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The Participation of the Social Factor in the Judiciary from a Constitutional Perspective

Abstract: The article presents the issue of social factor in the administration of justice from the perspective of constitutional rules. The aim of these considerations is to analyze the issue of limitation of the participation of lay judges in a trial in courts of general jurisdiction, which is a starting point for the evaluation and importance of lay judges in Polish judicial procedure, in which the participation of lay judges, as the result of changes of law, has been significantly limited.

Keywords: social factor, lay judge, criminal procedure, the right to a trial

1. A historical outline of social factor participation in the Polish administration of justice

Development of a contemporary criminal trial shows very clearly that indeed from the beginning citizens have actively participated in the prosecution of crimes. In the history of criminal procedure, all employers and all enforcement agencies have appreciated this social engagement in a criminal trial¹. The forms of this participa-

¹ S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2016, p. 230 et seq.

tion, however, have been different. We will solely consider and analyze here social factor participation in sentencing from the constitutional perspective.

The fact that in Poland all three variants of direct participation of the so called community or social factor in sentencing have occurred is of utmost importance for our considerations. These variants embrace: a form of community courts, which decided in cases involving some misdemeanours and offences², trials by lay judges (assessors) – a joint bench of professional and lay judges deciding both about guilt and punishment, and trials by jury, where a judge decides only about punishments whereas jurors about guilt³. A trial by jury was composed of three professional judges (the so called tribunal) and twelve jurors (the so called jury). The jury decided about guilt and circumstances excluding it whereas the tribunal imposed punishment. Due to this, an appeal against the jury's verdict was not allowed. Yet cassation to the Supreme Court was possible⁴. Trials by jury were abolished under the Act of 9 April 1938 on the Abolition of Trials by Jury and Magistrates⁵. They returned again under the Decree of Polish Committee of National Liberation of 15 August 1944 on the Introduction of Trial by Jury⁶. Eventually, the system of lay judges (assessors) of German origin has been selected in Poland, which in the pre-war period was applied only in commercial and employment cases⁷. It was thoroughly reformed in the 1950s⁸ and introduced the institution of lay judges to decide in first-instance courts in criminal⁹ and civil¹⁰ cases. The Constitution of 1952¹¹ constitutionally enshrined common participation of lay judges in the judiciary. Pursuant to Art. 49 thereof, people's assessors take part in the hearing of cases and the pronouncement of judgment, except in cases specified by law. However, we should mention the Act of 28 March 1958 on the Amendment of Civil Procedure Provisions¹² and the Act of 28 March 1958 on the Amendment of Criminal Procedure Provisions¹³, which limited the participation of lay assessors in the administration of justice. In the resolution of the entire Criminal Chamber of the Supreme Court of 14 May 1956¹⁴, the Supreme Court held that "a challenge of lay judges from a trial before a first instance court may also involve a situation when a judge adjudicates a case himself or herself only. (...) However, it should be emphasized that in connection with the constitutionally enshrined princi-

2 Decree of 22 February 1946 (Journal of Laws No. 8, item 64).

3 S. Waltoś, P. Hofmański, *Proces karny...*, *op. cit.*, p. 231. Also see: Z. Resich, *Nauka o organach ochrony prawnej*, Warszawa 1973, p. 80; J. Waszczyński, *Ustrój organów ochrony prawnej*, Łódź 1974, p. 76.

4 T. Ereciński, J. Gudowski, J. Iwulski, *Komentarz do prawa o ustroju sądów powszechnych i ustawy o Krajowej Radzie Sądownictwa*, Lex Polonica No. 3886725.

5 Journal of Laws No. 24, item 213.

6 Journal of Laws No. 2, item 7.

7 See, e.g.: M. Rybicki, *Ławnicy ludowi w sądach PRL*, Warszawa 1968, p. 13, 16.

8 Act of 20 July 1950 on the Amended Law of the System of Common Courts (Journal of Laws No. 38, item 347).

9 Act of 20 July 1950 on the Amendment of Criminal Procedure Provisions (Journal of Laws No. 38, item 348).

10 Act of 20 July 1950 on the Amendment of Civil Procedure Provisions (Journal of Laws No. 38, item 349).

11 Journal of Laws No. 33, item 232.

12 Journal of Laws No. 18, item 75.

13 Journal of Laws No. 18, item 76.

14 Resolution of Criminal Chamber of Supreme Court of 14 May 1956, I K 137/56, "Nowe Prawo" 1956, No. 10.

ple of the participation of lay judges in the administration of justice, the above mentioned provisions cannot be interpreted extensively but treated as exceptions”.

Adopting the system of lay judges, the Polish system-maker thus underlined the importance of a social sense of justice and the significance of public opinion in the administration of justice; furthermore, the importance of lay judges' life experience and knowledge should be juxtaposed with the professional judges' routine. Consequently, the bench's independence should be enhanced¹⁵. The above mentioned arguments show very clearly that the essence of the participation of lay judges in the administration of justice implies, above all, a social sense of justice resulting solely from the jurors' profound and inner beliefs based on their knowledge and life experience rather than rigid letter of the law. It is consistent with the principle of discretionary powers to assess evidence in Poland, according to which judicial bodies form their convictions on the basis of all evidence being taken, which is freely assessed with due consideration of the sound reasoning, knowledge and life experience (Art. 7 of the Code of Criminal Procedure of 1997)¹⁶. Trivializing, we can say that legal education is not a criterion of evidence assessment; what is more, it may sometimes do more harm than good in a proper assessment of evidence.

Just such understanding of the participation of social factor in the administration of justice is also consistent with the beginnings of this institution, which developed during French Revolution as a manifestation of opposition against royal absolutism and royal courts¹⁷. The concept of the participation of the citizenry in sentencing is thus closely connected with the idea of civil society. It is also a recognized standard in a democratic state of law. Moreover, it is constitutionally enshrined in the provision of Art. 182 of the Polish Constitution of 1997¹⁸. However, it is hard not to notice that since 1997, and then after 2005 (after the reform of the institution of lay judges in the Polish judiciary introduced under the Act of 1 August 2005 on the Amended Law on Common Courts Organization and Some Other Laws¹⁹) its axiology has been radically changed. The Constitution of 1997 does not enshrine the principle of the participation of lay judges in sentencing any more (Art. 49 of the Constitution of 1952), merely regulating the competence of an ordinary legislator to specify the participation of citizenry in the administration of justice, therefore both its form and scope. Hence L. Garlicki accurately notices that the content of currently binding regulation does not provide grounds for the mandatory adoption of statutory solutions making such participation common or preferable²⁰. On the other hand, it

15 M. Rybicki, *Ławnicy...*, *op. cit.*, p. 16.

16 Journal of Laws No. 78, item 483.

17 M. Rybicki, *Ławnicy...*, *op. cit.*, p. 14; S. Waltoś, P. Hofmański, *Proces...*, *op. cit.*, p. 104 et seq.

18 Journal of Laws No. 78, item 483 as amended.

19 Journal of Laws No. 169, item 1413.

20 L. Garlicki, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom V*, Warszawa 2003, p. 1-2. Also see: Constitutional Tribunal's judgment of 29 October 2005, ZU 2005/10 A/119, Journal of Laws No. 241, item 2037.

also excludes a possibility of the administration of justice in some cases solely by the so called social factor. Furthermore, starting with the amended Act of 1 August 2005, the legislator limited a participation of lay judges in many types of court cases, additionally establishing higher qualification requirements for candidates for lay judges²¹. The amended Code of Criminal Procedure of 15 March 2007 radically excluded lay judges from district courts in criminal cases. The amended Act of 27 September 2013 reinstated this institution, but in a very limited scope. Since 1 July 2015 the participation of lay judges in district courts has been optional. In regional courts, it is obligatory and optional. Cases involving most serious crimes heard in a first-instance regional court require obligatory participation of lay judges in the form of ordinary and extended jury. However, taking into account presumed competence of a district court as a basic first-instance court (Art. 24 § 1 of the Code of Criminal Procedure), it should be noticed that the participation of lay judges in sentencing is under 0.6% of all criminal cases heard in district and regional courts²².

A clear tendency to radically minimize a role of lay judges in the administration of justice is undeniably a departure from the provisions of the original Act referring to this institution. The relevant literature even treats it as "moving back to the times before French Revolution and a ruin of all ensuing achievements in the aspect of democratism perceived as a state of law"²³. From this perspective, it is in discord with the opinions according to which an increasing number and degree of complexity of provisions regulating specific areas of human activity as well as complicated techniques of their interpretation (among others, in compliance with the European Union law) may question the relevance of the participation of individuals who lack professional preparation in the administration of justice. The lawmaker himself is not devoid of such doubts, which is manifested in the subsequent amendments which, on the one hand, limit the participation of lay judges in many types of court cases, whereas on the other hand, they establish higher qualification requirements for candidates for lay judges²⁴. Finally, a suggested solution according to which lay judges in a first-instance trial should be replaced with a bench of professional judges is neither new nor good from the perspective of the above mentioned assumptions.

21 Reasoning to the governmental draft of the amended Act on the System of Common Courts and Some Other Acts, Sejm doc. No. 3797.

22 S. Waltoś, W dziesięciolecie obowiązywania Kodeksu postępowania karnego, PiP 2009, No. 4, p. 6 et seq.

23 M. Rybicki, Ławnicy..., *op. cit.*, p. 14. Also see: S. Waltoś, P. Hofmański, Proces..., *op. cit.*, p. 235 and 242.

24 See: Reasoning to the governmental draft of the amended Act on the System of Common Courts and Some Other Acts, Sejm doc. No. 3797.

2. Participation of citizens in the administration of justice (Art. 182 of the Polish Constitution)

Pursuant to Art. 182 of the Polish Constitution, a statute shall specify the scope of participation by the citizenry in the administration of justice. Thus participation of social factor in the administration of justice is an absolute legal requirement because it is constitutionally enshrined. The constitutional requirement of the participation of citizenry in the administration of justice included in Art. 182 is closely connected with the content of Art. 4 par. 1 of the Constitution, according to which supreme power in the Republic of Poland shall be vested in the Nation²⁵. Thus it results from the Constitution that administration of justice cannot be deprived of a social factor. The legislator established a general rule this way, and yet with regard to special solutions to the problem of participation of the citizenry in the administration of justice, he referred to statutory provisions²⁶. Nevertheless, we should notice a lack of regulation within this scope, i.e. which existing model assuring the participation of social factor in the administration of justice – a jury or lay judges as bench members, should operate in the Polish legal system. The constitutional requirement will be fulfilled when the legislator chooses the form he deems the most appropriate. It is true that Art. 182 of the Polish Constitution does not meet the condition of a precise normative regulation, but this provision cannot be treated as a referral to regulate this issue under a mere act of law. The subject literature indicates that despite a reserved or restrained character of this provision, we may perceive therein a designation of a specific direction of legislative works²⁷. It should be emphasized that the Constitution stipulated neither a form nor scope of the participation of social factor. The formulation of Art. 182 seems to indicate that a judicial procedure which would exclude lay judges from sentencing would be inconsistent with the Constitution. And such was a decision adopted by the Constitutional Tribunal, which stated that “it is neither possible to exclude the citizenry entirely from the administration of justice nor narrow its scope to merely a symbolic degree”²⁸. Being a norm providing both authorization and referral, Art. 182 of the Polish Constitution implies ordinary legislator’s competence to introduce the citizenry into the administration of justice²⁹. It is indicated that the content of this provision expresses the system-maker’s intention to depart from the solutions included in the previous legal system, where already mentioned Art. 49 of the Constitution of the Polish People’s Republic of 1952, according to which “people’s assessors take part in the hearing of cases and the pro-

25 K. Knoppek, *Udział obywateli w sprawowaniu wymiaru sprawiedliwości w postępowaniu cywilnym*, "Ius Novum", issue, Warszawa 2014, p. 26.

26 J. Ruzzewski, *Ramy prawne wyboru i funkcjonowania ławników w Polsce*, (in:) J. Ruzzewski (ed.), *Ławnicy – społeczni sędziowie w teorii i praktyce. Ocena funkcjonowania i procesu wyboru ławników sądowych na przykładzie sądów Apelacji Białostockiej*, Suwałki 2011, p. 50.

27 S. Waltoś, *Proces karny: zarys systemu*, Warszawa 2003, p. 236.

28 Constitutional Tribunal’s judgment of 29 October 2005, P 16/04, *Journal of Laws* No. 241, item 2037.

29 J. Ruzzewski, *Ramy prawne wyboru...*, *op. cit.*, p. 50.

nouncement of judgment, except in cases specified by law”, provided the grounds for a wide participation of the citizenry in the administration of justice. However, the currently binding regulation does not ensue that statutory solutions making this participation common must be mandatorily adopted³⁰. With regard to the participation of social factor in the administration of justice, it entails that such participation may be limited to some cases. Thus it also excludes a possibility of such a regulation which would assure sole participation of social factor in the administration of justice in certain types of cases. The Constitutional Tribunal supported this opinion in the above quoted judgment of 29 November 2005. Moreover, in the reasoning thereto, the Constitutional Tribunal pointed out the most important benefits ensuing from the admittance of lay judges to sentencing in common courts. One of them was a possibility of a joint settlement of a case, where an expert opinion is juxtaposed with a social point of view. The Tribunal believes that the participation of lay judges protects common courts from isolation and social exclusion. Moreover, the participation of lay judges allows to administer justice in a closer contact with public opinion whilst society is represented by lay judges, thanks to whom courts exert impact on the community within the sphere of upbringing, education and information³¹.

3. The institution of lay judges in the provisions of the Act of 27 July 2001 on the Common Courts Organization

The institution of lay judges in Poland embraced by the Act of 27th July, 2001 on the Common Courts Organization³² (hereinafter referred to as ACCO) is relevant due to, among others, its long tradition. However, there are no legal obstacles to replace it in the future, e.g., by the institution of a jury, under a statutory act. A scope of participation of the citizenry in the administration of justice is generally specified in Art. 4 of ACCO, according to which lay judges participate in administering justice in hearing cases before first-instance courts, unless acts provide otherwise (§ 1), being vested the same rights as judges (§ 2). This regulation justifies an opinion according to which even though a lay judge’s duty is not professional in its nature, they should be subject to the requirement of impartiality and independence³³. From this point of view, Art. 169 § 1 of ACCO is of significant importance as it stipulates that within the scope of sentencing, lay judges are independent and bound only by the Constitution and Acts. However, enjoying the same rights as professional judges, lay judges may not preside over a trial or council, or perform duties of a judge outside the trial, unless Acts provide otherwise (which is, in turn, envisaged by Art. 169 § 2 of ACCO). Nevertheless, due to the fact that lay judges prevail over professional ones with regard

30 L. Garlicki, (in:) L. Garlicki (ed.), *Konstytucja...*, *op. cit.*, p. 1-2.

31 Constitutional Tribunal’s judgment of 29 October 2005, P 16/04, *Journal of Laws* No. 241, item 2037.

32 Uniform text: *Journal of Laws* of 2015, item 133 as amended.

33 J. Gowin, *Ławnik – sędzia społeczny*. Informator, Warszawa 2011, p. 7.

to their number in the bench they are members of (and the foreman's vote is as important as the vote of other members of the bench), if a verdict cannot be agreed, they can settle a case against the opinion of a professional judge. However, if lay judges held different opinions themselves, each of them – the same as a professional judge – may submit a *votum separatum*.

4. The right to a fair trial and the participation of lay judges in a trial

A basic constitutional regulation indicating a possibility of admitting the citizenry into the participation in direct administration of justice is the right to a fair trial regulated in Art. 45 of the Polish Constitution. This legal norm, which is a constitutional principle, implies that every citizen shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Therefore, we should approve of the opinion according to which the right to a trial before a competent, impartial and independent court is the so called element of the system, which ensues a principally safe-guarding nature of the subject right and refers to the Strasburg standard, which directly inspired the system-maker while formulating Art. 45 par. 1 of the Constitution³⁴. It should also be mentioned here that apart from the administration of justice by lay judges in criminal procedure, participation of citizens in publicly held trials is also a form of social factor's participation. This way, the principle of open trial expressed in Art. 45 of the Polish Constitution has been manifested, which also meets adopted international standards. Openness of a first-instance trial has been observed, which is the most important phase of criminal proceedings whereas circumstances causing its exclusion are specified constitutionally (Art. 45 par. 2) or indicated in the Code of Criminal Procedure. Significant importance of the above mentioned principle of openness was emphasized by the Constitutional Tribunal in one of its judgments which acknowledged that the aim of the principle of openness is to assure judge's impartiality and regularity of proceedings; moreover, it stimulates greater diligence and conscientiousness in taking procedural steps³⁵. The Act on Proceedings also permits the media to take part in trials, among others in order to fulfil the constitutional right to information (Art. 61 of the Constitution).

In order to exercise the right to a fair trial, each citizen may request the participation of social factor in a trial due to endeavours to observe the principles of court's impartiality and objectivity during a trial and, most of all, while deciding about the content of a final verdict. It is worth pointing out that the Constitutional Tribunal's case law (the judgment of 9 June 1998, K 28/97) acknowledges that the right to a trial, apart from its apparent and implied purpose, is perhaps mainly the right to prop-

34 P. Wiliński, *Proces karny w świetle Konstytucji*, Warszawa 2011, p. 121.

35 Constitutional Tribunal's judgment of 20 November, 2007, SK 57/05; OTK-A 2007, No. 10, item 125.

erly held proceedings consistent with the requirements of justice and transparency³⁶. Moreover, according to the Constitutional Tribunal, “the principle of procedural justice is fulfilled if each party can present their opinions as to the points at issue, regarding both facts and judge’s appraisals”³⁷. Taking into account subjectivism of the parties who evaluate both facts of the case and legal issues during a trial, participation of lay judges, who fulfil a role of an impartial social factor in sentencing, assures a more objective evaluation of the case being heard.

Discussing issues connected with the fulfilment of constitutional principles in the administration of justice, we cannot omit the right to a fair trial. Analyzing this right, it is worth indicating that the content of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950, as amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2³⁸, lists its component elements including the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him. Additionally, the above provision stipulates that judgment shall be pronounced publicly; thus the press, media and public may not be restricted from the participation in a trial without a reasonable cause. With regard to this issue, Art. 360 of the Code of Criminal Procedure regulates a possibility of hearing a case at non-public sitting if an open trial may be conducive to disturbance of public order, offend decency, disclose circumstances which in consideration of significant State interests should remain secret, and infringe important private interests, or if a witness giving evidence is under fifteen years old, or the defendant is a minor. The right to a fair trial shall be guaranteed to everyone who may be a subject of a trial. It should be manifested in the guaranteed existence of actual access to protective measures and legal assistance as well as procedural solutions.

Considering the above discussed issue, it is worth adding here several comments on the prosecutor’s rights within this scope, i.e. the right to object to the exclusion of a public hearing contained in Art. 360 § 2 of the Code of Criminal Procedure. First of all, it should be indicated that the prerequisites listed in Art. 360 § 1 of the Code of Criminal Procedure are evaluative in nature while the court is not obliged to consider the respective occurrence of prerequisites when adjudicating a given case³⁹. Another important issue is the evaluation of circumstances of the case which provide the grounds for the relevance of the exclusion of a public hearing. According to the

36 Compare: A. Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego*, Łódź 2006, p. 203.

37 See: Supreme Court’s judgment of 14 December, 2001, V CKN 556/00; Supreme Court’s judgment of 14 March, 2007, I CSK 368/06; Supreme Court’s judgment of 7 November, 2007, II CSK 339/07; Supreme Court’s judgment of 16 July 2009, II PK 13/09; Supreme Court’s judgment of 3 February, 2010, II CSK 404/09; Supreme Court’s judgment of 2 December, 2011, III CSK 136/11; Supreme Court’s decision of 17 February, 2004, III CK 226/02; Supreme Court’s judgment, Civil Chamber, of 11 October 2012, III CSK 12/12, <http://sip.legalis.pl>

38 *Journal of Laws* of 1993, No. 61, item 284.

39 A. Murzynowski, *Istota i zasady procesu karnego*, Warszawa 1994, p. 188.

opinion expressed in the doctrine, the evaluation of, *inter alia*, a risk of infringing important private interests is vested with the court, which should thoroughly assess the circumstances that would have been the grounds for the exclusion of a public hearing so that it does not occur due to slightly important consequences for a given person⁴⁰.

On the other hand, referring directly to the prosecutor's rights in connection with the amended Code Criminal Procedure of 10 June 2016 (in effect since 5 August 2016), the prosecutor has been provided with a possibility of objecting to the exclusion of a public hearing, which is indicated in the content of the amended Art. 360 § 2 of the Code of Criminal Procedure. A role of the prosecutor with regard to the above issue is thus limited to the position of an advocate of the rule of law because he or she decides whether the exclusion of a public hearing is in the public interest. On the other hand, the prosecutor's objection should be justified by relevant reasoning and a possibility of appealing against the objection to a court due to the observance of the guarantee provided to every participant of criminal proceedings, the right to defence in particular⁴¹.

5. The importance of lay judges in a trial within the aspect of the principle of judicial independence

Pursuant to the reading of the constitutional principle of judicial independence, judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes (Art. 178 par. 1 of the Polish Constitution). As indicated in the doctrine, "judicial independence is founded on the sovereignty of the justice system with regard to its jurisdictional functions"⁴². What is more, the provisions of the above Article of the Polish Constitution indicate the scope of guarantees providing their fulfilment. It is in the interest of the entire society of a democratic state of law to maintain judicial independence and courts' sovereignty at all times. Guaranteed fulfilment of the above principles is also manifested in a possibility of social participation in the administration of justice through the establishment of a jury. Thus a function of a lay judge involves both active participation in a trial and its social control, which is a guarantee of the constitutional principle of a fair hearing of everyone's case, without undue delay, before a competent, impartial and independent court, contained in Art. 45 par. 1 of the Polish Constitution.

This possibility of social control of judge's work during a trial, verdict deliberation and voting is extremely significant. Thanks to the participation of the representatives of society in a trial, it is possible to verify an opinion held by a professional judge

40 L.K. Paprzycki, (in:) J. Grajewski (ed.), Kodeks postępowania karnego. Tom I. Komentarz do art. 1-424 k.p.k., Kraków 2006, p. 1128; M. Zimna, Wyłączenie jawności rozprawy jako gwarancja ochrony interesów uczestników postępowania karnego, Prok. i Pr. 2016, No. 9, p. 96.

41 M. Zimna, Wyłączenie..., *op. cit.*, p. 99.

42 K. Piasecki, Organizacja wymiaru sprawiedliwości, Kraków 2005, p. 39.

in a given case with regard to public opinion, which may also lead to the confrontation of two completely different attitudes. Such a situation precludes the adoption of only one point of view held by a professional judge who, adjudicating without the participation of lay judges, is not able to verify his or her own opinions and observations with public opinion. That is why resignation from the presence of lay judges in trials in common courts in less serious cases is not adequate to the needs resulting from the above mentioned reasons, which emphasize the importance of social factor in the administration of justice.

6. Objections to the limited participation of lay judges in district courts

The change introduced by the above mentioned amendment of 15 March 2007⁴³ deserves special attention with regard to the scope of participation of lay judges in sentencing. Pursuant to the provisions of the Act, participation of lay judges in criminal cases has been limited to serious crimes whereas with regard to civil cases, the legislator decided that lay judges are admitted to sentencing in only some types of cases. This way participation of lay judges in sentencing in common courts is possible, among others, in the following cases:

In criminal proceedings, a court adjudicates in a bench composed of one judge and two lay judges in cases involving serious crimes. Whereas in cases involving offences punished by life imprisonment, a court adjudicates in a bench composed of two judges and three lay judges. Moreover, the legislator envisaged a situation where, due to special complexity of a case or its importance, a first-instance court may decide to hear it in a bench composed of three judges, or one judge and two lay judges. The above change has been in force since 1 July 2015, and results from the need of a more profound fulfilment of the constitutional guarantee enshrined in Art. 182 of the Polish Constitution⁴⁴. Additionally, in effect of the Act of 27 September 2013 on the Amended Code of Criminal Procedure and Some Other Acts⁴⁵, regional courts adjudicate on damages and compensation for wrongful conviction and wrongful exercise of coercive measures in a bench composed of one judge and two lay judges (Art. 554 § 2 of the Code of Criminal Procedure). The legislator decided to resign from the participation of lay judges in appeal trials and extraordinary proceedings (cassation, revision and a complaint against the judgment of an appeal court), in accelerated procedure and the order for payment procedure, and with regard to cases involving minor offences, which are heard before one judge.

The legislator's decision to limit the scope of cases where the participation of lay judges is admitted cannot be approved of also from the point of view of the con-

43 Journal of Laws No. 112, item 766.

44 A. Sakowicz, (in:) A. Sakowicz (ed.) K.T. Boratyńska, P. Czarniecki, A. Górski, M. Królikowski, M. Warchoń, A. Ważny, Kodeks postępowania karnego. Komentarz., Warszawa 2016, <http://sip.legalis.pl>.

45 Journal of Laws, item 1247.

stitutional principle of the exercise of power by the Nation included in the Polish Constitution in Art. 4. This provision stipulates that supreme power in the Republic of Poland shall be vested in the Nation while the Nation shall exercise such power directly or through their representatives. It can be assumed that, depending on the Polish legislator's will, social participation in the administration of justice is a manifestation of a direct exercise of power by the Nation whereas a limited principle of the participation of lay judges in a trial violates this system-making law.

In 2010 the issue of a limited scope of cases admitting the participation of lay judges was raised in the constitutional complaint⁴⁶. In the reasoning to this complaint, the complainant's attorney indicated that "the appealed judgment, mostly due to the failure to fulfil the complainant's right to take advantage of the institution of lay judges within the scope under which they enjoy equal rights with the judge, violated the civil right, which means it also breached one of the human rights generating personal rights, i.e. the right to a fair trial.

7. Conclusion

Discussing the relevance of the existence of lay judges in all common courts, it is worth considering opinions expressed by judges and lay assessors themselves. Research carried out in Białystok appeal courts ensues that majority of judges do not approve of the work and operation of lay judges in trials. As implied in one of the judges' opinion: "with regard to cases where solely expertise in law is decisive, maintenance of lay judges is expensively absurd"⁴⁷. On the other hand, opposite opinions of lay judges point out significant importance of the participation of social factor in a trial. "Majority of lay judges believe that their participation in the administration of justice assures impartiality of verdicts, constitutes social control of the judiciary, eliminates social suspicions about courts' bias or partiality, and reinforces rule of law while safeguarding judges from passing unfair verdicts, it guarantees a fair trial"⁴⁸. Judge M. Celej is right saying that "judges cannot avoid a discussion with lay judges because they lose a lot themselves: they resign from knowing a different opinion, distinct from their own point of view and fresh arguments. If lay judges do not agree with the opinion of a professional judge, they are entitled to submit a *votum separatum*, or even put it to the vote"⁴⁹. Moreover, it is worth noticing that lay judges ap-

46 Skarga Konstytucyjna z dnia 30 lipca 2010 r. o stwierdzenie niezgodności art. 28 § 1 k.p.k. i art. 30 § 1 k.p.k. z Konstytucją w zakresie, w jakim przepisy te nie dopuszczają obywateli do udziału w sprawowaniu wymiaru sprawiedliwości przed Sądami I instancji (TS 180-10). Also see: uzasadnienie do tej skargi w zakresie, w jakim przepisy te nie dopuszczają obywateli do udziału w sprawowaniu wymiaru sprawiedliwości przed sądami I instancji, p. 7. <https://bgoczynski.fi.les.wordpress.com/2011/07/skarga-konstytucyjna-ts-180-10.pdf>.

47 A. Siemaszko, *Ławnicy: rezultaty badań empirycznych*, Warszawa 1994, p. 73.

48 J. Ruszewski (red.) *Ławnicy...*, *op. cit.*, p. 72.

49 Por. wywiad z M. Celejem w „Rzeczpospolitej”, http://www.rp.pl/artykul/80755,104288_Lawnicy___niechciani_spoeczni_sedziowie.html.

proach a case practically, and thanks to this they may help the judge make the most appropriate decision even if their participation is merely limited to passive observation of a trial. Their work is a certain kind of protection against improper operation of the courts because a judge is, after all, aware of the fact he or she is subject to lay judges' control.

Due to the fact that judges collegiality is an expression of the guaranteed constitutional principle of the right of the citizenry to participate in the administration of justice, the legislator's departure from this principle in district courts in criminal cases and selected civil cases cannot be approved of. What is more, it should trigger considerations on changing relevant provisions of law. It should also be pointed out that trials by jury express endeavours to assure a comprehensive examination of a case. Collegial hearing of a case should lead to the limitation of inaccuracies while establishing facts whereas a final verdict should be reached in effect of discussions and arguments surmounted by a final decision of the majority of the bench within factual and legal aspects⁵⁰.

Moreover, it should be pointed out that the Polish Constitution only indicates general principles the legislator should follow with regard to the regulation of the access of citizenry to the administration of justice. Therefore the question to be answered is whether the exclusion of lay judges from sentencing in district courts in criminal cases as well as in appeals and proceedings after the decision became final, in accelerated procedure and the order for payment procedure, and with regard to cases involving minor offences, which are heard before one judge, does not violate constitutional norms. A changed approach of the legislator to the above issue should result from the need to adapt legal provisions to standards designated in the Polish Constitution rather than from the need of cutting costs of lay judges' maintenance and indicating their insignificant impact on the operation of the administration of justice, which ensues from the hitherto adopted direction of changes with regard to this problem. If a democratic state is to assure the society a possibility of exercising power, particularly through the guaranteed participation of the society representatives in the administration of justice, the participation of lay judges in trials should be extended rather than restricted.

Summing up, it should be stated that nowadays, when the Polish legislator is searching new solutions in the criminal procedural law, the trick is not to "move out" lay judges from the administration of justice, but the whole trick is to use them as best as possible⁵¹. Their participation in a criminal trial enhances social trust in the administration of justice minimizing a sense of discretionary judicial power. It somehow joins case law with a life experience of ordinary people. Lay judges are a visible sign

50 K. Sadowski, (in:) G. Polkowska-Nowak (ed.), *Ławnik jako sędzia społeczny*. Informator, p. 18-19, <https://www.ms.gov.pl>.

51 Interview with M. Celej, *op. cit.*

of nation's sovereignty and social control of judicial power. Properly operating juries guarantee courts' impartiality and affect verdicts' quality. Nevertheless, the question arises whether these assumptions may be implemented in the contemporary legal system, and whether the concept of a radical limitation of the participation of lay judges can be harmonized with the priorities and a model of criminal proceedings adopted by the Polish legislator. Perhaps instead of limiting the participation of lay judges we should opt for a radical increase of their participation in the administration of justice in the form a classical jury is some types of criminal cases. Such a solution was adopted by the Ukrainian legislator, who decided to use a jury composed of five members to adjudicate in criminal cases in the new Ukrainian Code of Criminal Procedure of 2012⁵². This new institution evokes the strongest controversy and yet the Ukrainian literature indicates that "a trial by jury is the best form of sentencing, and its introduction has been an important step towards democratization of the society, enhancement of trust in the justice system and judicial power in the country. Trials by jury case law has only started to develop: ten criminal proceedings finished with trials by jury (three sentences in Luhansk Oblast, two in Crimea and one in each of the following Oblasts: Mykolaiv, Khmelnytskyi, Rivne, Chernihiv and Sumy). Most verdicts are convictions (in three cases life imprisonment). However, there has already been first acquittal in Sumy Oblast, in the case of a twenty years old man who was remanded in custody for a year and due to lack of evidence to prove participation in two murders he was acquitted"⁵³.

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52 The Act on Code of Criminal Procedure of 13 March 2012 which came into force on 20 November 2012, No. 9700-1 of 13 January 2012, the Act was adopted on 13 April 2012, drafted and returned by President on 14 May 2012.

53 F.Ch. Schroeder, T. de Vries (ed.), Nowe tendencje w prawie karnym procesowym: Niemcy, Polska, Ukraina, Białystok 2016, p. 265 et seq.

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