

## COMPLIANCE OF PLEA BARGAINING IN THE POLISH CRIMINAL PROCESS WITH FAIR TRIAL REQUIREMENTS FROM THE POINT OF VIEW OF ITS PARTICIPANTS AND THE COURT

In considering the mutual relations between the so – called procedural justice and the fair trial requirements, one must agree with P. Wiliński who believes that the notion of fair trial must refer to the method of conducting criminal proceedings, while the notion of procedural justice must focus on the purpose of criminal proceedings.<sup>2</sup> Thus, fair trial may also be understood as a template for forming the proceedings and as a synthesis of the applicable principles defining the procedural methods. In this context, P. Wiliński points out that the notion of fair trial may be regarded as a method to define a model of a criminal process. What is in question is a model of process in the “guarantee” sense, i.e. one that indicates what its method are (reaching a verdict while protecting the rights of all the participants of the process), what values it is to achieve, and what conditions it is to meet in striving to find the substantive truth.<sup>3</sup>

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2 P. Wiliński: *Sprawiedliwość proceduralna a proces karny* [Procedural justice and the criminal process], in: *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdaj* [Fair trial. Anniversary book for Professor Zofia Świdaj], Warsaw 2009, pp. 77–91

3 P. Wiliński, *Pojęcie rzetelnego procesu* [The term “fair trial”], in: A. Błachnio–Parzych, J. Kosonoga, H. Kuczyńska, C. Nowak, P. Wiliński, *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych* [Fair trial in judicial decisions of Polish and international courts], P. Wiliński, ed., Warsaw 2009, p. 26, and the literature referred to therein; E. Skrętowicz, *Z problematyki rzetelnego procesu karnego* [The on the problem of fair trial], in: *Rzetelny proces karny. Księga jubileuszowa*, [Fair trial. Anniversary book...], *op. cit.*, pp. 21–27.

Thus, P. Wiliński appears to identify two approaches to the objective of a criminal process, the first being a traditional one, which consists in finding the substantive truth, and the second being procedural justice, which has been gaining importance lately.<sup>4</sup> This discussion must be compared with the views expressed in the process doctrine, which question the possibility to consider fair trial as a procedural principle based on any legal guidelines.<sup>5</sup>

An opinion important to the discussion presented in this article is that of P. Hofmański, who believes that the term fair trial covers only those elements that have not been expressly described in art. 6 of the European Convention on Human Rights (ECHR). At the same time, he points at a number of elements forming the principle of fair trial, to include the right to be present at a hearing and to be heard by the court, the principle of equal weapons, the right to credible and precise information on the trial, and indication of potential opportunities for defence. In P. Hofmański's opinion, this principle sets certain requirements that must be observed in court verdicts that end the trial, in particular the requirement to base the verdicts on evidence presented before the court in a free and impartial manner as well as the requirement to substantiate the verdicts.<sup>6</sup>

Of note are the decisions of the European Court of Human Rights (ECtHR) which, as early as the 1980's, extended the fair trial guarantee (in particular the right to defence – art. 6 (3) of the ECHR) to cover preparatory proceedings<sup>7</sup> and appeals proceedings. Moreover, to

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4 See also: J. Skorupka: *Sprawiedliwość proceduralna jako cel procesu karnego* [Procedural justice as the objective of a criminal process], in *Rzetelny proces karny. Księga jubileuszowa...* [Fair trial. Anniversary book...], *op. cit.*, pp. 57–76.

5 See, e.g.: I. Nowikowski, *Uwagi o zasadzie rzetelnego procesu karnego (Kwestie wybrane)* [Comments regarding the fair trial principle], in *Rzetelny proces karny. Księga jubileuszowa...* [Fair trial. Anniversary book...], *op. cit.*, pp. 45–56.

6 P. Hofmański: *Konwencja Europejska a prawo karne* [The European convention and penal law], Toruń 1995, pp. 238–249.

7 Compare judgments: *Artico v. Italy* (13 May 1980 – the appointment of counsel does not, in itself, satisfy Article 6(3)(c). The Convention must be applied in a way which is practical and effective, not theoretical and illusory; *Kamasinski v. Austria* (19 December 1989, para. 65) – The appointment of a legal aid defence counsel is not sufficient to satisfy the requirement imposed under Article 6, paragraph 3.c; there is a need to guarantee the substantial and constant presence of legal assistance and there must be no interference with the relationship between the defence counsel and the defendant; *Monnell and Morris v. UK* (2 March 1987, para. 56) and *Berlinski v. Poland* (20 June 2002, para. 75) – the manner in which the provision of para-

a certain extent, the Court started applying the principle of fair trial also to the victim.<sup>8</sup>

Given the above discussion of different interpretations of the fair trial concept, its aspects in the Polish criminal process doctrine, and the expanding interpretation of this matter in the decisions of the ECtHR<sup>9</sup>, one must select the fair trial guarantees to be analyzed in the context of consensual modes of ending criminal proceedings.

If one assumes that plea bargaining in a criminal process leads to voluntary relinquishment by the defendant of certain fair trial guarantees (such as openness or adversarial nature of the hearing), then the elements mentioned in art. 6 (1) of the ECHR must be put aside. Consequently, this chapter focuses mainly on such aspects of fair trial as:

- 1) the possibility to find the substantive truth and, consequently, to achieve procedural justice;

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graph 3 (c) applies (in conjunction with the first paragraph of Article 6) in appeal and cassation proceedings or during a preliminary investigation depends on the characteristics of the proceedings in question; S v. Switzerland (28 November 1991, para.48) – for this right to be effective the accused has to have the opportunity to communicate with his counsel out of hearing of a third person; Croissant v. Germany (25 September 1992, paras 33–38) – the Court left open the question whether it would be consistent with the provision under (c) for the national authorities to seek partial or even full reimbursement after it had been established in enforcement proceedings subsequent to the trial that the convicted person lacks sufficient means to pay the costs of his defence; John Murray v. UK (8 February 1996, para.63) – if domestic law attaches consequences to the attitude of the accused at the initial stage of police interrogation, Article 6 in principle requires that the accused be allowed the benefit from the assistance of a lawyer in the pre-trial phase; Magee v. UK (6 June 2000, para.41) – this right may be subject to restriction for good cause at the initial stage of police interrogation; Brennan v. UK (16 October 2001, para.58) – the right of access to a counsel may be subject to restrictions “for good cause” as long as the proceedings as a whole are fair; Öcalan v. Turkey (12 March 2003, paras 140–143) – The applicant did not receive legal assistance for a period of seven days and made several self-incriminating statements that subsequently appeared to be crucial elements of the indictment. The decision to deny access to a lawyer might irreparably prejudice the defendant's rights (in): Fair Trial in Criminal Cases, Directorate General of Human Rights and Legal Affairs, Council of Europe, pp. 39–33. Compare: Kulesza C., *Efektowność udziału obrońcy w procesie karnym w perspektywie prawoporównawczej* [Effectiveness of the participation of defence counsel in criminal proceedings in international perspective], Kraków 2005, pp. 204–217.

8 See ECtHR judgments: Doorson v. the Netherlands (26 March 1996, para. 76 and 71–75) and Van Mechelen and others v. the Netherlands (23 April 1997, paras 56–65).

9 For more information, see: C. Nowak, *Pojęcie rzetelnego procesu karnego w świetle EKPC i orzecznictwa ETPC* [The term “fair trial” in the light of the ECHR and the verdicts of the ECtHR], in: *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych* [Fair trial in judicial decisions of Polish and international courts], *op. cit.*, pp. 95–150, and the judicial decisions referred to therein.

- 2) observance of the rights of the participants of the process: the defendant and the victim;
  - a) in the case of the defendant, of key importance is to guarantee the right to defence and the presumption of innocence;
  - b) as far as the victim is concerned, the limited decisions of the ECtHR concerning the victim and the fact that the Convention focuses, in principle, on the rights of the defendant<sup>10</sup> demonstrate that the rights of the victims are sometimes sacrificed in the name of narrowly defined cost-effectiveness of the trial.<sup>11</sup> Of note is also the opinion of P. Wiliński concerning the provision of art. 2 § 1 (3) of the Code of Criminal Procedure (CCP) (criminal proceedings must be shaped so as to “take into account the legally protected interests of the victim”) that “in the procedural justice concept, the sole objective is to take into account, and not to assure, proper protection of the victim’s rights.”<sup>12</sup>
- 3) The opinion, presented in the literature on this topic, that compliance of a criminal process with fair trial requirements may be evaluated on the basis of “legally undefined procedural behaviors.” In particular, one must consider the “non-statutory

10 One can mention, for instance, the opinion of S. Waltoś: “*One can suspect that the time for revising the European Convention of Human Rights will come. The Convention was devised as a charter protecting the rights of the person against whom the process is conducted and as a noble confrontation with what happens in the world that has been subdued. Today the situation is different. No one doubts now that protection should be extended to cover the rights of the victim in a criminal process. Such regulations are increasingly numerous in contemporary codes of criminal procedure and the time is approaching to properly update the European Convention of Human Rights.*” S. Waltoś: *Wizja procesu karnego XXI wieku* [A vision of the criminal process of the 21<sup>st</sup> century], in: *Postępowanie karne w XXI wieku: materiały z ogólnopolskiej konferencji naukowej, Popowo 26–28 października 2001 r.* [Criminal procedure of the 21<sup>st</sup> century. materials from the Poland-wide academic conference, Popowo 26–28 October 2001], P. Kruszyński, ed., Warsaw 2002, pp. 17–18.

11 Besides the European countries that are bound by the Convention, this problem is particularly visible in the US where victims of crimes do not have any influence over the outcome of plea bargaining and where the victims were allowed to file written Victim-impact statements only in the 1980’s. In no event can the victims oppose agreements between the prosecution and the defence. See, for example: S.H. Welling, *Victim Participation in Plea Bargains*, in: *Washington University Law Quarterly*, vol. 65, 1987, pp. 312–334; J. Gittler: *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, *Pepperdine Law Review*, vol. 11, 1984, pp. 117–162.

12 P. Wiliński: *Sprawiedliwość proceduralna...* [Procedural justice...], *op. cit.*, p. 87.

standards of honesty” of entities conducting the proceedings<sup>13</sup> which decide not only whether or not to start negotiations and conclude a plea bargain agreement but also to observe the agreed terms, in accordance with the Roman principle *pacta sunt servanda*.

The above – mentioned issues will be studied not only by way of a dogmatic analysis, but also by analyzing the judicial decisions and the results of surveys involving judges and public prosecutors performed in the years 2006–2008 by the Department of Criminal Procedure of the Law Faculty of the University of Białystok.

As to the essence of the issue mentioned in the title of this article, one may agree with the definition of plea bargaining in a criminal process proposed by S. Steinborn (*sensu largo*) as an agreement concluded by at least two participants of a criminal process, within the boundaries of their powers, which consists in the fact that in order to achieve the most advantageous standing in the process and by making concessions to the other party, they have reached consensus regarding an issue that is important to the course of the process or the substantial decision.<sup>14</sup>

Of note is the different forms of plea bargaining present in European administration of justice systems.<sup>15</sup> These include both formal agreements between entities conducting the preparatory proceedings and the defence (sometimes also the victim) at the initial stage of the process which result in their discontinuation (conditional or unconditional) and informal or paraformal agreements between the entities conducting the proceedings and the participants of the trial which lead to its quick

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13 See: M. Rzewnicka–Rogacka, *Znaczenie niepisanych reguł postępowania dla tworzenie podstaw rzetelnego procesu karnego* [Importance of unwritten rules of conduct to creation of grounds for a fair trial], in: *Rzetelny proces karny... [Fair trial...]*, *op. cit.*, pp. 100–106.

14 S. Steinborn, *Porozumienia w polskim procesie karnym. Skazanie bez rozprawy i dobrowolne poddanie się odpowiedzialności karnej* [Plea bargains in the Polish criminal Process. Conviction without trial and voluntary submission to a penalty], Kraków 2005, p. 52.

15 See, e.g.: C. Kulesza, *Porozumienia procesowe w europejskich systemach wymiaru sprawiedliwości* [Plea bargains in European administration of justice systems], in: C. Kulesza, ed., *Porozumienia karnoprocessowe w praktyce wymiaru sprawiedliwości* [Criminal process plea bargains in the practice of the administration of justice system], Białystok 2010, pp. 11–61, and the literature referred to therein.

ending.<sup>16</sup> However, the background of the Polish criminal process can consist mainly of the consensual forms allowed by the penal law that lead to final ending of a criminal process in accordance with a judicial sentence, with all the resulting legal consequences.

It must be observed that the basic function of plea bargaining is to accelerate the trial by simplifying, with the consent of the parties, the process leading to the court's sentence and, consequently, to shorten the whole procedure. The result, as the literature in Western countries indicates, is a fast-tracked, case-ending decision, also called a negotiated case – ending agreement. Its main attributes are:<sup>17</sup>

- the court's decision is based on the agreement reached by the parties;
- the case ends with actual conviction of the offender;
- the legal consequence of the conviction is a real, albeit more lenient, penalty.

In the context of fair trial, one may also point at the fact that the most recent verdicts of the ECtHR (even though, in principle, the Court does not deal with consensual forms of ending criminal proceedings) appear to accept plea bargains as measures supporting the requirement to end cases in reasonable time. As the ECtHR indicated in its verdict of 10 May 2011 (*Dimitrov and Hamanov v. Bulgaria*, Applications nos. 48059/06 and 2708/09): “It is a common feature of European criminal justice systems for a criminal defendant to receive a reduction in his or her sentence for a guilty plea in advance of trial (see *Babar Ahmad and Others v. the United Kingdom* (dec.), nos. 24027/07, 11949/08 and 36742/08, § 168, 6 July 2010, with further references). However, the plea bargain cannot be regarded as amounting to an acknowledgement

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16 This division of plea bargain agreements according to the criterion of their regulation in the applicable laws was made by S. Waltoś, *Porozumienia w polskim procesie karnym de lege lata i de lege ferenda (Próba oceny dopuszczalności)* [Plea bargains in the Polish criminal process *de lege lata* and *de lege ferenda* (an effort to evaluate their permissibility)], *Prokuratura i Prawo* 1992, book 7, p. 39 ff; S. Waltoś, *Porozumienia w europejskim procesie karnym; próba syntetycznego spojrzenia* [Plea bargains in the European criminal process; an attempt at a synthetic evaluation], *Prokuratura i Prawo* 2000, No. 1, p. 11 ff.

17 J. Peters, B. Aubusson de Cavarlay, C. Levis, P. Sobota, *Negotiated Case-ending Agreements: Ways of Speeding up the (Court) Process*, *European Journal on Criminal Policy & Research*, 2008, vol. 14, p. 146.

of a failure on the part of the authorities to determine the criminal charges against Mr. Dimitrov within a reasonable time, or as having afforded him express and measurable redress in relation to that (see, *mutatis mutandis*, *Kozarov v. “the former Yugoslav Republic of Macedonia”* (dec.), no. 64229/01, 10 November 2005).

The Polish penal law doctrine generally assumes that the main intent of the Polish legislator was that mediation, conviction of the defendant without trial, or voluntary submission to a penalty would become tools allowing for acceleration of the criminal process and, at the same time, for implementation of the principle of speedy procedure – also in its subjective aspects.<sup>18</sup> The universal use by the judiciary of the new regulations which, to a large extent, are based on those adopted in European continental systems<sup>19</sup>, is to be assured, among others, by the most recent legislative actions aimed to cover the broadest possible catalogue of offenses.<sup>20</sup> The amendments to the Code of Criminal Procedure of 10 January 2003 have authorized the entities conducting the proceedings to file motions in accordance with art. 335 of the CCP regarding offenses carrying a penalty of imprisonment for up to 10 years, which means that the upper limit of the penalty is 5 years higher compared to the previous regulations. Still more extensive changes were introduced regarding voluntary submission to a penalty; they

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18 See, in particular: S. Waltoś, *Nowa polska procedura karna a oczekiwania społeczne* [The new Polish criminal procedure and the expectations of the public], *Prokuratura i Prawo* 1998, No 9–10, pp. 104–105; A. Gaberle, *Reforma procedury karnej w Polsce w latach 1990–2002 (Uwarunkowania, założenia, perspektywy)* [The reform of the criminal procedure in Poland in the years 1990–2002 (Constraints, assumptions, perspectives)], *Prawo i Prokuratura* 2002, book 5, pp. 38–39; S. Steinborn, *Porozumienia w polskim procesie karnym...* [Plea bargains in the Polish criminal process...], *op. cit.*, pp. 57.

19 The prototype for the institution mentioned in art. 387 of the CCP was the Italian *processo abbreviato*; in the case of conviction without a trial, it was the solutions adopted in the Spanish (*conformidad*) and Italian (*patteggiamento*) criminal law. See. A. Ważny, *Porozumienia procesowe po nowelizacji kodeksu postępowania karnego* [Plea bargains after alteration of the code of criminal procedure], in: Z. Sobolewski, G. Artymiak, C.P. Klak, eds., *Problemy znowelizowanej procedury karnej* [Problems with the amended criminal procedure], Kraków 2004, p. 249.

20 The fact that the cost – effectiveness of proceedings constitutes a universal argument for enlarging the catalogue of offenses that can be resolved based on consensual procedures that are located also outside of the formal criminal justice system is confirmed among others by the example of American *alternative dispute resolution* (ADR), whose speed and low cost in their subjective aspects have been appreciated also by victims of crimes. See. A. Karmen, *Crime Victims: An Introduction to Victimology*, Pacific Grove 1990, pp. 340–341, 344.

consisted in broadening of the range of application of this instrument to include all offenses.

The amendment of art. 343 of the CPC in the aforementioned alteration is intended to constitute an encouragement to undertake plea bargaining. After the alteration of 10 January 2003 of the 1997 CCP, the new wordings of art. 343 (1) and (2) of the CCP allow not only for a more speedy ending of proceedings in a simplified mode, but also for verdicts concerning the convict's criminal responsibility in accordance with separate rules that are much more advantageous to the defendant. Consequently, the literature on this topic currently assumes that in art. 343 § 1 and § 2 of the CCP, the legislator defined a substantive law norm and that art. 343 § 3–7 of the CCP define the procedure of application of the permissible substantive law concessions to the defendant. Art. 343 § 2 of the CCP contains an autonomous substantive law basis for extraordinary mitigation of penalty (item 1), conditional suspension of execution of penalty (item 2), and limitation of conviction to a penal measure.<sup>21</sup>

The institution of conviction without a hearing of evidence, i.e. the so – called voluntary submission to criminal responsibility, regulated in art. 387 of the CCP, does not give an analogous possibility. In this case, however, the defendant who has been accused of an offense may file a motion to be convicted and receive a penalty on his own terms (art. 387 (1) of the CCP). As the judicial decisions indicate, the court may grant such a motion only provided that both the requirements given in art. 387 § 2 of the CCP are met and the penalty proposed by the defendant and the penal measures meet the general responsibility rules provided for in the Penal Code (PC) (compare, e.g., the verdict of the Supreme Court of 15 January 2010, V KK 368/09, Biul. PK 2010/2/19; the verdict of the Supreme Court of 16 July 2009, V KK 132/09, OSNwSK 2009/1/1560; the verdict of the Supreme Court of 19 May 2009; LEX no. 503245; the verdict of the Supreme Court

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21 P. Hofmański, E. Sadzik, K. Zgryzek: Kodeks postępowania karnego. Tom II, Komentarz do artykułów 297–467 [Code of criminal procedure. Volume II. Commentary to articles 297–467], Warsaw 2004, pp. 293–295; L.K. Paprzycki, in: J. Grajewski, L.K. Paprzycki, S. Steinborn, Kodeks postępowania karnego. Komentarz, Tom I (art. 1–424) [Code of criminal procedure. A commentary, Volume I (art. 1–424)]. Kraków 2010, p. 1092.

of 23 March 2009, V KK 24/09; LEX no. 495324; the verdict of the Supreme Court of 7 July 2006, III KK 405/05; LEX no. 193008; the verdict of the Supreme Court of 26 January 2006, IV KK 435/05, Lex no. 173643; and the verdict of the Supreme Court of 21 October 2004, II KK 226/04, LEX no. 141303).

However, the aforementioned verdicts indicate that the defendant, in exchange for a motion causing significant acceleration and shortening of the process, which in this process is connected with a guilty plea, benefits from various concessions, to include those pertaining to the penalty (compare the aforementioned verdict of the Supreme Court of 7 July 2006, III KK 405/05, LEX no. 193008).

In the context of procedural justice and the idea of a just penalty<sup>22</sup>, one must also consider the critical voices concerning the different criminal responsibility in the summary mode, compared to processes conducted in accordance with the general principles. For example, when analyzing plea bargains as a departure from the principle of direct examination of evidence during the main hearing, J. Tylman concludes that “in principle, [they] lead to a reduction of the pain of the penalty (by “flattening” the penalty), which is not only contrary to the demand for aggravation of penalties but also, in the case of petty offenses and offenses of moderate weight, constitute a regression in this regard.”<sup>23</sup>

The common denominator of both conviction without a hearing (art. 335 and 343 of the CCP) and voluntary submission to penalty (art. 387 of the CCP) in the field of criminal responsibility is the fact that if the motion leading to the shortening of the process is granted, the defendant will bear only such legal consequences of the offense that he or she has eventually agreed to (those defined in the original motion or those defined in the renegotiated terms). Neither the literature on this subject nor the judicial decisions express any doubts concerning the fact that the court may either decide to administer a penalty or penal measures in accordance with the terms agreed with the defendant or

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22 See, e.g.: I. Haýduk – Hawrylak: *Sprawiedliwej kary Conditio sine qua non* [Necessary condition of a just penalty], in: *Rzetelny proces karny...* [Fair trial...], *op. cit.*, pp. 107–121.

23 J. Tylman: *Zasada bezpośredniości na tle zmian w polskim prawie karnym procesowym* [The principle of directness on the background of changes in the Polish law of criminal procedure], in: *Rzetelny proces karny...* [Fair trial...], *op. cit.*, p. 144.

try the case in accordance with the general principles. (See the verdict of the Supreme Court of 23 September 2009, WK 21/09, OSNwSK 2009/1/1889 and the verdict of the Supreme Court of 8 September 2009, IV KK 287/09, LEX no. 519609.)

When making its decisions in accordance with art. 335 of the CCP and art 343 of the CCP, the court is not bound by the motion submitted by the public prosecutor in the indictment, in the sense that any changes to it, regardless of whether they are advantageous or disadvantageous to the defendant, require a modification of the motion in the presence of the parties or submission of the case to be tried in accordance with the general principles. As the Supreme Court rightly stated in its verdict of 26 August 2009 (III KK 194/09 ; LEX no. 519654), “given that the defendant changed his mind with regards to his acceptance of conviction without a trial, one of the conditions that justify his conviction in accordance with art. 343 of the CCP, i.e. without a trial, becomes invalid. In this situation, the Court must take actions to assure that the defendant and the public prosecutor agree again on the proposed penalty and that the public prosecutor files a new, modified motion in this regard; otherwise, in accordance with the provisions of art. 343 § 7 of the CCP, the Court must try the case in accordance with the general principles.”

Thus, consideration by a court of a motion for conviction without a trial is a specific aspect of the *pacta sunt servanda* “non–statutory rule.”

Another issue is the question whether plea bargains support the following objectives of criminal process: finding the objective truth and achieving procedural justice. Of note is the controversial opinion of S. Steinborn that „both the principle of substantive truth and the required verification by the court of whether the circumstances of the offense raise no doubts, provided for in art. 335 § 1 and art. 287 § 2 of the CCP, do not justify the conclusion that it is forbidden for the parties to agree on certain matters concerning the factual findings regarding the act or its legal qualification.”<sup>24</sup> According to S. Steinborn, a motion

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24 S. Steinborn, *Porozumienia...* [Plea bargains...], *op. cit.*, p. 111.

for conviction at a trial in accordance with art. 387 of the CCP may concern an act with a more lenient legal qualification, compared to the indictment. The literature on this matter also emphasizes the fact that it is not permissible in principle to reduce, as a result of negotiations, the number of charges presented to the defendant, and points at the fact that such a groundless reduction of the charges violates art. 10 § 2 of the CCP which defines the principle of legalism of prosecution. Nevertheless, some persons express the belief that in exceptional cases the number of charges can be subject to negotiations.<sup>25</sup>

Other authors point at the threats to the principle of objective truth and, consequently, to procedural justice, resulting from verdicts based on plea bargains. Let me quote the opinion of R. Kmiecik, who stated that “[t]he statutory requirement that the circumstances of an offense” raise no doubts are only a screen “for consensually determined facts” which either do not at all reflect the true facts or reflect only those facts that are beneficial to the actual perpetrator of the crime. What, on this background, is the status of the system of process guarantees that are intended to protect from baseless accusation or conviction a person who in reality is completely innocent and around whom, due to bad fate or by incident, focuses the circumstantial evidence which casts the “shadow of suspicions”?<sup>26</sup> The literature mentions the significant impact of the operational – reconnaissance activities on the criminal process,<sup>27</sup> which is associated with ineffective courts’ supervision of

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25 *Ibid.*, pp. 119–120, and the literature referred to therein.

26 R. Kmiecik, *O zasadzie prawdy materialnej, konsensualizmie i gwarancjach procesowych osoby niewinnej*, [On the principle of substantive truth, consensualism, and process guarantees enjoyed by innocent persons], in: Z. Sobolewski, G. Artymiak, eds., *Zasada prawdy materialnej. Materiały z konferencji Krasiczyn 15–16 października 2006* [The principle of substantive truth, Materials from conference, Krasiczyn 15–16 October 2006], Kraków 2006, pp. 148–149. See also: H. Paluszkiwicz, S. Stachowiak, *Rozwiązania konsensualne wprowadzone do polskiego procesu karnego a wykrycie prawdy* [Consensual solutions introduced into the Polish criminal process and detection of truth], in: *Zasada prawdy materialnej* [The principle of substantive truth], *op. cit.*, pp. 91–110; Z. Świda, W. Jasiński, M. Kuźma, *Dyrektywa rozstrzygnięcia sprawy „w rozsądnym terminie” a realizacja zasady prawdy materialnej w polskim procesie karnym* [The directive requiring that cases be resolved “within reasonable time” and the implementation of the principle of substantive truth in the Polish criminal process], in: *Zasada prawdy materialnej* [The principle of substantive truth], *op. cit.*, pp. 20–23;

27 Compare: A. Taracha, *Czynności operacyjno-rozpoznawcze. Aspekty kryminalistyczne i prawodowodowe* [Operational–reconnaissance activities. Criminalistic and legal – evidence aspects], Lublin 2006, pp. 219–290.

such activities and of use of evidence gathered in the course of such activities at trials.<sup>28</sup>

One must note, however, a tendency in the court verdicts that does not confirm such a broad range of plea bargaining, to exclude matters related to factual findings, the legal qualification of the act, and especially a reduction of the charges.

As commentators of art. 335 § 1 of the CCP emphasize, the required “lack of doubts as to the circumstances of the offense” does not mean that the statute requires that the suspect make a guilty plea<sup>29</sup>. However, as the Supreme Court stated in its verdict of 30 June 2009 (V KK 101/09, LEX no. 512088), “Although formally art. 335 § 1 of the Code of Criminal Procedure does not require that the suspect admit to committing the act he or she is accused of, but only that the circumstances of the act raise no doubts, in a situation where the suspect not only does not admit his or her guilt but also provides circumstances that would exculpate him or her, the principle of truth requires that the actual circumstances of the event qualified by the public prosecutor as an offense be determined. The defendant’s acceptance of conviction without trial must not be treated as an equivalent of admission of guilt or change of earlier explanations that questioned the perpetration of the crime by and the guilt of the defendant.”

Also the fact that the penalty was agreed with the suspect must not be considered as admission of guilt.<sup>30</sup> However, the thesis is considered to be true that the defendant’s acceptance of conviction expressed in accordance with art. 335 § 1 of the CCP does not absolve the court, and the public prosecutor at earlier stages, from the duty to find out if the defendant is in fact guilty of the offense that he or she has been accused of. The substantive–law condition for using the institution provided for in art. 335 of the CCP is the finding that the person mentioned in the

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28 Compare, e.g.: C. Kulesza, *Czynności operacyjno – rozpoznawcze w świetle orzecznictwa Trybunału w Strasburgu i sądów polskich* [Operational – reconnaissance activities in the light of judicial decisions of the Strasbourg Tribunal and Polish courts], *Przegląd Policyjny* 2008, no. 2

29 J. Grajewski, in: J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz...* [Code of criminal procedure. A commentary...], *op. cit.*, p. 1053. However, in the doctrine there are supporters of this requirement (*ibid.*, pp. 1052–1053).

30 *Ibid.*, p. 1053.

motion has committed the offense. The preparatory proceedings aimed to make factual findings are no different, with regards to evidence gathering, than proceedings in cases where the public prosecutor does not make motions in accordance with art. 335 of the CCP.

As the Supreme Court stated in one of its most recent verdicts, dated 29 September 2010 (IV KK 289/10, LEX no. 603805):

1. The defendant's acceptance of conviction in accordance with art. 335 § 1 of the CCP does not absolve the court (and earlier the public prosecutor) from the duty to determine if the defendant is in fact guilty of the offense that he or she has been accused of, that is to collect, by way of preparatory proceedings, evidence that clearly indicates that the defendant has perpetrated the act that he or she has been accused of, and the circumstances of the act.
2. Failure to grant the motion made in accordance with art. 335 of the CCP and the resulting trying of the case in accordance with the general principles shall take place when the court has doubts concerning the factual circumstances of the purported offense, or when an analysis of the gathered data leads it to believe that the defendant has not committed the crime he or she has been accused of, or when the court notices the need to change the legal qualification of the act, regardless of the direction of such change.

This thesis is supported by numerous earlier judicial decisions which indicate that the phrase "circumstances of the offense raise no doubts" must be interpreted broadly, because it pertains not only to findings concerning the perpetrator of the act but also to all circumstances that may affect its proper legal evaluation, to include negative process conditions defined in art. 17 of the CCP (verdict of the Supreme Court of 23 July 2009, III KK 147/09, LEX no. 519652).

In the opinion of the Supreme Court, expressed in its verdict of 23 April 2009, doubts can be raised not only by the essential issue of perpetration of the act by a certain person but also by all the circumstances that are important to the findings regarding the scope

of criminal responsibility of the perpetrator of the act, to include appropriate criminal – law evaluation (verdict of the Supreme Court of 23 April 2009, II KK 62/09, LEX no. 507930).

A specific aspect of the *pacta sunt servanda* principle with regards to conviction in accordance with art. 335 of the CCP was highlighted by the Supreme Court in its verdict of 19 November 2008 (V KK 181/08, LEX no. 477732) which assumed that in appeal proceedings it is impossible to change the verdict of a court of first instance issued based on a motion of the public prosecution made in accordance with art. 335 § 1 of the CCP, consisting in acquittal of the defendant. In the substantiation of this verdict, the Supreme Court pointed at the aspect of the “circumstances that raise no doubts” requirement, used as a basis for conviction in a consensual mode, which is detrimental to the defendant: “If the doubts concerning the circumstances of an offense are seen only by the appellate court considering an appeal of a verdict issued in accordance with art. 343 of the CCP, then, even if the appellate court considers the doubts as irremovable, it should not change the verdict that has been appealed against by acquitting the defendant, but should rescind it and direct it to be considered again by the *a quo* court which should “try the case in accordance with the general principles” as the injunction of art. 343 § 7 of the CCP to act so when “the circumstances of the offense raise doubts” is still in force. According to the opinion of the Supreme Court expressed in this verdict, this regulation is intended for the court of first instance, but one may not conclude that it does not indirectly apply to an appeal procedure too. After all, the essence of art. 343 § 7 of the CCP is that in the event of a lack of grounds for issuing a conviction verdict during a session in a consensual mode because, among others, the circumstances of the offense raise some doubts, evidence must be examined during the session so as to clarify the doubts (verdict of the Supreme Court of 19 November 2008 (V KK 181/08, LEX no. 477732). As far as the court of first instance is concerned, this requirement is confirmed for example in the verdict of the Supreme Court of 11 March 2009 (II KK 346/08, LEX no. 491315) which assumed that if the court considering the motion of the public prosecutor for convicting the defendant without a trial, concludes that the defendant has not perpetrated the offense that he or she has been

accused of or finds it necessary to change the legal qualification of the act, irrespective of whether the act should be considered as more or less grave, then the court must try the case, as required by art. 343 § 7 of the CCP.

In this context, we should look at the results of the country-wide survey study conducted by the Department of Criminal Procedure of the University of Białystok, in the years 2006–2008, as a part of a research grant. The study concerned plea bargains in the criminal process practice. It involved sending surveys to all common courts of law, public prosecutor's offices, and the Supreme Council of Advocates – a total of over 800 letters. The surveys comprised 20 questions (to judges and public prosecutors) or 17 questions (to advocates), most with a number of answers to choose from. Several questions were open – ended questions. 1607 surveys were returned by public prosecutors, 306 – by judges adjudicating in criminal cases, and 5 – by advocates. For obvious reasons, the last category of surveys are not covered by this analysis.

To verify the issue of possible scope of plea bargaining, public prosecutors were asked the following question: What matter is most often negotiated in accordance with art. 335 and 343 of the Code of Criminal Procedure? The survey participants could select one of the following answers:

- a) the penalty and the penal measures;
- b) the legal qualification of the act;
- c) the number of charges;
- d) rescission of detention awaiting trial;
- e) duty to redress the damage;
- f) aggregate sentence;
- g) continued offense;
- h) series of crimes;
- i) others.

An analysis of the results has allowed a fairly unequivocal evaluation of the situation. Over 80% of the participating public prosecutors

(82.08% to be exact) from the whole country stated that the matter that is negotiated most often is the penalties and the penal measures<sup>31</sup>. In the individual appeal court districts, this answer was selected by from 70.51% of public prosecutors (Łódź) to 87.10% of prosecutors (Rzeszów) and 86.96% of prosecutors (Warszawa). The remaining answers were selected by a very marginal number of respondents: 0.25% – aggregate sentence; 0.12% – the number of charges and the duty to redress the damage; and 0.6% – the most rarely selected answer – the legal qualification of the act. 17.30% of respondents selected the “others” answer, which covers a combination of the different answers, to include rescission of detention awaiting trial, continuous offense, and the period of temporary suspension of execution of the penalty, and remedy for the harm suffered. There was also a statement that “only in very rare cases, when the public prosecutor does not know which of the possible qualifications is more correct, when the attitude of the suspect is considered to be appropriate, the public prosecutor can “do him a favor” and make less serious charges.”

In the responses given by public prosecutors with regards to the subject of negotiations, they only marginally (or together with other subjects) mentioned rescission of detention awaiting trial (it must be mentioned that in accordance with art. 253 § 2 of the CCP, this preventive measure applied by the court can be rescinded by the prosecutor). In the context of the fundamental matter of voluntary nature of plea bargaining, it is necessary to mention a problem that is rarely discussed in the commentaries to the CCP and the literature on this subject, namely the so-called “extractive custody.” Nevertheless, in discussions of the reform of the system of preventive measures in the Polish criminal process, it is sometimes pointed out that one of the reasons, if not the only one, for using detention awaiting trial is to establish conditions to obtain from the detainee information concerning the perpetration of the act that he or she has been accused of or other acts covered by the preparatory proceedings. Such situations have

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31 A comprehensive analysis and a commentary to all the answers given by the public prosecutors was provided by K. T. Boratyńska, *Skazanie bez rozprawy (art. 335 kpk.) w ocenie prokuratorów* [Conviction without trial (art. 335 of the CCP) in the opinions of public prosecutors], in: *Porozumienia karnoprocesowe...* [Criminal process plea bargains...], op. cit., pp. 64–114.

been described in the mass media as “extractive custody” and are unequivocally qualified as abuse of law.<sup>32</sup>

As P. Kardas rightly observes with regards to detention awaiting trial, “the outcome, resulting in particular from isolation, is the reason why the use of this measure to the broadest extent – with other non – custodial measures being used more rarely – facilitates the conduct of process activities, not only by eliminating or at least significantly reducing the opportunity to take illegal actions that are detrimental to the correct course of the process but also, due to the unique situation of the person who is deprived of liberty, significantly facilitates obtaining information concerning the act that he or she has been accused of or other events that are not included in the charges but that may be of interest to the entities conducting the proceedings.”<sup>33</sup> Efforts of the defence to rescind the detention awaiting trial is also motivated by the intent to avoid the presumption that the defendant is guilty that can be made during the main hearing. As P. Kardas rightly observes, detention awaiting trial, if the information becomes public, results not only in a stigma of the defendant but, in a sense, in a “presumption of the final legal evaluation of the act that constitutes the grounds for its application.” In his explanation of this term, the author points at the “tendency, often present in the judicial practices, to follow the principle, especially if a custodial preventive measure has been used, that it is better to inflict a lenient penalty than to acquit the defendant; this is also caused by the fact that acquittal may lead to efforts to question the reasons and grounds for the application, during another stage of the process, of the custodial preventive measure.”<sup>34</sup>

The opinion expressed in the Polish literature on this subject is that the right to remain silent, which constitutes an embodiment of the *nemo tenetur se ipsum accusare* principle and a guarantee of the principle

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32 P. Kardas, *Opinia Prof. UJ Dr. Hab. Piotra Kardasa – Uniwersytet Jagielloński* (przygotowana dla potrzeb Komisji Kodyfikacyjnej Prawa Karnego) [Opinion of Professor Dr Hab. Piotr Kardas – Jagiellonian University (prepared for the Criminal Law Codification Committee), *Biuletyn Komisji Kodyfikacyjnej Prawa Karnego* [Bulletin of the Criminal Law Codification Committee], Book 1/2010, Ministry of Justice, Warsaw 2010, p. 207, note. 7 and the literature referred to therein. See also: S. Waltoś, *Polski proces karny. Zarys systemu* [Polish criminal process. A sketch of the system], Warsaw 2008, p. 437, note 27.

33 P. Kardas, *op. cit.*, p. 207.

34 *Ibid.* p. 207.

of presumption of innocence, is also an element of fair trial. This is confirmed by the verdicts of the ECtHR of 25 February 1993 (Funke v. France) and of 8 February 1996 (John Murray v. United Kingdom).<sup>35</sup>

Nevertheless, one must keep in mind the fact that the Polish doctrine includes the opinion that it is not permissible to make a motion for conviction without a trial connected with discontinuation of further proceedings to gather evidence, if the suspect has taken advantage of his or her right to remain silent, i.e. when he or she has provided no explanations. In the opinion of J. Grajewski, § 2 art. 335 of the CCP requires that the explanations of the suspect raise no doubts in the light of the collected evidence. Thus, if no explanations have been provided by the suspect, the explanations cannot be confronted with the evidence gathered and the statutory requirement cannot be met.<sup>36</sup>

The survey constituting a part of the research conducted by the Department included the question of whether or not the exercise by the defendant of the right to refuse to provide explanations (the right to remain silent) prevents the judge from granting a motion made in accordance with art. 335 and 343 of the CCP and a motion for voluntary submission to a penalty (art. 387 of the CCP). The respondents were free to select a fourth option. In the opinion of 29 surveyed judges, the judge must not grant motions made in accordance with art. 335 and 343 of the CCP if the defendant has taken advantage of the right to remain silent, while 31 respondents expressed the opinion that this situation concerns also voluntary submission to a penalty (art. 387 of the CCP). As many as 236 judges participating in the survey responded that the defendant's defence by remaining silent does not constitute an obstacle to the application of art. 335 and 343, or art. 387 of the CCP.

Of note is the fact that the answers given by the judges are in line with those given by the public prosecutors. Of the whole group of respondents, only 17.43% (280) public prosecutors stated that the exercise by the defendant of the right to remain silent prevents the

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35 B. Nita, *Konstytucyjne znaczenie zasady nemo tenetur se ipsum accusare* [Constitutional importance of the nemo tenetur se ipsum accusare principle], in: *Rzetelny proces karny. Księga jubileuszowa profesor Zofii Świdwy...* [Fair trial. Anniversary book for Professor Zofia Świdwa...], *op. cit.*, pp. 220–234.

36 J. Grajewski, *Kodeks...* [The code...], *op. cit.*, pp. 1053–1054.

application of the institutions provided for in art. 335 and art. 343 of the CCP. Only 3.93% (63) of public prosecutors stated that conviction under art. 387 of the CCP is not possible in such situations; a large majority, namely 70.5% (1,133), of public prosecutors expressed their belief that silence of the defendant constitutes no obstacle to the application of any of those institutions. It must be emphasized that most of the 115 public prosecutors participating in the survey, whose answers were classified as “other,” stated that the decision to apply a consensual measure ending the case depends on the evidence gathered.<sup>37</sup>

Consequently, A. Sakowicz is right in emphasizing, on the background of the above-mentioned results of the survey, in particular the statements of the judges who believe that the defendants who chose to remain silent as their defence tactics may not take advantage of the consensual institutions, that the perpetrator’s acts constituting an exercise of his or her constitutional right to defence (art. 42 (2) of the Constitution) may not be considered as circumstances that are detrimental to the perpetrator’s situation and lead to aggravation of the penalty. This pertains, in particular, to the non – admission of guilt, abstaining from apologizing to the victim, or refusal to give explanations or answer a question.<sup>38</sup>

In the context of the aforementioned condition of “lack of doubts as to the circumstances of the offense,” one must point at the provision of § 2 of art. 335 of the CCP which allows, in situations where such a motion can be made, for discontinuing the proceedings aimed to gather evidence, if the suspect’s explanations raise no doubts in the light of the evidence that has been collected. However, the doctrine emphasizes the fact that this provision leads to some risks and that its practical application requires caution, so as to eliminate motions in cases where the lack of sufficient evidence is made up for with the suspect’s negotiated acceptance of a more lenient penalty. It is rightly

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37 A. Sakowicz, in *Porozumienia...* [Plea bargains...], *op. cit.*, pp. 199–202.

38 A. Sakowicz, *op. cit.*, p. 203 and the verdicts mentioned therein: verdict of the Supreme Court of 19 November 1970, Rw 1226/70, LEX no. 21341; verdict of the Supreme Court of 6 December 1971, Rw 1260/71, OSNPG 1972, No. 4 item 77; verdict of the Supreme Court of 4 November 1977, V KR 176/77, OSNKW 1978, No 1, item 7; verdict of the Supreme Court of 5 February 1981, II KR 10/81, OSNKW 1981, No 7–8, item 38; verdict of the Administrative Court in Kraków of 25 April 2001, II AKa 674/01, KZS 2001, No 6, item 2.

observed that if the court rejects the public prosecutor's motion or if the appellate court rescinds the verdict, it may turn out that it is impossible to complete the preparatory proceedings.<sup>39</sup> This is why the timing of the earliest commencement of negotiations with the suspect concerning a motion under art. 335 of the CCP, the conditions for such a commencement, the entity conducting the negotiations with the suspect, and the permanence of the agreement reached, are of particular importance.

In connection with the above, the public prosecutors participating in the survey were asked the following question: In your opinion, what is the necessary condition for commencing negotiations with the suspect? The following possible answers were provided:

- a) comprehensive explanation of the circumstances of the case;
- b) the defendant's admission of guilt before the law enforcement entity;
- c) the defendant's admission only of perpetration of a prohibited act;
- d) high likelihood that the suspect has committed the offense;
- e) others.

The respondents gave the following answers. The basic condition for commencement of negotiations in accordance with art. 335 of the CCP is comprehensive explanation of the circumstances of the case, which is defined most often as factual findings that raise no doubts, materials constituting a basis for making the indictment – this answer was given by 1 in 3 respondents (33.17%). In the individual districts the percentage of respondents who selected this answer ranged from 27.53% (Gdańsk) to 39.30% (Katowice). The second most often selected answer was the suspect's admission of guilt before the law enforcement entity – it was given by 22.78% of respondents. In the individual districts the results ranged from 16.34% (Białystok) to 32.67% (Poznań). As mentioned before, despite the lack of requirement that the suspect admit guilt, in practice this condition is very important and the

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39 J. Grajewski, *Kodeks...* [The code...], *op. cit.*, p. 1053.

prosecutors in the individual districts assign different weights to it. In the home district of the researchers, this condition is not so important. The third most often selected answer was high likelihood that the suspect has committed the offense. 18.17% of the total group of respondents selected this answer. In the individual districts, the percentage of respondents who selected it ranged from 10.45% (Katowice) (with a very similar percentage in the Warsaw district) to 30.07% (Białystok). Given the above numbers, one may conclude that the Białystok district has a very liberal approach to the conditions for the application of art. 335 of the CCP. The prosecutors in that district, compared to the whole group of respondents, do not require admission of guilt and the largest percentage of them consider high likelihood that the suspect has committed the offense as the condition for commencing negotiations. The answer that the condition for commencing negotiation is the defendant's admission of only perpetrating a prohibited act was selected by a minority of respondents – only 5.29% of the whole group of respondents. Of note is the answer of one of the respondents who expressed the opinion that “one may not admit only committing a prohibited act without admitting guilt; if the suspect provides circumstances that preclude guilt and the circumstances are later confirmed, then the case is cancelled; otherwise, the admission is not worth much. There have been situations where suspects or even defendants have made motions in court for conviction without admission of guilt, but I have not agreed to such a solution.” The “others” answer was selected by a large number of respondents (20.04%). Similarly to question no. 1, the answer combines remaining conditions; however, it also includes other conditions, such as cooperation with the law enforcement entity, the defendant's consent, and, as an exception, also the victim's consent, even though art. 335 of the CCP does not provide for it, and assurance of quick redress of the damage done to the victim.

Another question asked in the survey was: “In your opinion, what are the main motives for commencing negotiations with suspects?” The respondents could choose from the following answers:

- a) quick and definitive ending of the case;
- b) obtaining the defendant's admission of guilt;

- c) the possibility to consider the case in a hearing in the absence of the public prosecutor, provided that the presiding judge or the court does not require the presence of the public prosecutor;
- d) foregone conviction, with the resulting lack of possibility that the court will return the case to the public prosecutor;
- e) others.

The results of the survey were as follows: 2 out of 3 public prosecutors (72.87%) considered quick and definitive ending of the case to be the main reason for commencing negotiations with suspects. Only small percentages of participants selected such answers as obtaining the defendant's admission of guilt (1.80%), the possibility to consider the case in a hearing in the absence of the public prosecutor, provided that the president of the court or the court does not require the presence of the public prosecutor (4.85%), and foregone conviction, with the resulting lack of possibility that the court will return the case to the public prosecutor (2.3%). A large percentage of the respondents (17.67%) selected the "others" answer, which covers, among others, the following reasons: the possibility to speed up the preparatory proceedings by resignation from some activities, redress of the damage or remedy to the victim, elimination or limitation of the scale of the conflict between the parties, quick and reliable conduct of the proceedings, the possibility to define the elements of the penalty that are commensurate with the guilt and the circumstances of the act, taking into account the life situation of the defendant, and identification of other perpetrators.

The next question asked of the respondents was: "Who most often initiates negotiation of a plea bargain under art. 335 and 343 of the CCP?" The respondents could choose from the following answers:

- a) the public prosecutor;
- b) the suspect;
- c) the Police or another non-prosecutorial law enforcement agency;
- d) the defence attorneys.

The answers given indicate that the entity which most often initiates negotiations in accordance with art. 335 of the CCP is the Police, which follows the instructions of the public prosecutor, or another non – prosecutorial law enforcement agency.<sup>40</sup> 1 in 3 public prosecutors from the whole group (38.27%) gave this answer. In the individual districts, the number of respondents who selected this answer ranged from 25.81% (Rzeszów) to 46.15% (Łódź). This may be due to the fact that most cases are conducted by the Police. The next most often selected answer was “the public prosecutor” – it was selected by 19.5% of the total group. The number of respondents in the individual districts who selected it ranged from 12.42% (Warsaw) to 26.14% (Białystok). This fairly large range of results is most likely caused by the difference in the size of the cities and in the number of cases that are conducted by the public prosecutor’s offices. The third most often selected answer was “the suspect.” It was given by 18.11% of the whole group; the number of respondents who selected it in the individual districts ranged from 13.07% (Białystok) to 23.66% (Rzeszów). Given the above numbers, it can be concluded that in the Białystok district it is the public prosecutor who bears the burden of initiating the negotiations, with the Police and the non – prosecutorial law enforcement agencies trailing behind.

An analysis of the public prosecutors’ answers to the next question (regarding the ways to determine the proposed terms of conviction of the suspect in accordance with art. 335 and 343 of the CCP) leads to the conclusion that the most frequent way is consultation with the prosecutor of the cases conducted by the Police. Over a half of all the public prosecutors participating in the survey (57%) indicated this form. In the individual districts, the percentages of the prosecutors who selected this answer ranged from 47.44% (Łódź) to 67.32% (Białystok). As far as consultation with the direct supervisors, it was selected as the answer by 12.26% of prosecutors in the whole group, and the percentage of respondents who selected it in the individual districts ranged from 2.73% (Wrocław) to 25.74% (Poznań). The least

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40 This is also confirmed by the literature on this subject. See, e.g. J. Kudrelek, *Rola Policji w zakresie stosowania konsensualnych rozstrzygnięć w postępowaniu karnym* [The role of the Police with regards to the use of consensual resolutions in criminal proceedings], in: *Ocena funkcjonowania...* [Evaluation of the functioning...], *op. cit.*, pp. 165–175.

frequently selected answer was consideration for the guidelines of the Minister of Justice – 1.43% of public prosecutors in the whole group. The “others” answer was selected by 29% of respondents. This answer covers combinations of the earlier answers, and consideration for the guidelines of the Minister of Justice is mentioned only rarely. This is another proof that the Police plays an important part in plea bargains as the institution of “first contact with the suspect.”

As far as observance of the *pacta sunt servanda* principle by the public prosecutors is concerned, only extrastatutory ethical requirements of the fair trial should guarantee that when the public prosecutor makes a motion in accordance with art. 335 of the CCP, the prosecutor is bound by its content. As the doctrine rightly proposes, in such situations as, for instance, a change of the findings, any doubts as to the circumstances of the act, failure to observe the provisions of the mediation agreement, this bond ceases to exist. This means that the public prosecutor has the right to withdraw his motion, but only when the changes occurred or became known to the public prosecutor only after the motion has been made in court.<sup>41</sup>

Thus, the public prosecutors were asked the following question: “What are the most frequent reasons for refusing to make or withdrawing a motion in accordance with art. 335 of the CCP?” The following list of answers was provided:

- a) withdrawal of acceptance of the plea bargaining by the defendant;
- b) agreement on penalties or penal measures that are not in line with the guidelines of the Minister of Justice, or lack of acceptance by the public prosecutor who is the direct supervisor;

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41 S. Steinborn, *Odwotywalność oświadczeń woli a porozumienia w polskim procesie karnym* [The possibility to withdraw statements of will and plea bargains in the Polish criminal process], *Palestra* 2001, No. 7–8, p. 29. Of a different opinion is I. Nowakowski who claims that such new circumstances do not need to occur and, for example, an instruction of the supervising prosecutor is sufficient; I. Nowakowski: *Odwotywalność czynności konsensualnych w polskim procesie karnym (zagadnienia wybrane)* [The possibility to withdraw from consensual activities in the Polish criminal process (selected issues)], in: C. Kulesza, ed. *Ocena funkcjonowania porozumień procesowych w praktyce wymiaru sprawiedliwości* [Evaluation of the functioning of plea bargaining in the practice of the administration of justice system], Warsaw 2009, pp. 88–91.

- d) defective motion (if so, what is the defect?);
- d) lack of the defendant's acceptance, expressed during the hearing, to modify the contents of the motion;
- e) others.

The answers given by the respondents are discussed below.

The results indicate that the main reason for refusal to make or withdrawal of a motion is withdrawal of acceptance by the defendant. 47.42% of all respondents, which is nearly a half, gave this answer. In the individual districts, the number of public prosecutors who gave this answer ranged from 30.36% (Gdańsk) to 60.75% (Kraków) (the percentage for the Białystok district was similar, 50.13%). The second most frequent reason was agreement on penalties or penal measures that are not in line with the guidelines of the Minister of Justice, or lack of acceptance by the public prosecutor who is the direct supervisor. A total of 16.49% of all respondents gave this answer; the numbers for the individual districts ranged from 8.5% (Białystok) to 30.33% (Łódź). The next most frequent reason was defective motion – 10.95% of all respondents chose this answer. The manifestations of the defect were, among others lack of conformance to substantive law, e.g. the period of suspension is not in compliance with the provisions of substantive law, not all penalties or penal measures have been considered, the suspension of the penalty has been agreed without the penal chart, the obligatory elements of the penalty, such as supervision by a probation officer and the period of suspension of the penalty for a juvenile offender have not been included, the aggregate penalty has not been considered, or the legal qualification of the act is not correct. The answer “lack of the defendant's acceptance, expressed during the hearing, to modify the contents of the motion” was given by only a small portion of the respondents – 3.73 of the total group (the smallest percentage was in the Lublin district – 0.81%, and the largest – in the Warsaw district – 6.83%). The “others” answer was selected by 20.78% of respondents. The last answer covers both traditional combinations of the different answers and other situations, such as the following: the defendant has been convicted of a crime before, new findings have been made regarding the circumstances of the offence, there are doubts

concerning the facts, the penalty agreed with another public prosecutor is not commensurate with the degree of guilt, the suspect has negative criminological prognosis, the suspect wants to receive a too lenient penalty, and the person supervising the proceedings changed his or her mind.

Of particular note in the above – mentioned results is the large disproportion between the percentage of respondents who selected the “agreement on penalties or penal measures that are not in line with the guidelines of the Minister of Justice (currently the Prosecutor General), or lack of acceptance by the public prosecutor who is the direct supervisor” answer and those who selected other answers. Based on the results obtained in the Białystok district, one could expect that, first, public prosecutors, in applying art. 335 of the Code of Criminal procedure, do so in accordance with the expectations of their supervisors and the guidelines of the Minister of Justice, or that the control of the direct supervisors is more formal due to the high trust in the actions of their subordinates, or that the public prosecutors are very autonomous and follow their own beliefs, without consulting their motions with their supervisors, which is in line with the answers given to the next question, as it indicates that only 7.19% of prosecutors in the Białystok district consult their motions with their direct supervisors (the number for the whole sample is 12.26%).

What should be noticed in the context of the statistical data confirming the increased importance of the institution of conviction without trial in accordance with art. 335 of the CCP and 343 of the CCP (which, together with conviction in accordance with art. 387 of the CCP, constitutes approx. 60% of all convictions), which is the basis for the thesis made in the literature on this matter that in this case the public prosecutor, in making a deal with the defence, becomes a quasi–adjudicating entity, knowing that in most cases the deal will become the convicting verdict.<sup>42</sup> If the deal is accepted by the court, the penalties or penal measures imposed by the court may not be different

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42 E. Zalewski, *Pozycja procesowa prokuratora w nowym kodeksie postępowania karnego w nowym kodeksie postępowania karnego* [The standing of the public prosecutor in the process according to the new code of criminal procedure], *Prokuratura i Prawo* 1998, no. 4, p. 32.

than those recommended by the public prosecutor with the defendant's consent (with the possibility to change the motion with the consent of both parties expressed during the hearing). It must be added that the public prosecutor plays an unprecedented role, not only of the entity recommending the penalty from the point of view of the state's and the citizens' interests during the final speech after the court proceedings, but also of the entity requesting a penalty taking into account the interests of the defendant.

Due to this, the problem of reaching plea bargain deals resulting in a motion for conviction in accordance to art. 335 of the CCP must be analyzed also from the point of view of prosecutors' ethics.<sup>43</sup> It is prosecutors' ethics that determine the "non – statutory standards of honesty" of public prosecutors mentioned in the first part of this article. In accordance with its principles concerning the public prosecutor's relations with the parties, the prosecutor must not initiate criminal proceedings or make efforts to continue them when the evidence gathered indicates that the accusations were unfounded. In the preparatory proceedings, the public prosecutor should effectively strive to make all the findings, regardless of whether they are to the advantage or detriment of the suspect. As far as the court proceedings are concerned, it must be pointed out that the first item of the chapter of the Collection of Ethical Principles concerning the principles of court speeches provides that prosecutors have the duty to strive to determine the truth in order to achieve a just sentence. In the preparatory proceedings conducted and supervised by the public prosecutor, the prosecutor has the duty to observe the standards of the CCP, which also carry ethical values. Thus, the public prosecutor has the duty to observe the principle of presumption of innocence and, if there are doubts that may not be eliminated, must consider them to the advantage of the defendant.<sup>44</sup> In analyzing the problem of consensual ending of criminal proceedings,

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43 The problem of plea bargaining from the point of view of process ethics is analyzed among others by A. Bogusłowicz: A. Bogusłowicz, *Rola prokuratora w konsensualnych formach zakończenia postępowania karnego (maszynopis niepublikowanej rozprawy doktorskiej)* [The role of the public prosecutor in the consensual forms of ending of criminal proceedings (copy of unpublished doctoral thesis)], pp. 50–60.

44 J. Szafnicki, *Refleksje o etyce prokuratorskiej* [Reflections about prosecutors' ethics], *Prokuratura i Prawo* 1996, no. 10, p. 102.

one must also point out art. 7 of the Act on the public prosecutor's office<sup>45</sup> which provides that prosecutors are required to take actions defined in statutes while observing the principle of impartiality, equal treatment of citizens, and art. 8 of the Act providing for independence of public prosecutors.

Looking at plea bargains in criminal proceedings from the point of view of the defence, one must conclude that the basic motive for the counsel to undertake plea bargain negotiations is to obtain measurable benefits for the defendant. Such benefits, depending on the case, may include:

- 1) achieving a mitigated criminal responsibility of the defendant by using consensual forms, compared with potential penalties imposed in proceedings conducted in accordance with the general principles;
- 2) rescission of detention awaiting trial or another preventive measure that is less painful to the defendant (if any such measures have been imposed in the case);
- 3) avoidance of stigmatization of the defendant due to openness of the main hearing (conviction during a hearing in accordance with art. 335 and 343 of the CCP);
- 4) avoidance of a state of legal uncertainty resulting from the potential verdict issued in accordance with the general principles by achieving predictability with regards to the penalty and the penal measures (art. 335 and 387 of the CCP);
- 5) quicker ending of the proceedings, if it is in the defendant's interest.

When undertaking negotiations with the entity conducting the proceedings, the counsel should be sure at least of the following matters:

- the defendant is guilty;
- the entities have gathered evidence that is sufficient to find the suspect to be guilty;

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45 I.e. Journal of Laws of 2002, no. 21, *item* 26, as amended.

- the plea bargain will not, in the counsel’s opinion, put the defendant in a clearly worse situation than a decision to take advantage of the full guarantee of his or her rights in an open and adversarial hearing. The counsel should follow, unless there are specific reasons for acting otherwise, the so – called mini – max strategy, i.e. suggest a solution that leads to a greater likelihood of achieving a less painful outcome.

In the context of opinions of the public prosecutors involved in the survey concerning the initiative to undertake negotiations concerning a plea bargain in accordance with art. 335 of the CCP, it must be noted that the initiative of the defence counsel is of marginal importance. In the whole group, only 1.74% of respondents indicated the defence counsel as the party initiating such negotiations. The percentages for the individual districts ranged from 0.79% (Szczecin) to 3.73% (Warsaw). This is most often caused by the fact that when the negotiations are undertaken the suspect has no defence counsel, and when he or she has one, the counsel is unable to make a decisions in this regard due to not having read the files of the case.<sup>46</sup>

Quite often the defence counsel joins the process after the defendant has expressed his or her consent before the law enforcement entity or the public prosecutor to be convicted without trial in accordance with art. 335 of the CCP. Thus, it is worth pointing at judicial decisions that assume the possibility to withdraw such consent by the defence. In its verdict dated 24 June 2010 (II KK 125/10, LEX no. 590211), the Supreme Court stated: “If after formal acceptance of the public prosecutor’s offer the defendant concludes that conviction without trial would be – for certain reasons – disadvantageous to him, he may withdraw his consent; he may do it only until the irreversible condition occurs, that is until the court issues a convicting verdict in a hearing in accordance with art. 343 of the CCP.” (See also the aforementioned verdict of the Supreme Court of 26 August 2009, III KK 194/09 ; LEX no. 519654).

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46 See: C. Kulesza, *Efektywna obrona w postępowaniu przygotowawczym a „favor procuratorii”* [Effective defence in the preparatory proceedings and the “favor procuratorii”], *Prokuratura i Prawo* 2007, no. 4, p. 10.

As far as concessions concerning criminal responsibility as a result of the application of art. 335 and 343 of the CCP are concerned, as an example, Polish file studies performed by the Administration of Justice Institute demonstrated that persons taking advantage of conviction without trial did in fact benefit from significant mitigation of the penalties; however, there were no cases of extraordinary mitigation of the penalty or a conditional suspension of execution of the penalty under art. 343 § 2 (1) and (2) of the CCP.<sup>47</sup>

On the other hand, with regards to the research conducted by our Department, it must be emphasized that the judges and public prosecutors did not clearly confirm the thesis that defendants convicted by way of plea bargaining benefit from mitigation of their criminal responsibility. In particular, only 5.2% (16 respondents) of the judges asked about the use of art. 343 § 2 of the CCP stated that they often used the institutions of extraordinary mitigation of the penalty or conditional suspension of the penalty in accordance with the principles defined in this regulation. On the other hand, 41.5% (127 respondents) of judges stated that they had never granted such extraordinary concessions to the defendants, and 43% (132 respondents) stated that they granted them only rarely. A large majority of judges (85.6%) stated that when they adjudicated conditional suspension of the penalty when issuing conviction without trial they observed the conditions for temporary suspension of penalty defined in art. 69 of the Penal Code; only 11.8% stated that they acted otherwise.

As far as public prosecutors are concerned, only 5.53% (89 respondents) stated that when they made the motion under art. 335 of the CCP, they often asked the court for extraordinary mitigation of the defendant's criminal responsibility on the basis of art. 343 § 1 and § 2 of the CCP. 47.1% (757 respondents) of prosecutors never asked for such mitigation, and a similar percentage, i.e. 46.1% (746 respondents) of prosecutors, asked for it only rarely.

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47 M. Jankowski, A. Ważny, *Instytucja dobrowolnego poddania się karze (art. 387 kpk.) i skazania bez rozprawy (art. 335 kpk.) w świetle praktyki. Rezultaty badań ogólnopolskich* [The institutions of voluntary submission to a penalty (art. 387 of the CCP) and conviction without trial (art. 335 of the CCP) in practice. Results of Poland-wide studies], *Prawo w działaniu* 2008, p. 129.

Thus, both the judges and the public prosecutors participating in the survey have confirmed the thesis that the new penal law regulation given in art. 343 § 1 and § 2 of the CCP, introduced into the Polish CCP by the reform of 10 January 2003, is used rarely.

As far as the principle of fair process is concerned, what must be pointed out is the defendant's right to a fair court, given in art. 6 (1) of the ECHR. The Polish literature on the matter does notice the problem of impartiality of judges in the context of their involvement in plea bargain negotiations, but it emphasizes the fact that courts naturally do not influence the conclusion of plea bargain agreements in accordance with art. 335 of the CCP (and do not suggest such agreements during examination of incidental issues, e.g. detention). At the jurisdiction stage, courts should not suggest or force the defendant to accept voluntary submission to a penalty in accordance with art. 387 of the CCP; however, they may appoint a public defender to a defendant who does not have one, if the defendant wants to effectively make an appropriate motion.<sup>48</sup> This problem is connected with the institution of disqualification of a judge.

As recently as in 2005 I pointed at the frequent problem, which the legislator apparently had not noticed in designing the institution of consensual ending of a process. The problem occurs in situations where the defendant voluntarily submits to a penalty in accordance with art. 387 of the CCP in trials involving many persons, where only a some of the co – defendants have expressed their consent to conviction and the cases of the others are heard in accordance with the general principles by the same judge who issued the convicting sentence in accordance with the aforementioned article.<sup>49</sup>

It must be added that despite the frequent occurrence of such process configurations in Poland, courts in their decisions have not found it to require disqualification of the judge in accordance with art. 41 of the CCP. The Supreme Court would not express its opinion on this matter, which was largely due to the fact that a decision to refuse to disqualify

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48 S. Steinborn, *Porozumienia...* [Plea bargains...], *op. cit.*, pp. 172–181.

49 C. Kulesza, *Efektywność udziału obrońcy...* [Effectiveness of the participation of the defence counsel...], *op. cit.*, p. 351.

the judge is non – actionable. This changed with the Supreme Court’s verdict of 29 August 2006 (V KK 107/05, OSNKW 2006/10/96, Biul. SN 2006/10/22, Prokuratura i Prawo – ins. 2007/2/2, OSP 2007/6/71) which pertained to conviction in accordance with art. 387 of the CCP. The verdict provided that:

“The judge’s participation in the trial of a case where the court assumed in its verdict that a specific person participated in criminal behavior, which constituted the matter of a later case against this person as the defendant, usually constitutes a circumstance which raises reasonable doubts as to the impartiality of the judge (art. 41 § 1 of the CCP).”

Important to the jurisprudence of the Supreme Court and the common courts of law is the subsequent resolution of the Supreme Court of 26 April 2007 (I KZP 9/07, OSNKW 2007/5/39, Biul. SN 2007/4/20, OSP 2008/12) assuming (in the context of art. 387 of the CCP) that “In the event that the evidence, based on which a verdict was issued concerning the criminal responsibility of one of the perpetrators of an act, is to constitute the evidence on which a verdict would be issued concerning the criminal responsibility of another perpetrator (abettor or accessory) of the same act, the judge who examined the evidence in relation to one of these persons should be disqualified from participation in the case concerning the other persons due to the presence of a circumstance which “could lead to a reasonable doubt as to his impartiality” in the meaning of art. 41 § 1 of the Code of Criminal Procedure.”

This thesis can be found in later court verdicts (see, for example, the verdict of the Supreme Court of 6 November 2007, V KK 33/07, LEX no. 332929; the verdict of the Supreme Court of 10 December 2007, V KK 115/07, Lex no. 361685; the verdict of the Supreme Court of 3 March 2008, V KK 299/07, OSNwSK 2008/1/519; the verdict of the Supreme Court of 26 June 2008, V KK 128/08, LEX no. 438465; and the verdict of the Supreme Court of 8 January 2009, III KK 257/08, LEX no. 532400).

On the other hand, neither the literature on this subject nor the judicial decisions mentioned in the first part of this article indicate

any objections to the involvement of the court in modification of the plea bargains during a hearing or a session. Our research indicates that the opinion of the judges participating in the survey appear to resolve the conflict which has been present in the literature and the judicial decisions as to whether motions made in accordance with art. 335 of the CCP may be modified during the session. As many as 72% of the judges (220 respondents) declared that they had been actively involved in the modification of such motions during the session, with regards to penalties and penal measures, while 28% of the judges (85 respondents) said that they had not.

In order to determine the public prosecutors' and judges' opinion of the role of defence counsels in plea bargain agreements, both groups were asked to answer the following question (by selecting the options listed below): "In your opinion, does the presence of a defence counsel in bargain deal:

- a) improve the defendant's chance of achieving a more lenient penalty compared to a verdict issued after a trial in accordance with the general principles?
- b) improves the defendant's chance of acceptance of the motion made in accordance with art. 387 of the CCP?
- c) not influence the penal sanction imposed on the defendant?
- d) allow for earlier rescission of detention awaiting trial?

An analysis of the answers indicates that, according to public prosecutors, the presence of a defence counsel does not, in most cases, affect the penalty imposed.<sup>50</sup> This answer was given by 44.87% of all respondents. In the individual districts the percentage ranged from 35.45% (Wrocław) to 59.14% (Rzeszów). The respondents did state that the presence of a defence counsel improves the defendant's chance of obtaining a more lenient penalty, compared to a verdict issued after a trial in accordance with the general principles. 20.35% of public prosecutors from the whole group chose this answer. The percentage of respondents in the individual districts who selected this answer ranged

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50 K.T. Boratyńska, *op. cit.*, pp. 110–113.

from 12.87% (Poznań) to 23.48% (Gdańsk) (with a similar number, 23.38%, in the Katowice district). The third most frequently selected answer (19.35% of all respondents – not far behind the previous one) was the answer that the presence of a defence counsel improves the defendant's chance for acceptance of the motion made in accordance with art. 387 of the CCP. This is true especially due to the fact that under art. 387 § 1 the court may, upon the defendant's request, appoint a public defender. Unexpectedly, the public prosecutors have stated that the pressure on the defence counsels to strike an agreement under art. 335 and 387 of the CCP is marginal and generally unimportant.

Also, over a half of all judges participating in the survey stated that the presence of a defence counsel does not influence, in most cases, the penal sanction imposed on the defendant, although over 30% judges said otherwise.

As for defence of the rights of the victim, constituting a part of the fair trial requirements, it must be emphasized that the literature on this subject mentions, as a function of plea bargain agreements, the assurance (facilitation) to the victim of a redress of the harm done as a result of the offense (in short, the compensation function). In the opinion of S. Steinborn, this function is manifested in two aspects: first, plea bargain agreements have mechanisms that secure redress of the damage done to the victim, a remedy, and an apology by the perpetrator; second, plea bargain agreements allow the victim to quicker achieve real redress of the harm done by the defendant, which makes it possible to avoid the time-consuming enforcement of the victim's claims.<sup>51</sup>

One may wonder what are the benefits of plea bargain agreements to the victim. The CCP provides that before granting a motion for conviction or voluntary submission to a penalty the court may, based on art. 341 § 3 of the CCP, find it reasonable to require that the defendant agree with the victim as to a redress of the harm or a remedy. For this purpose, the court must adjourn the hearing and set a certain deadline for the parties. In accordance with this provision, upon request of the defendant and the victim, made on the grounds that they must arrange

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51 S. Steinborn: *Porozumienia... [Plea bargains...]*, *op. cit.*, pp. 59–60.

an agreement, the court must order an appropriate break and adjourn the hearing.

As the literature on the subject emphasizes, two situations can be identified: the first, where the court itself sees the need for arrangements between the defendant and the victim, before the court makes the final decision (depending on the course of the proceedings) and adjourns the hearing; the second, where it is the victim and the defendant who want to make an agreement “concerning a redress of the harm” or a remedy.<sup>52</sup>

The doctrine of the criminal process lists a number of arguments supporting the existence of such agreements.<sup>53</sup> The doctrine emphasizes the benefits of such agreements to the victims: first, the possibility to obtain remedy (financial, moral, and symbolic); second, satisfaction from the active participation in the hearing and a sense of influence on the decision in a case that is of vital importance to the victim; third, the possibility to abreact the emotions related to the offense, to include making the perpetrator aware of the harm done; fourth, avoidance of “secondary victimization” and reduction of fear of crime. This thesis is confirmed in the judicial verdict which stated that: “When the damage and harm suffered by the victim of an offense is eliminated and ceases to exist, the penalty does not need to be severe as the principal function of the penalty, i.e. to remedy the victim’s sense of harm, has been fulfilled. The state should not hinder reaching consensual resolution of conflicts created by offenses, if such a resolution does not violate the basic principles of justice. This idea constituted the basis of the Penal Code of 1997 (verdict of the court of appeals in Krakow of 11 October 2007, II AKa 191/07, Prokuratura i Prawo – ins. 2008/4/11).

Of note is also art. 66 § 3 of the Penal Code which provides that if the victim has made peace with the perpetrator, the perpetrator has redressed the damage, or the victim and the perpetrator have agreed on the way the damage is to be redressed, the conditional rescission may

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52 A. Drozd, Pokrzywdzony wobec porozumień procesowych [The victim versus plea bargains], *Edukacja prawnicza* of 19 August 2010.

53 E. Bieńkowska, B. Czarnańska–Działuk, D. Wójcik, Postępowanie mediacyjne w nowej kodyfikacji karnej [Mediation proceedings in the new criminal law], in: *Nowa kodyfikacja karna. Kodeks postępowania karnego. Krótkie komentarze* [The new criminal law. Code of criminal procedure. Brief commentaries], Warsaw 1998, No 14, pp. 232–234.

be applied with regards to the perpetrator of a crime carrying a penalty of no more than 5 years of imprisonment (which is more than the 3 years of imprisonment mentioned in art. 66 § 3 of the Penal Code).

As commentaries to this regulations indicate, the use of art. 66 § 3 of the Penal Code is not precluded by the fact that the motive for the perpetrator's behavior in reconciling with the victim, remedying the harm, or agreeing the way the harm will be remedied is the intent to avoid the penalty. In such cases, it should be assumed that the securing function of the criminal – law norm has been met.<sup>54</sup> This opinion is justified by claiming that in accordance with art. 341 § 3 of the CCP, the court should support opportunities for an agreement between the defendant and the victim regarding remedy of the harm or redress and take into account, in its verdict concerning conditional discontinuation of the proceedings, the outcome of such an agreement. Art. 341 § 3 of the CCP does not refer only to an agreement that constitutes a condition for applying art. 66 § 3 of the Penal Code, but may be applied in all cases where conditional discontinuation of the proceedings has been applied (see also art. 68 § 2 of the Penal Code). As M. Kalitowski rightly emphasizes, art. 66 § 3 of the Penal Code is a manifestation of the importance assigned in the Code to elimination, by proper application of the measures provided for in the penal law, of the conflict caused by the offense and to securing the interest of the victim.<sup>55</sup>

Thus, it should be noted that, as a result of the alteration of 10 January 2003, the earlier requirements that the victim must each time express his or her acceptance of the application of the institution of voluntary submission to a penalty by the defendant was abandoned and replaced with only the negative condition of a lack of protest of the victim who has been duly informed about the date of the hearing and advised about the possibility that the defendant make such a motion (art. 387 § 2 in fine of the CCP)<sup>56</sup>. This “presumption” of the victim's

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54 A. Zoll, in: *Kodeks...* [The code...], *op. cit.*, p. 1001.

55 M. Kalitowski, in: M. Kalitowski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz. Tom II (art. 32–116)* [Penal code. A commentary. Volume II (art. 32–116)], Gdańsk 1999, p. 170.

56 As the judicial practice has demonstrated, even in the legal state before the January amendment there were cases where defendants' motions were granted despite the lack of express acceptance of the victim for the use of this institution. See. K. Kurowska, *Instytucje dobrowol-*

approval to apply the provisions of art. 387 of the CCP can be considered as a reasonable compromise between the postulate of effectiveness of the administration of justice system and the right of the victim to active defence of his or her interest in a criminal process<sup>57</sup>.

However, in the context of compliance with fair trial requirements from the point of view of the victim, one must also notice that in the case of plea bargaining in a situation where the defendant made a motion to be convicted without a trial, the victim is deprived of the possibility to make any impact on the outcome of the process as a plaintiff and an auxiliary prosecutor. If the victim has informed the court of his or her intent to act as an auxiliary prosecutor, the victim may only appeal the verdict issued during the hearing. In the case of both consensual institutions (art. 335 and art. 387 of the CCP), the situation of the victim who has brought a civil action is worsened because the examination of evidence is not conducted during the main hearing. Of note is also the threat to the victim's right to obtain compensation that arises if the victim has not made a motion defined in art. 46 of the Penal Code prior to bringing the indictment act. It must be emphasized that, from the point of view of the *onus probandi* principle, the situation of the victim is more advantageous when he or she makes a motion to redress a damage than when he or she makes an adhesion claim. The legal duty to prove the size of the damage rests, in the case of the institution of redress of a damage, on the entities conducting the process, the court's ability to refuse to satisfy the claims of the victim is limited, and the victim can count on such satisfaction *ex officio*. One must agree with the opinion of the Supreme Court, expressed in its verdict of 23 July 2009 (III KK 134/09, LEX no. 518147) that if the victim has made a motion for imposing as the penal measure the duty to remedy the damage before the verdict is issued in the case in accordance with art. 343 of the CCP, the court has the duty to both consider this motion

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*nego poddania się karze i skazania bez rozprawy w praktyce warszawskich sądów* [The institutions of voluntary submission to a penalty and conviction without a trial in the practice of Warsaw's courts], *Wojskowy Przegląd Prawniczy* 2003, no. 2, pp. 83–84.

57 Especially that delays in this matter may be the result of not only intentional obstruction on the part of the victim of the offense, but also of the victim's passive attitude or a large number of victims in the case of an collective offense. See: H. Skwarczyński, *Przyspieszenie procedowania po nowelizacji kpk* [Acceleration of the proceedings after the amendment of the CCP], *Jurysta* 2003, no. 6, p. 13.

and perform a substantive control of the public prosecutor's motion made in accordance with art. 335 § 1 of the CCP. In the opinion of the Supreme Court, if the court finds that the damage has not been redressed and the other conditions for imposing on the defendant the duty to redress the damage, the court must ask the parties to modify the public prosecutor's motion and if the parties refuse to do so, forward the case to be considered in accordance with the general principles.

The commentaries emphasize that while the CCP does not require the victim's approval of the application of the institution defined in art. 335, the public prosecutor, in deciding to take such an initiative, must not ignore the objective of the criminal process mentioned in art. 2 § 1 (3) of the CCP, namely the consideration for the legally protected interests of the victim. This pertains, in particular, to the possibility to use the institution of mediation between the victim and the suspect (art. 23a), which improves the chances of obtaining redress of the damage caused by the offense or of a remedy.<sup>58</sup>

Similarly, with regards to voluntary submission to a penalty, some commentaries emphasize the fact that while the court, in considering the defendant's motion, must not make its granting dependent on reconciliation between the defendant and the victim as to the compensation or remedy, as provided for in art. 387 § 3 of the CCP, the reference in the second sentence of § 3 indicates, that such a reconciliation should support the granting of the motion, because this is how the objective of the criminal proceedings defined in art. 2 § 1 (3) of the CCP will be achieved.<sup>59</sup> As the literature emphasizes, the aforementioned institutions allow for an agreement between the victim and the defendant and, at the same time, play a similar role to that of mediation, contributing to reconciliation, agreement, and elimination of the conflict. Despite the limitation of the proceedings aimed to gather evidence, they give the victim the possibility to present his or her opinion of the defendant's attitude and to obtain moral and material compensation<sup>60</sup>.

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58 J. Grajewski, in: *Kodeks...* [The code...], *op. cit.*, p. 1054.

59 L.K. Paprzycki, in: *Kodeks...* [The code...], *op. cit.*, p.1179.

60 A. Drozd, *Pokrzywdzony wobec porozumień procesowych...* [The victim versus plea bargains...], *op. cit.*

On the other hand, quite often the strengths of the parties to the agreement are highly disproportional and, therefore, “agreement between the victim and the defendant” brings about the risk that the victim may be intimidated or otherwise “forced” to express his or her acceptance to the perpetrator’s proposals.<sup>61</sup>

In our research, in 110 questionnaires (out of a total of 306 questionnaires), the participating judges mentioned that the reason for requiring the defendant to be present at the hearing concerning consideration of the motion made in accordance with art. 335 of the CCP is the lack of definition of the penalty or the penal measure. The second most often selected answer (86 respondents) was that the reason for requiring the defendant to be present is that at earlier stages of the criminal proceedings the victim has not made a motion for redress of the damage and the conditions mentioned in art. 46 of the Penal Code are met. Nevertheless, only 3.3% of judges (10 respondents) mentioned it as the main reasons for requiring the defendant to be present at the hearing.

In this context, it must be mentioned that the Act of 5 November 2009<sup>62</sup> changed, as of 10 June 2010, art. 46 § 1 of the Penal Code, which currently provides that if the court issues a convicting verdict, the court may adjudge or must adjudge, upon request of the victim or another authorized person, the requirement to redress the damage caused by the offense in full or in part, or to remedy the damage suffered by the victim. This provision, which, unlike art. 46 of the Penal Code, does not enumerate a catalogue of crimes, and which allows the court to adjudge the duty to redress the damage or to make a remedy in the case of any offense, should be considered as reasonable. Moreover, this provision allows the court to issue such a verdict also without the motion by the victim or another authorized person and, if such a motion has been

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61 E. Bieńkowska, Szybkość postępowania karnego i ochrona interesów pokrzywdzonego: zasady do pogodzenia czy nie? [The speed of criminal proceedings and protection of the victim’s interests: are these principles reconcilable or not?], in: Tadeusz Nowak, ed., *Nowe Prawo karne procesowe. Zagadnienia wybrane. Księga ku czci Profesora Wiesława Daszkiewiczza* [New law of criminal procedure. Selected issues. A book in honor of Professor Wiesław Daszkiewicz], Poznań 1999, pp. 129–130.

62 Act of 5 November 2009 on amending the Penal Code and other statutes (Journal of Laws of 2009, no. 206, item 1589).

made, the court is required to adjudge the duty to redress the damage (the same as before the amendment). It appears that this regulation, which makes this institution similar to the restitution orders present in the Anglo–Saxon criminal process, is intended to increase the number of cases where the perpetrators are required to redress the damage and make remedy to the victims, thus constituting a guarantee of a process that is fair to the victims of crimes.

In conclusion to the above discussion of the Polish criminal plea bargaining, one can make the general statement that even if it is assumed that such agreements are fully voluntary to the defence counsel, they may raise some doubts in the context of guarantees of a process that is fair to the defendant. It also appears that they do not guarantee satisfying the legally recognized interests of the victim in the criminal process. This conclusion concerns both the fair trial guarantees which are glorified by the European Convention on Human Rights and the ECtHR's judicial decisions which support them and which have the status of principles of process regulations of the Constitution of the Republic of Poland and the Polish CCP of 1997 (objective truth, right to defence, and presumption of innocence) and the unwritten rules, most importantly the honesty of the entities conducting the process and their observance of the civil–law principle *pacta sunt servanda*. This is why one should be a little skeptical about the proposals for a qualitative expansion of the range of application of consensual forms of ending of criminal proceedings and for a reduction of their formality included in the draft amendment of the CCP prepared by the Criminal Law Codification Committee. The quintessence of these doubts is expressed in the last chapter of this monograph.

## STRESZCZENIE

Opracowanie podejmuje problematykę rzetelności polskich porozumień karnoprosesowych z perspektywy ich uczestników oraz sądu. Odnosząc się do różnorodności pojmowania idei fair trial i jej aspektów w polskiej doktrynie procesu karnego oraz rozszerzającej wykładni tej materii w orzecznictwie ETPCz dokonano wyboru gwarancji rzetelnego procesowania, które poddano analizie w kontekście konsensualnych form zakończenia postępowania karnego. Przyjęta w tej części pracy metoda badawcza objęła nie tylko literaturę i orzecznictwo sądowe, ale także analizę wyników badań ankietowych przeprowadzoną w latach 2006–2008 przez pracowników Katedry Postępowania Karnego Wydziału Prawa Uniwersytetu w Białymstoku wśród sędziów i prokuratorów z całej Polski, a dotyczących funkcjonowania porozumień karnoprosesowych w praktyce systemu wymiaru sprawiedliwości. W tej części monografii odniesiono się zarówno do oceny rzetelności tych porozumień w spektrum takich ustawowych gwarancji rzetelnego procesu jak zasady: prawdy obiektywnej, domniemania niewinności (w szczególności reguły *nemo tenetur*), prawa do obrony, uwzględniania praw pokrzywdzonego jak i etyki organów procesowych i niepisanej reguły „*pacta sunt servanda*”.