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CONVENTIONAL MODEL OF A FAIR APPEAL PROCEEDINGS IN THE COMPARATIVE PERSPECTIVE[2]

I. Conventional model of a fair appeal proceedings

1. Preliminary remarks

The term fair trial continues to be a source of many controversies in the Polish criminal process doctrine, especially with regards to its semantics[3]. It is worth mentioning that in the juridical doctrine and judgments of the American judiciary a different term is used, similar to a fair trial – namely due process of law, established in the 14th Amendment to the American Constitution. This term is essentially synonymous with the term "fair trial" used in law European Union, under the influence of the European Convention on Human Rights; however, it also covers the stages of a process taking place outside the trial. Apart from conflicts in the Polish doctrine regarding the nature of the notion of fair trial (as the supreme procedural principle, the method of defining the process model, or the proceedings method), one must see the source of the fair trial principle in appeal proceedings in the following acts of international law: Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Art. 14 of the International Covenant on Civil and Political Rights of 16 December 1966.

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3 P. Wiliński, Sprawiedliwość proceduralna a proces karny, (in:) J. Skorupka (ed.), Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy, Warszawa 2009, pp. 77-91.

Table no. 1. Fair Criminal Appeal Standards

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950*	International Covenant on Civil and Political Rights, 16 December 1966**
Protocol No. 7 to the Convention, 22 November 1984*** Article 2 Right of appeal in criminal matters 1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.	Article 14 (...) 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Source: Authors' study.

* *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Journal of Laws of 1993, no. 61, item 284.*

** *International Covenant on Civil and Political Rights of 19 December 1966, Journal of Laws of 1997, no. 38, item 167.*

*** *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22.XI.1984.*

The decisions of the European Commission and the ECtHR have produced a body of case law which extends its influence far beyond the parties to the individual case. This is due to the fact, that other Convention states look to the ECtHR judgments for guidance as to the compatibility of their own domestic law with requirements of the Convention. Nowadays, the European Convention on Human Rights has become "a constitutional instrument of European public order in the field of human rights"[4].

The right to appeal is not contained in the ECHR itself but can be found in Article 2 of the 7th Protocol thereto. All Council of Europe

4 Compare: B. Emmerson et al., Human Rights and Criminal Justice (3rd Edition), London 2012, pp. 5-6.

Member States, except for Belgium, Germany, the Netherlands, Turkey and the UK, have ratified this Protocol.

As pointed out in the Polish literature on the subject, the power described in Article 2 of Protocol 7 is not included among the guarantees comprising the right to a fair trial in the broad sense, yet nevertheless it is significant if perceived in the light of Article 6 of the ECHR, which results from the following reasons[5]:

1. It applies to criminal cases within the meaning of Article 6 of the ECHR, and therefore, to cases to which guarantees of a fair trial are applicable[6].
2. Complaints concerning violation of the right of appeal in criminal cases are brought most frequently in connection with complaints against violation of the right to a fair trial, as mentioned in Article 6 of the ECHR. Therefore, it should be assumed that the power described in Article 2(1) of Protocol 7 supplements the catalogue of guarantees comprising the right to a fair trial in the broad sense. The case-law of the ECtHR clearly indicates that, when examining an appeal, a higher court must fulfill all conditions under Article 6, applicable to an appeal proceedings. A cassation proceedings should be deemed examination of a case within the meaning of this article as well.[7]

Article 2(1) of Protocol 7 states that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, is governed by law. This right only applies to cases regarded as criminal cases in the light of the ECHR[8] as well as decisions issued by organs regarded as tribunals under Article 6 of the ECHR.

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5 C. Nowak, Prawo do rzetelnego procesu sądowego w świetle EKPCz i orzecznictwa ETPCz, (in:) P. Wiliński (ed.), Rzetelny proces karny, Warszawa 2009, pp. 145-146.

6 See also: R. Boniecka, Uzasadnianie wyroku w polskim postępowaniu karnym, Warszawa 2011, p. 142 and the ECtHR's case-law cited thereof.

7 M. Nowicki, Wokół Konwencji Europejskiej. Komentarz do EKPCz (6th Edition), Warszawa 2013, p. 935 and the ECtHR's case-law cited thereof. See also: P. Hofmański, (in:) L. Garlicki (ed.), Konwencja o ochronie praw człowieka i podstawowych wolności, vol. 2. Komentarz do art. 19-59 oraz do protokołów dodatkowych, Warszawa 2011, pp. 630-631.

8 See: ECtHR judgment of 2 September 1993, application no. 17571/90, Borelli vs. Switzerland, D.R. 75.

This power applies to decisions concerning both conviction and sentence. Therefore, if the defendant pleads guilty, his option to exercise the right guaranteed under Article 2(1) of Protocol 7 may be restricted in the domestic law to appeal against the sentence[9]. In the doctrine, applying this restriction to judgments passed in the consensual mode, whereby the court accepts an agreement between the prosecution and the defence, an appeal against the elements covered by the agreement is regarded as justified. Simultaneously, however, the restriction of the scope of appeal against judgments solely to the level of punishment is criticized, arguing that pleading guilty cannot be interpreted as waiver of any appeal against the judgment whatsoever.[10]

2. Standard of fair appeal proceedings in the case-law of the ECtHR

Where appeal procedures are provided for, the ECtHR has ruled that they must comply with the Article 6 of the ECHR. The Court has emphasised that a fair balance should be struck between, on the one hand, a legitimate concern to ensure the enforcement of judicial decisions and, on the other hand, the right of access to the courts and the rights of defence.

In the judgment of 2 March 1987 in the case Monnell and Morris v United Kingdom the ECtHR[11] pointed out that the manner of application of Art. 6 to appeal proceedings depends upon the special features of the proceedings involved, and taking in account of the role and functions of appeal court. The court stressed that it is necessary to consider matters as follows: the significance of appeal procedure in the context of the criminal proceedings as a whole; the scope of powers of the Court of Appeal; the manner in which the appellant's interests were presented and protected in practice. Generally, the Court is insisted in several cases that it is of crucial importance for the fairness of the criminal justice

9 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Explanatory report, pt. 17, http://conventions.coe.int/Treaty/en/Reports/Html/117.htm.

10 P. Hofmański, (in:) L. Garlicki (ed.), Konwencja…, *op. cit.,* pp. 635-637.

11 ECtHR judgment of 2 March 1987, applications no. 9562/81 and 9818/82, Monnell and Morris vs. United Kingdom.

system that the accused be adequately defended, both at first instance and on appeal.

In order to determine whether the requirements of Article 6 were met, the ECtHR held in many judgments that as a general rule, Article 6(1) and Article 6(3)c taken together, require[12]:

- an oral hearing at which the accused person is entitled to be present,
- legal representation at the hearing, with legal aid if necessary,
- a court (including an appeal court) must give reasons for its decision,
- appeals should be heard within a reasonable time.

National law provisions define both the conditions of exercise of the power under consideration and the grounds for use thereof. Therefore, the fact that an appeal proceedings in certain countries is limited to analysis of legal issues, or that under some systems, the defendant has to petition for preliminary permits to bring an appeal, should be regarded as non-interfering with the provision under analysis[13]. However, the wording of Article 2(1) of the protocol implies that the issue of the scope of grounds for appeal (and, therefore, any restrictions thereof, such as exemption of factual findings from review) has been left to national legislations; provided, however, that no contradiction of the essence of the given appeal takes place incidentally. As stressed in the judgment by ECtHR of 10 April 2018 in the case Tsvetkova et al. vs. Russia, each restriction of the right of appeal, as contained in Article 2 of Protocol 7 to the ECHR, in a similar way as the right of trial, as described in Article 6(1) of the ECHR, should serve substantiated goals and cannot violate the essence of this right[14]. In this case, the ECtHR has deemed

12 B. Emmerson et al., Human Rights…, *op. cit.,* pp. 890, 891-899, 902.

13 See: ECtHR judgment of 1 September 2015, application no. 23486/12, Dorado Baúlde vs. Spain, LEX no. 1794022, § 15 and the ECtHR's case-law cited thereof.

14 "However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right ": ECtHR judgment of 10 April 2018, application no. 54381/08, Tsvetkova et al. vs. Russia § 179, LEX no. 2469462 and ECtHR judgment of 10 October 2014, application no. 17888/12, Shvydka vs. Ukraine §§ 48-55. See also: ECtHR judgment of 13 February 2001, application no. 29731/96,

the lack of a suspensory effect of an appeal against a judgment by an administrative court, imposing the penalty of arrest on the appellant for an administrative offence, resulting in the appellant having served the full extent of the penalty before the examination of the appeal, as incompatible with the right of appeal[15].

In its case-law, the ECtHR points out the necessity to preserve the equilibrium between the ensuring of execution of court decisions on the one hand and the guaranteeing of the right of access to court and the rights of defence on the other hand. In this context, the Tribunal in Strasbourg, in a range of decisions against France, has stated that deeming an appeal based on a plea of breach of law inadmissible solely on the basis on the appellant's objection against being placed in custody is incompatible with the essential guarantees of fair trial, as contained in Article 6 of the ECHR. Such court decisions force the appellant in advance to serve the penalty of imprisonment under a decision by the court of first instance, which is not final until a court of appeal makes a decision or until the time limit for bringing of an appeal expires.[16]

The right of appeal is not an absolute right, exceptions are admissible[17]. In the light of Article 2(2) of Protocol 7, exceptions from this right may be applied in case of minor offences, as specified in a parliamentary act, or in cases when a given person has been tried in the first instance by the Supreme Court (due to this person's holding of a high state office or to the nature of the alleged offence[18]), or has been convicted and sentenced as a result of appeal against a sentence of acquittal passed by the court of first instance. When qualifying an act as a minor offence, one considers the severity of the sanction for perpetration thereof, and in particular, the possibility of sentencing of

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Krombach vs. France, § 96 and P. Hofmański, (in:) L. Garlicki (ed.), Konwencja…, *op. cit.,* pp. 637-638 and the ECtHR's case-law cited thereof.

15 ECtHR judgment of 10 April 2018 r., Tsvetkova et al. vs. Russia, § 185; ECtHR judgment of 30 October 2014 Shvydka vs. Ukraine, § 54.

16 E. Cape, Z. Namoradze, R. Smith T. Spronken, Effective Criminal Defence and Fair Trial, (in:) E. Cape, R.Smith, Z. Namoradze, T. Spronken (eds.), Effective Criminal Defence in Europe, Antwerp-Oxford-Portland 2010, pp. 52-53.

17 See: P. Hofmański, (in:) L. Garlicki (ed.), Konwencja…, *op. cit.,* pp. 638-640 and the ECtHR's case-law cited thereof.

18 Hauser-Sporn vs. Austria, pt. 20.

imprisonment for such an act[19]. According to the stance of the ECtHR, an act punishable with a maximum of 15 days of imprisonment does not constitute a minor offence; therefore, people sentenced for perpetration of such acts, even to a lower penalty, should be able to exercise the guarantees specified under Article 2 of Protocol 7[20].

The case-law of the ECtHR stresses that the exercise of the right of appeal, as specified in national law regulations, cannot depend on the discretion of national authorities and must be directly available to the interested persons[21].

One element of a fair appeal proceedings is providing the defendant with a right to defence, also at this stage of the proceedings. The Polish doctrine stresses the fact that this principle obliges judicial bodies to inform the defendant about his rights and obligations, including to instruct him about the possibility to petition for appearance (of a defendant deprived of liberty) at an appeal hearing (see Article 451 of the Polish Code of Criminal Proceedings)[22]. It is pointed out that enforced appearance of a defendant deprived of liberty at an appeal hearing may be significant for the decisions concerning the defendant, made by the court of second instance, and will comply with the standards of fair trial[23].

However, in the judgment of 22 February 2011 in case *Lalmahomed vs. the Netherlands*[24] (which has not ratified Protocol 7 to the ECHR), the ECtHR stated there is a possibility that a proceedings concerning issuance of a permit for bringing of an appeal complies with the requirements of Article 6, even if the appellant has not been granted the possibility of personal appearance before the court of appeal, provided that he

19 *Ibidem*, pt. 21. See also: ECtHR judgment of 30 November 2006, application no. 75101/01, Grecu vs. Romania, § 82.

20 See: ECtHR judgment of 15 November 2007, application no. 26986/03, Galstyan vs. Armenia, § 124. See also: ECtHR judgment of 17 July 2008, application no. 33268/03, Ashughyan vs. Armenia, § 108-110.

21 ECtHR judgment of 6 September 2005, application no. 61406/00, Gurepka vs. Ukraine, § 59.

22 Z. Kwiatkowski, Prawo oskarżonego pozbawionego wolności do rzetelnego procesu przed sądem odwoławczym, (in:) J. Skorupka (ed.), Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy, Warszawa 2009, p. 586.

23 *Ibidem*, p. 597.

24 ECtHR judgment of 22 February 2011, application no. 26036/08, Lalmahomed vs. the Netherlands, LEX no. 736612.

has at least been granted a possibility of being heard by the court of first instance. The judgment stressed that as far as the resulting court decision is based on full and accurate assessment of significant factual circumstances, the Court would not review such a decision. It has also been pointed out that it is not a function of the Court to adjudicate in the area of errors concerning factual or legal circumstances, making of which by national courts was alleged, since the Court is not a court of appeal or, as it is sometimes said, it is not a court of "fourth instance" (appeal to which would be a defendant's right) against decisions of such courts[25].

In its case-law concerning appeal proceedings, the Court also recognizes the import of the principle of presumption of innocence, noticing that presumption of innocence, protected under Article 6(2) of the Convention, is an element of a fair trial, as required by Article 6(1). In the opinion of the ECtHR, it will be violated if a statement by a state official concerning a person accused of committing of a criminal offence reflects an opinion that such person is guilty before their guilt is proven in accordance with a parliamentary act. The Court notes that the principle of presumption of innocence may be violated not only by a judge or a court but also by other public authorities, including public prosecutors, and whether the statement by a public official violates the principle of presumption of innocence must be decided under specific circumstances under which the challenged statement has been made[26].

Fair evidentiary proceedings is strictly connected with the guarantees of the defendant's right to defence in an appeal proceedings. As pointed out in the case-law of the ECtHR, the fairness of evidentiary proceedings is of particular importance when a court of appeal is able to convict a defendant who has been previously acquitted. It is important to enable the defendant to submit explanations, especially in case of making of new findings in the area of the perpetrator-related aspect of the offence, when the court of appeal recognizes the case from the legal and factual viewpoint. In particular, a different assessment of witness testimonies by

25 *Ibidem*, § 43-48.

26 ECtHR judgment of 29 April 2014, application no. 9043/05, Natsvlishvili and Togonidze vs. Georgia, § 103-106, LEX no. 1503104.

a court of appeal may entail a necessity to hear the witnesses in an appeal proceedings[27].

The case-law and Polish doctrine on the subject point out that the justification of sentence, not only of the court of first instance but of the court of appeal as well, is of crucial importance to the fairness of the proceedings[28]. On the other hand, the ECtHR case-law stresses that proper justification, explaining the grounds of the judgment passed by the court of appeal, is of particular importance in case when the court of appeal assesses the factual state differently and, in lack of new evidence, alters the judgment to the detriment of the defendant[29]. In this context, it should be noted that this problem is absent from the Polish criminal procedure, since, according to the *ne peius* prohibition described in Article 454(1) of the Code of Criminal Proceedings, a court of appeal cannot convict a defendant who has been acquitted in the first instance or concerning whom the procedure was discontinued or conditionally discontinued in the first instance.

The defendant should be notified of any new evidence submitted by other participants of the appeal proceedings, so as to enable the defendant to express his stance. Communication of the evidence to the prosecution only violates the principle of equality of arms, and failure to disclose it to both parties – the principle of adversarial nature.

The case-law of the ECtHR points out that irregularities in the area of evidentiary proceedings before the court of the first instance may be validated in the appeal proceedings if the court of appeal has full

27 See: A. Lach, Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego, Warszawa 2018, pp. 41-43 and the ECtHR's case-law cited thereof: ECtHR judgment of 10 April 2012, application no. 19946/04, Popa and Tănăsescu vs. Romania § 43-55; ECtHR judgment of 6 July 2004, application no. 50545/99, Dondarini vs. San Marino, § 27; ECtHR judgment of 6 October 2015, application no. 4941/07, Coniac vs. Romania, § 62; ECtHR judgment of 18 May 2004, application no. 56651/00, Destrehem vs. France, § 36-47; ECtHR judgment of 5 July 2016, application no. 46182/08, Lazu vs. Moldawia, § 31-44; ECtHR judgment of 5July 2011, application no. 8999/07, Dan vs. Moldawia, § 33; ECtHR judgment of 29 June 2017, application no. 63446/13, Lorefice vs. Italy § 36-47.

28 See: R. Broniecka, Wymogi stawiane uzasadnieniom wyroków sądów I i II instancji a rzetelność postępowania odwoławczego (Repozytorium UwB).

29 A. Lach, Rzetelne postępowanie…, *op. cit.,* p. 43 and the ECtHR's case-law cited thereof: ECtHR judgment of 22 April 1992, application no. 12351/86, Vidal vs. Belgium § 34; ECtHR judgment of 18 May 2004, application no. 56651/00, Destrehem vs. France § 36-47; ECtHR judgment of 5 July 2016 r., application no. 46182/08, Lazu vs. Moldawia § 31-44.

jurisdiction to examine the case, so not only does it examine the plea (reassessing the evidence if necessary) but may alter the decision under appeal or refer the case back[30].

In the context of fair appeal proceedings, one should notice the problem of appeal against criminal-procedural agreements which have been regulated differently in different European justice systems[31]. Concerning criminal procedures where a judgment is passed after the hearing has taken place, one should note that due to criminal-procedural agreements, the defendant voluntarily waives certain guarantees of fair trial (such as the public or adversarial nature of the hearing), so these elements, included in Article 6(1) of the ECHR, will, by nature, not apply in consensual modes. Therefore, one should point out what is essentially the most important decision by the European Court of Human Rights concerning the respect for guarantees of fair trial in criminal proceedings completed in the mode of procedural agreements, namely, the decision of 29 April 2014 in the case *Natsvlishvili and Togonidze vs. Georgia* (complaint no. 9043/05)[32].The importance of this decision demands brief presentation thereof. The factual state upon which this decision has been made concerned the former mayor of the Georgian city of Kutaisi, who, upon negotiations with the prosecutor's office, accepted an arrangement according to which a fine was imposed on him in exchange for pleading guilty and conviction without conducting of a court proceedings. A district court in Kutaisi accepted the arrangement. It should be noted that the defendant, by way of remedying of damage incurred by the Georgian state treasury due to the economic crimes alleged to him, transferred the shares in his company to this entity before the conclusion of the agreement. In the criminal case, the defendant was represented by two defenders; moreover, he was instructed by the court concerning the criminal-law and civil-law consequences of the agreement concluded with the prosecutor's office. Therefore, he was

30 See: E. Lach, Rzetelne postępowanie…, *op. cit.,* p. 44 and ECtHR judgment of 11 December 2012, applications no. 3653/05, 14729/05, 20908/05, 26242/05, 36083/05 i 16519/06, Asadbeyli et al. vs. Azerbaijan, § 137.

31 See: C. Kulesza, Konsensualizm karnoprocesowy w świetle gwarancji rzetelnego procesu – perspektywa komparatystyczna, (in:) A. Wudarski (ed.), Prawo obce w doktrynie prawa polskiego, Warszawa 2016, pp. 431-466 and the literature and ECtHR's case-law cited thereof.

32 ECtHR judgment of 29 April 2014 r. (application no. 9043/05, Natsvlishvili and Togonidze vs. Georgia, LEX no. 1503104).

aware that, pursuant to the Georgian code of criminal procedure, the judgment passed as a result of the agreement was non-appealable[33].

Concerning the examined case, in which the European Court of Human Rights has stated that, despite the defendant submitting a statement of consent to end the criminal proceedings against him without a hearing during his stay in custody, his right to defence and the principle of presumption of innocence have not been compromised, the Court has determined the following standards to be fulfilled by procedural agreements in order to meet the requirements of fair trial, as specified in Article 6 of the ECHR (in particular, the requirements of fair trial as envisaged in Article 6(1) of the ECHR).

Within the context of the case being heard, the Court pointed out the following facts:

1) the defendant benefitted from legal assistance of two defenders who had the opportunity to acquaint themselves with the file of the case before the conclusion of the procedural agreement resulting in sentencing to a fine;
2) the procedural agreement took place on the initiative of the defendant who had concluded it with the prosecutor's office voluntarily and fully aware of the resulting consequences;
3) the court did not object to confirmation of the agreement, stating its voluntary nature and validity on the basis of the presented evidence, and assuming that the execution of the agreement[34] does not compromise the public interest (before the conclusion of the agreement, the defendant essentially remedied the damage resulting from an offence detrimental to the financial interest of Georgia).

In this case, the European Court of Human Rights has not found any violation of Article 2 of Protocol 7 to the ECHR either, stating that if the defendant, under consensual modes, has the right to waive his rights at

33 *Ibidem*, § 12-28.
34 *Ibidem*, § 90-98.

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an adversarial court hearing, he may waive an appeal proceedings all the more[35].

Accepting, as a rule, the position of the European Court of Human Rights (based on comparative-legal studies of European justice systems), one should stress at least the following accents of fair trial, not covered by the considerations of the Court, which, as it seems, cannot be sacrificed for the idea of narrowly understood procedural economy, i.e. quickness of proceedings: the ability to determine the substantive truth and, therefore, to reach procedural justice, and respect for the rights of the trial participants: the defendant and the injured party[36].

II. European models of criminal appeal proceedings

1. Preliminary remarks

In European criminal justice systems, the corrective mechanisms contain the elements of the appeal, cassation and revisory models. In the Polish doctrine on the subject, the following traits of the appeal model are distinguished[37]: review of adjudications in terms of both their legality and substance; the court's right to hear the evidence and to conduct its own establishment of the facts; the right to issue its own decision as to the merits; adjudgment essentially within the scope of appeal. The most important elements of the cassation model are as follows[38]: only charges of violation of the provisions of substantive or procedural law may constitute the basis for cassation; substantive review

35 Concerning the plea of violation of Article 2 of Protocol 7, as raised by the appellant, the Court has stated that greater restriction of the right of appeal in case of convictions passed upon an arrangement between the defendant and the prosecution – than takes place in case of convictions passed upon an ordinary trial – is normal and corresponds to the waiver of the right to examine the substance of prosecution in a criminal case: Natsvlishvili and Togonidze vs. Georgia, § 96.

36 See an analysis of compliance with such guarantees in consensual modes in the light of case-law of Polish courts: C. Kulesza, Compliance of plea bargaining in the Polish criminal process with fair trial requirements from the point of view of the 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, pp. 48-87 and the case-law cited thereof.

37 A. Kaftal, System środków odwoławczych (rozważania modelowe), Warszawa 1972, pp. 23-25.

38 *Ibidem*, pp. 32-33.

of the judgment appealed against, and thus the taking of so-called strict evidence, is impermissible; instead of adjudicating by itself, a court of cassation either dismisses the cassation or reverses the case appealed against and sends it back for a new trial; a cassation is tried within the scope of the appeal or even within the scope of the charges.

The characteristics of the revisory model include[39]: legal and substantive review of the judgment appealed against; reversal of the judgment and remandment of the case for re-examination; ability to render judgment on the merits, but only on the basis of the establishment of the facts presented in the judgment of the court of first instance and practically only to the benefit of the defendant, and thus impermissibility of strict evidence and of establishment of facts based upon such evidence; adjudgment within the scope of the appeal. Of course, in court practice, the aforesaid models are not observed in their pure form. One example is the Polish appeal proceedings model, which, as noted in the literature, was a hybrid until the reform of 1 July 2015, as it combined the elements of the appeal, cassation and revisory models[40].

2. English appeal model

The classic example of the appeal model is the English system. As pointed out in the literature, the right to appeal is a comparatively recent addition to the common law criminal process. For centuries, these legal systems, in stark contrast to those of continental Europe, did not provide a means by which defendants could effectively challenge their convictions[41]. Although the United Kingdom has not ratified Protocol 7 to the ECHR, it is nevertheless worth paying attention to the fact that, under the Human Rights Act of 1998, the rights and liberties guaranteed by the ECHR have been incorporated in the legislation of this country[42].

39 *Ibidem*, pp.37-38.

40 Compare: S. Zabłocki, Między reformatoryjnością a kasatoryjnością, między apelacyjnością a rewizyjnością, (in:) P. Wiliński (ed.), Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach, Warszawa 2015, pp. 416-417.

41 See: P.D. Marshall, A Comparative Analysis of the Right To Appeal, Duke Journal of Comparative & International Law 2011, vol. 22, pp. 4-11.

42 See a comprehensive analysis of this act in: B. Emmerson, A. Ashworth, A. Macdonald, A.L-T. Choo, M. Summers, Human Rights and Criminal Justice (3rd edition), London 2012, pp. 151-208.

With regard to the ability to appeal against a judgment in the English jurisdiction, it differs radically depending upon whether the judgment was rendered in accordance with a simplified procedure (summary trial) or in a case which required an indictment (trial on indictment).

2.1. Appeal proceedings before Crown Courts

In the case of a summary trial, only the defence (but not the prosecution) is automatically entitled to appeal against the sentence to the locally competent Crown Court, whereas the conviction may only be appealed against by the defence, in principle, if the defendant pleaded not guilty – (Magistrates' Courts Act – MCA, Article 108(1)[43]. However, as stressed in the literature and case law, the Crown Court will fix a date for a trial of appeal in spite of the fact that the defendant pleaded guilty before the Magistrates' Court when there are doubts as to the volition or unambiguity of the plea[44].

A trial of appeal before the Crown Court consists in a complete rehearing of the main trial before a court comprised of a professional judge and two lay magistrates. At a trial of appeal, the defence may bring up both legal and factual arguments, and in the case of an appeal against conviction, the course of the trial is similar to that before the trial court. Notably, the appeal proceedings are not restricted to the evidence heard by the court of first instance; the parties may admit new evidence which was previously unknown or which they did not want to use before. Furthermore, both the defence and the prosecution may appeal against the sentences of the lay magistrates on the charges of infringement of the law to a Higher Court.

With regard to the statistics of such appeals against the judgments of Magistrates' Courts to Crown Courts, in 2017, over 5449 appeals against conviction were filed (in 2007-5351), of which 42% were allowed (in

43 E. Cape, England & Wales, (in:) E. Cape, R. Smith, Z. Namoradze, T. Spronken (eds.), Effective Criminal Defence in Europe, Antwerp-Oxford-Portland 2010, p. 141.

44 J. Sprack, A Practical Approach to Criminal Procedure (12th edition), Oxford 2008, pp. 512-514.

2007 – 37%); furthermore, 4400 appeals against sentence were filed (in 2007 – 6288), of which 47% (in 2007 – 44 %) were successful[45].

2.2. Appeal proceedings before Court of Appeal

In the case of a trial on indictment, the defence has a limited right to appeal against the sentence of a Crown Court to a Court of Appeal, as per the *Criminal Appeal Act 1968*[46](amended by the *Criminal Appeal Act 1995*[47] and by the *Criminal Justice and Immigration Act* 2008 [48]). Most importantly, a convicted party may only appeal in this manner when they pleaded not guilty and must also obtain a certificate from a judge of the court of first instance that the case is "fit for appeal"[49]. In order to be granted permission to appeal, the appellant submits a letter that contains a Notice of Application for Leave and the Grounds of Appeal, often including an Advice of Appeal. Upon reading the documents, the judge either allows or refuses the appeal. In the event of a refusal, the appellant is entitled to request that the appeal be examined by the Criminal Division of the Court of Appeal in London. Appeal proceedings before a Court of Appeal do not include rehearing of the case, although the Court of Appeal has the right to and often does take documentary evidence and evidence by transcription of the key stages of the proceedings before the court of first instance.

In the previously referenced ECtHR judgment of 2 March 1987 in the case *Monnell and Morris vs. the United Kingdom*, the Court examined the English procedure under which the Court of Appeal (consisting of a single judge or the full panel) can determine the leave to appeal against conviction "based on documents" in absence of a defendant who has not been represented by a defender and without hearing oral arguments referencing the pleas of the appeal. The ECtHR determined by majority of vote that such procedure is compliant with Article 6 of the ECHR,

45 Criminal court statistics (quarterly): July to September 2018; table C8, https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-july-to-september-2018; accessed on 3 June 2019.
46 Criminal Appeal Act 1968.
47 Criminal Appeal Act 1995.
48 Criminal Justice and Immigration Act 2008.
49 J.R. Spencer, The English System, (in:) M. Delmas-Marty, J.R. Spencer (eds.), European Criminal Procedures, Cambridge 2008, p. 203.

noting that the court does not re-hear the facts of the case and does not summon witnesses during this procedure, even if the appeal contains pleas referencing both factual and legal issues. The Court has stressed that the prosecutor did not appear in such a proceedings either, the appellant obtained a negative opinion (advice) from a lawyer concerning the admissibility of the appeal, and was able to submit his own arguments in support of the appeal in the written form[50].

As for grounds for appeal in an English trial, the irregularities (usually of procedural nature) which may cause challenging of conviction (so-called unsafe conviction, i.e. when the defendant has been wrongly held guilty of an offence), include unfairness of procedure, lack of sufficient information for the defendant concerning his right to summon witnesses, improper disclosure of evidence, as well as erroneous assessment thereof[51].

The admissibility of new evidence before a Court of Appeal was definitively regulated by the amendment to Article 23 of the *Criminal Appeal* Act of 1968, performed on the strength of the *Criminal Justice and Immigration Act of* 2008 and is at the discretion of the Court of Appeal. The English doctrine notes that the restrictive jurisdictional approach which limits the admission of fresh evidence by a Court of Appeal creates a real risk of unjust convictions being sustained by said Court[52].

The Court of Appeal has wide possibilities of deciding on the subject matter of the trial in case of appeal against sentence. Beside upholding of the conviction, it may, in particular[53]:

1) decide on alteration of the sentence for an alternative offence under Article 3 or 3a of the CAA of 1968, sentencing the defendant under Article 3(2) or 3a(2);

50 ECtHR judgment in Monnell vs. United Kingdom, § 67.

51 Concerning the effectiveness of appeals to the Court of Appeal against judgments of Crown Courts, 2017 saw submission of 3700 appeals against conviction (5156 in 2013), of which 21,5% (21,7% in 2013) were recognized, and 1305 appeals against sentence (1558 in 2013),of which only 5,9% (7,8% in 2013) were effective. Source: own study based on Court of Appeal (Criminal Division) Annual Report 2016-17; https://www.judiciary.uk/publications/court-of-appeal-criminal-division-annual-report-2016-17 (accessed on 3 June 2019).

52 S. Roberts, Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal, The Journal of Criminal Law 2017, vol. 81(4), pp. 303-327.

53 D. Jones, G. Stewart, J. Bennathan, Criminal Appeals Handbook, London 2015, p. 220.

2) state that the proper judgment would be declaration of the defendant's incapacity and a decision of exercise of a detention order in the form of hospital treatment or total dismissal of criminal charges;
3) decide on annulment of sentence and ordering of reexamination of the case under Article 7 of the CAA of 1968. If the hearing does not take place within 2 months, the defence may request acquittal based on Article 8 of the CAA of 1968, or the prosecution may petition for postponement of the hearing date based on Article 8 of the CAA of 1968;
4) decide annulment of the sentence and ordering of acquittal under Article 2(a) of the CAA of 1968.

Comparing the statistical data quoted above, concerning the effectiveness of appeals against judgments of magistrate courts and appeals against judgments by Crown Courts, one may note unquestionably higher effectiveness of the former, wherein the procedure of recommencement of an evidentiary proceedings by Crown Courts, subject to the pure appellate nature, leads to annulment or alteration of approx. 40% of the contested judgments, whereas appeal procedure before the Court of Appeal causes alteration or annulment of Crown Court judgments only in 1/5 of all appeals against conviction and several per cent of appeals against sentence.

2.3. Standards of fair trial in the case-law of English courts

An analysis of the case-law of the Court of Appeal of England and Wales entitles one to a conclusion that the English appeal system, in the area of free legal representation of a defendant and his appearance in an appeal hearing, essentially meets the standards of fair appeal proceedings, as elaborated by the ECHR. One can draw the following conclusions from this analysis[54]:

– exercise of the procedure of leave without hearing the defendant does not contradict Article 6 of the ECHR, since the petition for

54 B. Emmerson et al., Human Rights…, *op. cit.,* pp. 896-897 and the case-law cited thereof.

admission of an appeal may be repeated at an oral hearing before the entire adjudicating panel. Moreover, such a petition has to be admitted if any member of the panel declares in favour of it;

- dismissal of the petition for admission of the appeal by the full panel may raise doubts in the context of Article 6 of the ECHR only under extraordinary situations when the case is complex or requires thorough examination of the evidence;
- when an oral session is determined concerning the petition, this is an argument in favour of admission of the defendant's appearance therein, and if he does not have a defender of choice -of granting a public defender, pursuant to the standard specified in Article 6(3)(c) of the ECHR;
- in serious cases, the defendant has the right of appearance at a full appeal hearing (appointed upon recognition of the petition) and to use free legal assistance (based on the criterion of wealth);
- if the appeal is based on fresh evidence adduced by any of the parties, the necessity to observe Article 6 of the ECHR essentially requires providing guarantees in an appeal proceedings, analogous to those applicable at the main hearing.

The line of cases of the Criminal Division of the Court of Appeal implies a possibility to regard errors made during the main hearing as grounds for appeal. As for procedural errors of courts, the most frequent pleas in appeals include errors in judges' summing up, such as: erroneous determination of attributes of an offence, denying the jury to decide on the basis of substantiated evidence provided by the defence, failure to provide guidance concerning the weight and/or standard of evidence[55].

The English doctrine points out that appeals based on the plea of error in factual findings and petitioning for examination of new evidence are particularly problematic, since they require the Court of Appeal to assume the role of a jury in determination of facts by way of assessment of fresh evidence and confrontation thereof with the evidence presented at the main hearing in order to examine whether the conviction was

55 Concerning the notion of weight and standard of evidence in an English trial, see: R. Munday, Evidence, London 2003, pp. 61-98 and the case-law cited thereof.

unsafe. The view prevailing in the literature is that the problems of the Court of Appeal, connected with examination of the plea of erroneous factual findings, are caused by excessive respect of this court for verdicts of the jury, excessive consideration for the principle of stability and finality of court decisions, as well as a lack of resources, giving rise to concerns about an excessive number of appeal petitions the court would be unable to handle. Therefore, as shown by the court case-law, such problems give rise the fact that more effective appeals are those not based on fresh evidence but on procedural errors[56].

A comparison of file studies performed in 1990 and 2016 respectively shows that currently, parties bring appeals based on fresh evidence more frequently but the Court of Appeal admits them less frequently (in 1990, 61% of such petitions were recognized, compared with 19% of the surveyed appeals including such petitions in 2016)[57]. Concerning the conventional requirement to provide justification for decisions (Article 6(1) of the ECHR), the analysis of case-law(e.g. judgment in the case *R. vs. Guney* [EWCA 2003, Crim 1502] shows that the appellant essentially has the right to learn the grounds for a judgment of a court of appeal; however, such right may be restricted in cases connected with adjudication based on classified information, where a non-disclosure procedure has been utilized. Moreover, in cases when appeal to the UK Supreme Court is possible and where legal issues of particularly significant public importance occur, the Supreme Court, while dismissing a petition for admission of an appeal, usually does not provide any detailed justification of its decision.

As for the assessment of fairness of evidentiary proceedings by the UK Supreme Court (UKSC), one should point out the judgment by this court of 25 May 2011 [2011] UKSC, annulling a judgment by the Scottish Court of Appeal in a circumstantial case. Because this is, most probably, the only UKSC judgment to refer to a typical circumstantial case, one should give a brief overview of the factual

56 See: S. Roberts, Fresh evidence and Factual Innocence in the Criminal Division of the Court of Appeal, The Journal of Criminal Law 2017, vol. 81(4), pp. 304-305 and the literature and the case-law cited thereof.

57 In a survey from 1990, the test sample comprised 8% of all appeals, whereas in 2016, it was 14% – see: S. Roberts, Fresh evidence…, *op. cit.,* pp. 318-321.

state of this case. In this case, defendant Nat Gordon Fraser was found guilty, by judgment of the High Court of Judiciary in Edinburgh of 29 January 2003, of arrangement of murder of his spouse Arlen Fraser who had disappeared from her apartment on 28 April 1998. By this judgment, the defendant was sentenced to life imprisonment. The basic circumstantial evidence presented by the prosecution was the finding of rings, including the wedding ring, at the victim's apartment on 7 May 1998, i.e. nine days after her disappearance. The prosecutor argued in the summing-up speech to the jury that, eight or nine days after the victim's death, the defendant took the rings from her dead body, brought them to the apartment and left them in the bathroom to simulate that the victim had decided to abandon her hitherto life and leave her husband. The prosecutor described the return of the rings as the grounds of accusation against the defendant. The operative part of the judgment dismissing the appeal read: "The appellant has been rightly convicted for murder. The case against her, circumstantial might it have been, was definitely strong (in terms of evidence – note by C.K.). We are satisfied with the fact that none of the pleas raised individually or cumulatively by Ms. Bennett-Jenkins (the defender – note by C.K.) has challenged the certainty of her (defendant's – note by C.K.) conviction".

3. The German system

3.1. German appeal and revision proceedings

The measures of appeal against judgments in the German criminal justice system include two fundamental measures of appeal[58]:

1. Appeal (*Berufung*; also translated as "Appeal on Fact and Law"), which is submitted to the court of first instance within 7 days since the announcement of the judgment orally for the record of the trial or minutes of the session, or in writing. It constitutes a procedural declaration, which must specify the subject of appeal (*Anfechtungsgegenstand*), details of the appellant and the request (*Anfechtungswillen*). Therefore, appeal is

58 R. Eschelbach, (in:) J.P.Graf (ed.), Strafprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen. Kommentar, München 2010, pp. 1270-1627; C. Roxin, B. Schünemann, Strafverfahrensrecht (26 Auflage), München 2009, pp. 413-440.

characterised by its high flexibility and lack of formalism, so that it can be limited just to some of the charges, and if those are not specified (the StPO does not require grounds for appeal, either – Section 317), the entire sentence is deemed appealed against (Section 328 of the StPO). An appeal is heard by a regional court (*Landgericht*), which acts as a court of appeal in such cases (Section 74(3) of the GVG). If the court of appeal considers that the appeal was filed without observance of the procedure, it may, in a ruling, dismiss the appeal, which may be contested by complaint (Section 322 of the StPO). The court of appeal hears the evidence to a broad extent, having unlimited ability to repeat the evidence heard by the court of first instance and to hear new evidence (cf. Sections 323-325 of the StPO). The court of appeal which hears the *Berufung* may either deem the appeal to be unfounded and refuse to allow it (*verwerfen*) or allow it, quash the judgment and give its own decision on the merits (Section 328 of the StPO).

2. Revision (*Revision*; also translated as "Appeal on Law"), which, unlike the appeal, has statutorily stipulated grounds for revision that are based on a violation of the law (Sections 337and 338 of the StPO). These include the so-called absolute grounds for revision, i.e. major violations of law (Section 338 of the StPO, similar to the absolute grounds for appeal as per Article 439 of the Polish Code of Penal Procedure), such as: unlawful composition of the court, participation of a judge barred from exercising judicial office, or inadmissible restriction of the defence on a question important for the decision (Section 338 of the StPO). A complainant, unlike an appellant, should specify in detail the extent to which they contest the judgment, as well as the grounds and reasons for revision (Section 344 of the StPO). If the revision does not meet those requirements or has been filed without observance of the required procedure, it may be dismissed by the court of revision as inadmissible. In the field of appeal proceedings, it is worth noting the appellant's ability to choose between an appeal and a revision[59]. As evidenced above, Germany has quite a complex three-instance system, where sentences may be appealed against using two different measures: appeal (appeal

59 T. Weigend, Das Rechtsmittel der Appellation aus deutscher Sicht, (in:) A. Gaberle, S. Waltoś (eds.), Środki zaskarżenia w procesie karnym. Księga pamiątkowa ku czci Prof. Zbigniewa Dody, Kraków 2000, pp. 147-170.

on fact and law) and revision (appeal on law). Both are characterised by their absolute down transference (the so-called *Abwälzungseffekt*) and suspensiveness, as well as the presence of the prohibition of *reformationis in peius*. Nevertheless, a number of differences sets them apart. The literature on the subject assumes the following fundamental differences between a revision and an appeal[60]:

- whereas it is possible to take new evidence for an appeal (Section 324(2) of the StPO) within the limitations of the principle of direct examination of evidence by the judge (Section 325 of the StPO), it is impossible for a revision. In addition, the defendant's presence is not obligatory (Section 350 of the StPO) and in most cases, the revision is decided upon in an order (without conducting a trial – Section 349(2) and (4) of the StPO);
- in the case of an appeal, the judgment is comprehensively contested, unless the appellant restricts the appeal to certain points of complaint (Section 318 of the StPO). In the case of a revision, the sentence is only reviewed to the extent of the facts specified in the revision (Section 352 of the StPO);
- a revision requires the grounds for it to be stated (Section 344 of the StPO), whereas in the case of an appeal, it is at the appellant's sole discretion whether they provide any grounds for it or not, and only based upon factual and not legal circumstances (Section 317 of the StPO). This results in a court of appeal coming to different conclusions than the district court, based upon its own establishment of the facts and consideration of the evidence. A court of revision merely ascertains violation of the law and bases its sentence on that (Section 337(1) of the StPO);
- whereas the judgment of a court of appeal may be appealed against on fact and law (revised) (Section 333 et. seq. of the StPO and Section 74(3) of the GVG), no measure of appeal is vested against the judgment of a court of revision. If a court of revision decides as to the merits of a case or repeals the revision, then its

60 F.Ch. Schroeder, Strafprozessrecht, München 2001, pp. 196-206; K.H. Gössel, Die Überprüfung tatsächlicher Feststellungen im Rechtsmittelzug des deutschen Strafverfahrens, (in:) A. Gaberle, S. Waltoś (eds.), Środki zaskarżenia w procesie karnym. Księga pamiątkowa ku czci Prof. Zbigniewa Dody, Kraków 2000, pp. 183-185.

judgment immediately becomes valid. If a case is remitted to be re-examined, a measure of appeal is vested against the new judgment of the court of first instance.

In the context of the right to defence in an appeal procedure, it should be noted that an appellant against a judgment by a district court has a choice because he may bring a revision instead of an appeal. Thus, by bringing directly a revision against a judgment, he omits the appeal, as if "skipping" it (so-called *Sprungrevision*). The German literature advices defenders to exercise significant prudence when making the choice between appeal and revision. It is stressed this should be decided upon the receipt of justification for the judgment and the minutes from the hearing. This is about whether we face problems of legal nature and one should not expect an appeal proceedings to determine factual findings more favourable to the defendant or to draw more favourable legal consequences from them, or whether there is a negative procedural premise (choice of revision is recommended in such case). If the defender believes there is an opportunity to determine more favourable factual circumstances or better assessment of the evidence in an appeal proceedings, or even discontinuation based on Sections 153, 153a and 154 of the StPO, the defender should choose appeal. Therefore, defenders should choose *Sprungrevision* when they are absolutely sure it would succeed, and should not resign an appeal in doubtful cases. Moreover, the defender should take account of the fact that the essential threat in case of appeal is a range of exceptions from the prohibition of *reformationis in peius* of the defendant from Section 331(1)of the StPO, such as the BGH possibility of aggravation of stay at a closed psychiatric or drug rehabilitation institution or ban on driving vehicles[61].

A significant regulation of the right of substantive defence of a person in a revocatory (either appeal or revision) proceedings is foreseen in Section 299 of the StPO, envisaging that a defendant deprived of liberty may submit statement for the minutes, referencing the appeal, to the district court with jurisdiction over the place of detention (or prison). As indicated in court case-law, this provision responds to

61 G. Widmayer, Münchener Anwalts Handbuch Strafverteidigung, München 2014, pp. 534-535 and the BGH and OLG's case-law cited thereof.

practical difficulties connected with appearance of such a defendant at an appeal proceedings on the one hand, and does not restrict other rights of the defendant, including the right of personal appearance at a hearing, on the other hand[62].

In the context of fairness of an appeal proceedings, of particular importance is the provision of Section 313(2) of the StPO, accounting for a possibility to dismiss an appeal if it is obviously unsubstantiated (*offensichtlich unbegründet*). There are no consistent views in the literature and case-law concerning the interpretation of the term "obviously unsubstantiated"; however, it is assumed this takes place when one can state without probing inquiry and without examination of evidence that the predicted result of an appeal proceedings will correspond to the judgment of the court of the first instance. This is about the predicted compliance of the court's decisions *a quo* concerning factual circumstances, the issue of guilt, legal qualification of the act and the imposed penalty. In case of any doubts in this regard, the appeal should be accepted[63].

A similar regulation concerning revision is found in Section 349(2) of the StPO, stipulating that a revision court may, upon substantiated request by the public prosecutor, deem a revision inadmissible in the form of a decision if it is obviously unsubstantiated. It is worth mentioning this provision was subject to examination by the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) which has deemed it compliant with the Constitution of the FRG (BVerfG NJW 1982, p. 925; 1987, p. 2219; NStZ 2002, pp. 487-488)[64]. The case-law points out that revision is obviously unsubstantiated if every qualified lawyer can state without longer study what legal problems appear in the

62 W. Frisch, (in:) J. Wolter (ed.), SK-StPO. Systematischer Kommentar zur Strafprozessordnung. Mit GVG und EMRK, (6th edition), Band VI, Köln 2013, pp. 208-210 and the BGH and OLG's case-law cited thereof.

63 L. Meyer-Gossner, (in:) L. Meyer-Gossner, B. Schmitt, Strafprozessordnung mit GVG und Nebengesetzen, (60 Auflage), München 2017, pp. 1361-1362; S. Wiedner, (in:) J.P. Graf (ed.), Strafprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen. Kommentar, München 2010, p. 1279 and the BGH and OLG's case-law cited thereof.

64 S. Wiedner, (in:) J.P. Graf (ed.), Strafprozessordnung…, *op. cit.*, p. 1542 and the case-law cited thereof.

case, how they should be solved and that a revision complaint will not bring the expected result[65].

During an appeal procedure, special attention is paid to the defendant's presence at the appeal hearing and the summons should instruct the defendant on the results of his absence (Section 323 of the StPO). Such consequences depended on who brought an appeal. If the appeal was brought by the absent defendant, the court dismissed an appeal by judgment. However, this did not apply to situations when a court of appeal reexamined a case upon it has been referred back by the revision court (Section 329(1) of the StPO). In its original wording, in turn, the provision of Section 329(2) of the StPO accounted for a possibility to conduct in absence of the defendant if the appeal was brought by the prosecutor.

The provisions of Section 329(1), 329(2) and 329(4) have been amended as a result of the ECtHR judgment of 8 November 2012 in the case *Neziraj vs. Germany* (complaint no. 30804/2007), where the Court has stated that if an absent defendant wishes to assume defence at an appeal hearing through an appointed defender, the provision of Section 329(1) of the StPO, foreseeing mandatory dismissal by the court of an appeal brought by an absent defendant, is contrary to Article 6(1)as well as 6(3)(c) of the ECHR. Section 329(1) of the StPO, amended as a result of this judgment, provides for a possibility to conduct a trial in absence of the defendant who has brought an appeal if the defendant is represented by a defender. On the other hand, the current wording of Section 329(2) states that unless the defendant's presence is necessary (*erforderlich*), the trial shall take place in absence thereof, provided that the defendant is represented by a defender with a valid authorization for defence or if absence thereof in case of a hearing appointed as a result of appeal by the prosecutor's office has not been sufficiently justified[66].However, the new wording of the provision of Section 329(4) of the StPO stipulates that when a court of appeal deems the defendant's appearance at the

65 L. Meyer-Gossner, (in:) L. Meyer-Gossner, B. Schmitt, Strafprozessordnung…, *op. cit.,* pp. 1466-1467 and the case-law cited thereof.

66 L. Meyer-Gossner, (in:) L. Meyer-Gossner, B. Schmitt, Strafprozessordnung…, *op. cit.,* pp. 1389-1391 and the BGH and OLG's case-law cited thereof.

hearing necessary despite the defender's presence, it shall summon the defendant to the hearing or order enforced appearance.

As for the defendant's right to appear at a revision hearing, he has such a right, or a right of being represented by a defender authorized in writing (Section 350(2) of the StPO). However, a defendant deprived of liberty is not entitled to a petition (*Anspruch*) to appear at the hearing. If such a defendant is not brought up to the revision hearing and does not have a defender of choice, he will be instructed on the option to petition (within 7 days since the notification of the hearing date) for appointment of a public defender (Section 350(3) of the StPO). The case-law points out that in case of appearance of an authorized defender at the hearing, one should assume this defender is prepared to conduct the case, and, just as the defendant, he may conduct passive defence through silence and non-submission of petitions (a decision by OLG Oldenburg of 20 December 2016, Ss 178/16)[67].

If a defendant in a revision proceedings is represented by several defenders, it is worth pointing out the decision by BGH of 12 September 2017, implying that the time limit for preparation of justification of the revision for each one of them shall be counted since the moment of delivery to the first of them[68].

Because a revision court does not conduct an evidentiary proceedings of its own, its decisions have the nature of cassation. Upon examination of the case, it may make the following decisions (Section 353 of the StPO[69]):

1) dismiss the revision as inadmissible – if it deems the complaint regulations to be infringed;
2) dismiss the revision as unsubstantiated – if the judgment under revision is fully correct;
3) discontinue the proceedings pursuant to Section 260 of the StPO – if a negative procedural premise occurs;

67 StV 2018, no. 3, pp. 148-50.
68 An order by BGH of 12 September 2017 (3 StR 132/17), StV 2018, no. 3, p. 138.
69 L. Meyer-Gossner, (in:) L. Meyer-Gossner, B. Schmitt, Strafprozessordnung…, *op. cit.*, pp. 1478-1482 and the BGH and OLG's case-law cited thereof.

4) annul the judgment as well as the findings concerning factual circumstances established in breach of the law (Section 353(1) and 353(2) of the StPO).

As a rule, a revision court, upon annulment of a decision, will refer a case back to the first instance of the relevant court of the given federal state, whereas in relation to decisions by the OLG – to another panel (the Senate). When reexamining the case as a result of a revision brought by or on behalf of the defendant, it is prohibited to deteriorate the defendant's situation concerning the kind or amount of punishment, excluding defendants placed at psychiatric or drug rehabilitation institutions (Section 358(2) of the StPO)[70].

If a revision court annuls the judgment for reasons other than formal, it may, by way of exception, decide independently concerning the substance of the case, and in particular, as far as factual findings enable it -acquit the defendant (Section 354(1) of the StPO). A revision court decides independently on discontinuation of a proceedings due to negative procedural premises.

The Federal Supreme Court – BGH[71], as a revision court, may, as indicated above, pursuant to Section 335(1)and 335(2) of the StPO, annul the judgment, as well as findings concerning factual circumstances made in breach of law.

3.2. Fairness of an appeal proceedings in the case-law of German courts

In the context of fairness of evidentiary proceedings conducted by a court of first instance and a court of appeal (to which regulations concerning the first-instance hearing are applicable – Section 332 of the StPO), the literature points out that the demonstrated circumstance is important for decision-making, not just when it is directly significant but also if it is circumstantial evidence or an auxiliary evidentiary circumstance, e.g. when it is capable of challenging the credibility

70 L. Meyer-Gossner, (in:) L. Meyer-Gossner, B. Schmitt, Strafprozessordnung…, *op. cit.*, pp. 1506-1507 and the BGH and OLG's case-law cited thereof.

71 Bundesgerichtshof – BGH.

of a witness for the prosecution. In case of circumstances of merely indirect significance, the case-law allows for anticipation of the result of demonstration in such a way that the court may deem a given circumstance insignificant if it does not lead to necessary conclusions but only to possible conclusions concerning the main subject of the trial and the court would not draw such conclusions at this state of the case (BGH NJW 2004, 3051, 3056; 05,2242 f, NStZ-RR 07, 52)[72]. Such view can also be encountered in the latest case-law of the BGH (a decision by BGH of 6 March 2018, 3 StR 342/17)[73].

Such decisions may be commented to the effect that the BGH, in some way, regards circumstantial evidence to be a "weaker" kind of evidence, allowing the court greater leave in decision of dismissal, by way of anticipation, of a motion intended to examine such indirect evidence. However, the case-law of the BGH recommends that, in deciding on dismissal of a motion as to evidence due to the fact that the circumstance being proven is not relevant to the case, such a motion should be assessed within the entirety of the gathered evidence, and its content should be properly interpreted (in particular, if it is brought by the defendant himself) (a decision by BGH of 10 November 2015, 3 StR 322/15)[74]. It is stressed that "Limited or dubious value of the evidence is not tantamount to full unsuitability thereof" (a decision by BGH of 20 May 2015, 2 StR 46/14[75]). The latest case-law also takes note that a person bringing a motion as to evidence (or a court deciding its validity) does not have to be sure this motion would lead to proving of the assumed evidential thesis, since it is sufficient to be probable in the light of the circumstances of the case (a decision by BGH of 16 November 2017, 3 StR 460/17[76]).

The case-law, stressing the principle of equality of arms in hearing of witnesses, also points out that the prohibition to hear witnesses who have exercised the right to refuse to testify (Section 252 of the StPO) also includes the prohibition to hear persons who have been present

72 C. Roxin, B. Schünemann, Strafverfahrensrecht, p. 341.
73 StV 2018, no. 8, pp. 478-479.
74 StV 2016, no. 6, pp. 340-342.
75 StV 2016, no. 6, p. 342.
76 StV 2018, no. 8, pp. 476-478.

during the prior hearing of such witnesses, including judges who have conducted such a hearing (a decision by BGH of 30 November 2017, 5 StR 454/17[77]).

A considerable portion of court case-law applies to revisions examined by Courts of Appeal (*Oberlandesgerichte* – OLG) and the Federal Supreme Court (*Bundesgerichtshof* – BGH). Therefore, it should be pointed out that pursuant to Section 337 of the StPO, the essence of revision consists in the fact that, unlike an appeal, it may only be based on breaches of law, and the appellant cannot raise the plea of error in factual findings. This is implied by the division of tasks between a trial court as a "court of the facts" and a revision court as a "court of the law" (*Tatgericht und Revisionsgericht*), as assumed under the German system[78].In practice, however, the case-law of German courts (including the Federal Court – BGH) has, to an extent, blurred the distinction between the powers of a revision court and a court of appeal through creation of so-called "expanded revision" (*erweiterte Revision*). It consists in the revision court interfering with the principle of free assessment of evidence by the court of first instance (protected under Section 261 of the StPO), the violations of which are strictly connected with errors in factual findings by the German doctrine and case-law[79].

The German procedural practice also places special emphasis on the regulation of Section 336 of the StPO, providing for a possibility to submit revision pleas referring breaches of law by a court or law enforcement agencies before the hearing, i.e. during the preparatory proceedings and during judicial control over prosecution. Among such charges, the doctrine and case-law mention breach of the procedure by law enforcement agencies when conducting proceedings to take evidence (e.g. wiretapping, search, interrogation of a suspect or witnesses, as well

77 StV 2018, no. 8, pp. 479-480.

78 L. Meyer-Gossner, (in:) L. Meyer-Gossner, B. Schmitt, Strafprozessordnung, pp. 1416-1417; S. Wiedner, (in:) J.P. Graf (ed.), Strafprozessordnung…, *op. cit.,* p. 1386 and the BGH and OLG's case-law cited thereof.

79 T. Park, Gedanken zur Akzeptanzkrise der Revisionsprechung, Strafverteidiger 2018, no. 12, pp. 816-817; C. Roxin, B. Schünemann, Strafverfahrensrecht…, *op. cit.,* pp. 428-430 and case-law cited thereof. See also: C. Kulesza, Dowód poszlakowy w doktrynie i orzecznictwie sądowym Anglii i Walii oraz Niemiec, Przegląd Sądowy 2017, no. 6, pp. 110-112.

as use of police secret agents and informers), resulting in inadmissibility of evidence obtained in such a way[80].

The current case-law of German Courts of Appeal (OLG) points out that the concept of "necessity" of the defendant's appearance at the appeal hearing, as foreseen in Section 329(1) and 329(4) of the StPO, should be interpreted in accordance with its guarantee nature and the defendant's appearance should be deemed necessary particularly when the hearing is to examine factual circumstances concerning the defendant's guilt and criminal liability (a decision by OLG Hamburg of 21 October 2016, 1 Rev 57/16[81]).

The judgments rendered in accordance with procedural agreements (*Verständigungen* – Section 257c of the StPO) can be appealed against and revised**.** Valid judgments rendered as per Section 257c of the StPO may also be challenged by reopening the proceedings (Section 359 of the StPO).

Unlike an appeal, a revision cannot be based on errors in factual findings but breaches of law; above all, of procedural law. As shown by the analysis of the BGH case-law, such procedural shortcomings mainly include breaches of transparency of procedural agreements if they are conducted outside the first-instance hearing (or even before the indictment was brought), and the course thereof is not disclosed at the hearing (see decisions by BGH: of 16 June 2016, 1 StR20/16, and of 18 May 2017, 3 StR 511/16[82]). In particular, the decisions by BGH condemn breaches of the president's obligation to notify of the course and effects of negotiation of the agreement (*Mitteilungspflicht*-Section 243(4) of the StPO)[83].

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80 See: C. Kulesza, System środków odwoławczych w Niemczech, (in:) S. Steinborn (ed.), Postępowanie odwoławcze w procesie karnym – u progu nowych wyzwań, Warszawa 2016, pp. 27-28 and the literature cited thereof. L. Brößler, Strafprozessuale Revision, München 2015, pp. 51-64.

81 A decision by OLG Hamburg of 21 October 2016, 1 Rev 57/16 with a gloss by S. Hüls, StV 2018, no. 3, pp. 145-148. Concerning the justification of the defendant's appearance at the appeal hearing and results of his non-appearance, see the decisions by OLG in: StV 2018, no. 3, pp. 152-153.

82 Strafverteidiger (StV), 2018, no. 1, pp. 1-3.

83 See the rich case-law of the Federal Court of Germany(BGH) in: Strafverteidiger, 2018, no. 1, pp. 3-9, 11-14.

Moreover, the BGH case-law points out that a reason for annulation of a judgment may be conviction of the defendant under different conditions than agreed upon with the defendant (a decision by BGH of 25 October 2016 1 StR 120/15[84]).

As shown by the statistical data, BGH adjudicated a total of 3,208 cases connected with revisions and petitions for interpretation of law in 2017 (2,941 in 2016). This was the highest level in the last nineteen years. Among 3,204 revisions, 194 cases (6%) were adjudicated by a judgment. For 2,872 revisions adjudicated by way of a decision by the criminal chamber, in 105 cases (3.2% of all revisions) total annulment of the judgment was decreed pursuant to Section 349(4) of the StPO; in 445 cases (13.8%),partial annulment was decided pursuant to Section 349(2) and 349(4) of the StPO. The vast majority of revisions (2,292, 71.5%) was dismissed as obviously unsubstantiated pursuant to Section 349(2) of the StPO. In 138 cases (4.3%), the revision was withdrawn or handled otherwise[85].

4. The Russian system

4.1. Appeal proceedings

Until 2013, Russian proceedings used the cassation model, which, prior to the reform (in particular in its "Soviet" model), was criticised in the Russian doctrine as inconsistent with international acts, namely Article 14 of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights and Article 2(1) of Protocol No. 7 to the Convention and Article 50(3) of the Constitution of the Russian Federation, as it did not provide for fair proceedings before a court of second instance[86]. Article 50(3) of the Constitution of the Russian Federation stipulates that anyone convicted for a crime is entitled to have the judgment reviewed by a court of higher instance as per the procedure set out by the federal

84 StV 2018, no. 1, pp. 9-10.

85 BGH: Statistik der Strafsenate 2017, https://www.bundesgerichtshof.de/, accessed on 10 April 2019

86 A. Paniczіewa, Jawliajetsia li pieresmotr ugołownych dieł wo 2-j instancji appiellacjonnym? „Ugołownoje Prawo" 2016, vol. 4, p. 100.

law. Therefore, as a result of the reform of 2013, appeal proceedings adopted the appeal model, which replaced the cassation model[87]. The Russian literature considers the following to be the fundamental traits of appeal proceedings[88]: a) broad scope and freedom of appeal against non-final judgments and other procedural decisions; b) instance appeal against non-final judgments and other procedural decisions; c) revisory procedure of review of criminal cases and materials in appeal proceedings; d) court orders are reviewed with regard to their lawfulness (legal form) and factual grounds (fairness); e) prohibition of worsening of a defendant's situation when the measure of appeal does not originate from the injured or from the public prosecutor. Presently, two forms of appeal exist in Russian proceedings: appeal complaint (*апелляционная жалоба*) lodged by a party, and appeal petition filed against a judgment by the public prosecutor (*представление*); for the purpose of confirming the evidence contained in the measure of appeal, the appellant is entitled to file apetition for the court of appeal to hear the evidence heard by the court of first instance, which must be specified in the appeal complaint or petition, and a list of witnesses, experts and other persons summonable to the court sitting for this purpose must be enclosed. If an appellant in their appeal complaint files a petition for the hearing of evidence that was not heard by the court of first instance (fresh evidence), they are obliged to provide in the measure of appeal the grounds for the inability to present such evidence before the court of first instance (Article 389.6(1[1]) introduced by the Federal Act No 217-ФЗ of 23 July 2013).

A court of appeal verifies the legality, reasonableness and fairness of a sentence, as well as the legality and reasonableness of any other judgment of a court of first instance (Article 389(9)), generally acting within the scope of the appeal and the pleas raised[89]. The appeal may be based on both absolute and relative grounds for appeal (Article 389.

87 C. Kulesza, Postępowanie apelacyjne w procesie rosyjskim po nowelizacji z 2013 r., Białostockie Studia Prawnicze 2018, no. 2.

88 W. Kudriawcewa, W.P. Smirnow, Appiellacjonnoje proizwodstwo w ugołownom processie Rossiji, Moscow 2013, pp. 26-27.

89 B.T. Biezliepkin, Kommientarij k ugołowno-processualnomu kodieksu Rossijskoj Fiedieracji, (13. edition), Moscow 2016, pp. 376-377.

(16)-(17), as well as on the charge of unfair judgment (chiefly with regard to the penalty – Article 389(17))[90].

The Code introduces a rule stipulating that the provisions on proceedings before a court of first instance apply to proceedings before a court of appeal (Chapters 35-39 of the Criminal Procedure Code of the Russian Federation) unless the provisions regulating appeal proceedings stipulate otherwise (Article 389(13)(1) of the Criminal Procedure Code of the Russian Federation). The advantages of appeal proceedings over cassation proceedings chiefly include the right of a court of appeal to directly and orally take evidence as part of new judicial proceedings and to form its own internal opinion on the facts of the case. A court of appeal, regardless of who has filed the appeal complaint or petition, may not repeal a judgment of acquittal and render a convicting judgment by itself, but must instead refer the case to be re-examined by the court of first instance[91].

A court of appeal is not bound by pleas of evidentiary nature of an appeal complaint or petition and may control an evidentiary proceedings to the full extent, whereas in case when an appeal was only brought by some of the convicted persons -it may review the decision in relation to all convicted persons (Article 389(19)(1) and 389(19)(2)).

As pointed out in the case-law of the Plenary Session of the SCRF, this regulation implies that a court of appeal may annul or alter a court decision under appeal in such a situation, in relation to all convicted persons who have been affected by the breach of law, regardless of which one of them has brought the appeal complaint[92].

A condition for deterioration of a defendant's standing in an appeal proceedings is bringing of an appeal by a public prosecutor, a private prosecutor or a civil plaintiff (however, the latter, as indicated above, may only appeal against a court decision in the extent referencing civil action)to the detriment of the defendant.

90 *Ibidem*, p. 456.
91 *Ibidem*, p. 457.
92 Pt. 17 of the decision of the Plenary Session of the SCRF of 17 November 2012, no. 26, quoted after: B.T. Biezliepkin, Kommientarij…, *op. cit.,* p. 455.

Parties are notified of the date of the appeal hearing. Absence of parties properly notified of the date of the appeal hearing does not preclude examination of the case (Article 389(12)(3) of the CCP of the RF). However, in some cases, the code stipulates mandatory appearance of parties at an appeal hearing. In public-complaint cases, the presence of the public prosecutor is mandatory (Article 389(12)(1)(1)). As for the other parties, the code only stipulates their mandatory appearance under specific procedural situations. Namely, in case of a person who was convicted, acquitted or had the procedure towards them discontinued – if they have petitioned for appearance at the hearing or the court deems their appearance obligatory. If the convict is deprived of liberty and petitions for admission to appear at the hearing, he should be enabled to appear directly or via videoconference (Article 389(12)(2)). If a private prosecutor brings an appeal complaint, his appearance at the hearing is mandatory as well (Article 389(12)(1)(3) of the CCP of the RF).

On the other hand, appearance of a defender at an appeal hearing is mandatory in situations described in Article 51, which provision stipulates obligatory defence in such situations as when the defendant is a minor, when the defendant cannot assume the defence on his own due to his physical or mental ailment, or when the defendant does not speak the language in which the trial is conducted(Article 389(12)(1)(4)in conjunction with Article 51(1)(2), 51(1)(3) and 51(1)(4) of the CCP of the RF).

This literature stresses the fact that, pursuant to Article 123(1) of the Constitution of the RF, examination of cases in all courts is open, and it is only allowed in camera in cases stipulated by federal law (the issue of closing to the public is regulated by Article 241 of the CCP of the RF). On the other hand, the delivery of a judgment is always open, yet in a case closed to the public, the delivery of a judgment is only open concerning its recitals and operative part (Article 241(7) of the CCP of the RF).

Essentially, the Code does not introduce any restrictions concerning the scope of evidentiary proceedings (excluding the evidence preclusion from Article 389(13)(6)[1] – as mentioned further), and parties may submit additional materials at an appeal hearing in order to support

or challenge the evidence included in the appeal complaint or appeal petition (Article 389(13)(4)). A court of appeal may summon and hear the witnesses already heard by the court of the first instance if it deems it necessary (Article 389(13)(5)of the CCP of the RF).

In an appeal, as well as at an appeal hearing, parties can submit motions as to evidence to summon witnesses or experts, to issue a written expert's opinion, or to submit material evidence and documents which have not been examined in the first instance (fresh evidence).

A motion as to evidence should include substantiation, and the court of appeal makes a decision concerning the motion upon hearing the stances of the parties (Article 271(1)-(2) of the CCP of the RF). However, a court of appeal cannot dismiss a motion as to evidence based solely on the fact it has not been recognized by the court of the first instance (Article 389(13)(6)).

A manifestation of evidence preclusion in an appeal proceedings is the regulation introduced in 2013, stipulating that evidence which has not been examined before the court of the first instance shall be examined by a court of appeal if a person petitioning for admission thereof has substantiated the impossibility of submitting thereof before the court of the first instance for reasons beyond this person's control, and the court deems such reasons substantiated (Article 389(13)(6[1]) of the CCP of the RF).

The grounds for appeal for annulment or alteration of a decision by a court of the first instance may be:

1) a discrepancy between the court's conclusions included in the judgment and factual circumstances of the case, as determined by the court of appeal instance in cases described in Article 389(16) items 1-4 of the CCP of the RF;
2) severe violation of rules of procedure having a nature of relative causes of appeal – Article 389 (17)(1) of the CCP of the RF, as well as absolute causes of appeal – Article 389 (17)(2) of the CCP of the RF;
3) improper application of provisions of substantive criminal law – Article 389(17) items 1-3 of the CCP of the RF;

4) unfairness of the judgment (tantamount to unfairness of the penalty) – Article 389 (18)(2) of the CCP of the RF.

A court of appeal – pursuant to Article 389(20)(1) of the CCP of the RF – may issue the following kinds of decisions:

1) upholding of the judgment, decision or order under appeal if, following examination of the case in the second instance, the decision under appeal is determined to be lawful, justified and fair and there are no premises for discontinuation of the proceedings[93]. The remaining decisions are specified by separate articles of the CCP (Article 389(21) to 389(27) of the CCP of the RF);
2) annulment of the sentence and acquittal of the defendant;
3) annulment of the sentence and issuance of another sentence;
4) annulment, during the preparation for an appeal session or hearing, of the judgment, decision or order of the court of the first instance under appeal and referral of the case back to the court of the first instance[94]on annulment of the acquittal and issuance of a sentence;
5) annulment of the decision or order and issuance of an acquittal or another court decision(this point, in the wording of the federal act of 23 July 2013, No 217-Ф3);
6) annulment of the judgment, decision or order and remission of the case to the public prosecutor[95];
7) on annulment of the judgment, decision or order and discontinuation of the proceedings[96];

93 *Ibidem*, p. 456.
94 The premise of this decision – inability to remove the breaches of law by the court of appeal – and the procedure of implementation thereof is described in Article 389 (22) par.1 and 2.
95 If circumstances mentioned in Article 237(1)(1) are revealed, i.e. if during statement of the charges or drawing up or bringing of the indictment such breaches of the CCP have taken place that the court cannot pass a judgment or a different decision on the basis of such procedural decisions, see: W. Kalnickij, T. Kuriachowa, Obstojatielstwa, wliekujuszczije wozwraszczienije ugołownowo dieła prokuroru w sistemie osnowanij otmieny sudiebnych rieszenij w kassacionnom i nadzornom proizwodstwach, „Ugołownoje Prawo" 2016, no. 3, pp. 110-113.
96 A decision on annulment of the judgment under appeal and discontinuation of a court procedure is issued in case of occurrence of negative procedural premises described in Articles 24, 25, 27, and 28 of the Code of Criminal Proceedings of the RF (Article 398 (21) of the CCP).

8) on alteration of the judgment or another decision under appeal;

9) on discontinuation of the appeal proceedings.

In cases specified in items 1-4 and 7-10 of Part I of Article 389, a court of appeal issues an order or a decision. In cases specified in items 2, 3, 5, the court of appeal issues a judgment, whereas in cases specified in item 6, the court issues a judgment, an order or a decision.

As pointed out in the Russian literature, taking account of wide powers of a court of appeal in the area of evidentiary proceedings and making of own factual findings (intended to fulfill the stipulation of resolution of a case within a reasonable period of time – Article 6(1) of the ECHR) the possibility of cassation adjudication should be excluded; however, the Russian legislator retained such possibilities in Article 389(17)(1)and Article 389(22)(1) of the CCP of the RF. As a result, courts of appeal may exercise the possibility to annul a court decision and refer the case back, even when they could correct the errors of the court of the first instance on their own account[97].

In particular, it is noted that observation of an error in factual findings in an appeal procedure, made by the court of the first instance, cannot constitute remission of the case for reexamination, since a court of appeal may determine the factual state of the matter a new and issue an alteration decision[98].

After a 2013 amendment, a court judgment passed on the basis of a verdict by a jury may be appealed if it was only subject to cassation control under the previous legal status[99].

97 A. Kudriawcewa, D. Dik, Połnomoczija suda appiellacionnoj instancji w ugołownom sudoproizwodstwie, „Ugołownoje Prawo" 2018, no. 2, pp. 115- 122.

98 *Ibidem*, p. 121. See also: W. Kalnickij, T. Kuriachowa, Obstojatielstwa, wliekujuszczije wozwraszczienije ugołownowo dieła prokuroru w sistemie osnowanij otmieny sudiebnych rieszenij w kassacionnom i nadzornom proizwodstwach, „Ugołownoje Prawo", 2016, no. 3, pp. 110-113.

99 Concerning the institution of jury courts in Russia, see: C. Kulesza, Udział czynnika społecznego w orzekaniu w perspektywie historyczno-prawnoporównawczej, „Białostockie Studia Prawnicze" 2017, vol. 21.

4.2. Cassation procedure

Bringing of a cassation complaint against a valid court decision is a power of persons mentioned in Article 401² (1) of the CCP of the RF, namely, the convict, the acquitted, their defenders and legal representatives, the injured party, a private prosecutor, their statutory representatives, as well as other persons to the extent that the court decision violates their rights and legal interests. A civil plaintiff, a defendant, or their legal representatives may only appeal against a court decision to the extent referencing a civil claim.

On the other hand, a cassation petition against a valid court decision may be submitted by the Prosecutor General and his deputies, heads of federal prosecutor's offices as well as heads of their corresponding military prosecutor's offices (Article 401² (1) of the CCP of the RF).

Cassation complaints and petitions may be submitted directly to cassation courts within one year since the moment when the court decision under appeal has become final. The functional competence of cassation courts is determined by Article 401³ (2), the grounds for cassation – by Article 401(15), and the kinds of decisions by a cassation court – by Article 401(13). A cassation court is not bound by pleas of evidentiary nature of a cassation complaint or petition and may review an evidentiary proceedings to the full extent, and if the cassation was submitted only by some of the convicted people, it may review the decision with regard to all of them (Article 401(16), par. 1 and 2).

On the other hand, chapter 48¹ of the CCP of the RF applies to supervisory proceedings conducted by the Presidium of the Supreme Court of the RF as a result of supervisory complaints and petitions brought by the authorized subjects indicated above, as specified in Article 401²(1) and 401²(2), if they have exhausted all the hitherto appeal and cassation remedies (see Article 412¹(1) of the CCP of the RF). As in case of cassation, the only criterion of supervisory review is the compliance of the final decisions under appeal with the law, whereas the catalogue thereof is specified in Article 412¹(3) of the CCP of the RF. A preliminary review of a supervisory complaint and a supervisory petition is exercised personally by a judge of the Presidium of the SCRF who, in the event of lack of grounds on which a supervisory complaint

or petition must be based (material violations of substantive law or law of criminal proceedings, affecting the result of the case – Article 412 (9) leaves this extraordinary remedy at law without examination. In case of a positive result of the review, the judge refers the case for examination to a session of the Presidium of the SCRF[100]. The kinds of decisions of the supervisory court (passed in the form of a decision or an order) are specified by Article 412 (14) of the CCP of the RF)[101].

A manifestation of the *reformationis in peius* prohibition in a cassation and supervisory proceedings is a regulation stipulating that if several defendants have been convicted or acquitted, a cassation or supervisory court cannot annul a judgment, order or decision to the detriment of those convicted or acquitted to whom the extraordinary remedy at law has not applied (respectively, Article 401(16)(5) and Article 412 (29) (2) of the CCP of the RF)[102].

4.3. Fairness of trial in the case-law of the Presidium of the Supreme Court of the Russian Federation

In order to ensure unified standards of application by the courts of general jurisdiction of the ECHR and the Protocols thereto ratified by the Russian Federation, the Plenary Session of the Supreme Court of the Russian Federation, on the basis of Article 126 of the Constitution of the Russian Federation issued on 27 June, 2013 rules to the courts[103]. The main thesis concerning right to appeal are as follows:

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100 It is worth mentioning that a negative decision by a single judge may be altered by the President of the Presidium of the SC or his deputies who will then refer the case for examination to a session of the Presidium (Article 412 (5) par. 3).

101 See e.g.: W. Kalnickij, T .Kuriachowa, Obstojatielstwa…, *op. cit.,* pp. 110-115.

102 More broadly about a supervisory proceedings before the Presidium of the SCRF after the 2013 amendment see: B.T. Biezliepkin, Kommientarij…, *op. cit.,* pp. 493-501 and the case-law of the SCRF presented therein.

103 Ruling of the Plenary Session on the Supreme Court of the Russian Federation no. 21: "On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by Courts of General Jurisdiction", Moscow, 27 June 2013, http://www.supcourt.ru/en/rulings_plenum/2013/ (accessed on 1 June 2019). See also Ruling of the Plenary Session on the Supreme Court of the Russian Federation no. 51 "On Application of Legislation in Consideration of Criminal Cases in a Court of First Instance (General Manner of Proceedings)", Moscow, 19 December 2017, http://www.supcourt.ru/en/rulings_plenum/2017/ (accessed on 1 June 2019).

– "As follows from the provisions of Item 2 of Part 1 of Article 389 (12) of the CCrP RF, Article 6 § 1 of the Convention as interpreted by the European Court, a court of appeal is not entitled to examine a criminal case in absence of a person convicted to imprisonment if only the person does not distinctly state his/her willingness not to participate in examination of the appeal (submission). If a person wishes to waive his/her rights and freedoms it may be evidenced by absence of any action on his part, if such absence of action is regulated by law"(pt.10);
– "In compliance with Article 6 (3)(c) of the Convention as interpreted by the European Court the defendant has the right to effectively protect himself/herself personally or through a personally chosen legal assistance. The first-instance courts, courts of appeal, courts of cassation or supervisory instance must give an exhaustive explanations on the content of this right as well as to provide for its implementation in compliance with the Russian Federation legislation"(pt.13).

In its case-law, the Presidium of the SCRF pays much attention to the right to defence, the breach of which may constitute not only legitimate grounds for appeal but also significant grounds for cassation or annulment of a valid judgment or another valid court decision in a supervisory proceedings conducted before this Presidium. This problem has been handled in Resolution no. No 29 by the Presidium of the SCRF of 30 June 2015,"On the practice of application by courts of legislation guaranteeing the right to defence in a criminal court proceedings"[104]. As indicated in thesis 1 of this resolution, „The CCP of the RF constitutes a legal form of reconciliation of social contradictions occurring in a court procedure". The Supreme Court pointed out that this act was intended to abolish the relics of the Soviet procedure from the modern criminal proceedings and to establish a system of criminal-procedural guarantees of the right to defence. The Supreme Court also referenced the case-law of the Constitutional Court of the Russian Federation, requiring a citizen

104 See: T. Władykina, Kommientarij k postanowlieniju Plienum Wierchownowo Suda „O praktikie primienienija sudami zakonodatielstwa obiezpiecziwajuszczіewo prawo na zaszczitu w ugołownom sudoproizwodstwie", „Ugołownoje Prawo" 2016, no. 4, pp. 93-100 and the case-law of the SCRF presented therein.

to be provided with a constitutional right to defence, regardless of the citizen's formal status in a criminal proceedings.

In thesis 2, the Presidium of the Supreme Court has stressed the importance of the information about rights and obligations, provided to a suspect and a defendant by procedural authorities as a guarantee of their right to defence[105].

The further part of the resolution points out the appropriate use by courts of appeal of regulations concerning appearance of defendants deprived of liberty in appeal hearings by way of videoconferences (at their request) as an indirect form of exercise of the right to defence. It has been stressed that a videoconference does not fulfill the requirements of guarantees of the right to defence (in particular, in a situation of obligatory defence) if the defendant cannot refer to the prosecutor's stance and cannot benefit from the defender's effective assistance. It has also indicated the importance of appropriate time for preparation for defence in an appeal proceedings as well as ensuring of the equilibrium between the achievement of the goals of the trial and the guarantees of the right to defence. The SCRF also stressed that defence of several defendants whose interests remain contradictory by the same defender violates the effective right to defence in an appeal proceedings[106].

III. Final conclusions

European justice systems have assumed different models of appeal and cassation proceedings, which have to meet the fair trial criterion. As indicated in the ECtHR case-law, Article 6 of the ECHR does not oblige the parties to establish courts of appeal or cassation courts, but if a State being a party to the Convention decides to introduce such courts, it must ensure the observance of the guarantees mentioned in Article 6 during a proceedings before such courts[107]. In the case-law analyzed in the present study, the ECtHR points out the necessity to preserve the equilibrium between the ensuring of enforcement of court decisions on

105 *Ibidem*, pp. 93-95.
106 *Ibidem*, pp. 96-100 and the case-law of the SCRF presented therein.
107 ECtHR judgment of 17 January 1970 r., application no. 2689/65, Delcourt vs. Belgium, § 25.

the one hand and the guaranteeing of the right of access to court and the rights of defence on the other hand. Another subject of the study of the ECtHR was the fairness of evidentiary proceedings before a court of appeal, particularly in case when the court of appeal assesses the factual state differently and, in lack of new evidence, alters the judgment to the detriment of the defendant. This case-law also references the compliance of restrictions in appeal against judgments passed as a result of procedural agreements with the fair trial principle. The discussion in the further part of the study covers the appeal systems of England and Wales (including the case-law of the Court of Appeal of England and Wales as well as the Supreme Court of the UK), the German system (including the case-law of the Federal Court of Germany and Courts of Appeal), as well as the appeal system of the Russian Federation (including the case-law of the Presidium of the Supreme Court of Russia). The UK and Germany have not ratified the Protocol 7 to the ECHR, establishing the minimum requirements for an appeal proceedings. However, the conducted analysis permits a conclusion that both the appeal system of England and Wales and the appeal and revision system of Germany essentially meet the fair appeal proceedings standards as elaborated by the ECtHR. Also the appeal and cassation system of Russia which has ratified this protocol appears to meet the convention standard in this regard.

Summarising the above deliberations, one must keep in mind that the appeal systems applicable in the criminal justice systems described are intrinsic to the main trial models: whereas in England and Russia, a court of first instance uses the adversarial trial models, where the outcome of a trial depends upon the activity of the litigant parties, German proceedings use a mixed inquisitorial-adversarial model, where a court is obliged *ex officio* to seek the material truth and uses initiative in the matter of evidence during the trial[108].

108 C. Kulesza, Kontradyktoryjność postępowania odwoławczego w świetle projektu nowelizacji kodeksu postępowania karnego Komisji Kodyfikacyjnej z dnia 8 listopada 2012 r. (druk sejmowy no. 870), (in:) P. Wiliński (ed.), Kontradyktoryjność w polskim procesie karnym, Warszawa 2013, pp. 105-117.