

Chapter 2.

LAY JUDGES IN CRIMINAL PROCEEDINGS: A LAY JUDGE'S PERSPECTIVE

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I. Introduction

The issue of participation by the citizenry in the administration of justice in Poland, unlike other more “attractive” and “fashionable” institutions and problems related to the activities of the judiciary, has not been addressed too often in the literature. The theoreticians’ and practitioners’ evaluations of the current legal regulation and the very idea of the admission of non-professional persons to adjudicating cases are ambiguous. Current research on lay judges and their role in adjudicating cases indicates rather marginal significance of lay judges despite their theoretically high judicial authority guaranteed by law. As I fulfil the duties of a lay judge in the 3rd Criminal Division of Regional Court in Białystok (in Polish *III Wydział Karny Sądu Okręgowego w Białymstoku*) for a second term of office, I would like to draw attention to and take a position on selected phenomena – regarding the criminal proceedings and described by the researchers and their respondents – that are actually visible from the perspective of a lay judge. First of all, however, legislation defining the position of a lay judge in criminal proceedings must be presented.

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II. The position of a lay judge in criminal proceedings

Participation by the citizenry in the administration of justice is provided by Article 182 of the Constitution, which at the same time refers to the provisions of a statute. The constitutional rule is elaborated by Article 4 of the Act of 27 July 2001 – Law on Common Courts Organization (l.c.c.o.)² which provides that citizens participate in the administration of justice by acting as lay judges in hearing of cases before courts of lower instances, unless statutes provide otherwise (§ 1), and when resolving a case lay judges are vested with the same rights as judges (§ 2). They may not preside over a trial and deliberation or perform duties of a judge outside the trial, unless statutes provide otherwise (Article 169 § 2 l.c.c.o.). In addition, Article 169 § 1 l.c.c.o. guarantees that within the scope of adjudicating cases lay judges are independent and bound only by the Constitution and statutes.

With regard to criminal cases Article 3 ccrp. states that within the scope laid down in the legislation, criminal proceedings shall be conducted with the participation of a representative of the society. These limits related to the participation of lay judges in adjudicating cases are now much narrower than at the time of entry into force of the ccrp. Under the Act of 15 March 2007 amending the Code of Civil Procedure, the Code of Criminal Procedure and Some Other Acts³ a “panel” of one judge in the first instance is a rule. Lay judges take part in the decision-making in the regional court only in cases of felonies, i.e. crimes punishable by a minimum of 3 years imprisonment. In such cases the court shall sit in a panel consisting of one judge and two lay judges (Article 28 § 2 ccrp.). In the case of felonies punishable by life imprisonment the court shall sit in a panel consisting of two judges and three lay judges (Article 28 § 4 ccrp.). When the Act of 27 September 2013 amending the Code of Criminal Procedure and Some Other Acts⁴ enters into force, which is to take place on 1 July 2015, the court of the first instance will be allowed to decide under the modified Article 28 § 3 ccrp. to hear the case in a panel consisting of three judges or –

2 Consolidated text Journal of Laws of 2013, item 427, as amended.

3 Journal of Laws of 2007, No. 12, item 766.

4 Journal of Laws of 2013, item 1247.

alternatively – one judge and two lay judges due to the special complexity of the case or its importance.

In the Polish justice system the term of office of lay judges is four calendar years, following the year in which the selection was made, and upon the expiry of the term of office a lay judge may participate only in hearing of the case he/she participated in before the expiry of the term until the time the case concludes (Article 165 § 1 and 2 l.c.c.o.). As a lay judge may be selected a person who (Article 158 § 1 l.c.c.o.):

- 1) is a Polish citizen and enjoys full civil and full public rights,
- 2) is a person of integrity,
- 3) has attained 30 years of age,
- 4) has been employed or has resided in the place he/she candidates in for at least a year,
- 4) is not older than 70 years,
- 6) has the ability to perform duties of a lay judge as regards the health condition,
- 7) has completed at least secondary education.

Additionally, in labour cases only a person who shows special knowledge of employee issues may be selected as a lay judge (Article 158 § 3 l.c.c.o.).

A lay judge may not be a person who (Article 159 § 1 l.c.c.o.):

- 1) is employed in a common court or in another court or in a public prosecutor's office,
- 2) is a member of a body against the decision of which the initiation of court proceedings may be requested,
- 3) is a police officer or holds a post related to the prosecution of offences or petty offences,
- 4) is a barrister (in Polish *adwokat*) or a barrister trainee,
- 5) is a legal advisor (in Polish *radca prawny*) or a legal advisor trainee,
- 6) is a clergyman,
- 7) is a soldier on service,
- 8) is a Prison Service officer,

9) is a councillor in a municipality (in Polish *gmina*), county (in Polish *powiat*) and province (in Polish *województwo*).

In recent years one can notice not only the reduction in the catalogue of cases involving lay judges, but also the tendency to introduce restrictions on the right to stand for a lay judge (e.g. the requirement of at least secondary education, adequate health, non-exercise of this function by a councillor in a municipality, county and province) as well as to regulate the electoral process more precisely (e.g. explicit exclusion of political parties from proposing candidates for lay judges, raising the amount of citizens filing candidacy from 25 to 50, defining in the Act the documents that must be attached to the application for a lay judge)⁵. The obstacles on the way to become a lay judge as well as smaller number of mandates to be distributed will surely eliminate a lot of random persons who see the function of a lay judge through the prism of pecuniary compensation or who represent low intellectual level. Some persons may be discouraged by the perspective of paying about 100 PLN for a certificate of good conduct and a medical certificate with no guarantee of being selected by the municipal council. So, it seems that in the current term of office for the years 2012–2015 the selection and the level of lay judges is much better than in previous terms of office.

III. The role of a lay judge from the perspective of empirical research and own experience

The role of a lay judge is seen by F. Prusak through the prism of three major functions: a civic judge (in Polish *sędzia społeczny*), a factor of social control and a liaison of justice with the society. The first of the above functions relies on deciding together with the professional judge on guilt and punishment. Social control is not only the presence of the lay judges in the judging panel and participation in all procedural actions in the main hearing or session, but also the possibility of an active influence on the course of the proceedings and its outcome. It prevents the routine of professional judges and disciplines to greater

5 These amendments were introduced by the Act of 15 April 2011 amending the Law on Common Courts Organisation (Journal of Laws of 2011, No. 109, item 627).

diligence and correctness of the proceedings. It also strengthens judicial independence since making pressure on lay judges is more difficult than on a professional judge who is subject to evaluations, the pressure of public opinion and the media. Lay judge has nothing to lose; collegiality of judging and a quantity preponderance of the lay judges in the judging panel make it difficult to exercise influence thereon from the outside. The third function is related to the fact that a lay judge brings to adjudicating cases not only their own life experience and knowledge, but also an opinion and a sense of justice of a social group in which he or she lives. On the other hand, a lay judge transfers to the society their own opinions, evaluations and experience of adjudicating cases, as well as a point of view and criminal policy of the legislature and representatives of the criminal justice system⁶.

The empirical research with the participation of lay judges conducted by A. Bartnik helped to distinguish more specific typologies of the role of lay judges in a criminal trial. Due to the criterion of the relationship between the lay judge and professional judge the author distinguishes the following roles: a full partner of a judge, a counsellor of a judge, an assistant of a judge on technical matters and a passive observer. Due to the identification with a specific entity or community, lay judges see themselves as representatives of: (1) the Polish public opinion, (2) their own social group, (3) the court, (4) the interests of the accused, (5) the interests of the victim. Among the foreground tasks imposed on lay judges the preventing judge's routine, paying attention to the social context of the case with particular regard to the interests of the parties, increasing judicial independence, monitoring the judge in terms of diligence of proceedings and freedom from external influences, raising legal culture and awareness with the society are indicated⁷.

For all practical purposes, the first of the typology presented by A. Bartnik seems to be the most important. It is the relationship between the professional judge and the lay judge that impinges on the actual participation of lay judges in adjudicating cases and their impact on the

6 F. Prusak, *Czynnik społeczny w procesie karnym*, Warszawa 1975, p. 27–29.

7 A.S. Bartnik, *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, Warszawa 2009, p. 102.

judgment the most. My own experience and observations prove that the above mentioned attitudes occur with varying frequency, sometimes cumulatively. Although the ccrp. treats the role of lay judges in the criminal proceedings almost equally with professional judges role, lay judges are generally inactive during the hearing. Admittedly, in some cases I personally used the opportunity to ask questions during witness' or expert's hearing, but none of other lay judges from the panel has ever asked the question at the hearing. In a few cases the activity of mine and of the other lay judge from the panel appeared thanks to the presiding judge who asked for help in reading the numerous interrogation protocols in the courtroom during the trial. The three of us read in turns large number of pages which allowed to speed the course of the case up greatly and to prevent the judge to catch a sore throat.

Lay judges rarely get acquainted with the files prior to the trial so they have the first contact with the evidence only during the hearing of the defendant, witnesses, experts or reading the protocols and documents by the presiding judge. Not infrequently, however, all members of the judging panel exchange the comments about the course of the trial or the evidence or criticise specific statute regulations in the deliberation room during breaks in the trial. So, one cannot say that the lay judges are completely passive. On the contrary, such discussions prove the lay judges are vividly interested in the case. I have not observed so far the lay judges who were indifferent to the case. The lay judges may also be helpful in another aspect. I have a habit of sitting at the bench at the far left of a presiding judge, just near the recording clerk, and keeping an eye on the monitor to find errors in the protocol (minutes). At this time, the presiding judge can focus on more important matters.

Lay judges' activity stems from three main factors. These are the motivation of a lay judge to fulfil his or her functions, his or her knowledge (in particular in the field of law), and the attitude and expectations of professional judges to lay judges.

The reasons to run for the lay judges declared by them are primarily (in order): having a large amount of free time, the interest in the law,

the desire to help other people, financial considerations⁸. It seems that the latter reason is becoming increasingly rare due to smaller and smaller number of cases involving participation of lay judges, and hence lower demand for lay judges in the next terms of office.

The increasing level of knowledge of the law, especially among lay judges serving for another term of office, can also be observed. My own observations indicate that many lay judges who are now retired carried out in the past professions and functions that required the knowledge of the law. Some of them were or still are socially involved and do not avoid discussion with the professional judges about the law and penal policy.

The attitude of professional judges during the trial is the third factor influencing the involvement of lay judges. If professional judges understand the need for the participation of the citizenry in the administration of justice and accept an active role of lay judges, if they are open, friendly and patient, a field for active cooperation with the lay judges is created. It seems that cases of disregard for the role of lay judges in a criminal trial have gone into the past, along with the reduction of participation of lay judges to the most serious cases. The involvement of lay judges in less serious cases (obvious in relation to factual and legal issues), required by the provisions of the ccrp. before 2007, can somehow justify the reluctant attitude of professional judges towards the lay judges.

IV. The image of lay judges and the relationship between professional judges and lay judges

Lay judges are sometimes described by professional lawyers in a disrespectful manner, for example, they are called “vases” (apparently because they are sitting at the bench for decoration). From time to time one jokes that lay judges sleep during the trial as being mostly of advanced age. Indeed, probably most lay judges are retired or at least in their fifties, while younger people who bring up little kids and have

8 *Ibid.*, p. 84–85.

careers are not likely to have the motivation and free time to be active as lay judges. Lay judges' passivity sometimes causes harsh appraisal of their work and the demands for their elimination from Polish courts⁹.

As far as the relationship between professional judges and lay judges is concerned, it seems to be very friendly and positive. I have not met any symptoms of disrespect from the judges. The judges willingly talk with lay judges before the beginning of the trial and during breaks they discuss the case or other topics "of everyday life". Although they have full knowledge of the case and great legal skills, they do not put on airs. If it is necessary to postpone or discontinue the trial, the judges consult the dates of further hearing or delivery of the judgment first with the lay judges and always take into consideration their concerns. They respect the lay judges for voluntary participation in settlement of unpleasant cases. Lay judges indicate themselves that professional judges rather respect their opinion but, on the other hand, almost 25% of lay judges were faced (fortunately occasionally) with the situation when they felt that the judgment they signed was not agreed with them¹⁰. Professional judges expect primarily the impartiality and objectivity, self-control, punctuality and commitment to the work from lay judges. The judges do not treat the level of education of a lay judge as important; the experience of life and courage in expressing their own views are much more essential¹¹.

9 Only 50% of respondents (presidents or vice-presidents of regional courts and district courts of the territory of Appellate Court in Białystok) evaluates the work of the lay judges well, and as much as 35.71% of them thinks the institution of lay judges should be abolished. See P. Sitniewski, *Analiza wyników ankiet prezesów sądów w zakresie wyboru ławników, jakości ich pracy oraz funkcjonowania w ramach wymiaru sprawiedliwości*, [in:] J. Ruszewski (ed.), *Ławnicy – społeczni sędziowie w teorii i praktyce. Ocena funkcjonowania i procesu wyboru ławników sądowych na przykładzie sądów Apelacji Białostockiej*, Suwałki 2011, p. 86, 97. Councillors in municipalities or communes who select lay judges tolerate their participation in the judiciary much more. Only 10% of them is in favour to abolish this institution; see J. Ruszewski, *Udział radnych w wyborze ławników oraz ocena ich udziału w sprawowaniu wymiaru sprawiedliwości w opiniach radnych*, [in:] J. Ruszewski (ed.), *op. cit.*, p. 143–144.

10 W. Klaus, *Udział obywateli w sprawowaniu wymiaru sprawiedliwości w opiniach ławników*, [in:] J. Ruszewski (ed.), *op. cit.*, p. 117.

11 P. Sitniewski, *op. cit.*, p. 80–85, 92.

V. The impact of lay judges on the final outcome of a criminal case

Although Articles 109–112 ccrp. describe how to vote on the judgment, it is clear that the practice is somewhat different. According to Article 109 § 2 ccrp., at the conclusion of deliberations the presiding judge shall collect the votes commencing with the youngest member of the panel, from the lay judges in order of their age, to the (professional) judges in order of their rank, giving his own vote last. The reporting judge, if he is not the presiding judge, shall be the first to vote. Furthermore, Article 111 § 1 and 2 ccrp. constitutes that decisions shall be rendered by majority vote but if the opinions of the panel differ so much that none commands a majority, the opinion least favouring the defendant shall be coupled with the one most similar thereto until a majority is achieved. A judge who has voted “not guilty”, may refrain from voting on the further questions; the vote of such a judge shall then be coupled with the vote most favourable to the defendant (Article 112 ccrp.).

The above-mentioned research on the participation of lay judges in a criminal trial made it possible to determine when and how a judgment is formed. Lay judges, professional judges, prosecutors and lawyers pointed out that it may take place in the deliberations, during breaks between cases, in conversations with prosecutor or when the defendant pleads guilty and voluntarily submits to punishment. The ccrp. formally establishes the stage of deliberation on the judgment as a moment in which the content of a judgment is formed. Based on interviews with lay judges, there were distinguished the following types of deliberation depending on the degree of involvement of lay judges in the process of forming a judgment: (1) deliberation with no deliberating, (2) judge-dominated deliberation, (3) *pro forma* deliberation, (4) model type deliberation and (5) deliberation with discussion (bargaining). In the first case the content of the judgment is announced by the presiding judge to lay judges who sign a ready judgment or even a “blank” judgement. The second type is a deliberation which is fully dominated by the professional judge who expresses his or her opinion without any discussion or justification and asks the lay judges if they accept

the proposal. In turn, during the *pro forma* deliberation the judge most often justifies his or her proposal and submits it for discussion and the opinions of lay judges which sometimes result in the modification of the proposal especially if the presiding judge tends to be somewhat more flexible. The type of deliberation which is fully in accordance with the provisions of the ccrp., i.e. the lay judges formulate their proposals first, is very rare, since the lay judges are passive and the presiding judge feels constrained to speak first. The latter type of deliberation which (after active discussion) results in a compromise taking into account the opinions of lay judges is equally rare¹².

From my own experience, I can confirm that the third type of deliberation appears most common. The presiding judge usually takes the request of the public prosecutor as to criminal sanction as the starting point, next he or she suggests a particular penalty, justifies his or her point of view and asks the lay judges whether they accept it or possibly have a different opinion. In most cases the lay judges support the judge's proposal but it happens that it is modified (almost always by mitigating the sanction) under the influence of lay judges' counter-proposals. Forcing a professional judge's opinion on lay judges is of course out of the question. There is only a suggestion of persons experienced in adjudicating cases. Otherwise, one can take advantage to express his dissenting opinion when signing the judicial decision (Article 114 § 1 ccrp.). I know only one case where the deliberation was held in accordance with the provisions of the ccrp. It is not surprising that in fact the professional judges are the first to propose a particular decision, especially with regard to the penalties and penal measures. It is difficult to expect lay judges who are not as experienced as professionals to be able to develop a rational and proportionate proposal. The discussion on the guilt and penalty consists in finding a consensus on the final type and amount of punishment. From my own experience, I know that the lay judges usually mitigate professional judges' proposals. I have never met

12 A.S. Bartnik, *op. cit.*, p. 145–155. A similar classification of deliberations was elaborated on the grounds of national research carried out in the 60s of the 20th century; see S. Zawadzki, L. Kubicki (eds.), *Udział ławników w postępowaniu karnym. Opinie a rzeczywistość. Studium prawnoempiryczne*, Warszawa 1970, p. 80–89.

a lay judge who proposed to tighten up the proposal of the judge. The above experiences are confirmed also in the literature of the subject¹³.

In the course of trial that does not end up on the same day after a single hearing, the phenomenon of unofficial discussions between professional judges and lay judges which in a way replace or supplement the stage of deliberation over judgment appears frequently. It occurs in particular during short breaks in the trial, before entering the courtroom or after leaving it. The members of the judging panel form their opinion on the evidence, the credibility of witnesses or the defendant's guilt at that time. One can hazard a guess that in most cases the issue of liability and guilt of the defendant is a foregone conclusion at the stage of the main hearing and only decisions on penalties and penal measures are usually passed during the deliberation. On the other hand, I did not notice any informal consultation or arrangements as to the content of the judgment involving the judging panel and the public prosecutor. The practice of entering into the courtroom only when all the participants took their seats and leaving as the first makes it difficult for judging panel to exchange the views with the public prosecutor before the hearing or during breaks. The latter way of the formation of a decision by the judging panel distinguished by A. Bartnik¹⁴, i.e. so-called voluntary submission to penalty, no longer exists because in the current legal framework lay judges adjudicate only on felonies in regional courts in the first instance. The voluntary submission to the penalty (Article 387 ccrp.) could be applied only in cases of misdemeanours which are adjudicated by one judge only.

VI. Lay judges as a social group

The community of lay judges has not been tight-knit or well organised so far. Admittedly, the legislature provided for the creation and operation of the boards of lay judges in the courts. Under Article 175 § 2 l.c.c.o. the tasks of the board of lay judges include, in particular, increasing the level of work of lay judges and representing lay judges as

13 See F. Prusak, *op. cit.*, p. 33–34.

14 See A.S. Bartnik, *op. cit.*, p. 170–184.

well as stimulating the educational activity of lay judges in the society. However, the boards inherently operate in the community of lay judges of a particular court. In addition, the competences of the boards are mainly related to the representation of lay judges and the interaction with the chief judge of the court on issues specified in § 9 of the Ordinance of the Minister of Justice of 31 January 2006 on the Procedure for Selection, Composition and Organisational Structure, Procedure for Acting and Detailed Tasks of the Board of Lay Judges¹⁵.

Only in 2013 the nationwide association of lay judges called the National Council of Civic Judges (in Polish *Krajowa Rada Sędziów Społecznych*) was established. The following objectives are enshrined in the statute of the Council (Article 6 section 1):

- 1) realisation of the principles of democratic state ruled by law,
- 2) strengthening the independence of courts and lay judges, and caring for their prestige,
- 3) striving for the statutory change of the name “lay judge” to “civic judge”,
- 4) representing the legal and civil interests of the community of lay judges,
- 5) striving to strengthen a civic role of lay judges in Polish courts,
- 6) cooperation with national and international organisations for purposes consistent with the objectives of the Council,
- 7) shaping public opinion with regard to the participation of citizens in the administration of justice,
- 8) striving for the influence on the proper quality selection of candidates for lay judges during the election of lay judges,
- 9) cooperation with the legislature and other bodies in the field of the Council goals in the course of legislative works.

It is notable that one of the above purposes is perhaps less practical but rather symbolic. It is about the striving to change the terminology used to define the function of a lay judge. Attention to this problem was already paid forty years ago by F. Prusak who regarded the genesis of the

15 Journal of Laws of 2006, No. 23, item 174.

name “lay judge” (which was shaped in a different historical period) as the main reason to challenge it. He recognised the name of “civic judge” as more appropriate; it is to emphasise the equality of professional judge and lay judge position¹⁶.

The statutory objectives of the Council are accomplished through (Article 6 section 2 of the statute of the Council):

- 1) organisation of conferences, seminars and training for members of the association,
- 2) initiating meetings which correspond to the objectives of the association,
- 3) cooperation with the National Council of the Judiciary, the National Council of Public Prosecution and the bodies of the legislative and the executive,
- 4) popularising and promoting the participation of citizens in the administration of justice,
- 5) nomination of candidates for lay judges,
- 6) organisation of financial assistance to members of the association in justified cases,
- 7) taking other legal measures to achieve the objectives of the association.

The above-mentioned methods of operation allow hope for a deeper integration of the community of lay judges from all over the country as well as for improving the competence of the lay judges themselves.

16 F. Prusak, *op. cit.*, p. 25.