ORCID: 0000-0002-1639-3975

Adrianna Niegierewicz[1]

EVIDENTIARY PROCEEDINGS IN THE APPEAL INSTANCE IN THE LIGHT OF RESEARCH FINDINGS[2]

1. Introduction

The goal of this study is to analyze the scope of evidentiary proceedings before courts of appeal (regional and appelate) based on results of file and questionnaire research conducted by the investigators under the scholarly project "*Is the Polish model of criminal appeal proceedings fair?*" (competition "OPUS 8"), financed by the National Science Centre in accordance with Contract no. UMO-2014/15/B/HS5/02689.

The intent of the Author of the study is, primarily, to outline the significant elements in the area of the subject matter of evidentiary proceedings before courts of appeal, and subsequently, to show the effect of the changes brought into the criminal procedure by the recent amendments – i.e. the amendment of the Code of Criminal Procedure of 1 July 2015 (introduced by Act of 27 September 2013 and Act of 20 February 2015[3]) and the amendment of 15 April 2016 (introduced by the Act of 11 March 2016 [4]) – on the practical functioning and assessment of such individual elements.

The goal of the study was determined by a research hypothesis formulated within the general assumptions of the research grant

1 The Department of Criminal Procedure of the Faculty of Law of the University of Białystok.

2 This article was written within the framework of the project under the title: "Is the Polish model of the criminal appeal proceedings fair?" (programme „OPUS 8") founded by the National Scientific Center, according to the agreement no. UMO-2014/15/B/HS5/02689.

3 Act of 27 September 2013 amending the Act – the Code of Criminal Procedure and certain other acts, Journal of Laws 2013, item 1247, as amended and Act of 20 February 2015 amending the Act – the Code of Criminal Procedure and certain other acts, Journal of Laws 2015, item 396, as amended, which came into effect on 1st July 2015.

4 Act of 11 March 2016 amending the Act – the Code of Criminal Procedure and certain other acts, Journal of Laws 2016, item 437, as amended, which came into effect on 15th April 2016.

mentioned above, generally contained in the claim that the criminal procedure reform which came into force on 1 July 2015 and 15 April 2016 while introducing qualitative changes in the Polish model of appeal proceedings, has not affected the practice of Polish appeal proceedings before courts of appeal.

This study will also approach such issues as: the effect of the change of the model on the functioning of the appeal proceedings, actual possibilities of conducting of appeal proceedings, the powers of courts of appeal in the area of enquiry in an appeal proceedings, the scope of adjudication. These issues will be analyzed on the basis of research results showing evaluation thereof by judges of courts of appeal (questionnaire surveys), as well as on the basis of file research showing the actual situation.

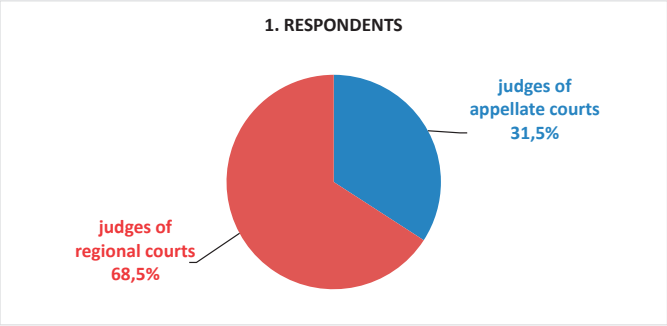
2. Basic methodological assumptions

As indicated above, a questionnaire survey has been conducted among judges of common courts (courts of appeal) under this project. As a part thereof, a survey questionnaire titled "The model of fair appeal proceedings in the Polish criminal procedure" has been drawn up and subsequently sent to all courts of appeal with a request for judges of criminal appeal divisions to complete it. The goal of the survey was to obtain knowledge of the current practice before courts of appeal and to learn the judges' opinions on the changes in appeal proceedings, including changes concerning evidentiary proceedings in this instance.

The survey questionnaire was directed once, and the data obtained from the survey will be supplemented and compared with the file research conducted by the investigators. The questionnaire consisted of two parts. The first one included 20 substantive, closed single-choice questions. The second one included personal-background questions concerning the workplace (regional or appellate court) and the experience of work at a court of appeal.

In total, the questionnaire survey was performed on a sample of 143 judges, of which 68.5% were judges of regional courts, and 31.5% were judges of appellate courts, as shown below in Fig. 1 – Workplaces of the surveyed.

Figure no. 1. Workplaces of the surveyed



Source: Authors' own study.

Concerning the work experience, 4.9% of the surveyed served as judges for a period below one year, 10.5% worked as judges for a period between 1 year and 5 years, and 13.3% of the surveyed served between 6 and 10 years; most surveyed performed this function for 11-15 years; moreover, a high percentage performed it for 16-20 years (18.2%), and slightly more of the surveyed acted as judges for above 20 years (23.1%), as shown below in Fig. 2 – Work experience of the surveyed. Individual issues subject to analysis in this study will be accompanied with presented opinions of judges with short work experience (1-5 years of work – due to a more representative number of the surveyed with short experience) as well as the most experienced ones, i.e. with work experience exceeding 20 years, comprising a relatively high percentage of the surveyed.

Table no. 1. Work experience of the surveyed judges

Work experience	%
less than year	4,9
1-5	10,5
6-10	13,3
11-15	30,1
16-20	18,2
more than 20 years	23,1

Source: Authors' own study.

Sometimes, individual data from the conducted questionnaire survey will also be presented with consideration to the workplace and work experience of the surveyed.

The study will also present data on appeal proceedings, resulting from the conducted file research.

The research covered a total of 595 cases concluded with legal validity, from three appeal jurisdictions: Łódź, Białystok and Warsaw. The appeals were related to judgments passed by regional courts, appealed against before an appellate court, and subsequently, upon examination of the appeal, referred back to the court of the first instance between 1 January 2016 and 31 December 2018.

The data from the file research will be presented broken down into cases examined under the old appeal model and under the new appeal model, in order to show the differences between appeal proceedings before a court of appeal under the old and new model.

This division has been assumed on the basis of the content of a resolution by a panel of seven Supreme Court judges of 29 November 2016 (ref. no. I KZP 10/16), assuming that in cases conducted after 14 April 2016, in which the indictment, motion for passing of a sentence, motion for conditional discontinuance of a proceedings, or motion for discontinuance of preparatory proceedings and adjudication of a detention order was directed to the court before 1 July 2015, the applicable regulations governing the course of criminal proceedings will be those introduced by Act of 11 March 2016 (*Journal of Laws* 2016, item 437), i.e. generally new regulations. In view of the fact that this resolution has a power of a principle of law, the investigators have assumed the division of cases into the so-called "old" appeal model and the "new" appeal model:

1) cases in which the judgment by the Appellate Court was passed before 15 April 2016 (the "old" appeal model);
2) cases examined pursuant to the legal status of 15 April 2016, if the judgment by the Appellate Court was passed after 15 April 2016, (the "new" appeal model).

According to this breakdown, 363 cases (85 from the Warsaw appeal jurisdiction; 119 from the Białystok jurisdiction; 159 from the Łódź jurisdiction) were examined under the new legal status (i.e. after 15 April 2016), whereas 232 cases (94 from the Warsaw appeal jurisdiction; 93 from the Białystok appeal jurisdiction; 45 from the Łódź appeal jurisdiction) were examined under the old legal status (i.e. before 15 April 2016).

3. Changes in the model and the evidentiary proceedings before a court of appeal

The amending act of 27 September 2013, coming into effect on 01 July 2015, significantly remodelled the proceedings before a court of appeal. Therefore, the legislator's goal was to transfer the responsibility for errors made by the court of the first instance to the court of appeal by enabling it to remedy the errors of the court *a quo*, utilizing the possibility to conduct evidentiary proceedings before a court of appeal. On the other hand, a legislative measure of significance for the appeal proceedings model was carried out by the act of 11 March 2016. The inquisitorial nature of evidentiary proceedings before a court of the first instance was combined with the appeal model of appeal proceedings[5]. As indicated in the substantiation for the bill, the goal of the amendment was to "modify the model of criminal procedure towards restoration of a more active role of a court during the course of a proceedings, aimed at ensuring the maximum degree of compatibility of factual findings in the perspective of the material truth principle, as well as increasing the efficiency of prosecution. The proposed reform assumes a return to the model of criminal procedure preserving the superiority of material truth, in which the adversarial principle comprises one of the procedural principles facilitating reaching the truth"[6]. With thus determined goal of the amendment which had been, in fact, a partial reversal of the reform introduced by the Act of 27 September 2013 (*Journal of Laws* 2013, item 1247), known as the July amendment, interesting remarks have been made concerning the model of proceedings before a court of the second

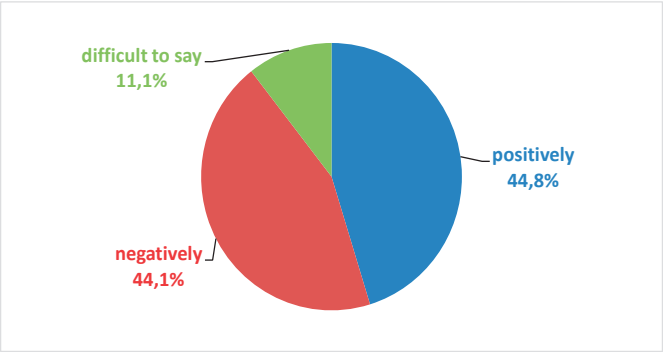
5 C. Kulesza, P. Starzyński, *Postępowanie karne*, Białystok 2018, p. 343.

6 *Substantiation for the bill of the Act of 8 January 2016 on the amendment of the Code of Criminal Procedure Act as well as certain other acts by the Sejm of the Republic of Poland of the 8th term*], Parliamentary Document no. 207.

instance; in particular, in the area of examination of evidence and passing of a specific decision. Restoring elements of the inquisitorial system in the model of the main hearing, the legislator has preserved the appeal/amendment model of appeal proceedings, since it was determined that an unquestionable advantage of this model consists in providing the court of appeal with appropriate conditions for substantive examination of a case, which enables the court to amend decisions. Thus, the legislator has deemed the direction of changes determined by the July amendment to be appropriate.

It should be noted that, as shown by questionnaire survey, 71.3% of judges have assessed the introduced changes as significant for the model of appeal proceedings, 16.1% have indicated that the changes were not significant, and 12.6% of the surveyed have chosen the answer "difficult to say". However, the significance of the introduced changes does not affect the judges' assessment of the issue of expansion of the possibility of conducting of evidentiary proceedings by a court of appeal. Although the change through expansion of the possibility of conducting of evidentiary proceedings by the court *ad quem* may be deemed significant, it will not always be considered a positive change. Detailed data in this regard are shown in the following Fig. 2.

Figure no. 2. The opinion of judges concerning the expansion (author's emphasis) of the possibility of conducting of evidentiary proceedings by a court of appeal

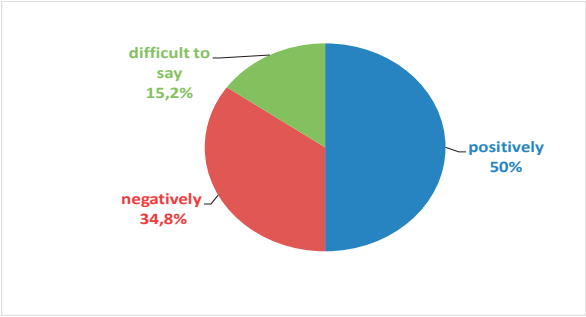


Source: Authors' own study.

The obtained result leads to a conclusion that judges are divided almost evenly in their opinion on their powers to adduce evidence under the amended appeal model, since a similar number of the surveyed judges have assessed the expansion of the possibility of conducting of evidentiary proceedings by a court of appeal positively (44.8%) and negatively (44.1%).

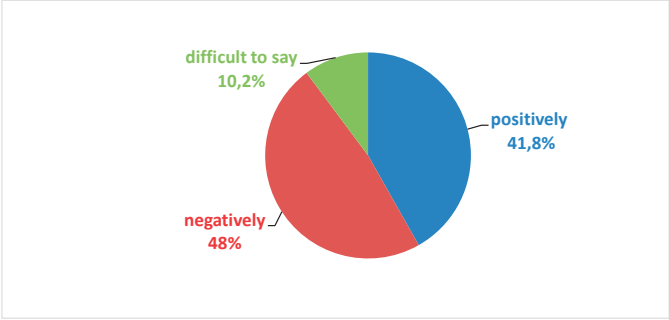
The results of the analysis of the judges' answers depending on the type of court in which they have adjudicated are slightly different, as shown by Figs. 3 and 4 below.

Figure no. 3. The opinion of appellate court judges concerning the expansion of the possibility of conducting of evidentiary proceedings by a court of appeal



Source: Authors' own study.

Figure no. 4. The opinion of regional court judges concerning the expansion of the possibility of conducting of evidentiary proceedings by a court of appeal

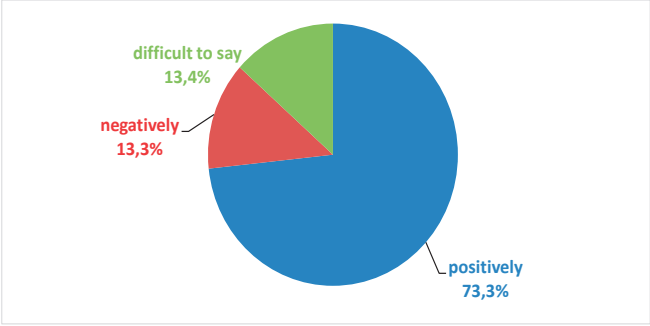


Source: Authors' own study.

The majority (50%) of appellate court judges have assessed the change of the possibility of conducting of evidentiary proceedings by a court of appeal positively, and the minority have considered it to be a negative change (34.8%), whereas a part of the surveyed (15.2%) gave the answer "difficult to say". The proportions of answers by judges of appellate divisions of regional courts were opposite: most of them deemed the change under consideration negative (48%), and a slight minority (41.8%) have considered it positive, whereas a part of the surveyed (10.2%) answered "difficult to say".

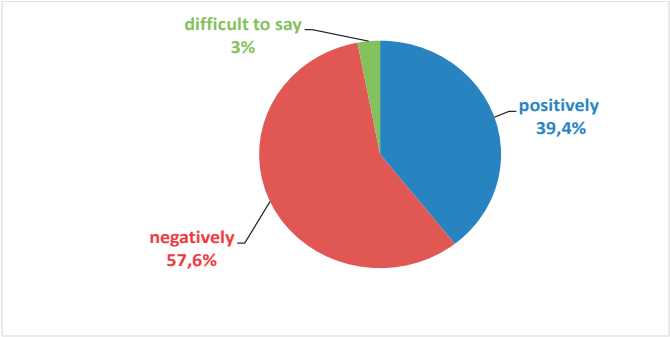
An interesting relation can also be noticed when analyzing the answers of the surveyed considering the criterion of their work experience, as shown by Figs. 5 and 6.

Figure no. 5. The opinion of judges with short work experience (1-5 years) concerning the expansion of the possibility of conducting of evidentiary proceedings by a court of appeal



Source: Authors' own study.

Figure no. 6. The opinion of judges with long work experience (above 20 years) concerning the expansion of the possibility of conducting of evidentiary proceedings by a court of appeal



Source: Authors' own study.

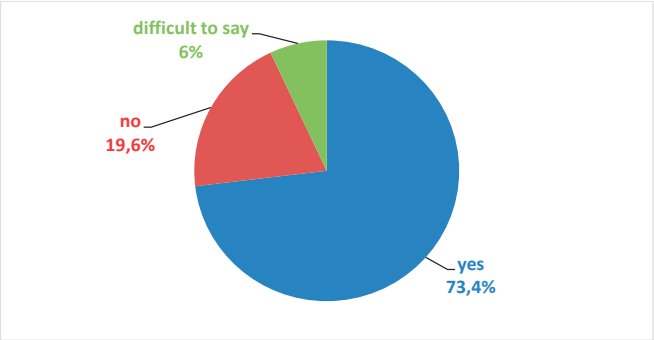
Judges whose work experience was not very long (1-5 years) have assessed this change positively (73.3%), a small minority of them have deemed it negative (13.3%), and a small portion of the surveyed (13.4%) answered "difficult to say". On the other hand, the most experienced judges whose work experience exceeded 20 years have predominantly deemed it a negative change (57.6%), and a minority of them have considered it to be positive (39.4%), whereas only 3% of the surveyed have answered "difficult to say".

Overall, as shown by the diagrams above, a very similar number of the surveyed assessed the expansion of the possibility of conducting of evidentiary proceedings by a court of appeal positively (44.8%) and negatively (44.1%). However, when analyzing opinions depending on the workplace and work experience, these proportions are distributed differently. The majority of appellate court judges have expressed a positive opinion (50%), whereas regional court judges, on the contrary, expressed a negative one (48%). Moreover, there is no connection between the workplace and work experience of judges concerning their attitude to the changes in the area of evidentiary proceedings in the appeal instance; this relation is inverse, since the majority of appellate court judges whose work experience is typically the longest

have expressed a negative opinion (57.6%), whereas the vast majority of regional court judges whose work experience is typically shorter have expressed a positive opinion (73.3%).

Keeping in mind the legislator's aspiration to extend the evidentiary proceedings, as well the amendments to the Code of Criminal Procedure made in this regard (the general assessment of which was the subject of the previous question, and the results were presented above), the surveyed were asked whether, in their opinion, a court of appeal, based on the current wording of the provisions of the Code of Criminal Procedure, has sufficient possibilities to conduct evidentiary proceedings. This is a more detailed question, referencing individual regulations included in the code, affecting the judicial practice. Answers to this question are shown in Fig. 7.

Figure no. 7. The judges' opinion concerning the possibility (author's emphasis)
of conducting of evidentiary proceedings before a court of appeal



Source: Authors' own study.

Most judges claim they currently have sufficient possibilities to conduct evidentiary proceedings (73.4%). Only 19.6% of the surveyed have answered that their powers in this regard are insufficient, and 6% had difficulties addressing this question. This trend also persists when broken down by the criterion of workplace and work experience (Figs. 8-11).

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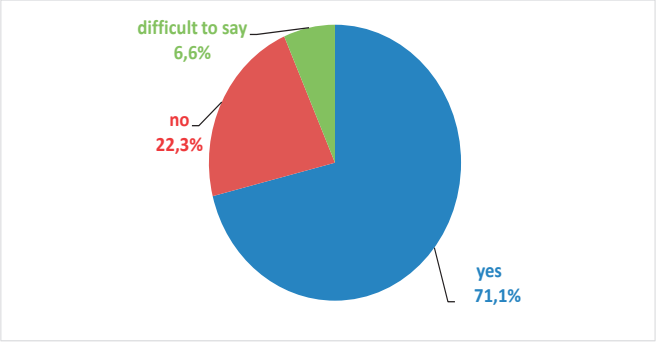
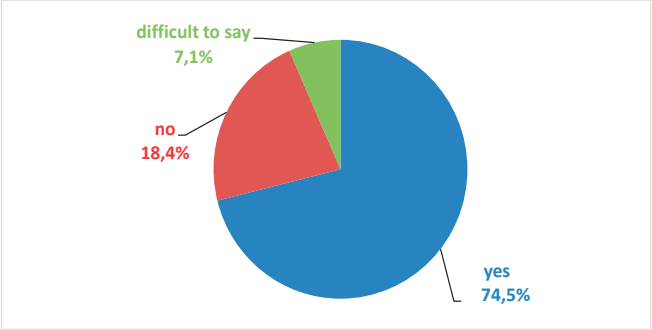
Figure no. 8. Opinion of appellate court judges concerning the possibility to conduct evidentiary proceedings before a court of appeal



Source: Authors' own study.

Figure no. 9. Opinion of regional court judges concerning the possibility to conduct evidentiary proceedings before a court of appeal



Source: Authors' own study.

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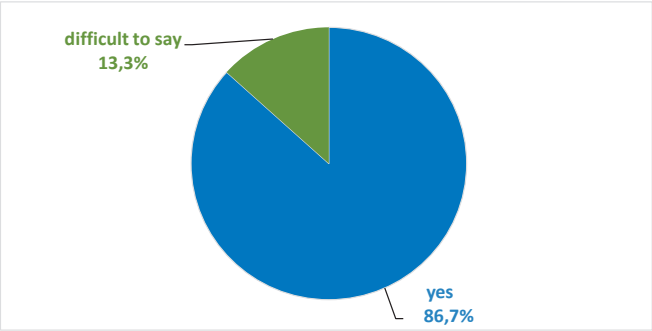
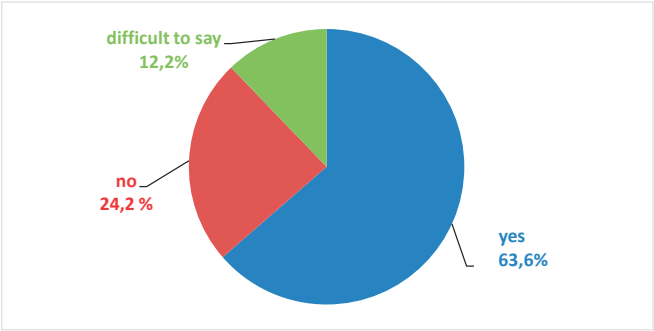
Figure no. 10. Opinion of judges with short work experience concerning the possibility to conduct evidentiary proceedings before a court of appeal



Source: *Authors' own study*.

Figure no. 11. Opinion of judges with long work experience concerning the possibility to conduct evidentiary proceedings before a court of appeal



Source: *Authors' own study*.

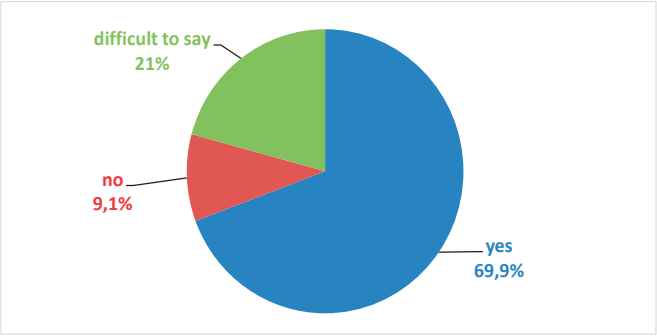
The majority of appellate court judges have also answered that they have sufficient possibilities to conduct evidentiary proceedings (71.1%), while 22.3% of the surveyed answered that their powers in this regard are too narrow (6.6% have no opinion in this regard). Regional court judges have also predominantly assessed they had sufficient possibilities

to conduct evidentiary proceedings (74.5%), whereas 18.4% answered their powers in this regard are insufficient (and 7.1% have no opinion in this regard). The majority of judges with short work experience (1-5 years) have considered their possibilities to conduct evidentiary proceedings to be sufficient (86.7%), nobody answered that their possibilities are insufficient, and 13.3% gave the answer "difficult to say". Judges whose work experience exceeded 20 years have also predominantly deemed their possibilities sufficient (63.6%), whereas 24.2% considered them insufficient, and 12.2% of the surveyed marked the answer "difficult to say".

In case of this question, it can be noted that all of the surveyed, regardless of the criteria of workplace and work experience, have stated that the court of appeal has sufficient possibilities to conduct evidentiary proceedings.

The following question asked to the surveyed pertained not to the possibilities given by the legislator to courts of appeal in the area of conducting of evidentiary proceedings but to practical application of such possibilities. The answers of the surveyed are shown in Fig. 12.

Figure no. 12. The judges' opinion concerning practical application (author's emphasis) of the extended possibilities of conducting of evidentiary proceedings



Source: Authors' own study.

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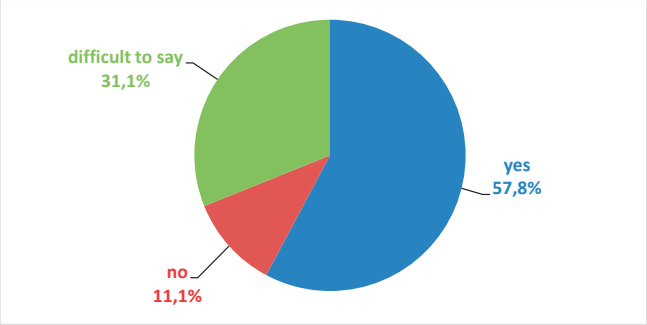
The surveyed have answered predominantly that courts of appeal make use of the extended possibilities of conducting of evidentiary proceedings (69.9%). Only 9.1% have stated that the courts do not use their granted powers, whereas 21% have answered "difficult to say". It can already be noted now that the obtained results contradict the results of the file research as presented further, showing that courts of appeal seldom make use of the extended possibilities of conducting of evidentiary proceedings. This result also contradicts the results of questionnaire surveys concerning *ex officio* examination of evidence (which will be mentioned in the further part of the study).

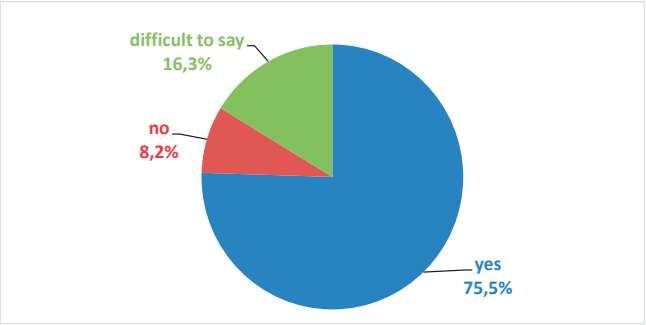
The general trend concerning the affirmative answer to the question formulated above also persists with the criterion of division by workplace – yet the percentage result looks slightly different for judges of appellate courts and of regional courts – as well as when broken down by work experience (Figs. 13-16).

Figure no. 13. Opinion of appellate court judges concerning practical application of the extended possibilities of conducting of evidentiary proceedings



Source: Authors' own study.

Figure no. 14. Opinion of regional court judges concerning practical application of the extended possibilities of conducting of evidentiary proceedings

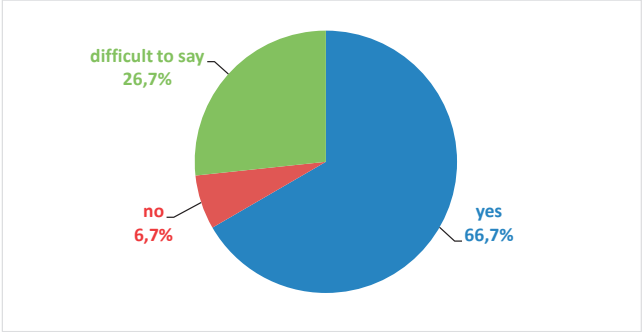


Source: Authors' own study.

57.8% of appellate court judges have stated they made use of the powers they have been granted, whereas 11.1% have deemed these possibilities are not used, and as much as 31.1% of the surveyed have no opinion in this regard. Definitely more firm answers were given by regional court judges, as much as 75.5% of them indicating that they make use of such possibilities. Just 8.2% of the surveyed gave a negative answer, and 16.3% answered "difficult to say".

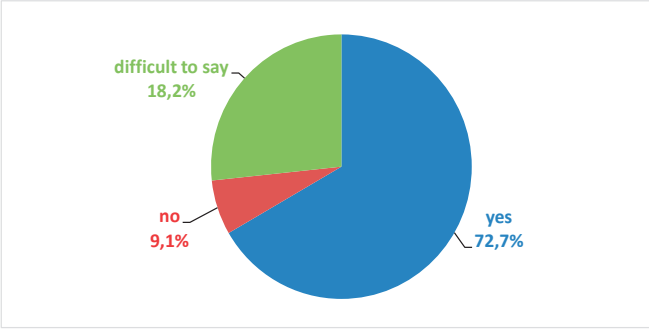
As shown by the diagrams below (Fig. 15-16), this trend is also preserved when the respondents are broken down by work experience. The majority (66.7%) of judges with a relatively short work experience (1-5 years) have stated that the possibilities of conducting of evidentiary proceedings, as broadened by the reform, are used, and a small minority have deemed them not to be used (6.7%), whereas a relatively high percentage of the surveyed answered "difficult to say" (26.7%). On the other hand, the majority of the most experienced judges, whose work experience exceeded 20 years, have stated that the extended possibilities of conducting of evidentiary proceedings are used (72.7%); a small minority have deemed them not to be applied (9.1%), and a small portion of the surveyed gave the answer "difficult to say" (18,2%).

Figure no. 15. Opinion of judges with short work experience concerning practical application of the extended possibilities of conducting of evidentiary proceedings



Source: *Authors' own study*.

Figure no. 16. Opinion of judges with long work experience concerning practical application of the extended possibilities of conducting of evidentiary proceedings



Source: *Authors' own study*.

4. Evidence activity of parties

Under the appeal proceedings model currently in force, any possible errors, resulting either from actions or omissions by parties to the

proceedings or by insufficient activity of the court of the first instance, can and should be remedied through appropriate actions taken by the parties and by the court of appeal authorized to examine evidence and to amend decisions on its basis. This action includes, among other things, evidence activity of parties (motions as to evidence) and the court's initiative to adduce evidence.

Moving to the analysis of actual evidence activity before courts of appeal (appellate courts), it should be noted from the outset that the file research shows that the evidence activity of parties to a proceedings in an appeal proceedings is relatively low. A table considering the evidence activity of parties, divided by model before and after 15 April 2016, is presented below (Fig. 7). The results show both the numeric value and the percentage ratio of the number of motions as to evidence, filed by individual parties to a procedure, to the appeals brought thereby. The numeric and percentage result shows the activity of the passive party (defender and defendant), the active part (auxiliary prosecutor's representative and auxiliary prosecutor), as well as public prosecutor.

Table no. 2. Evidence activity of parties according to file research[7]

	Model before 15.04.2016 r.	Model after 15.04.2016 r.
defender	61 (26,3%)	47 (12,9%)
accused	4 (1,7%)	9 (2,5%)
public prosecutor	0 (0%)	3 (0,8)
auxiliary prosecutor	0 (0%)	4 (1,1)
proxies of auxiliary prosecutors	2 (0,9%)	7 (1,9)
total	67 (28,9%)	70 (19,3%)

Source: Authors' own study.

7 Concerning the distribution of the data above in individual appeal jurisdictions, see the study by K. Łapińska, "Changes in the Polish appeal proceedings model in the light of research results", Table 26.

In the first place, one should conclude there is no significant difference between the activity of parties under the old and new model of appeal procedure. As shown by the file research, the evidence activity under the old model amounted to 28.9% (the ratio of the total number of motions as to evidence by all parties to the number of cases), while under the new model, it was 19.3%, since 67 motions as to evidence were filed out of 232 appeal cases under the old model, whereas 70 motions as to evidence were filed out of 363 cases under the new one.

Statistically, under the two models under analysis, the passive party filed motions as to evidence in 19% of appeal cases, whereas defenders would file motions as to evidence in 17% of appeal cases. The public prosecutor manifested vestigial evidence activity (1.9%). The active party (excluding the public prosecutor) was the most active, having filed motions as to evidence in 32.5% of cases. The passive party is the runner-up in terms of evidence activity. However, this result should be treated with some caution due to the fact that representatives of auxiliary prosecutors brought appeals extremely rarely (a non-representative test sample) and would often accompany them with motions as to evidence.

There can be no doubt that evidence preclusion plays a significant role in the issue of evidence activity. This issue was also subject to study under the research project. As shown by the conducted questionnaire surveys, the overwhelming majority (84.6%) of the surveyed judges indicated a need of presence of evidence preclusion in evidentiary proceedings. A small percentage of judges (14.7%) do not see such a need, and only one judge failed to pick any answer to this question. This may evidence certain reluctance of the surveyed towards increase of the decision-amendment aspect of appeal proceedings, which, as shown by appeal models assumed e.g. in England (Crown Courts) or in Russia, is connected with a wide extent of conducting of evidentiary proceedings by courts *ad quem*, or even repeat of the entire judicial proceedings[8]. Apart from this somewhat theoretical question, the respondents were also asked whether evidence preclusion is present under the current model of appeal proceedings. Only 4.9% of judges have indicated that evidence preclusion is present under the current model of appeal proceedings,

8 See C. Kulesza, "Conventional model...", es included in this monograph.

whereas a decisive majority (52.4%) have indicated that evidence preclusion functions in the proceedings to a limited extent. On the other hand, 34.3% of the surveyed claimed that evidence preclusion does not function under the current model of proceedings, whereas 10% of judges did not specify whether it refers to our model of criminal appeal proceedings, and 0.3% failed to answer this question[9]. The diversity of answers may result from varied understanding of the term "evidence preclusion" by judges, since this term was not defined in the question itself.

5. The effectiveness of motions as to evidence

The evidence activity of parties to a proceedings is not tantamount to actual effectiveness of motions as to evidence, as brought by the parties. The results of file and questionnaire research presenting the subject matter of efficiency of motions as to evidence in a proceedings before a court of appeal will be shown below.

Table no. 3. The effectiveness of motions as to evidence according to file the file research[10]

		Model before 15.04.2016 r. (232 cases)	Model after 15.04.2016 r. (363 cases)
allowing		20 (29,9%)	35 (50%)
dismissal	art. 170 CCP	20 (29,9%)	26 (37,1%)
	art. 427 § 3 CCP	1 (1,5%)	2 (2,9%)
	art. 452 § 2 CCP	0 (0%)	4 (5,7%)
	others	11 (16,4%)	2 (2,8%)
no data		15 (22,4%)	1 (1,4%)
number of motions		67	70

Source: Authors' own study.

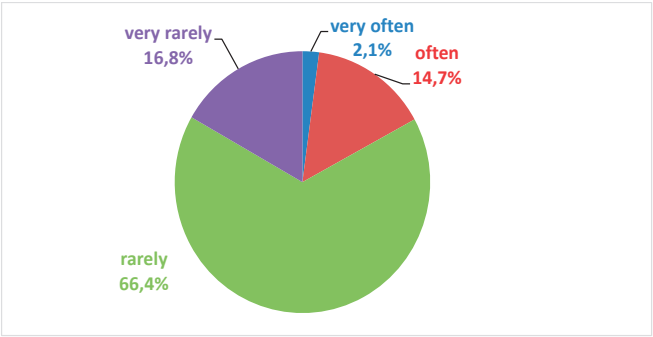
9 See the study by K. Łapińska, Figures no. 7 and 8.

10 Concerning the distribution of the data above in individual appeal jurisdictions, see the study by K. Łapińska, table 29.

The conducted file research also shows that the effectiveness of motions as to evidence is relatively low (a vast majority of motions were dismissed pursuant to Article 170 of the CCP), both under the old and the new model of appeal procedure; however, it seems that motions are recognized slightly more frequently under the new model. Under the old appeal procedure model, the recognition of motions as to evidence has statistically remained at the level of 8.6% of all appeal cases (the ratio of recognized motions as to evidence to the number of appeal cases), whereas under the new model, the recognition of motions as to evidence has statistically remained at the level of 15.2%. Concerning the frequency of dismissals of motions as to evidence, it is worth pointing out that the percentage is very similar under both models: it was 13.8% under the old model and 14% under the new one.

Concerning the evidence activity of parties, judges were asked about the usefulness of the parties' initiative to adduce evidence for resolution of a case. The opinion expressed by the judges refers both to the issue of the relevance of admission of a motion as to evidence itself and to a situation when the motion as to evidence had been admitted but did not affect the issued decision. Detailed answers of the respondents are shown in Fig. 17.

Figure no. 17. The judges' opinion concerning the usefulness of the parties' initiative to adduce evidence for resolution of a case



Source: Authors' own study.

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Rozbudowa otwartych zasobów naukowych Repozytorium Uniwersytetu w Białymstoku – kontynuacja,
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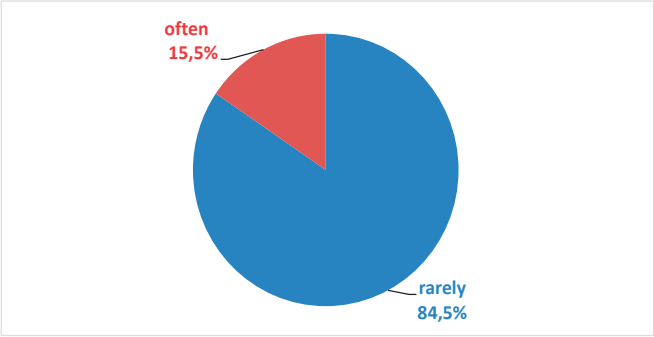
Analyzing the diagram above, one should note that the most frequent answer was that the parties' initiative to adduce evidence is seldom useful for resolution of a case (66.4%), 16,8% of the surveyed chose the answer that this initiative is useful very rarely; slightly less, i.e. 14.7% of judges, have deemed it useful often, whereas the rest of the surveyed (2.1%) indicated the initiative of the parties to be useful very often for resolution of a case. Summarizing the negative and positive answers, one may reach a conclusion that the vast majority of judges take the view that the parties' initiative to adduce evidence is seldom useful for resolution of a case (83.2%), whereas a minority claim it is often useful (16.8%). This trend does not change when considering the results with the criterion of workplace and work experience (Figs. 18-21).

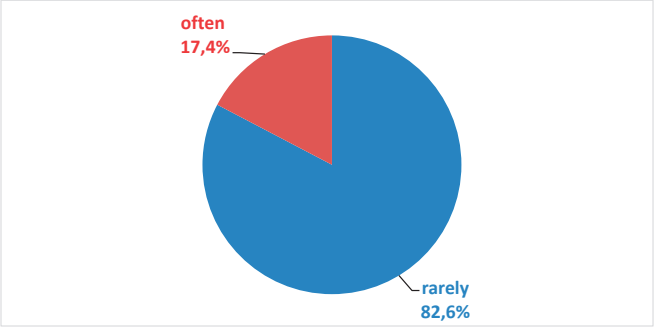
Figure no. 18. The opinion of appellate court judges concerning the usefulness of the parties' initiative to adduce evidence for resolution of a case



Source: Authors' own study.

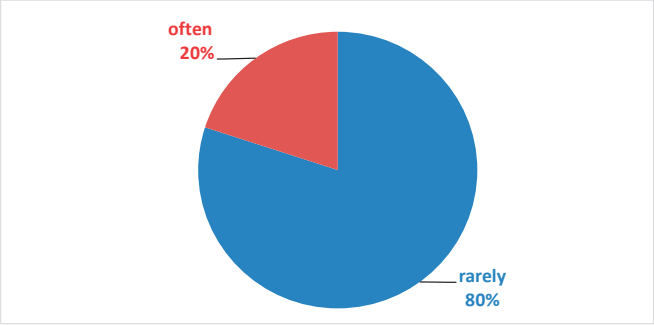
A total of 84.5% of appellate court judges have considered the parties' initiative to adduce evidence to be seldom useful, whereas 82.6% of regional court judges claimed the same. A small minority of both appellate court judges (15.5%) and regional court judges (17.4%) have deemed the parties' initiative to adduce evidence to be often useful.

Figure no. 19. The opinion of regional court judges concerning the usefulness of the parties' initiative to adduce evidence for resolution of a case



Source: Authors' own study.

Figure no. 20. The opinion of judges with short work experience concerning the usefulness of the parties' initiative to adduce evidence for resolution of the case



Source: Authors' own study.

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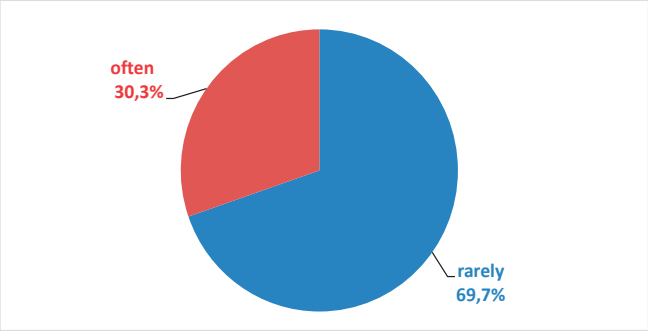
Rozbudowa otwartych zasobów naukowych Repozytorium Uniwersytetu w Białymstoku – kontynuacja,
dofinansowanego z programu „Społeczna odpowiedzialność nauki" Ministra Edukacji i Nauki
na podstawie umowy BIBL/SP/0040/2023/01

Figure no. 21. The opinion of judges with long work experience concerning the usefulness of the parties' initiative to adduce evidence for resolution of the case



Source: Authors' own study.

80% of judges with shorter work experience (1-5 years) answered that the initiative is seldom useful, while 20% answered it is often useful. On the other hand, 69.7% of judges whose work experience exceeded 20 years deemed the initiative to be seldom useful, while 30.3% claimed it is often useful for resolution of a case.

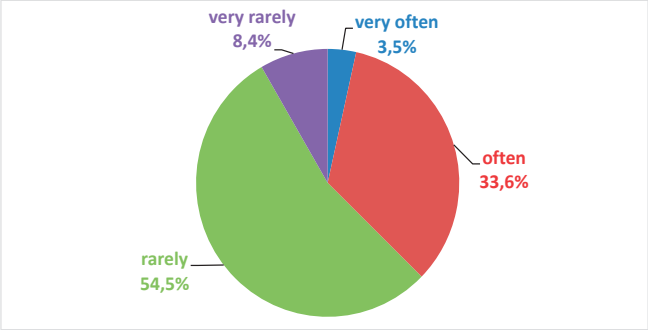
The obtained results concerning the usefulness of the parties' initiative to adduce evidence for resolution of a case are essentially convergent with the results of the file research, yet they contradict the answers to the previous question concerning the judges' opinion on the practical use of the extended possibilities of conducting of evidentiary proceedings (Fig. 6). However, it seems the differences in answers to this question may be explained by different perspectives assumed by the respondents when answering both questions. Addressing the question concerning use of the extended possibilities to conduct evidentiary proceedings, the respondents could have treated it as a question about general (as if abstract) evaluation of changes introduced into the CCP in the area of evidentiary proceedings, whereas answering the question about the usefulness of the parties' initiative to adduce evidence for resolution of a case, they relied on the experiences of their own decision-making practice.

To sum up the above, it should be stated that in practice, despite the possibilities offered by the Code of Criminal Procedure, the parties show no evidence activity, usually attaching "vestigial" motions as to evidence to their appeals which are, in turn, mostly dismissed by the court of appeal. On the other hand, motions as to evidence which had been recognized by the court, or evidence examined ex officio, did not affect an issued decision (usually upholding of a judgment).

6. *Ex officio* examination of evidence

When analyzing evidentiary proceedings before a court of appeal, it is necessary to reference the court's evidence activity. To this end, relevant results of questionnaire and file research will be shown. The survey questionnaire included a significant question about the need for a court of appeal to take the initiative to adduce evidence, and the results are shown in Fig. 22 below.

Figure no. 22. The judges' opinion concerning the need for a court of appeal to take the initiative to adduce evidence

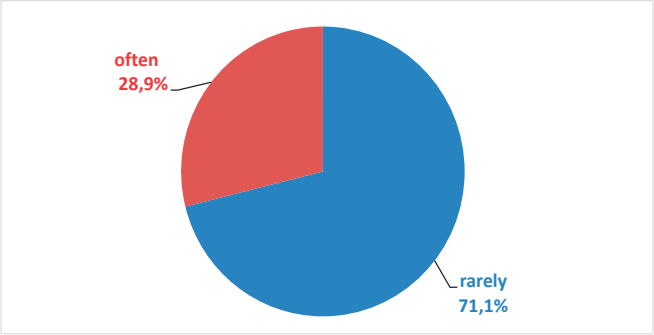


Source: Authors' own study.

The distribution of answers to the question "In your opinion, how often there is a need for a court of appeal to take the initiative to adduce evidence?" has turned out to be very interesting, since 3.5% of the surveyed indicated the answer "very often", 33.6 % picked the answer "often", 54.5% answered "rarely", and 8.4% – "very rarely".

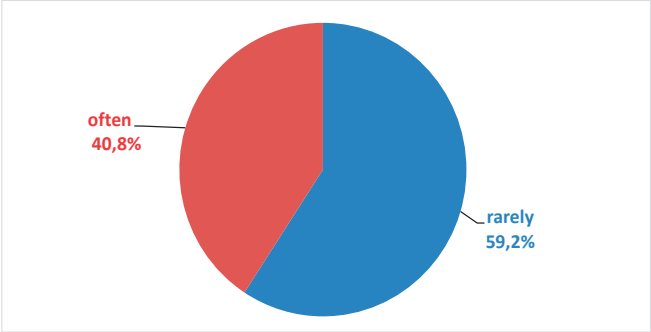
Summarizing and generalizing the negative and positive answers, the vast majority of the surveyed (62.9%) indicated that the need for a court of appeal to take the initiative to adduce evidence occurs rarely, and a minority (37.1%) have claimed such a need exists often. It is worth additionally analyzing whether this trend will be sustained, dividing the results by the criterion of workplace and work experience (Figs. 23-26).

Figure no. 23. The opinion of appellate court judges concerning the need for a court of appeal to take the initiative to adduce evidence



Source: Authors' own study.

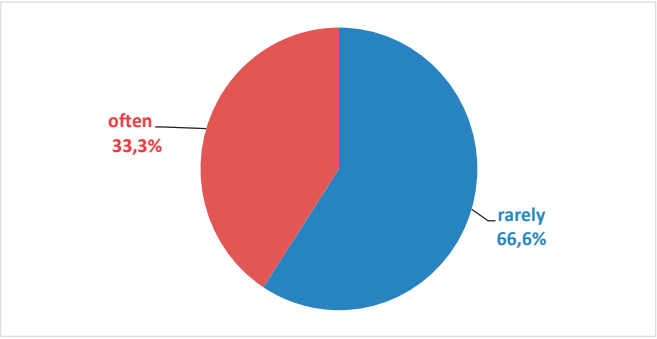
Figure no. 24. The opinion of regional court judges concerning the need for a court of appeal to take the initiative to adduce evidence



Source: Authors' own study.

As shown by Figs. 23 and 24, both appellate and regional court judges indicate that the need for a court of appeal to take the initiative to adduce evidence occurs rarely; however, the ratios are not even, since regional court judges see the need to take the initiative to adduce evidence more often. It is worth checking additionally whether the conclusion can be drawn from the analysis of data considering the criterion of work experience (Figs. 25 and 26).

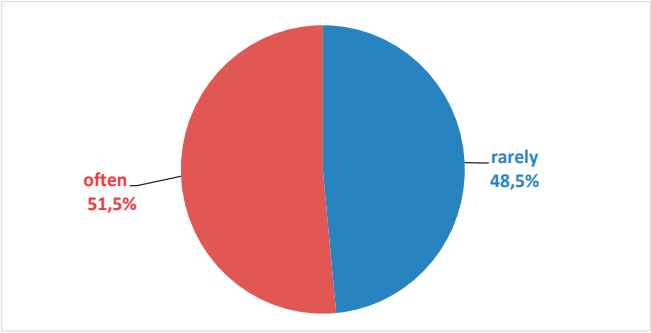
Figure no. 25. The opinion of judges with short work experience concerning the need for a court of appeal to take the initiative to adduce evidence



Source: Authors' own study.

The result of the answer to the question concerning the need for a court of appeal to take the initiative to adduce evidence, as given by judges with long work experience (above 20 years), has turned out to be quite surprising. These judges, in a slight majority of cases, pointed out that such a need exists, whereas 48.5% of judges have indicated that such a need occurs rarely, which contradicts the previous answers in this regard.

Figure no. 26. The opinion of judges with long work experience concerning the need for a court of appeal to take the initiative to adduce evidence



Source: Authors' own study.

The comparisons above, referencing the need for a court of appeal to take the initiative to adduce evidence, contradict the answers to the question concerning the use of the possibilities of conducting of evidentiary proceedings by a court of appeal, as the surveyed have predominantly indicated that courts of appeal use their powers in conducting of evidentiary proceedings, and simultaneously, their highest percentage has answered these courts seldom take the initiative to adduce evidence. It seems that in this situation, differences in answers to this question can also be seen to lie with a different perspective assumed by respondents when giving answers (an abstract, theoretical question vs. a question concerning their own professional practice).

The obtained result essentially converges with the results of the file research showing scant initiative by a court of appeal to adduce evidence, as only in 2% of cases (12 out of 595 cases), a court of appeal has taken the initiative to adduce evidence[11].

11 See the study by K. Łapińska, Table no. 28.

7. The new bill of the Act on the amendment of the Code of Criminal Procedure Act as well as certain other acts (Document no. 3251)

When analyzing the subject matter of evidentiary proceedings before the court of appeal from the perspective of the recent changes in the Code of Criminal Procedure, it is impossible not to mention briefly, due to the framework of this study, the projected changes in the Code of Criminal Procedure. Currently, a government bill of changes in the CCP is at the stage of legislative works at the Sejm[12]. In the area of evidentiary proceedings before a court of appeal, the proposal includes a new wording of Article 452(2), Article 170, Article 427, and Article 454 of the CCP.

The following wording of the first of the indicated provisions, i.e. Article 452(2) of the CCP, is proposed: "*A court of appeal also dismisses a motion as to evidence if:*

1) *examination of the evidence by this court would be irrelevant for purposes specified in Article 437(2), second sentence;*
2) *the evidence was not adduced before the court of the first instance, in spite of the fact that the applicant could have adduced it then, or the circumstance to be proven pertains to a new fact, not subject to the proceedings before the court of the first instance, and the applicant could have indicated it then.*"

It is proposed to extend the catalogue included in Article 170(1) of the CCP by a new sixth point, reading as follows: "*6) a motion as to evidence has been filed after the time limit determined by the procedural authority, of which the applying party has been notified*". Moreover, after Section 1, a new Section 1a is added, reading as follows: "*§ 1a. A motion as to evidence cannot be dismissed pursuant to § 1(5) or 1(6) if the circumstance to be proven is of significance for determination whether an unlawful act has been committed, whether this act constitutes an offence and what offence it is, whether the unlawful act has been committed under conditions mentioned in Article 64 or 65 of the Penal Code, or whether there are conditions to adjudicate a stay at a psychiatric institution pursuant to Article 93g of the Penal Code*".

12 Government bill of 4 Dec 2018 of the Act on the amendment of the Code of Criminal Procedure Act as well as certain other acts, Document no. 3251.

On the other hand, in the draft Article 427 of the CCP, it is proposed to add a new Section 3a after Section 3, reading as follows: "The plea of failure to examine evidence ex officio cannot be raised in an appeal, unless the circumstance to be proven is of significance for determination whether an unlawful act has been committed, whether this act constitutes an offence and what offence it is, whether the unlawful act has been committed under conditions mentioned in Article 64 or 65 of the Penal Code, or whether there are conditions to adjudicate a stay at a psychiatric institution pursuant to Article 93g of the Penal Code".

The analysis of substantiation of the draft amendment leads to the conclusion that the proposal of amendment in the area of evidentiary proceedings before a court of appeal is intended to:

I) oblige the parties to bring motions as to evidence within a time limit determined by a procedural authority, which is intended to ensure focus of evidentiary proceedings on the stage of first-instance proceedings, which is conducive to the efficiency of proceedings and properly implements the standard of double-instance criminal procedure (Article 452 (2) and Article 170 (1) (6))[13];

II) prohibit raising the plea of failure to examine evidence ex officio in an appeal, through which it also assumes stressing of the adversarial principle in the conducted evidentiary proceedings through determination of a wide foreground for the parties' initiative to adduce evidence, preserving the priority significance of the material truth principle (Article 427(3a))[14];

III) prioritize the making of correct factual findings concerning the essential matter of the proceedings, since the principle of examination of evidence primarily before the court of the first instance should give way to the material truth principle (Article 170(1a), 427(3a)). The provision of Article 170(1a) of CCP is to constitute a mechanism guaranteeing implementation of the material truth principle, superior in a criminal procedure,

13 Substantiation of the Government bill of 4 Dec 2018 of the Act on the amendment of the Code of Criminal Procedure Act as well as certain other acts, Document no. 3251, pp. 62-3.

14 Substantiation, pp. 53-4.

and thus the correctness of factual findings of significance for resolution of the case[15];

IV) discipline the parties additionally, as envisaged in Article 427(3a), since without the introduction of this provision, a party could show absolute passivity before a court *a quo* concerning the initiative to adduce evidence, and subsequently accuse the court of such passivity in case of an unfavourable decision – through failure to examine appropriate evidence ex officio, which would burden the court of appeal completely groundlessly with the obligation of examination of evidence which should be examined before the court of the first instance[16];

V) establish an additional basis for dismissal of a motion as to evidence by the court of appeal and to establish sui generis evidence preclusion by the new wording of Article 452(2) of the CCP due to the restrictions indicated in Section 2; however, the restrictions indicated in this provision are subject, due to the proposed regulation of Article 170(1a) of the CPC, to exclusion if the circumstance to be determined is of significance for determination:

1) whether an unlawful act has been committed;
2) whether it constitutes an offence and which offence it is;
3) whether the unlawful act has been committed under conditions mentioned in Article 64 or 65 of the Penal Code, or
4) whether there are conditions to adjudicate a stay at a psychiatric institution pursuant to Article 93g of the Penal Code.

Quite important, from the perspective of conducting of evidentiary proceedings before the court of appeal, is the amendment of Article 454(1) of the CCP and deletion of Section 3 of this provision. The following wording of Section 1 is proposed: "The court of appeal cannot sentence a defendant who has been acquitted in the first instance or towards whom the proceedings has been discontinued in the first instance". The substantiation of the draft amendment points out that the

15 Substantiation, p. 25.
16 Substantiation, p. 53.

ne peius rules restrict the amendment of decisions by a court of appeal in case of bringing of a valid appeal to the detriment of the defendant and significantly prolong the entire criminal procedure; as a result, the court of appeal cannot amend the contested judgment to the detriment of the defendant but should annul it and refer the case back to the court of the first instance, since it is this court that can pass a sentence or impose a penalty of life imprisonment. Therefore, it is proposed to eliminate such a restriction with regard to sentence in the appeal instance upon examination of an appeal against conditional discontinuation of the proceedings, as well as imposing of the penalty of life imprisonment by the court of appeal[17].

It is worth noting that modifications of the *ne peius* rules have constituted the axis of a dispute since the modification of this provision by the July act. A doctrinal dispute concerned the conformity of the introduced changes with the constitutional principle of right of appeal from Article 176 of the Constitution. Advocates of formal interpretation of the principle of right of appeal took the stance that increased possibilities of amendment of decisions by a court of appeal, based on increased possibilities of examination of evidence, remain in conformity with this constitutional norm, whereas representatives of the doctrine, advocating its material interpretation, saw threats in the increased possibilities of amendment of decisions by a court of appeal, both for the revision function of the appeal proceedings and for the defendant's right to defence[18]. Concerning the *ne peius* rules, it is worth citing a fragment of the substantiation of the resolution by the Supreme Court of 20 September 2018[19]. The Supreme Court claimed that „The possibility to annul a sentence of acquittal or a judgment discontinuing or conditionally discontinuing a criminal procedure and to refer the case back, connected with the *ne peius* rule specified in Article 454(1) of the CCP (Article 437(2), second sentence, of the CCP) only takes place when the court of appeal – as a result of removal of the observed errors constituting one of the grounds for appeal, as specified in Article 438 pts. 1-3 of the CCP (i.e. e.g. upon supplementation of the evidentiary proceedings, performance of proper assessment of evidence, making

17 Substantiation, p. 63.
18 C. Kulesza, Apelacja, p. 252.
19 Resolution of the Supreme Court of 20 September 2018, ref. no. I KZP 10/18, Legalis.

of correct factual findings) – states there are grounds for passing of a sentence, which is prevented by a prohibition specified in Article 454(1) of the CCP. The possibility alone of passing of such a judgment in the repeated proceedings before the court of the first instance is insufficient for assumption of occurrence of the *ne peius* rule as specified in Article 454(1) of the CCP". Therefore, an extremely important role is played here by possibilities of conducting of evidentiary proceedings before a court of appeal and the actual scope of evidentiary proceedings before this court. The conducted research shows that, despite the possibilities provided by the legislator, evidentiary proceedings before the court of appeal does not exist at all as far as the practice goes, and therefore, limitation of the *ne peius* rules may only cause an illusory increase of the scope of amendment of decisions by a court of appeal.

8. Conclusions

To sum up the conducted discussion on the scope of evidentiary proceedings and the kinds of decisions by a court of appeal, one should make several constructive remarks.

1. From the viewpoint of the standard of fair trial and the right of examination of the case within a reasonable time limit, contained within this standard, one should express approval for extending of the possibilities of amendment of decisions in an appeal proceedings, together with significant expansion of the scope of conducting of evidentiary proceedings. The earlier, revision-based model of appeal procedure did not guarantee the parties to have the case examined within a reasonable time limit. The discussion herein shows that the court of the second instance is currently authorized to conduct evidentiary proceedings in the full extent (with consideration of restrictions, i.e. evidence preclusion, the court being bound by the limits of the appeal), unless there are specific grounds for dismissal of a motion as to evidence;
2. The current form of appeal proceedings does not violate any conventional or constitutional standards, mainly in the perspective of the principle of double-instance proceedings, which is another

indicator of fairness of the proceedings. The principle of double-instance proceedings has gained a new dimension compared with the earlier differences in understanding thereof. It seems that currently, the properly understood principle of double-instance proceedings does not prevent changes in the area of factual findings, performed in the appeal instance, regardless of whether such changes will be performed on the basis of evidence examined by the court of the first instance yet wrongly evaluated thereby, or whether they will be performed based on evidence only examined before the court of appeal. Therefore, it does not prevent so-called substantive proof before a court of appeal;

3. One principle of fair appeal proceedings is the right to adduce and examine evidence before a court of the second instance, therefore it should be noted in this regard that the recent changes in the criminal procedure have measurably matched this principle. The current appeal proceedings model has taken the appropriate direction, enabling conducting of evidentiary proceedings to a wider extent, and subsequently issuance of a substantive decision;
4. However, the conclusion from point 3 is only a conclusion resulting from the analysis of the amended statutory regulations. With regard to the parties' initiative to adduce evidence and the possibilities to present new evidence, the conducted file research has demonstrated very low activity and effectiveness of parties in this regard (a small number of motions as to evidence and rare recognition thereof). The conducted research has also demonstrated vestigial use by the court of appeal of the initiative to adduce evidence; if the initiative to adduce evidence before a court of appeal was used, admitted and examined evidence was seldom useful for issuance of a final decision;
5. It should be noted that however the legislator introduced a range of changes leading to broadening of the scope of evidentiary proceedings, such changes, despite such possibilities, are not reflected in practice, so the research hypothesis indicated in the introduction to the study, consisting in the claim that the reform of criminal procedure, coming into effect on 1 July 2015 and 15 April 2016 while having introduced qualitative changes in the

Polish appeal proceedings model, did not affect the practice of Polish evidentiary proceedings before a court of appeal, has been confirmed;

6. Despite the legislator's assumption that model changes concerning appeal proceedings, including those related to evidentiary proceedings at this stage of the procedure, were significant, there is no unambiguous evaluation among the judges whether these changes are positive or negative;
7. The hypothesis of lack of any significant difference between the evidence activity of the parties and the court under the "old" and "new" model of appeal proceedings has been confirmed.