; overwhelming majority of them are alcoholics before, during or after therapy. Very often they are inmates sentenced to punishment for different offences, from theft to homicide. "Mateusz" also houses people who were released from psychiatric facilities. All of them may be well described as homeless, unemployed, lost in life, suffering from medical and emotional problems, and mainly coming from Toruń and nearby area.

Basic activities of the Centre (including *stricte* supportive ones) are contained in its Regulations and are limited to, among others: satisfaction of housing needs (accommodation, board, clothes, shoes and cleaning supplies), support to fulfil life functions, take care of and arrange personal matters, participation in group therapy and improvement of skills, satisfaction of religious and cultural needs, stimulation to establish, maintain and develop contacts with family and wider communities, activities favouring residents empowerment or independence, taking up a job, paying for necessary personal items of individuals who do not have their own income in the amount not exceeding 20-30% of permanent social benefit, contact with a psychologist or therapist, etc.[18]

18 Regulations of Reintegration Centre "Mateusz".

Residents can formally stay in the Centre from 6 to 12 months. They must observe basic rules of conduct which include specified orders and obligations binding in the Centre. The above mentioned rules encompass: absolute soberness (giving up alcohol and psychoactive substances) within and outside the Centre, refraining from both verbal and physical violence, no provocative behaviour, cultural communication, and sincerity. Basic obligations embrace: participation in classes or courses and other residents meetings, working for the Centre (cooking, cleaning, repairing, renovating, taking care of the surroundings, etc.) and sharing costs of the Centre's maintenance.

About a dozen people regularly reside in the Centre, and during the past seven years nearly one hundred people looking for support have found there warmth, understanding and, most of all, normality. All the time the Centre carries out works to improve the quality of its operation through, among others, extending the building and allocating places to sleep, eating meals, furnishing bathrooms and a common room, fencing the area to relax and host guests. The extension and development of the facilities have been and is possible thanks to lobbying, in effect of which, among others, the city of Toruń handed over the building to the Association and Toruń president himself was the Centre's guest several times. Further ideas aim at the stabilization of "Mateusz" situation by covering its funding by the local system of post-penitentiary assistance. The concept thereof has been the subject of ongoing social debate and discussion among the Centre's friends and supporters.

The activities carried out by Waldemar Dąbrowski and his associates outside the Centre have initiated works on establishing a similar centre for women in Grudziądz. At the same time, conceptual preparation has been launched for setting up another centre, this time for men, in Włocławek. Moreover, there is an ongoing debate about the idea to establish Research and Reintegration Institute "Mateusz" that would join its therapeutic functions with scientific research.

5. "Dąbrowski method"

Seven years of Reintegration Centre "Mateusz" operation, the fact that already nearly one hundred people have been residing there, the study author's direct observation (over two years) of everyday operation of the Centre, and the opinions of experts, therapists and educators allow to use the notion "Dąbrowski method" with full awareness of its specificity and impreciseness.

The essence of this method has been outlined by Waldemar Dąbrowski who said: "…I am trying to show them that life is worth living. I believe that a man who has been convicted or otherwise excluded is not flawed. I have learned this myself, and today I thank God he has tried me so. I help guys because I know very well what they feel. I have done it all. I do not use scientific psychology but a simple conversation.

The message: «Pull yourself together, man, because you will return where you have come from.» – is understood by these men"[19].

The source of "Dąbrowski method" are his own life experiences (alcoholism) and personal skills acquired during numerous alcohol rehabilitation therapies. A basic form of this method's implementation is sincere conversation rather than academic psychotherapy. This method has no scientific background based on the analyzed professional literature or research carried out directly by its author. Practical knowledge acquired systematically for years is extended thanks to everyday contacts of W. Dąbrowski with the representatives of the world stricken by traumatic experience. He himself expresses this univocally saying that: "…boys from «Mateusz» are an open book I learn a lot from"[20].

Waldemar Dąbrowski identifies with "his boys" very much during the group therapy called "community". He speaks their language in everyday conversations too. Thus he achieves a necessary level of credibility which allows him to challenge "broken feelings" full of anger, sense of wrong, injustice, or abandonment, etc., but also big emotions. Waldemar Dąbrowski is fully aware of the difficulty of this task saying, among others, that: "I did not realize earlier that «work on emotions» may be such hard drudgery, but I have learnt simple methods which are the most efficient. We have no aggression, swearing, orders or bans. And this is true about all residents […]. These people change right before my eyes, I see it every day"[21].

Knowing the Centre residents' social capital (broken families, professional and social ties, etc.) and human capital (lack of education or its expiry, communication very often based on prison slang, instable emotions, or broken feelings, etc.) well, Waldemar Dąbrowski is acutely aware of these conditions and the difficulty of the task he has undertaken. This ensues the need to search appropriate forms of impact to be applied in a correct order while being fully aware of time limits at his disposal. It is confirmed by his words: "You have mentioned this job, yes, I really help them find it but, first, boys have to grow mentally to face it. For many of them, it is too early to confront reality. They usually stay in my Centre from six to twelve months, but some of them stand on their own two feet faster. They rent a room, work, meet a woman and get their life back together"[22].

Waldemar Dąbrowski helps "Mateusz" residents solve their current but still urgent or burning problems. Apart from the support ensuing right from the fact of their residence in the Centre, he satisfies their other needs: accommodation (a place to stay the night), board, sanitary needs, etc. He looks for jobs for them (mainly with his colleagues who are businessmen and a variety of employers) pledging his word for them. He helps them find proper medical assistance or professional therapy. He

19 W. Dąbrowski, as cited in: P. Błaszkiewicz, Proste metody są najlepsze, "Nowości", 11 August 2014, p. 8.
20 *Ibidem.*
21 *Ibidem.*
22 *Ibidem*.

arranges meetings with the family and close friends being interested in the course of such meetings and even often participating in them.

The activity outside the Centre is a very important element of "Dąbrowski method". It mainly involves searching people who can help him solve specific problems concerning "Mateusz" everyday operation. Recently (already having a stable group of people supporting him on every day basis such as, e.g., a baker), he takes part in lobbying activities to resolve the Centre's system problem (e.g. the Centre's permanent and fixed manner of funding) and develop an optimal model of post-penitentiary assistance in Poland (among others, through a mutual meeting with two Committees of Polish Senate, or a scheduled meeting in Polish Sejm, and cooperation with Management and Members of the Council for Post-Penitentiary Assistance of Ministry of Justice).

"Dąbrowski method" resembles social and personal (life) coaching the most. It contains many elements of social mentoring because it is voluntary, based on trust, requires commitment to others, patience, confidentiality and openness. Due to a highly individualized nature, it contains elements of therapy or rather psychotherapy because it mostly refers to feelings and emotions.

6. The case of "Mateusz" as a source of new welfare system providing support to individuals leaving prisons in Poland

The situation of individuals released from prisons in Poland is connected with the weakness of institutional post-penitentiary assistance, which results, among others, from the lack of coordination of aid activities, insufficient and hardly available information (for the convicts) about places and forms of assistance, imperfect and often ignored legal solutions, limited therapeutic and psychological assistance, insignificant financial support, and a slim chance of social and professional activation of ex-inmates. If we add here a sphere of social awareness which is dominated by the conviction that, in fact, each of us perceives an ex-inmate as a dangerous criminal and, in consequence, a threat to himself or herself and the nearest environment, the situation of individuals leaving prisons appears hopeless and thus favours re-offence.

The system of centres established according to "Mateusz" experience might be the so called **first post-penitentiary assistance**, equivalent to first pre-medical aid. Similar to their prototype, as "gates of freedom", they could relatively painlessly secure the convict's first contact with free environment thus limiting risk factors connected with his contact with criminal environment or alcohol, and providing initial therapy. Centres' residents could gain support from social welfare centres, benefits from employment agency, or any assistance referring to professional activity. New institutions would create conditions of the so called **positive adaptation**, which is defined as a process of successful adaptation to the new, so called out-of-prison, situ-

ation that requires qualitative changes with regard to various psychosocial functions and properties of an individual. In the centres of "Mateusz" type it would be possible thanks to "Dąbrowski method" based on social and personal (life) coaching, which is characterized by the following features.

Clear and simple rules, leaving no doubts as to their observance, e.g. absolute soberness (giving up alcohol and psychoactive substances) within and outside the Centre, withdrawal from verbal and physical violence, cultural communication, and sincerity.

Individual approach, which means adapting the content and form of support to the needs of a specific person, his level of awareness, readiness for change, and a degree of determination to exit the sphere of comport closed to "others".

A small number of same-sex residents: the Centre regularly houses maximum about a dozen men, which favours more profound individual relations, everyday direct contacts and creates specific home-like atmosphere.

Activation of residents. First of all, everyone residing in the Centre is engaged in the house's functioning, works connected with everyday rhythm of its residents' life, and undertakes friendly cooperation to resolve problems. Secondly, every beneficiary works or actively look for a job and, if it is necessary and possible, takes part in various forms of therapy outside the Centre[23].

Special personal traits of the person managing the centre shaped in result of life experience, obtained education and connected with natural attributes favouring mentor's credibility.

Particular style of leadership: communication with the use of a simple language, everyday contact, thorough observation of residents, listening to their needs and openness to their requests, creating conditions for direct conversations, full acceptance and respect, relying on the residents' widely understood resources, values and capabilities.

7. Summary

Emphasizing that social policy is a way to implement restorative justice in the post-penitentiary assistance phase appears to be obvious and natural. Considering the fact that sources of crime are mainly rooted in social causes and that punishment for a crime is generally executed in the conditions of incarceration thus limiting, according to many experts, efficient re-education or rehabilitation, it seems absolutely socially necessary to support individuals leaving prisons.

The Polish system of post-penitentiary assistance suffers from numerous legal, financial, organizational and informational weaknesses as well as formality. This aid is characterized with little flexibility, lack of openness and empathy with regard to

23 *Ibidem*.

convicts, or their efficient activation. All of this together ensues limited inclusive possibilities of this assistance favouring consolidation or even intensification of social exclusion that can be apparently confirmed by high rates of re-offence.

Mainly due to its undeniable advantages with regard to the fulfilment of tasks of first post-penitentiary assistance and authentic opportunities to achieve the so called positive adaptation, "Dąbrowski method" provides hope and indicates a direction of searching a new welfare system in Poland. Moreover, it is undoubtedly a form of restorative justice implementation as it connects an offender with the community by securing the first contact of an ex-inmate with free environment and limiting possibilities of his contact with criminal environment and stimulants (alcohol and drugs) as well as providing initial therapy which is appropriate to his needs. However, we should remember about limitations of such aid. Limited nature of this method is connected with its basic features such as: a small number of residents, individualization, personalization of internal relations, and special traits a leader or manager of such an institution must possess. It is hard to imagine that all individuals leaving prisons in Poland could be beneficiaries of "Mateusz" assistance. What is more, not all of them will decide to take advantage of such aid while it must be voluntary. Finally, and particularly important, not everyone needs such support.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.04

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The Participation of the Social Factor in Sentencing in the Historical and Law-Comparative Perspective

Abstract: The article concerns the historical and comparative analysis of the institutions of jury and lay judges as basic forms of the participation of social factor in sentencing, referring mostly to English, German and Russian examples. The article discusses both advantages and disadvantages of these institutions as well as procedural issues of their functioning and the jurisprudence of the European Court of Human Rights in regard to this matter. In conclusions, a fundamental role of public participation in sentencing as the indication of democratic exercise of power is emphasized.
Keywords: lay judges, jury, England and Wales, Germany, Russia, trial

1. Introduction

Traditionally, community may participate in sentencing assuming one of the three variants below[1]:

1) "total" participation in the form of community courts composed solely of non-professional subjects,
2) participation within mixed courts, i.e. professional judges and lay judges,
3) participation in the form of the jury functioning on the basis of the principle of division of powers between magistrates ("judges of fact") and professional judges ("judges of law").

1 B. Janusz-Pohl, Zasada udziału czynnika społecznego, (in:) P. Wiliński (ed.), System prawa karnego procesowego. Tom III. Cz. 2. Zasady procesu karnego, Warszawa 2014, p. 1438-1439. Referring to models of social factor participation in court benches, see more in: K. Wieczorek, Udział czynnika społecznego w orzekaniu w polskim i amerykańskim procesie karnym, Szczecin 2012, p. 15-20.

2. Trial by jury

Taking into account the historical development of community participation, we should start our considerations herein from the institution of the trial by jury. Its homeland is England, where it has been in operation for over 800 years[2]. Its popularity as a form of direct democracy mainly derives from the jurors' independence and a possibility of intuitive action. Since the 13th century, the jury has become a popular form of the public system of justice thousands of jurors and defendants have taken part in. Despite its disadvantages, the jury has been widely considered by the community as an institution of vital importance to guarantee a defendant a reliable trial. The current subject literature also points out religious roots of the jury in England[3].

Hence already at the beginning of its existence, the jury expressed social will in the justice system whereas jurors often acquitted individuals accused by the Crown of murder and theft (app. 50% of cases) in trials by ordeal. With regard to murder, jurors were able to differentiate between manslaughter and homicide whereas in cases about theft they lowered the value of stolen property (*pious perjury)*[4], thanks to which the defendant could avoid death penalty. At the time of its utmost importance in the 18th century, the jury used to acquit defendants in many political cases and petty theft cases. Lord Devlin described these times in the following way: "So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives"[5].

It is worth adding that apart from the jury deciding about the defendant's guilt after a trial in the form of a sentence (called petit jury), English legislation had known the institution of Grand Jury before the issue of 1933 Administration of Justice Act, which provided initial supervision of the prosecution in the most important cases and decided whether the prosecution collected sufficient evidence to continue the trial[6].

Nowadays, the principles of qualification for jury service and its operation are specified in Juries Act 1974, which envisages that a juror may be a randomly selected person from a larger group of citizens randomly selected from a larger group by a judicial officer (acting on behalf of the Polish equivalent of Attorney General). This

2 Referring to historical development of the jury in criminal cases in Great Britain see: J. Morgan, W. Forsyth, History of Trial by Jury, New York 1875, p. 159-177; J. Hostettler, The Criminal Jury Old and New. Jury Power from Early Times to the Present Day, Winchester 2004, p. 16-124; G. Andoor, Laien in der Strafrechtsprechung. Eine vergleichende Betrachtung der Laienbeteilung an deutschen und englischen Strafgerichten, Berlin 2013, p. 31-41.

3 See, e.g.: J.Q. Whitman, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial, (Yale Law Library Series in Legal History and Reference), Yale University Press, New Haven-London, p. 27-90.

4 J. Hostettler, A History of Criminal Justice in England & Wales, Hampshire 2009, p. 125-145.

5 J. Hostettler, The Criminal Jury…, *op. cit*., p. 141.

6 First Grand Juries appeared in the 12th century during the reign of King Henry II while procedures of their operation were determined during the reign of King Henry III in 1216-1217. To find out more about the history of Grand Jury in England see*:* W.J. Campbell, Eliminate the Grand Jury*,* "Journal of Criminal Law & Criminology" 1973, vol. 64, p. 175-177.

group is composed of randomly selected citizens from up-to-date lists of parliamentary or local government electors[7].

As mentioned before, an usher selects members of a specific jury to a specific case whereas parties and their litigation friends have access to the list of potential jurors, which allows them to take advantage of the procedure of challenging some jurors or the entire jury if they present a challenge for cause[8]. Apart from this, only the prosecution is entitled to the right to stand by a juror, which is independent of a challenge for cause, under which the prosecutor may request a challenge of a specific juror without giving any reason before the jurors are sworn. If the prosecutor makes such a challenge, the juror is automatically replaced by another one from the jury in waiting[9]. However, the prosecutor must show a cause of challenge should the entire jury panel be exhausted without a full jury being obtained. The judge to hear a case is also entitled to the right to stand by a juror[10].

Juries Act 1974 requires 12 jurors to sit on the jury but in practice 11 or even 10 jurors often adjudicate.

If a sufficient number of jurors capable of hearing a specific case cannot be summoned, an exceptional procedure of ad hoc appointment may be applied in order to make up the number of jurors by summoning any person in the vicinity, a process known as "praying a tales". It was applied by Judge Andrew Barnett in Salisbury Crown Court in June 2016, when he realized that he was 3 jurors short. Not to delay the trial, he sent his clerk to the street who obtained a consent of only one passer-by to join the jury while the trial had to be adjourned anyway in order to verify two other jurors from Winchester[11].

A professional judge is in charge of a hearing, where after preliminary speeches and presentation of evidence first by the prosecutor and then the defence, both these parties deliver their final speeches: counsel for prosecution sums up his case and counsel for defence sums up his case. A final and very important stage of a trial before Crown Court is judge's summing up, where the judge draws jurors' attention to legal issues and helps them analyse the facts[12]. He or she will explain then the judge's

7 To find out about the principle of participation of citizens in juries and a possibility of discharging them from this duty see: K. Girdwoyń, Sądownictwo w Anglii i Walii, (in:) P. Kruszyński, P. Hofmański (ed.), Proces karny. Rozwiązania modelowe w ujęciu prawnoporównawczym. System Prawa Karnego Procesowego, v. II, Warszawa 2014, p. 724-726 and literature cited there.

8 To find out about the selection of jurors and their challenge see: J. Sprack, A practical approach to criminal procedure, Oxford 2008, p. 294-300; K. Girdwoyń, Sądownictwo..., *op. cit.,* p. 784-786 and literature cited there.

9 It is a panel of 20 or more jurors who are either in the court when the defendant does not plead guilty, or they are summoned to court after it is known whether the defendant pleads guilty or not, J. Sprack, A practical approach..., *op. cit.,* p. 294-295.

10 It is worth adding that for centuries the Defence had the right to challenge a certain number of jurors from a jury without giving a reason. It was enough for the Defence Counsel to say "challenge" directly before a panel juror was sworn, and he or she was replaced by another one. This institution was called a challenge without cause or peremptory challenge and since it was quite often abused it was abolished under Criminal Justice Act 1988, J. Sprack, A practical approach..., *op. cit.,* p. 296-297.

11 Halsbury's Laws of England, vol. 11(3), p. 1289.

12 J. Sprack, A practical approach..., *op. cit*., p. 314-347; K. Girdwoyń, Sądownictwo..., *op. cit*., p. 791-793 and literature cited there.

and jurors' role emphasising that although jurors decide about facts, they are bound by the judge's instructions on legal issues and evidence. Moreover, the judge explains the essence of a tried offence and its elements to be proved. The judge's summing up must also explain who bears a burden of proof and its standards (beyond reasonable doubt). The judge may recommend jurors to acquit the defendant but he or she cannot order them to return a verdict of guilty[13].

Jurors deliberate in a separate jury room without the presence of a professional judge or other people[14]. Until 1967 (i.e. before Criminal Evidence Act 1967 came into force), English trial required jurors' unanimity to pass a sentence. This solution was criticized in the literature due to a possibility of one juror blocking the case resolution on the one hand, and lack of responsibility of single jurors for anonymous sentence on the other hand[15].

Presently, pursuant to Art. 17 (1) of Juries Act 1974, the verdict is agreed if in a case where there are not less than eleven jurors, ten of them agree on the verdict (i.e. 11:1, 10:2, 10:1); and in a case where there are ten jurors, at least nine of them must agree on the verdict. In all these situations, the foreman of the jury must state in open court the number of jurors who respectively agreed to and dissented from the verdict (Art. 17 (3) Juries Act 1974) for the verdict to be biding. In principle, jurors only state a defendant is "guilty" or "innocent", but sometimes they may choose a third option – find the defendant innocent as charged but guilty of another, less serious offence. The judge, generally, must accept the jury's verdict even if he or she disagrees with it, but sometimes they are not obliged to accept the verdict passed first time[16]. It occurs when:

- jurors passed a verdict on indictment they were not authorized to pass (e.g. for an act that has not been covered by the indictment). Then the judge orders jurors to deliberate again,
- when the verdict was ambiguous, e.g. when the statement of "guilty" or "innocent" was accompanied by comments evoking doubts as to the appropriate content of the verdict which the judge should explain.

The relevant literature indicates that if the jury changes their decision after the judge refused to accept their first agreed verdict, the second verdict has effects. If the jury does not change their verdict, it should be accepted[17].

13 House of Lords in Wang case (2005) UKHL 9.
14 J. Sprack, A practical Approach..., *op. cit.,* p. 339-342.
15 J. Hostettler, The Criminal Jury..., *op. cit.,* p. 130-131.
16 J. Sprack, A practical approach..., *op. cit.*, p. 367; K. Girdwoyń, Sądownictwo..., *op. cit.*, p. 795-798 and literature cited there.
17 J. Sprack, A practical approach..., *op. cit.*, p. 367.

The institution of the jury in England and Wales was subject to serious criticism in the 20th century, which also brought about postulates to abolish it. The most important arguments of its opponents embraced, among others[18]:

- perverse verdicts characteristic of the 800 years long tradition of the jury, in particular unfair acquittals and sentences. Surveys carried out, for instance, in the 1970s confirmed that such phenomena occurred quite frequently from the litigants' point of view whereas imperfect appeal procedures did not prevent it[19],
- full discretion and confidentiality of decisions made by jurors meant that jurors were not obliged to explain verdict's motifs, which arouse fear as to its compliance with the institution of a reliable and fair trial enshrined in Art. 6 of ECHR. Apart from this, it is argued that confidentiality prevents the presiding judge from assuring that jurors comply with court procedures[20],
- high social costs of this institution's operation ("the jury-luxury").

Nevertheless, the above arguments do not change the fact that trials by jury have been an inherent element of English legal tradition for over 800 years, and every year over 200.000 citizens do jury service.

With regard to the efficiency of the jury in the English contemporary system of justice, research published by Ministry of Justice in February 2010 indicate that such courts are efficient because if jurors are sworn, they reach a verdict in due time in 99%. On the other hand, when the jury encounters problems to agree on a verdict (so called hung jury), in most cases a verdict is reached, at least with regard to some charges[21]. The above research confirm that the greatest proportion of convictions by the jury refers to cases which carry a high probability of the occurrence of proximate evidence (most often physical evidence) incriminating the defendant (in case of theft, drug trafficking, forgery, fraud and blackmail). Whereas the lowest conviction rate occurs in cases when jurors must be certain as to the mens rea of a defendant or victim (a threat of murder, manslaughter or attempted murder). Hence the data suggest that the conviction rate by the jury is connected with the nature of legal issues jurors must resolve to find the defendant guilty of a specific crime as well as the nature of evidence they are presented with[22].

18 See: J. Hostettler, The Criminal Jury..., *op. cit.,* p. 145-154. Juries in the USA are subject to similar critique, where the "erosion" of this institution is depicted: S.D. Jordan, The Criminal Trial Jury: Erosion of Jury Power,: "The Social Justice Law Review" 2002, vol. 5, p. 1-62.

19 J. Baldwin, J. McColvin, Trial by Jury: Some Empirical Evidence on Contested Criminal Cases in England, "Law & Society Review" 1978-1979, vol. 13, p. 860-889.

20 P.S. Ferguson, The criminal jury in England and Scotland: the confidentiality principle and the investigation of impropriety, "International Journal of Evidence & Proof" 2006, vol. 10, p. 16-211.

21 C. Thomas, Are juries fair?, Ministry of Justice Research Series 1/10, London 2010, s. 25-28, https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf (08.02.2016).

22 *Ibidem,* p. 29-31.

At the same time, the above research concluded that contrary to public opinion and earlier government's reports, the juries more often convict than acquit rapists whereas the conviction rate for other serious crimes (homicide, manslaughter, attempted murder or grievous bodily harm) is lower than for a rape[23].

As far as appeals against jury verdicts are concerned, we should point out guidance set by the Appeal Court's case law, which provides an opportunity of grounding the appeal upon mistakes committed during a first-instance trial. With regard to judicial mistakes, the most frequent appellate objections refer to mistakes made in the judge's summing up such as: wrongly specified crime elements, failure to allow the jury to deliberate on the basis of substantive evidence presented by the defence, and omission to instruct the jury about the burden and/or standard of proof[24]. Other objections refer to procedural faults committed during a trial, e.g. allowing the prosecutor to correct the indictment if it evokes a possibility of injustice, admitting (unlawful) inadmissible evidence, lack of an appropriate response to jurors' comments, or failure to include statutory rules of majority voting. Nevertheless, such objections will only be recognized as grounds of an efficient appeal provided they affect conviction, that is the answer to the question: was the conviction safe[25]?

Important Appeal Court's case law guidance is a question whether Defence Counsel's ineptitude and negligence during a trial may be a reasonable ground of an appeal[26].

In the context of a critique of jury trials in England and Wales, it should be emphasized that, until 1938, interwar Poland had an institution of trials by jury as well. Some of the objections raised against this institution embraced its following faults, among others[27]:

- questions asked jurors by professional judges lead to a number of errors and irregularities, which results from the fact that jurors do not know law and do not understand legal effects of answers given to these questions,
- it has been noticed that in the continental trial, despite the assumption that jurors are to be "judges of fact" whereas professional judges "judges of law", actually quite often jurors decided about the law under continental Europe's provisions of law (not knowing it) whereas professional judges decided about facts,
- jurors decided about guilt whereas professional judges about punishment; and this dualism was harmful due to a close connection between guilt and punishment,

23 *Ibidem*, p. 31-32.
24 To find out about the notion of burden and standard of proof in English trial see: R. Munday, Evidence, Butterworths 2003, p. 61-98 and case law cited therein.
25 J. Sprack, A practical approach..., *op. cit.,* p. 482.
26 *Ibidem*, p. 482-483 and case law cited therein.
27 S. Śliwiński, Polski proces karny przed sądem powszechnym. Zasady ogólne, Warszawa 1947, p. 145-147.

- the experience of the jury operation revealed that jurors' verdict was often merely accidental; jurors showed dependence on a number of external factors, and in particular they were not able to oppose public opinion,
- in continental systems terms of office of trials by jury were only cyclical (in the Anglo-Saxon system jurors are summoned to a specific case), which contributed to proceedings protraction and prolonged defendant's detention[28].

In contemporary Europe trials by jury, in principle, follow English solutions. They were introduced ages ago (e.g. in France after the Great French Revolution under *Code d'Instruction Criminelle* of 1808*)* due to similar reasons, i.e. increased impact of citizens on the system of criminal justice.

An interesting example of the connection between the institution of trials by jury and development of democracy and civil rights is the Russian Federation (hereinafter RF). In Russia such courts were introduced by the Code of Criminal Procedure of 1864 and survived until 1918. They were reintroduced under the new RF Constitution in 1993, which introduced an adversarial model of proceedings based on the American system thus replacing soviet inquisitorial-adversarial litigation (Art. 15 of the Code of Criminal Procedure of RF of 5 December 2001, and Art. 193 of RF Constitution). Initially, trials by jury as an inherent element of the adversarial system were introduced in the 1990s in nine Federation Republics, and then in all others. The last republic where trials by jury were established as late as 2010 was Chechnya[29]. Defendants have the right to select a trial by jury only in case of serious crimes punished by deprivation of freedom for minimum ten years. Defendants have the right to choose either a trial by jury or before a court composed of a professional judge and two jurors, which they should be instructed about.

The rules of jury selection and summoning have been specified in Art. 325 of the RF Code of Criminal Procedure similar to the English trial. Yet twelve jurors are selected by a judge out of minimum twenty candidates while two persons fulfil a role of alternate jurors. The selection is based on questions a judge asks candidates in a meeting whereas the parties have the right to submit justified motions to challenge individual candidates (Art. 327-328 of RF Code of Criminal Procedure)[30].

A course of trial is similar to trials before other benches because after reading the indictment, if the defendant does not plead guilty, first the prosecutor presents his or her evidence to be followed by the defence (Art. 273-274 of RF Code of Criminal Procedure)[31]. After the parties' final speeches, the bench president shortly summarizes the course of the trial and parties' positions, asks jurors questions about the

28 Similar faults of trial by jury were also indicated in Polish postwar literature, see, e.g.: W. Daszkiewicz, Proces karny. Część ogólna, Warszawa 1996, p. 116-118.

29 V. Turanjanin, European Systems of Jury Trial, "US-China Law Review" 2015, vol. 12, p. 202-204.

30 B.T. Biezliepkin, Kommientarij k ugołowno-processualnomu kodieksu Rossijskoj Fiedieracji, Moskwa 2016, p. 415-419.

31 *Ibidem,* p. 362.

crime, the defendant, his or her guilt as well as mitigating and incriminating circumstances. The judge draws jurors' attention to the importance of presumption of innocence and a ban on the presumption of guilt when the defendant takes advantage of the right to remain silent as his or her defence[32]. In principle, an unanimous verdict of the jury should be reached within three hours of a secret debate (in a separate jury room), and after the lapse of this time, majority votes decide. A professional judge is bound by the jury's decision of either guilt or innocence of the defendant, and he or she passes a sentence on this basis[33].

The jurors' verdict may be appealed against to the Supreme Court on the grounds of violation of law, incorrect application of criminal law, violation of provisions on the procedure, or if the verdict is not fair. The Appeal Court (after the amended appeal procedure in 2013) reviews evidence and may repeat the entire litigation which, as pointed out in the comments, is contrary to over 150 year-long tradition of trials by jury whose verdict, in principle, was not subject to an appeal[34].

However, the Russian subject literature criticizes the institution of trials by jury as a manifestation of social factor's participation in sentencing due to its limitation, vulnerability to be influenced by political power, and lack of genuine social respect, which makes it a pretence of democracy[35]. It is emphasized that jurisdiction of such courts has been excluded since 2009 in cases regarding terrorism, which was found consistent with the RF Constitution by the Constitutional Tribunal under the judgment of 19 April 2010[36]. Apart from this, in principle, this institution can solely be applied to Russian citizens while only native Russians may serve as jurors[37].

I believe it is now worthwhile pointing out the European Court of Human Rights (ECHR) case law referring to the compliance of sentencing by jury with Art. 6 of the European Convention of Human Rights (ECHR). The Court generally believes that States – parties to the Convention – enjoy significant discretion with regard to the choice of a specific system of criminal justice which should assure their compliance with a fair trial principle. The Court further notices that pursuant to Art. 6 par. 1 of ECHR, no right to be tried by a jury has been introduced. In this context, "the Court had to assess the decision-making procedure to ensure that it complied with the Convention requirement of adversarial proceedings and incorporated adequate safeguards to protect the interests of the accused, taking into account special circum-

32 *Ibidem*, p. 427-431.
33 *Ibidem*, p. 432-438.
34 *Ibidem*, p. 442. To find out about the procedure of appeal in the contemporary Russian trial, see a monograph: A. W. Kudriawcew, W.P. Smirnow, Appielacjonnoje proizwodstwo w ugołownom processie Rossiji, Moskwa 2013.
35 See the results of research cited in a monograph: Y. Cheryachukina, The Jury System in Russia: Perceptions & Attitudes Toward Criminal Trials, New York 2007, p. 111-131, and V. Turanjanin, European Systems..., *op. cit*., p. 205.
36 F.F. Davis, S. Tyulkina, Undermining Trial by Jury in Russia in Counterterrorism and the Wider Criminal Law, "Vienna Journal on International Constitutional Law" 2014, vol. 8, p. 393-415.
37 N. Kvalew, Jury Trials for Violent Hate Crimes in Russia: Is Russian Justice only for Ethnics Russians?, "Chicago Kent Law Review" 2011, vol. 86, p. 669-687.

stances, nature and complexity of a given case"[38]. However, in the case *Taxquet v. Belgium,* the Court held that there had been a violation of Article 6 § 1 of the Convention on account of failure to adjust individual questions asked by a professional judge to jurors regarding each defendant, in effect of which there was lack of adequate procedural safeguards to enable the accused to understand reasons for jury's guilty verdict[39].

3. Courts of lay judges (assessors)

Courts of lay judges (assessors) originated in Germany, which evokes a short analysis of the participation of social factor in this system of justice. Similar to English trials by jury, German trials by jury and courts of lay assessors are deeply rooted in history and tradition as principal institutions of social impact on the justice system in Middle Ages and subsequent centuries based on trials by ordeal[40].

Initially, German Code of Criminal Procedure (StPO) envisaged participation of two types of social judges in a criminal trial: lay judges (assessors) *(Schöffen*) and jurors *(Geschworenen*). Similar to present honorary judges (*ehrenamtlichen Richtern)*, lay assessors sat in a bench together with a professional judge enjoying the same rights (except access to case files). As far as trials by jury are concerned, which were competent to adjudicate in cases involving the most serious crimes, initially (similar to English and French systems), there was a division of tasks between professional judges and lay assessors: a jury composed of twelve jurors decided about guilt themselves whereas three professional judges decided about punishment[41].

In contemporary German trial, there are only lay assessors who fulfil this function honourably enjoying the same rights as professional judges while deciding about guilt and punishment (§ 30 and § 77 item 1 of the German Act of 9 May 1975 on the System of Courts – GVG); they are also independent to adjudicate within the same scope as professional judges (§ 45 item 1 of the German Act of 19 April 1972 on Judges – DriG)[42]. As emphasized by the German subject literature, participation of

38 Decision of ECHR as of 28th May, 2013 in the case of Warecka K., Twomey, Cameron and Guthrie v. the United Kingdom*,* Lex No. 1318103. In this case ECHR decided that failure to disclose materials not regarding the defendants' guilt or innocence by the prosecution whilst disclosing only those materials referring to the contact of the defendants with the jury, in effect of which the jury was dismissed and the trial was continued before a professional judge sitting alone, complied with Art. 6 of ECHR.

39 ECHR's judgment of 16th November, 2010 in the case of Taxquet v. Belgium, a complaint No. 67318/09 and 2226/12, Lex No. 131803.

40 To find out about the history of social factor participation in sentencing in Germany before the adoption of the Code of Criminal Procedure (StPO) of 1877, see: F.Ch. Grube, Richter ohne Robe. Laienrichter in Strafsachen im deutschen und anglo-amerikanischen Rechtskreis, Frankfurt am Main 2004, p. 35-59; B. Linkenhein, Laienbeteiligung an der Strafjustiz. Relikt des burgerlichen Emanzipationsprozessenoder Legitimation einer Rechtsprechung "Im Namen des Volkes"?, Berlin 2003, p. 49-92; H. Lemke-Küch, Der Laienrichter – überlebtes Symbol oder Garant der Wahrheitsfi ndung?, Frankfurt am Main 2014, p. 9-89; G. Andoor, Laien in…, *op. cit.,* p. 23-30.

41 C. Roxin, B. Schünemann, Strafverfahrensrecht*,* München 2009, p. 32-33 and literature cited therein.

42 W. Grikschat, A. Luthke, F.-W. Dopatka, I. Muller, Gesellschaft, Recht und Strafverfahren. Eine Einfuhrung in die Strafjustizfur Schöffen und andere Interessierte*.* Opladen 1975, p. 47-49.

lay assessors in a criminal trial contributes to, most of all, social understanding of the essence of law observance and enhancing social trust in the system of justice[43]. Nevertheless, it is also pointed out that this function can only be correctly implemented provided community judges possess "institutionally developed self-awareness" (*institutionell fundiertes Selbstbewusstsein)*, which, however, does not occur in Germany (opposite to the USA). Thus sentencing, lay assessors are generally dominated by professional judges and they rarely challenge their opinions. One of the reasons for this phenomenon is the fact lay assessors do not know case files, which only a professional judge has access to[44].

Relevant literature and case law even point out that if a lay assessor reads the indictment and preliminary procedure results before they are read aloud, he or she can be challenged from the trial; the same as a peculiar "pre-judgment" (*Vor-Urteil)* about the defendant's guilt assumed by a lay assessor on the basis of the trial's press coverage[45].

Moreover, it is pointed out that due to a limited scope of procedural knowledge of lay assessors and, concurrently, an important role of their votes in verdict deliberation (including a possibility of *votum separatum)*, lay assessors are "both a chance and danger" for defence counsels. It is emphasized that lay assessors often pay attention to insignificant details of a case, they are easily affected by pressure and emotions, or likes and dislikes, which may introduce irrational decision-making elements to the verdict *(irrationale Entscheidungselemente*)[46].

Already in the 1990s the German literature mentioned psychological conditions of cooperation between lay assessors and professional judges that were manifested in the latter ones' domination over lay assessors during a trial and verdict deliberation as well as their low activity during litigation. The reasons for such passivity of lay assessors were difficulties to communicate with professional judges resulting from, among others, lay assessors' low self-esteem, or an objective degree of case complexity[47].

Low activity of lay assessors during a trial often generates objections of a "sleeping juror" (*"schlafende Schöffe"*) raised in appeals. Court case law reveals that such grounds of an appeal are found reasonable only if a juror "was sleeping for a long time" and did not follow significant parts of the trial, which causes essential evidence problems for the appellants[48].

Polish Constitution of 2 April 1997[49] does not univocally settle the scope of a social factor participation in the system of justice. As emphasized by the doctrine, it re-

43 *Ibidem,* p. 9-12.
44 C. Roxin, B. Schünemann, Strafverfahrensrecht…, *op. cit.*, p. 33 and literature and case law cited therein.
45 H. Dahs, Handbuch des Strafverteidigers, Köln 2005, p. 68 and 142 and case law cited therein.
46 *Ibidem*, p. 131.
47 Ch. Renning, Die Entscheidungsfi ndung durch Schöffen und Berufsrichter in rechtlicher und psychologischer Sicht, Marburg 1993, p. 176-309, 531-536.
48 H. Dahs, Handbuch..., *op. cit*., p. 586 and case law cited therein.
49 Journal of Laws No. 78, item 483 as amended.

sults from Art. 182 of the Constitution that neither full elimination of participation of the citizenry in the administration of justice nor its limitation to a symbolic role is possible. A similar opinion is held by the Constitutional Tribunal[50].

A role of lay assessors in criminal cases is specified by the Act of 6th June, 1997 – Code of Criminal Procedure (CCP)[51], whose Art. 3 stipulates that within the scope laid down in the legislation, criminal proceedings shall be conducted with the participation of a representative of the community. These limits are currently much narrower with regard to lay assessors' participation in sentencing than at the moment of the CCP coming into force on 1st September, 1998[52]. As indicated in the comments thereto, a limited principle of citizenry participation in sentencing enshrined by Art. 3 of the CCP of 1997 as compared to the CCP of 1969 mainly results from a critical assessment of lay assessors' participation in the administration of criminal justice and ensuing postulates to limit this institution[53]. Fundamental and furthest reaching changes in the limited participation of lay assessors in criminal cases were brought by the amended CCP under the Act of 15th March, 2007 amending the Code of Civil Procedure, the Code of Criminal Procedure and Some Other Laws[54], in result of which two benches of lay assessors were envisaged. The first one – ordinary or common, to decide in cases involving serious crimes (Art. 28 § 2 of the CCP), and the second one – extended, to decide in cases involving crimes punished by a life sentence (Art. 28 § 4 of the CCP). In effect thereof, the participation of lay assessors in sentencing has been marginalized. Nowadays, we may even talk about a radical limitation (if not complete exclusion) of the principle of citizenry participation in the administration of justice[55].

As emphasized in the doctrine, the participation of lay assessors make all participants of litigation carry out their activities with more diligence, enhances independence of the adjudicating bench, and hampers the exertion of pressure upon the court[56]. Lay assessors themselves perceive their function, most of all, as a chance to learn about the law and social problems, manifestation of the citizenry's participation in ruling, and a guarantee of "not letting a legal paragraph rise above life in a court". Nearly half lay assessors (44%) studied by A.S. Bartnik claimed that the juror's opin-

50 See: Constitutional Tribunal's judgment of 29 November 2005, P 16/04, OTK-A 2005, No. 10, item 119.
51 Journal of Laws No. 89, item 555 as amended.
52 See: S. Waltoś, Ławnik – czy piąte koło u wozu?, (in:) T. Grzegorczyk (ed.), Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana, Warszawa 2011, p. 526-527.
53 See: J. Grajewski, L.K. Paprzycki, S. Steinborn, Kodeks postępowania karnego. Tom I. Komentarz do art. 1-424, Warszawa 2013, p. 54-55 and literature cited therein.
54 Journal of Laws No. 112, item 766.
55 See, e.g.: W Jasiński, Bezstronność sądu i jej gwarancje w polskim procesie karnym, Warszawa 2009, p. 263-264.
56 See, e.g.: D. Pożaroszczyk, Refleksje na temat udziału ławników w polskim procesie karnym, (in:) B.T. Bieńkowska, D. Szafrański (ed.), Problemy prawa polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym, Warszawa 2013, p. 176-180 and literature cited therein.

ion affected a verdict while almost three quarters (74%) were aware of the fact that a juror may disagree with the judge[57].

Moreover, the relevant literature emphasizes that a significant factor impacting lay assessors' engagement is an attitude of professional judges sitting in a bench. However, presidents (vice presidents or judges) of district and regional courts of Białystok Appeal Court quite pessimistically perceive the function of lay assessors because only 50% of respondents evaluate jurors' work well whereas as many as 35.71% believe the institution of lay assessors should be completely abolished in the Polish legal system[58].

With regard to the rights enjoyed by lay assessors in a criminal trial, in the Polish trial, as mentioned before, they are generally entitled to the same rights as professional judges (Art. 4 § 2 of the Law on Common Courts Organization). However, lay assessors can neither preside over a bench nor carry out judge's activities outside a trial (Art. 169 § 2 of the Law on Common Courts Organization). Opposite to German lay assessors, they have the right to access case files. Even though all lay assessors studied by A.S. Bartnik were aware of their right to read case files and ask questions during a trial, they, generally, hardly ever take advantage of such a possibility or of other rights[59]. Lay assessors' passiveness during a trial is affected by three factors: a lay assessor, professional judge and judicature. Lay assessors themselves do not perform their role appropriately; they do not prepare for trials and their work is limited to attending the trial[60].

4. Final comments

The above historical and comparative analysis of law ensues a conclusion according to which the institution of a jury established as early as Middle Ages in England and Wales as well as the institution of trials by lay judges (assessors) in continental Europe (in Germany) expressed the same idea: to ensure the impact of social factor on the system of justice.

As indicated in the subject literature, nowadays, the most significant difference between the institution of a trial by lay assessors in Poland and a trial by jury in the USA is a peculiar division of the function. As far as trials by jury are concerned, the function of a professional judge deciding about the law is distinguished from the function of a juror as a judge of the fact[61]. Another important feature of the classi-

57 See A.S. Bartnik's research: Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna, Warszawa 2009, p. 105-110.

58 P. Sitniewski, Analiza wyników ankiet w zakresie wyboru ławników, jakości ich pracy oraz funkcjonowania w ramach wymiaru sprawiedliwości, (in:) J. Ruszewski (ed.), Ławnicy – społeczni sędziowie w teorii i praktyce, Suwałki 2011, p. 77-86, 92, 97 and the results of research cited therein.

59 To find out about the rights and duties of a lay assessor, see, e.g.: K. Wieczorek, Udział czynnika społecznego…, *op. cit.*, p. 43-46.

60 As concluded by A.S. Bartnik: "Therefore this social voice is dumb while social context of judgments is an illusion" – see: A.S. Bartnik, Sędzia…, *op. cit.,* p. 113.

61 K. Wieczorek, Udział..., *op. cit.*, p. 160-161.

cal Anglo-Saxon model of a trial by jury is its "intuitive" sentencing on the basis of a principle of unlimited discretion to assess evidence because jurors do not have to justify the agreed verdict. In effect thereof, there is a lack of a sense of responsibility for a verdict (particularly if it is passed unanimously, thus incognito) among twelve jurors summoned just once to judge a specific case. Nevertheless, we should draw attention to the Spanish trial, where juries, re-instated in 1995 (after sixty years of Franco regime), are obliged to justify their verdict whereas jurors can use judicial clerk's assistance while drafting it (Art. 60 of the Act on the System of Trials by Jury – *Ley Orgánica del Tribunal del Jurado* of 22nd May, 1995). What is more, a professional judge may order jurors to correct their verdict if it violates substantive or procedural law, or a guilty verdict is not consistent with the facts[62].

Furthermore, jurors deliberating together with professional judges hold joint and several responsibility for a correct resolution of not only the defendant's guilt but also his or her criminal liability; they are generally dominated both during a trial and verdict deliberation by a professional factor.

Nowadays, we can talk about certain convergence of both models of social factor participation. Verdicts passed in trials by lay assessors are subject to full appeal control with regard to both regularity of the establishment of facts and compliance with the law. As mentioned before, even though a jury's verdict in the English trial may be, in principle, appealed against on the ground of procedural objections or challenges, in Russia such a verdict may be fully controlled by the second-instance court. As far as the impact of professional judges upon juries' verdicts is concerned, the judges can disregard verdicts which were reached with the violation of the law, and order jurors to deliberate again in order to correct a wrongly taken decision. It is worth adding that during a verdict deliberation jurors can contact a presiding judge through an usher in order to explain procedural and evidence issues.

Hence also in the 21st century we can say that the impact of a social factor on the administration of justice is the "litmus paper" of democratic ruling in a given country. Nevertheless, it is real impact because, as confirmed by the example of Russia, even trials by jury may transform into a façade institution hiding non-democratic state structures.

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62 V. Turanjanin, European Systems..., *op. cit.*, p. 200-202.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.05

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The Participation of the Social Factor in the Judiciary from a Constitutional Perspective

Abstract: The article presents the issue of social factor in the administration of justice from the perspective of constitutional rules. The aim of these considerations is to analyze the issue of limitation of the participation of lay judges in a trial in courts of general jurisdiction, which is a starting point for the evaluation and importance of lay judges in Polish judicial procedure, in which the participation of lay judges, as the result of changes of law, has been significantly limited.
Keywords: social factor, lay judge, criminal procedure, the right to a trial

1. A historical outline of social factor participation in the Polish administration of justice

Development of a contemporary criminal trial shows very clearly that indeed from the beginning citizens have actively participated in the prosecution of crimes. In the history of criminal procedure, all employers and all enforcement agencies have appreciated this social engagement in a criminal trial[1]. The forms of this participa-

1 S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, Warszawa 2016, p. 230 et seq.

tion, however, have been different. We will solely consider and analyze here social factor participation in sentencing from the constitutional perspective.

The fact that in Poland all three variants of direct participation of the so called community or social factor in sentencing have occurred is of utmost importance for our considerations. These variants embrace: a form of community courts, which decided in cases involving some misdemeanours and offences[2], trials by lay judges (assessors) – a joint bench of professional and lay judges deciding both about guilt and punishment, and trials by jury, where a judge decides only about punishments whereas jurors about guilt[3]. A trial by jury was composed of three professional judges (the so called tribunal) and twelve jurors (the so called jury). The jury decided about guilt and circumstances excluding it whereas the tribunal imposed punishment. Due to this, an appeal against the jury's verdict was not allowed. Yet cassation to the Supreme Court was possible[4]. Trials by jury were abolished under the Act of 9 April 1938 on the Abolition of Trials by Jury and Magistrates[5]. They returned again under the Decree of Polish Committee of National Liberation of 15 August 1944 on the Introduction of Trial by Jury[6]. Eventually, the system of lay judges (assessors) of German origin has been selected in Poland, which in the pre-war period was applied only in commercial and employment cases[7]. It was thoroughly reformed in the 1950s[8] and introduced the institution of lay judges to decide in first-instance courts in criminal[9] and civil[10] cases. The Constitution of 1952[11] constitutionally enshrined common participation of lay judges in the judicature . Pursuant to Art. 49 thereof, people's assessors take part in the hearing of cases and the pronouncement of judgment, except in cases specified by law. However, we should mention the Act of 28 March 1958 on the Amendment of Civil Procedure Provisions[12] and the Act of 28 March 1958 on the Amendment of Criminal Procedure Provisions[13], which limited the participation of lay assessors in the administration of justice. In the resolution of the entire Criminal Chamber of the Supreme Court of 14 May 1956[14], the Supreme Court held that "a challenge of lay judges from a trial before a first instance court may also involve a situation when a judge adjudicates a case himself or herself only. (...) However, it should be emphasized that in connection with the constitutionally enshrined princi-

2 Decree of 22 February 1946 (Journal of Laws No. 8, item 64).
3 S. Waltoś, P. Hofmański, Proces karny…, *op. cit.*, p. 231. Also see: Z. Resich, Nauka o organach ochrony prawnej, Warszawa 1973, p. 80; J. Waszczyński, Ustrój organów ochrony prawnej, Łódź 1974, p. 76.
4 T. Ereciński, J. Gudowski, J. Iwulski, Komentarz do prawa o ustroju sądów powszechnych i ustawy o Krajowej Radzie Sądownictwa, Lex Polonica No. 3886725.
5 Journal of Laws No. 24, item 213.
6 Journal of Laws No. 2, item 7.
7 See, e.g.: M. Rybicki, Ławnicy ludowi w sądach PRL, Warszawa 1968, p. 13, 16.
8 Act of 20 July 1950 on the Amended Law of the System of Common Courts (Journal of Laws No. 38, item 347).
9 Act of 20 July 1950 on the Amendment of Criminal Procedure Provisions (Journal of Laws No. 38, item 348).
10 Act of 20 July 1950 on the Amendment of Civil Procedure Provisions (Journal of Laws No. 38, item 349).
11 Journal of Laws No. 33, item 232.
12 Journal of Laws No. 18, item 75.
13 Journal of Laws No. 18, item. 76.
14 Resolution of Criminal Chamber of Supreme Court of 14 May 1956, I K 137/56, "Nowe Prawo" 1956, No. 10.

ple of the participation of lay judges in the administration of justice, the above mentioned provisions cannot be interpreted extensively but treated as exceptions".

Adopting the system of lay judges, the Polish system-maker thus underlined the importance of a social sense of justice and the significance of public opinion in the administration of justice; furthermore, the importance of lay judges' life experience and knowledge should be juxtaposed with the professional judges' routine. Consequently, the bench's independence should be enhanced[15]. The above mentioned arguments show very clearly that the essence of the participation of lay judges in the administration of justice implies, above all, a social sense of justice resulting solely from the jurors' profound and inner beliefs based on their knowledge and life experience rather than rigid letter of the law. It is consistent with the principle of discretionary powers to assess evidence in Poland, according to which judicial bodies form their convictions on the basis of all evidence being taken, which is freely assessed with due consideration of the sound reasoning, knowledge and life experience (Art. 7 of the Code of Criminal Procedure of 1997)[16]. Trivializing, we can say that legal education is not a criterion of evidence assessment; what is more, it may sometimes do more harm than good in a proper assessment of evidence.

Just such understanding of the participation of social factor in the administration of justice is also consistent with the beginnings of this institution, which developed during French Revolution as a manifestation of opposition against royal absolutism and royal courts[17]. The concept of the participation of the citizenry in sentencing is thus closely connected with the idea of civil society. It is also a recognized standard in a democratic state of law. Moreover, it is constitutionally enshrined in the provision of Art. 182 of the Polish Constitution of 1997[18]. However, it is hard not to notice that since 1997, and then after 2005 (after the reform of the institution of lay judges in the Polish judicature introduced under the Act of 1 August 2005 on the Amended Law on Common Courts Organization and Some Other Laws[19]) its axiology has been radically changed. The Constitution of 1997 does not enshrine the principle of the participation of lay judges in sentencing any more (Art. 49 of the Constitution of 1952), merely regulating the competence of an ordinary legislator to specify the participation of citizenry in the administration of justice, therefore both its form and scope. Hence L. Garlicki accurately notices that the content of currently binding regulation does not provide grounds for the mandatory adoption of statutory solutions making such participation common or preferable[20]. On the other hand, it

15 M. Rybicki, Ławnicy…, *op. cit*, p. 16.
16 Journal of Laws No. 78, item 483.
17 M. Rybicki, Ławnicy…, *op. cit.*, p. 14; S. Waltoś, P. Hofmański, Proces…, *op. cit.,* p. 104 et seq.
18 Journal of Laws No. 78, item 483 as amended.
19 Journal of Laws No. 169, item 1413.
20 L. Garlicki, (in:) L. Garlicki (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom V, Warszawa 2003, p. 1-2. Also see: Constitutional Tribunal's judgment of 29 October 2005, ZU 2005/10 A/119, Journal of Laws No. 241, item 2037.

also excludes a possibility of the administration of justice in some cases solely by the so called social factor. Furthermore, starting with the amended Act of 1 August 2005, the legislator limited a participation of lay judges in many types of court cases, additionally establishing higher qualification requirements for candidates for lay judges[21]. The amended Code of Criminal Procedure of 15 March 2007 radically excluded lay judges from district courts in criminal cases. The amended Act of 27 September 2013 reinstated this institution, but in a very limited scope. Since 1 July 2015 the participation of lay judges in district courts has been optional. In regional courts, it is obligatory and optional. Cases involving most serious crimes heard in a first-instance regional court require obligatory participation of lay judges in the form of ordinary and extended jury. However, taking into account presumed competence of a district court as a basic first-instance court (Art. 24 § 1 of the Code of Criminal Procedure), it should be noticed that the participation of lay judges in sentencing is under 0.6% of all criminal cases heard in district and regional courts[22].

A clear tendency to radically minimize a role of lay judges in the administration of justice is undeniably a departure from the provisions of the original Act referring to this institution. The relevant literature even treats it as "moving back to the times before French Revolution and a ruin of all ensuing achievements in the aspect of democratism perceived as a state of law[23]. From this perspective, it is in discord with the opinions according to which an increasing number and degree of complexity of provisions regulating specific areas of human activity as well as complicated techniques of their interpretation (among others, in compliance with the European Union law) may question the relevance of the participation of individuals who lack professional preparation in the administration of justice. The lawmaker himself is not devoid of such doubts, which is manifested in the subsequent amendments which, on the one hand, limit the participation of lay judges in many types of court cases, whereas on the other hand, they establish higher qualification requirements for candidates for lay judges[24]. Finally, a suggested solution according to which lay judges in a first-instance trial should be replaced with a bench of professional judges is neither new nor good from the perspective of the above mentioned assumptions.

21 Reasoning to the governmental draft of the amended Act on the System of Common Courts and Some Other Acts, Sejm doc. No. 3797.

22 S. Waltoś, W dziesięciolecie obowiązywania Kodeksu postępowania karnego, PiP 2009, No. 4, p. 6 et seq.

23 M. Rybicki, Ławnicy…, *op. cit.*, p. 14. Also see: S. Waltoś, P. Hofmański, Proces…, *op. cit.*, p. 235 and 242.

24 See: Reasoning to the governmental draft of the amended Act on the System of Common Courts and Some Other Acts, Sejm doc. No. 3797.

2. Participation of citizens in the administration of justice (Art. 182 of the Polish Constitution)

Pursuant to Art. 182 of the Polish Constitution, a statute shall specify the scope of participation by the citizenry in the administration of justice. Thus participation of social factor in the administration of justice is an absolute legal requirement because it is constitutionally enshrined. The constitutional requirement of the participation of citizenry in the administration of justice included in Art. 182 is closely connected with the content of Art. 4 par. 1 of the Constitution, according to which supreme power in the Republic of Poland shall be vested in the Nation[25]. Thus it results from the Constitution that administration of justice cannot be deprived of a social factor. The legislator established a general rule this way, and yet with regard to special solutions to the problem of participation of the citizenry in the administration of justice, he referred to statutory provisions[26]. Nevertheless, we should notice a lack of regulation within this scope, i.e. which existing model assuring the participation of social factor in the administration of justice – a jury or lay judges as bench members, should operate in the Polish legal system. The constitutional requirement will be fulfilled when the legislator chooses the form he deems the most appropriate. It is true that Art. 182 of the Polish Constitution does not meet the condition of a precise normative regulation, but this provision cannot be treated as a referral to regulate this issue under a mere act of law. The subject literature indicates that despite a reserved or restrained character of this provision, we may perceive therein a designation of a specific direction of legislative works[27]. It should be emphasized that the Constitution stipulated neither a form nor scope of the participation of social factor. The formulation of Art. 182 seems to indicate that a judicial procedure which would exclude lay judges from sentencing would be inconsistent with the Constitution. And such was a decision adopted by the Constitutional Tribunal, which stated that "it is neither possible to exclude the citizenry entirely from the administration of justice nor narrow its scope to merely a symbolic degree"[28]. Being a norm providing both authorization and referral, Art. 182 of the Polish Constitution implies ordinary legislator's competence to introduce the citizenry into the administration of justice[29]. It is indicated that the content of this provision expresses the system-maker's intention to depart from the solutions included in the previous legal system, where already mentioned Art. 49 of the Constitution of the Polish People's Republic of 1952, according to which "people's assessors take part in the hearing of cases and the pro-

25 K. Knoppek, Udział obywateli w sprawowaniu wymiaru sprawiedliwości w postępowaniu cywilnym, "Ius Novum", issue, Warszawa 2014, p. 26.

26 J. Ruszewski, Ramy prawne wyboru i funkcjonowania ławników w Polsce, (in:) J. Ruszewski (ed.), Ławnicy – społeczni sędziowie w teorii i praktyce. Ocena funkcjonowania i procesu wyboru ławników sadowych na przykładzie sądów Apelacji Białostockiej, Suwałki 2011, p. 50.

27 S. Waltoś, Proces karny: zarys systemu, Warszawa 2003, p. 236.

28 Constitutional Tribunal's judgment of 29 October 2005, P 16/04, Journal of Laws No. 241, item 2037.

29 J. Ruszewski, Ramy prawne wyboru…, *op. cit.*, p. 50.

nouncement of judgment, except in cases specified by law", provided the grounds for a wide participation of the citizenry in the administration of justice. However, the currently binding regulation does not ensue that statutory solutions making this participation common must be mandatorily adopted[30]. With regard to the participation of social factor in the administration of justice, it entails that such participation may be limited to some cases. Thus it also excludes a possibility of such a regulation which would assure sole participation of social factor in the administration of justice in certain types of cases. The Constitutional Tribunal supported this opinion in the above quoted judgment of 29 November 2005. Moreover, in the reasoning thereto, the Constitutional Tribunal pointed out the most important benefits ensuing from the admittance of lay judges to sentencing in common courts. One of them was a possibility of a joint settlement of a case, where an expert opinion is juxtaposed with a social point of view. The Tribunal believes that the participation of lay judges protects common courts from isolation and social exclusion. Moreover, the participation of lay judges allows to administer justice in a closer contact with public opinion whilst society is represented by lay judges, thanks to whom courts exert impact on the community within the sphere of upbringing, education and information[31].

3. The institution of lay judges in the provisions of the Act of 27 July 2001 on the Common Courts Organization

The institution of lay judges in Poland embraced by the Act of 27th July, 2001 on the Common Courts Organization[32] (hereinafter referred to as ACCO) is relevant due to, among others, its long tradition. However, there are no legal obstacles to replace it in the future, e.g., by the institution of a jury, under a statutory act. A scope of participation of the citizenry in the administration of justice is generally specified in Art. 4 of ACCO, according to which lay judges participate in administering justice in hearing cases before first-instance courts, unless acts provide otherwise (§ 1), being vested the same rights as judges (§ 2). This regulation justifies an opinion according to which even though a lay judge's duty is not professional in its nature, they should be subject to the requirement of impartiality and independence[33]. From this point of view, Art. 169 § 1 of ACCO is of significant importance as it stipulates that within the scope of sentencing, lay judges are independent and bound only by the Constitution and Acts. However, enjoying the same rights as professional judges, lay judges may not preside over a trial or council, or perform duties of a judge outside the trial, unless Acts provide otherwise (which is, in turn, envisaged by Art. 169 § 2 of ACCO). Nevertheless, due to the fact that lay judges prevail over professional ones with regard

30 L. Garlicki, (in:) L. Garlicki (ed.), Konstytucja…, *op. cit.,* p. 1-2.
31 Constitutional Tribunal's judgment of 29 October 2005, P 16/04, Journal of Laws No. 241, item 2037.
32 Uniform text: Journal of Laws of 2015, item 133 as amended.
33 J. Gowin, Ławnik – sędzia społeczny. Informator, Warszawa 2011, p. 7.

to their number in the bench they are members of (and the foreman's vote is as important as the vote of other members of the bench), if a verdict cannot be agreed, they can settle a case against the opinion of a professional judge. However, if lay judges held different opinions themselves, each of them – the same as a professional judge – may submit a votum separatum.

4. The right to a fair trial and the participation of lay judges in a trial

A basic constitutional regulation indicating a possibility of admitting the citizenry into the participation in direct administration of justice is the right to a fair trial regulated in Art. 45 of the Polish Constitution. This legal norm, which is a constitutional principle, implies that every citizen shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Therefore, we should approve of the opinion according to which the right to a trial before a competent, impartial and independent court is the so called element of the system, which ensues a principally safe-guarding nature of the subject right and refers to the Strasburg standard, which directly inspired the system-maker while formulating Art. 45 par. 1 of the Constitution[34]. It should also be mentioned here that apart from the administration of justice by lay judges in criminal procedure, participation of citizens in publicly held trials is also a form of social factor's participation. This way, the principle of open trial expressed in Art. 45 of the Polish Constitution has been manifested, which also meets adopted international standards. Openness of a first-instance trial has been observed, which is the most important phase of criminal proceedings whereas circumstances causing its exclusion are specified constitutionally (Art. 45 par. 2) or indicated in the Code of Criminal Procedure. Significant importance of the above mentioned principle of openness was emphasized by the Constitutional Tribunal in one of its judgments which acknowledged that the aim of the principle of openness is to assure judge's impartiality and regularity of proceedings; moreover, it stimulates greater diligence and conscientiousness in taking procedural steps[35]. The Act on Proceedings also permits the media to take part in trials, among others in order to fulfil the constitutional right to information (Art. 61 of the Constitution).

In order to exercise the right to a fair trial, each citizen may request the participation of social factor in a trial due to endeavours to observe the principles of court's impartiality and objectivity during a trial and, most of all, while deciding about the content of a final verdict. It is worth pointing out that the Constitutional Tribunal's case law (the judgment of 9 June 1998, K 28/97) acknowledges that the right to a trial, apart from its apparent and implied purpose, is perhaps mainly the right to prop-

34 P. Wiliński, Proces karny w świetle Konstytucji, Warszawa 2011, p. 121.
35 Constitutional Tribunal's judgment of 20 November, 2007, SK 57/05;OTK-A 2007, No. 10, item 125.

erly held proceedings consistent with the requirements of justice and transparency[36]. Moreover, according to the Constitutional Tribunal, "the principle of procedural justice is fulfilled if each party can present their opinions as to the points at issue, regarding both facts and judge's appraisals"[37]. Taking into account subjectivism of the parties who evaluate both facts of the case and legal issues during a trial, participation of lay judges, who fulfil a role of an impartial social factor in sentencing, assures a more objective evaluation of the case being heard.

Discussing issues connected with the fulfilment of constitutional principles in the administration of justice, we cannot omit the right to a fair trial. Analyzing this right, it is worth indicating that the content of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950, as amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2[38], lists its component elements including the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him. Additionally, the above provision stipulates that judgment shall be pronounced publicly; thus the press, media and public may not be restricted from the participation in a trial without a reasonable cause. With regard to this issue, Art. 360 of the Code of Criminal Procedure regulates a possibility of hearing a case at non-public sitting if an open trial may be conducive to disturbance of public order, offend decency, disclose circumstances which in consideration of significant State interests should remain secret, and infringe important private interests, or if a witness giving evidence is under fifteen years old, or the defendant is a minor. The right to a fair trial shall be guaranteed to everyone who may be a subject of a trial. It should be manifested in the guaranteed existence of actual access to protective measures and legal assistance as well as procedural solutions.

Considering the above discussed issue, it is worth adding here several comments on the prosecutor's rights within this scope, i.e. the right to object to the exclusion of a public hearing contained in Art. 360 § 2 of the Code of Criminal Procedure. First of all, it should be indicated that the prerequisites listed in Art. 360 § 1 of the Code of Criminal Procedure are evaluative in nature while the court is not obliged to consider the respective occurrence of prerequisites when adjudicating a given case[39]. Another important issue is the evaluation of circumstances of the case which provide the grounds for the relevance of the exclusion of a public hearing. According to the

36 Compare: A. Kubiak, Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego, Łódź 2006, p. 203.

37 See: Supreme Court's judgment of 14 December, 2001, V CKN 556/00; Supreme Court's judgment of 14 Maarch, 2007, I CSK 368/06; Supreme Court's judgment of 7 November, 2007, II CSK 339/07; Supreme Court's judgment of 16 July 2009, II PK 13/09; Supreme Court's judgment of 3 February, 2010, II CSK 404/09; Supreme Court's judgment of 2 December, 2011, III CSK 136/11; Supreme Court's decision of 17 February, 2004, III CK 226/02; Supreme Court's judgment, Civil Chamber, of 11 October 2012, III CSK 12/12, http://sip.legalis.pl

38 Journal of Laws of 1993, No. 61, item 284.

39 A. Murzynowski, Istota i zasady procesu karnego, Warszawa 1994, p. 188.

opinion expressed in the doctrine, the evaluation of, *inter alia*, a risk of infringing important private interests is vested with the court, which should thoroughly assess the circumstances that would have been the grounds for the exclusion of a public hearing so that it does not occur due to slightly important consequences for a given person[40].

On the other hand, referring directly to the prosecutor's rights in connection with the amended Code Criminal Procedure of 10 June 2016 (in effect since 5 August 2016), the prosecutor has been provided with a possibility of objecting to the exclusion of a public hearing, which is indicated in the content of the amended Art. 360 § 2 of the Code of Criminal Procedure. A role of the prosecutor with regard to the above issue is thus limited to the position of an advocate of the rule of law because he or she decides whether the exclusion of a public hearing is in the public interest. On the other hand, the prosecutor's objection should be justified by relevant reasoning and a possibility of appealing against the objection to a court due to the observance of the guarantee provided to every participant of criminal proceedings, the right to defence in particular[41].

5. The importance of lay judges in a trial within the aspect of the principle of judicial independence

Pursuant to the reading of the constitutional principle of judicial independence, judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes (Art. 178 par. 1 of the Polish Constitution). As indicated in the doctrine, "judicial independence is founded on the sovereignty of the justice system with regard to its jurisdictional functions"[42]. What is more, the provisions of the above Article of the Polish Constitution indicate the scope of guarantees providing their fulfilment. It is in the interest of the entire society of a democratic state of law to maintain judicial independence and courts' sovereignty at all times. Guaranteed fulfilment of the above principles is also manifested in a possibility of social participation in the administration of justice through the establishment of a jury. Thus a function of a lay judge involves both active participation in a trial and its social control, which is a guarantee of the constitutional principle of a fair hearing of everyone's case, without undue delay, before a competent, impartial and independent court, contained in Art. 45 par. 1 of the Polish Constitution.

This possibility of social control of judge's work during a trial, verdict deliberation and voting is extremely significant. Thanks to the participation of the representatives of society in a trial, it is possible to verify an opinion held by a professional judge

40 L.K. Paprzycki, (in:) J. Grajewski (ed.), Kodeks postępowania karnego. Tom I. Komentarz do art. 1-424 k.p.k., Kraków 2006, p. 1128; M. Zimna, Wyłączenie jawności rozprawy jako gwarancja ochrony interesów uczestników postępowania karnego, Prok. i Pr. 2016, No. 9, p. 96.

41 M. Zimna, Wyłączenie..., *op. cit.,* p. 99.

42 K. Piasecki, Organizacja wymiaru sprawiedliwości, Kraków 2005, p. 39.

in a given case with regard to public opinion, which may also lead to the confrontation of two completely different attitudes. Such a situation precludes the adoption of only one point of view held by a professional judge who, adjudicating without the participation of lay judges, is not able to verify his or her own opinions and observations with public opinion. That is why resignation from the presence of lay judges in trials in common courts in less serious cases is not adequate to the needs resulting from the above mentioned reasons, which emphasize the importance of social factor in the administration of justice.

6. Objections to the limited participation of lay judges in district courts

The change introduced by the above mentioned amendment of 15 March 2007[43] deserves special attention with regard to the scope of participation of lay judges in sentencing. Pursuant to the provisions of the Act, participation of lay judges in criminal cases has been limited to serious crimes whereas with regard to civil cases, the legislator decided that lay judges are admitted to sentencing in only some types of cases. This way participation of lay judges in sentencing in common courts is possible, among others, in the following cases:

In criminal proceedings, a court adjudicates in a bench composed of one judge and two lay judges in cases involving serious crimes. Whereas in cases involving offences punished by life imprisonment, a court adjudicates in a bench composed of two judges and three lay judges. Moreover, the legislator envisaged a situation where, due to special complexity of a case or its importance, a first-instance court may decide to hear it in a bench composed of three judges, or one judge and two lay judges. The above change has been in force since 1 July 2015, and results from the need of a more profound fulfilment of the constitutional guarantee enshrined in Art. 182 of the Polish Constitution[44]. Additionally, in effect of the Act of 27 September 2013 on the Amended Code of Criminal Procedure and Some Other Acts[45], regional courts adjudicate on damages and compensation for wrongful conviction and wrongful exercise of coercive measures in a bench composed of one judge and two lay judges (Art. 554 § 2 of the Code of Criminal Procedure). The legislator decided to resign from the participation of lay judges in appeal trials and extraordinary proceedings (cassation, revision and a complaint against the judgment of an appeal court), in accelerated procedure and the order for payment procedure, and with regard to cases involving minor offences, which are heard before one judge.

The legislator's decision to limit the scope of cases where the participation of lay judges is admitted cannot be approved of also from the point of view of the con-

43 Journal of Laws No. 112, item 766.

44 A. Sakowicz, (in:) A. Sakowicz (ed.) K.T. Boratyńska, P. Czarnecki, A. Górski, M. Królikowski, M. Warchoł, A. Ważny, Kodeks postępowania karnego. Komentarz., Warszawa 2016, http://sip.legalis.pl.

45 Journal of Laws, item 1247.

stitutional principle of the exercise of power by the Nation included in the Polish Constitution in Art. 4. This provision stipulates that supreme power in the Republic of Poland shall be vested in the Nation while the Nation shall exercise such power directly or through their representatives. It can be assumed that, depending on the Polish legislator's will, social participation in the administration of justice is a manifestation of a direct exercise of power by the Nation whereas a limited principle of the participation of lay judges in a trial violates this system-making law.

In 2010 the issue of a limited scope of cases admitting the participation of lay judges was raised in the constitutional complaint[46]. In the reasoning to this complaint, the complainant's attorney indicated that "the appealed judgment, mostly due to the failure to fulfil the complainant's right to take advantage of the institution of lay judges within the scope under which they enjoy equal rights with the judge, violated the civil right, which means it also breached one of the human rights generating personal rights, i.e. the right to a fair trial.

7. Conclusion

Discussing the relevance of the existence of lay judges in all common courts, it is worth considering opinions expressed by judges and lay assessors themselves. Research carried out in Białystok appeal courts ensues that majority of judges do not approve of the work and operation of lay judges in trials. As implied in one of the judges' opinion: "with regard to cases where solely expertise in law is decisive, maintenance of lay judges is expensively absurd"[47]. On the other hand, opposite opinions of lay judges point out significant importance of the participation of social factor in a trial. "Majority of lay judges believe that their participation in the administration of justice assures impartiality of verdicts, constitutes social control of the judicature, eliminates social suspicions about courts' bias or partiality, and reinforces rule of law while safeguarding judges from passing unfair verdicts, it guarantees a fair trial"[48]. Judge M. Celej is right saying that "judges cannot avoid a discussion with lay judges because they lose a lot themselves: they resign from knowing a different opinion, distinct from their own point of view and fresh arguments. If lay judges do not agree with the opinion of a professional judge, they are entitled to submit a *votum separatum*, or even put it to the vote"[49]. Moreover, it is worth noticing that lay judges ap-

46 Skarga Konstytucyjna z dnia 30 lipca 2010 r. o stwierdzenie niezgodności art. 28 § 1 k.p.k. i art. 30 § 1 k.p.k. z Konstytucją w zakresie, w jakim przepisy te nie dopuszczają obywateli do udziału w sprawowaniu wymiaru sprawiedliwości przed Sądami I instancji (TS 180-10).Also see: uzasadnienie do tej skargi w zakresie, w jakim przepisy te nie dopuszczają obywateli do udziału w sprawowaniu wymiaru sprawiedliwości przed sądami I instancji, p. 7. https://bgoczynski.fi les.wordpress.com/2011/07/skarga-konstytucyjna-ts-180-10.pdf.

47 A. Siemaszko, Ławnicy: rezultaty badań empirycznych, Warszawa 1994, p. 73.

48 J. Ruszewski (red.) Ławnicy…, *op. cit.*, p. 72.

49 Por. wywiad z M. Celejem w „Rzeczpospolitej", ttp://www.rp.pl/artykul/80755,104288_Lawnicy___niechciani_spoleczni_sedziowie.html.

proach a case practically, and thanks to this they may help the judge make the most appropriate decision even if their participation is merely limited to passive observation of a trial. Their work is a certain kind of protection against improper operation of the courts because a judge is, after all, aware of the fact he or she is subject to lay judges' control.

Due to the fact that judges collegiality is an expression of the guaranteed constitutional principle of the right of the citizenry to participate in the administration of justice, the legislator's departure from this principle in district courts in criminal cases and selected civil cases cannot be approved of. What is more, it should trigger considerations on changing relevant provisions of law. It should also be pointed out that trials by jury express endeavours to assure a comprehensive examination of a case. Collegial hearing of a case should lead to the limitation of inaccuracies while establishing facts whereas a final verdict should be reached in effect of discussions and arguments surmounted by a final decision of the majority of the bench within factual and legal aspects[50].

Moreover, it should be pointed out that the Polish Constitution only indicates general principles the legislator should follow with regard to the regulation of the access of citizenry to the administration of justice. Therefore the question to be answered is whether the exclusion of lay judges from sentencing in district courts in criminal cases as well as in appeals and proceedings after the decision became final, in accelerated procedure and the order for payment procedure, and with regard to cases involving minor offences, which are heard before one judge, does not violate constitutional norms. A changed approach of the legislator to the above issue should result from the need to adapt legal provisions to standards designated in the Polish Constitution rather than from the need of cutting costs of lay judges' maintenance and indicating their insignificant impact on the operation of the administration of justice, which ensues from the hitherto adopted direction of changes with regard to this problem. If a democratic state is to assure the society a possibility of exercising power, particularly through the guaranteed participation of the society representatives in the administration of justice, the participation of lay judges in trials should be extended rather than restricted.

Summing up, it should be stated that nowadays, when the Polish legislator is searching new solutions in the criminal procedural law, the trick is not to "move out" lay judges from the administration of justice, but the whole trick is to use them as best as possible[51]. Their participation in a criminal trial enhances social trust in the administration of justice minimizing a sense of discretional judicial power. It somehow joins case law with a life experience of ordinary people. Lay judges are a visible sign

50 K. Sadowski, (in:) G. Polkowska-Nowak (ed.), Ławnik jako sędzia społeczny. Informator, p. 18-19, https://www.ms.gov.pl.

51 Interview with M. Celej, *op. cit.*

of nation's sovereignty and social control of judicial power. Properly operating juries guarantee courts' impartiality and affect verdicts' quality. Nevertheless, the question arises whether these assumptions may be implemented in the contemporary legal system, and whether the concept of a radical limitation of the participation of lay judges can be harmonized with the priorities and a model of criminal proceedings adopted by the Polish legislator. Perhaps instead of limiting the participation of lay judges we should opt for a radical increase of their participation in the administration of justice in the form a classical jury is some types of criminal cases. Such a solution was adopted by the Ukrainian legislator, who decided to use a jury composed of five members to adjudicate in criminal cases in the new Ukrainian Code of Criminal Procedure of 2012[52]. This new institution evokes the strongest controversy and yet the Ukrainian literature indicates that "a trial by jury is the best form of sentencing, and its introduction has been an important step towards democratization of the society, enhancement of trust in the justice system and judicial power in the country. Trials by jury case law has only started to develop: ten criminal proceedings finished with trials by jury (three sentences in Luhansk Oblast, two in Crimea and one in each of the following Oblasts: Mykolaiv, Khmelnytskyi, Rivne, Chernihiv and Sumy). Most verdicts are convictions (in three cases life imprisonment). However, there has already been first acquittal in Sumy Oblast, in the case of a twenty years old man who was remanded in custody for a year and due to lack of evidence to prove participation in two murders he was acquitted"[53].

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52 The Act on Code of Criminal Procedure of 13 March 2012 which came into force on 20 November 2012, No. 9700-1 of 13 January 2012, the Act was adopted on 13 April 2012, drafted and returned by President on 14 May 2012.

53 F.Ch. Schroeder, T. de Vries (ed.), Nowe tendencje w prawie karnym procesowym: Niemcy, Polska, Ukraina, Białystok 2016, p. 265 et seq.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.06

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The Participation of a Social Factor in Criminal Proceedings in the Light of Court Judicature

Abstract: The paper presents the problem of the perceived participation of social factor in a criminal trial compared to the existing jurisdiction of common courts and the Supreme Court. The article is an attempt to assess the extent and type of participation of social factor in criminal proceedings, pointing out both new opportunities and constraints for all participants to the process. These issues will also be examined on the basis of jurisprudence.
Keywords: social factor, criminal procedure, assumptions, jurisdiction

1. Introduction

Participation of social factor in criminal proceedings derives from the necessity to maintain standards of a democratic state of law, where punishment means an appropriate response of the society to a crime committed by a perpetrator[1].

For the above reason, the doctrine underlines a binding force of a specific principle of the participation of social factor in a criminal trial[2], grounded in Art. 182 of the Polish Constitution[3]. This Article stipulates that the participation of the citizenry in the administration of justice is statutorily specified.

1 See more: L. Garlicki, Polskie prawo konstytucyjne. Zarys wykładu, Warszawa 2006, p. 66; A. Murzynowski, Istota i zasady procesu karnego, Warszawa 1984, p. 222; F. Prusak, Czynnik społeczny w procesie karnym, Warszawa 1975, p. 6; K. Wieczorek, Udział czynnika społecznego w orzekaniu w polskim i amerykańskim procesie, Warszawa 2012, p. 9.
2 A. Sakowicz, (in:) A. Sakowicz (ed.), Kodeks postępowania karnego. Komentarz 2016, Warszawa 2016, p. 24-25.
3 Journal of Law No. 78, item 483 as amended.

The Code of Criminal Procedure[4] (hereinafter the CCP) sets forth in Art. 3 that within the scope laid down in the legislation, criminal proceedings shall be conducted with the participation of a representative of the community. However, this regulation fails to specify the scope of social factor participation in criminal proceedings.

On the other hand, certain forms of the participation of social factor in the Polish administration of criminal justice may be found in different parts of the Code of Criminal Procedure. Therefore the scope of participation of social factor in a criminal trial should be defined precisely including previous and current court rulings.

For the above reasons, there is a need to analyze the relevant case law to find out not only how the principle of the participation of social factor in a criminal trial is interpreted, but also with regard to possibilities of practical participation of the citizenry in criminal cases. The opinions expressed in the doctrine are not uniform with reference to the issue of embracing other procedural forms of cooperation between the community and the justice system by a common rule of the participation of social factor in a criminal trial[5]. Thus this study will be an attempt at resolving the issue of the participation of the above factor in a criminal trial from the perspective of court rulings.

2. Social factor in a criminal trial

Undeniably, the participation of social factor in a criminal trial may be manifested in different forms[6] depending on the interpretation of this notion. In a broad sense, the scope of "participation of social factor" concerns forms of procedural cooperation which encompass: 1) the principle of a court audience, 2) the institution of a social representative, and 3) participation of lay judges in a criminal trial. In a narrow sense, the scope of "participation of social factor" is limited to a possibility of participation of a social representative in criminal proceedings[7] and the assurance of the participation of lay judges in criminal cases. Nevertheless, one should support the opinion of the doctrine's representatives according to which a court audience, i.e. the principle of transparency, is the effect of the participation of the community in a criminal trial. Procedural bodies should engage citizens into cooperation in criminal proceedings following the principle of cooperation between the society and institutions in the prosecution of crime[8]. Thus it means that the notion and scope of the "participation of social factor" in a criminal trial should be interpreted broadly.

4 Uniform text: Journal of Laws of 2016, item 1749.
5 Also see: A. Sakowicz, (in:) A. Sakowicz (ed.) Kodeks…, *op. cit.*, p. 25.
6 K. Wieczorek, Udział…, *op. cit.*, p. 10.
7 W. Daszkiewicz, Proces karny. Część ogólna, tom I, Poznań 1996, p. 121-122; T. Grzegorczyk, Kodeks postępowania karnego. Komentarz, tom. I, Warszawa 2014, p. 56; P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Tom 1. Komentarz do artykułów 1-296, Warszawa 2011, p. 50.
8 K. Marszał, Proces karny, Katowice 2013, p. 59-60; K. Marszał, Proces karny. Zagadnienia ogólne, Katowice 2008, p. 44; I Krześnicki, Ławnik ludowy, czyli ławnik, „Rzeczpospolita" 2003, No. 6; S. Waltoś, Proces karny, Warszawa 2016, p. 240-246.

2.1. The principle of a court audience as a form of the participation of social factor in a criminal trial

The literature points out that the broadest form of the participation of social factor in a criminal trial is a possibility of participation of citizens in public court hearings[9]. The principle of an open hearing results directly from the content of Art. 355 of the CCP; it is further defined in Art. 356 of the CCP by referring it only to those who have attained maturity (adulthood) and are unarmed. However, pursuant to the content of Art. 356 § 2 of the CCP, with the permission of a presiding judge, a trial held in open court may be also attended by minors and persons legally obligated to carry arms.

Moreover, persons in a condition incompatible with the court's dignity shall not be admitted to the trial (Art. 356 § 3 of the CCP).

The issue of open court and an ensuing possibility of the participation of citizens in court sessions *de lege lata* in criminal cases was debatable. The reasoning to the resolution of the Supreme Court of 25 March 2004[10] pointed out that Art. 96 of the CCP merely specifies entities or subjects (parties and other individuals) who are entitled to take part in the session. It was noticed, however, that this provision also entails that each court session is accessible not only to the parties and individuals who are not the parties specified in Art. 96 § 1 of the CCP, but also third parties – audience – whose presence is not excluded by any provision of the Criminal Procedure Act. What is more, the Supreme Court pointed out in the above decision that the exclusion of an open hearing may only be effected on the basis of the provisions of Chapter 42 of the Code of Criminal Procedure which are applied analogously in the same cases as the exclusion of an open court session. The Supreme Court looked for the support of this opinion in the content of Art. 45 par. 1 of the Constitution, which enshrines a "public hearing of a case" but not an open court session, as well as in Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms[11].

The Court of Appeal in Katowice expressed an opposite opinion in its decision of 8 December 2010[12], 18 January 2011[13] and 14 September 2011[14]. According to the last decision thereof, Art. 96 of the CCP envisages the participation of the parties and individuals who are not the parties in court sessions in a suitable scope whereas this provision does not entail the participation of audience in sessions. In other words, according to the Court of Appeal in Katowice, there are no grounds to transfer regulations concerning external openness of hearings to sessions.

9 K. Wieczorek, Udział…, *op. cit.,* p. 11.
10 Supreme Court's Resolution of 25 March 2004, I KZP 46/03, OSNKW 2004, No. 4, item 39.
11 Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284).
12 Decision of Court of Appeal in Katowice of 8 December 2010, II S 69/10, Lex No. 1642329.
13 Decision of Court of Appeal in Katowice of 18 January 2011, II AKz 880/10, Lex No. 1681030.
14 Decision of Court of Appeal in Katowice of 14 September 2011, II S 40/11, Lex No. 1544218.

Due to discrepancies of opinions within the scope of external openness of sessions, the Supreme Court issued a resolution on this matter on 28 March 2012 on the basis of Art. 60 § 1 of the Act of 23 November 2002 on Supreme Court[15] and the application of First President of Supreme Court of 19 December 2011 for the resolution passed by seven judges of Supreme Court. The Supreme Court claimed in the conclusion to this resolution that "1. In criminal proceedings, open sessions are those where a court "hears or resolves a case" in the meaning of Art. 42 § 2 of the Act of 27 July 2001 on the Common Courts Organization (Journal of Laws No. 98, item 1070 as amended). 2. The notion of a "case" interpreted under the content of Art. 45 par. 1 of the Polish Constitution means a case within the scope of the subject of the proceedings as well as incidental issue which is connected with a possible interference in the sphere of fundamental rights enshrined by the provisions of the Constitution. 3. Exclusion of an open session in which a court either hears or resolves a case is admitted solely in cases specified in the Act (Art. 42 § 3 of the Act on the Common Courts Organization)"[16].

On the other hand, with regard to the prerequisites of the exclusion of openness, the Court of Appeal in Białystok expressed an opinion in the judgment of 19 March 2015 according to which even strong stress connected with the defendant's statement made in court publicly is not the reasons for the exclusion of an open hearing. The Court claimed in the above cited judgment that "with regard to the defendant and her personal profile, it can be said that each public statement about the act evoked strong stressful reactions, which could be identified with the prerequisites of the exclusion of the public. The exclusion of openness occurs solely in cases specified in the Act – Art. 360 of the CCP"[17].

On the other hand, in accordance with the thesis of the Court of Appeal in Szczecin, expressed in the judgment of 6 November 2014 in the case II AKa 198/14, "1. An open hearing, as a special element of transparency of the system of justice, contributes to the fulfilment of the purpose of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, i.e. a fair trial, the guarantee of which is one of the basic principles of a democratic society. Procedural guarantees envisaged in the norm of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with regard to the defendant (fair trial) are also applied in relation to the person subject to lustration proceedings. 2. In a democratic state of law, general pronouncement of materials generated by communistic secret service as state secret as well as restricting the person who is subject to lustration access to case files, is not consistent with the principle of fair lus-

15 Uniform text: Journal of Laws of 2013, item 499 as amended.

16 Resolution of 7Judges of Supreme Court, Criminal Chamber, of 28 March 2012, OSNKW 2012, No. 4, item 36, Legalis No. 440090.

17 Court of Appeal in Białystok's judgment of 19 March 2015, II AKa 29/15, KZS 2015, No. 9, item 58, Legalis no 1241695.

tration proceedings including the principle of equality of arms. 3. If the Act orders a judgment to be served together with reasoning, the action pursuant to the content of Art. 100 § 5 of the CCP is admissible solely if an open hearing has been excluded whereas the ground thereof was the provision of Art. 360 § 1 point 3 of the CCP"[18].

In the ruling of 30 September 2009, the Supreme Court decided that "a judgment is always announced openly (publicly) even if an open hearing as well as the reasons for judgment have been fully excluded (Art. 45 par. 2, sentence 2 of the Polish Constitution, Art. 364 § 2 of the CCP). Thus if the so called conclusion of a judgment containing elements specified in Art. 413 of the CCP, i.e. including a name, surname and other data identifying the defendant (Art. 413 § 1 point 3 of the CCP), and description and legal evaluation of a deed the defendant has been accused of by the prosecutor (Art. 413 § 1 point 4 of the CCP) must be announced openly (publicly) for constitutional reasons whilst court proceedings should be carried out promptly and without undue delay, a person who assigned a confidentiality clause to pleadings containing these data (or his or her superior) is obliged to give their consent to change or cancel this clause within the above scope before an indictment is brought"[19].

Moreover, some attention should be paid to the content of Art. 360 of the CCP, amended under the Act of 5 August 2016 on the Amendment of the Code of Criminal Procedure , Act on the Profession of a Physician and Dentist and the Act on the Rights of Patients and Patient Ombudsman[20], on the exclusion on an open hearing. A previous obligatory nature of the exclusion of openness, which resulted from § 1 of this provision on the ground of fulfilled prerequisites listed in points 1-4 thereof, has become optional. Furthermore, the catalogue of prerequisites allowing the court to exclude an open hearing has been changed too. Even though after the changes introduced in 2016 the circumstances of the exclusion of an open hearing listed in § 1 above have been extended by a possibility of "an insult to decency", other prerequisites have been maintained[21]. Although a decision to exclude openness is vested in a first-instance court, a role of a prosecutor seems to be superior because pursuant to the content of § 2 of the above provision, if a prosecutor objects to the exclusion of openness, a hearing shall be held publicly. The prosecutor's opinion and his or her objection to the exclusion of an open hearing is, therefore, of key importance after the changes introduced in 2016.

18 Court of Appeal in Szczecin's judgment of 6 November 2014, II AKa 198/14, KZS 2015, no 4, item 115, Legalis No. 1219084.

19 Supreme Court's judgment of 30 September 2009, I KZP 13/09, OSNKW 2009 No. 11, item 93, Legalis No. 171979.

20 Journal of Laws, item 1070.

21 See more: M. Zimna, Wyłączenie jawności rozprawy jako gwarancja ochrony interesów uczestników postępowania karnego, "Prokuratura i Prawo" 2016, No. 9, p. 87-108.

2.2. The institution of a community representative as a form of social factor participation in a criminal trial

A possibility of participation of a social organization representative in a criminal trial is regulated in the provisions of Art. 90-91 of the CCP[22] as well as Art. 271 § 1 of the CCP (social organization guarantee). Pursuant to the reading of Art. 90 § 1 of the CCP, such participation should be petitioned if it is necessary to protect community or individual interests within the statutory purposes of such an organisation, especially in matters pertaining to the protection of human rights and freedoms.

On the other hand, pursuant to the new reading of Art. 90 § 2 of the CCP, in their petition, a social organisation shall indicate a community or individual interest within the statutory purposes of this organisation and designate a person who is to represent this organization. A certified copy of the articles of association or another document regulating this organization's activity shall be enclosed to the petition. A representative of a social organization shall file his or her power of attorney in writing with the court.

Pursuant to Art. 90 § 3 of the CCP, the court shall admit a representative of a social organization to participate in a case if at least one of the parties thereto gives their consent. The party may withdraw their consent at any time. If only one party does not agree for a representative of a social organization to participate in the case, the court shall exclude him or her from the participation in a trial unless his or her participation in court proceedings is in the interests of justice.

Furthermore, under § 4 of the above provision, the court shall admit a representative of a social organization to participate in a case regardless of a lack of consent of the parties thereto if it is in the interest of justice. However, pursuant to the content of § 5, the court shall refuse to admit a representative of a social organization to participate in a case if a community or individual interest indicated in the petition has been found not consistent with the statutory purposes of this organization or it is not connected with the case being heard.

According to § 6, the court may limit a number of representatives of a social organization participating in a case if it is necessary to secure a proper course of proceedings. The court shall then request the prosecutor and the defendant to suggest not more than two representatives of social organizations who could take part in the case. If there is more than one defendant or more than one prosecutor in the case, each of them can suggest one representative. Failure to indicate a representative shall be deemed as a withdrawal of consent to his or her participation in the case. Regardless of the parties' opinion, the court may decide about continued participation of in-

22 See more: M. Tomkiewicz, Udział przedstawiciela społecznego w procesie karnym, "Prokuratura i Prawo" 2012, No. 7/8, p. 107-120 and literature quoted therein; K. Woźniewski, Przedstawiciel społeczny, (in:) C. Kulesza (ed), System prawa karnego procesowego, v. VI, Warszawa 2016, p. 1254-1290 and literature quoted therein.

dividual representatives of social organizations if their participation is in the interest of justice.

Procedural rights of a representative of a social organization ensue from the content of Art. 91 of the CCP and encompass the following possibilities:

– participation in a trial;
– making statements;
– submitting written motions.

Despite the indicated scope of rights envisaged for a representative of a social organization in a criminal trial, the relevant literature has pointed out that the institution of a community representative is a dead object[23].

In the judgment of 29 October 2003 the Court of Appeal in Krakow ruled that "the court shall not control how the participants to the proceedings exercise their rights even if a community representative has limited his or her activity to the cooperation with the defendant's Defence Counsel"[24]. It implies that a possible activity of a community representative may be limited to cooperation with one of the parties to criminal proceedings. If so, a representative of a social organization may fulfil a role of a specific additional "assistant" of litigants; all the more, also because presently a consent given by one of the parties to the participation of a community representative in a criminal trial ensues an obligatory duty to admit him or her to participate in the proceedings.

The above thesis is confirmed by the objection raised by the complainant in the cassation in effect of which the Supreme Court issued a decision on 10 January 2007[25]. The attorney of a private prosecutor filing the above complaint alleged violation of Art. 90 § 3 of the CCP, which occurred through failure to admit a representative of a social organization in the proceedings, in result of which there may have arisen negative consequences affecting the parties which, in turn, may have caused possible detriment to the interest of justice.

Even though neither the attorney's cassation nor the alleged prevention of the participation of a community representative in the case have been allowed by the Supreme Court, a possible activity of a social organization representative in a criminal trial has been underlined this way.

On the other hand, in the judgment of 30 June 2014 the Court of Appeal in Warsaw ruled that "Art. 91 of the CCP clearly limits the rights of a community representative to possible participation in a trial, making statements and submitting written motions. The right to make a statement cannot be identified with the right to ask questions to witnesses or suspects, or offer evidence"[26]. However, we should remem-

23 M. Tomkiewicz, Udział…, *op. cit.*, p. 108.
24 Judgment of Court of Appeal in Krakow of 29 October 2003, II AKa 175/03, KZS 2004, No. 4, item 43, Lex no 118903.
25 Decision of Supreme Court of 10 January 2007, V KK 290/06, Lex No. 569221.
26 Judgment of the Court of Appeal in Warsaw of 30 June 2014, II AKa 78/14, Lex No. 1496107.

ber that written motions submitted by a community representative may be an important source of information both about possible evidence and the opinion on the case. This, in turn, may affect the first-instance court's requirement to provide evidence.

After the amendments to the Code of Criminal Procedure of 2016, a reversal of the obligation to declare the participation of a community representative in a criminal trial in due time (i.e. before the opening of court proceedings) may affect the participation of a higher number of community representatives in a criminal trial who fulfil a role of additional judicial assistants not only of the court but litigants too.

A social organization may play an important role when the institution of a personal guaranty is applied. Art. 271 of the CCP is of a hybrid nature and lists two categories of entities authorized to offer a guaranty. A social organization is included in the second category[27]. Pursuant to Art. 271 of the CCP, a guaranty may be given by a social organisation of which the defendant is a member, upon the motion of such persons. Such a guaranty shall state that the accused will appear whenever summoned and will not unlawfully obstruct the course of the proceedings. Furthermore, § 2 of the above provision stipulates that the collective or social organisation shall enclose an excerpt from the minutes containing a resolution on undertaking such a guaranty to the motion requesting that guaranty be accepted.

Assuming the function of a social guarantor, a social organization and a person acting on its behalf as a guarantor are obliged to ensure that the defendant will appear whenever summoned by the court and will not unlawfully obstruct the course of the proceedings (because pursuant to § 3, the motion requesting that guaranty be accepted should indicate the person who will undertake the duties of a guaranty-provider; such a person shall make a statement to the effect that he or she accepts such duties). A social guarantor is obliged to immediately notify the court or prosecutor about the defendant's doings he or she is aware of which aim at evading the obligation to appear as summoned, or otherwise unlawfully obstruct the proceedings. The relevant case law implies that, generally, there is one requirement to provide a guaranty – the defendant should be a member of a community providing the guaranty[28].

2.3. Participation of lay judges as a form of social factor in a criminal trial

Within the context of social factor participation in a criminal trial, are far as criminal proceedings' objectives are concerned, the participation of this factor in sentencing itself is of utmost importance. Under the Code of Criminal Procedure, a court may be composed of two types of benches: it may be solely composed of a professional factor, or a professional and social (lay judges) factor as well. It should be noticed here that the importance of lay judges has been recently more and more

27 K. Dudka, Praktyka stosowania nieizolacyjnych środków zapobiegawczych w polskim procesie karnym, Warszawa 2016, p. 112-113.

28 Resolution of Supreme Court of 27 September 1980, U 1/80, OSNKW 1980, No. 10/11, item 79.

undermined whereas the scope of cases they may adjudicate while sitting in a bench[29] has been diminishing, the effects of which are far-reaching[30].

Pursuant to Art. 4 § 2 of the Act of 27 July 2001 on the Common Courts Organization[31] (hereinafter CCO), when resolving a case, lay judges are vested with the same rights as judges (essential issues connected with sentencing will be discussed later).

Relevant case law mostly refers to the composition of courts while marginally treating the validity of the participation of lay judges therein, merely indicating formal prerequisites of their participation included in the provisions of the CCP. The Supreme Court has expressed its opinion thereon many a time in the following way: "there are no better or worse benches; there are only right and improper benches. The legislator distinguishes benches with regard to a forum (court), phase of proceedings, alleged deed, and likely and actually imposed punishment"[32]. It is worth noticing here that the judicature does not emphasize the participation of lay judges in resolving cases in the context of the idea of a civil community and significant functions it fulfils such as social control or liaison between the court and community.

In the decision of 22 April 2009 (where the Defence Counsel of the person convicted in cassation alleged the infringement of, among others, Art. 439 § 1 point 2 in connection with Art. 3 of the CCP) the Supreme Court ruled that the allegation is groundless because "contrary to the claim made by the author of cassation, the composition of the court in the case was not improper; therefore the claim that the court heard the case without the participation of lay judges is groundless". The Supreme Court believed that the above provisions would have been infringed only if the bench had actually lacked lay judges while the verdict had been passed by one professional judge. Yet as it ensued from the case files' analysis, the names of lay judges were omitted in the record of the trial by mistake, which was then corrected by the Order of 5 March 2008 including the content of the clerk's statement as of the same day […]. The judgment of 19 November 2007 is signed by the lay judges, whose signatures are placed beside the presiding judge's signature. According to the Supreme Court, negligence involving the omission of lay judges' surnames in the record of the trial cannot be identified with the absolute cause of the decision's reversal mentioned in Art. 439 § 1 point 2 of the CCP"[33]. Diminishing the importance of lay judges, the above judgment points out a distinct opinion functioning in the doctrine with regard to the perception of a social factor in a trial as a manifestation of maintained standards of a democratic state of law[34].

29 K.T. Boratyńska, Ł. Chojniak, W. Jasiński, Postępowanie karne, Warszawa 2012, p. 67.
30 See more: S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, wyd. 12, Warszawa 2016, p. 242; S. Waltoś, W dziesięciolecie obowiązywania Kodeksu postępowania karnego, "Państwo i Prawo" 2009, No. 4, p. 6.
31 Uniform text: Journal of Law of 2015, item 133 as amended.
32 Decision of Supreme Court of 30 October 2014, I KZP 22/14, OSNKW 2015, No. 1, item 2.
33 Decision of Supreme Court of 22 April 2009, III KK 5/09, OSNwSK 2009, No. 1, item 944, Legalis No. 444075.
34 A. Murzynowski, Istota i zasady procesu karnego, Warszawa 1984, p. 222.

Within the above scope, the case law is not uniform. In the judgment of 29 August 2013[35], the Court of Appeal in Białystok ruled that "each composition of the bench contrary to the Act elicits the necessity to reverse the judgment under appeal. It should be indicated that the content of Art. 28 of the CCP makes the composition of the bench dependent on the category of a case being resolved". According to the Supreme Court's case law, if the court resolved a case in the bench composed of lay judges (Art. 28 § 2 of the CCP) while it should have heard a case under the content of Art. 28 § 1 of the CCP in the bench consisting of one judge, the judgment under appeal should be reversed. A court of appeal is obliged to examine the regularity of a bench composition to monitor the occurrence of one of the absolute prerequisites of an appeal. A court of appeal should establish such facts ex officio regardless of the limits of appellate measures[36].

The Court of Appeal in Warsaw adopted a similar opinion claiming that "each composition of the bench resolving a case different from the one specified in Art. 28 of the CCP is not right. It refers to the situation when it is not envisaged by the Act, or stipulated in the Act but not referring to a given category of cases. Thus each composition of the bench contrary to the Act elicits the need to reverse the judgment under appeal"[37].

Some attention should be paid to the opinions that are well-established in the judicature and which refer to the causes of extended bench composition, i.e. participation of lay judges therein. A criminal act itself is of decisive importance in this aspect rather than a forecast of legal evaluation in the indictment[38].

The Court of Appeal in Krakow considers the above issue in the following way: "a legal evaluation included in the indictment is not a final settlement with regard to the composition of a bench. This evaluation is only a proposed legal assessment of the alleged act, which by all means does not bind the court. The court may change this evaluation not only in the judgment but also during the initial examination of the prosecution; thus the court may verify it if it is wrong, which will ensue the scope of the court jurisdiction (Art. 339 § 3 of the CCP). It does not bind the court in further proceedings (Art. 347 of the CCP). Evaluating if the bench has been properly composed (Art. 439 § 1 point 2 of the CCP), a criminal act is of decisive importance therein, and neither the act's description nor legal evaluation proposed in the indictment bind the court"[39].

The above opinion has also been supported by the Supreme Court, according to which "if a specific composition of the bench depends on the type of a case to be tried (Art. 28 § 3 of the CCP), a criminal act whose commitment is indicated in the indict-

35 Judgment of the Court of Appeal in Białystok of 29 August 2013, II AKa 161/13, Lex No. 1372238.
36 Decision of Supreme Court of 30 October 2014, I KZP 22/14, OSNKW 2015, No. 1, item 2.
37 Judgment of the Court of Appeal in Warsaw of 7 December 2012, II AKa 356/12, Lex No. 1240281; and: Judgment of the Court of Appeal in Lublin of 29 September 2009, II AKa 192/09, Lex No. 550483.
38 Judgment of the Court of Appeal in Warsaw of 7 December 2012, II AKa 356/12, Lex No. 1240281.
39 Judgment of the Court of Appeal in Krakow of 25 January 2005, II AKa 252/05, KZS 2006, No. 1, item 35.

ment decides whether the bench "has been improperly composed" (Art. 439 § 1 point 2 of the CCP). However, neither the act's description nor legal evaluation proposed in the indictment – similar to deciding upon the court's jurisdiction - bind the court"[40].

Case law is uniform in relation to the above issue, i.e. an extended composition of the bench is decided by a possibility of accepted legal evaluation of the deed itself, which justifies the necessity to resolve the case in the adopted composition of the bench. A specified bench is determined by the committed criminal act, i.e. a factual event rather than a description of the act or legal evaluation included in the indictment. The bench resolving a case is not bound in any way by the above[41]. However, it is not explicit with a decisive statement contained in Art. 28 § 4, where this matter refers to a criminal deed punished by a life sentence[42].

Due to a number of decisions within the scope of issuing an aggregate sentence, this issue appears to be problematic and worth analyzing. Two different case laws can be distinguished herein. The Court of Appeal in Krakow treated this issue in the following way: "Passing […] an aggregate sentence when one of the sentences subject to aggregation has been passed in the first-instance court in an extraordinary bench composed of two judges and three lay judges as the case involved a crime statutorily punished by twenty five years of imprisonment or life sentence, is still a resolution of the case involving this crime because it is the case where criminal liability for this crime is resolved. Especially when the prerequisite to resolve the case in an extended bench is grounded not only in the type of a criminal deed but the ensuing punishment as well".

Thus it seems that a correct interpretation would be the one according to which provisions on an extraordinary extended bench may be applied, i.e. Art. 28 § 3 of the CCP[43]. On the other hand, the Court of Appeal in Katowice, in the judgment of 9 December 2010[44] presents this issue in the following way: "Resolving a case on passing an aggregate sentence, a first-instance court does so each time in a bench composed of one judge even if a life sentence can be passed pursuant to the regulation resulting from the provision of Art. 88 of the Criminal Code; therefore the provision of Art. 28 § 4 of the CCP does not apply here". It appears that the issue has been decided by the Supreme Court's decision which briefly stated that "A first-instance court resolves a case on passing an aggregate sentence in a bench composed of one judge (Art. 28 § 1 of the CCP), or in a bench composed of three judges if the case is particularly complex (Art. 28 § 3 of the CCP)"[45].

40 Resolution of Supreme Court of 16 November 2000, I KZP 35/00, Lex No. 44025.
41 M. Krudysz, Wpływ zakazu reformationis in peius na skład sądu pierwszej instancji ponownie rozpoznającego sprawę, Lex/el. 2015.
42 R.A. Stefański, Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2000 r., WPP 2001, No. 2, p. 74.
43 Judgment of the Court of Appeal in Krakow of 25 January 2005, II AKa 252/05, KZS 2006, No. 1, item 35.
44 Judgment of the Court of Appeal in Katowice of 9 December 2010, II AKo 395/10, KZS 2011, No. 5, item 109.
45 Decision of Supreme Court of 30 October 2014, I KZP 22/14, OSNKW 2015, No. 1, item 2.

With regard to cases involving crimes statutorily published by a life sentence, Art. 28 § 4 of the CCP envisages an extended bench composed of two judges and three lay judges. Due to this provision, discrepancies have emerged in the criminal procedure, i.e. whether legal evaluation and description of a deed included in the indictment decide about the composition of a bench of a first-instance court specified in Art. 28 § 4 of the CCP, or is it a procedural situation that occurred after the reversal of a district court's first judgment due to the examination of an appeal submitted by the defendant's defence counsel and the functioning of an indirect ban of *reformationis in peius* in re-examination (Art. 443 of the CCP)[46]. With regard to this, we can notice two opinions in the judicature. According to the first one, this ban does not affect the composition of a bench.

In the judgment of 17 September 2008[47], the Court of Appeal in Wroclaw decided that "The ban of *reformationis in peius* does not affect the scope of the provision of Art. 28 § 4 of the CCP. Due to the above, a case involving a crime statutorily punished by a life sentence will always be resolved by the bench composed of two judges and three lay judges; including situations when due to Art. 443 of the CCP, a first-instance court cannot pass a sentence stricter than the one reversed by the court of appeal in effect of an appeal submitted solely for the benefit of the defendant". The simplest example thereof can be the Resolution of Seven Judges of Supreme Court of 19 March 1970[48]: "In cases involving crimes statutorily punished by death penalty, a first-instance court always resolves the case in a bench composed of two judges and three lay judges".

It can be noticed that the judicature attaches considerable importance to providing each member of a bench with a possibility to participate in the whole trial. Supreme Court's case law is significant in this respect. According to the Supreme Court, "if a bench must be changed, it is necessary to start proceedings again from the beginning to provide each member of the bench passing a sentence with a possibility of participating in the whole trial and hearing evidence on pain of the judgment's reversal"[49].

With regard to the issue of equal rights enjoyed by lay judges and judges (Art. 4 § 2 of the CCO), this term implies that in passing a sentence lay judges' votes carry the same force as the vote of a professional judge. Due to the proportion in a number of lay judges to professional judges, lay judges may be outvoted by a professional judge in individual cases[50].

46 M. Krudysz, Wpływ…, *op. cit.*
47 Judgment of the Court of Appeal in Wroclaw of 17 September 2008, II AKa 170/08, Lex No. 457797.
48 Resolution of Supreme Court of 19 March 1970, VI KZP 27/69, Lex No. 18057.
49 Judgment of Supreme Court of 6 May 2003, III KK 73/03, Lex No. 78396; and judgment of Supreme Court of 29 September 2010, III KK 59/10, Lex No. 612458.
50 G. Ott, (in:) A. Górski (ed.), Prawo o ustroju sądów powszechnych. Komentarz, Lex 2013.

3. Conclusion

The participation of social factor in a criminal trial may play an important role, most of all, through the observation of a hearing by citizens and direct impact on the resolution of a case by lay judges composing a bench. It is also significant that the legislator has not precisely determined a possible activity of a community representative in a criminal trial, which provides a broad spectrum of his or her possible participation in proceedings.

The literature points out that the principle of audience (openness) of a hearing is the broadest manifestation of social factor participation in a criminal trial. An important aspect of the participation in court proceedings is the fact that a court may permit representatives of the radio, television, film production and the press to make video and sound recordings of the course of the trial if this is warranted by legitimate public interest; moreover, if it does not obstruct the hearing and is not contrary to an important interest of the participant thereof (Art. 357 § 1 of the CCP). This way, a greater number of recipients may learn about the course of a trial. Furthermore, they may pursue their own analyses and evaluations thereof with regard to judges' independence, impartiality and sovereignty.

A community representative may play a role of a specific litigation assistant of the parties or justice system because, generally, he or she does not have to be objective. It should also be noticed that the possibility of participation of a community representative in a criminal trial in the form of making statements and submitting written motions may bring significant information to criminal proceedings.

Referring to the participation of lay judges in criminal proceedings, divergent case laws are often noticeable. Although case law connected with the extended composition of a bench (lay judges) is uniform (possible adoption of a legal evaluation of a deed which justifies the need to resolve a case in a specific bench decides about the extended composition of a bench; the court is bound neither by the description of a deed nor its legal evolution), there have emerged discrepancies related to the possible extension of a bench with regard to passing an aggregate sentence and impact of banned *reformationis in peius* on the extended composition of a bench. It appears that within the first aspect (i.e. the extended bench with regard to passing an aggregate sentence), the concept of a bench composed of one judge has prevailed regardless of the envisaged punishment whereas a possibility of a bench composed of three judges occurs solely in particularly complex cases. As far as the impact of a ban of *reformationis in peius* on the composition of a bench is concerned, it is difficult to distinguish "more popular case law". It appears, however, that more recent case law has been more inclined to support the claim according to which a ban expressed in Art. 443 of the CCP does not co-shape the court's jurisdiction and composition of a bench.

Referring to the above mentioned issue of equal rights enjoyed by lay judges and judges, it should be noticed that the fact that lay judges cannot preside over a hearing and deliberations does not diminish their position with regard to sentencing at all because the principles of vote on a verdict do not privilege a presiding judge – his or her vote carries the same weight as the vote of other members of a bench. A problematic issue is, among others, access of lay judges to confidential information, which has been revealed by the analysis of relevant case law. In the same period of time, judicature contains completely divergent interpretations of this right with regard to lay judges. Thus it is difficult to find and adopt one of them as a "better" one. Yet it can be depicted that distinct interpretations of law govern these two discrepant interpretations. The opinions which do not require lay judges undergo security (screening) procedure are, most of all, based on the linguistic and system interpretation whereas contrary opinions – on the functional interpretation connected with the importance of information subject to special protection[51].

Even though changes of 2016 within the scope of Art. 90 of the CCP do not *de facto* concern increasing procedural rights of a community representative in a criminal trial, they do confirm that he or she may play a role of a specific litigation assistant of the party. Such an attitude is justified by the eliminated prerequisite of the "importance" of individual interest it protects as well as the above mentioned consent of one of the litigants to the participation of a community representative in a criminal trial, which introduces his or her obligatory admission to participate in a case.

Moreover, the Code of Criminal Procedure, amended within the scope of Art. 360 through changing the prerequisites to exclude an open hearing from absolute to relative, may contribute to a declining number of cases where an open and public hearing will be excluded. Nevertheless, it is debatable whether a superior role of the prosecutor in this aspect should prevail over a decision of the court resolving the case.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.07

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The Participation of a Social Factor in the Administration of Justice as the Implementation of the Rule of the Public Trial

Abstract: The article presents the rule of transparency in criminal procedure, especially the external aspect of this rule – the rule of a public trial. The paper shows constitutional and criminal regulations of the rule of an open trial. The article presents when a trial is freely accessible for the audience and when an open trial is not possible. What is more, the article depicts targets, features and aspects of the implementation of the rule of an open trial.
Keywords: criminal procedure, social factor, rule, audience, transparency

1. Introduction

The participation of social factor in the administration of justice is one of the fundamental principles of the justice system operation regulated by the Polish legislator. It has been enshrined in the most important legal act – the Constitution of the Republic of Poland of 2 April 1997[1] in Art. 45 and 182. For the needs of the article, two possible types of the participation of citizenry in the administration of justice should be distinguished:

- through the assumed role in the proceedings (participation *sensu stricto*);
- through the presence in a courtroom without assuming any role in the proceedings (participation *sensu largo*).

With regard to concrete forms of the participation of social factor in the administration of justices, the following three examples can be depicted:

- participation of lay judges in sentencing;
- the institution of a community representative;

1 Journal of Laws No. 78, item 483 as amended.

– public access to open and public hearings.

Within the narrow meaning of the word, the participation of social factor mostly refers to court benches composed of lay judges and the institution of a community representative. The broad meaning of the participation of citizenry in the administration of justice, on the other hand, should be understood as public access to open and public hearings.

2. Participation of social factor *sensu largo*

2.1. General comments

Active community participation in the administration of justice, which entails taking a specified role in litigation, is not the only manifestation of the participation of social factor. Apart from the constitutional principle contained in Art. 182 of the Constitution, another equally important principle of an open trial envisaged in Art. 45 of the Constitution should be mentioned. It is one of the pillars of the rule of a fair trial functioning in democratic states.

The rule of an open and public trial has been permanently embedded in the development of criminal procedure. The rule of a public trial, which was unlimited with regard to the parties and audience, was binding already in the Roman criminal trial. It was favoured, among others, by the very venues where the proceedings were held – market squares, and during the Republic – court buildings (*basilicae*)[2]. In the Athenian democracy, the principle of an open trial was an indispensible element of a court as well; it was already understood as internal and external openness[3]. During the Early Middle Ages in Poland, the princely court in assemblies was, among others, open and public. It was usually held in the open air and was attended by a large number of audience. The inquisitorial trial, on the other hand, was secret. In the Noble Republic of Poland, a distinct form of a criminal trial developed in city courts under the influence of *Constitutio Criminalis Carolina*. The reception, however, was not full; contrary to German proceedings, a trial was open and public[4]. In the 19th century trial, the mixed court developed, which retained elements of the inquisitorial court (most of all in preparatory proceedings). A main hearing was held according to the principle of both external and internal openness[5]. As far as Polish interwar legislation is concerned, the Act of 17 March 1921 – the Constitution of the Republic of Poland[6], already stipulated that both civil and criminal trials are open and public unless an ex-

2 J. Skorupka, Jawność procesu karnego w toku jego historycznych zmian, (in:) J. Skorupka (ed.), Jawność procesu karnego, Warszawa 2012, p. 29.
3 K. Nowicki, Jawność zewnętrzna postępowania sądowego, (in:) J. Skorupka (ed.), Jawność procesu karnego, Warszawa 2012, p. 311.
4 J. Skorupka, Jawność…, *op. cit.,* p. 35.
5 *Ibidem*, p. 38.
6 Journal of Laws No. 44, item 267 as amended

ception thereto is envisaged. Regulation of President of the Republic of Poland of 19 March 1928 – The Code of Criminal Procedure[7], was issued in a similar vein. Pursuant to Art. 315 of the CCP of 1928, a hearing was held orally and openly, with some exceptions envisaged in the Act. Post-war legislation referred to the rule of an open trial too. The Constitution of 1952[8] contained a provision in Art. 53 par. 1, according to which cases are resolved openly and publicly in all courts of the Polish People's Republic. In the 1950s, show trials were held outside court buildings, most of all in cases involving theft of public property and in political trials. This method was still used as late as in the end of the 1980s[9]. The rule of an open and public trial (with specified exceptions) was appropriately included in the Code of Criminal Procedure of 1969.

The very notion of open and public proceedings can be understood in two ways:

– as internal openness;
– as external openness.

Internal openness should be understood as a principle referring solely to the litigation parties and individuals cooperating with them. It is a guarantee of adversarial proceedings. Its core are the parties' rights to access case files and participate in evidence-gathering acts. The participation of the parties (or individuals cooperating with them) will be full only if they are provided with unrestricted access to all information and acts connected with the litigation. In this aspect, the principle of an open trial is closely connected with the principle of the right to a court and a fair trial.

It has been rightly noticed that external openness should be treated as a separate rule – the rule of an open and public trial[10] referring to the entire society. And just this rule is regulated by Art. 45 par. 1 of the Constitution. An open and public trial is not understood by the Constitution as internal openness because it is embraced by the rule of a fair trial[11]. Thus it involves open proceedings with regard to third parties (including the media).

Open proceedings resolving a case encompass:

– open and public court sessions;
– broadly understood open and public litigation, which should be understood as a possibility of obtaining information about the course of proceedings by third parties and public opinion;
– publicly announced judgment.

7 Journal of Laws of 1932, No. 83, item 725 as amended.
8 Journal of Laws No. 33, item 232 as amended.
9 B. Wójcicka, Jawność postępowania sądowego w polskim procesie karnym, Łódź 1989, p. 125.
10 P. Hofmański, O jawności posiedzeń sądowych, (in:) A. Marek (ed.), Współczesne problemy procesu karnego i jego efektywności, Toruń 2004, p. 12-121.
11 Judgment of Constitutional Tribunal of 11 June 2002, SK 5/02, OTK-A 2002, No. 4, item 41.

2.2. System regulation

The Constitution does not indicate what sessions should be open and public. It means that all sessions, as a rule, are held openly and publicly regardless of the type of proceedings: first-instance, appeal or cassation. It is a standard procedure that cases should be resolved in a manner allowing audience to participate therein. Case settlement should be publicly announced. The constitutional legislator uses the notion of a judgment, which should be understood as a substantive ruling passed in individual proceedings. It obviously does not refer to rulings that do not concern the subject of litigation (e.g. discontinuance of proceedings), or rulings on incidental issues (e.g. restitution of a prior status – *restitutio in integrum*)[12]. A publicly announced ruling should be understood as both reading the sentence and providing essential reasoning thereto in an open session after terminated proceedings and providing third parties with public access to the ruling in a court building, or including its content in the collection of judicial decisions[13]. The requirement of a public announcement of a judgment must be paid attention to. Although a trial may be held in secret, the ruling should always be made public. It proves great significance of the principle of an open trial. The legislator stresses with much emphasis transparency of state bodies' activity. The rule of an open trial should be applied as broadly as possible until it does not contradict other interests or values.

Furthermore, Art. 45 par. 2 of the Constitution regulates reasons for the exclusion of an open trial. They embrace: morality, State security, public order or protection of the private life of a party, or other important private interest. It was necessary to regulate situations where the rule of an open trial yields precedence to other values as it may often happen that openness will contradict private or public interest. Then, exceptionally, the rule of an open trial should be abandoned in favour of the higher or greater good.

It should be mentioned that the rule of an open trial has also been regulated in international acts of law. Art. 6 par. 1 of the European Convention on Human Rights[14] clearly indicates that courts proceedings are open but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. It is a very similar regulation to the one contained in the Constitution of the Republic of Poland. The fact that both present and previous European legislation has

12 P. Grzegorczyk, K. Weitz, (in:) M. Safjan, L. Bosek (ed.), Konstytucja RP, Tom I, Warszawa 2016, p. 1143.
13 *Ibidem*, s. 1143.
14 Convention on the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950, amended by Protocol No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993 No. 61, item 284).

put such great emphasis on this rule proves its considerable importance and deep-rooted origin in the European legal culture.

2.3. Regulation of the Code of Criminal Procedure

In the criminal procedure, an open main hearing has been regulated in Chapter 42 of the Code of Criminal Procedure. Art. 355 of the CCP envisages that a hearing, in principle, is open and public but there may be exceptions from this principle (the Code of Criminal Procedure itself envisages such cases as well as other Acts, e.g. the Act of 25 June 1997 on the Crown Witness[15]). A necessary element for the principle of an open trial to be implemented is to provide access to the information about a venue and time of a hearing so that interested parties may take part in it. As indicated by the European Court of Human Rights, factual obstacles hampering the implementation of the principle of an open trial result in the violation of the European Convention on Human Rights[16] . The rule of an open and public trial obviously does not refer to all proceedings since Art. 108 § 1 of the CCP stipulates that the deliberation and voting on the decision shall be conducted in a closed session. With regard to the exclusion of openness, it shall not be allowed when judgment is announced (Art. 45 par. 2 of the Constitution). Opposite to a hearing, a session is secret (Art. 95b of the CCP) even though the legislator has also introduced exceptions from this rule. A session may be open if it is specified accordingly by the Act (the catalogue from Art. 95b § 2 of the CCP) and when the Court President or court rules otherwise. The Act imposes an obligation to carry out an open session when the defendant's criminal liability is to be decided thereon. Such sessions concern: discontinuance of proceedings (Art. 339 § 3 point 1 and 2 of the CCP), a conditional suspension of the proceedings (Art. 339 § 3 point 5 of the CCP), conditional discontinuance of proceedings (Art. 341 of the CCP), a sentence without a trial (Art. 343 § 5 of the CCP), a sentence without evidentiary proceedings (Art. 343a of the CCP), extradition (Art. 603 of the CCP), transfer and custody (Art. 607l § 1 of the CCP), execution of punishment or measure in case of refusal to transfer (Art. 607s § 3 of the CCP), and transfer and judgment execution (611c § 4 of the CCP, 611ti § 1 of the CCP). As rightly observed by H. Paluszkiewicz[17], admitting to a session other persons than the participants of litigation in the above situations fulfils the standard of public proceedings. Community has an opportunity to find out about the court's decision on the defendant's criminal liability, the content of a judgment and its reasoning.

It is worth paying attention here to Art. 418a of the CCP, according to which if a judgment was rendered in a secret session, the content of the judgment shall be made public by submitting its copy in the court's secretary office for a seven-day

15 Uniform text: Journal of Laws of 2014, item 1801 as amended.
16 Judgment of ECHR of 14 November 2000 in the case of *Riepan v. Austria*, No. of complaint 35115/97, § 27.
17 H. Paluszkiewicz, Pierwszoinstancyjne wyrokowanie merytoryczne poza rozprawą w polskim procesie karnym, Warszawa 2008, p. 268.

period. At the same time, the Supreme Administrative Court noticed that a court's judgment is an official document in the meaning of the Act on Access to Public Information and does not lose this character after it has been publicly announced or made public in a court's secretary office[18]. Furthermore, the Polish Constitution stipulates that each citizen shall have the right to obtain information on the activities of organs of public authority (Art. 61 of the Constitution). It shows that a purpose of both the legislator and bodies applying the law is the assurance of transparency of the activities of bodies of public authority. In this context, anonymization of rulings, which is discernible, e.g., in the Lex portal, is puzzling. It is depicted that in West European countries and the USA rulings posted in Internet portals are not subject to such anonymization. For instance, the ECHR decisions give the parties' names and surnames[19]. It should also be mentioned that the party may apply for decision's anonymization, which ECHR often accepts. Undeniably, Internet access to the full content of rulings would enhance community supervision and trust in the administration of justice. This issue is debatable and thus worth mentioning herein.

If pending proceedings attract considerable interest which would be beyond the court's organizational capacities, entry passes may be issued to a court room. This right is vested in the Court President[20]. It may not, however, ensue a selection of persons admitted to participate in a hearing as audience even though entry passes may first be granted to the media representatives, individuals connected with the litigation parties, or persons interested in the proceedings for scientific reasons[21]. A selection of persons admitted to a court room would apparently contradict the principle of an open and public trial. It could entail the admittance of persons favouring solely one party to the proceedings, or hostile to a witness thus evoking certain anxiety in him or her. It seems that the only case of a broadly understood selection may the situation regulated in Art. 359 of the CCP.

Art. 359 of the CCP indicates that the principle of an open and public trial is not tantamount to the full openness of a trial to everyone. § 1 thereof univocally sets forth that apart from the participants of the proceeding, a hearing may be solely attended by individuals who have come of age and are unarmed. This ban may be reversed by an order of the presiding judge. As far as minors are concerned, their presence in a trial may be justified by their relations or ties with a party thereto or educational reasons[22]. With regard to armed individuals, the presiding judge may permit them to attend a trial if they are obliged to carry weapons. What is more, persons

18 Judgment of Supreme Administrative Court of 11 August 2011, I OSK 933/11, Lex No. 1165432.

19 See: P. Dobrowolski, Jawność postępowań: wszystko, co dzieje się na sali sądowej, jest wspólną sprawą, "Dziennik Gazeta Prawna" of 20 January 2012, http://prawo.gazetaprawna.pl/artykuly/586201,jawnosc-postepowan-wszystko-co-sie-dzieje-na-sali-sadowej-jest-wspolna-sprawa.html.

20 § 68 of the Regulation of Minister of Justice of 23 December 2015. Regulation of Common Courts Official Activity (Journal of Law, item 2316 as amended).

21 W. Jasiński, (in:) J. Skorupka (ed.), Kodeks postępowania karnego. Komentarz, Warszawa 2016, p. 881.

22 *Ibidem*, p. 880.

in a condition incompatible with the court's dignity shall not be admitted to the trial. It concerns, most of all, people under the influence of alcohol or drugs, or individuals whose conduct or dress is inappropriate.

With the current development of technology, an indispensible element of the principle of open proceedings is the presence of the media in a trial. Art. 357 § 1 of the CCP obliges the court to permit the representatives of the media to make video and sound recordings of the trial. It is worth adding that an application for such permit should be submitted by a representative of a specified medium; that is why the court acts upon the initiative of an applicant. This permit obviously concerns recording the trial by means of special equipment, i.e. a photo camera, sound recorder or video camera. A number of the media representatives in a trial may also be limited for technical conditions of a courtroom (the above mentioned issue of entry passes). In case of such restrictions, it is essential to maintain objectivity in choosing the media representatives. Paragraph 3 prescribes that the choice can be made on the first come first serve basis, or at random. If the course of a trial is disturbed by the media representatives, the court shall order them to leave a courtroom. The media may also be instructed to leave a courtroom if their presence embarrasses or confuses a witness. Then it is a temporary leave of a courtroom only for the time of hearing a witness. Therefore paragraph 4 assigns priority to the principle of substantial truth over the principle of an open trial[23] as it is more important to duly hear a witness than fulfil the principle of open proceedings. As noticed by R. Koper[24], the issue of recording a trial has been well balanced by the legislator. Agreeability of the regulation contained in Art. 357 of the CCP is, in his opinion, very clear, creating solutions reconciling opposing interests and goods.

Another very important regulation is also worth considering, namely Art. 13 of the Act of 26 January 1984 – Press Law[25]. Paragraph 1 thereof sets forth that it is not allowed to express one's opinion about the settlement of litigation in the press before a judgment is in a first-instance court. It is of vital importance as it assures the observance of the principle of judicial independence, consideration for the defendant's interest (in the aspect of presumed innocence), and guarantees citizens' right to reliable information[26]. Furthermore, paragraph 2 of the provision in question stipulates that personal data and image of a person against whom preparatory proceedings or litigation is held must not be published in the press, as well as personal data and image of witnesses and injured parties, unless they give their consent. As far as the consent of the participants of proceedings is concerned, it is pointed out that the nature and

23 *Ibidem*, p. 883.
24 R. Koper, Jawność zewnętrzna postępowania karnego, (in:) W. Jasiński, K. Nowicki (ed.) Jawność jako wymóg rzetelnego procesu karnego. Zagadnienia prawa polskiego i obcego, Warszawa 2013, p. 112.
25 Journal of Laws No. 5, item 24 as amended.
26 R. Koper, Jawność…, *op. cit.,* p. 112.

scope of such consent cannot be presumed or alleged[27]. It should be univocal. On the other hand, the prosecutor or court may permit to disclose personal data and image of individuals against whom preparatory proceedings or litigation is held due to important public interest. This decision is subject to a complaint. It seems that such a solution allows to balance both private interest of the participants of a criminal trial and public interest. The Constitutional Tribunal[28] ruled on the constitutionality of Art. 13 par. 3 of the Press Law because in its previous reading this provision did not envisage a possibility of submitting a complaint to a court against a decision of the prosecutor to permit the publication of data and image of participants of preparatory proceedings. The previous regulation was inconsistent with Art. 45 par. 1 and Art. 77 par. 2 of the Constitution of the Republic of Poland. In effect of the Constitutional Tribunal's judgment, par. 4 envisaging the above mentioned complaint was added to Art. 13 of the Press Law.

A party may apply to a court for a permit to record the course of a trial using sound recording equipment (Art. 358 of the CCP). The court may refuse only if it adversely affects the regularity of proceedings. Thus such a refusal should be treated as an exception.

The Code of Criminal Procedure provides two categories of cases that are closed to the public; when they regard:

- a motion from the state prosecutor for discontinuance of the proceedings due to the non-accountability of the perpetrator and application of a precautionary measure;
- a case of defamation or calumny; however, on a motion of the injured party, the hearing is held in open court.

These are the categories of cases that are fully closed to the public *ex lege*. With regard to cases of defamation or calumny, if the injured party submits a motion for an open trial, it is fully open to the public *ex lege*. The court may not disregard such a motion. The reason for such a solution is the implementation of the provision of Art. 45 par. 2 of the Constitution, which enshrines important private interest as the cause of excluded openness of proceedings.

Art. 360 § 1 of the CCP establishes a possibility of excluding the public from all or part of the trial, where the public nature of a hearing may:

- be conducive to disturbance of public order,
- offend decency,
- disclose circumstances which in consideration of significant State interests should remain secret,
- infringe important private interests.

27 M. Brzozowska-Pasieka, (in:) M. Brzozowska-Pasieka, M. Olszyński, J. Pasieka, Prawo prasowe. Komentarz, Warszawa 2013, p. 224.

28 Judgment of Constitutional Tribunal of 18 July 2011, K 25/09, OTK-A 2011, No. 6, item 57.

Moreover, the court may exclude the public from a hearing if at least one of the accused is a minor, for the time of hearing a witness who has not turned 15 years old, and upon a motion of a person who filed for prosecution. It is another situation when the CCP refers directly to Art. 45 par. 2 of the Constitution. The reasons listed in Art. 360 § 1 of the CCP correspond to those envisaged in the Constitution. A practical example of the application of Art. 360 § 1 of the CCP may be a hearing which was held on 24 November 2016 in the Regional Court in Białystok. The case involved the prosecution of Chechens accused of, among others, financial support given to the so called Islamic State. According to the media[29], some witnesses giving evidence in this trial feared for their lives. Amidst them doctors who helped one of the defendants. Media coverage ensued that the court excluded the public from the trial due to confidentiality of medical information and witnesses fearing for their safety. It may be presumed that the public was excluded from this case due to important private interest.

Pursuant to the reading of the provision in force since 5 August 2016[30], Art. 360 § 2 sets forth that the prosecutor may object to the exclusion of the public from a hearing, which ensues its obligatory open pursuit. This objection may be raised only before the court issues a decision to exclude the public. In practice, before issuing a decision on the exclusion of the public from the proceedings, the court should request the prosecutor present in a trial to express his or her opinion on the exclusion of an open trial if the exclusion is grounded on Art. 360 § 1 point 1 of the CCP. If the prosecutor objects to the exclusion of an open trial, the court is not allowed to exclude it. As pointed out in the literature[31], it is a serious infringement of the principle of equality of litigants since only a prosecutor is entitled to object; the defendant does not enjoy such a right. In principle, the court is an entity which evaluates whether a specific value or interest may be a reason for the exclusion of the public from a hearing. In this case, the court's powers have been transferred onto the prosecutor. Moreover, the requirement of justifying the exclusion of the public if the prosecutor objects to it does not result from the content of the provision. Thus it can be claimed that the prosecutor enjoys greater discretion than the court since the court is obliged to justify its decision about the exclusion of the public while the prosecutor does not have to do so if he or she objects to the exclusion[32]. At the same time, a part of the doctrine points out that due to the maintenance of the right to defence by the participants of a criminal trial, prosecutor's objection should be supported by the reasoning and a possibility of appealing against it to the court[33].

29 I. Krzewska, Proces podlaskich Czeczenów. Świadkowie boją się o swoje życie, "Kurier Poranny" of 23 November 2016, http://www.poranny.pl/wiadomosci/Białystok/a/proces-podlaskich-czeczenow-swiadkowie-boja-sie--o-swoje-zycie,11495169/.

30 Act of 10 June 2016 on the Amendment of the Act – Code of Criminal Procedure, Act on the Profession of a Physician and Dentist and Act on Patient Rights and Patient Rights Ombudsman (Journal of Law, item 1070).

31 W. Jasiński, (in:) J. Skorupka (ed.), Kodeks…, *op. cit.,* p. 888.

32 *Ibidem*, p. 888.

33 M. Zimna, Wyłączenie jawności rozprawy jako gwarancja ochrony interesów uczestników postępowania karnego, "Prokuratura i Prawo" 2016, No. 9, p. 99.

Then, the catalogue of persons who may attend a hearing despite the exclusion of the public (Art. 361 § 1 of the CCP) should be provided. They are so called persons of trust. Apart from the litigants, they embrace: two persons designated by the public prosecutor, two by the auxiliary prosecutor, two by the private prosecutor and two by the defendant.

Persons of trust, however, cannot participate in a hearing if it is feared that confidential information classified as "secret" or "top secret" may be revealed. Additionally, persons of trust cannot participate in a hearing of a crown witness (Art. 13 par. 1 of the Act on the Crown Witness) and during reading *incognito* witness's testimony (Art. 393 § 4 of the CCP). The presiding judge may permit individuals other than persons of trust to attend a closed hearing even if information classified as "secret" or "top secret" is revealed[34].

The presiding judge shall inform the persons attending the hearing of their obligation to keep secret any information learned during the hearing in a closed session, and warn them of the consequences of their failure to do so (Art. 362 of the CCP). As indicated by the Supreme Court, "the Court is absolutely obliged […] to carry out a hearing in such a manner […] as not to allow any violation of legally protected interests of the injured parties"[35].

If a motion is filed to have a hearing held in a closed session, and if the motion has been filed by the party or when the court finds it necessary, the hearing on the motion shall be conducted in a closed session (Art. 363 of the CCP).

Art. 364 § 1 of the CCP prescribes that the judgement shall be announced in open court. It is another reference to the absolute rule of an open trial contained in the Constitution of the Republic of Poland (Art. par. 2 sentence 2 – The Judgments shall be announced publicly) and European Convention on Human Rights (Art. 6, item 1). However, if all or part of the trial has been held in a closed session, the announcement of the statement of reasons for the judgement may be also made in a closed session fully or partly.

3. Conclusion

The principle of open proceedings is one of the essential and oldest principles of litigation. With the development of technology, its range and scope have greatly increased. Previously, a number of individuals who could follow a specific trial was limited to those who found enough room in a public square or courtroom. Nowadays, the principle of an open trial refers rather to the recipients of the media, i.e. radio programme listeners, TV viewers, Internet users or readers. Open proceedings are

34 R.A. Stefański, (in:) R.A. Stefański, S. Zabłocki, Kodeks postępowania karnego. Komentarz, tom II, Warszawa 2004, p. 641.

35 Decision of Supreme Court of 25 March 2009, III KO 21/09, Lex No. 608111.

now an institution thanks to which the community may learn about the operation of the administration of justice. Thus it exerts actual impact on the image of judges, prosecutors, attorneys and legal advisors. The principle of an open trial may be an effective instrument to build social trust in the administration of justice. Ipso facto, it should enhance the quality of work of judicial staff and raise legal awareness and culture of the citizens.

It should be remembered that judicial power is the only power citizens cannot directly affect at all. Opposite to legislative and executive power, judicial power is not elected by the people. Due to the principle of irremovability of judges, citizens cannot express their approval or disapproval towards the representatives of judicial power. Judge's independence, on the other hand, ensues not only a lack of citizens' impact on judicial power, but it also precludes other powers' impact on the administration of justice. Therefore the principle of an open trial is the only instrument allowing to exert control that is necessary to guarantee appropriate operation or work of every, even best educated and morally shaped entity. Such control is possible solely thanks to the access to information about the operation of judicial power that citizens are provided with. Information can only be obtained, in turn, if the external openness of proceedings is guaranteed. Lack of such information would evoke citizens distrust of the representatives of justice on the one hand, and negatively affect judges' motivation to carry out a proper service on the other hand. Activities of each power, including judicial power, are subject to the requirement of transparency. As ruled by the Constitutional Tribunal, a purpose of the principle of an open trial is to "assure judge's impartiality and regularity of proceedings, and motivate the court to employ greater diligence and conscientiousness in the proceedings"[36].

Nevertheless, we should not forget that open proceedings must have certain limits. We should take into account circumstances that may arise in practice which would ensue the need to sacrifice the principle of an open trial for the sake of greater good. Such limits have been envisaged both by the Polish Constitution and Acts (including the Code of Criminal Procedure). Disclosure of information might imply serious infringement of private or public interests. We can easily imagine many situations where the presence of third parties, including the media, could threaten the above mentioned interests. It may be a business interest of an entrepreneur when his or her competitor is present in a courtroom while his or her business strategy is discussed or mentioned during a trial. A private interest may be wellbeing of a victim of a rape who filed for the prosecution. Violation of a public interest, in turn, may be a public hearing of a testimony given by a high rank officer of Internal Security Agency or Intelligence Service which could infringe a State secret, which is, ipso facto, the Republic of Poland's interest. We can imagine a situation when the subject of litigation is certain reprehensible conduct on the grounds of a race or worldview the public

36 Judgment of Constitutional Tribunal of 2 October 2006, SK 34/06, OTK-A 2006, No. 9, item 118.

opinion is keenly debating. Then an open trial could evoke public nuisance. Finally, an open trial of the accused Minister where details of his or her private life are mentioned could infringe standards of public decency. Due to the above, it is necessary to protect goods and values which could be threatened in effect of open proceedings[37].

As noticed by S. Waltoś[38], improper application of the principle of an open trial often adversely affects the principle of presumed innocence. We witness a recent phenomenon of conscious or intentional "leaks" of information from preparatory proceedings. It concerns both case files' photographs (publishing photos from the case files from preparatory proceedings in the so called "bug affair") and service officials making video recordings of suspects being detained. Such leaks are generally aimed at concrete persons or groups. Seeing an image of a handcuffed person, the public forms a negative opinion about this individual even though he or she is still innocent. Many a time, further acquittal does not change the opinion previously forged by the media coverage about the acquitted person. In such situations, the principle of presumed innocence simply does not work. Ensuing social pressure puts the court, defence counsel and, above all, the defendant, in a very difficult position.

Additionally, some attention should be paid to the transformation of traditional media (the press, television and the Internet) into modern social media. With regard to them, a role of a journalist and recipient mingles. In one place (portal), a recipient can be a journalist while a journalist – a recipient. It adversely affects the quality and manner of conveying information. It concerns both facts or opinions posted on Facebook or Tweeter as well video recordings uploaded in YouTube. It appears that within this area there are no binding principles except the principle of decency which is, nevertheless, excessively abused. At the same time, a range of social media is much broader than traditional ones. That is why a scale of abuses connected with publishing information about litigations is so vast.

The principle of open proceedings is enshrined by the Constitution of the Republic of Poland. It fulfils not only a system role but also assures regular and proper operation of the justice system by providing public access to its activities. This access is the only instrument affecting discipline and impartiality of the judiciary. This principle, however, cannot be abused in any way. It could adversely affect not only the image of the justice system but, above all, the image of private individuals. Regardless of the above, the principle of open proceedings is and should continue to be a fundamental pillar of a democratic state of law.

37 D. Gil, E. Kruk (ed.), Role uczestników postępowań sądowych – wczoraj, dziś i jutro, Tom II, Lublin 2015, p. 215.
38 S. Waltoś, Domniemanie niewinności w świecie mediów, (in:) C. Kulesza (ed.), System wymiaru sprawiedliwości a media, Białystok 2009, p. 16-22.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.08

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Participation of Social Organizations in Juvenile Proceedings – Theoretical Foundations and Practice

Abstract: Juvenile law is a rather young branch of law. It was singled out just at the turn of the 19th and 20th centuries. From the very beginning, the juvenile law regulations could be distinguished into two dominant models: protective and restrictive. However, both of them did not fulfil the expectations and faced a wave of criticism. One of the consequences of this situation was the appearance of the "third road" of reaction to juvenile crimes – restorative justice. Under the regulations in force, in Poland juvenile matters are solved on the basis of the protective model. Since 2001 it has been enriched with elements of a restorative justice model such as mediation. Abovementioned regulations also provide a wide participation of social factor in juvenile matters but, as statistics show, with minimal relevance in practice. The article is a contribution to the discussion about causes of this minimal relevance and the possibilities of changing it, for instance, by enlarging the participation of social organizations in juvenile criminal cases.
Keywords: juvenile law, restorative justice, social participation, mediation, criminal law

Proceedings in cases involving minor perpetrators of criminal acts are a relatively young branch of law. Even though it has always been apparent that children breaking basic rules of community life have to be treated differently, there has not been a distinct system of a relevant procedure for hundreds of years. To a large degree, it was just connected with a comparatively insignificant social need to regulate this. In ancient times, children's legal disobedience was mainly a problem of a family head – traditionally a father – who was the only person authorized to administer internal justice (within the family). It was also a father who was externally responsible for the breaches of law committed by family members who did not enjoy full legal rights (a woman or child)[1]. During the time of a feudal social structure that was prevalent in Europe for centuries and was characterized by a domination of rural or

1 M. Cieślak, Od represji do opieki (Rzut oka na ewolucję zasad odpowiedzialności nieletnich), "Palestra" 1973, No. 1, p. 34.

small town forms of life, the situation was similar. Apart from the role of a father – a family head – and the ensuing right to punish he was authorized to, feudal local communities were characterized with strong mechanisms of internal control, which fulfilled their tasks within the sphere of upbringing and responding to undesirable phenomena occurring among children and youth quite well. Local community was then a basic, i.e. satisfactory in a broader scale, means of an efficient response to such phenomena. Children's criminal liability rarely appeared within the framework of the official justice system. It generally referred merely to cases of the so called "public order crimes", i.e. those that were perceived by the state authority as infringing public interest. Only a small number of cases of children who were publicly held liable for a prohibited act they committed evoked an apparent tendency to impose more lenient punishment. Death penalty and mutilation were particularly avoided while compensatory punishment was applied more often so that children could make up for their misconduct, or edifying penalties such as confinement in a monastery or penal colony where personal improvement is achieved through labour[2].

The actual problem of juvenile delinquency and the accompanying need to regulate it systematically appeared, in fact, as late as in the second half of the 19th century. The reasons for this phenomenon are rooted in several interrelated sources[3]. Undoubtedly, we should mention here political transformations originating in the French Revolution, which disseminated enlightenment ideas on the operation of a state and society. Nevertheless, the explosion of juvenile delinquency is mainly attributed to the Industrial Revolution[4]. Development of industry ensued a need to increase a number of people capable of working in factories. It was necessary to definitively abandon the feudal social structure embedded for centuries, free rural population and provide them with free movement and settlement in cities. Fast urbanization and a rapid increase of city population, often coming from different parts of a country, resulted in a breach of traditional social ties or bonds occurring in rural areas. Replacing farm work with industry labour changed family relations too. Undertaking work in factories, parents stayed far from their children who, this way, became excluded from the traditional system of control and supervision usually getting nothing in return. All of the above started to generate fruits in the form of a "phenomenon" of juvenile delinquency. This phenomenon was particularly significant in the American continent, where immense migrations of the 1880s and 1890s took an

2 *Ibidem*. Sources do not provide too much information about the trials of minor wrongdoers in Middle Ages or Renaissance – see more, e.g.: A. Walczak-Żochowska, Systemy postępowania z nieletnimi w państwach europejskich. Studium prawno-porównawcze, Warszawa 1999, p. 8 et seq.; B. Konarska-Wrzosek, Prawny system postępowania z nieletnimi w Polsce, Warszawa 2013, p. 35 et seq.; M. Korcyl-Wolska, Postępowanie w sprawach nieletnich na tle standardów europejskich, Warszawa 2015, p. 34 et seq.

3 B. Stańdo-Kawecka, Prawo karne nieletnich. Od opieki do odpowiedzialności, Warszawa 2007, p. 23 et seq.

4 M.H. Veillard-Cybulsky, Nieletni przestępcy w świecie, Warszawa 1968, p. 14; B. Stańdo-Kawecka, Prawo…, *op. cit.*, p. 23; M. Korcyl-Wolska, Postępowanie…, *op. cit.,* p. 19.

additional multicultural aspect (there were Russian, Italian, Irish, Jewish, Polish and Chinese migrants).

In the middle of the 19th century, criminal law was still influenced by the concept of retributive justice, which perceived punishment as ethical necessity[5] or logical imperative[6] and required guilt to be attributed to a perpetrator charged with a prohibitive act. Despite this, criminal law turned out to be helpless with regard to juvenile delinquency. It was difficult to talk about a perpetrator's act of good will in relation to this phenomenon; yet it was also difficult to ignore its range and escalation.

Thus it became clear that it required a separate and systemic study. Furthermore, distinguishing minor rights was also favoured by a slowly developing distinct perception of a child in social culture. Development of psychology and pedagogy in the second half of the 19th century provided necessary justification to the new approach to juvenile delinquency, and preventive and educational measures applied in relation to a minor offender[7]. Finally, legal positivism allowed to abandon the concept of punishment as necessary and just retribution in favour of the concept of penalty as a measure of perpetrator's correction and rehabilitation. These transformations led to the development of two opposite models of treating minor offenders: a justice model and welfare model[8].

The justice model of juvenile delinquency refers to the classic school of criminal law and assumes that a child can also be a subject of criminal liability if at least partial recognition can be attributed to him or her. Because children are not fully psychologically and morally developed, a form of their liability should be mitigated. Thus juvenile proceedings should focus on the establishment whether minor offenders committed a prohibited act, if guilt can be attributed to them and relevant punishment imposed in a form adequate to the deed's nature and a degree of guilt. The justice model assumes that juvenile proceedings are a special type of criminal proceedings. In consequence, minors must be provided with a possibility of enjoying basic litigation rights a defendant is entitled to, i.e. the right to defence and presumed innocence.

The welfare model, on the other hand, relies on a positivistic concept of crime perceiving its conditions in environmental factors. Thus a basic purpose of juvenile proceedings is not to punish minor offenders but improve their educational and living conditions in order to reverse the process of demoralization and put a child back on the path of rule and legal order. Such proceedings are not a special type of criminal proceedings. They do not entail the observance of the right to defence, presumed innocence or rules of adversarial proceedings. Their purpose is not to ill-treat a per-

5 Following I. Kant's theory of moral retaliation.

6 Following G.W. Hegel's theory of dialectic retaliation. See more about basic features of these concepts, e.g.: S. Prejsnar-Szatyńska, Problem uzasadnienia kary – analiza filozoficzna, "Probacja" 2014, No. 2, p. 99 et seq.

7 A. Mogilnicki, Uzasadnienie części ogólnej projektu Kodeksu karnego, Warszawa 1930, p. 30 et seq.

8 More about models of juvenile proceedings: B. Stańdo-Kawecka, Prawo…, *op. cit*., p. 25 et seq.; and from a slightly different perspective in: A. Walczak-Żochowska, Systemy…, *op. cit*.

petrator but, on the contrary, take care of him or her and protect them against further demoralization. A decision about the choice of the best educational and welfare measures in relation to a child who committed a crime should be based a wide analysis of their living conditions, educational environment, health condition, and a diagnosis of their personality features. Thus a decision-making process should embrace a broad cooperation with entities which allow to find out more about the child's environment and their psychological and health conditions. Courts do not have to be vested with sentencing, but if they have been entrusted with it, its form should be deformalized. Instead of penalties, the welfare model postulates application of correctional and educational measures marked proportionally (relatively) and modified in proportion to the ongoing rehabilitation progress. At the same time, referring to the child's educational conditions as a main source of their delinquency, the welfare system allows for a wider intervention in an earlier stage, i.e. not as late as after a child has already committed a crime. It envisages a possibility of undertaking appropriate intervention already in connection with manifestations of conduct which may lead to a crime in the future[9].

To the end of the 19th century, juvenile proceedings worldwide were mainly based on the justice model. Since the beginning of the 20th century, first in the American continent, then gradually in Europe, the justice model has started to give way to the welfare model[10]. At the beginning, however, starting from the 1970s first in the American continent, the third type of juvenile proceedings emerged, i.e. the system of restorative justice. The idea of restorative justice, brought up within the same manner in the criminal law for adults, derived from the conviction that the existing models of liability were inefficient[11]. They were criticized for high social costs and low efficiency. It was noticed that attempted endeavours to reconcile the idea of punishment as a means of retribution and correction entailed high prisonization and poor rehabilitation. The idea of rehabilitation itself was criticized for exempting a perpetrator from the responsibility for his or her conduct making the whole society responsible[12] instead, which in effect contributes to even more profound pathological behaviours. Professionalization of justice systems, which leads to the monopoly of state and its structures in handling of conflicts[13], was particularly criticized. In effect, neither perpetrators of a prohibited deed nor their victims receive what they should from the proceedings. A victim, treated solely as a source of information about facts,

9 American literature called conduct which may ensue a state response due to a minority of a perpetrator as "status offences"; in Poland such conduct embraces demoralization indicated in Art. 4 of the Act on Juvenile Proceedings.

10 More: M. Cieślak, Od represji…, *op. cit.,* p. 60; B. Stańdo-Kawecka, Prawo …, *op. cit.,* p. 37 et seq.

11 See more: H. Messmer, H.-U. Otto, Restorative Justice. Steps on the Way Toward a Good Idea, (in:) H. Messmer, H.-U. Otto (ed.), Restorative Justice on Trial, Pitfalls and Potentials of Victim – Offender Mediation. International Research Perspectives, Dortrecht – Boston – London 1992, p. 1 et seq.

12 W. Zalewski, Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego, Gdańsk 2006, p. 48.

13 N. Christie, Conflicts as Property, "British Journal of Criminology" 1977, No. 17 (reprinted in: M. Fajst, M. Płatek (ed.), W kręgu kryminologii romantycznej, Warszawa 2004, p. 174); M. Wright, Przywracając szacunek sprawiedliwości, Warszawa 2005.

has no possibility to be morally satisfied, just on the contrary, he or she is susceptible to secondary victimization. A perpetrator is deprived of a possibility of realizing moral consequences of his or her actions. What is more, he or she is not motivated to genuine repentance and long-term change of their conduct at all[14]. Therefore attention was paid to the need to search solutions which would, first of all, make a perpetrator of a prohibited deed a subject interested in liquidating the effects of social rule and order infringed in result of his or her conduct and, consequently, arise in him or her a genuine need to change; secondly, they would focus on an individual interest of the injured party in the proceedings who could be redressed for the harm incurred in result of a crime. These aims were found particularly important just with regard to juvenile proceedings, which carry a great risk of objectification of a perpetrator who is put in the role of a passive recipient of authoritatively imposed method of impact. Concurrently, due to the need to individualize such impact (influence) with educational needs of a minor offender, such proceedings, in principle, do not provide a place for the satisfaction of the injured party's interest. As a form of reconciliation of these two values, restorative justice seemed to be something which filled in a hole in the existing models of juvenile proceedings, which may be applied as a sort of a closing form, complementing the existing systems.

The binding model of juvenile proceedings in the Polish legal system which was adopted by the Act on Juvenile Proceedings of 1982[15] undoubtedly refers to the welfare model. Juvenile proceedings may be initiated if a child committed an offence (including tax offence), or if there are manifestations of demoralization. In principle, the proceedings are carried out on the basis of the provisions of the Code of Civil Procedure on guardianship cases, i.e. in non-litigious proceedings. All proceedings are carried out by the family court. There is no prosecutor and the injured party may only use exhaustively listed rights (generally focused on the right to information about the results of the proceedings and the right to prevent premature discontinuation of proceedings). The settlement of the case is based on the confirmed demoralization of a minor and the need to apply educational or correctional measures towards him or her, or impose punishment. Therefore only the fact that a minor committed an offence is not sufficient to apply designated measures. It must be confirmed that they are necessary for educational reasons. The Act on Juvenile Proceedings envisages a whole arsenal of measures implemented towards a minor, starting from a caution or warning, through injunction ordering specific conduct (including, e.g., redressing damage, carrying out specific service (work) or consideration for the benefit of the injured party or a local community, participating in appropriate educational, therapeutic or training courses, refraining from contact with specific environments or

14 M. Wright, Geneza i rozwój sprawiedliwości naprawczej, (in:) B. Czarnecka-Dzialuk, D. Wójcik (ed.), Mediacja. Nieletni przestępcy i ich ofiary, Warszawa 1999, p. 14 et seq.; N. Christie, Granice cierpienia, Warszawa 1991, p. 114.

15 Act of 26 October 1982 on Juvenile Proceedings (uniform text: Journal of Laws of 2014, item 382 as amended).

places, or giving up drinking alcohol), putting a minor on probation to be supervised by a probation officer, youth or other social organization, workplace, or a trustworthy person, implementing responsible supervision of parents or guardian, referral to a probation centre, social organization or youth correction, therapeutic or training institution, finishing with a decision to place a minor in a youth correction centre, professional foster family, or eventually a juvenile detention facility. A feature of the above measures is the fact their duration is not decided in advance. They may last either until a minor turns eighteen years old, or exceptionally, until he or she turns twenty one years old[16]. Thus a key stage herein are executive proceedings during which the family court may any time – whenever educational reasons imply this – change or reverse applied educational measures (Art. 79 of the Act on Juvenile Proceedings). Besides, flexibility of execution of the above measures is a typical feature of the welfare model.

The element of the justice model appears in connection with the fact that the family court may refer a perpetrator of the most serious crimes to the prosecutor (among others: homicide, a gang (group) rape or rape committed with particular cruelty, robbery, hostage taking, or intentional threat of public safety) who, at the moment of the crime, was over fifteen years old, in order to prosecute him or her in a criminal court. On the other hand, the element taken from the restorative justice model is a possibility of referring a perpetrator and victim to mediation[17], which was introduced to the Act on Juvenile Proceedings in 2001.

A core of the welfare model is wide community engagement in the process of responding to children criminal conduct. It can be implemented in different forms and various stages thereof. Firstly, within the very initiation or filtration of cases which will be subject to further proceedings; secondly, during these proceedings, and thirdly, during the execution of measures imposed against a minor.

Art. 4 of the Act on Juvenile Proceedings obliges everyone who learnt about a criminal act committed by a minor to report it to the police or family court, or other competent body. Whereas Art. 4 § 3 of the above Act obliges state institutions and social organizations which, in connection with their activity, learnt about a criminal act committed by a minor that is prosecuted ex officio to immediately report it to the family court or police as well as undertake urgent actions necessary to protect clues and evidence against their loss or deformation. The obligation envisaged in this provision is of a legal, not just social nature, and binds managers or administrators of a state institution or social organization; a failure to fulfil it may entail official or

16 Before a perpetrator turns 21 years old, possible enforceable penalties include: caution (warning), adjudicated probations or a decision to place a minor in correction facility – see Art. 73 of the Act on Juvenile Proceedings

17 Actually, mediation appeared in Polish juvenile proceedings already in 1996 in the form of experimental pilot programme initially carried out in district courts in 5 cities: Zielona Góra, Piła, Poznań, Skarżysko Kamienna and Warsaw – see more: B. Czarnecka-Dzialuk, Eksperymentalny program mediacji między nieletnim sprawcą a pokrzywdzonym. Podstawowe założenia i pierwsze doświadczenia, (in:) B. Czarnecka-Dzialuk, D. Wójcik (ed.), Mediacja. Nieletni przestępcy i ich ofiary, Warszawa 1999, p. 121.

administrative consequences including, in extreme cases when the obliged entity additionally acted as a public official, criminal law consequences (Art. 231 of the Criminal Code). In practice, it will most often involve duties burdening schools and school principals. It is worth remembering that a criminal act may also be any act which exhausts substantial essentials of a crime or tax crime but also of some exhaustively listed misdemeanours such as, e.g., theft or destruction of property of insignificant value (Art. 119 and 124 of the Code of Minor Offences in connection with Art. 1 § 2 point 2 of the Act on Juvenile Proceedings), nuisance or causing a scandal (outrage) in a public place (Art. 50 of the Code of Minor Offences). It seems that in some cases the obligation to inform the family court or police in the above form may appear too rigorous. The legislator did not envisage any possible verification of the need to make a relevant report by the obliged entities through, for instance, seriousness (burden) of a committed criminal act, or actual fear of the perpetrator's demoralization. It can be easily assumed that in a group of children there may occur numerous petty events or conflicts which formally exhaust the essentials of a misdemeanour or even crime, yet factually not necessarily providing objective justification for the court involvement. *De lege lata*, however, has no "backdoor" allowing such prior filtration of the need to initiate court proceedings by the state or social institution obliged to make such a report. Only the family court can make such a filtrating decision. What is apparent and characteristic about the welfare model is the fact that a criminal act committed by a minor does not prejudge that the court will decide to initiate and carry out proceedings at all. Pursuant to Art. 21 par. 2 of the Act on Juvenile Proceedings, the family court does not initiate proceedings and discontinues already launched proceedings fully or partly if there are no grounds to initiate litigation or carry it out within a specified scope, or if a decision to apply educational or correctional measures is futile. It is worth noticing that in 2005 family courts refused to initiate or discontinued proceedings launched due to suspected criminal act committed by a minor in 13141 cases, in 2010 – in 13627 cases, in 2012 – in 12237 cases, and in 2013 – in 10102 cases. At the same time, family courts decided, respectively, to refer cases of minors suspected of committing a criminal act to a session or hearing in 2005 in 38526 cases, in 2010 – in 35723 cases, in 2012 – in 30898 cases, and in 2013 – in 25618 cases[18]. It results from the above that in one third of cases, and in 2013 in nearly half of the cases initiated by the reported criminal act committed by a minor, the family court did not even decide to refer the case to a session. Perhaps it is so just because of the above mentioned rigorous nature of Art. 4 § 3 of the Act on Juvenile Proceedings which obliges state institutions and social organizations to notify family courts about each criminal act being committed. It is worth considering, therefore, whether we should not think about a more flexible mechanism of the assessment of the need to involve the court in the

18 Polish Statistical Yearbook of 2014, GUS, p. 165.

cases which are known in advance as trivial and do not generate a need to consider the application of educational measures.

As far as participation of community in juvenile proceedings is concerned, first of all, it should be pointed out that nowadays community participation is no longer envisaged in sentencing. Final elimination of lay judges from sentencing in juvenile cases occurred on 27 July 2007, when lay judges were abolished from corrective proceedings[19]. Lay judges had been earlier eliminated from sentencing in family and guardianship procedure. Currently, sentencing in juvenile cases is purely professional whereas possible participation of social factor in the proceedings results from extraordinary provisions. Those more important are embraced, in particular, by Art. 24 § 2 point 1 of the Act on Juvenile Proceedings. Pursuant to the above regulation, representatives of social organizations whose statutory objectives contain education of minors or support of rehabilitation (Art. 24 § 2 point 1 of the Act on Juvenile Proceedings) may carry out environmental surveys in exceptional situations. Moreover, under Art. 26 of the above Act, they may transfer a minor into the supervision of a youth organization or other social organization during pending proceeding as a temporary measure. A purpose of this institution is to facilitate undertaking of educational activities towards a minor even before the issue of a final decision when it is necessary due to the child's welfare and because of the need to launch actions to prevent his or her further demoralization immediately. As confirmed by available studies, in practice, however, such forms of cooperation are generally not used or used very rarely[20].

Taking into account the aspect of closing the stage of recognition, participation of social factor may be updated by referring to the mechanism envisaged by Art. 32j if the Act on Juvenile Proceedings. Namely, a family court may hand over a minor's case to the school he or she attends upon his or her consent as well as to a youth, sports, culture, educational or other social organization he or she belongs to if the court decides that educational measures a given school or organization disposes of are sufficient. Anyway, this institution has been envisaged from the very beginning in the Act on Juvenile Proceedings and its purpose was just to allow handing over minor's cases, mainly of a lesser degree of demoralization, to out-of-court community entities[21]. Again, relying on statistical data, it is worth noting that in 2005 this solution was applied in 118 cases whereas, concurrently, in 33674 cases educational measures were applied towards a minor. In 2010 there were 22 cases handed over to a school or social organization whereas in 30412 cases educational measures were adjudicated. In

19 Art. 2 of the Act of 15 March 2007 on the Amendment of the Code of Civil Procedure Act, Code of Criminal Procedure and Some Other Acts (Journal of Laws No. 112, item 766).

20 B. Czarnecka-Dzialuk, K. Drapała, A. Więcek-Durańska, Analiza postępowań karnych przed sądem dla nieletnich o wybrane czyny karalne popełnione przez osoby w wieku 15-17 lat, Warszawa 2011, p. 98 and 110 et seq.

21 This possibility had many opponents, particularly within the context of handing over a minor's case to a school. They argued that this solution may, unfortunately, contribute to increasing stigmatization of a minor in the school environment, and it may also reinforce his or her antisocial attitude in a long term.

2012, respectively, 17 cases were handed over and educational measures adjudicated in 26538 cases. Finally, in 2013, 25 cases were handed over and in 22105 cases educational measures were applied[22]. Interestingly enough, overwhelming majority of educational measures adjudicated towards minors for criminal acts they committed embrace the following: caution (respectively, in 2005 – 9257, in 2010 – 4404, in 2012 – 6972, and in 2015 – 4268) and probation (in 2005 – 8508, in 2010 – 7615, in 2012 – 6559, and in 2015 – 3488)[23]. At the same time, such educational measures as referring a minor to a social organization or institution providing education, therapy or training to minors (Art. 6 par. 1 point 6 of the Act on Juvenile Proceedings), or handing a minor over under a supervision of a youth organization or other social organization (Art. 6 par. 1 point 4 of the Act on Juvenile Proceedings) are not commonly applied in practice at all. Respectively, the first measure was adjudicated towards minors in 2010 in 16 cases, in 2012 – in 14 cases, and in 2015 – in 15 cases[24]. Furthermore, a decision to hand a minor over under the supervision of a youth organization or other social organization was adjudicated only once in 2015, in 2012 – twice, and in 2010 – not at all.

A picture of the participation of out-of-court factor in juvenile proceedings will be complete if we mention the frequency of applying mediation. Hence, in 2005 mediation was applied in 343 cases involving minors, in 2010 – in 337 cases, in 2012 – in 322 cases, and in 2015 – in 212 cases.

The comparison of the above figures clearly shows how far theoretical assumptions failed to meet the reality. Despite the statutory model of proceedings, undeniably based on the assumed need for a broad social participation in adjudicating and enforcing measures towards minor offenders, and despite the existence of relevant provisions thereon, such participation is, practically, marginal.

It is very difficult to univocally asses the reasons for the above situation without more profound studies. One of them is, undoubtedly, weakness of organizations which could support official administration of juvenile justice and courts distrusting entities that would be ready to undertake relevant activity within this field. Work

22 Polish Statistical Yearbook of 2014, GUS, p. 165. We should also remember that before 1 January 2014, a minor did not have to give a consent before the issue of a decision to hand his or her case over to a school or youth organization. This condition was introduced by the Amended Act of 30 August 2013 (Journal of Laws, item 1165).

23 Polish Statistical Yearbook of 2014, GUS, p. 168. Nieletni wg orzeczonych środków. Prawomocne orzeczeniach w latach 2008-2015 – information available on the Ministry of Justice website https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie (05.12.2016). Analyzing the above data, we should remember that from 2005 to 2015, a number of juvenile proceedings drastically decreased, in particular cases carried out just due to a suspected criminal act committed by a minor, thus in consequence thereof, a number of decisions decreased too. Hence, in 2005 courts issued binding and final decisions in connection with a suspected criminal act committed by a minor in 26228 cases, in 2010 – in 22807 cases, in 2012 – in 20980 cases, and in 2015 – only in 12237 cases; see more: Nieletni – prawomocne orzeczenia w latach 2003-2015. Informacja statystyczna Ministerstwa Sprawiedliwości.

24 It looks a bit better with regard to adjudicating educational measures in the form of participation in appropriate educational, therapeutic or training courses (Art. 6 par. 1 point 2 of the Act on Juvenile Proceedings). In connection with a confirmed criminal act committed by a minor, there were 990 such decisions in 2010, 995 in 2012, and 607 in 2015. Statistical data presented this way, however, do not answer the question if such measures should be enforced as part of the courses carried out by social centres or by state institutions.

with young offenders is of a special nature and requires special responsibility. No wonder courts do not want to experiment by undertaking cooperation with unverified entities. At the same time, transformations of the 1990s and the pace of subsequent economic as well as political and social changes did not conduce development of reputation and experience of newly created social organizations. Unfortunately, all of this impacts a statistical image of the operation of the juvenile system of justice. This image indicates that a prevailing factor therein is the official one in the form of a court. Perhaps excessiveness of caseload or maybe its pettiness entail that many cases are referred to a court only formally, yet engaging effort and resources of individual judges, who must decide to discontinue proceeding due to its futility or pointlessness. A main entity the court cooperates with when enforcing measures applied against minors is also an official body – a probation officer. It is not a proper place to assess probation officer's work taking into account certain massiveness of his or her tasks. Undeniably, however, there is quite vast and unused space within which unofficial entities, mostly social organizations, may reliably and effectively participate in the educational process of bringing up minors, reversing results of criminal acts they commit and preventing them in the future. Apart from drawing judges' attention to consider the need to develop cooperation with social organizations and undertake actions facilitating such cooperation as well as assessment of such organizations' credibility, it is worth considering introducing statutory regulations allowing more flexible proceedings before engaging the court. We should consider, among others, possibilities of referring a case to mediation not only by a court but also police, probation officers, or even school principals. It does not appear that such a possibility could threaten anyone's interests remembering that the parties must first agree to mediation while the consent is guaranteed by a mediator himself or herself too. At the same time, it might contribute to the increased number of this form of conflict resolution with the participation of a minor, favour teaching right attitudes and reduce a number of juvenile cases which, anyway, are either discontinued or closed by the issue of a caution.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.09

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Public Participation in Polish Executive Proceedings in View of Selected European Regulations

Abstract: The paper presents legal possibilities of public participation in the execution of sentence. It is based on the Polish and other European countries regulations, i.e. French, English, Welsh and German examples. Above-mentioned models will be examined taking into account accessibility, effectiveness and aim of their regulations. The paper shows that entrusting third sector organizations with some responsibilities in the execution of sentence could bring measurable benefits for the convicted offenders as well as society.
Keywords: public participation, social factor, criminal proceedings, execution of sentence

1. Introduction

Penitentiary and post-penitentiary systems of European countries encounter numerous problems in their efforts to establish an ideal model of the execution of sentence. Their struggle to solve them generates both success and failure. All these attempts share a noticeable and systematic withdrawal from custodial sentences for the sake of non-custodial sentences while increasing a role of community in the process of the sentence execution. Participation of social factor during this stage of proceedings is to be a specific remedy for intensifying problems of prison overcrowding, prison violence and ex-convicts failing to adapt to the reality after serving their sentence[1]. Council of Europe Committee of Ministers' Recommendations on the Euro-

1 B. Nowak, Reintegracja społeczna skazanych w wybranych państwach Unii Europejskiej, "Resocjalizacja Polska" 2015, No. 10, p. 57-58.

pean Rules on Community Sanctions and Measures[2] and on the European Prison Rules[3] draw special attention to as broad community participation, i.e. of social organizations and private individuals, as possible in the enforcement of sanctions and other measures. According to the above recommendations, social factor participating in the enforcement of sentence is to play a role of a bridge spanning convicted offenders and society and not allowing to break this bond[4].

In the Polish legislation, community participation is a relatively new principle. It was introduced by the Criminal Executive Code Act in 1997. Thus executive proceedings ceased to be a sole domain of the State and its bodies. Pursuant to Art. 38 § 1 of the Act of 6 June 1997 – Criminal Executive Code (hereinafter referred to as CEC)[5], associations or societies, foundations, organizations and institutions as well as churches and other denominational (religious) organizations and persons of trust may cooperate in the execution or enforcement of sentence, penal measures, compensatory, protective and preventive measures, in particular connected with deprivation of liberty and forfeiture. What is more, representatives of the above entities may take part in Councils or other collective bodies appointed by Prime Minister, Minister of Justice or subordinate bodies, or Province Governors, whose task is to provide aid and support to convicts and their families or coordinate cooperation between the society and correctional institutions (prisons) and detention or custody facilities. A detailed scope, form and course of the cooperation as well as requirements to be fulfilled by the representatives of the entities are determined by Prime Minister's Regulation of 28 December 2016 on Cooperation between Entities in the Enforcement of Sentence, Penal Measures, Compensatory, Protective and Preventive Measures and Forfeiture as well as Community Control over their Execution[6], which came into force on 1 January 2017. The above entities may also take part in the activities of General Council for Social Reintegration and Assistance to Convicted Offenders appointed by Prime Minister.

Representatives of these entities may also provide offenders and their families with necessary help and assistance, in particular material and medical, finding a job and accommodation and giving legal advice in order to facilitate social reintegration and, especially, counteract the return to crime. What is more, offenders are entitled to appoint a trustworthy person as their representative in a written form and upon their consent, especially from among the representatives of associations, foundations, organizations and institutions mentioned in Art. 38 § 1 of the CEC. Bearing the above

2 Recommendation No. R (92)16 of the Council of Europe Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures of 19 October 1992.

3 Recommendation Rec (2006)2 of the Council of Europe Committee of Ministers to Member States on the European Prison Rules of 11 January 2006.

4 A. Janus-Dębska, Praca na rzecz społeczności lokalnej w wybranych krajach europejskich, "Probacja" 2013, No. IV, p. 125-126.

5 Journal of Laws No. 90, item 557 as amended.

6 Journal of Laws, item 2305.

in mind, a circle of entities admitted to cooperation within the execution of sentence has been outlined very broadly by the legislator. However, a given entity may participate in the process of the convict's social rehabilitation solely if its articles of association contain a clause on carrying out activity aimed at the implementation of tasks indicated in Chapter VII of the CEC. With regard to churches and religious organizations, each time these entities may only be those whose legal status has been regulated and approved of by the State[7].

Social factor participation is also visible in penitentiary systems of other European countries. The French model is worth mentioning in particular, where the so called third sector plays an important role in, inter alia, drafting reports about the defendants, detaining prisoners and organizing support both to the convicted persons' families and victims themselves. Being an alternative to the operations of the State itself, this sector has been more and more often responsible for the offenders' re-adaptation and reintegration into society[8]. A network of institutional partners is organized while agreements between French Ministry of Justice and non-governmental organizations which provide aid and assistance to ex-inmates are concluded. These agreements are concluded both with organizations operating nationally and locally. A main purpose of this undertaking is facilitating ex-inmates' access to such goods as accommodation, work, education, health care, etc.[9]

An interesting fact is that statistically each French citizen is a member of at least one association and being often involved with a bigger number of non-governmental organizations. In effect, app. 14 million French citizens take an active part in the life of communities to struggle with problems contained in their articles of associations, which are usually unprofitable or forgotten by the authorities. Nevertheless, it should be pointed out that current non-governmental organizations often have nothing in common with voluntary service and unpaid help and assistance any more. This tendency is called "professionalization" of associations[10]. Yet, the fact that such organizations' staff receive remuneration for their work does not change the assumptions and objectives of their operation, including the context of community participation in the execution of sentence and offenders' re-adaptation and reintegration into society.

Organizations engaged in the execution of sentence by the convicted offenders are responsible, among others, for the measure called placement in the community, community work, or probation. The offenders' re-adaptation would not be possible without community participation due to the lack of such a policy by the State. The organizations provide the convicted offenders with accommodation, night refuge, food, and clothes, etc. These entities are engaged in community work, prevention

7 T. Szymanowski, (in:) T. Szymanowski, Z. Świda, Kodeks karny wykonawczy. Komentarz, Warszawa 1998, p. 84.
8 M. Herzog-Evans, French third sector participation in probation and reentry: Complementary or competitive? "European Journal of Probation" 2014, vol. 6(1), p. 42, ejp.sagepub.com (08.11.2016).
9 B. Nowak, Reintegracja…, *op. cit.*, p. 65.
10 M. Herzog-Evans, French…, *op. cit.,* p. 42-43.

and treatment of addictions, or aid and assistance provided to the victims. Other organizations operate in penitentiaries providing assistance within medical treatment, access to culture and education, or enhancing convicts' vocational qualifications. Before a sentence is rendered, non-governmental organizations prepare a pre-sentence report about the defendant. Upon the judge's request, they may also check if there are circumstances allowing probation. Ultimately, the performance of the above functions by the organizations is more economical for the State than investing in civil servants. That is why judicial bodies more and more often cooperate with non-governmental organizations. However, this trend should not be identified with this sector's privatization or private sector's domination over the public one[11].

There are so many such organizations in France that we have resigned from presenting their list herein showing their share in the execution of probation focusing on the largest four instead

(*Federations Citoyen et Justice, Fédération Nationale des Associations d'Accueil et de Réinsertion Sociale, Federation Addictions Federation des Associations Reflexion Action Prison et Justice*)[12]. It might seem that such large organizations could force smaller ones out from the market, but according to the French doctrine, there is no such risk as they set up federations[13]. Non-governmental organizations do not eliminate state structures too even if they strive for "professionalization" of their members and actions. As pointed out, they are a complementary source of support for the convicts which is not competitive to state structures; they simply found their niche where the state itself resigned from interfering for mostly cultural reasons[14].

2. Restriction of liberty

Restriction of liberty, particularly after changes introduced by the Act of 20 February 2015 Amending the Criminal Code Act and Some Other Acts[15], is perceived as punishment alternative to suspended imprisonment. Restriction of liberty is generally imposed as an independent sanction, yet the court may exceptionally impose it together with imprisonment. Referring to the amended reading of Art. 34 § 1a of the Criminal Code, restriction of liberty may be unpaid, controlled work for social purposes, or a deduction from 10% to 25% of a monthly salary for a social goal specified by the court. Sentencing to restriction of liberty, the court imposes at least one these obligations on the convict; yet they may also be imposed together (cumulatively). What is more, adjudicating restriction of liberty, the court may impose on the convicted person obligations envisaged in Art. 72 § 1 points 2-7a of the Criminal Code,

11 *Ibidem*, p. 43-44.
12 *Ibidem*, p. 45.
13 *Ibidem*, p. 45-46.
14 *Ibidem*, p. 46-47.
15 Journal of Laws, item 396.

for instance, apologizing to the victim, undergoing addiction treatment, performing his or her obligation to maintain another person, or impose pecuniary considerations mentioned in Art. 39 point 7 of the Criminal Code for their benefit. Thus the core of this penalty is the restriction of specified spheres of the convict's freedom – freedom to choose a place of residence, place of work, organize free time, or dispose of his or her salary[16].

Due to the issues discussed in this article, we should mainly focus on the aspects connected with the enforcement of restriction of liberty social factor may participate in. That is why the issue of unpaid controlled work for social purposes will be discussed later. To enforce restriction of liberty, the court sends a copy of the decision (judgment) to a competent professional probation officer, who is responsible for all activities connected with the organization and control of restriction of liberty's enforcement. After hearing the convicted person, a probation officer refers him or her to a workplace designated by a competent village mayor, city mayor or city president. This work may also be performed for the benefit of institutions or organizations representing a local community, and in educational and correctional centres, youth correctional centres, youth social therapy centres, and medical treatment entities in the meaning of the provisions on medical activity, organizational units of social welfare and assistance, foundations, associations and other institutions or communal organizations providing charity services upon their consent. The choice of a proper workplace is essential for the convicted person in his or her return to society and re-adaptation. According to the relevant literature, due to a positive impact of the above form of punishment on the convict as well as its social perception, it is necessary to promptly extend the structure of entities creating workplaces and find appropriate sources of funding them. Furthermore, social organizations, foundations or entrepreneurs should be feasibly encouraged to as wide engagement in this process as possible[17]. A purpose of this punishment cannot be achieved without a significant extension of the facilities and structure of entities interested in cooperation with convicted offenders. Moreover, the author of this theory rejects egalitarianism in relation to the execution of unpaid controlled work for social purposes claiming that community work should be diversified to match personal attributes of the convict; situations when an economist or businessman sweeps the streets instead of helping others using their qualifications should not take place[18].

Community work performed in such places as hospice or hospital in particular should eventually change the convict and make them revalue their life again[19]. Due to the cost of maintenance of a potential convict in prison, providing him or her with

16 R. Giętkowski (in:), R.A. Stefański (ed.), Kodeks karny, Warszawa 2015, p. 290.
17 K.A. Politowicz, O potrzebie i sposobach rozszerzania bazy dla wykonywania pracy społecznie użytecznej po nowelizacji kodeksu karnego, "Probacja" 2015, No. III, p. 94.
18 *Ibidem*, p. 93.
19 A. Janus-Dębska, Uwarunkowania efektywnego wykonywania kary ograniczenia wolności, "Probacja" 2014, No. III, p. 117.

unpaid workplace is definitely cheaper. What is more, such work is not competitive to other employees or unemployed because it is most often performed for charity or unprofitable purposes, which opens immense opportunities for non-governmental organizations, local government units or religious organizations[20]. Detailed principles of the execution of restriction of liberty are specified in the Regulation of Minister of Justice of 1 June 2010 on Entities Enforcing Restriction of Liberty and Community Service[21]. Provisions on the enforcement of restriction of liberty are also applied when, pursuant to Art. 45 § 1 of the CEC, the court changed a fine into community service.

Research on the functioning of cooperation between probation officers and other institutions safeguarding the performance of work by the convicts[22] reveal that those sentenced to community service mostly perform it in entities designated by village mayors, city mayor or city presidents (95.2%) and other state or local government organizational units (35.6%). Courts cooperate with educational and correctional centres to a small extent (29.2%), health care centres (20.9%), charity foundations, associations and other institutions or organizations (14.6%), institutions or organizations representing a local community (13.6%), organizational units of social welfare (11.1%), youth correctional centres and youth social therapy centres (2.5%). The respondents also mentioned other entities such as: correctional facilities, botanical gardens, forest inspectorate, animal shelters, churches, and Monar centres.

The above considerations ensue a conclusion according to which restriction of liberty is a significant form of impact on convicted offenders in the Polish system. On the other hand, a German model does not envisage restriction of liberty in its catalogue of penalties. The German Criminal Code (*Strafgesetzbuch*) does not contain any terms or notions referring directly to restriction of liberty or community service. Nevertheless, the latter punishment is included in the Code itself and it is a measure classified as substitute penalty[23]. Pursuant to Art. 293 of the Introductory Act to the German Criminal Code, Land governments have been authorized to pass resolutions (they could sub-delegate powers to Lands' judicial administration) under which a fine could be replaced by community service. Generally, this rule has been in force until today. The effect of this solution is lack of uniformity in the manner of regulating this measure in the whole country[24]. It is also claimed that completing of penalty

20 K. Postulski, Zmiany w wykonywaniu kary ograniczenia wolności, "Probacja" 2011, No. III, p. 121.

21 Journal of Laws No. 98, item 634.

22 A. Janus-Dębska, Współpraca kuratorów sądowych z osobami organizującymi i nadzorującymi prace skazanych w ramach kary ograniczenia wolności w świetle badań własnych, "Probacja" 2015, No. III, p. 19. At the beginning of 2014, the author of the above article carried out surveys and questionnaires in the group of judges (70 respondents), probation officers (335 respondents) and representatives of units where community service is performed (30 respondents) on sentencing and enforcement of restriction of liberty after implementation of two important amendments which came into force in 2010 and 2012.

23 A. Ornowska, "Pot zamiast odsiadki": Dylematy związane z wprowadzeniem do niemieckiego porządku prawnego elementów kary pracy społecznie użytecznej i próby ich przezwyciężenia (część I), "Probacja" 2014, No. I, p. 51.

24 *Ibidem*, p. 54.

mostly depends on the system of sentence enforcement adopted by a given Land. It has been confirmed that a penalty is much more likely to be completed if a convict has been provided with a workplace chosen by associations supporting the offender rather than court clerks or probation officers[25].

The above mentioned regulation is not the only form of community service application in the German penal system. Community service elements are also contained in the institution of parole or probation when the court may impose some obligations on the defendant. A catalogue of such obligations also envisages "other community considerations" beside a duty to redress damage or pay pecuniary consideration for the State or social purpose. This expression itself encompasses community service even though it is very rarely used in practice. It is also unclear if community service adjudicated as a form of punishment can be grounded in the regulation envisaging a duty to impose injunction in a form of orders to be performed by the convict during a trial period, e.g. relating to work, education or free time. These duties may also be adjudicated in case of parole after serving a part of a custodial sentence or life sentence[26].

Another institution of criminal law containing elements of community service can be found in the German Code of Criminal Procedure in the provisions on conditional discontinuation of proceedings. Pursuant to the regulations thereof, a defendant can be obliged to perform community consideration as a condition to apply the above institution[27]. Despite intense attempts to introduce community work modelled on the English community service model into the German Criminal Code, this idea has not been approved of by the German legislator yet. A part of the doctrine explains this deadlock by the contradiction between potential norms concerning this penalty and norms ensuing from the German constitution. Constitutional provisions straightforwardly and directly ban forced labour except penal labour and work performed as part of common and uniform public service obligations. According to the German doctrine, this catalogue does not envisage the exception for the provision of community work (service)[28]. Moreover, we cannot forget that a ban of forced labour carries additional meaning and significance in the context of German history, which must always be taken into account by the drafters of criminal code changes[29].

3. Probation

Probation is a main form of activity pursued by social organizations within the field of convicted offenders' re-adaptation, social rehabilitation, rehabilitation or ther-

25 A. Ornowska, "Pot zamiast odsiadki": Dylematy związane z wprowadzeniem do niemieckiego porządku prawnego elementów kary pracy społecznie użytecznej i próby ich przezwyciężenia (część II), "Probacja" 2014, No. II, p.141.
26 *Ibidem*, p. 55-56.
27 *Ibidem*, p. 56.
28 *Ibidem,* p.133-134.
29 A. Janus-Dębska, Praca…, *op. cit.,* p. 135.

apy[30]. These entities may, in particular, supervise a person whose proceedings were conditionally discontinued or who was given a parole or put on probation. Moreover, these organizations may participate in the enforcement of a fine if it has been replaced with community service (provisions on the participation of organizations in the enforcement of restriction of liberty and community service are analogical both with regard to offences and misdemeanours). What is more, social organizations may take active part in preparing ex-inmates to free life after they have been released from prison.

As part of probation, professional probation officers organize and undertake activities aimed at helping a convict socially re-adapt to counteract their return to crime as well as supervise the observance of obligations imposed on the convict by a court or those ensuing from probation (Art. 173 of the CEC). Furthermore, they manage and direct work of social probation officers and trustworthy persons enforcing probation. Detailed duties and rights of persons enforcing probation have been specified in the Regulation of Minister of Justice of 13 June 2016 on a Manner and Course of Activities Carried out by Probation Officers in Criminal Enforcement Cases[31]. This regulation also of provides a professional probation officer with a possibility of handing over probation to a social probation officer if he or she is authorized to waive personal probation.

What is more, a professional probation officer may entrust representatives of associations, organizations and institutions with the enforcement of probation within the scope stipulated by Art. 175 of the CEC. Thanks to the rights of associations, organizations and institutions envisaged therein, they feasibly support probation officers' work. Operating associations, organizations and institutions are mainly specialized and prepared to work with the convicts who require additional therapy programmes or treatment. Entrusting those subjects with some important duties of professional probation officers, including full responsibility for probation or filing motions with a court, should entail the use of their huge potential and, at the same time, relieve professional probation officers, who are excessively burdened with tasks and obligations[32].

Preparing inmates to life after prison, participation of social organizations within this scope may also be manifested in the cooperation with professional probations officers who, among others, are obliged to co-organize support and assistance provided to convicts through cooperation with inmates and prison service as well as bodies of government and local government administration, associations, foundations, organ-

30 Rada Główna do Spraw Readaptacji i Pomocy Skazanym, Uczestnictwo społeczeństwa w wykonywaniu orzeczeń sądu, Warszawa, 7 November, 2013.
31 Journal of Laws of 2016, item 969.
32 K. Postulski, Kodeks karny wykonawczy. Komentarz, Lex 2016.

izations, institutions and other entities whose activities are aimed at helping inmates to socially re-adapt[33].

Nevertheless, it should be emphasized that parole is not probation in a strict sense because it is not a measure of response to a crime. However, this institution belongs to the measures of probation, which is decided by a conditional nature of a release and a trial period as well as probation the released person is put on whose legal effects are conditioned on the course and results of the trial[34]. As far as the participation of social factor in the enforcement of such a decision is concerned, it is analogical to other institutions of probation which are connected with the obligation of putting a convict on probation.

4. Electronic monitoring programme

Electronic monitoring is a relatively new form of supervising inmates, which emerged in result of technological development, including technologies allowing remote monitoring of a place of whereabouts of a person carrying a transmitter. It was introduced to the Polish legal system by the Act of an episodic nature[35]. As of 1 July 2015 this institution was adopted (together with relevant changes) to the Criminal Executive Code (Chapter VIIa). Before 30 June 2015 electronic monitoring programme was in force as one of the systems of deprivation of liberty enforcement. Whereas since 1 July 2015 the following penalties may be adjudicated and enforced together with electronic monitoring: restriction of liberty in a form of the obligation to stay in a place of permanent residence or another designated place with accompanying daily supervision (probation) (Art. 34 § 1a point 2 of the Criminal Code), a ban to approach specified individuals (Art. 41a § 1 and 2 of the Criminal Code), the obligation to stay in a place of permanent residence or another designated place during some mass events covered by the ban (Art. 41b § 3 of the Criminal Code), and security (protective) measure (Art. 93a § 1 point 1 of the Criminal Code). However, experiences ensuing from the operation of electronic monitoring programme after 1 July 2015 as a form of restriction of liberty enforcement indicate a diametrical decline in a number of persons covered by this system even though development of electronic monitoring, with regard to both the system's capacity and organizational and technical level, allows a wider use of this system in criminal law, especially through its subsequent use during the enforcement of deprivation of liberty[36]. That is why Art. 34 §

33 Rada Główna do Spraw Readaptacji i Pomocy Skazanym, Uczestnictwo społeczeństwa w wykonywaniu orzeczeń sądu, Warszawa, 7 November 2013.

34 A. Marek, Kodeks karny. Komentarz do art. 77, Lex 2010, teza 1, p. 139.

35 Act of 7 September 2007 on the Enforcement of Deprivation of Liberty Outside Prison in the System of Electronic Monitoring (uniform text: Journal of Laws of 2010 No. 142, item 960, as amended).

36 K. Postulski, Komentarz do niektórych przepisów ustawy z dnia 6 czerwca 1997 r. Kodeks karny wykonawczy, w zakresie zmian wprowadzonych ustawą z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks karny wykonawczy, Lex 2016.

1a point 2 of the Criminal Code and Art. 35 § 3 of the Criminal Code on sentencing to restriction of liberty involving the obligation to stay in a place of permanent residence or another designated place with accompanying electronic monitoring as well as Criminal Executive Code's provisions on the enforcement of restriction of liberty in this form have been repealed as of 15 April 2016.

Activities connected with the organization and control of the enforcement of penalties with the use of electronic monitoring and obligations imposed in connection with them have been assigned to probation officers (Art. 43d § 3 of the Criminal Executive Code). Although the amendments did not directly envisage the participation of a social probation officer in exercising control over the enforcement of penalties within this system, the same as previously, a professional probation officer may cooperate with entities mentioned in Art. 38 of the Criminal Executive Code (see comments to point I).

With regard to electronic monitoring, professional probation officers tasks' are different from ordinary probation; contacts with inmates are not of a controlling nature because electronic monitoring system and authorized probation entity "watch" over the regularity of penalty enforcement. Probation officer's activities are mainly aimed at providing inmates with support necessary in everyday personal or professional matters, which facilitates building a trust-based rapport[37]. However, the position of a probation officer in the process of social rehabilitation of inmates subject to electronic monitoring is not marginal because the existence of modern technology merely enhances the system which cannot replace a social factor.

Referring to the so called probation institutions and their possible legal regulations, it is worth mentioning the model functioning in England and Wales, which has been subject to privatization[38]. In 2013, serious changes to the model of probation institutions were proposed through the so called *Transforming Rehabilitation*[39] – the government program of offenders management of 1 February 2015, whose goal is to counteract convicts' return to crime. The reform is heading towards a neoliberal perception of managing probation through privatization and outsourcing some tasks of a welfare state and, at the same time, concurrent strengthening of certain spheres of the State coercion, in particular a sphere of employment and security[40]. Implemented changes are based on the engagement of a public sector in probation, i.e. National Public Probation Service, which would be responsible for app. 12% of the so called high risk inmates, and a private sector – the so called Community Rehabilitation Companies, which would be responsible for rehabilitation of low and medium risk

37 A. Kiełtyka, A. Ważny, Ustawa o wykonywaniu kary pozbawienia wolności poza zakładem karnym w systemie dozoru elektronicznego. Komentarz, Warszawa 2011, p. 218-220.

38 W. Fitzgibbon, J. Lea, Defending probation: Beyond privatisation and security, "European Journal of Probation" 2014, Vol. 6(1) p. 27-28, ejp.sagepub.com (08.11.2016).

39 https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transforming-rehabilitation-response.pdf, (14.11.2016).

40 W. Fitzgibbon, J. Lea, Defending…, *op. cit*., p. 29.

inmates, and additionally exercise control over inmates sentenced to 12 months of deprivation of liberty after their release from prison (relevant legal regulations have been included in the Offender Rehabilitation Act of 2014[41]. CRCs' administration and management have been entrusted to social organizations and private entities[42].

The first audit carried out in 2016 in this sector revealed positive aspects of the above changes and drew attention to ensuing threats too. National Audit Office[43] stressed that the reform of a probation model was introduced at a right time whereas its measurable financial effects are already discernible. On the other hand, however, such a manner of managing convicted offenders and payment by result (private entities are paid for result) may, first of all, entail that these enterprises will focus solely on profit forgetting about the convicted offenders' needs and, secondly, lead to a certain manipulation of data reflecting actual activities of the enterprises – NAO confirmed that some controlled enterprises failed to submit appropriate information about their operation[44]. Subsequent audits also revealed new irregularities and negligence in CRC's operation[45]. The reports on the functioning of these institutions in London confirm that many offenders have not been seen for weeks or months and some "have been lost in the system altogether"[46].

5. Conclusion

Associations, foundations, organizations and institutions whose aim is to implement tasks specified in Chapter VII of the Criminal Executive Code as well as churches and other religious groups and trustworthy persons may cooperate in the enforcement of penal responsive measures connected with deprivation of liberty in particular. This distinction emphasizes that just this segment of executive proceedings is most susceptible to social rehabilitation, social, cultural, educational, sport and religious activity pursued by external entities[47]. Amended Art. 175 of the Criminal Executive Code has considerably extended the rights and obligations of associ-

41 http://www.legislation.gov.uk/ukpga/2014/11/notes (14.11.2016).

42 W. Fitzgibbon, J. Lea, Defending…, *op. cit.*, p. 26. Zob. także M. Muskała, Służba kuratorska w Anglii i Walii, „Probacja" 2015, No. I, p. 51-66.

43 Pełen raport o funkcjonowaniu zreformowanego modelu probacyjnego dostępny na stronie: https://www.nao.org.uk/report/transforming-rehabilitation.

44 R. Cooke, Is the Privatised Probation Service Working?, http://www.seven-resourcing.com/criminal-justice/news/privatised-probation-service-working/ (14.11.2016), and S. Fenton, Watchdog criticises Government's privatisation of probation services, http://www.independent.co.uk/news/uk/politics/national-audit-office-watchdog-savages-governments-disastrous-privatisation-of-probation-services-a7010496.html (14.11.2016), A. Travis, Liz Truss calls for rapid completion of probation privatisation review, "The Guardian", 06.12.2016, https://www.theguardian.com/society/2016/dec/06/liz-truss-calls-rapid-completion-probation-privatisation-review (29.12.2016).

45 See: R. Merrick, Privatisation of probation services branded a failure by two watchdog inspections, http://www.independent.co.uk/news/uk/politics/prison-privatisation-chris-grayling-probation-services-watchdog-criticism-government-failure-a7344361.html (14.11.2016).

46 A. Travis, Privatisation of probation service has left public at greater risk – report, „The Guardian", 15 December 2016, https://www.theguardian.com/society/2016/dec/15/probation-privatisation-public-greater-risk-report-glenys-stacey (29.12.2016).

47 K. Postulski, Kodeks karny wykonawczy…, *op. cit.*

ations, organizations and institutions whose aim is to participate in the enforcement of penalties, penal measures and protective and preventive measures connected with deprivation of liberty; almost up to the level of professional probation officers with regard to the scope of their tasks embracing the enforcement of probation. Cooperation between bodies enforcing a sentence occurs during the enforcement of restriction of liberty, provision of support and assistance in social re-adaptation of inmates released from prison, or the enforcement of probation measures. Due to their profiles or qualifications, operating associations, organizations and institutions are an excellent supplement of court probation. Entrusting them with probation activities or services not only relieves professional probation officers but is also a form of "social supervision or control" over the enforcement of adjudicated penalties and measures.

Nonetheless, these entities still attract insignificant interest of State institutions to establish mutual cooperation, opposite to the French example described above. According to the above mentioned results of surveys and questionnaires, a small percentage of convicted offenders serves a sentence within social structures. Whereas examples of penitentiary systems of European counties provide us with many ideas which could be used to improve our penitentiary model. The French model seems to be the most effective because it arises interest of most citizens who wish to take part in social life. The British example indicates that privatization of the sector of offenders management creates considerable threats, mostly because of a risk of losing a goal of action due to a pursuit of profit by all means. However, entrusting social organizations with the enforcement of probation of a specific kind of offenders (those least demoralized) appears to be an interesting solution. The more so since cooperation between associations or organizations and convicted offenders is a visible expression of compensating society for the committed wrongful acts within the framework of general prevention. The above mentioned idea of K.A. Politowicz appears to be equally interesting: he believes that community service should be tailored to match personal attributes of an offender who, using his or her qualifications, could help others at his or her best. Unpaid and controlled work for social purposes contains all elements of punishment thus fulfilling its retributive aim and preventive objectives involving, among others, integration of a perpetrator with society and society with a perpetrator. Recent amendments of the Criminal Code should encourage courts to sentence offenders to this type of restriction of liberty more often as this punishment is fair from a social point of view. At the same time, examples of European solutions within the scope of engaging society in the enforcement of punishment should be a guideline for the Polish legislator.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.10

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Characteristics of Selected Institutions of Probation in the Context of the Participation of Non-Governmental Organizations in their Implementation

Abstract: This article is an attempt at presenting the problem of probation in Poland. It contains a summary of the institutions falling within the definition of this concept. The article is divided into three parts. The first two concern the solutions contained in the Polish Penal Code. The third part is devoted to the subject of social factor's participation in the form of non-governmental organizations. The paper also presents statistics illustrating the scale of the phenomenon of probation in Poland.
Keywords: probation, community, restorative justice

1. Institutions of probation – definitions

The institution of probation developed in the Anglo-American legal system in the middle of the 19th century as a measure of response to juvenile delinquency. It involved finding a perpetrator guilty as charged, suspending a sentence, obliging a convicted offender to perform certain duties during a trial period, and determining a trial period under a supervision of a probation officer[1]. Probation is based on the assumption according to which punishing an offender is not always necessary to fulfil a purpose of punishment, in particular preventing him or her from returning to crime. Moreover, economical reasons additionally support the claim according to which perpetrators who committed acts that are not seriously socially detrimental should not be subject to deprivation of liberty; instead they should be subject to a measure which would be relatively repressive but, at the same time, would not force the State to pay the cost of perpetrator's incarceration[2].

1 J. Warylewski, Prawo karne. Część ogólna, Warszawa 2012, p. 463.
2 S. Hypś, (in:) A. Grześkowiak, K. Wiak (ed.), Kodeks karny. Komentarz, Warszawa 2014, p. 364.

Positive practical effects of probation at the beginning of its introduction in the middle of the 19th century ensued its implementation into the legal systems of most countries of then Europe, which resulted in the establishment of several versions of the discussed measure: a Danish-Norwegian-Dutch model, which involved suspension of all criminal proceedings, already mentioned Anglo-American model based on sentencing entailing simultaneous suspension of a sentence, a German model where a decision to suspend a sentence was not vested in the court but an executive body, and a French-Belgian model which allowed to sentence and simultaneously suspend a sentence for a trial period that finished with the sentence annulment. Solutions adopted in the Polish Criminal Code of 1932[3] were based on the latter modification of the above discussed measure.

The currently binding Act of 6 June 1997 – Criminal Code[4], contains three measures connected with putting a perpetrator to a test (trial): conditional discontinuation of proceedings, probation (conditionally suspended sentence) and parole (conditional release from prison after serving a part of the sentence). The first two measures may be combined with a sentence imposing on a perpetrator several duties which are determined in the Criminal Code as well. It is an original and unique approach to the issue of applying institutions of probation because one legal act regulates the issue of more than one measure connected with putting a perpetrator to a test (trial)[5].

2. Conditional discontinuation of criminal proceedings

Probation in a form of conditional discontinuation of proceedings is an institution from the borderline of substantive criminal law and procedural criminal law; i.e. petty offences with a concurrent positive profile of a perpetrator should not ensue his or her sentence but should fulfil as many purposes of criminal proceedings as possible by the application of appropriate burdens. Most generally speaking, conditional discontinuation of proceedings is a measure of probation based on abandonment of sentencing and punishing a perpetrator guilty of the offence[6].

As pointed out by the Supreme Court, conditional discontinuation of proceedings should be "a measure deepening individualization of criminal liability and a measure of rehabilitation considerably limiting the application of short-term deprivations of liberty or penalties not connected with deprivation of liberty, and replacing such penalties with educational or correctional measures assuring perpetrator's

3 J. Warylewski, Prawo karne…, *op. cit.*, p. 463-464.
4 Uniform text: Journal of Laws of 2016, item 1137.
5 S. Hypś, (in:) A. Grześkowiak, K. Wiak (ed.), Kodeks karny…, *op. cit.*, p. 364, G. Łabuda, (in:) J. Giezek (ed.), Kodeks karny. Część ogólna. Komentarz, Warszawa 2012, p. 470.
6 T. Bojarski, (in:) T. Bojarski (ed.), Kodeks karny. Komentarz, Warszawa 2013, p. 197; P. Kozłowska-Kalisz, (in:) M. Mozgawa (ed.), Kodeks karny. Komentarz, Warszawa 2015, p. 215-217; J. Warylewski, Prawo karne…, *op. cit.*, p. 465.

improvement if they are petty offenders with a clean criminal record, and positively affecting the perception of law without the need to sentence the offender"[7].

The institution of conditional discontinuation of proceedings was introduced to the Polish legal system together with the implementation of Criminal Code of 1969, which was connected with the then existing phenomenon called a crisis of deprivation of liberty. It somehow forced legislators in many countries to search alternatives to the above mentioned penalty, especially if it was short-term[8].

The reasoning to the governmental draft of Criminal Code of 1969 emphasized that conditional discontinuation of proceedings was, in fact, controlled freedom which, in case of a negative outcome, allowed to impose a rational penalty or penal measure. What is more, it was depicted that the application of conditional discontinuation of proceedings eliminates a need to hold a hearing, which considerably accelerates litigation thus satisfying the principle of procedural economics. Additionally, a decision on the application of the discussed penal measures protects an offender against stigmatization connected with serving time in prison[9].

3. Legal nature of conditional discontinuation of criminal proceedings

From the very beginning, conditional discontinuation of proceedings arouse doubts as to its legal nature. Unfortunately, the volume of the study does not permit an accurate analysis of the described issue. Nevertheless, it is necessary to briefly present the problem due to its significance.

A basic division in the doctrine was generated by the question whether the discussed measure is a sentence but without punishment, or whether conditional discontinuation of proceedings is not a form of criminal liability, i.e. it is not a sentence[10]. Although the first opinion enjoyed considerable support, now the second one prevails among the doctrine representatives. They underline that even though conditional sentencing itself acknowledges that the defendant committed an act he or she has been charged with, it is merely a new form of legal, not criminal, liability[11]. Furthermore, the second opinion was strongly supported by the judicature, which also believed that conditional discontinuation of proceedings could not be treated as a specific kind of a sentence. For instance, the Supreme Court ruled that "a verdict which conditionally discontinued criminal proceedings does not have a character of a sentence, therefore requirements contained in the provision of Art. 413 § 2 of the

7 Resolution of Supreme Court's Criminal Chamber of 29 January 1971, VI KZP 26/69, OSNKW 1971, No. 3, item 33.
8 B. Kunicka-Michalska, Warunkowe umorzenie postępowania karnego, (in:) M. Melezini (ed.), System Prawa Karnego. Kary i środki karne. Poddanie sprawcy próbie. Volume 6, Warszawa 2010, p. 938.
9 S. Hypś, (in:) A. Grześkowiak, K. Wiak (ed.), Kodeks karny…, *op. cit.*, p. 364-365.
10 B. Kunicka-Michalska, Warunkowe…, *op. cit.*, p. 953.
11 *Ibidem*, p. 953-954.

Code of Criminal Procedure do not apply thereto"[12]. The Constitutional Tribunal held a similar opinion claiming that "a difference in determining necessary component elements of a sentence and ruling of conditional discontinuation is not accidental; it expresses the legislator's will as to the legal structure of conditional discontinuation of proceedings"[13]. Moreover, the doctrine is engaged in a dispute whether the discussed institution should be treated as: a release from criminal liability, a measure of criminal law response to a crime, a form of conditional sentencing, a penal measure connected with putting an offender to a trial or test, or a manifestation of opportunism in crime prosecution[14]. It is also important that the application of the discussed measure of probation is a manifestation of infringed presumption of innocence because conditional discontinuation of proceedings and imposition on the convicted offender obligations described further in the study occur despite the fact that his or her guilt has not been proved by a legally binding sentence[15].

4. Prerequisites to apply conditional discontinuation of criminal proceedings

Pursuant to the currently binding Criminal Code of 1997, the legislator conditioned the application of conditional discontinuation of proceedings on the parallel occurrence of all prerequisites specified in Art. 66 § 1-3 of the Criminal Code, i.e.: insignificant guilt and social harm of the act, no doubts as to the commission of the act, a clean criminal record of a perpetrator with regard to intentional offences, a positive criminological forecast and a condition that an offence committed by a perpetrator is punished by a maximum 5 years imprisonment. The prerequisite of insignificant guilt, whose occurrence is required for the application of the discussed measure, arises considerable problems in practice because it requires reference to the catalogue of circumstances mitigating guilt; yet, at the same time, it does not permit the application of circumstances excluding it. Each time, it forces courts to assess a factual state of the case pursuant to their knowledge, experience and principles of criminal procedure[16]. The prerequisite of insignificant social harm of the act causes much fewer problems because the court may herein refer to the content of Art. 115 § 2 of the Criminal Code, which lists prerequisites that establish criteria which are taken into account to determine a degree of social harm of an act[17]. We should also remember that conditional discontinuation of proceedings is possible only when both above

12 Supreme Court's judgment of 3 October 2008, III KK 167/08 (not published).
13 Constitutional Tribunal's judgment of 16 May 2000, P 1/99, OTK 2000, No. 4, item 111.
14 R.A. Stefański, Prawo karne materialne. Część ogólna, Warszawa 2008, p. 348.
15 More on presumed innocence in, i.a.: A. Jezusek, "Domniemanie winy" w prawie karnym materialnym a procesowe domniemanie niewinności, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, No. 2, p. 175-187.
16 G. Łabuda, (in:) J. Giezek (red.), Kodeks karny…, *op. cit.*, p. 471.
17 B. Kunicka-Michalska, Warunkowe…, *op. cit.*, p. 988.

mentioned prerequisites occur. Nevertheless, each of them must be established separately and independently[18].

No doubts as to the fact that the offender committed the act he or she is charged with is not only the prerequisite necessary to apply the institution of conditional discontinuation of proceedings; it also fulfils the function of a guarantee because it protects him or her against the application of the discussed measure if the defendant should be acquitted[19]. As pointed out by the Supreme Court, a decision on conditional discontinuation of proceedings taken by a court will be right only if a factual state of the case does not arise any doubts in the light of collected evidence and assessment made by the court. Just on the basis of this evidence does the court determine the defendant's perpetration, a degree of his or her guilt and social harm of the act, i.e. circumstances which imply another prerequisite of conditional discontinuation of proceedings, that is the prerequisite of no doubts as to the commission of the act[20]. What is more, both the doctrine and judicature believe that if the defendant pleads guilty, it does not imply that the discussed prerequisite has been satisfied, whereas if he or she does not plead guilty, the adjudicating body is merely forced to be more careful as to the application of the discussed measure[21]. Previous clean criminal record as the prerequisite of applying the institution of conditional discontinuation of proceedings embraces all binding sentences which have been passed before the application of the discussed institution is adjudicated. The subject requirement is applied not only when an offender is convicted of a crime or intentional misdemeanour, but also when punishment is renounced, or when measures envisaged for minors or security measures are applied[22]. Yet the doctrine and judicature simultaneously claim that the requirement of clean criminal record refers not only to intentional offences but also intentional-unintentional, and concerns sentencing a perpetrator to one of the penalties envisaged in Art. 32 of the Criminal Code[23]. The Supreme Court also emphasizes that "a condition of previous clean criminal record for intentional offences is of an absolute nature and does not depend on the knowledge of the court hearing the case"[24]. At the same time, we should remember that a previous conviction for intentional offence does not matter when a decision on the application of conditional discontinuation of proceedings is taken if it has already been erased[25].

18 P. Hofmański, L.K. Paprzycki, (in:) M. Filar (ed.), Kodeks karny. Komentarz, Warszawa 2012, p. 354.
19 S. Hypś, (in:) A. Grześkowiak, K. Wiak (ed.), Kodeks karny…, *op. cit.,* p. 367.
20 Supreme Court's judgment of 20 October 2011, III KK 159/11, Lex No. 1101665.
21 P. Hofmański, L.K. Paprzycki, (in:) M. Filar (ed.), Kodeks…, *op. cit.*, p. 354; G. Łabuda, (in:) J. Giezek (ed.), Kodeks karny…, *op. cit.,* p. 475; Supreme Court's judgment of 11 July 1985, RNw 17/85, OSNKW 1986, No. 3/4, item 18.
22 P. Kozłowska-Kalisz, (in:) M. Mozgawa (ed.), Kodeks karny…, *op. cit.,* p. 215-217.
23 S. Hypś, (in:) A. Grześkowiak, K. Wiak (ed.), Kodeks karny…, *op. cit.,* p. 368; G. Łabuda, (in:) J. Giezek (ed.), Kodeks karny…, *op. cit.,* p. 474; Supreme Court's decision of 1 October 2003, II KK 156/03, OSNwSK 2003, No. 1, item 2080.
24 Supreme Court's judgment of 1 February 2011, IV KK 406/10, Lex No. 725081.
25 P. Hofmański, L.K. Paprzycki, (in:) M. Filar (ed.), Kodeks…, *op. cit.*, p. 355.

The prerequisite of positive criminological forecast is the most subjective among all requirements necessary to apply the discussed measure even though deciding about conditional discontinuation of proceedings, the court must have justified reasons to assume that the convicted offender will follow legal order and will not reoffend in particular[26]. Deciding about the application of the discussed institution, the court pays attention to the perpetrator's conduct and attitude (especially whether he or she shows repentance, expresses willingness to improve, or whether the event was incidental), his or her personal features and conditions (understood as personal qualities and temper but also a level of education), and a previous lifestyle (especially those elements of the perpetrator's life which contributed to a crime committed by him or her such as their environmental, family and housing conditions)[27].

A limit of maximum penalty necessary to apply the institution of conditional discontinuation of proceedings cannot exceed five years. This is the only prerequisite of a *stricte* formal nature. This entails that the application of possible extraordinary mitigation or aggravation of penalty envisaged by the law does not affect its occurrence[28].

5. Final comments on conditional discontinuation of criminal proceedings

The discussed measure of probation is of a solely elective nature and may be adjudicated exclusively by a court ruling. Confirming the occurrence of the above mentioned prerequisites, instead of the indictment the prosecutor may apply to the court for the application of the discussed institution towards a perpetrator proposing a trial period and duties the defendant should fulfil and, possibly, determine the scope of probation[29].

Conditional discontinuation of proceedings is adjudicated for a trial period from one to three years counting from the day on which a decision on this measure's application has become final and binding. Its aim is to verify a criminological forecast and exert educational or correctional impact on a perpetrator[30].

Furthermore, the court may put a perpetrator on probation under a supervision of a probation officer or a trustworthy person, association, institution or social or-

26 B. Kunicka-Michalska, Warunkowe…, *op. cit.*, p. 996.
27 S. Hypś, (in:) A. Grześkowiak, K. Wiak (ed.), Kodeks karny…, *op. cit.,* p. 369; G. Łabuda, (in:) J. Giezek (ed.), Kodeks karny…, *op. cit.,* p. 475.
28 P. Kozłowska-Kalisz, (in:) M. Mozgawa (ed.), Kodeks karny…, *op. cit.,* p. 215-217.
29 R.A. Stefański, Prawo…, *op. cit.*, p. 352.
30 J. Warylewski, Prawo…, *op. cit.*, p. 466; P. Kozłowska-Kalisz, (in:) M. Mozgawa (ed.), Kodeks karny…, *op. cit.,* p. 218-219.

ganization whose activities involve educational care, prevention of demoralization or help and assistance provided to convicted offenders[31].

Deciding to conditionally discontinue proceedings, the court obliges a perpetrator to redress harm fully or partly and, as far as possible, imposes on him or her a duty to compensate the afflicted harm, or otherwise the court adjudicates exemplary damages instead of these obligations. Additionally, depending of the needs, the court obliges a perpetrator to inform the court or probation officer about the course of a trial period, apologize to the victim, exercise the obligation to maintain another person he or she is burdened with, refrain from abusing alcohol or other intoxicating substances, undertake addiction therapy, undertake therapy, in particular psychotherapy or psycho-education, participate in correctional-educational activities, refrain from contacting the victims or other persons in a specified manner or approaching the victim or other persons, and move out a place or residence occupied together with the victim. Moreover, the court may apply penal measures in a form of pecuniary consideration or a ban on driving a vehicle for two years[32].

In 2015, 26 959 proceedings were conditionally discontinued before first-instance courts, including 26 153 initiated by the prosecutor and 747 – by a private individual. It is a decline in comparison to 2014, when 27 418 proceedings were conditionally discontinued, 26 725 initiated by the prosecutor and 663 – by a private individual, respectively[33].

The court is obliged to launch conditionally discontinued proceedings if the perpetrator committed an intentional offence he or she has been convicted of during a trial period. The proceedings are optionally launched if the perpetrator grossly violates legal order, avoids obligations he or she has been imposed on and, in particular, if he or she has committed another offence[34]. In the discussed cases, however, the court is obliged to launch conditionally discontinued proceedings if the convicted offender received a written admonition from a probation officer unless special considerations suggest otherwise.

6. The institution of probation (a conditionally suspended sentence)

Probation (a conditionally suspended sentence) is another measure contained in the Criminal Code of 1997. It is of a form of punishment where a perpetrator is sentenced to appropriate penalty but the execution thereof is concurrently renounced[35].

31 Act of 27 July 2001 on Probation Officers (Journal of Laws No. 98, item 1071 as amended); Regulation of Minister of Justice of 26 February 2013 on the Manner of the Fulfilment of Obligations and Rights by Probation Officers in Executive Criminal Cases (Journal of Laws, item 335); Regulation of Prime Minister of 1 December 2003 on Special Scope and Course of Participation of Entities in the Enforcement of Penalties, Penal, Protective and Preventive Measures and Social Control over their Execution (Journal of Laws No. 211, item 2051).

32 J. Warylewski, Prawo…, *op. cit.*, p. 466.

33 Mały rocznik statystyczny 2016, Warszawa 2016, p. 88; Mały rocznik statystyczny 2015, Warszawa 2015, p. 87.

34 T. Bojarski, (in:) T. Bojarski (ed.), Kodeks karny…, *op. cit.,* p. 201.

35 S. Hypś, (in:) A. Grześkowiak, K. Wiak (ed.), Kodeks karny…, *op. cit.,* p. 364.

The doctrine has emphasized from the beginning of existence of the described institution that it fulfils an important criminological-political role. Similar to conditional discontinuation of proceedings, probation (a conditionally suspended sentence) is an alternative to deprivation of liberty, which concurrently satisfies its implied individual-preventive purposes and allows the convicted offender to avoid stigmatization connected with serving time in prison thus eliminating ensuing costs thereof. What is more, the aim of probation (a conditionally suspended sentence) is to prevent perpetrator's return to crime and further violation of legal order by him or her[36].

7. Prerequisites to apply probation (a conditionally suspended sentence)

Probation (a conditionally suspended sentence) may be applied with regard to deprivation of liberty not longer than one year. In special cases specified by the Criminal Code, it may also be adjudicated with regard to deprivation of liberty for up to five years[37].

It particularly refers to situations when penalty can be extraordinarily mitigated, that is when a perpetrator "sold out" accomplices or revealed important circumstances of the offence, or upon the prosecutor's request when, regardless of evidence given by a perpetrator in his or her case, he or she revealed and presented to enforcement agencies important circumstances they had not known before referring to offences punished by deprivation of liberty for more than five years[38].

Yet, we should also consider the Supreme Court's opinion, which implies that the requirement of not exceeding the length of deprivation of liberty "also refers to situations when probation regards cumulative penalty which was adjudicated in result of accumulation of deprivations of liberty and their conditional suspension"[39].

Deciding about the application of the institution of probation (a conditionally suspended sentence), the court takes into account a similar scope of the substantive prerequisite which occurred with regard to conditional discontinuation of proceedings, that is the perpetrator's conduct and attitude, his or her personal features and conditions, a previous lifestyle as well as his or her conduct after committing the offence[40].

36 J. Skupiński, Warunkowe umorzenie postępowania karnego, (in:) M. Melezini (ed.), System Prawa Karnego. Kary i środki karne. Poddanie sprawcy próbie. Volume 6, Warszawa 2010, p. 1061; G. Łabuda, (in:) J. Giezek (ed.), Kodeks karny…, *op. cit.,* p. 491.

37 R.A. Stefański, Prawo…, *op. cit.*, p. 353-354; P. Hofmański, L.K. Paprzycki, (in:) M. Filar (ed.), Kodeks…, *op. cit ,* p. 372.

38 J. Skupiński (in:), R.A. Stefański (ed.), Kodeks karny. Komentarz, Warszawa 2015, p. 468-479.

39 Supreme Court's judgment of 4 October 2004, IV KK 232/04, OSN Prok. i Pr. 2005, No. 4, item 1.

40 M. Budyn-Kulik, (in:) M. Mozgawa (ed.), Kodeks karny. Komentarz, Warszawa 2015, p. 222-225.

As noticed by the Supreme Court, the above mentioned circumstances taken into account in adjudicating on the application of the benefit of a conditionally suspended sentence do not have a character of a closed catalogue, which is confirmed by the expression "most of all" used therein[41].

Interestingly enough, opposite to the institution of conditional discontinuation of proceedings, a previous clean criminal record of the perpetrator does not decide about the exclusion of the application of the institution of probation (a conditionally suspended sentence) in his or her case[42]. However, the Criminal Code envisages the exclusion of the discussed institution in relation to perpetrators who committed acts of hooliganism and those who were previously convicted of driving a vehicle under the influence alcohol or drugs unless special circumstances occur[43].

8. Final comments on probation (a conditionally suspended sentence)

Similar to conditional discontinuation of proceedings, the application of the discussed measure of probation is also of an elective (optional) nature and depends only on the court's discretion as to the satisfaction of all above described prerequisites by the perpetrator[44].

A sentence is conditionally suspended for a trial period from one to three years. However, it is subject to prolongation depending on the perpetrator's characteristics, i.e.: from two to five years with regard to a juvenile offender and a perpetrator who committed an offence with the use of violence harming a person residing together with him or her, and up to ten years pursuant to Art. 60 § 5 of the Criminal Code[45].

Adjudicating about a conditionally suspended sentence, the court may put the offender on probation under the supervision of a probation officer, a trustworthy person or appropriate social organization during a trial period. Nevertheless, the court is obliged to apply probation with regard to a juvenile offender who committed an intentional offence, a perpetrator specified in Art. 64 § 2, a perpetrator who committed an offence connected with sexual deviation, and a perpetrator who committed an offence with the use of violence harming a person residing together with him or her[46].

Probation (a conditionally suspended sentence) may be accompanied by a fine, which is accessory in nature and pays a role of economic hardship (discomfort) whilst, as noticed by the Supreme Court, "counteracts a wrong belief that conditionally suspended deprivation of liberty is a manifestation of leniency towards offenders"[47].

41 Supreme Court's decision of 7 October 2010, II KK 246/10, Biul. SN, No. 7, p. 28.
42 G. Łabuda, (in:) J. Giezek (ed.), Kodeks karny…, *op. cit.,* p. 491.
43 J. Skupiński, (in:) R.A. Stefański (ed.), Kodeks…, *op. cit.,* p. 468-479.
44 M. Budyn-Kulik, (in:) M. Mozgawa (ed.), Kodeks…, *op. cit.,* p. 222-225.
45 R.A. Stefański, Prawo…, *op. cit.*, p. 355.
46 J. Warylewski, Prawo…, *op. cit.*, p. 467.
47 M. Budyn-Kulik, (in:) M. Mozgawa (ed.), Kodeks…, *op. cit.,* p. 222-225.; G. Łabuda, (in:) J. Giezek (ed.), Kodeks karny…, *op. cit.,* p. 495; Supreme Court's judgment of 18th July, 1975, V KRN 76/75, OSNKW 1976, No. , item 6.

Moreover, a conditionally suspended sentence may be connected with several optional duties imposed on the perpetrator. These are: the obligation to inform the court or probation officer about the course of a trial period, apologize to the victim, exercise the obligation to maintain another person he or she is burdened with, perform paid work, study or undertake vocational training, refrain from abusing alcohol or other intoxicating substances, undertake addiction therapy, undertake therapy, in particular psychotherapy or psycho-education, participate in correctional-educational activities, refrain from visiting specified environments or places, refrain from contacting the victims or other persons in a specified manner or approaching the victim or other persons, and move out a place or residence occupied together with the victim, or behave in another appropriate manner during a trial period which may prevent reoffending[48].

In 2013 courts conditionally suspended 197 998 sentences, including 195 345 deprivations of liberty, 1 093 restrictions of liberty, and 1 557 unconditioned fines, that is much more than in 2014, when courts conditionally suspended 165 429 sentences, including 163 534 deprivations of liberty, 897 restrictions of liberty, and 998 unconditioned fines[49].

9. Enforcement of probation by non-governmental organizations

Probation enforced by NGOs (non-governmental organizations) is an interesting issue that is very rarely depicted in the subject literature and which is closely connected with both probation measures described above. Insofar as the institution of a probation officer is frequently discussed by both doctrine and practice, enforcement of probation by other authorized entities is marginalized.

As already mentioned above, under Art. 67 § 2 of the Criminal Code and Art. 73 of the Criminal Court, the court may or must put on probation a person against whom one of the above mentioned probation measures was applied under the supervision of an association, institution or social organization whose activities involve educational care, prevention of demoralization or help and assistance provided to convicted offenders.

None legal act functioning within the territory of the Republic of Poland contains a legal definition of the above mentioned organizations. Doctrine and case law are not of much help here too due to the already mentioned fact of disregarding these issues in their considerations. Thus we should approve of the approach adopted by the District Court of Krakow Śródmieście in Krakow, which ruled that the content of articles of associations of a given association, institution or social organizations, their objectives of operation contained therein in particular, should decide about classi-

48 M. Budyn-Kulik, (in:) M. Mozgawa (ed.), Kodeks…, *op. cit.,* ps. 222-225.
49 Mały rocznik statystyczny 2016…, *op. cit.,* p. 90-91.

fication of an NGO as an authorized organization satisfying the provision of both Criminal Code's Articles[50].

Detailed solutions concerning enforcement of probation by non-governmental organizations are envisaged by the Regulation of Prime Minister of 1 December 2003 on Special Scope and Course of Participation of Entities in the Enforcement of Penalties, Penal, Protective and Preventive Measures and Social Control over their Execution[51].

The content of this legal act contains, among others, a catalogue of activities which may be performed by non-governmental organizations, determines conditions necessary to exert supervision and regulates issues of concluding relevant agreements between non-governmental organizations and entities responsible for the administration of justice within the territory of the Republic of Poland.

Interestingly enough, non-governmental organizations, which are anyway equipped with numerous rights, additionally acquired the rights to: visit persons involved in the proceedings in a place of their residence or stay including prisons and contact their families; demand necessary information and explanations from persons put on a trial period, probation or those who were imposed with obligations; cooperate with appropriate associations, organizations and institutions within the scope of improvement of housing and health conditions, employment and training of persons involved in the executive proceedings; cooperate with prison administration within the scope of appropriate preparation of inmates for release; review court files and make copies thereof in connection with the performance of activities ordered by the court; carry out environmental interviews and collect necessary information from the bodies of governmental administration, local government, workplaces, associations, organizations and institutions; undertake other activities necessary to appropriate enforcement of penalties, penal and protective measures, and provide offenders with other suitable help and assistance[52].

Engagement of non-governmental organizations in the enforcement of probation of persons sentenced to parole or probation (a conditionally suspended sentence) is an attempt at encouraging citizens and local communities to voluntarily cooperate in the processes of social re-adaption of offenders, in particular helping

50 Information about the rights enjoyed by associations, organizations and institutions whose activities involve educational care, prevention of demoralization or help and assistance to convicted offenders, or trustworthy persons to enforce probation of convicted offenders or criminals is available at http://www.krakow-sr.sr.gov.pl/?c=mdPliki-cm-Pobierz-163-SW5mb3JtYWNqYSAtIDAyMjYyMTMucGRm (16.06.2014).

51 Journal of Laws No. 211, item 2051.

52 More information about may be obtained from the presentation titled Participation of society in the enforcement of judicial rulings, available at the official website of Ministry of Justice: http://bip.ms.gov.pl/ministerstwo/struktura-organizacyjna/rada-glowna-do-spraw-spolecznej-readaptacji-i-pomocy-skazanym/materialy-informacyjne-i-szkoleniowe/ (16.06.2014) and on the website devoted to NGOs at http://wiadomosci.ngo.pl/wiadomosci/830474.html (16.06.2014).

them adapt to live in the society and, at the same time, raising legal awareness and enhancing peace and order[53].

10. Conclusion

Comparing and analyzing both above described institutions, it is impossible not to see the legitimacy of their application. Both conditional discontinuation of proceedings and conditional suspension of deprivation of liberty provide perpetrators who committed socially insignificant misdeeds with a possibility of bearing responsibility and satisfying other purposes envisaged for punishment while simultaneously avoiding stigmatization connected with serving time in prison and paying costs thereof by the State Treasury.

The fact that the application of the above mentioned institutions does not ensue negative effects that usually accompany deprivation of liberty speaks in their favour. Convicted offenders do not break ties with society, they do not encounter personality changes resulting from isolation from their family or environment. At the same time, convicted offenders are not subject to integration with other offenders sentenced to deprivation of liberty. Furthermore, the control they are subject to during a trial period as well as obligations they are imposed on satisfy a rightful purpose of punishment. Convicted offenders' personal features, their attitude and conduct as well as positive criminological forecast , which are prerequisites to apply the above described probation measures, make us presume that their individual-preventive nature will allow the offender be punished rationally and economically thus satisfying punishment's social and educational role (taking into account all norms of widely understood humanitarianism) and preventing re-offence.

Hence it is not surprising that both above discussed measures of probation have played an important criminal and political role since they were implemented into the Polish legal system. It may be assumed that in result of the current tendency to increase non-custodial sentences both these institutions will be more and more often applied by the courts.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.11

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Selected Procedures Used in Community Courts and Changes in the Institution of Conditional Discontinuance of the Proceedings and Conditional Sentencing in the Years 2015-2016

Abstract: In the years 2015-2016 regulations of instruments present in Polish criminal law such as conditional discontinuation of proceedings and conditional sentencing changed. The aim of this study is therefore to answer the question whether the regulations resulting from these acts change the institution of conditional discontinuation of criminal proceedings and institution of conditional sentencing in such a way that they can contribute to the increased use of the procedures used within the model of a community court.
Keywords: procedures used in community courts, conditional discontinuation of proceedings, conditional sentencing

1. Introduction

In the end of the 1980s, courts applying procedures referring to the assumptions of philosophy and problem-solving[1] were established in the USA. Community courts, that is courts cooperating with local social organizations in order to solve problems of a given local community, should also be classified therein. The essence of an innovative nature of such courts lies in a close cooperation between their representatives and social organizations. As part of this cooperation, courts following the model of community courts implement distinctive procedures such as: collecting as much information about a perpetrator as possible, applying legal measures

1 See: S. Burdziej, Funkcjonowanie *community court* w praktyce – na przykładzie Red Hook Justice Center w Nowym Jorku, (in:) C. Kulesza, D. Kużelewski, B. Pilitowski (ed.), Współpraca organizacji społecznej z wymiarem sprawiedliwości, Białystok 2015, p. 17-18.

containing elements of restorative justice and legal measures containing elements to help the perpetrator, applying legal measures that are alternative to deprivation of liberty, and undertaking activities to increase the efficient fulfilment of obligations perpetrators have been imposed on[2]. Courts following the model of a community court use the above mentioned procedures with regard to minor and petty offences. In the Polish criminal law, a catalogue of instruments which may be applied within the above scope encompasses, among others, two institutions of probation, i.e. conditional discontinuation of proceedings and conditional sentencing. Each institution may, within a specified scope, apply procedures used in the model of a community court[3]. In 2015-2016, however, the regulation of the above mentioned instruments of the Polish criminal law was subject to normative changes. They mainly resulted from the Act of 27 September 2015 on the Amendment of the Act – Code of Criminal Procedure and Some Other Acts[4], the Act of 20 February 2015 on the Amendment of the Act – Criminal Code and Some Other Acts[5] as well as the Act of 11 March 2016 on the Amendment of the Act – Code of Criminal Procedure and Some Other Acts[6]. A purpose of this study is, therefore, to answer the question whether changes ensuing from the above amendments affecting regulation of the institution of conditional discontinuation of proceedings and conditional sentencing may contribute to the increased application of the procedures applied in the model of a community court within their scope.

2. Conditional discontinuation of criminal proceedings

Considering a possibility of using procedures applied in the model of a community court within the institution of conditional discontinuation of proceedings, the extended scope of prohibited acts the above mentioned institution may be applied to should be positively assessed. Before 1 July 2015, the scope of conditional discontinuation of proceedings referred to misdemeanours punished by deprivation of liberty not exceeding three years as well as misdemeanours punished by deprivation of liberty not exceeding five years if the victim reconciled with the perpetrator, or the perpetrator redressed damage, or the victim and perpetrator mutually agreed how to redress damage (Art. 66 § 2 and 3 of the Criminal Code)[7]. In effect of the above men-

2 See more: P. Gensikowski, Analiza możliwości implementacji wybranych procedur stosowanych w Midtown Community Court oraz Red Hook Community Justice Center w Nowym Jorku w warunkach polskiego prawa karnego, (in:) C. Kulesza, D. Kużelewski, B. Pilitowski (ed.), Współpraca organizacji społecznej z wymiarem sprawiedliwości, Białystok 2015, p. 46-47.

3 *Ibidem*, p. 48 et seq.

4 Journal of Laws, item 1247.

5 Journal of Laws, item 396.

6 Journal of Laws, item 437.

7 Until 1 July 2015 the exception from rules specified in Art. 66 § 2 and 3 of the CC was envisaged in Art. 72 par. 1 i item 4 of the Act of 29 July 2005 on Counteracting Drug Addiction (uniform text: Journal of Laws of 2012, item 124 as amended). In the light of Art. 72 par. 1 i 4 of the quoted Act, conditional discontinuation of proceedings could be applied in case of prohibited acts punished by deprivation of liberty not exceeding 5 years if it concerned

tioned amended Act of 27 September 2013 coming into force, conditional discontinuation of proceedings may be applied with regard to all misdemeanours punished by deprivation of liberty not exceeding five years (Art. 66 § 2 of the Criminal Code). Due to this, as an example thereof, it should be pointed out that since 1 July 2015 conditional discontinuation of proceedings may be applied with regard to offenders who committed theft (Art. 278 § 1 of the CC), qualified conversion of items (Art. 284 § 2 of the CC), damaged items belonging to another person (Art. 288 § 1 of the CC), or committed assault or caused injury treated for more than seven days (Art. 157 § 1 of the CC). In effect of the changes in force since 1 July 2015, conditional discontinuation of proceedings may also apply to offences "without a victim", punished by deprivation of liberty not exceeding five years[8], that is, for instance, to offenders who forged or redrafted or reedited a document (Art. 270 §1 of the CC). From the perspective of a possibility of using procedures applied in the model of a community court within the scope of conditional discontinuation of proceedings, the extended probation period a court may apply thereto should also be positively assessed. Before 1 July 2015, a maximum probation period in case of conditional discontinuation of proceedings amounted to two years. However, the content of Art. 67 § 1 of the CC was changed by the Amended Act of 20 February 2015. Pursuant to this provision under the amended reading thereof, conditional discontinuation of proceedings is effected for the probation period from one to three years. In effect of this change, since 1 July 2015 a maximum probation period in case of the above mentioned institution has been extended to three years. Rising an upper time limit of the probation period by a year corresponds to the extended scope of offences in Art. 66 of the CC where conditional discontinuation of proceedings may be applied to[9]. This solution should be positively assessed because the application of conditional discontinuation of proceedings for a longer probation period allows to control the perpetrator's conduct for a longer period of time. An extended period of control over the perpetrator's conduct in most cases should, in turn, contribute to a positive course of the probation period, particularly if during this period the perpetrator is subject to probation by one of the entities listed in Art. 67 § 2 of the CC, i.e. a probation officer or a trustworthy person, association, institution or organization whose activities involve educational care, prevention of demoralization or help and assistance provided to offenders.

From the perspective of a possibility of using procedures applied in the model of a community court within the scope of conditional discontinuation of proceedings, a changed scope of measures that may be concurrently imposed on a perpetrator to fulfil a purpose of restorative justice should also be positively evaluated. Before 1 July 2015, applying conditional discontinuation of proceedings, a court could only im-

a person addicted from or using harmful psychoactive substances who was charged with an offence in connection with using drugs or psychotropic substances.

8 See: J. Majewski, Kodeks karny. Komentarz do zmian 2015, Warszawa 2015, p. 227.

9 *Ibidem,* p. 229.

pose on a perpetrator a duty to redress damage and exemplary damages[10] within the scope of these measures. Due to the fact that a duty to redress damage is a probation measure in its nature, pursuant to Art. 67 § 4 of the CC in connection with Art. 74 § 1 of the CC, imposing this obligation on a perpetrator, a court had to set a time limit for its performance. However, the amended Act of 20 February 2015 changed a subjective scope of the above mentioned obligation. According to the amended reading of Art. 67 § 3 of the CC, applying conditional discontinuation of proceedings, a court may impose on a perpetrator not only a duty to redress damage but also, as far as possible, a duty to compensate inflicted harm, or otherwise adjudicate exemplary damages instead of these duties. Since 1 July 2015, the introduction of such a solution has allowed a procedural settlement on conditional discontinuation of proceedings to contain elements aimed at compensating the victim not only for the financial loss ensuing from the committed offence but also for non-financial damage, i.e. harm[11]. The extended scope of harm suffered by the injured party, ensuing from the amended reading of Art. 67 § 3 of the CC, which may be compensated in criminal proceedings is of particular importance for conditional discontinuation of proceedings in case of offences in result of which the injured party suffers harm, e.g. in a case of a traffic accident (Art. 177 § 1 of the CC). Since 1 July 2015, imposing on a perpetrator a duty to redress damage or a duty to compensate the inflicted harm, the court cannot set a time limit during which the perpetrator should fulfil his or her obligations towards the victim. The nature of these obligations, which constitute *de lege lata* compensatory measures[12], was also changed by the above mentioned amended Act of 20 February 2015. Thus the above mentioned legal nature of these duties now excludes the application of the provision of Art. 74 § 1 of the CC the legislator refers to in Art. 67 § 4 of the CC while these obligations are adjudicated. Inadmissibility of setting a time limit during which a perpetrator should redress damage or compensate the inflicted harm adjudicated pursuant to Art. 67 § 3 of the CC means that these duties are enforceable immediately after the judgment becomes valid and binding (*argumentum ex* Art. 9 § 2 of the Criminal Executive Code). Since then the injured party may already demand the perpetrator to perform obligations of a compensatory nature he or she has been imposed on. Therefore, such a solution may undoubtedly favour a faster pace of obtaining financial compensation for the harm suffered by the injured party in effect of the committed offence.

From the perspective of a possibility of using procedures applied in the model of a community court within the scope of conditional discontinuation of proceedings,

10 More about issues connected with adjudicating exemplary damages in case of conditional discontinuation of criminal proceedings in: P. Gensikowski, Problematyka nawiązki jako środka towarzyszącego warunkowemu umorzeniu postępowania karnego, "Probacja" 2012, No. 1, p. 133 et seq.

11 The same J. Lachowski, (in:) M. Królikowski, R. Zawłocki (ed.), Kodeks karny. Część ogólna. Tom. II, Warszawa 2015, p. 351.

12 The same: A. Zoll, Środki związane z poddaniem sprawcy próbie i zamiana kary, (in:) W. Wróbel (ed.), Nowelizacja prawa karnego 2015. Komentarz, Kraków 2015, p. 433; J. Majewski, Kodeks karny…, *op. cit.,* p. 229.

changed bases allowing the initiation of proceedings should also be positively evaluated. Similar to American courts operating within the model of a community court, in case of conditional discontinuation of proceedings, the fulfilment of duties imposed on the perpetrator or implementation of other measures adjudicated towards him or her are also subject to control[13]. During the probation period, the perpetrator's conduct is subject to control by persons listed in Art. 67 § 2 of the CC as well as by the court. In the latter case, it involves a possibility of initiating proceedings if the legal bases envisaged in Art. 68 § 1 of the CC, or in Art. 68 § 2 of the CC have been confirmed during executive proceedings. The amended Act of 20 February 2015 changed the second provision mentioned above by completing previously applied bases allowing to initiate proceedings that have been conditionally discontinued to include evasion of the fulfilment of compensatory measures or forfeiture imposed on the perpetrator. This change resulted from the separation of a duty to redress damage, a duty to compensate the inflicted harm, exemplary damages or forfeiture from the catalogue of penal measures and classifying them as separate instruments of a response to prohibited acts[14]. The solution introduced in Art. 68 § 2 of the CC by the above mentioned amended Act should be approved of because despite granting a new legal nature to the above mentioned measures, it allows courts to maintain control over the perpetrator's conduct during the probation period within the scope of the fulfilment of these measure.

The amended Act of 11 March 2016 changed the determination of a manner of performance of a duty to refrain from contacting the victim or other persons in a specific way, or approaching the victim or other persons envisaged in Art. 72 § 1 point 7 of the CC. This change involved adding to the provision of Art. 67 § 3 sentence 2 of the CC a reference to Art. 72 § 1a of the CC. This way, since 15 April 2016, imposing on a perpetrator a duty envisaged in Art. 72 § 1 point 7a of the CC, the court must establish a minimum distance the perpetrator is obliged to keep from protected persons[15]. The duty envisaged in Art. 72 § 1 point 7a of the CC, however, is not an instrument aimed at the implementation of restorative justice or an element of help or assistance provided to a perpetrator. That is why the above mentioned change within the scope of determining a manner of the performance of this duty by a perpetrator is not connected with increasing a possibility of using procedures applied in the model of a community court within the scope of conditional discontinuation of proceedings. The change in the regulation of the catalogue of other duties that can be imposed on a perpetrator within conditional discontinuation of proceedings should be assessed in a similar way. The amended Act of 20 February 2015 changed the reading of Art. 67 § 3 of the CC within the scope of probation duties envisaged in Art. 72 § 1

13 See: P. Gensikowski, Analiza…, *op. cit.,* p. 50.
14 The same: J. Majewski, Kodeks karny…, *op. cit.,* p. 236.
15 The same: V. Konarska-Wrzosek, (in:) V. Konarska-Wrzosek (ed.), Kodeks karny. Komentarz, Warszawa 2016, p. 406.

of the CC which may be applied in case of conditional discontinuation of proceedings. Nevertheless, the above quoted amendment was merely an adjustment to the new reading of Art. 72 § 1 of the CC. For this reason, it should be acknowledged that it did not matter from the perspective of increasing possibilities of using procedures applied in the model of a community court within the scope of conditional discontinuation of proceedings.

3. Conditional sentencing

In the system of Polish criminal law, procedures applied in the model of a community court may be used not only in conditional discontinuation of proceedings but also conditional sentencing. Bearing this in mind, changes concerning principles of probation duties imposed on a perpetrator that may be applied towards him or her due to conditional sentencing should be approved of. In the light of the reading of Art. 72 § 1 of the CC binding until 1 July 2015, probation duties accompanying a conditional suspension of a sentence could be imposed electively, at the court's discretion. At the same time, the content of this provision lacked a decision determining a number of probation duties that could be imposed on a perpetrator. The above mentioned principles of imposing probation duties on a perpetrator have been changed as of 1 July 2015. In the light of Art. 72 § 1 of the CC, *in principio* in the reading enacted by the amended Act of 20 February 2015, suspending a sentence, the court shall oblige a convicted offender to perform specified duties whereas adjudicating a penal measure, the court may oblige a convicted offender to perform such duties. The above described change of the principle of imposing probation duties was connected with the introduction of a decision determining a minimum number of duties that may be imposed on a perpetrator during the probation period. In the light of Art. 72 § 1 of the CC *in fine*, in the reading enacted by the above mentioned amended Act of 20 February 2015, a conditional suspension of a sentence implies that at least one duty shall be imposed. Solutions changing principles of imposing probation duties within conditional sentencing deserve positive assessment. The introduction of these changes supports a thesis according to which conditional suspension of a sentence is connected with specified discomfort suffered by a perpetrator, thanks to which it is not identified with the remission of a penalty[16]. Introduction of the assessed solution into Art. 72 § 1 of the CC may, however, mostly contribute to

16 The same: V. Konarska-Wrzosek, Kodeks karny…, *op. cit.,* p. 422. It results from the reasoning to the governmental draft of the Act which became the basis of the amended Act of the Criminal Code of 20 February 2015 that the reason for the introduction of discussed solutions was replacing "pure" probation by the structure which will always contain some concrete and burdensome discomfort suffered by a perpetrator from the moment the judgment becomes valid. See: Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, Druk nr 2393 cz. 1, p. 16.

the reinstitution of conditional sentencing having a nature of a probation measure[17]. A new reading of this provision is indeed a way of increasing a number of sentences where deprivation of liberty which has been conditionally suspended will be accompanied by probation duties, including duties aimed at the implementation of restorative justice known in the model of a community court, or duties aimed at helping the perpetrator. Such a structure of conditional sentencing, distinct from conditional suspension of a sentence not combined with duties imposed on a perpetrator may, in turn, contribute to increased efficiency of this institution's functioning in the practice of the administration of justice.

From the perspective of a possibility of using procedures applied in the model of a community court within the scope of conditional sentencing, changed bases allowing to activate the suspended sentence should also be positively evaluated. Similar to American courts operating within the model of a community court, in case of conditional sentencing, the fulfilment of duties imposed on the perpetrator or implementation of other measures adjudicated towards him or her are also subject to control[18]. During the probation period, the perpetrator's conduct is subject to control by persons listed in Art. 73 § 1 of the CC as well as by the court. In the latter case, it involves a possibility of activating the suspended sentence if the legal bases envisaged in Art. 75 § 1 of the CC, Art. 75 § 1a of the CC, Art. 75 § 3 of the CC, or in Art. 75 § 2 of the CC have been confirmed during executive proceedings. The amended Act of 20 February 2015 changed the last provision mentioned above by completing previously known bases allowing to activate the suspended sentence to include evasion of the fulfilment of compensatory measures or forfeiture imposed on the perpetrator. This change resulted from the separation of a duty to redress damage, a duty to compensate inflicted harm, exemplary damages or forfeiture from the catalogue of penal measures and classifying them as separate instruments of response to prohibited acts[19]. The solution introduced in Art. 75 § 2 of the CC by the above mentioned amended Act should be approved of because despite granting a new legal nature to the above mentioned measures, it allows courts to maintain control over the perpetrator's conduct during the probation period within the scope of the fulfilment of these measure.

From the perspective of a possibility of using procedures applied in the model of a community court within the scope of conditional sentencing, a narrowed category of wrongdoers against whom the above mentioned institution may be applied should

17 The same: P. Gensikowski, Obowiązki probacyjne związane z poddaniem sprawcy próbie w świetle najnowszych zmian kodeksu karnego, (in:) A. Adamski, M. Berent, M. Leciak (ed.), Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej, Warszawa 2016, p. 247; A. Zoll, (in:) W. Wróbel, A. Zoll (ed.), Kodeks karny. Część ogólna, T. I, Warszawa 2016, p. 319.

18 See: P. Gensikowski, Analiza…, *op. cit.,* p. 55-56.

19 The same: J. Majewski, Kodeks karny…, *op. cit.,* p. 257-258.

be disapproved of[20]. Before 1 July 2015 the subjective scope of this institution referred to perpetrators who were sentenced to two years of deprivation of liberty, restriction of liberty, or a fine. The amended Act of 20 February 2015 changed the reading of Art. 69 § 1 of the CC, in effect of which conditional sentencing *de lege lata* may indeed be applied solely towards wrongdoers who were sentenced to deprivation of liberty not exceeding a year if they were not convicted of an offence when committing the act[21]. A narrowed subjective scope of conditional sentencing also corresponded to a shortened probation period the court may apply it for[22]. Until 1 July 2015 the probation period amounted from two to five years in case of conditional suspension of deprivation of liberty, whilst in case of juvenile offenders or perpetrators of offences committed under conditions specified in Art. 64 § 2 of the CC, this period amounted from three to five years. The amended Act of 20 February 2015 changed the provision of Art. 70 of the CC, in effect of which the probation period amounts from one to three years in case of conditional suspension of deprivation of liberty, whilst in case of juvenile offenders or perpetrators of offences committed with the use violence harming a person they reside with, this period amounts from two to five years[23]. The introduced solution does not foster increasing possibilities of implementation of procedures used in the model of a community court. A shortened probation period in conditional suspension of sentence indeed means a shorter time of control over the perpetrator's conduct by the entities listed in Art. 73 § 1 of the CC as well as by the court. A purpose of this control is to counteract reoffending. From this perspective, we cannot exclude that a shortened time of control over the perpetrator may, in some cases, impede satisfaction of the above mentioned objective[24].

Changes of the regulation concerning a way of performing probation duties by a perpetrator did not matter for increasing possibilities of implementation of procedures used in the model of a community court within the scope of conditional sentencing. In this regard, the amended Act of 20 February 2015 changed the content

20 In the context of the discussed limited scope of application of conditional sentencing, the following opinion expressed in the doctrine deserves attention. According to it, a solution introduced in Art. 69 § 1 of the CC may result in an increased number of adjudicated absolute deprivation of liberty. See: A. Zoll, Regulacja warunkowego zawieszenia wykonania kary pozbawienia wolności w ustawie z 20 lutego 2015 r., (in:) M. Bojarski, J. Brzezińska, K. Łucarz (ed.), Problemy współczesnego prawa karnego i polityki kryminalnej. Księga jubileuszowa Profesor Zofii Sienkiewicz, Wrocław 2015, p. 412.

21 The exception from these principles was envisaged in Art. 60 § 5 of the CC, according to which in situations specified in Art. 60 § 3 of the CC, Art. 60 § 4 of the CC, conditional sentencing may also apply to perpetrators sentenced by the court to deprivation of liberty up to 5 years. The same: V. Konarska-Wrzosek, Ustawowe przesłanki stosowania warunkowego zawieszenia wykonania kary po nowelizacji kodeksu karnego, (in:) A. Adamski, M. Berent, M. Leciak (ed.), Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej, Warszawa 2016, p. 168; J. Lachowski, Kodeks karny…, *op. cit.*, p. 369; A. Zoll, Kodeks karny…, *op. cit.*, p. 303.

22 The same: J. Majewski, Kodeks karny…, *op. cit.*, p. 243.

23 Only in case of conditional suspension of deprivation of liberty under conditions specified in Art. 60 § 5 of the CC, the probation period may amount to 10 years.

24 Yet, shortened probation period in case of conditional sentencing was also positively assessed by the doctrine. See: J. Skupiński, Zalety i wady instytucji warunkowego zawieszenia wykonania kary po nowelizacji kodeksu karnego, (in:) A. Adamski, M. Berent, M. Leciak (ed.), Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej, Warszawa 2016, p. 186.

of Art. 72 § 1a of the CC, according to which imposing a duty listed in § 1 point 7a, the court establishes a minimum distance the perpetrator is obliged to keep from protected persons. What is more, the above mentioned Act added the provision of Art. 72 § 1b of the CC, according to which imposing on a perpetrator who committed an offence with the use of violence or unlawful threat against the closest person the obligation listed in § 1 point 7b, the court establishes how the convicted offender shall contact the victim. The first above quoted change is related to the merits while the second one is merely editorial[25]. Obligations envisaged in Art. 72 § 1 point 7a of the CC and in Art. 72 § 1 point 7b of the CC are not instruments aimed at the implementation of restorative justice or elements aimed at helping the perpetrator. For this reason, the above quoted changes, which are to determine how these obligations should be performed by a perpetrator, are not connected with increasing possibilities of implementation of procedures used in the model of a community court within the scope of conditional sentencing. What is more, changes regulating the catalogue of probation duties that may be applied within this institution should be also similarly assessed. Most of these modifications do not ensue any substantial changes as they are formal and simplifying in nature. Nevertheless, moving a duty to participate in correctional-educational undertakings from the previous point 6a of Art. 72 § 1 of the CC to a newly created point 6b of this provision should be evaluated the same[26]. Furthermore, a new reading of Art. 72 § 1 point 8 of the CC referring to a possibility of imposing on a perpetrator a duty not listed in the catalogue specified in Art. 72 § 1 point 1-7b of the CC and replacing the words "if it may prevent" from this provision by the expression "which may prevent"[27] should be evaluated in a similar way. Moreover, a formal meaning had to be given to the amended content of Art. 72 § 1 point 6a of the CC, according to which a perpetrator can be obliged to undertake therapy with his or her consent, in particular psychotherapy or psycho-education. Nevertheless, the above solution is indeed not *novum* in comparison to the legal status in force before 1 July 2015, where pursuant to Art. 72 § 1 point 6 of the CC *in fine*, the court could also oblige a convicted offender to undertake therapy, which also required his or her consent due to the previous content of Art. 74 § 1 of the CC[28]. Furthermore, elimination of a possibility of obliging a convicted offender to undertake treatment from the catalogue of probation duties did not matter for the changed scope of possibilities of using of procedures used in the model of a community court within the scope of conditional sentencing, which ensues from the annulment of previous expressions used in point 6 of Art. 72 § 1 of the CC "to undertake treatment, in particular detoxification or rehabilitation". However, the introduction of this solution does not mean that the court is deprived of an effective instrument of impacting perpetra-

25 See: J. Majewski, Kodeks karny…, *op. cit.*, p. 251.
26 See: P. Gensikowski, Obowiązki probacyjne…, *op. cit.*, p. 254.
27 *Ibidem.*
28 *Ibidem.*

tors who committed an offence due to their addiction, or who may commit such an act during the probation period. The amended Act of 20 February 2015 replaced the expression "to undertake treatment, in particular detoxification or rehabilitation" in Art. 72 § 1 point 6 of the CC with the expression "to undertake addiction therapy".

4. Conclusion

The changes introduced into the criminal law in 2015-2016 within the scope of the regulation of the institution of conditional discontinuation of proceedings may only partly contribute to its increased use within procedures applied in the model of a community court. From this perspective, the extended scope of prohibited acts the institution of conditional discontinuation of proceedings may be applied to as well as the extended length of the probation period the court may apply thereto should be approved of. The changes introduced with regard to measures aimed at the implementation of restorative justice which may be imposed on a perpetrator when proceedings were conditionally discontinued as well as changes in legal bases allowing to activate conditionally discontinued proceedings deserve a similar assessment. On the other hand, changes determining how a perpetrator should fulfil this obligation as well as changes regulating the catalogue of other duties that may be imposed on him or her within this institution do not matter for increasing possibilities of using procedures applied in the model of a community court within the scope of conditional discontinuation of proceedings.

The changes introduced into the criminal law in 2015-2016 within the scope of the regulation of the institution of conditional sentencing may also only partly contribute to its increased use within procedures applied in the model of a community court. From this perspective, changed principles of imposing probation duties on a perpetrator which may be applied towards him or her in connection with conditional sentencing as well as changed legal bases allowing to activate the suspended sentence should definitely be approved of. From this point of view, however, a narrowed category of wrongdoers against whom conditional sentencing may be applied should be assessed differently. Finally, changes of regulations concerning a manner of performance of probation duties accompanying conditional sentencing as well as changes in the regulated catalogue of these duties did not matter for increasing possibilities of implementing procedures known in the model of a community court within the scope of conditional sentencing.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.12

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Admission of a Community Representative to Court Proceedings to Article 90 of the Amended Code of Criminal Procedure of 10 June 2016

Abstract: In June this year, Polish Sejm passed a law amending Article 90 of the Code of Criminal Procedure. This provision regulates the institution of the so called community representative (similar to *amicus curiae*) in a Polish criminal trial. A purpose of the above amendments is to facilitate participation of a community representative in the proceedings. Adopted amendments change the procedural mechanism of admitting a community representative to the proceedings, which is conditioned on consent thereto of at least one party to litigation.
Keywords: criminal procedure, community representative, admission requirements, non-governmental organization

1. Introduction

A community representative is a participant of a criminal trial whose role therein is a specific manifestation of society's participation in criminal proceedings and, at the same time, fulfilment of the principle of cooperation between society and institutions to prosecute crimes[1]. A community representative was introduced to the system of criminal procedural law when the Act of 14 April 1969 – the Code of Criminal Procedure[2], came into force. Provisions regulating this institution were contained in four Articles (Art. 81-84) in Chapter 10. Due to social and economic transformations in Poland in the 1990s, when works were launched on a new Act of Criminal Procedure, this institution was not envisaged in the governmental draft of 1995[3]. Nev-

1 S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, Warszawa 2016, p. 244.
2 Journal of Laws No. 13, item 96 as amended.
3 See: Rządowy projekt ustawy – Kodeks postępowania karnego (druk nr 1276 z 18 sierpnia 1995 r.), http://orka.sejm.gov.pl/proc2.nsf/opisy/1276.htm.

ertheless, during legislative works, it was eventually included in Chapter 10 of the new Code of Criminal Procedure enacted in 1997, embracing altogether two Articles (Art. 90-91)[4].

Despite insignificant practical importance of this institution, a community representative has arisen numerous controversies from the very beginning of its functioning. For nearly three decades, representatives of science have embraced both its supporters and opponents[5]. Overwhelming majority of authors found this institution to be dead and ostensible[6]. Keen interest in this specific form of social participation in a criminal trial generated a considerable amount of publications devoted to this issue[7]. Despite a hectic nature of works of the Polish legislator in nearly every political climate, the institution of a community representative has so far eluded numerous amendments to the Code of Criminal Procedure. Only on 10 June 2016, passing another (over one hundredth) amendment to the Code of Criminal Procedure, the Sejm changed Art. 90 of the CCP – one of the two provisions regulating the discussed institution[8].

The above mentioned amendment extended the Article by several new paragraphs (§ 4 – § 6) and modified three previous ones (§ 1 – § 3). Compared to the previous reading of Art. 90 of the CCP, prerequisites and procedural mechanism admitting a community representative to take part in criminal proceedings have been newly formulated. In the light of these provisions, newly formulated prerequisites thereof include: a) an authorized entity to act as a community representative – Art. 90 § 1 of the CCP, where the word representative has been repealed from the previous reading; b) protection of individual interest, here the adjective important that was referring to this interest has been deleted – § 1; c) time limit to designate a community

4 Journal of Laws No. 89, item 555 and uniform text: Journal of Laws of 2016, item 1749.

5 The following authors approved of this institution, yet not without some reservations: M. Siewierski, Przedstawiciel społeczny w nowym kodeksie postępowania karnego, "Palestra" 1969, No. 9, p. 5 et seq.; A. Murzynowski, Udział przedstawiciela społecznego w procesie karnym, NP 1971, No. 7/8, p. 1021; whilst critical opinion thereon was expressed by: M. Lipczyńska, Przedstawiciel społeczny w procesie karnym, NP 1972, No. 4, p. 562 and literature cited therein; W. Daszkiewicz, Przedstawiciel społeczny w procesie karnym, Warszawa 1976, p. 168.

6 Comp. e.g., W. Daszkiewicz, Przedstawiciel społeczny w procesie karnym, "Palestra" 1985, No. 11, p. 59, 73-74; W. Daszkiewicz, Społeczni uczestnicy procesu karnego, "Państwo i Prawo" 1990, No. 5, p. 71 et seq.; J. Grajewski, (in:) J. Grajewski, L.K. Paprzycki, Kodeks postępowania karnego z komentarzem, Sopot 2000, p. 160; P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Tom 1. Komentarz do artykułów 1-296, Warszawa 1999, p. 414 and literature cited therein; R. Kmiecik, E. Skrętowicz, Proces karny. Część ogólna, Kraków 1996, p. 172; K. Marszał, Proces karny, Katowice 1998, p. 169-170; S. Waltoś, Proces karny. Zarys systemu, Warszawa 1998, p. 197 (however, already in the issue of his handbook of 2001, the author draws attention to certain "animation" of this institution after changes of the CCP in 1997); S. Waltoś, P. Hofmański, Proces…, *op. cit.*, p. 199; different opinion: M. Tomkiewicz, Udział przedstawiciela społecznego w procesie karnym, "Prokuratura i Prawo" 2012, No. 7/8, p. 120.

7 Comp. publications cited in the footnote 2 and 3, and, i.a., A. Wierciński, Przedstawiciel społeczny w polskim procesie karnym, Poznań 1978; W. Sieracki, Uwagi na tle wytycznych wymiaru sprawiedliwości i praktyki sądowej w sprawie udziału przedstawiciela społecznego w postępowaniu przed sądami wojskowymi, WPP 1980, No. 4; J. Lisiewicz, S. Przyjemski, Udział czynnika społecznego w wojskowym prawie karnym na tle uchwały Izby Wojskowej Sądu Najwyższego, WPP 1980, No. 4.

8 See Art. 1 point 1 of the Act of 10 June 2016 on the Amendment of the Act – Code of Criminal Procedure, Act on the Profession of a Physician and Dentist, and Act on the Rights of Patients and Patient Ombudsman (Journal of Laws, item 1070).

representative to entire "litigation" – § 1 *in pricipio*; d) the introduction of an explicit requirement of a formal submission, which should contain confirmation of the existence of substantive prerequisites, designation of a representative of a given social organization, and an official copy of articles of association or other document regulating operation of this organization – § 2; e) a consent expressed by at least one party to litigation to admit a statutory representative to participate in these proceedings and the mechanism of such consent's withdrawal – Art. 90 § 3; f) the introduction of prerequisites admitting several community representatives to proceedings – Art. 90 § 6. Due to the introduced requirement of consent of the parties to admit community representatives to proceedings, if the consent is withdrawn, a mechanism of court control of the envisaged declarations of will within this scope has been introduced – Art. 90 § 3, sentence 3 of the CCP and Art. 90 § 6, sentence 5 of the CCP. Further comments presented below attempt to preliminarily analyse a new perspective of prerequisites admitting a community representative to participate in a trial.

2. Social organisations

A social organization is authorized to take part in litigation as a community representative fulfilling a role of the Commissioner for Public Interest. Such a legal concept of the discussed procedural entity has already been commonly adopted in the current literature[9]. Before the amendment, the reading thereof contained the expression according to which a representative of a social organization declared his or her participation in proceedings. However, it did not imply at all that a community representative was a social organization but merely its representative. A social organization exercised its right through a person of a community representative. The amendment of the above issue not longer evokes a sliver of doubt. At the same time, the amendment does not introduce any changes into the notion of a social organization leaving a definition of this concept to the doctrine of criminal procedural law. Moreover, it rightly does not return to the solution binding under the Code of Criminal Procedure of 1969, i.e. a list of social organizations included therein authorized to act as a community representative[10]. A substantive criterion qualifying a social or-

9 M. Cieślak, Polska procedura karna. Podstawowe założenia teoretyczne, Kraków 2011, s. 35; S. Waltoś, P. Hofmański, Proces…, *op. cit.*, s. 198 i n.; T. Grzegorczyk, (in:) T. Grzegorczyk, J. Tylman, Polskie postępowanie karne, Warszawa 2014, p. 372; G. Artymiak, M. Klejnowska, Cz.P. Kłak, M. Rogalski, Z. Sobolewski, K. Sowiński, Proces. Część ogólna, Warszawa 2012, p. 161; W. Daszkiewicz, Prawo karne procesowe. Zagadnienia ogólne, tom I, Bydgoszcz 2000, p. 228; Z. Gostyński, (in:) J. Bratoszewski, Z. Gostyński, L. Gardocki, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, Kodeks postępowania karnego. Komentarz, tom I, Warszawa, 2003, p. 622; K.T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, Kodeks postępowania karnego. Komentarz, Warszawa 2014, p. 207; J. Grajewski, L.K. Paprzycki, S. Steinborn, Kodeks postepowania karnego. Komentarz, tom I, Warszawa 2013, p. 332; T. Grzegorczyk, Kodeks postępowania karnego wraz z komentarzem do ustawy o świadku koronnym, Warszawa 2014, p. 395; P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks…, *op. cit.*, p. 608; Z. Świda, J. Skorupka, R. Ponikowski, W. Posnow, Postępowanie karne. Część ogólna, Warszawa 2012, p. 222.

10 More: K. Woźniewski, (in:) C. Kulesza (ed.), System Prawa Karnego Procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego, Warszawa 2016, p. 1258. As rightly noticed by L.K. Paprzycki, these organizations

ganization as a legal entity is sufficient to apply the analyzed procedural institution in practice. In the meaning of the provision of Art. 90 § 1 of the CCP, this criterion are organization's objectives, i.e. protection of public or private interest, in particular of human rights and freedoms. Thus a positive answer to the question whether the articles of association of a social organization contain a statement that the objective of this organization is protection of public or private interest, in particular of human rights and freedoms, decides about subjective admissibility of a given social organization to participate in a trial. In practice, from the perspective of a legal nature of a given legal entity, such applicants are most frequently associations (including collective copyright licensing organizations acting under provisions of the Act of 7 April 1989 – the Law on Associations[11], and the Act of 4 February 1994 on Copyright and Related Rights[12]), religious organizations, trade unions, social-professional farmers organizations, employers organizations, sports organizations, and professional self-governments and foundations if only their articles of association embrace tasks connected with the protection of protection of public or private interest, in particular of human rights and freedoms[13].

3. Protection of private interest

Another important change ensuing from the amendment is connected with a newly specified nature of the prerequisite of private interest protection. Removing the adjective "important", the legislator lowered a requirement concerning the importance of the need to protect private interest. Therefore, it can be assumed *de lege lata* that private interest mentioned in § 1 Art. 90 of the CCP does not have to belong to the category of interests characterized by great importance, significance, or relevance to the litigants taking part in concrete litigation. A removal of the word "important" from the analysed provision eventually implies that examining the motion to admit a community representative, the court is deprived of the right to evaluate whether private interest *in conreto* is significant enough to admit a community representative to a trial. Thus it would seem that in practice a social organization will simply point out a public or private interest covered by their statutory tasks, which should decide about admitting them to proceedings. However, the analysis of the content of Art. 90 § 5 of the CCP regulating the grounds of refusal to admit a representative of a social organization to take part in the case clearly entrusts the court with both the right and duty to examine two issues, i.e., firstly, whether a public or private interest declared

had political profile typical of PRL – L.K. Paprzycki, (in:) J. Grajewski, L.K. Paprzycki, S. Steinborn, Kodeks…, *op. cit.*, p. 333.

11 Uniform text: Journal of Laws of 2015, item 1393 as amended.

12 Uniform text: Journal of Laws of 2016, item 666 as amended.

13 In practice, on the other hand, a possibility of participation of such special entities as non-profit commercial law companies which, nevertheless, enjoy a status of public benefit organizations, arises doubts – see: K. Woźniewski, (in:) C. Kulesza (ed.), System…, *op. cit.*, p. 1267 and literature cited therein.

in the motion is covered by the applicant organization's statutory tasks and, secondly, whether declared interests are connected with the case being heard. The second criterion deserves special attention due to its substantive nature. Insofar as the provision of § 1 cancels the criterion of importance of a private interest, § 4 replaces it, as it appears, with the criterion of a relation existing between protected public or private interest and the case being heard. Thus a social organization submitting a motion to admit a community representative to a trial will be procedurally burdened with a duty to confirm the existence of the above relation on pain of refusal to admit them to take part in a trial.

4. Time limit to submit a community representative

Another change introduced by the discussed amendment is connected with a different determination of a procedural moment when a motion on the participation of a community representative in the case may be submitted. In the previous legal system, a maximum procedural time limit to submit the motion was specified very precisely, i.e. by the indication of the stage of litigation, that is initiation of proceedings. A motion submitted afterwards was null and void. Due to the fact that the above expression has been repealed, the question about a current time limit to submit the motion arises. The expression "during litigation", which was retained without determined additional maximum procedural time limit to pursue a procedural action of submitting a litigation friend, theoretically means that such a motion may be submitted anytime during litigation. Starting from its initiation, when the indictment is brought before a first instance court, or an appeal activating appeal proceedings as well as in litigations pursued due to extraordinary appeal, or even in proceedings after the judgment became final and valid – in each case when procedural decisions are taken during a hearing and, exceptionally, in sessions[14].

On the other hand, we can attempt to indicate a final moment when such a motion would be admissible due to its practical procedural sense once the legislator resigned from an explicit legislative barrier for such motions. It appears that a final jurisdictional moment, at least in first instance and appeal proceedings, to submit such a motion should be activities connected with closing litigation because after these actions the phase of final speeches occurs during which an admitted community representative is entitled to speak[15].

The reasoning to the draft does not provide *ratio legis* for such a solution but it may be supposed that it again implied the encouragement for social organizations to

14 More: K. Woźniewski, (in:) C. Kulesza (red.), System…, *op. cit.*, p. 1284.

15 The discussed amendment removed from Art. 406 of the CCP the issue of a community representative being allowed to speak depending on the court's decision, i.e. the court decided whether there was a need for that at its discretion. Now, if a community representative has been admitted to a trial, he or she has the absolute right to speak after litigants and their representatives made their statements.

undertake such activities. Apparently, it is connected with the fact that many social organizations must be aware of a pending or due trial of a concrete person to take a decision of acting therein as a community representative. A source of such information are usually members of a given social organization counting on its help in just this form. Now, social organizations more and more often find out about criminal trials from the media and join the proceedings perceiving the need to protect a public or private interest to gain publicity or promote their public image. Obviously, a social organization may submit a motion to be admitted to participate in a trial already during preparatory proceedings; then a relevant body pursing such proceedings encloses the motion to the case files and sends it to the court together with the indictment – analogous to Art. 69 § 1 of the CCP[16].

Despite considerable liberalization of the formal requirement of a time limit to submit a motion by a social organization, such a solution may appear problematic in practice due to the advancement of litigation. Although the sequence of procedural actions making up litigation somewhat designates natural time limits to submit motions about admission of a litigation friend, i.e. bringing the indictment or appeal and closing litigation, it seems that only the practice of applying this provision will more accurately specify a procedural time limit that is so widely determined now.

5. Elements of the submission

Another change introduced by the discussed amendment considers formal issues connected with the admission of a community representative to a trial. More precise and systematized description of necessary formal elements of pleadings that are a declaration of will of a social organization within this scope should be approved of because the previous provision of § 2 Art. 90 of the CCP merely set forth that a social organization designated its representative in the submission whereas the representative submitted a written power of attorney with the court. First of all, the current reading of this provision imposes on the applicant an obligation to indicate a public or private interest covered by their statutory tasks, which should be understood as an obligation to confirm the above. A proper fulfilment of this duty will allow to assess its legitimacy. Secondly, the Act imposes an obligation to enclose a formal copy the organization's articles of association or another document regulating its activity (e.g. resolutions of executive or decision making bodies of social organizations specifying their objectives and tasks). In practice, such documents were submitted but this requirement should have been evaluated as a procedural burden of proof rather than a legal obligation. Whereas the third sentence of the discussed paragraph is an effect of the change discussed in point 2 herein.

16 The same under the CCP of 1969. A. Wierciński, Przedstawiciel…, *op. cit.*, p. 65.

6. Required consent of litigants

An entirely new and very specific procedural solution is the required consent of at least one litigant (Art. 90 § 3, first sentence of the CCP) introduced to a decision making process on the admission of a community representative. The reasoning to the drafted amendment pointed out the necessity to abolish court's arbitrariness with regard to the admission of a community representative to a trial[17] while the consent of at least one litigant is just to be a measure to achieve this purpose. In effect of such a consent, the court is obliged to admit a community representative to a trial[18].

A procedural declaration of will made by a party on giving or refusing to give a consent is, however, of a relatively imperative nature. It is connected with the fact that the Act entrusts the court with the right to admit a community representative despite a lack of consent given by the parties provided it is justified by the interest of the administration of justice (§ 4). The above solution should be considered accurate[19]. What is more, within the framework of the institution of consent of litigants to admit a community representative, the provision of Art. 90 § 3 also regulates the issue of withdrawal of the given consent. Although theoretically correct, this solution evokes mixed feelings. It cannot be excluded that a possibility of making a statement on a withdrawal of the consent by the party will be treated as a peculiar type of a sanction in relation to a community representative who does not meet the party's "expectations" with regard to supporting it. From the perspective of litigants, community representatives can be divided into those designated in effect of the agreement or arrangement with a given litigant, and those not connected with a given litigant at all. In the second case, a possibility of both giving and withdrawing a consent by the parties should not arise major doubts but the issue becomes complicated when a community representative "arranged" by the party has been admitted. A possibility of withdrawing a consent by the party that opposed the community representative who was submitted by the other party and with their consent does not seem to be a fortunate solution, particularly if making a statement on a withdrawal of the consent may result in the exclusion of the representative from participating in the case. Although the content of the provision of Art. 90 § 3, sentence 2, appears not to exclude such a possibility, the court's right – due to the interest of the administration of justice – to refuse to exclude a community representative against whom a statement on the withdrawal of a consent has been made, is a protection against the abuse of this right by the parties.

17 See: Uzasadnienie do projektu ustawy, druk nr 451, p. 10, (http://orka.sejm.gov.pl/Druki8ka.nsf/0/DBD9E9635C-718980C1257FA2002E7085/%24File/451.pdf).

18 *Ibidem*.

19 In practice, after submitting a motion to admit a litigation friend by a social organization, the court is obliged to inform the parties about it and ask them whether they agree to this. Yet, it does not seem that the consent was a panacea for the court decision's arbitrariness with regard to admitting a litigation friend.

7. A larger number (plurality) of community representatives

Under Art. 90 of the CCP before the discussed amendment, the doctrine debated on the issue of plurality of community representatives in a concrete trial. It may happen that more than one organization decides it is desirable or necessary to declare their participation in the case as a community representative. Neither the CCP of 1969 and nor the binding procedure Act regulated this issues until the discussed amendment. Nevertheless, some proposals to resolve this problem did appear in the literature[20]. Thus amending the provision of Art. 90 of the CCP, the legislator added a new paragraph number six regulating this issue. The implemented solution is analogous to the resolution of the issue of plurality of auxiliary prosecutors adopted in Art. 56 § 1 of the CCP, which is based on the court's power to determine their number taking into account the need to secure a regular course of proceedings.

Hence, pursuant to § 6 of Art. 90 of the CCP, if at least several social organizations submit a motion to admit their community representatives, exercising its right to limit their number, the court then requests the prosecutor[21] and defendant to designate not more than two representatives of social organizations who could participate in the case. If more than one defendant or one prosecutor acts in the case, each can designate one representative whilst failure to do so effects in a withdrawal of consent to his or her participation in the case. If there is only one active party to the proceedings (e.g. auxiliary prosecutor and one passive party), a number of community representatives may be maximum four, two for each litigant. If there are numerous parties to the proceedings, each prosecutor and every defendant is entitled to designate one litigation friend whilst the problem of the right of a social organization to participate will emerge if more than several subjects turn up with one of the parties while the court arbitrarily limits their number inevitably excluding some of them from participating in the trial.

Similar to auxiliary prosecutor, the criterion of limiting a number of community representatives implies the need to secure regularity of proceedings. A regular course of litigation can be understood as proceedings conduced in accordance to the principle of expeditious and concentrated trial so that all circumstances of the case are explained and clarified on the basis of the evidence allowing to fulfil postulates ensuing from the principle of accurate criminal response. The above meaning of a regular course of proceedings was proposed in the literature with reference to Art. 56 § 1 of the CCP, which is using just this criterion with regard to limiting a number of auxiliary prosecutors[22]. It seems that in principle it remains still adequate in the context

20 More about it: K. Woźniewski, (in:) C. Kulesza (ed.), System…, *op. cit.*, p. 1277 et seq.

21 It obviously refers here solely to a subsidiary auxiliary prosecutor because it is hard to imagine that a public prosecutor would designate a community representative, similar to the consent given for the participation of a community representative under § 3 Art. 90 of the CCP.

22 See: K. Woźniewski, Prawidłowość czynności procesowych w polskim procesie karnym, Gdańsk 2010, p. 25 and literature cited therein.

of limiting a number of community representatives too since the legislator did not decide to introduce explicit additional criteria the court should follow when determining a number of community representatives. The legislator did not indicate more perceptible and tailored criteria only for the institution of a community representative, i.e. those connected with their role in litigation involving, most of all, the expression of social assessment of practically all factual and legal circumstances connected with the subject of a concrete criminal trial. The court is provided with a certain possibility within this scope by being entitled to decide about further participation of individual litigants' representatives despite failure to designate "their" community representative by the authorized party because regardless of the parties' opinion, the court may decide about further participation of individual representatives of social organizations if their participation is in the interest of the administration of justice (Art. 90 § 6, sentence 5 of the CCP).

It should be pointed out here that the parties' right to, first of all, give a consent to admit a specific community representative to take part in a trial and, secondly, designate their community representatives upon the court's request in case of multi-party litigation, must evoke repeated discussion about the legal nature of this procedural institution. The right to appoint somehow one's own community representative by the party may be indeed perceived as designation of a public defender or community prosecutor. We can only wish that the legislator had not intended to change a previously neutral position of a community representative into the one committed to one of the parties. If in practice the application of the provisions of Art. 90 § 3, sentence 1 and § 6, sentence 2 and 3 of the CCP, will take a direction contrary to the statutory function of a community representative while the court's right referring to community representatives will continue to be only slightly decisively used, it may imminently result in the transformation of concrete litigations into collective community disputes in criminal cases.

8. Conclusion

The institution of a community representative has remained beyond the legislator's interest to amend for decades as one of very few such institutions in criminal proceedings. The amendment of June 2016 is indeed the first one which so significantly changed its structure, which has been somehow marginalized in a criminal trial. With regard to other amendments limiting, among others, participation of lay judges in a criminal trial, it has become an important manifestation of the principle of community participation in these proceedings. A keynote thereof, which was strongly emphasized in relation to the amendment, was the extended possibility of community acting in proceedings as a community representative to be achieved by the abolition of formal barriers hampering their participation in litigation. It does not

appear, however, that the discussed solutions contributed to an increased degree of this "facilitated" participation. It is not relative automatism of admitting a community representative to litigation upon the consent given by at least one party that will decide about it but, perhaps, it will lead to a re-defined status of a community representative from an autonomous advocate of a public interest that is neutral to the parties to an advocate of a public interest that is somewhat a satellite of one litigant. We can only suppose here that probably an actual barrier to more frequent engagement of social organizations are rather insignificant "soft" rights of community representatives admitted to a trial, which are limited to participating in a hearing, presenting opinions, or making written statements (not amended Art. 91 of the CCP).

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.13

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Activities of Non-Governmental Organizations in Polish Courts that Do Not Include Involvement in Proceedings

Abstract: Non-Governmental Organisations in Poland show a wide interest in the justice system. Their actions are not limited to litigation. The paper outlines a typology of activities performed by NGOs in courts or closely related to courts other than taking part in court or executive proceedings. Two main types of actions are studied: monitoring and assistance provided to the clients of the justice system. Polish examples include monitoring performed with the use of observation and other methods of information gathering such as a comprehensive program of citizen court monitoring, in which since 2010 more than 2,000 observers took part voluntarily. In the field of legal aid, NGOs run a few hundred centres where legal advice is provided free of charge.
Keywords: non-governmental organizations, social organizations, transparency, court watchdogs, research, legal aid

Direct participation of non-governmental organizations in litigation is only one method of possible cooperation between them and the justice system. The article discusses types and examples of activities undertaken by social organizations in courts excluding their participation in the proceedings themselves. A source of information is both desk research and free-form interviews with the organizations' representatives. Non-governmental organizations is a collective term describing legal entities which do not belong to the sector of public finance and do not operate for profit. Their most common forms are associations and foundations. These are entities which have been appointed by private individuals to fulfil concrete statutory objectives. Their domain are charitable operations. Although they are non-profit organizations, they may carry out ancillary activity of a business profile. There are app. 100,000 associations and foundations registered in Poland. They mainly deal with sports and tourism, culture, education and charity operations. They also include organizations whose aim is to control and monitor authorities' operations, observe civil rights and freedoms and improve public administration's operation.

A non-governmental organization may be a party to litigation, e.g., it may bring a lawsuit on behalf of a natural person, join the proceedings as a litigation friend of one the parties thereto, or submit an opinion of a friend of the court (Latin *amicus curiae*). Such actions may be motivated by the willingness to help a vulnerable person or evoke some system change (strategic litigation)[1]. These organizations may also take part in the enforcement of criminal judgments: exercising probation of the convicted offender[2] or hiring him or her to perform unpaid controlled work for social purposes[3]. Since all activities pursued by these organizations in the system of justice cannot be discussed here, I will refer herein only to types and examples of activities carried out without the organizations' formal engagement in litigation.

1. Research of courts

A pursuit of research is one of the objectives of charitable operations mentioned in the Act of 24 April 2003 on Charitable and Voluntary Activity. Many organizations carry out research of the law and administration of justice. I will refer here only to examples of research concerning directly work performed by the courts. The organizations generally apply three methods of collecting data within this scope. The first one is observation, which is mainly applied with regard to monitoring work of the courts or concrete cases. The second is the analysis of court files and other official data. The third – research using personal sources: interviews or surveys whose respondents may be both practitioners of justice and its "users", that is litigants, attorneys, witnesses and other interested parties.

Monitoring is a term used by social organizations to describe a planned and systematized study of a selected fragment of social reality following the adopted scheme; at the same time, monitoring is an element of actions aimed at changing this reality without the use of violence[4]. A systematic controlling activity is called as "watchman" or watchdog activity (from the English word watchdog). Its purpose is most often to monitor the observance of the law as well as quality of work performed by the administration including courts in order to ensure better fulfilment of civil rights and interests. It happens that monitoring is particularly focused on the exercise of rights or interests of a specific group of entities (in principle the disabled, victims of domestic violence or children).

1 See: Ł. Bojarski, D. Pudzianowska, J. Jagura, Niedyskryminacja w praktyce sędziowskiej – projekty organizacji obywatelskich, "Krajowa Rada Sądownictwa" 2016, No. 3, p. 34 et seq.

2 The organization may be entrusted with probation in the following cases: conditionally suspended deprivation of liberty (under Art. 71 § 1 of the Criminal Code), parole (Art. 159 § 1 of the CC), conditional discontinuation of criminal proceedings (Art. 67 § 2 of the CC), if the perpetrator convicted of an offence committed due to alcohol or drug addiction has to undertake ambulatory treatment or rehabilitation in a health care rehabilitation centre (Art. 97 § 1 of the CC)

3 Under Art. 56 § 3 of the Executive Criminal Code.

4 M. Nowicki, Z. Fialova, Monitoring praw człowieka, Warszawa 2004, p. 13.

The most commonly used method of monitoring the administration of justice is observation. Observation of court hearings is a practical and organized fulfilment of the right to a public trial. It ensues both from the Polish Constitution (Art. 45) and the European Convention on Human Rights (Art. 6). It is further confirmed by the entries included in the Acts: on the Organizational Structure of Common Courts (Art. 42), Code of Civil Procedure (Art. 148) and Code of Criminal Procedure (Art. 355). A public nature of proceedings may imply the fulfilment of the constitutional principle of supreme power of a nation over the judiciary[5]. Transparency of proceedings is a manifestation of social control over the operations of procedural bodies to enhance their work[6].

However, the function of monitoring courts and litigation exceeds the objective of control. Ł. Bojarski lists eight reasons why social organizations send their observers to courts and court rooms:

1. to enhance transparency in the exercise of power (to judge);
2. to collect information and data on the selected subject;
3. to raise social awareness and evoke public debate on the selected subject;
4. to document court practice in comparison to the provisions of law;
5. to formulate proposals of changes in the practice and law;
6. to affect court culture;
7.to document possible violations of standards of a fair trial;
8. to guarantee a fair trial in a specific case[7].

Office for Democratic Institutions and Human Rights of ODIHR distinguishes three types of monitoring in its manual of trial monitoring: systemic, thematic and *ad hoc*[8]. Systemic monitoring is s the term used for a long-term, wide-ranging trial-monitoring programme aimed at assessing parts of the justice system in order to support the system of justice reform. Thematic monitoring focuses on an in-depth analysis of a specific area of the administration of justice. The last type involves monitoring of individual usually high-profile cases or a group of such cases, often connected with a specific event or scandal.

Nevertheless, further differentiation thereof should be introduced here, i.e. into monitoring of proceedings and monitoring of courts. The first one involves necessary tracking of the case from its beginning to end. A subject of the analysis is the case while a priority purpose of observation is the evaluation of the observance of law by courts and procedural bodies. As far as monitoring of courts is concerned, a sub-

5 W. Jasiński, Bezstronność sądu i jej gwarancje w polskim procesie karnym, Warszawa 2009, p. 375.

6 R.A. Stefański, (in:) J. Bratoszewski, Z. Gostyński, L. Gardocki, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, Kodeks postępowania karnego. T. 2. Komentarz, Warszawa 1998.

7 Ł. Bojarski, Obserwacja procesów sądowych – obserwacja ogólna – obserwacja specjalistyczna, http://www.inpris.pl/fi leadmin/user_upload/documents/Biblioteka_MWS/201_obserwacja_procesow-opis_metody_LB.doc (20.10.2016).

8 Trial Monitoring: A Reference Manual for Practitioners (Revised edition 2012), Organization for Security and Co-operation in Europe (OBWE), Warszawa 2012.

ject of the analysis may be individual sessions, court departments or entire courts. A comprehensive experience of the interested party with the court is at a centre of interest here, that is a manner of treatment, language comprehensibility, equal treatment – from a subjective perspective too – and a perceived possibility of exercising one's rights before the court in practice.

1.1. A court watch research method

A court watch method is specific due to its "unprofessional" civic nature, i.e. observers do not have to be lawyers while a formal part of the trial is not subject to evaluation. The first study similar to this method was conducted in Poland in 2004-2008 by Helsinki Foundation for Human Rights and was called "Monitoring of Commercial Courts in Poland – Courtwatch". Maria Ejchart and Adam Bodnar describe its assumptions in the following way: "[W]e visited all commercial courts in Poland observing court buildings, courtrooms and proceedings themselves as well as work performed by judges, attorneys and court staff. Thus we were not interested in concrete hearings, nor did we research substantive legitimacy of court judgments. We only observed how judges conduct hearings, how they organize their work, and how the court functions on everyday basis fulfilling its routine work. We were checking how individual courts and judges provide their clients with a possibility of exercising the right to a fair trial"[9].

Helsinki Foundation published a report on the last cycle of its monitoring in 2009. "The report on the implementation of the programme of Monitoring of Commercial Courts – Courtwatch" contains conclusions from observations carried out by 25 observers in 104 commercial divisions of district and regional courts. They concern both commercial procedure and problems of commercial divisions' functioning as well as technical problems encountered by the courts visited by the observers.

Insofar as Helsinki Foundation for Human Rights brought the court watch method to Poland, it was popularized by another organization. A year after the programme of court observation by volunteers of Helsinki Foundation was finished, Court Watch Poland Foundation launched their activity. According to its objectives, it was appointed to disseminate and popularize knowledge about the right to a public trial and attract interest of as many citizens as possible to social control of the judiciary.

Court Watch Poland Foundation does not control accuracy of court judgments. Its purpose is to reconstruct the perspective of the actual experience of an ordinary citizen who has found himself or herself in court for the first time and then changing the practice of courts in such a way as to build trust in the judiciary through contact with the court. The Foundation applies and improves a court watch method follow-

9 A. Bodnar, M. Ejchart, Raport z realizacji programu Monitoring sądów gospodarczych – Courtwatch, Warszawa 2009, p. 107.

ing the methodology of social sciences. Its observers are not professional lawyers. They take part in hearings as audience and fill in a form (observation sheet) containing questions about the course of hearing. They also fill in a form with questions about their interaction with the court building and court staff. Quantitative and qualitative data collected this way are annually analyzed and presented to the courts and public opinion.

During six years since it was established (2010), Court Watch Poland Foundation has collected over 35,000 observations from over 2200 volunteers. Although samples are not randomly but merely accidentally selected, the amount of data collected in over 280 common and administrative courts allows to draw far-reaching conclusions about the courts' functioning and problems which contribute to forging negative opinions on the Polish administration of justice. Each year it appears that half of the sessions participated by the observers commences unpunctually. In a few percent of observations volunteers noticed aggressive or impolite conduct of judges. These values do not change radically in time. On the other hand, an explicit change has been noticed in criminal divisions, where traditionally prosecutors had a wider access to a courtroom than other individuals. They entered the courtroom before being summoned and they stayed there during the breaks and after hearing, which, in the Foundation's opinion, could create an impression of the privileged position of the prosecution in a trial and undermine trust to court's impartiality. A percentage of observations in criminal divisions where the above occurred decreased from 22% in 2011 to 11% in 2016[10]. The change is even bigger in case of courts where the Foundation carried out regular and intensive monitoring. A percentage of alarming observations declined from 28% to 8%[11].

1.2. Examples of thematic monitoring

Studies conducted by social organizations very often focus on a specific type of cases selected due to the subject matter a given organization deals with. Authors of thematic monitoring use observation of entire trials as one of the methods. This is often supplemented by file reviews, interviews, analyses of judgments' reasoning and statistical data, including data received by the organization from the courts in the course of access to public information which have been specially processed for this purpose.

For instance, Mr Cat's Black Sheep Foundation in partnership with Wroclaw Association of Animals Protection EKOSTRAŻ implemented the project "Let them have their rights!" from October 2014 to March 2016. An important element thereof was monitoring of the judiciary within the scope of applying the provisions of the

10 B. Pilitowski, Wyniki obserwacji rozpraw i posiedzeń, (in:) B. Pilitowski, S. Burdziej (ed.), Obywatelski Monitoring Sądów 2015/2016, Toruń 2016, p. 50.

11 B. Pilitowski, S. Burdziej, Polskie sądy z perspektywy obywateli – podsumowanie pięciu lat programu „Obywatelski Monitoring Sądów", "Krajowa Rada Sądownictwa" 2015, No. 4, p. 23.

Act on Animal Rights' Protection. The study embraced 146 randomly selected district courts all over Poland. Requests for public information filed with the courts contained a demand to make publicly available all legally valid and binding judgments regarding offences and misdemeanours under the Act on Animal Rights' Protection which were passed in 2012-2014. Received judgments were analyzed with regard to selected categories including, among others, a legal classification of the act, the perpetrator's sex, or what animal the offence or settlement reached in the case concern[12]. What is more, the Foundation's observers took part in selected court hearings and sessions in cases involving offences against animals. Additionally, the Internet survey for representatives of organizations for animal protection and private individuals was carried out conceding their experiences connected with the operation of law enforcement agencies and common courts[13].

Positive Changes Foundation carried out monitoring of district courts within the territory of Silesia Province with regard to court judgments passed under Art. 207 of the Criminal Code (i.e. family violence or abuse) in 2012-2014. Monitoring was carried out in two directions: 1) district courts were sent requests for public information regarding a wide range of their work including violence against women; 2) the Foundation's volunteers took part in hearings as audience. The report was published on the basis of collected data[14]. Moreover, the Foundation publishes information about scheduled sessions in cases regarding Art. 207 of the CC conducted in the District Court in Bielsko-Biała on the Foundation's website, and observes selected cases. At the same time, Positive Changes Foundation gives legal advice to victims of violence and takes part in some cases as a community representative.

In order to study stereotypes about women in proceedings involving domestic violence, the Centre of Women Rights seated in Warsaw carried out research by analyzing judgments and their reasoning, observing hearings, interviewing and analyzing case files. The interviews were conducted with women who were victims of violence and sought justice in the court; court judgments and experts' opinions were also analyzed while the Centre's observers monitored court hearings within the territory of Mazovia Province. They took part in 123 hearings in the following district courts: in Warsaw, Grodzisk Mazowiecki, Pruszków, Piaseczno, Nowy Dwór Mazowiecki, Żyrardów, Skierniewicz, Węgrów, Garwolin, Otwock and Wołomin. The study commenced in 2012 while the report thereon was published in 2016[15].

12 D. Karaś, Jak Polacy znęcają się nad zwierzętami? Raport z monitoringu sądów, prokuratur i policji, Kraków – Wrocław 2016, p. 35 et seq., http://czarnaowca.org/wp-content/uploads/2016/03/CzarnaOwca-NMP-RAPORT-1.pdf (09.11.2016).

13 *Ibidem*, p. 9.

14 A. Kula, A. Chęć, M. Wieczorek, R. Szczepańska, Art. 207 k.k. – znęcanie się nad osobą najbliższą – monitoring śląskich sądów, Bielsko-Biała 2015, http://www.pozytywnezmiany.org/assets/multimedia/dokumenty/ raport_art207kk.pdf (09.11.2016).

15 A. Dominiczak, U. Nowakowska, K. Sękowska-Kozłowska, Temida pod lupą. Stereotypy w sądzie w sprawach dotyczących przemocy wobec kobiet, Warszawa 2016.

1.3. Methods of research other than observation of hearings

Social organizations carry out thematic monitoring not using the method of observation. Thus they are based solely on desk research or data collected by requesting access to public information. The example thereof may be the research carried out by Bona Fides Association from Katowice whose purpose was to check websites of Public Information Bulletins of courts and prosecutor's offices in Silesia Province with regard to their content and compliance with the law, and evaluate their transparency and functionality[16].

The main source of information in the research of non-governmental organizations can also be interviews or surveys conducted with participants of proceedings or court staff. Court Watch Poland Foundation attempted to carry out research, headed by Dr Stanisław Burdziej of the Institute of Sociology of the Nicolaus Copernicus University in cooperation with Denver University in Colorado and with the help of scientists from the Institute of Sociology of the Jagiellonian University, accompanying the change of criminal procedure in 2015. Its purpose was to check if the change of the inquisitorial model into adversarial would improve a sense of procedural justice experienced by the defendants. As part of the research, over 100 interviews were conducted with convicted offenders in proceedings held according to the inquisitorial model. A prompt amendment of the procedure restoring the inquisitorial model prevented verification of the main thesis about a positive impact of adversarial proceedings on a sense of justice experienced by the defendants. Nevertheless, the research allowed to verify the hypothesis according to which convicted offenders correlate legitimization of judicial power with the perceived level of procedural justice of court proceedings they took part in[17]. Precise results of the research will be published.

A research project called "Monitoring of occupational stress in courts and its health implications" implemented by Association of Healthy Work focused on working conditions of common courts employees. The research respondents were not only judges but office workers and assistants. The psychological test method was used therein while data were collected from the Internet survey filled in by the respondents themselves. An overwhelming number of surveys was collected – 1890. Unfortunately, the research may evoke several methodological objections, among others failure to maintain appropriate conditions to carry out psychological tests, lack of certainty as to the actual identity of respondents (the survey was publicly available in the Internet and the link was also published in mass media), which implies a lack of certainty as to the sample representativeness for the researched publication. Despite

16 S. Tkacz, G. Wójkowski, Biuletyny Informacji Publicznej Sądów i Prokuratur w Województwie Śląskim, Katowice 2011, http://www.bonafi des.pl/wp-content/uploads/2016/08/raport-bip_sadow_i_prokuratur.pdf (10.11.2016).

17 See: S. Burdziej, Legitymizacja władzy a sprawiedliwość proceduralna, „Studia Socjologiczne" 2016, No. 4 (223), p. 167 et seq.

these reservations, the research findings are unreliably explorative. They signal the occurrence of several factors generating stress to a large degree, including mobbing[18].

Researchers studied a number of external factors adversely affecting judges' creativity and their decision-making process in the project "Bon Appétit Your Honour!"[19]. This project was carried out by the volunteers from Court Watch Poland Foundation from Cracow with cooperation of the Institute of Sociology of the Jagiellonian University. In its first phase, the relevant world literature was reviewed to find factors affecting creativity and a decision-making process. The research (and its title) was inspired by the studies of decisions taken by penitentiary judges pursued by psychologists connected with Tel Aviv University. The research revealed that the longer time passed since the judges' last meal, the stricter sentence they passed (i.e. they granted parole more rarely). Israeli researchers recommended judges not to resign from frequent breaks for meals or relax[20]. A questionnaire was prepared on the basis of the list of factors established in result of the literature review, and interviews were conducted with a randomly selected sample of judges working in the District Court in Cracow. The research findings were presented to the court's administration; a sample of judges and referendaries working in district courts of Cracow District is scheduled to be researched too[21]. A drawback of the interview method applied in the research is certainly a declaratory and subjective nature of data provided therein. Nevertheless, accumulation of anomalies in individual courts may confirm the need to intervene and take care of working conditions in a given court or division. Therefore these data may trigger taking more rational decisions within the scope of administrative supervision and provision of appropriate conditions for the operation of judicial power.

2. Assistance provided to clients

Although social organizations are not involved in a direct cooperation with the institutions of administration of justice, they contribute considerably to its better operation through providing legal aid to people in need. Thanks to advice given by lawyers and law students working under the auspices of non-governmental organizations, every year, thousands of people more legibly express their expectations towards the court and often refrain from initiating a lawsuit finding out it would be futile.

18 K. Orlak, Stres zawodowy w sądach powszechnych i jego skutki zdrowotne, Warszawa 2016, http://zdrowapraca.org/orka/wordpress/wp-content/uploads/2016/12/Stres_w_sadach__wyniki_TEMIDA2015.pdf (20.10.2016).

19 See: https://courtwatch.pl/fundacja/biezace-projekty/smacznego-wysoki-sadzie/ (accessed: 20.10.2016).

20 S. Danziger, J. Levav, L. Avnaim-Pesso, Extraneous factors in judicial decisions, "Proceedings of the National Academy of Sciences of the United States of America" 2011, v. 108, No. 17.

21 Smacznego, Wysoki Sądzie!, https://courtwatch.pl/fundacja/biezace-projekty/smacznego-wysoki-sadzie/ (25.01.2017).

2.1. Legal aid

Free legal aid is provided by various organizations all over Poland. Some of them provide general aid, i.e. available to all or depending on income. Other specialize in aid given to specific groups of people, e.g. women, victims of domestic violence, or addicts and their families. There are also organizations that provide legal aid to other organizations, e.g. Civil Society Development Foundation. A range of aid is different too. Sometimes advice is given in all fields of law. Organizations often specialize in specific branches of law, e.g. consumer law, or specific Acts, e.g. the Act on Access to Public Information, like Citizens Network Watchdog Poland.

Advice or counselling is most often provided by lawyers, but they are rarely registered as attorneys and legal advisors. University Law Clinics are a unique network of organizations providing legal aid. They operate in most Law Faculties of Polish universities. Students work there under substantive supervision of university scientific staff. The Foundation of University Law Clinics animates such clinics' development. It created standards and accreditation system enhancing the quality of operation of university law clinics both in relation to beneficiaries and students themselves. Since 2016 non-governmental organizations have also been running some centres of free legal advice established in Poviats under the Act of 5 August 2015 on Free Legal Aid and Legal Education. Many NGOs ran such centres before on *pro bono* basis, or funding this activity from sources other than a newly established foundation.

2.2. Information and assistance in courts

Aid that can be provided by the organizations directly in courts embraces informing and assisting clients (interested parties), witnesses or litigants. Such a type of aid has been provided since the end of 2015 in the District Court in Białystok by the volunteers of Court Watch Poland Foundation in cooperation with the Faculty of Law of the University of Białystok. The Information Centre run by the Foundation is placed in the court's building, opposite Customer Service Desk. Volunteers relieve Customer Service staff by helping clients establish what type of a case they deal with (Customer Service staff in Białystok are divided into specializations related to branches of law), how to fill in a form or draft a letter as well as find a right courtroom[22]. The activity of the Information Centre in the District Court in Białystok follows the model of "a witness assistant" that Court Watch Poland Foundation's workers came across during their study visits in the USA and Norway. Under the institution of a witness assistant, volunteers on duty in a court accompany participants of a session who need such a company in a courtroom. Their help is available *ad hoc* and, generally, to all participants of proceedings, most of all witnesses. The scope of activity of the Centre in Białystok is slightly broader while the largest group of bene-

22 Pomoc informacyjna dla uczestników procesów w sądzie w Białymstoku, http://Białystok.onet.pl/pomoc-informacyjna-dla-uczestnikow-procesow-w-sadzie-w-bialymstoku/h9cyzw (25.01.2017).

ficiaries are not witnesses summoned to court but individuals initiating non-procedural proceedings: involving land or other registry. The Foundation's volunteers most often help them feel at ease in a court and fill in a form. Staff working in the Białystok Court's Centre are also different from those observed in the USA or Norway because every day few dozen volunteers are on duty there shifting every several hours. Each of few dozen volunteers spends from two to maximum eight hours a week in the Centre while workers and volunteers of foreign institutions of this type most often work in a smaller number but longer working hours.

2.3. Provision of a trustworthy person

Volunteers or workers of the organizations take part in hearings as audience also upon a clear request of one of the litigants to fulfil a role of a trustworthy person. This status allows them to remain in a courtroom even if the openness of a trial has been excluded under Art. § 1 of the Code of Civil Procedure in a civil case or Art. 361 § 1 of the Code of Criminal Procedure in a criminal case, respectively. Their principal role is to support by their very presence people who could feel anxious or uncertain in a court. This activity is sometimes connected with thematic monitoring. The Centre for Women Rights or Positive Change Foundation write straightforwardly about just this role of their observers in the above cited reports. These organizations' objective is to protect women rights – victims of violence – and address their offer of help to them. Court Watch Poland Foundation conducting monitoring of courts all over Poland provides everyone with an opportunity to invite volunteers to their hearings. To facilitate inviting observers to a hearing, this Foundation runs a dedicated website called Civic Calendar of Cases. An invitation to a requested hearing is handed over to local observers who decide themselves whether to accept it and which session to attend. Between 2012 and 2016 the Foundation received invitations for over 1200 cases[23].

3. Conclusion

The collected data confirm that courts are often a workplace of social organizations. However, taking formal limitations into account, potential benefits ensuing from the cooperation between the organizations and courts remain unused in Poland. There is a shortage of institutionalized examples to follow and take advantage of opportunities offered by the organizations. The above mentioned example of permanent institutionalized cooperation between Białystok district court and the organization running the Information Centre there is rather an exception confirming the rule. A barrier herein may be a specific way of understanding courts' impartiality and lack of trust in the organizations' competence. In some cases the organizations' activity

23 Wokanda Obywatelska, https://wokandaobywatelska.pl (25.01.2017).

is perceived by the judiciary personnel as unnecessary or outright obstructive their work. On the other hand, it may be concluded from many opinions of judges[24] and more frequent attendance of the representatives of organizations[25] in conferences and trainings that the third power in Poland is interested in what the organizations have to offer.

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24 W. Żurek, Nie tylko o raporcie z Obywatelskiego Monitoringu Sądów, "Krajowa Rada Sądownictwa" 2014, No. 4, p. 39 et seq.

25 See: Ł. Bojarski, Razem czy osobno? Współpraca, interakcja, komunikacja wymiaru sprawiedliwości i organizacji pozarządowych (Non Governmental Organizations, NGOs), "Krajowa Rada Sądownictwa" 2014, No. 4, p. 20 et seq.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.14

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The Effectiveness of Victim-Offender Mediation in Criminal Proceedings Carried Out in 2011-2014 in the District Court of Białystok in the Light of Files Research

Abstract: This article is based on the results of scientific research conducted within the project "The pilot implementation of the Community Court model in Poland as an institutional bridge between the judiciary, local government authorities and social organizations to facilitate the implementation of restorative justice in practice". The project was funded by the National Centre for Research and Development under the programme "Social Innovations" according to the agreement No. /IS-1/039/ NCBR/2014. Within the project, fifty court cases, which had been previously referred to victim-offender mediation, were examined. All of them were conducted before the Third Criminal Division of the District Court in Białystok in 2011-2014 (first half). The decisive criterion was the date of the court's decision to refer the case to victim-offender mediation. The ratio of settlements concluded in the course of victim-offender mediation in criminal cases conducted before the District Court of Białystok is about 10-30% lower in comparison to the national average in each of the studied years. The types of crime which are most frequently referred to mediation proceedings in the District Court of Białystok and in other Polish courts do not differ. The crimes against life and health, honour and personal inviolability, the family and guardianship, property as well as against freedom are the most common. The motions for victim-offender mediation are usually filed by the counsels for the defence and by the accused themselves, and subsequently the court. The best results in mediation settlements are reached in the cases of a joint initiative of the parties. In cases in which the settlement was concluded, the court most frequently applied a conditional discontinuance of proceedings or imprisonment with conditional suspension of its execution. The failure of mediation resulted mainly from the lack of agreement by the parties, and subsequently from the absence or refusal to participate in mediation by the accused or the victims. Mediation completed with a settlement effectively prevents from lodging an appeal against the sentence of the first instance court. The appeal was lodged only in 12.5% of such cases.
Keywords: victim-offender mediation, effectiveness, criminal proceedings

The article presents the results of research conducted within the project "The pilot implementation of the Community Court model in Poland as an institutional bridge between the judiciary, local government authorities and social organizations

to facilitate the implementation of restorative justice in practice"[1]. One of the objectives of the project assumed examination of fifty court cases referred to mediation. A main purpose of the project was evaluation of the state and barriers of a wider application of restorative justice methods by the justice system and community participation in criminal proceedings. Apart from lay judges, community (social factor) was understood here as a social organization representative being the so called advocate of public interest, the entity providing a guarantee as a preventive measure as well as a mediator conducting mediation between the victim and defendant. A partial purpose, related directly to files research, was to diagnose selected aspects of criminal proceedings with regard to mediation and its results. Due to editorial profile and limitations, the article presents only some issues that have been examined in connection with the effectiveness of mediation and affecting factors. Furthermore, the institution of mediation in the Polish criminal law has not been described here as this issue is a subject matter of many commonly availably scientific studies[2].

The research embraced selected cases conducted in the Third Criminal Division of the District Court in Białystok in 2011, 2012, 2013 and the first half of 2014. The cases were selected from the list of mediations MED in the above mentioned period while a decisive criterion was a date of the court decision to refer the victim and defendant to mediation.

Table 1. A number of mediations and their results in individual years

Year	Cases referred to mediation		Mediations completed with a settlement		Mediations without a settlement	
	number	%	number	%	number	%
2011	16	32	7	43.75	9	56.25
2012	11	22	4	36.4	7	63.6
2013	14	28	8	57.2	6	42.8
2014 – first half	9	18	5	55.6	4	44.4
Total	50	100	24	48	26	52

Source: the author's own study.

1 The project was funded by the National Centre for Research and Development under the programme "Social Innovations" according to the agreement No. /IS-1/039/NCBR/2014.

2 See, among others, recent publications: L. Mazowiecka (ed.), Mediacja karna jako forma sprawiedliwości naprawczej, Warszawa 2011; E. Bieńkowska, O unormowaniu mediacji w sprawach karnych, "Prokuratura i Prawo" 2012, No. 1, p. 19-36; L. Mazowiecka (ed.), Mediacja w praktyce prokuratorskiej – dziś i jutro, Warszawa 2012; L. Mazowiecka (ed.), Mediacja karna jako instytucja ważna dla pokrzywdzonego, Warszawa 2013; D. Szumiło-Kulczycka, Proces karny a idea sprawiedliwości naprawczej, (in:) P. Hofmański (ed.), System prawa karnego procesowego. Tom I. Cz. 2. Zagadnienia ogólne, Warszawa 2014, p. 365-415; J. Czapska, M. Szeląg-Dylewski (ed.), Mediacje w prawie, Kraków 2014; L. Mazowiecka (ed.), Unijne standardy programów sprawiedliwości naprawczej, Warszawa 2015.

In the analyzed period, each year over a dozen cases were referred to mediation (to the end of September 2014, 13 cases were entered in the MED list). Taking the number of such cases into account (3254 cases in 2011 and 2012, respectively, 3696 cases in 2013, and 3770 cases in 2014[3]) as well as a number of district and regional courts in Poland (over 360), the Third Criminal Division of the District Court in Białystok is statistically slightly above the average number of cases referred to mediation in one court. Nevertheless, the number of cases potentially suitable for mediation may also be affected by the fact that compared to other appeals, Prosecutors of Białystok Appeal Court very often refer cases they are investigating to mediation already during preparatory proceedings[4]. Therefore a number of such cases is, to a large degree, exhausted in preparatory proceedings, which means their number in court proceedings is inevitably lower. Thus a number of cases annually referred to mediation by the District Court in Białystok that is above the Polish average should be highly assessed all the more.

The effectiveness of mediation understood as a settlement between the victim and defendant reached in its effect varied. Nevertheless, every year embraced by the study it was beneath the Polish average, which for years has reached the same level of 60-70% of mediations completed with a settlement compared to all cases referred to mediation[5]. Altogether, a number of mediations completed with a settlement constitutes nearly half of all mediations out of the fifty examined cases[6]. It should be noticed that in four cases where a settlement was not reached due to discrepancies between the parties, the victims were apologized and the apology was accepted while in another two cases – the parties expressed their mutual willingness to reconcile.

3 Statistical data of the Department of Courts, Organization and Judicial Analyses of the Ministry of Justice, http://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/ (19 December 2016).

4 See data in: D. Kużelewski, Mediacja w procesie karnym w opinii sędziów i prokuratorów – wybrane zagadnienia, (in:) C. Kulesza (ed.), Ocena funkcjonowania porozumień procesowych w praktyce wymiaru sprawiedliwości, Warszawa 2009, p. 258-259; E. Wildner, Stosowanie mediacji w postępowaniu przygotowawczym – wybrane zagadnienia, (in:) J. Czapska, M. Szeląg-Dylewski (ed.), Mediacje w prawie, Kraków 2014, p. 289; Sprawozdania Prokuratora Generalnego z rocznej działalności prokuratury w roku 2010, 2011, 2012, 2013, 2014 i 2015, http://pk.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html (19 December 2016). A percentage of cases referred to mediation in preparatory proceedings by Prosecutors of Białystok Appeal Courts in the discussed period compared to the whole country amounted to: in 2011 – 57,5%, in 2012 – 60,3%, in 2013 – 57,8%, and in 2014 – 57,1%. The recent data for 2015 indicate considerable decline of this ratio to 48,7%.

5 Statistical data of the Department of Courts, Organization and Judicial Analyses of the Ministry of Justice, http://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/ (19 December 2016). Higher ratios of concluded settlements than in Białystok were also achieved in four Cracow district courts in 2010-2011: respectively 61% out of a total number of 172 cases referred to mediation, and 53% out of 211 cases – see: M. Chalimoniuk-Zięba, G. Oklejak, Stosowanie postępowania mediacyjnego w sprawach karnych w latach 2010-2011, analiza na podstawie badań aktowych przeprowadzonych w krakowskich sądach rejonowych, (in:) J. Czapska, M. Szeląg-Dylewski (ed.), Mediacje w prawie, Kraków 2014, p. 324. An example of a much lower ratio (29,9%) in older research carried out in Warsaw – see: M. Mendelska-Stec, Wyniki badań. Funkcjonowanie instytucji mediacji w Polsce, "Mediator" 2005, No. 3, p. 52-53.

6 One of the qualified cases which resulted in no settlement was actually more complicated. The victim and three defendants took part in mediation completed with an apology and settlement concerning damages and compensation; then their case was excluded for a separate examination. The other two defendants did not turn up at a mediation meeting – thus mediation failed in their case.

Table 2. A number of mediations and their results with regard to the course of proceedings

A course of proceedings	Cases referred to mediation		Mediations completed with a settlement		Mediations without a settlement	
	number	%	number	%	number	%
Ordinary	5	10	3	60	2	40
Simplified	23	46	14	60.9	9	39.1
Simplified changed into ordinary	9	18	3	33.3	6	66.7
Private prosecution	13	26	4	30.8	9	69.2
Total	50	100	24	48	26	44

Source: the author's own study.

Even though mediation (alternative to a settlement session) is a mandatory element of private prosecution, only 26% of cases referred to mediation were conducted under this course. Participants of such mediations were also the least amicable – only 4 in 13 (30.8%) mediations under such a course finished with a settlement. Overwhelming majority of cases involving mediation were still carried out in the then functioning simplified criminal proceedings whilst in some cases the course of proceedings was changed into ordinary. Cases finished under a simplified course brought the highest ratio of settlements among all courses – 60.9%.

Table 3. A number of mediations and their results with regard to a type of offence

A type of offence	Cases referred to mediation		Mediations completed with a settlement		Mediations without a settlement	
	number	%	number	%	number	%
Against life and health	19	38	4	21.1	15	78.9
Against transport safety	2	4	2	100	0	0
Against freedom	4	8	1	25	3	75
Against family and guardianship	8	16	7	87.5	1	12.5
Against honour and personal inviolability	9	18	4	44.4	5	55.6
Against the employees' rights	1	2	1	100	0	0
Against property	7	14	5	71.4	2	28.6
Total	50	100	24	48	26	52

Source: the author's own study.

On the basis of legal classification of prohibited acts the defendants were charged with, types of offences that were most often referred to mediation were established as well as those which were most suited for mediation due to their final result. As in some cases the charges embraced two and more concurrent provisions, to simplify the situation such acts were classified into categories with regard to their main aspect, e.g. abuse or cruelty (Art. 207 § 1 of the CC) concurrent with bodily injury (Art. 157 § 1 or § 2 of the CC) or battery (Art. 217 § 1 of the CC) were classified as offences against family and guardianship, deprivation of freedom (Art. 189 § 1 of the CC) concurrent with bodily injury (Art. 157 § 1 or § 2 of the CC), aggravated assault (Art. 158 § 1 of the CC) or battery (Art. 217 § 1 of the CC) were classified as offences against freedom. In effect thereof, it may be concluded that among all cases referred to mediation in the discussed period, most of them (38%) involved prohibited acts against life and health (bodily injury under Art. 157 § 1 or § 2 of the CC and aggravated assault under Art. 158 § 1 of the CC), next – offences against honour and personal inviolability (defamation – Art . 216 § 1 of the CC, insult – Art. 206 § 1 of the CC, and battery – Art. 217 § 1 of the CC), against family and guardianship (abuse and cruelty – Art. 207 § 1 of the CC), and against property (robbery – Art. 280 § 1 of the CC, damage of property – Art. 288 § 1 of the CC). The above data confirm conclusions ensuing from the research carried out by other authors related both to mediation in preparatory proceedings[7] and court proceedings[8]. The above mentioned kinds and types of offences constitute a main subject of mediations in different proportions; they are also accepted by the literature and practitioners as acts that are best suited for conciliation and settlement before a mediator[9].

Disregarding offences against transport safety and employees' rights due to their single occurrence, the highest effectiveness of mediation was recorded with regard to offences against family and guardianship (settlements in 87.5% cases) and against property (71.4%). The lowest ratio of settlements occurred with regard to cases against life and health (only 21.1%).

7 See: E. Wildner, Stosowanie…, *op. cit.*, p. 291.

8 See: data on mediations in Lublin district courts in 1998-2002 – R. Kaszczyszyn, Rozwój i sytuacja mediacji w Polsce na przykładzie ośrodka lubelskiego, "Mediator" 2003, No. 2, p. 40. Subsequent research carried out in Lublin confirm that in these courts in 2006-2011 (first half) cases involving offences against family and guardianship, freedom, life and health, and property were most often referred to mediation – see: G.A. Skrobotowicz, Mediacja karna – studium przypadku, (in:) J. Czapska, M. Szeląg-Dylewski (ed.), Mediacje w prawie, Kraków 2014, p. 305-308. In Cracow courts in 2010-2011 this order was as follows: offences against family and guardianship, life and health, property, honour and personal inviolability, freedom and transport safety – see: M. Chalimoniuk-Zięba, G. Oklejak, Stosowanie postępowania mediacyjnego…, *op. cit.,* p. 326.

9 See: H. Pawlak, Mediacja w świetle danych Ministerstwa Sprawiedliwości, (in:) Konferencja naukowa: "Mediacja w polskiej rzeczywistości" (11 September 2002), Warszawa 2003, p. 15; D. Wójcik, Poglądy sędziów na temat mediacji w sprawach karnych, (in:) K. Krajewski (ed.), Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. Rocznicy urodzin Profesora Andrzeja Gaberle, Warszawa – Kraków 2007, p. 560; D. Kużelewski, Mediacja w procesie karnym…, *op. cit.,* p. 249; D. Kużelewski, Mediacja w polskim procesie karnym w ocenie prokuratorów i sędziów, (in:) C. Kulesza (ed.), Porozumienia karnoprocesowe w praktyce wymiaru sprawiedliwości, Białystok 2010, p. 157-162.

Table 4. A number of mediations and their results with regard to entities applying for mediation

Entities applying for or informing about mediation	Cases referred to mediation		Mediations completed with a settlement		Mediations without a settlement	
	number	%	number	%	number	%
Court (upon the parties' consent)	10	20	3	30	7	70
Defendant's motion	10	20	6	60	4	40
Victim's motion	2	4	0	0	2	100
Both parties' motion	6	12	6	100	0	0
Defence Counsel's motion	14	28	5	35.7	9	64.3
Victim attorney's motion	3	6	0	0	3	100
Prosecutor's motion (upon the parties' consent)	1	2	1	100	0	0
Total	50	100	24	48	26	52

Source: the author's own study.

Motions for mediation were mostly submitted by the defendants and their Defence Counsels (altogether nearly half of all motions). The court was also quite active therein but most cautions (instructions) were made in private prosecutions, where mediation is anyway a mandatory element of the proceedings alternative to a settlement session whilst victims and their attorneys showed small interest (altogether their initiative in only 10% cases). In one case, it was recorded in the files that the prosecutor applied for mediation upon the consent of the parties even though he or she is not entitled to such an initiative under Art. 23a § 1 of the CCP[10].

It is not surprising that the most effective mediations were those carried out upon the amicable motion of both parties, where a settlement was reached in all cases. The amicable motion itself confirmed willingness to reconcile and reach a settlement. On the other hand, absolute failure of mediations motioned by the victims or their attorneys draws attention. In none of five such cases mediation finished with a settlement; moreover, in three cases a mediation meeting was not held at all: in one case the defendant did not agree to mediation, in the second case the defendant did

10 The above cited research carried out in Lublin reveal slightly different proportions with regard to initiating mediation: defendants and their Defence Counsels (44,0%), amicable motion of the defendant and victim (34,8%), the victims and their attorneys or statutory representatives (15,7%), court (3,7%), and public prosecutor (1,8%) – see: G.A. Skrobotowicz, Mediacja karna…, *op. cit.,* p. 311. On the other hand, Cracow research reveal a very active role of the court within this scope (72% cases), which not only provided the parties with necessary information but, in some cases, also referred the case to mediation in a session without the parties' participation under Art. 339 § 4 of the CCP, entrusting the mediator with a duty to obtain the parties' consent. Defence Counsels and defendants themselves motioned for mediation in 22% cases, the victim and their attorneys in only 3% cases, while the amicable motion of the defendant and victim occurred in 2% cases – M. Chalimoniuk-Zięba, G. Oklejak, Stosowanie postępowania mediacyjnego…, *op. cit.,* p. 324-325.

not turn up, and in the third case the files were returned to the court by the mediator without carrying out mediation.

Table 5. A number of mediations and their results with regard to a number of victims and defendants taking part in mediation

A number of victims	A number of defendants	Cases referred to mediation		Mediations completed with a settlement		Mediations without a settlement	
		number	%	number	%	number	%
1	1	36	72	18	50	18	50
1	2	5	10	2	40	3	60
1	3	2	4	1	50	1	50
1	6	1	2	0	0	1	100
2	1	2	4	1	50	1	50
2	2	2	4	1	50	1	50
2	3	1	2	0	0	1	100
3	3	1	2	1	100	0	0
Total	-	50	100	24	48	26	52

Source: the author's own study.

Overwhelming majority of mediations were carried out according to the following scheme: one victim and one defendant (72% of all cases) and a settlement reached in the middle of the process. Multifaceted schemes on both sides occurred much more rarely while from this perspective, the most interesting one was a successful mediation between three defendants and three victims, however, it was indirect mediation. Considering all schemes other than one victim and one defendant altogether, we can notice their slightly lower efficiency (6 out of 14 mediations completed with a settlement, i.e. by 42.9%).

Table 6. The content of a settlement and the content of a final ruling finishing the proceedings

The content of a settlement	The content of a ruling finishing criminal proceedings	Mediations completed with a settlement	
		number	%
Apology, apology accepted	Discontinuation	4	16.7
Apology and other intangible conditions, or apology and redress of damage or compensation	Conditional discontinuation	12	50

Apology and other intangible conditions, or apology and redress of damage or compensation	Sentence of deprivation of liberty from 6 months to 2 years suspended for specified time, possibly redress of damage or compensation	8	33.3
Total	-	24	100

Source: the author's own study.

Table 6 depicts the impact of a settlement on the content of a ruling finishing criminal proceedings. In four cases involving private prosecution this impact was clear because they finished with reconciliation, and the court was obliged to discontinue proceedings under Art. 492 § 1 of the CCP. In one of the above cases, although the content of the settlement concluded before a mediator was read, the court applied legal grounds under Art. 491 § 1 of the CCP due to unexcused failure to attend an adjourned settlement session by a private prosecutor who was duly notified. The remaining cases were grouped into two categories in a simplified manner – cases finished with a conditional discontinuation of criminal proceedings (half of all cases completed with a settlement after mediation) and a sentence of deprivation of liberty (sometimes accumulated) with suspended enforcement (33.3% cases). Custodial sentences involved minimum 6 months and maximum 2 years of deprivation of liberty. Both kinds of sentences were preceded by settlements which, apart from apologies, in some cases included various intangible obligations, e.g. not to threaten or use negative language or gestures nor undertake prohibited acts against the victim, not to insult the victim by saying words commonly considered as insulting and follow norms of community life, not to use physical and psychological violence, not to drink alcohol and undertake rehabilitation treatment, not to undertake self-willed garden works in the victim's premises, to unload vehicles without causing nuisance for exiting the defendant's premises, stop taking photos and making films of the victim's family, to show mutual respect, not to use vulgar words, to live peacefully with the neighbours and maintain personal contacts limited to necessary interactions with the neighbours, to limit mutual contacts to common greetings, or not to defame each other. In 11 cases completed with a conditional discontinuation of proceedings or a sentence of suspended deprivation of liberty, the settlement reached in mediation contained an agreement about damages or compensation[11].

In one case (driving a vehicle under the influence of alcohol – Art. 178a § 1 of the CC, and causing a traffic accident and grievous bodily injury by driving under the influence of alcohol – Art. 177 § 2 of the CC in connection with Art. 178 § 1

11 In Cracow courts judgments in cases where a settlement was reached were slightly more varied. Similar to Białystok, absolute deprivation of liberty was never imposed while conditional discontinuation of proceedings (58% cases) was most often imposed; the second place was taken by discontinuation of proceedings (19%). Conditionally suspended deprivation of liberty was applied in only 9% of cases – see: M. Chalimoniuk-Zięba, G. Oklejak, Stosowanie postępowania mediacyjnego…, *op. cit.,* p. 329.

of the CC), mediation completed with a settlement was the basis of the prosecutor's consent to voluntary submission to a penalty by the defendant. Initially, the prosecutor did not agree to such a motion declaring a demand for deprivation of liberty for four years and a driving ban for eight years but he supported the defence counsel's motion for mediation. Thanks to the settlement reached during mediation the prosecutor changed his mind and, together with a statutory representative of the victim, accepted the defence counsel's motion for a cumulative penalty of deprivation of penalty for two years conditionally suspended for the probation period of five years and supervision of a probation officer as well as a cumulative ban on driving motor vehicles for eight years. Apart from the above case, the court accepted a motion for voluntary submission to a penalty by the defendant in four cases where mediation finished with a settlement (in cases with mediation without a settlement sentences under Art. 387 of the CCP were not recorded at all).

Table 7. The content of a final ruling finishing proceedings where a settlement was not reached

The content of a final ruling finishing criminal proceedings	Mediations without a settlement	
	number	%
Acquittal	1	3.8
Discontinuation	4	15.4
Conditional discontinuation	7	27
Deprivation of liberty from 6 months to 2 years suspended for specified time and redress of damage or compensation	9	34.7
Deprivation of liberty	1	3.8
Restriction of liberty	1	3.8
Fine	1	3.8
Pending case	2	7.7
Total	26	100

Source: the author's own study.

Types of rulings finishing criminal proceedings in cases where a settlement was not reached despite mediation were much more varied than in cases with mediation completed with a settlement. Majority of sentences were suspended deprivations of liberty accompanied with a duty to redress damage or compensation as well as conditional discontinuations of criminal proceedings. There was also one acquittal in the case initiated by subsidiary prosecution about illegal logging of trees with intent to appropriate (Art. 290 § 1 of the CC in connection with Art. 278 § 1 of the CC), which was effected due to a lack of sufficient data to justify the suspicion (Art. 414 § 1 of the

CCP in connection with Art. 17 § 1 point 1 of the CCP)[12]. In one case the sentence was passed without a hearing upon the motion of the prosecutor submitted under Art. 335 § 1 of the CCP. In two other cases the court did not accept such a motion.

Table 8. The reasons for not reaching a settlement during mediation

The reason for no settlement reached	Number of cases	%
Failure to appear or refusal to take part in mediation by the defendant/defendants	5	19.2
Failure to appear or refusal to take part in mediation by the victim/victims	4	15.4
Lack of mutual agreement	16	61.6
Remission of the case without mediation	1	3.8
Total	26	100

Source: the author's own study.

Despite the fact that cases were referred to mediation, in as many as 10 cases (20% of all researched cases) mediation failed to reach its main stage, i.e. a meeting between the defendant and victim in the presence of a mediator. The defendants and victims alike in approximately the same number of mediations failed to appear or refused to take part in it. Deducting the above mentioned 10 cases, it turns out that a mediation session itself participated by the parties more often finishes with a settlement than not (60% vs. 40% with regard to mediation where the parties met "face to face", or indirect mediation – only 4 such cases)[13].

Table 9. A number of cases in comparison to appeals

Appeal	Cases referred to mediation		Mediations completed with a settlement		Mediations without a settlement	
	number	%	number	%	number	%
Filed	11	22	3	12.5	8	30.8
Not filed	34	68	20	83.3	14	53.8

12 Judgments of Cracow courts were similarly varied in case of unsuccessful mediation; yet they adjudicated more equally with regard to a number of cases than the District Court in Białystok. In a range of 10 to 18% of all cases, the following sentences were passed: conditionally suspended deprivation of liberty and fine, conditionally suspended deprivation of liberty, conditional discontinuation of criminal proceedings, discontinuation of proceedings, acquittal, and fine. Absolute deprivation of liberty was imposed only in one case – see: M. Chalimoniuk-Zięba, G. Oklejak, Stosowanie postępowania mediacyjnego…, *op. cit.,* p. 332.

13 The causes of failure to reach a settlement formed differently in Cracow courts. Formal reasons prevailed, i.e. a lack of consent to mediation or failure to appear (51% cases) whilst discrepancies between the parties occurred more rarely (32%) – see: M. Chalimoniuk-Zięba, G. Oklejak, Stosowanie postępowania mediacyjnego…, *op. cit.,* p. 330.

A case pending case in a first instance during file research	5	10	1	4.2	4	15.4
Total	50	100	24	100	26	100

Source: the author's own study.

Appeals were filed in 22% cases that had been earlier referred to mediation. The efficiency of mediation is best illustrated by the proportion between a number of appeals being filed and settlements reached during mediation. Hence only in 3 out of 24 cases referred to mediation and completed with a settlement (i.e. in 12.5% of such cases) an appeal against the first instance ruling was filed. Two appeals were filed by the defence counsels. In these cases the Regional Court in Białystok upheld the first instance judgments. The third appeal was filed by the prosecutor and in consequence thereof the first instance judgment was reversed in the following way: Art. 66 § 1 and 2 of the CC and Art. 67 § 1 of the CC were adopted as the legal basis of a conditional discontinuation of criminal proceedings against the defendants instead of Art. 66 § 1 and 3 of the CC and Art. 67 § 1 of the CC.

A number of cases with mediation but without a settlement where an appeal was filed amounted to 30.8% of all such cases. It means that appeals were filed almost three times more often when mediation did not lead to an agreement between the defendant and victim. Out of 8 appeals filed in such cases, 6 appeals were filed by the defendants' defence counsel or defendants themselves. In 5 of them the judgment was upheld and the appeal was found absolutely groundless while in one case the judgment was reversed (the ruling on a joint and several duty of the defendants to redress damage suffered by the victim amounting to PLN 100 was reversed whilst the amount of the joint compensation to be paid by the defendants for the victim for the afflicted harm was lowered to PLN 10,000; and the first instance judgment was upheld within the remaining scope). In one case the appeal was filed both by the defence counsel and auxiliary prosecutor's attorney. Nevertheless, the judgment was upheld and both appeals were found absolutely groundless. The last case was more complicated because the appeal was filed twice against the judgment of acquittal by a subsidiary auxiliary prosecutor – first the Regional Court in Białystok reversed this judgment and referred the case for re-examination and then, after repeated proceedings in the first instance and appeal filed against another judgment of acquittal, the court upheld the judgment and found the appeal absolutely groundless.

Table 10. A number of cases referred to mediation by individual judges and mediation effects

A judge (F) female; (M) male	Cases referred to mediation		Mediations completed with a settlement		Mediations without a settlement	
	number	%	number	%	number	%
No. 1 (M)	1	2	1	100	0	0
No. 2 (F)	4	8	1	25	3	75
No. 3 (M)	5	10	2	40	3	60
No. 4 (M)	8	16	6	75	2	25
No. 5 (F)	7	14	2	28.6	5	71.4
No. 6 (F)	13	26	7	53.8	6	46.2
No. 7 (F)	10	20	4	40	6	60
No. 8 (F)	2	4	1	50	1	50
Total	50	100	24	48	26	52

Source: the author's own study.

During the studied period, 8 judges referred cases to mediation, among whom the most active were judges No. 6 and 7 (altogether 46% of cases). Of course, we cannot draw too far-reaching conclusions about the causes of different number of cases referred to mediation by individual judges illustrated in Table 10. It is affected not only by specificity of each case and the parties' will but also a total number of cases heard by each judge, which can depend on many factors. Hence we cannot draw conclusions about the statistics connected with mediation efficiency because even a choice of a specific mediator does not guarantee success.

Table 11. Mediators appointed by individual judges

A judge (F) female; (M) male	A mediator (F – female; M – male)						Total
	No. 1 (F)	No. 2 (M)	No. 3 (M)	No. 4 (M)	No. 5 (F)	No. 6 (F)	
No. 1 (M)	0	0	1	0	0	0	1
No. 2 (F)	0	0	0	0	2	2	4
No. 3 (M)	0	0	5	0	0	0	5
No. 4 (M)	0	2	2	1	3	0	8
No. 5 (F)	0	1	2	0	2	2	7
No. 6 (F)	1	0	0	0	2	10	13

No. 7 (F)	0	0	0	0	2	8	10
No. 8 (F)	0	0	1	0	1	0	2
Total	1	3	11	1	12	22	50

Source: the author's own study.

Data included in Table 11 are not to assess mediation efficiency; yet they reveal if judges have their own "permanent" or "favourite" mediators, or whether they attempt to diversify individuals entrusted by them to carry out mediation. Three judges (No. 3, 6 and 7) had definitely fixed preferences appointing mostly the same mediator. Mediator No. 6 received 18 out of 22 cases just from the judge No. 6 and 7. Interestingly enough, male judges are more willing to appoint male mediators (in 10 out of 14 cases, i.e. in 71.4% of cases) whereas female judges mainly designated female mediators (in 32 out of 36 cases, i.e. in 88.9% of cases). Only the judge No. 4 and 5 referred cases to mediation to 4 mediators out of 6 who were appointed to carry out mediation in the studied period.

Table 12. A number of cases carried out by individual mediators and their effects

A mediator (F – female; M – male)	Cases referred to mediation		Mediations completed with a settlement			Mediations with no settlement reached		
	number	%	number	% of mediations of a given mediator	% of mediations completed with a settlement	number	% of mediations of a given mediator	% of mediations with no settlement reached
No. 1 (F)	1	2	0	0	0	1	100	3.8
No. 2 (M)	3	6	1	33.3	4.2	2	66.6	7.7
No. 3 (M)	11	22	6	54.5	25	5	45.5	19.3
No. 4 (M)	1	2	0	0	0	1	100	3.8
No. 5 (F)	12	24	6	50	25	6	50	23.1
No. 6 (F)	22	44	11	50	45.8	11	50	42.3
Total	50	100	24	-	100	26	-	100

Source: the author's own study.

As indicated above, 6 mediators carried out mediations in the discussed period while half of them was appointed in 45 cases (90% of all mediations)[14]. Despite equal

14 Uneven distribution of cases among mediators in the District Court in Białystok is nothing extraordinary considering, e.g., Cracow courts, where one mediator (out of 74 persons and one institution) "monopolized" mediation service because in two years he was appointed to mediate in 338 cases out of 383, at the same time achieving

distribution of mediations with regard to sex, female mediators received 35 cases (70%). Among three leaders who carried out the largest number of mediations, the ratio of success – measured by a number of settlements in relation to all mediations carried out by a given mediator – amounted to 50% with a slight advantage of mediator No. 3. The following conclusions may be ensued from the presented results of the case files research:

- even though the District Court in Białystok is slightly above the average number of cases distributed statistically onto one court (district and regional courts altogether) in Poland, the efficiency of mediation measured by the mediation ratio where settlements were reached in all cases referred to mediation is much lower than the Polish average (this ratio is by app. 10-30% lower in each year embraced by the study),
- only 26% of cases referred to mediation were initiated by private prosecution whilst the ratio of effective settlements was the lowest among all courses of procedure (30.8%), which contradicts the idea of amicable resolution of such cases strongly emphasized in the Code of Criminal Procedure,
- types of offences that are most often subject to mediation in the Regional Court in Białystok is not different from such cases in other courts – they most frequently embrace offences against life and health, honour and personal inviolability, family and guardianship, property, and freedom,
- defence counsels and defendants themselves most often apply for mediation, to be followed by the court, whereas the best result in the form of a settlement is achieved by mediation when both parties apply for it; the initiative of the victim and his or her attorney failed completely because no settlement was reached in any mediation,
- overwhelming majority of mediations (72%) are carried out with the participation of one defendant and one victim,
- none of the cases where a settlement was reached finished with a sentence of absolute deprivation of liberty – in most cases the court applied a conditional discontinuation of proceedings or suspended deprivation of liberty; whereas cases not completed with a settlement were much more variously resolved by the court, nevertheless, most often (in 1/3 of cases) the courts sentenced to suspended deprivation of liberty and conditional discontinuation of proceedings; relatively seldom did settlements result in voluntary submission to a penalty,
- the most frequent cause of failure to reach a settlement was a lack of agreement between the parties (61.6% cases), then failure to appear or refusal to take part in mediation by the defendants or victims,

80% efficiency in reaching a settlement and never applying for prolongation of time limit to terminate mediation – M. Chalimoniuk-Zięba, G. Oklejak, Stosowanie postępowania mediacyjnego…, *op. cit.,* p. 325-326.

- mediation completed with a settlement efficiently prevents appeals against the ruling closing the case in a first instance court; an appeal was filed in only 12.5% cases; nearly all appeals – both when a settlement was and was not reached – were not effective and the appeal court upheld judgments finding appeals absolutely groundless,
- individual judges usually appointed the same person as a mediator in their cases; mediators' "diversification" was rare.

Due to the fact that community representatives and lay judges do not act before the court, participation of mediators in a district court in criminal proceedings is now the most significant manifestation of the presence and active role of social factor in a criminal trial. The conclusion ensuing from the interviews carried out with the practitioners of the judicature and law enforcement as well as probation officers is worth emphasizing here, i.e., practitioners see the potential of the model of a community court and are greatly interested in applying its elements in the Polish criminal trial. They believe that currently mediation between the victim and offender should play a key role.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.15

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Mediation Procedure in Labour Law Disputes

Abstract: The subject matter of the dissertation embraces issues concerning mediation in labour law disputes. The article is focused on the amendments which were enacted into the Civil Procedure Code on 1 January 2016. They should contribute to an increase in significance and popularity of mediation, which is alternative to judicial procedures and relatively inexpensive. As previously, mediation may be conducted under an agreement between the parties (employee and employer) and the mediator or the decision of the court. At present the court may refer the parties to mediation at every stage of judicial procedures and it can proceed in that way many times. Moreover, before the first trial the court may oblige the parties to take part in an information meeting concerning mediation. The aim of the meeting is to impel the parties to reach agreement. In spite of the fact that mediation, as before, is voluntary, the legislator has enhanced instruments which are supposed to restrain the parties from an unjustified refusal to participate in mediation proceedings. According to the Civil Procedure Code, the party may be charged for legal expenses.
Keywords: mediation, mediator, agreement, employer, employee, civil procedure

1. Introduction

The doctrine defines mediation as proceedings aimed at an amicable resolution of the dispute between the parties conducted by the third party (a mediator) who helps the parties reach a settlement[1]. Mediation is similarly understood by the European law provisions. Pursuant to Art. 3, letter a of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[2], 'mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by

1 See: G. Goździewicz, Mediacje i arbitraż w polskim prawie pracy, (in:) G. Goździewicz (ed.), Arbitraż i mediacja w prawie pracy. Doświadczenia amerykańskie i polskie, Lublin 2005, p. 10; M. Liwo, E. Nowosiadły-Krzywonos, Mediacja zamiast sądu w prawie pracy, "Palestra" 2012, No. 3/4, p. 70; M. Sychowicz, (in:) A. Marciniak, K. Piasecki (ed.), Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1-366, Warszawa 2014, p. 651.

2 Official Journal of the EU L 136 of 24.05.2008, p. 3. The Directive applies to transnational disputes.

themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

Mediation has been functioning in Poland since 1991. This institution was first applied in the area of collective labour law as one of the mandatory stages of resolving collective disputes[3]. Later on, mediation was admitted to criminal cases[4] and juvenile cases[5], and in 2005 to civil cases[6] as well. With regard to civil cases, mediation as an alternative (to litigation) method of dispute resolution is allowed in cases where a settlement is admissible (Art. 10 of the Code of Civil Procedure). That is to say, it particularly concerns labour law disputes (Art. 476 of the CCP). On the other hand, social insurance disputes are excluded from mediation (Art. 477^{12} of the CCP). Previously, cases examined in orders to pay or payment procedures could not be referred to mediation too. Since 1 January 2016 such cases may be resolved in mediation unless objections were effectively lodged.

Even though disputes between employees and employers may have been resolved by mediation for over ten years now, this instrument has not attracted too much interest of labour law subjects so far[7]. Marginal importance of mediation, which is recognized as a modern and relatively cheap instrument of conflict resolution, ensues, among others, from a lack of sufficient knowledge about this institution practice possessed by practitioners[8]. This fact and the amended provisions of the Code of Civil Procedure[9] have spurred discussion on mediation in labour law. Issues concerning initiation and pursuit of mediation in labour law disputes with a particular focus on recent changes will be discussed below.

2. Legal basis of mediation

Pursuant to Art. 183^1 § 2 of the CCP, mediation proceedings may be carried out under a mediation agreement or court decision. For this reason, mediation has been

3 Act of 23 May 1991 on resolution of collective disputes, uniform text: Journal of Laws of 2015, item 295.
4 Act of 6 June 1997 – Code of Criminal Procedure, uniform text: Journal of Laws of 2016, item 1749.
5 Act of 15 September 2000 on amending the Act on Juvenile Proceedings, Journal of Laws No. 91, item 1010.
6 Act of 28 July 2005 on amending the Code of Civil Procedure and some other Acts, Journal of Laws No. 172, item 1438.
7 Ministry of Justice data reveal that in 2013, 324 labour law disputes were referred to mediation in the basis of a court's decision, 57 of which completed with a settlement.
8 See: A. Majerek, Problematyka kwalifikacji mediatorów sądowych, (in:) J. Czapska, M. Szeląg-Dylewski (ed.), Mediacje w prawie, Kraków 2014, p. 45-46.
9 Act of 10 September 2015 on amending some Acts due to supporting out-of-court methods of dispute resolution, Journal of Laws, item 1595.

divided into conventional, also known as contractual, private or out-of-court, and court referred, also known as court ordered[10].

In a mediation agreement the parties, in particular, define the subject of mediation and a mediator , or a manner of his or her choice (Art. 183[1] § 3 of the CCP). Opposite to civil law relations, where the subject of mediation can be generally defined, in labour law disputes it must be precisely provided[11]. Thus a contractual decision envisaging mediation in all labour law disputes existing between the parties and resulting from employment relation is insufficient[12].

Due to the lack of reservations envisaged by the Code as to the form of this agreement, it may be concluded in an oral or written form or even allegedly through an expressed consent by the party to mediation when the other party applied for it. The first form of mediation is the most advantageous due to evidence. A mediation agreement may be concluded at any time. Parties to the employment relation may do this both before and after the dispute, before a court trial or during litigation.

Decisions concerning mediation may be concluded in a separate agreement or as an autonomous clause directly in the agreement referring to the legal relation under which a dispute may arise in the future, e.g. in an employment contract[13].

The doctrine treats a legal nature of a mediation agreement differently. Some believe that a mediation agreement is a type of the so called procedural agreement, i.e. an agreement where a main direct effect is manifested on the procedural level and where the parties' will is directed towards the modification of rules of civil procedure[14]. By concluding this agreement, a dispute is handed over to mediation; none of the parties acquires financial or non-financial benefits in effect thereof[15]. Others claim that a legal contractual relation arises between the mediator and the parties to a dispute (an employee and employer) – the agreement which is subject to the provisions of the Civil Code concerning contracts of agency[16]. M. Malczyk disagrees claiming that a mediation agreement can neither be treated as a contract of agency nor any other service contract subject to the provisions on contracts of agency because it is not a contract obliging to perform a set of legal and factual actions[17]. M. Pazdan thinks the same claiming that since a mediation agreement does not generate any

10 See: M. Macyszyn, M. Śledzikowski, Umowa o mediację w prawie polskim – wybrane zagadnienia, "ADR" 2015, No. 3, p. 5.

11 See: D. Dzienisiuk, M. Latos-Miłkowska, Mediacja a specyfika spraw z zakresu prawa pracy, "PiZS" 2011, No. 1, p. 20.

12 See: K.W. Baran, Mediacja w sprawach z zakresu prawa pracy, "PiZS" 2006, No. 3, p. 2.

13 See: K.W. Baran, (in:) K.W. Baran (ed.), Procesowe prawo pracy. Wzory pism, Warszawa 2013, p. 118.

14 See: K. Weitz, Mediacja w sprawach gospodarczych, (in:) System prawa handlowego. Tom 7. Postępowanie sądowe w sprawach gospodarczych, Warszawa 2007, p. 248; E. Stefańska, (in:) M. Manowska (ed.), Kodeks po stępowania cywilnego. Komentarz, Warszawa 2015, p. 512.

15 See: R. Kulski, Umowy procesowe w postępowaniu cywilnym, Kraków 2006, p. 170 et seq.

16 See: A. Marek, Mediacja – sposób rozwiązywania sporów pracowniczych, "Sł. Prac." 2008, No. 3, p. 12; J. Kuźmicka-Sulikowska, Podstawa prawna odpowiedzialności cywilnej mediatora, "ADR" 2008, No. 3, p. 85; P. Sobolewski, Mediacja w sprawach cywilnych, "PPH" 2006, No. 2, p. 36.

17 See: M. Malczyk, (in:) A. Góra-Błaszczykowska (ed.), Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1-729, Warszawa 2016, p. 591.

obligation to perform a legal action, it cannot be treated as a contract of agency. Furthermore, it does not have features of a civil law company agreement too. In effect, mediation should be treated as an agreement *sui generis* regulated partly in the Code of Civil Procedure and Civil Code[18]. This opinion is shared by R. Morek, who believes that it is much more accurate to claim that mediation is an agreement *sui generis* – of a mixed nature – showing similarity to both substantive law agreements and procedural agreements. A procedural nature of this agreement is confirmed by the place of regulating this institution, its main objective, which is resolution of a conflict and reaching a settlement between the parties, and a legal effect it evokes (Art. 202^1 of the CCP). Whereas its substantive law nature is confirmed by a lack of jurisdictional competence of a mediator and the fact that mediation may be alternative to litigation[19]. Ł. Błaszczak is of a similar opinion – he defines this agreement as a separate type of a nominate contract regulated outside the Civil Code, mutually binding but not mutual and creating a legal relation of a permanent nature[20]. This last opinion is the most convincing. It is worth emphasizing that in the light of the regulations of the Code of Civil Procedure, the parties to the agreement should attempt to resolve a conflict before the initiation of litigation; a settlement that is not confirmed by the court is also binding whilst a procedural effect is the result of actions pursued by the parties that are not always litigants. In effect thereof, a mediation agreement should be qualified as an agreement of substantive law regulated by the Code of Civil Procedure.

In order to make the parties settle a dispute amicably before bringing the case to a court, the legislator obliged a plaintiff to inform in a petition whether the parties tried to resolve their dispute in mediation, and if such an attempt was not made, to explain why. Failure to include information about mediation in a petition does not evoke negative consequences for the party; its lack, in particular, is not a circumstance justifying a return of the petition.

Pursuant to Art. 183^1 § 2 of the CCP, mediation may also be initiated under the court's decision to refer the case to mediation. Previously, the court was entitled to issue a relevant decision to close the first session scheduled for a hearing while after its closure it was possible exclusively upon a mutual request of the parties. Moreover, such actions could only be undertaken once during the proceedings. Presently, the court may take advantage of this right at every stage of the proceedings and, significantly enough, more than once. New regulations provide courts with more flexibility and increase chances for an amicable resolution of a conflict thus shortening the pro-

18 See: M. Pazdan, Umowa o mediację, (in:) Księga pamiątkowa ku czci Profesora Janusza Szwaji. Prace z wynalazczości i ochrony własności intelektualnej, Kraków 2004, p. 264.

19 See: R. Morek, Umowa o mediację i jej charakter, (in:) M. Pazdan, W. Popiołek, E. Rott-Pietrzyk, M. Szpunar (ed.), Europeizacja prawa prywatnego, tom I, Kraków 2008, p. 773.

20 See: Ł. Błaszczak, Charakter prawny umowy o mediację, "ADR" 2008, No. 1, p. 26.

ceedings too. It happens that at the beginning of litigation the parties are absolutely against mediation while later they become more willing to undertake it.

Referring the parties to mediation, the court establishes it duration (prolonged) for up to three months. The need to introduce changes within this scope ensued from the previous practice. Considering that mediations generally lasted longer than a month, prolonging the initially adopted time limit, the legislator made a possibility of reaching a settlement real. A three-month period is instructive in nature. Upon an amicable request of the parties or due to other important reasons, time limit for mediation may be prolonged if it contributes to an amicable resolution of the dispute. Time of mediation is not counted into time of litigation. A presiding judge generally schedules a hearing after the lapse of a specified time period. It may be designated before this date if just one party to the conflict declares they do not agree to mediation.

According to Art. 10 of the CCP, courts are obliged to aim at an amicable resolution of the case at each stage of the proceedings, in particular by encouraging the parties to mediation. Art. 183^8 § of the CCP corresponds fully to the above regulation stipulating that a presiding judge may request the parties to take part in an information session concerning amicable methods of dispute resolution, mediation in particular. This meeting may be conducted by a judge, court refendary, judicial clerk, judge's assistant or permanent mediator. Within this scope, Polish regulations are in compliance with Art. 5 of Directive 2008/52. An information meeting is not only to provide important information about mediation but also persuade the parties to take advantage of this alternative method of conflict resolution. A decision on how to hold such meetings has been left to individual courts' discretion. What is more, before the first session scheduled for a hearing, a presiding judge decides if the parties should be referred to mediation. If he or she believes it is first necessary to listen to the parties, a presiding judge may summon the parties to appear in person in a closed session (§ 5). The party that will not attend an information meeting or closed session without any justification may be burdened with the cost of ordered appearance borne by the opposite party. Furthermore, the provisions of the Code of Civil Procedure envisage that if the parties concluded a mediation agreement before the launch of litigation, the court refers the parties to mediation with regard to the defendant's objection raised before the dispute about the essence of the case. New regulations on encouragement and dissemination of knowledge about mediation should contribute to increased popularity of mediation and its importance in resolution of conflicts between the subjects of employment relation.

3. Voluntary mediation

Pursuant to Art. 183^1 § 1 of the CCP, a basic feature of mediation distinguishing it from litigation is its voluntary character. The principle of voluntary participation

applies equally to the parties and mediator, especially if he or she has been selected *ad hoc*. Consequently, neither the motion for mediation submitted by one of the parties (employee or employer) nor referral of the case to mediation by the court are binding. The principle of voluntary participation is fulfilled at every stage of proceedings, which means that each party to the employment relation may refuse to take part in mediation at any time not suffering negative procedural consequences for it[21]. The party that refuses to take part in mediation without any reasonable justification my only be encumbered with the costs of proceedings. Circumstances which do not justify the refusal to the slightest degree should be treated as "no reasonable justification". It is worth emphasizing that pursuant to Art. 103 § 2 of the CCP in a new reading, a financial penalty may be imposed on every subject refusing to take part in mediation. Previously, negative financial consequences served to discipline the subject who initially agreed to mediation to prolong litigation and then withdrew his or her consent[22].

The principle of voluntary participation is also fully enjoyed by a mediator selected *ad hoc*. He or she has the right to refuse a proposal to conduct mediation within a week from the date of being served a motion to carry out mediation. It is not necessary to provide the reasons for the refusal (Art. 183^6 § 2 point 2 and 3 of the CCP). On the other hand, a permanent mediator is entitled to this only for important reasons, which he or she must immediately inform the parties about if they have been referred to mediation by the court, and the court too (Art. 183^2 § 4 of the CCP). A refusal is fully reasonable if mediator's impartiality may arise any doubts. It may occur if the mediator is connected to one of the parties to the dispute, or personally interested in a specific resolution.

The principle of voluntary participation also refers to the settlement reached between an employee and employer. Remembering that a settlement is, in its essence, a compromise between each party's demands, its content cannot be imposed by a mediator. This conclusion is confirmed in a new Art. 183^{3a} of the CCP, which stipulates that a mediator conducts mediation using different methods aimed at an amicable resolution of a dispute, including supporting the parties in formulating settlement's proposals or, upon a mutual request of the parties, he or she may indicate ways of dispute resolution which are not binding the parties. The content of the above mentioned provision implies that solutions presented by a mediator are only proposals the parties in conflict may reject not suffering any negative consequences for that.

Voluntary mediation is the effect of the principle expressed in Art. 45 par. 1 of the Polish Constitution, which enshrines everyone's right to a fair and open trial by

21 See: A. Mucha, Czy obecna konstrukcja prawna mediacji jest efektywna ekonomicznie? O kosztach społecznych mediacji w ujęciu ekonomicznej analizy prawa, (in:) J. Czapska, M. Szeląg-Dylewski (ed.), Mediacje…, *op. cit.*, p. 64.

22 See: Z. Miczek, Mediacja w sprawach cywilnych, PPH 2006, No. 6, p. 12.

an independent, impartial and sovereign court. This feature is also emphasized in the EU provisions (point 13 of the Preamble and Art. 5 of Directive 2008/52).

4. Initiation of mediation

Mediation starts when a mediator is served a mediation motion with enclosed confirmation of the receipt of its official copy on the other side thereof (Art. 183^6 § 1 of the CCP). As previously, in situations enumerated in the Act, regardless of a relevant motion being sent, mediation is not launched. Circumstances evoking such an effect embrace, in particular: a refusal to carry out mediation submitted within a week by a permanent mediator, *ad hoc* mediator or a person designated by one of the parties to the mediation agreement where a mediator was not specified as well as no consent given by the other party to carry out mediation by the selected mediator within the same time limit. According to new regulations, if in the situations listed above the party brings a lawsuit for the claim covered by the mediation motion within three months since the day: 1) on which the mediator or the other party submitted a statement in effect of which mediation has not been initiated, or 2) following the day from the lapse of a week on which the mediation motion was served if the mediator or the other party did not make such a statement – with regard to this claim, the effects envisaged for the launch of mediation will be maintained. It results *expressis verbis* from the content of the above provision that the limitation period shall be interrupted if within a statutory time limit – not exceeding three months since the mediator or the opposite party rejected a mediation proposal, and in the event of their silence, within three months since the day on which a statement on refusal could be served – a lawsuit is brought for the claim which was to be resolved in mediation (Art. 123 § 1 point 3 of the CCP).

Mediation proceedings are private. Additionally, the legislator obliges a mediator, parties and other persons taking part in mediation to keep facts they learnt in the course of mediation secret. This requirement is not absolute because pursuant to Art. 183^4 § 2 sentence 2 of the CCP, the parties may exempt a mediator and other persons taking part in mediation from the ban on not disclosing circumstances which were revealed in mediation. A concerted action of the parties in conflict is necessary within the above scope, which means that the authorization given by only one of them does not exempt from the obligation envisaged in the discussed provision. It should be emphasized that due to its exceptional character, Art. 183^4 § 2 sentence 2 of the CCP must be strictly interpreted. Considering that solely a mediator and other persons are listed in this provision, the parties to the dispute are obliged to keep any information acquired during mediation secret, without any exception. Moreover, the legislator restricts that invoked settlement proposals, proposals of mutual conces-

sions or other statements made during mediation in the course of proceeding before the court or arbitration courts shall be ineffective.

A purpose of mediation is reaching a settlement[23]. In accordance with previously valid provisions, each settlement, i.e. reached during mediation carried out under a relevant agreement or a decision to refer the parties to mediation, had to be confirmed by a competent court. In consequence, immediately after reaching a compromise, a mediator was obliged to submit the minutes of mediation proceedings with the court. The above rules have not been changed in relation to mediations based on a court decision. While in the event of contractual mediations, a mediator submits the minutes if, after reaching a settlement, the party applies to the court for its confirmation. Amending the Code provisions, the legislator intended to enhance the importance of out-of-court settlements. If the parties voluntarily fulfil obligations contained in the agreement, there is no need to engage the court. The court undertakes relevant action upon the party's request. Confirmation of the settlement and making it enforceable – if it is subject to enforcement in executive proceedings – shall be carefully analyzed with regard to, among others, compliance with the law, principles of community life, content and consistence.

5. A mediator

A mediator may only be a natural person with a full capacity to perform legal actions enjoying full civil rights regardless of a nationality, education or profession. The only restriction here is a judge who cannot fulfil this function, except retired judges. During legislative works on the drafted Act of 10 September 2015, it was proposed to extend practice and competency requirements for mediators: they must be competent and have relevant skills and knowledge about mediation, be at least 26 years old, and speak Polish. Moreover, they cannot be validly convicted of an intentional offence or prosecuted for such an offence, and they must be entered in the registry of permanent mediators[24]. Eventually, the legislator confined himself to previous solutions. Although it does not directly ensue from the Code provisions that a person

23 See: K.W. Baran, Mediacja…, *op. cit.,* p. 4 et seq.; K.W. Baran, Ugody zawarte przed mediatorem w sprawach z zakresu prawa pracy, (in:) A. Świątkowski (ed.), Studia z zakresu prawa pracy i polityki społecznej, Kraków 2006, p. 119 et seq.; R. Flejszar, Ugodowe rozwiązywanie sporów z zakresu prawa pracy, (in:) A. Świątkowski (ed), Studia z zakresu prawa pracy i polityki społecznej, Kraków 2010, p. 315 et seq.; A. Marek, Mediacja…, *op. cit.*, p. 12-14.

24 Proposed changes were similar to the requirements imposed on mediators in criminal cases, see: Regulation of Minister of Justice of 7th May, 2015 on mediation in criminal proceedings (Journal of Laws, item 716), which stipulate that a mediator may be a person who: 1) is a Polish national, is a citizen of another EU Member State, or EFTA member state – a party to the European Economic Area or the Swiss Confederation, or a citizen of another state if pursuant to the EU law provisions he or she is entitled to work or be self-employed within the Republic of Poland under rules specified in these provisions, 2) fully enjoys public civil rights and has a full capacity to perform legal acts, 3) is over 26 years old, 4) is fluent in Polish (spoken and written), 5) has not been validly convicted of an intentional offence or intentional tax offence, 6) has knowledge and skills to carry out mediation, resolve conflicts and establish interpersonal relations, 7) guarantees proper fulfilment of his or her duties, 8) has been entered into a relevant registry.

with relevant essential preparation may be a mediator, it is undoubtedly a mediator who decides about the success of mediation to a large degree. Therefore it should be a person who has appropriate knowledge and experience in mediation, enjoying community respect and trust. Knowledge of law, psychology, ethics and different methods of amicable resolution of dispute is equally important too[25]. Highly professional mediators positively affect the course of mediation thus increasing a chance of reaching a compromise and enhancing community trust in amicable resolution of disputes.

Within the scope of their statutory tasks, non-governmental organizations, particularly employers' organizations and trade unions, as well as universities (state and private) may keep registers of mediators and open mediation centres. A mediator may be entered into this registry solely upon his or her written consent. Information about registries of mediators and mediation centres is conveyed to the president of a regional court. He or she should be notified about individual mediator's specialization or expertise to facilitate the right choice of a mediator by both the parties and the court. Registries embracing permanent mediators are not binding, which means that mediation may be conducted by a person selected *ad hoc* by the parties to the employment relation or the court (Art. 183^9 § 1 of the CCP).

The right to choose a mediator is firstly vested in the parties to the proceedings; if they cannot agree thereto, a mediator is selected by the court referring the case to mediation.

As previously, a mediator is obliged to carry out mediation impartially. Added Art. 183^3 § 2 of the CCP fully corresponds to this obligation stipulating that the obligation to immediately notify the parties about the circumstances that may evoke doubts as to the mediator's neutrality. The draft's reasoning underlined that the change within the above scope will enhance the mediator's credibility by convincing the parties that they have no conflict of interest with the mediator, in effect of which the conflicting parties will be encouraged to resolve their dispute out-of-court[26].

The Code solutions adopted in the above scope correspond to the regulations of Art. 4 of Directive 2008/52 stipulating that Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

A mediator has the right to remuneration for his or her activities and reimbursement of expenses connected with the mediation. These include the cost of travel, notification of the parties, stationery and renting a place to carry out mediation[27]. Pursuant to the regulations of the Code of Civil Procedure (Art. 183^5), a mediator may waive their remuneration whereas additional expenses – being obligatory – bur-

25 See: Mediator Code of Ethics prepared by Polish Centre of Mediation, www.mediator.org.pl.
26 See: reasoning to the drafted Act, www.sejm.gov.pl.
27 See: Regulation of Minister of Justice of 30 November 2005 on remuneration and reimbursement of expenses incurred by a mediator in civil proceedings, uniform text: Journal of Laws of 2013, item 218.

den both or one party to the proceedings depending on relevant arrangements. It should also be noticed that the exemption from court costs does not cover expenses connected with the cost of mediation carried out due to the court's referral, which are included in the cost of a trial (Art. 98 and Art. 98^1 of the CCP).

6. Conclusion

Amended provisions of the Code of Civil Procedure, which came into force on 1 January 2016, should contribute to the enhanced importance of mediation in resolving civil cases, especially labour law disputes. A mandatory statement on undertaking mediation made in a petition, participation in an information meeting concerning mediation and, finally, a possibility to refer a disputed case to mediation many times, at every stage of the proceedings, serve the above mentioned purpose. A waived requirement to confirm a settlement negotiated before a mediator each time by the court is not without significance too. Voluntary fulfilment of obligations set forth in an out-of-court settlement does not require the court's involvement. An extended period of mediation carried out on the basis of the court's decision should be approved of. A three-month period increases a chance of an amicable resolution of a dispute.

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Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.16

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Commentary on the Judgment of the Supreme Court of 18 March 2015 (Ref. No. II KK 318/14)[1]

Envisaging an unconditioned prerequisite of reading aloud a testimony of a witness who resides abroad, the provision of Art. 391 § 1 of the Code of Criminal Procedure does not make the application of this possibility depend on any additional conditions such as, e.g., a long period of residence abroad and the importance of such evidence being read aloud to the pending proceedings, which does not exempt the court from a duty to establish whether the witness's residence abroad is a real impediment to implement the principle of immediacy.

The fact that a witness resides abroad should be treated as a sufficient prerequisite to read aloud his or her testimony given in preparatory proceedings only if his or her examination before the court is impeded in a way comparable to impossibility of serving him or her with summons or with other insurmountable obstacles.

1. The statement made by the Supreme Court about a possibility of disclosing the minutes of the examination of a witness residing abroad if he or she fails to appear in the hearing if he or she was previously examined evokes fundamental doubts both about the theses and main argumentation's threads. Therefore it does require a more profound analysis because the reasoning to the above quoted theses is general, not to say – partially internally contradictory. On the one hand, the Supreme Court indicates that a possibility of free travel in the EU countries means that often the only actual impediment of giving evidence by a witness residing abroad before a judge may be a long distance from the place of the witness's residence to the court's build-

1 Supreme Court's judgment of 18 March 2015, II KK 318/14, OSNKW 2015, No. 9, item 73.

ing. However, due to the common access to means of communication, such a difficult obstacle can be overcome. Indeed it is beyond any doubts, as noticed by the Supreme Court in the reasoning, that in many cases appearance in a court will be less time consuming and burdensome for a witness residing abroad than for a witness living in a remote part of the country. This eventually leads the Supreme Court to conclude that residence abroad of a witness should be treated as a sufficient prerequisite to read aloud his or her testimony given in preparatory proceedings only if his or her examination before a court is impeded to an extent comparable to a lack of possibility to serve him or her summons or other insurmountable obstacles.

On the other hand, the Supreme Court admits in another part of the reasoning to the glossed judgment that envisaging an unconditioned prerequisite of reading aloud a testimony of a witness who resides abroad, the provision of Art. 391 § 1 of the Code of Criminal Procedure does not make the application of this possibility depend on any additional conditions such as, e.g., a long period of residence abroad and the importance of such evidence being read aloud to the pending proceedings, which does not exempt the court from a duty to establish whether the witness's residence abroad is a real impediment to implement the principle of immediacy[2]. Moreover, the Supreme Court adds that the norm contained in the provision of Art. 391 § 1 of the CCP is of an "exceptional nature while the context created by other prerequisites listed therein allowing to read aloud a testimony of an absent witness do not leave any doubts that the witness's residence abroad should be treated as a sufficient prerequisite to read aloud his or her testimony given in preparatory proceedings only if his or her examination before a court is impeded to an extent comparable to a lack of possibility to serve him or her summons or other insurmountable obstacles".

2. The above opinion of the Supreme Court can be approved of solely within the scope of the exceptional nature of the provision of Art. 391 § 1 of the CCP expressing deviation from the rule of immediacy. It elevates a legal norm determining conditions to be fulfilled to allow disclosure of the minutes of the examination in a hearing if a witness fails to appear in it[3]. One of these conditions is the witness's residence abroad. The circumstance is unconditioned, the same as other conditions indicated in Art. 391 § 1 of the CCP allowing to read aloud appropriate fragments of the minutes of testimonies submitted earlier by a witness in preparatory proceedings or before a court in this or another case, or other proceedings envisaged by the Act. Admitting a possibility of reading aloud a witness's testimony both by the court and parties[4], the legislator failed to specify accurately both a kind of such residence and

2 The same opinion was expressed by the Supreme Court in the ruling of 6 April, 2006, IV KK 7/06. The Court ruled that the very fact of a witness residing abroad for a long time authorizes a court to read aloud his or her testimony regardless of its importance to pending proceedings (OSNKW 2006, No. 6, item 60).

3 D. Świecki, Bezpośredniość czy pośredniość w polskim procesie karnym, Warszawa 2012, p. 203.

4 Content *de lege lata* of Art. 391 § 1 of the CCP does not specify who may read aloud relative fragments of the minutes of a hearing. It is confirmed by the term used by the legislator therein: "allowed to read aloud". Considering

its duration[5]. The legislator implies that a possibility of reading aloud the minutes of the witness's testimony does not depend on "any additional conditions such as, e.g., a long residence abroad or the importance of such evidence being read aloud to the pending proceedings", which has also been approved of by the Supreme Court in the glossed judgment. It expresses the Supreme Court's reference merely to the rules of language interpretation and the conviction that the application of these rules eliminates the very admissibility of pursuing the interpretation with the use of still other methods. Nevertheless, it should be noticed that even an obvious effect of the language interpretation does not exempt the interpreter from a duty to refer to systemic and functional interpretation in order to explore whether the result of the language interpretation is not irrational or axiologically unacceptable. Thus the doctrine and Supreme Court's case law rightly more and more often indicate that relying only on the language interpretation as the only method of interpretation is not sufficient and may lead to the incomplete reading of a legal norm. Therefore it is postulated not to finish the process of interpretation at this stage but verify the obtained results with the use of further interpretation directives (systemic and functional) regardless of a degree of the language unambiguity[6]. Hence you do not need to be too penetrative to claim that in such a situation the result of a legal interpretation performed through the prism of many interpretative directives provides greater opportunities for obtaining a correct result of this process than limiting oneself to one method of interpretation.

Moving on the subject matter of the glossed judgment of the Supreme Court and considering the above, it is necessary to refer to extra-linguistic directives of inter-

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the reading of Art. 167 of the CCP, it should be assumed that the minutes may be read aloud by the court or parties. It should be added that reading aloud the minutes of a witness hearing by the party requires a prior motion for evidence and admitting it under Art. 368 of the CCP.

5 The CCP of 1969 used an analogous expression in Art. 337 § 1 thereof. It was justified by the need to replace a prerequisite admitting reading aloud a testimony „due to a considerable distance of the place of residence", which was first occurred in Art. 340 § 1 of the CCP of 1928 (introduced by the Act of 27 April 1949 on amending provisions of the Code of Criminal Procedure, Journal of Laws No. 32, item 238), and then in Art. 299 § 1 of the CCP of 1928 after implementation of a uniform text, Journal of Laws of 1950, No. 40, item 364). Also see: T. Nowak, Zasada bezpośredniości w polskim procesie karnym, Poznań 1971, p. 138.

6 Compare: M. Zieliński, Podstawowe zasady współczesnej wykładni prawa, (in:) P. Winczorek (ed.), Teoria i praktyka wykładni prawa, Warszawa 2005, p. 118; M. Zieliński, Wykładnia prawa. Zasady, reguły, wskazówki, Warszawa 2013, p. 314 et seq.; M. Zieliński, Osiemnaście mitów w myśleniu o wykładni prawa, (in:) L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), Dialog między sądami i trybunałami, Warszawa 2010, p. 137 et seq.; M. Peno, M. Zieliński, Koncepcja *derywacyjna* wykładni a wykładnia w orzecznictwie Izby Karnej i Izby Wojskowej Sądu Najwyższego, (in:) J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), Zagadnienia prawa dowodowego, Warszawa 2011, p. 117-136; P. Hofmański, S. Zabłocki, Elementy metodyki pracy sędziego w sprawach karnych, Warszawa 2006, p. 234; P. Gensikowski, O wykładni prawa karnego, (in:) L. Morawski (ed.), Wykładnia prawa i inne problemy filozofii i prawa, Toruń 2005, p. 114; also see: Resolution of 7 judges of Supreme Court of 24 February 2010, I KZP 28/09, OSNKW 2010, No. 3, item 21. However, a prevailing opinion thereon is still the one according to which language interpretation is the most important – see, e.g., L. Morawski, Zasady wykładni prawa, Toruń 2006, p. 67 et seq.; L. Morawski, Wykładnia w orzecznictwie sądów, Komentarz, Toruń 2002, p. 85 et seq.; J. Wróblewski, Rozumienie prawa i jego wykładnia, Wrocław 1990, p. 86; Constitutional Tribunal's judgment of 28 June 2000, K 25/99, OTK 2000, No. 5, item 141; Supreme Court's resolution of 22 March 1994, I KZP 3/94, OSNKW 1994, No. 5/6, item 29; Supreme Administrative Court's ruling of 26 January 2001, I S.A./Lu 1176/99, "Biuletyn Skarbowy" 2001, No. 4, p. 22.

pretation. In the pursuit of the above, it should be pointed out that the provision of Art. 391 § 1 of the CCP functions as an exception from the rule of immediacy to take evidence in criminal proceedings, which is commonly binding in the Polish procedure; and the same as every exception, it should be applied moderately. We should remember that despite numerous exceptions, the contemporary model of criminal proceedings is based on the rule of immediacy to take evidence proving the defendant's responsibility directly by a competent court. Two directives ensure from the rule of immediacy, i.e., the procedural body and parties should have a direct contact with the source of evidence and evidence, and the procedural body should establish facts most of all by means of original evidence[7]. Nevertheless, there are opinions enriching the content of the rule of immediacy by another directive according to which the court should rely solely on evidence taken during a hearing[8]. Anyway, leaving disputes on the content of the rule of immediacy aside, it should be underlined that a significant guarantee ensuing from the rule of immediacy is the necessity of a direct contact of the court with the evidence being taken, which allows members of the bench gather impressions necessary to assess this evidence properly. The thing is judges should be fully aware of the entire evidence used as the basis of sentencing in order to guarantee judgments actually based on the evidence that has been duly and properly verified and assessed by the judges with regard to its credibility and value. A direct contact of the court with evidence sources and a possibility of verifying its content during a trial does allow the court to fully evaluate evidence. What is more, later on, it significantly affects the accuracy of the assessed credibility of evidence and its importance with regard to the case's resolution; and in consequence, implementation of the principle of the search for the truth.

Although the addressee of the rule of immediacy is, above all, the first-instance court as this court establishes facts which are the substantial basis of a ruling on the matter of litigation, this rule applies to all procedural bodies and litigants[9]. With regard to the parties, taking evidence directly in a hearing should fully implement the right to defence and the rule of adversarial proceedings by the active participation

7 The same, e.g.: S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, Warszawa 2016, p. 269.

8 D. Świecki, inter alia, supports the above opinion claiming that "to apply this rule properly, sentencing forum is also important because apart from a main hearing, the court may also take evidence elsewhere. Yet only in a hearing the court has the best conditions to evaluate evidence properly. It ensues from the fact that the court must disclose evidence in a hearing. This way the legislator ensures the court has a direct contact with evidence. The same, the first directive of the rule of immediacy facilitates implementation of the second directive. Thus it is also an important element of the rule of immediacy. Whereas the third directive is the essence of this rule because it creates the best conditions to search the truth" – D. Świecki, Bezpośredniość…, *op. cit.,* p. 23-24. The same opinion supported by M. Cieślak, Zasady procesu karnego i ich systemu, ZNUJ, Prawo No. 5, Kraków 1956, p. 199; T. Nowak, Zasada.., *op. cit.,* p. 44 et seq; W. Daszkiewicz, Prawo karne procesowe. Zagadnienia ogólne, t. I, Bydgoszcz 1999, p. 107 et seq.; J. Tylman, (in:) T. Grzegorczyk, J. Tylman, Polskie postępowanie karne, Warszawa 2009, p. 104; J. Grajewski, (in:) J. Grajewski (ed.), Prawo karne procesowe – część ogólna, Warszawa 2011, p.104; K. Marszał, S. Stachowiak, K. Zgryzek, Proces karny, Katowice 2003, p. 78 et seq.; B. Bieńkowska, (in:) P. Kruszyński (ed.), Wykład prawa karnego procesowego, Białystok 2003, p. 96 et seq.; A. Murzynowski, Istota i zasady procesu karnego, Warszawa 1994, p. 311-312.

9 Compare: D. Świecki, Bezpośredniość…, *op. cit.,* p. 21-22; T. Nowak, Zasada…, *op. cit.,* p. 45-48.

of the parties in hearing of evidence. In consequence, the parties may have a direct access to each piece of evidence and participate actively in hearing evidence during a trial if they are present and express their will to participate actively in hearing evidence before the court. Thus the rule of immediacy guarantees that the court will rely on the evidence obtained and taken in a way allowing full examination of the case, which is also the implementation of the defendant's procedural guarantee.

In the light of the above considerations, it cannot be claimed that a legal norm expressed in the provision of Art. 391 § 1 of the CCP allows to read aloud the witnesses' testimony in pending criminal proceedings in every situation of the witnesses' residence abroad regardless of "any additional conditions such as, e.g., a long residence abroad". If it happened, the rationale behind the rule of immediacy would be depreciated while the rule itself would be considerably weakened. That is why, bearing in mind the content of the rule of immediacy and being aware of the fact that the norm expressed in Art. 391 § 1 of the CCP is the exception thereto, it should be assumed that the obstacle in the form of the witness's residence abroad may be a prerequisite to read aloud his or her testimony given before by them if this residence is real, persistent or long-lasting and actually prevents the witness's appearance and his or her direct examination before the court. The procedural body cannot forget that Art. 391 § 1 of the CCP is a special provision which allows to depart from the rule of immediacy in specified circumstances, but it cannot be interpreted separately from other provisions of the Code of Criminal Procedure, in particular separately from the rules expressed in Art. 2 § 1 of the CCP, which bind the courts to, most of all, search for the truth while applying the provisions of the Code. In effect thereof, if the witness's testimony is considerably important to resolve the case, the court should apply Art. 391 § 1 of the CCP without prior exhaustion of the possibilities of examining the witness before the court, that is without acknowledging that there do occur insurmountable obstacles to satisfy the rule of immediacy and adversarial proceedings. Only then the witness's testimony may be read aloud within the appropriate scope regardless of its importance to the proceedings, even without the consent of the parties[10]. It certainly is not possible if the witness's residence abroad is connected with a temporary stay, visit, trip, or holiday, etc.[11] Then, it is not possible to acknowledge that there indeed occurred insurmountable obstacles to satisfy the rule of immediacy[12]. Nevertheless, each time the court decides about the disclosure of the minutes of the examination when the witness is absent in a hearing, it should consider a directive of hearing the case in a reasonable time (Art. 2 § 1 point 4 of the CCP) while

10 Supreme Court's ruling of 22 May 2014, III 117/14, Lex No. 1482405.

11 The judgment of Administrative Court in Katowice of 1 February 2008, II AKa 382/08, KZS 2008, No. 7/8, item 100; the judgment of Administrative Court in Białystok of 18 June 2015, II AKa 59/15, Lex No. 1808616.

12 Supreme Court's judgment of 15 May 1978, I KR 91/78, OSNKW 1978, No. 11, item 135; Supreme Court's judgment of 24 February 1984, II KR 35/84, OSNPG 1989, No. 8/9, item 82.

respecting the victim's legally protected interests and his or her dignity[13]. Due to this, it is accurate to claim that the Procedural Act does not make a possibility of reading aloud a testimony under Art. 391 § 1 of the CCP dependent on an ineffective attempt to summon the witness to a hearing but rationality of undertaking such activities aimed at a direct examination of the witness by the court appears quite obvious[14].

3. The Procedural Act does not make a possibility of reading aloud a testimony under Art. 391 § 1 of the CCP dependent on an ineffective attempt to summon the witness to a hearing but rationality of undertaking such activities aimed at a direct examination of the witness by the court appears quite obvious, particularly if we consider the need to respect directives composing the rule of immediacy. It undeniably refers to the situation when, e.g., the place of the witness's residence abroad is known, a distance from this place to the court's building does not exceed comparable distances within the country while it results from other evidence that the witness travels from the place of residence to Poland without greater limitations[15]. Furthermore, we cannot forget that even from the moment of enacting the provision of Art. 391 § 1 of the CCP in its current reading, since Poland joined the European Union and Schengen Area, a reference point for the term "s/he resides abroad" has changed with regard to individuals residing in the EU countries. Movement of people within the Schengen Area is undeniably easier.

Finally, the right ensuing from Art. 391 § 1 of the CCP cannot be considered separately from a more and more elaborate sphere of cooperation between judicial bodies of the EU countries regulated by treaties and conventions. It allows, among others, online examination of witnesses with the use of telecommunication devices assuring transmission of both sound and image in real time. In particular, such a possibility exists with regard to the examination of a witness and expert witness under Art. 10 of Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000[16], and under the provisions of Art. 9 and 10 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters drafted in Strasbourg on 8 November 2001[17]. In both cases, hearing by video conference does not deprive a hearing of the features of immediate hearing of evidence before the court.

13 Supreme Court rightly stated that "striving for full fulfilment of the rule of immediacy, within the limits of law obviously, may grossly contradict the postulate defined in Art. 2 § 1 point 3 of the CCP. It would strengthen a wrong opinion among the society, i.e. that a victim of a prohibited act exists in the margin of a criminal trial while the judicature is interested in him or her solely with regard to the need to hold the defendant criminally liable or acquit him or her of the charges. Such understanding of the term of insurmountable obstacles as a real possibility of deterioration of the victim's mental health due to experiences connected with appearing before the court" – compare: Supreme Court's judgment of 4 November 1988, IV KR 291/88, OSNKW 1989, z. 3/4, item 31; Supreme Court's ruling of 11 March 2003, V KK 150/02, Lex No. 77022.

14 Supreme Court's judgment of 17 May 2012, V KK 369/11, Lex No. 1165301.

15 *Ibidem*.

16 Journal of Laws of 2007, No. 135, item 950.

17 Journal of Laws of 2004, No. 139, item 1476.

Summing up, as far as witnesses residing abroad are concerned, a departure from the rule of immediacy envisaged in Art. 391 § 1 of the CCP should not be automatically applied but the court should endeavour to examine the witness in a hearing with the use of all possible means, including technical ones. The court may also take advantage of legal assistance under Art. 587 of the CCP. The above mentioned legal possibilities should be applied particularly when the testimony of a witness residing abroad is of considerable importance to the substantial hearing of the case[18]. To achieve this, the court should serve the witness with summons to the hearing scheduled on a date he or she will be able to arrive. Yet, if it was impossible, the court should launch the procedure of hearing the witness under a foreign legal assistance pursuant to the international agreement or Art. 177 § 1a of the CCP[19]. Only when the above activities appear to be ineffective should the norm expressed in Art. 391§ 1 of the CCP be applied.

18 Compare: Supreme Court's judgment of 6 June 1997, III KKN 114/96, OSPriP 1998, No. 3, item 14. Supreme Court's case law contains the opinion according to which the very fact of a witness's long residence abroad authorizes the court to read aloud his or her testimony regardless of its importance to pending criminal proceedings. It ensues from the claim that the provision of Art. 391 § 1 of the CCP "explicitly stipulates that when a witness resides abroad, appropriate fragments of the minutes of evidence given by him or her before in the preparatory proceedings, or before the court in this or another case or in another proceedings envisaged by the Act may be read aloud. It goes without saying that such a permission is a manifestation of support for the rule of prompt and efficient trial prevailing over the rule of immediacy in this specific situation" – see: Supreme Court's ruling of 6 April 2006, IV KK 7/06, OSNKW 2006, No. 6, item 60; Supreme Court's ruling of 16 December 2003, III KK 110/03, R-OSNKW 2003, item 2722.

19 See more: A. Lach, Przesłuchanie na odległość w postępowaniu karnym, "Państwo i Prawo" 2006, No. 12, p. 84; the same opinion was held by the Supreme Court in its ruling of 4 June 2009, V KK 295/08, Lex No. 512081 which claimed that "examining witnesses residing abroad in a hearing by video conference with the participation of a translator by the judge of a foreign county acting as a summoned court does not violate Art. 177 § 1a of the CCP in connection with Art. 396 § 2 of the CCP".

Białostockie Studia Prawnicze
2016 vol. 21

DOI: 10.15290/bsp.2016.21.17

Harald Lemke-Küch

Der laienrichter – überlebtes Symbol oder Garabt der Wahrheitsfindung? Eine rechtsgeschistliche Untersuchung über das "moderne" Volksgericht in Deutschland seit Beginn des 19. Jahrhuderts

Peter Lang GmbH, Frankfurt am Main 2014 (pp. 241)

1. General comments

The issue of community participation in sentencing has already been discussed in numerous monographic studies in German literature[1]. What is more, guidebooks or manuals for lay judges sentencing in criminal cases are published in Germany, among others by German Association of Lay Judges (*Deutsche Vereinigung der Schöffinnen und Schöffen*)[2].

A provocatively formulated main thesis of the monograph, which is limited to the question whether community participation (of a lay judge) in sentencing is an outdated element of a trial or a guarantee to discover the objective truth, evokes reflection itself. A tool used by the Author to achieve this objective was to be, above all,

1 G. Andoor, Laien in der Strafrechtsprechung. Eine vergleichende Betrachtung der Laienbeteilung an deutschen und englischen Strafgerichten, Berlin 2013; H. Lieber, U. Sens (ed.), Ehrenamtliche Richter. Demokratie oder Dekoration am Richtrertisch?, Wiesbaden 1999; F.Ch. Grube, Richter ohne Robe. Laienrichter in Strafsachen im deutschen und anglo-amerikanischen Rechtskreis, Frankfurt am Main 2004, p. 35-59; B. Linkenhein, Laienbeteiligung an der Strafjustiz. Relikt des burgerlichen Emanzipationsprozessen oder Legitimation einer Rechtsprechung "Im Namen des Volkes"?, Berlin 2003; W. Grikschat, A. Luthke, F.-W. Dopatka, I. Müller, Gesellschaft, Recht und Strafverfahren. Eine Einfuhrung in die Strafjustiz für Schöffen und andere Interessierte. Opladen 1975; Ch. Renning, Die Entscheidungsfi ndung durch Schöffen und Berufsrichter in rechtlicher und psychologischer Sicht, Marburg 1993; I. Nassif, Das erweitere Schöffengericht Regensburg 2009.

2 H. Lieber, U. Sens, Fit fürs Schöffen und andere Interessierte. Opladen 1975; Ch. Renning, Die Entscheidungsfindung durch Deutscher Schöffentamt, Berlin 2013; Mehr Demokratie am Richtertisch. Dokumentation. Bonn 1992.

a historical and law-comparative method, including valid German criminal procedure legislation.

I have assumed to review the above monograph since in the Polish criminal procedure legislation and ensuing court case law as well as opinions held by the doctrine tendencies to eliminate (or limit) manifestations of community participation in sentencing have emerged too.

2. Monograph's structure

The monograph is divided into introduction, seven chapters and summary. The introduction emphasizes constitutional foundations of the rule of community participation in sentencing whilst indicating problems ensuing, among others, from the juxtaposition of this principles with the defendant's right to defence (p. 1-7). It is underlined that the institution of community courts in Germany is rooted at the turn of the 18th and 19th centuries, and at that time took the form of juries, named so following the example of the English "jury". This part of the monograph focuses on the problem which is over 200 years old, i.e. the question whether a fate or fortune of the defendant subject to the principle of assumed innocence can be entrusted with jurors, who are not experts in law?

The first chapter of the monograph depicts historical development of the institution of a juror/community judge and systematizes terms and notions applied later in the legal and historical analysis. This chapter is an attempt at defining such terms as a community court (*Volksgericht*) (p. 9-13), which has been juxtaposed with the term of lay judges courts (*Laiengericht*) (p. 13-14). Furthermore, the term of community courts has been compared to the institution of juries and jurors (p. 14-17), to be followed by a lay judge and lay judges courts (p. 17-19).

The second chapter of the monograph discusses functions of community courts and expectations they were to satisfy at the beginning of the 19th century. Originally, the German Code of Criminal Procedure (StPO) envisaged participation of two types of community judges in a criminal trial: lay judges (*Schöffen*) and jurors (*Geschworenen*). Lay judges, the same as now honorary judges (*ehrenamtlichen Richtern*), sat in the bench together with professional judges and enjoyed equal rights (except access to case files). Whereas with regard to juries, which were competent to resolve cases of the most serious crimes, their tasks were initially (similar to the English and French system) divided between professional judges and lay judges: the jury composed of twelve jurors decided about guilt themselves while three professional judges decided about punishment[3]. Since juries were not able to handle complicated issues of facts and law and due to other defects of this institution (including financial reasons), their previous form was significantly modified in 1924 under the Regulation of Minister of

3 C. Roxin, B. Schünemann, Strafverfahrensrecht, München 2009, p. 32-33 and literature cited therein.

Justice (the so called *Emminger Reform*). Presently, they do not differ from lay judges courts (even though judges of such courts are still customarily called "jurors"). According to the Author, just this reform led to the abolishment of the institution of juries in Germany (p. 29-41).

The third chapter of the monograph is devoted to the principles of selecting community judges to juries and lay judges courts in the 19th century as well as after the *Emminger* reform of 1924. The chapter depicts these times' reality, among others deprivation of specific professional and social groups of a possibility to be a candidate for a community judge and actual exclusion of women candidates thereto in the 19th century (p. 43-48).

The fourth chapter of the monograph depicts the problem of jurors' expertise in law and impact thereof on their choice. The problem of an act (*Tatfrage*) has been extensively described here. Moreover, the issue of the jurors' verdict (*Wahrspruch*) with regard to the defendant's guilt and impact of professional judge's instructions given to the jurors after the closure of litigation on this verdict have been considered. Finally, the principle of free evaluation of evidence as a basis of community judges' sentencing has been presented (p. 102-118).

The fifth chapter of the monograph discussed jurors' competence to sentence in cases other than criminal ones, that is in labour and social insurance courts, commercial courts, administrative and financial judiciary and agricultural courts (p. 119-144).

In the sixth chapter the Author analyses the participation of lay judges in sentencing in totalitarian systems, including community courts of the former German Democratic Republic (DDR).

The seventh chapter considers selected problems connected with the functioning of juries in Germany, that is a lack of access to case files and practical fulfilment of the jurors' right to ask questions during a trial.

3. Summary

From the Polish reader's perspective, the most important considerations are included in the last – eight chapter of the monograph – which contains conclusions ensuing from the prior historical and legal analyses (p. 233-241). The Author underlines historical importance of community participation in criminal sentencing stressing that it is one of the most crucial aspects of social trust in the system of justice and a guarantee of judicial independence.

Moreover, this part of the monograph focuses on problems connected with the choice of lay judges from a historical perspective and in the currently binding German legislation. It is emphasized that within historical development, the German legislator departed from the requirement of property and education qualification

of community judges endeavouring to recruit them from all representative social groups and environments excluding some categories of civil servants. The Author also discerns the problem of a political character of the institution of lay judges in the former DDR, which was manifested in the party-oriented criteria of their selection (p. 233-234).

Furthermore, the summary considers the quality of sentencing of the courts with the participation of lay judges. The Author believes that the quality of a criminal court's judgment does not depend on the fact whether it was rendered with the participation of jurors (without a professional judge's impact), or by the bench with the participation of lay judges (p. 233-235). He invokes the Volk's thesis: "The only argument for the abolishment of participation of lay judges (in sentencing – ref. by C.K.) are uncertain consequences of such a decision; the only argument for the participation of lay judges is the fact it exists" (p. 235).

Concluding, the Author considers the fact of conveying lay judges basic information about the case files before the launch of a hearing (which are fully known by a presiding judge – a professional justice), yet solely to such an extent they could not be convinced about the defendant's guilt and perpetration due to the above access to case files.

The monograph also emphasized the need to provide lay judges with appropriate training in criminal law and procedure because, contrary to other lay judges courts (sentencing, e.g., in commercial cases, or employment and social security cases), lay judges sentencing in criminal cases are not able to counterbalance unequal competence between them and professional judges by their life experience. A postulate of creating lay judges committees within administrative court structures, which would affect these structures' administration, has been conveyed for a long time now in order to improve communication between lay judges and between lay judges and professional judges (p. 236-237).

Considering arguments for and against community participation in sentencing, the Author claims that in effect of the analyses pursued in the monograph, he is not persuaded by the opinion of professional judges who believe that the advantage of lay judges' participation is presentation of a social and pedagogical point of view (*volkspädagogische Gesichtspunkt*) which enhances social trust in the administration of justice. This advantage is undermined by negative circumstances accompanying community participation in sentencing, i.e. a lack of legal expertise, lack of sufficient knowledge about the case and practical skills to resolve it, or emotionally charged lack of objectivism. Due to prevailing legal expertise and competence of professional judges, lay judges are not able to fulfil a function of a guarantor of proper sentencing too.

Indicating the above, the Author believes a proper place for lay judges is a community court (following the example of previously existing courts in the former DDR), which could sentence in cases completed with opportunistic discontinua-

tion (§ 153, § 153a StPO), or in mediation (*Täter-Opfer-Ausgleich*) as well as during enforcement of punishment the defendant was sentenced to (p. 238-241). The above proposed alternatives for current lay judges courts have one thing in common – depriving lay judges of co-responsibility for a main hearing and rendering a judgment. According to the Author's last sentence of the monograph: "If we approve of this opinion, we will create an opportunity, perhaps the only one, to add a new, future perspective to the above quoted Volk's opinion on "uncertain" consequences of the removal of community participation, which is solely focused on the examination of a criminal case in criminal proceedings" (p. 241).

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