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The Election of Lay Judges and the Principle of Participation by Citizenry in the Administration of Criminal Justice

Abstract: Participation in the administration of justice not only by professionals, but also by representatives of the citizenry, is one of important manifestations of contemporary modern democratic states. In recent years, one can notice not only a reduction in the catalogue of cases involving lay judges, but also a tendency to introduce restrictions on the right to stand as a lay judge (e.g. the requirement of completion of at least secondary education, adequate health, non-performing this function by a councilor of a municipality, county or province) as well as to regulate the electoral process more precisely (e.g. explicit exclusion of political parties from proposing candidates for lay judge appointments, raising the amount of citizens filing candidacy from 25 to 50, defining documents that must be attached to the application for a lay judgepost).

The current system of election of lay judges in Poland is a legacy of communism, its principles founded in the 50s and 60s of the twentieth-century. Objections to the current selection system provoke proposals for making amendments. At least four possible ways of selecting lay judges can be proposed: general elections, drawing from among members of the local community, selection by competent courts or the introduction of a lay judgeexamination.

Each of the abovementioned options presents advantages and disadvantages. Perhaps it is worth considering complementing the current electoral process with the ability to nominate candidates as lay judges from among members of the academic community, or possibly other persons enjoying the respect of society by the senates of universities, which should serve to increase the authority and competence of candidates insofar that in essence it constitutes a guarantee of their quality.

Keywords: lay judge, citizenry, election, criminal proceeding

Słowa kluczowe: ławnik, czynnik społeczny, wybory, postępowanie karne

1. Introduction

Opinions on citizenry participation in the administration of justice diverge in the doctrine. In spite of research conducted in the past on the role of lay judges in the Polish criminal procedure and their influence on takingprocedural decisions,

this matter has not been fully examined yet. The article aims at addressing the role of lay judges in the criminal procedure in Poland and presenting a way of their election. The election for the said function is one of issues treated subsidiarily in the literature. In 2015, another four-year term of lay judges in common courts in Poland comes to an end. At the same time, this will also be an election year for a next term, a period from 2016 to 2019. Among other things, the above factor should justify increased interest in lay judges in our country, although – at first glance – they seem to constitute a marginal phenomenon in Polish courts, taking part in hearing of less than 0.6% of all criminal cases conducted in the first instance¹. Thus, the question arises, whether this is a correct realization of the principle of citizenry participation in adjudicating, or perhaps it proves nonexistence of such principle.

According to the doctrine, lay judges perform at least three main, different, but at the same time complementary functions: they act as a factor of social control (protecting a professional factor from falling into routine, and having disciplining influence on it), they are social judges *sensu stricto* (guaranteeing collegiality of adjudicating), as well as they act as a link between the justice and society². Social control consists not only in the presence of lay judges in the composition of a court and their participation in all procedural acts during a hearing, but also in a possibility of actively influencing the course of a proceeding and its result, it prevents routine of professional judges and disciplines them to greater diligence and correctness of a proceeding, finally it strengthens judicial independence, as influencing a lay judge is more difficult than influencing a professional judge being subject to evaluation, pressure from public opinion and media. The second function is performed by deciding, together with a professional judge, on guilt and punishment. Whereas the third is connected to the fact that a lay judge brings to adjudicating not only her or his own life experience and knowledge, but also an opinion and a sense of justice of his or her community. On the other hand, a lay judge passes on to her or his community not only her or his own opinions, assessments and experiences related to adjudicating, but also the point of view and penal policy of the legislator and representatives of the justice³.

1 S. Waltoś, W dziesięciolecie obowiązywania kodeksu postępowania karnego, "Państwo i Prawo" 2009, vol. 4, p. 6.

2 See: D. Pożaroszczak, Refleksje na temat instytucji ławników w polskim procesie karnym, (in:) B.T. Bienkowska, D. Szafrński (eds.), Problemy prawa polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym. Część czwarta, Warszawa 2013, pp. 174-180 and the literature quoted therein.

3 F. Prusak, Czynniki społeczne w procesie karnym, Warszawa 1975, p. 27-29.

2. Social factor in criminal procedure

Allowing not only professionals, but also representatives of the society, that is so-called social factor, to participate in administration of justice is one of important indications of a contemporary, modern democratic state. Participation of the social factor, however, is not limited merely to passing sentences. In the criminal procedure, where participation of citizens is of particular importance due to the need of ensuring guarantee to the parties (especially to the accused), by exercising – in a sense – social control over the course of the proceeding, the principle of citizenry participation can be understood within the framework of the following material scopes:

- 1) the principle of social factor participation in a narrow sense (*sensu stricto*), which determines direct participation of citizenry in administration of justice (in Polish procedure these are lay judges),
- 2) the principle of social factor participation *sensu largo*, which covers – apart from the aforementioned direct participation in the administration of justice – also forms of indirect participation, that is cooperation in the criminal procedure in other roles, e.g. a social representative or a social guarantor,
- 3) the principle of social factor participation in the broadest sense, which – including the aforementioned forms – covers also participation of this factor as the public during a hearing or supplementally, as citizens collaborating in criminal prosecution⁴.

In spite of concerns whether, under the Constitution of the Republic of Poland of 2 April 1997⁵, Article 182 of which in enigmatic way provides for the citizenry participation in the administration of justice and, at the same time, refers to provisions of a statute, it is possible at all to distinguish the said principle⁶, the doctrine – often by the force of tradition – seems to approve its existence. It is indicated that in directive approach, this provision orders the authorities of criminal procedure to allow for the citizenry (social factor) participation in the criminal procedure whenever a special provision formulates such possibility, especially in a situation, when initiative to participate in the procedure comes from the citizens themselves⁷.

Direct citizens' participation in the administration of justice may appear in one of three variants:

- 1) 'total' participation, occurring in the form of civil courts composed exclusively of non-professional entities,

4 B. Janusz-Pohl, Zasada udziału czynnika społecznego, (in:) P. Wiliński (ed.), System prawa karnego procesowego. Tom III Cz. 2. Zasady procesu karnego, Warszawa 2014, p. 1457.

5 Dz.U. z 1997 r. Nr 78, poz. 483 z późn. zm. [Journal of Laws of 1997 No. 78 item 483 as amended].

6 See: S. Waltoś, Ławnik – czy piąte koło u wozu?, (in:) T. Grzegorzczak (ed.), Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana, Warszawa 2011, p. 524-526.

7 B. Janusz-Pohl, Zasada..., *op. cit.*, p. 1451.

- 2) participation within the framework of mixed composition, i.e. professional judges and lay judges,
- 3) participation in the form of the jury functioning under the principle of division of competences between social judges ('judges of fact') and professional judges ('judges of law')⁸.

The first model is quite rarely found. The best-known example is an English judge of peace. Whereas in Poland, bodies composed exclusively of non-professionals were civilian courts established in 1946 and social courts functioning between 1960 and 1990⁹. The second model is known *inter alia* in Germany, Austria, Belgium, Denmark, Russia¹⁰; whereas the jury functions most of all in Anglo-Saxon countries (Great Britain, USA), but also in France¹¹.

In the Polish legal system, the system of mixed – professional and lay judges – composition has become established. The constitutional principle of social factor participation in administration of justice is detailed in Article 4 §§ 1 and 2 of the act of 27 July 2001 Law on the common court system (l.c.c.s.)¹², providing that citizens take part in administration of justice by participation of lay judges in hearing cases before courts in the first instance, unless statutes provide otherwise, and while hearing cases, lay judges have rights equal to the rights of judges. In turn, Article 169 §§ 1 and 2 of this act guarantees that lay judges are independent in terms of adjudicating and are subject only to the Constitution and statutes. Unlike professional judges, they are merely allowed neither to preside over a hearing and a deliberation, nor exercise judge's activities outside the trial, unless provided otherwise in statutes.

3. Participation of lay judges in adjudicating in criminal cases in Poland

The scope of lay judges' participation in criminal cases is regulated by the Code of criminal procedure of 6 June 1997¹³, which – in Article 3 – confirms the principle of social factor participation in justice ('within the scope set forth in the statute a criminal proceeding is conducted with participation of social factor'). This scope

8 *Ibidem*, p. 1438-1439.

9 See: M. Fajst, *Udział czynnika społecznego w wymiarze sprawiedliwości*, "Studia Iuridica" 1998, t. XXXV, p. 50-62.

10 See: A. S. Bartnik, *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości IIIRP. Analiza socjologiczno-prawna*, Warszawa 2009, p. 26-27 and the literature quoted therein.

11 See: K. Wiczorek, *Udział czynnika społecznego w orzekaniu w polskim i amerykańskim procesie karnym*, Szczecin 2012, p. 16.

12 *Tekst jedn. Dz.U. z 2013 r., poz. 427 z późn.zm.* [The uniform text, Journal of Laws of 2013 item 427 as amended].

13 *Dz.U. z 1997r. Nr 89, poz. 555 z późn. zm.* [Journal of Laws of 1997 No. 89 item 555 as amended].

is presently significantly narrower, than it was when the Code of criminal procedure entered into force. Act of 15 March 2007 amending an act – Code of civil procedure, an act – Code of criminal procedure and certain other acts¹⁴ put an end to the existing principle of collegiality of a panel of judges and introduced the primacy of a single person composition of the court in the first instance. The lay judges adjudicate only in a regional court in cases concerning crimes, that is acts subject to the penalty of at least 3 years imprisonment, where a composition of one judge and two lay judges is binding (Article 28 §2 c.c.p.), whereas – in the case of crimes subject to the penalty of life imprisonment – a court proceeds in a panel of two judges and three lay judges (Article 28 § 4 c.c.p.)

On 1 July 2015, a new act of 27 September 2013 amending an act – Code of criminal procedure and certain other acts¹⁵, entered into force, and introduced possibility of expanding, by a decision of the court, the formation of the court in the first instance, not only to three judges as previously, but also to one judge and two lay judges. The condition in this case is having regard to particular complexity of the case or its significance. It is puzzling that the legislator does not limit possibility of enlarging composition to include lay judges only in the case of regional courts, but literally allows it in the first instance, thus also in a district court. The problem is that lay judges in criminal matters were removed from district courts by the said 2007 amendment. Thus, will it be necessary to select also lay judges to district courts for the imminent and next terms, who may not even have a chance to adjudicate in a criminal proceeding at all, since lay judges in the composition will be a unique and an optional phenomenon?

4. Election criteria for a lay judge

In the Polish system of justice, a term of office of lay judges is four calendar years following the year when election took place; whereas, upon expiry of the term, a lay judge may participate only in hearing of a case commenced before with his participation, pending its completion (Article 165 § 1 and 2 l.c.c.s.). Selected as a lay judge may be a person, who pursuant to Article 158 § 1 l.c.c.s.:

- 1) is a Polish citizen and enjoys full civil and civic rights,
- 2) has unimpeachable character,
- 3) is at least 30 years of age,
- 4) has been employed, has conducted business activity or lived in a place where he or she is a candidate for at least a year,
- 5) is not over 70 years of age,
- 6) is capable of fulfilling lay judge's duties, as regards health condition,

14 Dz.U. z 2007 r. Nr 112, poz. 766. [Journal of Laws of 2007 No. 112 item 766].

15 Dz.U. z 2013 r., poz. 1247. [Journal of Laws of 2013 item 127].

7) has completed at least secondary education.

Additionally, when adjudicating in labor law cases, a lay judge may be a person demonstrating specific knowledge in staff matters (Article 158 § 3 l.c.c.s.).

The function of a lay judge cannot be performed, in view of clear prohibition provided for in Article 159 § 1 l.c.c.s., by:

- 1) persons employed in common courts and other courts, as well as in the public prosecutor's office, persons, who are members of bodies, from rulings of which commencing a court proceeding can be demanded
- 2) police officers and other persons holding positions connected to prosecution of offences and minor offences,
- 3) advocates and trainee advocates,
- 4) legal advisors and trainee legal advisors,
- 5) clergymen,
- 6) soldiers on active duty,
- 7) officers of Prison Service,
- 8) councilors of gmina, powiat and voivodeship.

As in the case of narrowing a catalogue of matters in which lay judges participate, in recent years one can observe a tendency towards introducing restrictions as to possibility to stand for the function of a lay judge (e.g. census of at least secondary education, suitable health condition, ban on performing this function by a councilor of gmina, powiat and voivodeship), as well as a tendency towards stricter regulation of the selection process itself (e.g. explicit exclusion of the possibility to submit candidates for lay judges by political parties, increasing the number of citizens proposing candidates from 25 to 50, providing for in a statute what documents must be submitted to the proposition of a candidate for a lay judge)¹⁶. Introduced impediment to obtain the status of a lay judge, and a lower number of mandates to occupy surely eliminated many random persons, looking at the function of a lay judge mainly through the prism of financial compensation, or representing low intellectual level. Some persons could have been discouraged by perspective of necessity to spend around PLN 100 on a clean criminal record certificate and a medical certificate, without a guarantee that they would be selected by a municipal council. Thus, motivation and substantive level of lay judges was significantly higher between 2012 and 2015 than in previous terms of office. It should be noted however, that a cost related to submitting documents in the course of lay judges recruitment for the 2016 – 2019 term significantly decreased, as obtaining information on criminal records is currently associated with a payment of PLN 30 (§ 3 section 1 of the Ordinance of the

16 Such amendments were introduced by the act of 15 April 2011 amending the act – Law on the common court system (Dz.U. z 2011 r. Nr 109, poz. 627) [Journal of Laws of 2011 No. 109 item 627]

Minister of Justice of 18 June 2014 setting the fee for the provision of information from the National Criminal Register¹⁷), whereas a medical certificate on the lack of impediments to perform the function of a lay judge can be obtained free of charge from a doctor providing primary health care service (e.g. a specialist in family medicine).

5. Postulates of lay judges' election system modification

It should be noted that the present system of electing lay judges in Poland is a heritage of the Polish People's Republic. Its rules were established in 50s and 60s of the XX century¹⁸. Insofar as a mechanism of appointing lay judge candidates – who were initially top-down nominated by presidiums of national councils, subsequently meetings of employees of workplaces, village meetings and meetings of members of social organizations, whereas presently by social organizations, groups of at least 50 citizens and presidents of particular courts – has been in a way modified, the act of the selection to a lay judge function itself, still belongs to the local legislative body – municipal councils have replaced in this respect national councils functioning in the previous system. An obligation to convene a committee, previously appointed by the presidium of a national council, presently by a municipal council, a task of which is to provide opinion on proposed candidates – was sustained. The same problems remained however, resulting from unprecise procedures and unmeritorious factors at the stage of assessing candidates by a committee of a municipal council. Research on practical aspects of lay judges election to the 2004-2007 term indicated a vast variety of practices adopted in respective municipal councils, as well as – in extreme cases – applying the criterion of decision-maker's political or personal sympathies towards specific candidates¹⁹. Even now, when political parties are formally excluded from possibility of proposing candidates, there are no obstacles to force through 'yours' in the course of the committee's work on opinions, and then during the final voting by a municipal council. The election calendar is also similar to the calendar in force in the previous system – election of lay judges in October of the year preceding a new term of office, lay judges making vow at the latest in December.

As a result of reservations towards the system of lay judges' election binding for years, there is a discussion and proposals made in the literature. At least four possible ways of appointing lay judges are indicated:

17 Dz.U. z 2014 r., poz. 861. [Journal of Laws of 2014 item 861].

18 On evolution of a mode of proposing and selecting lay judges at that time see: M. Rybicki, *Ławnicy ludowi w sądach PRL*, Warszawa 1968, p. 220-235.

19 See: A. S. Bartnik, *Sędzia czy kibic?...*, *op. cit.*, p. 44-54.

- the general elections²⁰ – it seems that the only advantage is in this case is the full democratism of such procedure, while disadvantages include the potentially low turnout of voters, significant costs of organizing the general voting (even if correlated with municipal elections), fear of considerable politicization of elections, and consequently the justice itself, substantive value of candidates giving way to election social engineering and populist tricks; as research shows, also judges²¹ and councilors are against²²,
- drawing from among members of a local community, similar to procedure of selecting the jury in the US²³ – the obvious advantage would be detachment from politics (lay judges appointed as a result of fortune), yet disadvantages prevail also in this case (need to adjudicate by random persons, with no desire to do so and having no proper knowledge, intelligence, life experience and predisposition),
- selection by proper courts²⁴ – in the case of candidates already having previous experience in performing the function of lay judges and evaluated positively by judges with whom they adjudicated, such a procedure would certainly work, the proper dimension of social factor would be negated however, there would be fear of dominating and subordinating lay judges to interests of judicial environment, it could lead to the loss of – in a sense – control influence on professional judges and justice, whereas lay judges themselves would catch technocratic rite – as a matter of fact even now, having a possibility to propose their candidates for lay judges, presidents of courts don't hurry to use this prerogative,
- an exam for a lay judge²⁵ – an advantage of this concept would be, as it seems, increased professionalism, authority, and acceptance of lay judges by the society and representatives of justice; on the other hand, such exam could prevent from running and attract strongly determined individuals, but not necessarily competent and having so-called soft competences – maybe the idea would be worth considering as one of few elements of lay judge selection process.

20 A supporter of this manner is A. S. Bartnik, *Sędzia czy kibic?...*, *op. cit.*, p. 199.

21 See: P. Sitniewski, *Analiza wyników ankiet prezesów sądów w zakresie wyboru ławników, jakości ich pracy oraz funkcjonowania w ramach wymiaru sprawiedliwości*, (in:) J. Ruzewski (ed.), *Ławnicy – społeczni sędziowie w teorii i praktyce. Ocena funkcjonowania i procesu wyboru ławników sądowych na przykładzie sądów Apelacji Białostockiej*, Suwałki 2011, p. 94.

22 J. Ruzewski, *Udział radnych w wyborze ławników oraz ocena ich udziału w sprawowaniu wymiaru sprawiedliwości w opiniach radnych*, (in:) J. Ruzewski (ed.), *Ławnicy – społeczni sędziowie w teorii i praktyce...*, *op. cit.*, p.158.

23 More on procedures related to determination of the composition of the juries in the USA see: K. Wiczorek, *Udział czynnika...*, *op. cit.*, p. 94-121.

24 See: D. Pożaroszczyk, *Refleksje na temat...*, *op. cit.*, p. 182.

25 See: D. Pożaroszczyk, *Refleksje na temat...*, *op. cit.*, p. 182.

Each of the above mentioned alternatives is equally – if not more – controversial than the lay judges' election system binding in Poland. Maybe it would be worth considering whether to complement the current election process with a possibility to propose lay judge candidates from among members of academic society and possibly other persons enjoying social respect by senates of schools of higher education, what should also increase candidates' authority and competence, giving in a way a guarantee of their high standard.

6. Summary

Summarizing consideration concerning participation of social factor in administration of criminal justice in Poland, one has to agree with assertion that lay judges in the Polish Peoples' Republic – against expectations of authorities of that time – became a factor mitigating the justice, although authoritarianism does not tolerate the full independence of judges and lay judges, and – if does not find other solution – will willingly eliminate participation of representatives of the society in the administration of justice²⁶. It seems that also today lay judges are a thorn in technocrats – trusting only in totally professionalized justice – flesh.

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26 See: S. Waltoś, *Ławnik...*, *op. cit.*, p. 526.

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