PART II

COURT CULTURE AND "ACTORS" IN THE COURT SYSTEM

Chapter 1.

PARTIES TO CRIMINAL PROCEEDINGS. COURT CULTURE, PROFESSIONAL ETHICS AND THE PRINCIPLE OF FAIR TRIAL

Cezary Kulesza[1]

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[2]. 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 methods are (reaching a verdict while protecting the

1 Prof. Cezary Kulesza, head of the Department of Criminal Procedure, Faculty of Law, University of Białystok; barrister.

2 P. Wiliński, *Sprawiedliwość proceduralna a proces karny*, [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*, Warszawa 2009, p. 77–91.

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[3].

Apart from conflicts in the doctrine regarding the nature of the notion of fair trial (as the supreme procedural principle, the method of defining the process model, or the proceeding method), one must see the source of the due process principle in the following acts of international law[4]: Article 6 of the European Convention of 1950 on the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Covenant of 19 December 1966 on Civil and Political Rights[5], as well as in Polish laws, most of all in Article 45(1) of the Constitution of the Republic of Poland.

Court culture as well as prosecutors' and defence lawyers' ethics must be considered as guarantees of fair trial (due process). We will discuss this problem in two separate aspects:

1) in the context of main trial and

2) outside of main trial, especially during plea bargains.

Ad 1) Judicial culture also includes the principle of equal treatment of parties to proceedings as a condition of fair trial. As widely noted in the literature of the subject, it is impossible to achieve full equality of defence and prosecution at trial. This is mainly due to the fact that pre–trial protocols drawn up without the participation of defence are used at trial. However, procedural practice allows us to show certain habits of some judges or prosecutors which in a less or more important manner deepen inequality of parties. Already before the start of the hearing some prosecutors enter the courtroom for a few minutes before the defence counsels. This can leave the impression among people waiting for the hearing that the prosecution and the Court are discussing over the verdict. This impression is especially strong among trainees and non–lawyer assistance in the process concerned with the hearing.

---

3 P. Wiliński, *Pojęcie rzetelnego procesu*, [in:] P. Wiliński (ed.), *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych*, Warszawa 2009, p. 26, and the literature referred to therein; E. Skrętowicz, *Z problematyki rzetelnego procesu karnego*, [in:] J. Skorupka (ed.), *op. cit.*, p. 21–27.

4 See also: M. Płachta, *Rzetelny proces karny w Unii Europejskiej*, [in:] J. Skorupka (ed.), *op. cit.*, p. 28–44.

5 Journal of Laws of 1997, No. 38, item 167.

An important issue is the refusal by the court to take the defence evidentiary motions into account. With the content of Article 369 ccrp., it appears that the evidence of the prosecution should be as far as possible carried out before the evidence of the defence. At the same time Article 370 section 2 ccrp. provides that the party who requested the witness statement asks questions first.

In this context, it should be noted that the indictment contains a list of the witnesses proposed by a prosecutor (compare Article 333 § 1 item 1 ccrp.). As a rule the court will hear all witnesses requested by the prosecutor at many hearings, even if they have nothing to say in the matter. Therefore, witnesses requested by the defence are heard at the end of the process. Then, the court acting under the pressure of time is often inclined to reject evidentiary motions of the defence as "obviously aiming for the excessive length of proceedings" (Article 170 § 1 item 5 ccrp.). In my practice I have never had a situation where the court declared the prosecution evidence inadmissible for the above mentioned reason.

The rejection of the evidentiary motions of the defence as unfounded may be a starting point for discussion about the difference in the position of defence counsel and prosecutor in the proceedings. The prosecutor when leading the investigation and listening to the witnesses uses the help of police. So even before the hearing in the court he/she has knowledge of the content of testimony of witnesses and may make their selections. He/she can also issue a command search for witnesses and summons to the hearing. At the same time, in the Polish criminal justice system, as opposed to the Anglo–Saxon system, the defence counsels do not have the right to conduct their own investigations. No provision of the Polish law prohibits the defence counsels' contacts with witnesses who have not been heard yet. However, the judges have a very bad attitude to such contacts. Perhaps the judges treat those contacts as an attempt to influence the testimony of witnesses or obstruct the administration of justice. In addition, it is clear that such talks with defence witnesses before the trial are prohibited (in my opinion wrongly) by the ethical rules for lawyers.

Assessing the situation, I would like to emphasise also the obligation of the counsel to act only in favour of the defendant (see Article 86 § 1 ccrp.). It follows the basic rule of witness interrogation by a lawyer, i.e. "do not ask questions that you do not know the answer". In other words, the defence counsel should not have to call witnesses to the hearing who will be charged to the defendant. However, this is not possible to be avoided if the defence counsel does not have prior knowledge of what the witness is to say.

There are situations when a defence counsel – following the explanations of the defendant – proposes to call a witness who can provide important information for the defence. The court makes efforts to call such a witness, who is in prison, sometimes several hundred kilometres away from the court. At the hearing, it turns out, however, that the witness does not have anything to say about the matter. In such a situation the court usually blames the delay in the process on a defence counsel.

The parties expect from the judges qualities such as experience, patience, understanding, empathy, respect and good organisation of work. However, in Poland, as opposed to the Anglo–Saxon system of justice, for example a judge may be a young person, e.g. 30 years old, and in such a case his/her experience of life is usually not too rich. Of course, in cases requiring the expertise, a judge may consult with an expert.

Patience, understanding and empathy are essential when interviewing people who normally for the first time met with the criminal justice system and do not know the rules. They are particularly important when interviewing victims and ill–treatment by the courts is likely to be secondary victimisation. They expect their understanding of victimisation, meeting their needs and assistance in the performance of their duties in the proceedings. In particular, the criminal courts should not be quick to leave civil actions unexamined based on the vague criterion that "the evidence revealed at the trial is not sufficient to resolve the civil action, and the completion of this material would result in a significant length of proceedings" (Article 415 § 3 ccrp.). If the

victim in a criminal trial has certain responsibilities, he/she has the right to assert their civil claims in the criminal court.

Good organisation of the court allows the process participants to avoid the excessive waiting before the courtroom and/or the need to travel to the court for multiple hearings.

Moreover, we cannot forget that the culture of the trial also depends on the parties to the process. Both the defence and prosecution should be thoroughly familiar with the case files and well prepared for the case. In practice, however, there are cases where either the prosecutor appointed at the last minute to appear at a hearing, or a lawyer (trainee) substituting the counsel, are not prepared for the case. In such a situation, the court should demonstrate understanding of the weaker party process, i.e. the defence, and – in accordance with the principle of loyalty to the process – support in the performance of this party's functions. Moreover, the court should not artificially "enhance" their authority by "instructing" the trainee lawyers on procedural mistakes committed by them or their insufficient knowledge of the law. Judges should remember that such demonstration of the superiority of the judges towards young people aspiring to be barristers (or legal advisors) not only may adversely affect the defendants and/or victims but also discourage young people to continue to practice.

Culture of the trial requires that not only the court, but also the parties to the process are punctual. However, even in this area we can point to inequality of arms, as the delay (or other disturbance of the process) may result in fines imposed on the defence but not on the prosecutor. As indicated in the German literature, the respect for the selected process requires that judges give proper attention to the final speech (regardless of its impact on the judgment) and do not spend that time reading the files of other cases[6]. A phenomenon inconsistent with the principle of court culture that occurs sometimes is shortening of the final defendant's speech by the judges, for example by asking the defendant – prior to the commencement of the speech – questions such

6 H. Dahs, *Handbuch des Strafverteidigers*, Köln 2005, p. 135–137.

as "Do you support the position of the defence counsel?" or "Does the defendant plead innocent or for leniency?".

The judges of the courts of appeals should understand that in the case of "compulsory defence" and in particular in the case of *ex officio* defence, the defence counsel is required to submit an appeal, even if he/she does not see any grounds for it. So even where an appeal has been recognised by the court of appeals as "manifestly unfounded", the oral or written reasons for the judgment of the court of appeals should not involve any accents that disparage a qualified attorney.

Finally, I would like to draw your attention to the dilemma faced by a lawyer pursuing an effective defence of his/her client. As emphasised by the famous German lawyer, Professor Hans Dahs, author of *Handbuch des Strafverteidigers* (Handbook of the defence counsel), defence counsels often have to choose between effective defence and care for the "*favor judicis*"[7]. A defence counsel who jealously defends his/her client (which is required by the code of ethics for lawyers) cannot take care of favour with the judge in future cases that he/she will conduct. So, he/she cannot sacrifice the interest of the defendant for his own career. And the culture of the judge requires that the code of ethics for barristers is understood and appreciated.

The ECHR judgments pointed out the following key elements of the right to legal aid and effective defence counsel[8]:

- its application also at the pre–trial stage,
- presence of a lawyer during pre–trial questioning of the accused,
- free choice/appointment of a lawyer by the state,
- legal assistance when the defendant does not appear at the trial,
- exclusion/refusal of lawyers by the state,
- state liability for conduct of lawyers,

---

7 Compare C. Kulesza, *Efektywna obrona a problem favor judicis (refleksje na tle prawnoporównawczym)*, [in:] K. Krajewski (red.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warszawa 2007, p. 239 et seq.

8 See: *Fair Trial in Criminal Cases*, Directorate General of Human Rights and Legal Affairs, Council of Europe 2008, p. 39–33. Compare: C. Kulesza, *Efektywność udziału obrońcy w procesie karnym w perspektywie prawnoporównawczej*, Kraków 2005, p. 204–217.

– sufficient means to pay for a lawyer,
– repayment of costs,
– "interests of justice" that calls for legal assistance,
– guarantee of "effective assistance".

Undoubtedly, effective criminal defence requires not only the right to competent legal assistance. Also legislative and procedural context should be considered, as well as organisational structures that enable and facilitate an effective defence as a crucial element of the right to fair trial. In the European literature an opinion can be found that it is necessary to approach the assessment of access to effective criminal defence in any particular jurisdiction at three levels[9]: "(a) Whether there exists a constitutional and legislative structure that adequately provides for criminal defence taking ECHR jurisprudence, where it is available, as establishing a minimum standard. (b) Whether regulations and practices are in place that enable those rights to be 'practical and effective'.(c) Where there exists a consistent level of competence amongst criminal defence lawyers, underpinned by a professional culture that recognises that effective defence is concerned as process as well as outcomes, and in respect of which the perception and experiences of suspects and defendants are central".

In the context of the fundamental issue of an effective defence, it is necessary to mention a problem that is rarely discussed in the commentaries to legal provisions of ccrp. and other literature on the subject, namely the so–called "extractive custody". Nevertheless, in discussions about 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 the use of detention awaiting trial is to establish conditions to obtain from the detainee information concerning the perpetration of the act that he/she has been accused of or other acts covered by the preparatory proceedings. Such situations

9 See: E. Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in a European Context*, [in:] E. Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in Europe*, Antwerp–Oxford–Portland 2010, p. 5–6. Compare: C. Kulesza, *Developments of the European Criminal Justice Systems: Defence Perspective*, [in:] E.W. Pływaczewski (ed.), *Current Problems of the Penal Law & Criminology*, Warszawa 2012, p. 320–325.

have been described in the mass media as "extractive custody" and are unequivocally qualified as abuse of law[10].

As P. Kardas rightly observes with regard 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"[11]. 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 may 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 for the defendant but also, in some 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"[12].

Ad 2) 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 issue in the decisions of ECHR[13],

10 P. Kardas, *Opinia Prof. UJ Dr. Hab. Piotra Kardasa – Uniwersytet Jagielloński (przygotowana dla potrzeb Komisji Kodyfikacyjnej Prawa Karnego)*, Biuletyn Komisji Kodyfikacyjnej Prawa Karnego 2010, Vol. 1, p. 207, footnote 7 and the literature referred to therein. See also: S. Waltoś, *Polski proces karny. Zarys systemu*, Warszawa 2008, p. 437, footnote 27.

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

12 *Ibid*, p. 207.

13 For more information, see: C. Nowak, *Pojęcie rzetelnego procesu karnego w świetle EKPC i orzecznictwa ETPC*, [in:] P. Wiliński (ed.), *op. cit.*, p. 95–150 and the judicial decisions referred to therein.

one must select the fair trial guarantees to be analysed 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 Article 6(1) e.c.p.h.r. must be put aside. Consequently, this work focuses mainly on such aspects of fair trial as[14]:

1) the possibility to find the substantive truth and, consequently, to achieve procedural justice;
2) observance of the rights of the participants of the process: the defendant and the victim:
   - in the case of the defendant, of key importance is to guarantee the right of defence and the presumption of innocence;
   - as far as the victim is concerned, the limited decisions of ECHR concerning the victim and the fact that e.c.p.h.r. focuses, in principle, on the rights of the defendant demonstrate that the rights of the victims are sometimes sacrificed in the name of narrowly defined cost–effectiveness of the trial[15].

Of note are also opinions in the literature concerning the provision of Article 2 § 1 item 3 ccrp. (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"[16].

---

14 Compare C. Kulesza, *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:] C. Kulesza (ed.), *Criminal Plea Bargains in the English and the Polish Administration of Justice Systems in the Context of the Fair Trial Guarantees*, Białystok 2011, p. 48–66 and the judicial decisions referred to therein.

15 Besides the European countries that are bound by e.c.p.h.r., this problem is particularly visible in the U.S.A. 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 1980s. 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*, Washington University Law Quarterly 1987, Vol. 65, p. 312–334; J. Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problem*s, Pepperdine Law Review 1984, Vol. 11, p. 117–162.

16 P. Wiliński, *Sprawiedliwość proceduralna*…, *op. cit.*, p. 87.

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 judgment and, consequently, to shorten the whole procedure. The result, as the literature in Western countries emphasises, is a fast–tracked, case–ending decision, also called a negotiated case–ending agreement. Its main attributes are as follows[17]:

- 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 relation to the topic of this chapter one could conclude that the semantic meaning of the term **fair trial**, as pertaining to court hearings, does not apply to consensual forms of ending criminal proceedings in the Polish criminal process, as the use of such forms leads to the verdict being issued outside either the hearing (during a session – Articles 335, 343 and 474 ccrp.)[18] or during the hearing but without presentation of evidence (Article 387 ccrp.).

The key criminal plea bargains are those resulting in a motion for conviction without a hearing (Articles 335 and 343 ccrp.) and in voluntary submission to a penalty (Article 387 ccrp.). According to Article 335 ccrp., the public prosecutor may include in the indictment act a motion for issuing a convicting verdict and a sentence with the penalty or penal measure agreed with the defendant, for an offense carrying a penalty of no more than 10 years of imprisonment, without a hearing, if the circumstances of the offense raise no doubts and the attitude of the defendant demonstrates that the objectives of the proceedings will be achieved. Under Article 387 ccrp., until the first examination of all the defendants during the main hearing is completed, the defendant who has been charged with an offense may make a motion for a convicting

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.

18 See: H. Paluszkiewicz: *Pierwszoinstancyjne wyrokowanie merytoryczne poza rozprawą w polskim procesie karnym*, Warszawa 2008.

verdict with a specified penalty or penal measure without presentation of evidence. If the defendant has no legal counsel of his or her choice, the court may, upon the defendant's request, appoint an attorney. The court may grant the defendant's motion for a convicting verdict if the circumstances of the offense raise no doubts and the objectives of the proceedings will be achieved despite the fact that the hearing will not be conducted completely. Such a motion may be granted only provided that the public prosecutor and the victim, duly informed of the date of the hearing and advised as to the possibility that the defendant will make such a motion, do not object to it (Article 387 § 2 ccrp.). The court's decision regarding the granting of the motion for conviction without a hearing (Articles 335 and 343 ccrp.) and the motion for voluntary submission to a penalty (Article 387 ccrp.) may depend on an agreement reached between the defendant and the victim and on completion of mediation procedures.

In the literature there was the opinion presented on this topic that compliance of a criminal process with fair trial requirements may be evaluated on the basis of "legally undefined procedural behaviours". In particular, one must consider the "non–statutory standards of honesty" of entities conducting the proceedings[19] 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 common denominator of both conviction without a hearing (Articles 335 and 343 ccrp.) and voluntary submission to penalty (Article 387 ccrp.) 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

19 See: M. Rzewnicka–Rogacka, *Znaczenie niepisanych reguł postępowania dla tworzenie podstaw rzetelnego procesu karnego*, [in:] P. Wiliński (ed.), *op. cit.*, p. 100–106.

measures in accordance with the terms agreed with the defendant or try the case in accordance with the general principles[20].

When making its decisions in accordance with Articles 335 and 343 ccrp., 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, "given that the defendant changed his mind with regard to his acceptance of conviction without a trial, one of the conditions that justify his conviction in accordance with Article 343 ccrp., 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, according to the provisions of Article 343 § 7 ccrp., the Court must try the case in accordance with the general principles"[21]. 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".

In the context of procedural justice and the idea of a just penalty[22], 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 analysing 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"[23].

---

20 See the judgment of the Supreme Court of 23 September 2009, WK 21/09, LEX No. 598216, and the judgment of the Supreme Court of 8 September 2009, IV KK 287/09, LEX No. 519609.

21 III KK 194/09, LEX No. 519654.

22 See, e.g.: I. Haÿduk–Hawrylak, *Sprawiedliwej kary conditio sine qua non*, [in:] J. Skorupka (ed.), *op. cit.*, p. 107–121.

23 J. Tylman, *Zasada bezpośredniości na tle zmian w polskim prawie karnym procesowym*, [in:] J. Skorupka (ed.), *op. cit.*, p. 144.

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"?[24] The literature mentions the significant impact of the operational–reconnaissance activities on the criminal process[25] which is associated with ineffective courts' supervision of such activities and of use of evidence gathered in the course of such activities at trials.

What should be noted in the context of the statistical data confirming the increased importance of the institution of conviction without trial in accordance with Articles 335 and 343 ccrp., which is the basis for the thesis made in the literature on this matter, is 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[26]. If the deal is accepted by the court, the penalties or penal measures imposed by the court may not be different 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

24 R. Kmiecik, *O zasadzie prawdy materialnej, konsensualizmie i gwarancjach procesowych osoby niewinnej*, [in]: Z. Sobolewski, G. Artymiak (eds.), *Zasada prawdy materialnej. Materiały z konferencji Krasiczyn 15–16 października 2006*, Kraków 2006, p. 148–149. See also: H. Paluszkiewicz, S. Stachowiak, *Rozwiązania konsensualne wprowadzone do polskiego procesu karnego a wykrycie prawdy*, [in:] Z. Sobolewski, G. Artymiak (eds.), *op. cit.*, p. 91–110.

25 Compare: A. Taracha, *Czynności operacyjno–rozpoznawcze. Aspekty kryminalistyczne i prawnodowodowe*, Lublin 2006, p. 219–290.

26 E. Zalewski, *Pozycja procesowa prokuratora w nowym kodeksie postępowania karnego w nowym kodeksie postępowania karnego*, Prokuratura i Prawo 1998, No. 4, p. 32.

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 with Article 335 ccrp. must be analysed also from the point of view of prosecutors' ethics[27]. It is prosecutors' ethics that determines the "non–statutory standards of honesty" of public prosecutors mentioned in the first part of this chapter. 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 ccrp., 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[28]. In analysing the problem of consensual ending of criminal proceedings, one must also point out Article 7 of the Act of 20 June 1985 on the Public Prosecutor's Office[29] which provides that prosecutors are required to take actions defined in statutes while observing the principle of impartiality, equal treatment of citizens, and Article 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

27 The problem of plea bargaining from the point of view of process ethics is analysed, among, others by A. Bogusłowicz. See A. Bogusłowicz, *Rola prokuratora w konsensualnych formach zakończenia postępowania karnego* (unpublished dissertation typescript), p. 50–60.

28 J. Szafnicki, *Refleksje o etyce prokuratorskiej*, Prokuratura i Prawo 1996, No. 10, p. 102.

29 Consolidated text Journal of Laws 2002, No. 21, item 206, as amended.

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 stigmatisation of the defendant due to openness of the main hearing (conviction during a hearing in accordance with Articles 335 and 343 ccrp.);
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 (Article 335 and 387 ccrp.);
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;
– 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.

Criminal process, to be effective, needs some cooperation between prosecution and defence[30], especially during the preparatory proceedings (*care for favor procuratori*). But the most important goal of activities of the defence counsel must be always the best interest of his/her client (Article 86 § 1 ccrp.).

Some authors present the analysis of the current reform of criminal procedure from the perspective of certain procedural principles, i.e. the right to defence. The foundation of the amendment of 27 September 2013 is the principle of an adversarial hearing and the release of the court from the obligation to carry out evidence *ex officio*. The reform provides also for the extension of the scope of the procedural agreements leading to the accelerated completion of the criminal proceedings. So there will be the important role of the court and the defence counsel to guarantee the voluntariness of agreements. The court shall not put any pressure on the defence to reach consensus[31].

Such fundamental changes may raise concerns from the point of view of the principle of objective truth and the principle of equality of arms. Pursuant to Article 42 section 2 of the Constitution and Article 6 ccrp., it is believed that the right to defence in the Polish criminal process covers both the substantive aspect (as the sum of guarantees given to the defendant with regards to his defence in a process) and the formal aspect (the defendant's right to receive assistance of a defence counsel). Even though the quality of a defence counsel's work should be considered as one of the guarantees of due process, it must be stated that, in the context of the Polish criminal process system of 21st century, there are constraints on the effectiveness of the defence that are independent of the defence counsel's efforts. In such context, reasons for the limitations (barriers)to the effective participation of the defence

30 "The public defender and the prosecutor are trying cases against each other every day. They begin to look at their work like two wrestlers who wrestle with each other in a different city every night and in time to get to be good friends. The biggest concern of the wrestlers is to be sure they don't hurt each other too much. Apply that to the public defender and prosecutor situation, and it is not a good thing in a system of justice that is based on the adversary system"; R. Alschuler, *The Defence Attorney's Role in Plea Bargaining*, The Yale Law Journal 1975, Vol. 84, p. 1210.

31 F.A. Hessick, R.M. Safjani, *Plea Bargaining and Convicting Innocent: Role of the Prosecutor, the Defence Counsel and the Judge*, Yale University Journal of Public Law 2001–2002, Vol. XVI, p. 210.

in criminal procedure are of various nature. The following ones should certainly be distinguished[32]:

1) reasons of individual nature, connected to the essence of the defence relation including:
   a) subjective circumstances dependant on the quality of the defence action and
   b) legal regulations describing the nature of the relation (court–appointed defence or defence counsel chosen by the defendant), time of its establishment and influencing its stability, as well as the security of mutual communication between the defence and the accused (defence confidentiality);
2) reasons of objective nature independent from the defence and the character of the defence relation;objective factors of the defence effectiveness may be divided into:
   a) outside system barriers (or chances), related to Poland's international obligations, in particular to the ratification of the European Convention on Human Rights and Fundamental Freedoms, and acceptance of the ECHR's jurisdiction, as well as to the access to the European Union; one of the dominant trends in the development of the EU law is the aspiration to unify it based on the principle of "mutual recognition"; in this context the draft Directive on the right to access to a lawyer in criminal proceedings and to communicate upon arrest[33] is very important; it was negotiated (unsuccessfully) under the Polish Presidency in the EU (December 2011);
   b) internal system barriers (resulting from the construction of the justice system, principles and aims of the criminal procedure); one of very important factors in this system is the court culture which can be deciding about the formal or effective defence in criminal proceedings[34].

---

32 C. Kulesza, *Developments*…, *op. cit.*, p. 323–324; C. Kulesza, *Efektywność*…, p. 40–65.

33 Proposal of 20 June 2011 for a Directive of the European Parliament and the Council on the right to access to a lawyer in criminal proceedings and to communicate upon arrest, COM (2011) 326/3.

34 See: C. Kulesza, *Od obrony formalnej do obrony realnej? Nowa rola obrońcy w projekcie reformy procedury karnej*, [in:] J. Jakubowska–Hara, J. Kosonoga, H. Kuczyńska, A. Błachnio–Parzych (eds.), *Problemy wymiaru sprawiedliwości karnej. Księga jubileuszowa Profesora Jana Skupińskiego*, Warszawa 2013, p. 462 et seq.