Fairness of the new model of Polish criminal appeal proceedings in the context of delivered research

FAIRNESS OF THE NEW MODEL OF POLISH CRIMINAL APPEAL PROCEEDINGS IN THE CONTEXT OF DELIVERED RESEARCH

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Content

INTRODUCTION

Polish criminal proceedings has been changed thoroughly in the last few years. Since 2012 Polish parliament has significantly amended criminal procedure almost three times by the Act of 27th September, 2013[1] and the Act of 2th February, 2015[2], which came into effect on 1st July, 2015 and the Act of 11th March, 2016[3], which came into effect on 15th April 2016. However, these three amendments mentioned above are only the biggest ones passed during this period. The most astonishing is that they have been varying from each other. All efforts put in trainings and workships for judges, prosecutors, advocats and legal cancellors, studies, analysis carried by doctrine or changing social attitude to new conduct of criminal proceedings taken before 1st July, 2015 have been buried by introducing the Act of 11th March, 2016, which restored both adversarial and inquisitive character of trial. The reasons of such changes were various; most of them should have healed our criminal proceedings problems like excessive formality of proceedings or the role of the judge, who was the prosecutor, arbiter, and defendant in one person. The changes introduced by the first two acts were so revolutionary that the amendment was given the name "Great". The authors of amendments in their justification of changes referred to American criminal proceedings, which seemed to them the best example of adversary trail. The adversarial principle, although it was previously present in the Polish criminal procedure (but not in such a complex form), has become the key issue of changes in criminal proceedings, in particular the proceedings pending before the court of first instance.

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1 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.

2 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.

3 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.

Not without significance, however, is the fact that the Great Amendment also influenced the Polish model of appeal proceedings. As indicated, the changes introduced on 1st July, 2015 were guided by the idea of improving appeal proceedings and changing the evidentiary proceedings before the court of appeal. The shape of these changes was also influenced by the increasing *audiatur et altera pars* rule of the main hearing, what was particularly evident in the provisions relating to conducting evidential proceedings, appealing against court decisions, including those issued on the basis of plea bargaining, access to a counsel *ex officio* or the participation of parties in proceedings before court.

All changes brought into Polish appeal procedure could be then divided after D. Świecki[4] into three categories: ordering, modifying and innovative. The first category of changes included issues related to the limits of the legal appeal or being bound by the court to appeal objections. The second category modified the preasumptions regarding the scope of the appeal, the *ne peius* rule and the evidentiary proceedings. The third category envisaged completely new solutions, i.e. evidentiary preclusion, obligation to form the objections against the decision, impossibility of making certain objections of evidentiary nature, as well as against certain provisions of plea bargaining settlements, determining the scope of the appeal at the stage of motion for justification, supplementing the justification, appointing a lawyer *ex officio* to lodge an appeal.

As mentioned before, the Act of 11th March, 2016 in its content rejected the previously introduced changes and returned to the mixted, inquisitorial and adversarial model of the criminal procedure. However, despite of rejecting the adversarial solutions, the legislator decided to maintain the reformatory model of appeal proceedings, which is supposed to speed up the appeal procedure. The reinstatement of the inquisitive-adversarial model of main hearing has also changed the attitude to the evidentiary proceedings before court of appeal. Since then both the parties and the court could express the necessity of conducting evidence.

4 D. Świecki, Postępowanie odwoławcze, (in:) D. Świecki (ed.), Postępowanie odwoławcze, nadzwyczajne środki zaskarżenia, postępowanie po uprawomocnieniu się wyroku i postępowanie w sprawach karnych ze stosunków międzynarodowych, Kraków 2015, pp. 18-19.

It should also be noted that the government draft of another amendment to the Code of Criminal Proceedings (Act of 4th December 2018 on the amendment of the Code of Criminal Proceedings Act as well as certain other acts) upholds the possibility of substantive adjudication in an appeal proceedings; however, it stresses the need of proper implementation of the standard of double-instance criminal proceedings through focusing of the evidentiary proceedings at the stage of a first-instance proceedings thanks to introduction of an additional basis for dismissal of a motion as to evidence by a court of appeal if the evidence was not adduced before the court of first instance, even though the mover could have adduced it then or the circumstance to be demonstrated pertains to a new fact which has not been subject to the proceedings before the court of the first instance, and the mover could have adduced it at that time (Article 452(2) of the CCP)[5]. As pointed out in the substantiation to the draft, "thus, examination of evidence should primarily take place before the court of the first instance. However, these correct assumptions concerning functional relations between the main procedure and the appeal one must subside in the event that making of correct factual findings concerning the essential subject of the trial would be compromised"[6].

The above-mentioned changes of appeal proceedings became the subject of a research project entitled "Is the Polish model of criminal appeal proceedings fair?." In the first chapter of the monograph the author analysed the changes of appeal model using the comparative method, referring to solutions of other countries, as well as to international regulations contained in the European Convention on Human Rights, where the meaning of fair trial and the right of appeal in criminal cases are defined. The criminal cases conducted under the aforementioned acts were also examined.

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5 Substantiation of the government bill of 04 Dec 2018 on the amendment of the Code of Criminal Procedure Act and of certain other acts (Printing no. 207), https://legislacja.rcl.gov.pl/docs//2/12318806/12554733/12554734/dokument370955.pdf.

6 Government bill of 04 Dec 2018, https://legislacja.rcl.gov.pl/docs//2/12318806/12554733/12554734/dokument370954.pdf.

The subject of discussion of the following chapter of the monograph will be the changes of the Polish appeal proceedings model from 2015-2016 in the light of findings from file and questionnaire studies.

The authors of the project performed a file study of a total sample of 595 court files selected from three appeal jurisdictions: Białystok, Łódź and Warsaw, in the period between 1 January 2014 and 31 December 2018. The cases under analysis were divided into those subject to the regime preceding the changes introduced by Act of 11th March 2016 on the amendment of the Code of Criminal Procedure Act and certain other acts (the aforementioned April amendment) and upon its entry into force on 15 April 2016, i.e. into cases in which a judgment by an appellate court was passed before 15 April 2016 (so-called "old" model of appeal proceedings) and cases in which the judgment by an appellate court was passed on 15 April 2016 or later (so-called "new" model of appeal proceedings). Such a way of compilation of data was based, among other things, on conclusions from the resolution by a panel of 7 judges of the Supreme Court of 29 November 2016, ref. no. I KZP 10/16. This forced a change in the original assumptions by the authors of the grant, concerning the division of cases into those subject to the regime of "increased adversarial aspect" and those conducted under the regulations valid before 1 July 2015. Having divided the cases according to the new turning point,232 cases conducted under regulations valid before 15 April 2016 as well as 363 cases conducted under the amended regulations were covered by the analysis.

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 (appelate and regional) 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. 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.

The remaining chapters of the monograph will present the results of project studies, concerning detailed issues, and will describe the elements affecting the assessment of fairness of the Polish model of appeal proceedings as a whole. Therefore, they will pertain to the following issues: the role of grounds for appeal in the amended CCP, evidentiary proceedings in an appeal instance, the significance of the basis for appeal from Article 440, as analyzed in the context of procedural limits of (un)fairness in proceedings, the scope of examination of an appeal and decisions by a court of appeal, the right to defence and protection of the injured party's rights in an appeal proceedings.

The discussion of the entire monograph and the findings presented therein[7] are intended to answer the essential question: Is the Polish model of appeal proceedings in criminal cases fair?

Białystok, 1 August, 2019

Cezary Kulesza

7 All tables and figures presented in the following monograph have been developed by the team of Authors under the academic project GR 67: "Is the Polish model of criminal appeal proceedings fair?"The team of the project consists of Adrianna Niegierewicz, Małgorzata Mańczuk, PhD Dariusz Kużelewski, PhD Izabela Urbaniak-Mastalerz, Katarzyna Łapińska (the Department of Criminal Procedure of the Faculty of Law of the University of Białystok), PhD Łukasz Chojniak (The Institute for Social Prevention and Resocialisation at the University of Warsaw), PhD Rossana Broniecka (the Department of Criminal Procedure of the Faculty of Law of the University of Warmia and Mazury) and the Head of the research project Professor Cezary Kulesza (the Department of Criminal Procedure of the Faculty of Law of the University of Białystok).

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

I. Conventional model of a fair appeal proceedings

1. Preliminary remarks

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

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

Table no. 1. Fair Criminal Appeal Standards

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

Source: Authors' study.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 *Ibidem*, p. 597.

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

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

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

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

25 *Ibidem*, § 43-48.
26 ECtHR judgment of 29 April 2014, application no. 9043/05, Natsvlishvili and Togonidze vs. Georgia, § 103-106, LEX no. 1503104.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. European models of criminal appeal proceedings

1. Preliminary remarks

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

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

36 See an analysis of compliance with such guarantees in consensual modes in the light of case-law of Polish courts: C. Kulesza, Compliance of plea bargaining in the Polish criminal process with fair trial requirements from the point of view of the participants and the court, (in:) C. Kulesza (ed.), Criminal Plea Bargains in the English and the Polish Administration of Justice Systems in the Context of the Fair Trial Guarantees, Białystok 2011, pp. 48-87 and the case-law cited thereof.

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

38 *Ibidem*, pp. 32-33.

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

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

2. English appeal model

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

39 *Ibidem*, pp.37-38.

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

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

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

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

2.1. Appeal proceedings before Crown Courts

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

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

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

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

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

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

2.2. Appeal proceedings before Court of Appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The German system

3.1. German appeal and revision proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

71 Bundesgerichtshof – BGH.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. The Russian system

4.1. Appeal proceedings

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

84 StV 2018, no. 1, pp. 9-10.
85 BGH: Statistik der Strafsenate 2017, https://www.bundesgerichtshof.de/, accessed on 10 April 2019
86 A. Paniczіewa, Jawliajetsia li pieresmotr ugołownych dieł wo 2-j instancji appiellacjonnym? „Ugołownoje Prawo" 2016, vol. 4, p. 100.

law. Therefore, as a result of the reform of 2013, appeal proceedings adopted the appeal model, which replaced the cassation model[87]. The Russian literature considers the following to be the fundamental traits of appeal proceedings[88]: a) broad scope and freedom of appeal against non-final judgments and other procedural decisions; b) instance appeal against non-final judgments and other procedural decisions; c) revisory procedure of review of criminal cases and materials in appeal proceedings; d) court orders are reviewed with regard to their lawfulness (legal form) and factual grounds (fairness); e) prohibition of worsening of a defendant's situation when the measure of appeal does not originate from the injured or from the public prosecutor. Presently, two forms of appeal exist in Russian proceedings: appeal complaint (*апелляционная жалоба*) lodged by a party, and appeal petition filed against a judgment by the public prosecutor (*представление*); for the purpose of confirming the evidence contained in the measure of appeal, the appellant is entitled to file apetition for the court of appeal to hear the evidence heard by the court of first instance, which must be specified in the appeal complaint or petition, and a list of witnesses, experts and other persons summonable to the court sitting for this purpose must be enclosed. If an appellant in their appeal complaint files a petition for the hearing of evidence that was not heard by the court of first instance (fresh evidence), they are obliged to provide in the measure of appeal the grounds for the inability to present such evidence before the court of first instance (Article 389.6(1¹) introduced by the Federal Act No 217-ФЗ of 23 July 2013).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9) on discontinuation of the appeal proceedings.

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

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

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

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

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

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

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

4.2. Cassation procedure

Bringing of a cassation complaint against a valid court decision is a power of persons mentioned in Article 401^2 (1) of the CCP of the RF, namely, the convict, the acquitted, their defenders and legal representatives, the injured party, a private prosecutor, their statutory representatives, as well as other persons to the extent that the court decision violates their rights and legal interests. A civil plaintiff, a defendant, or their legal representatives may only appeal against a court decision to the extent referencing a civil claim.

On the other hand, a cassation petition against a valid court decision may be submitted by the Prosecutor General and his deputies, heads of federal prosecutor's offices as well as heads of their corresponding military prosecutor's offices (Article 401^2 (1) of the CCP of the RF).

Cassation complaints and petitions may be submitted directly to cassation courts within one year since the moment when the court decision under appeal has become final. The functional competence of cassation courts is determined by Article 401^3 (2), the grounds for cassation – by Article 401(15), and the kinds of decisions by a cassation court – by Article 401(13). A cassation court is not bound by pleas of evidentiary nature of a cassation complaint or petition and may review an evidentiary proceedings to the full extent, and if the cassation was submitted only by some of the convicted people, it may review the decision with regard to all of them (Article 401(16), par. 1 and 2).

On the other hand, chapter 48^1 of the CCP of the RF applies to supervisory proceedings conducted by the Presidium of the Supreme Court of the RF as a result of supervisory complaints and petitions brought by the authorized subjects indicated above, as specified in Article 401^2(1) and 401^2(2), if they have exhausted all the hitherto appeal and cassation remedies (see Article 412^1(1) of the CCP of the RF). As in case of cassation, the only criterion of supervisory review is the compliance of the final decisions under appeal with the law, whereas the catalogue thereof is specified in Article 412^1(3) of the CCP of the RF. A preliminary review of a supervisory complaint and a supervisory petition is exercised personally by a judge of the Presidium of the SCRF who, in the event of lack of grounds on which a supervisory complaint

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Final conclusions

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

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

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

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

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

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CHANGES IN THE POLISH APPEAL PROCEEDINGS MODEL IN THE LIGHT OF RESEARCH RESULTS[2]

The main goal of this paper is to analyze the changes in the model of Polish appeal proceedings in the context of the research conducted under the academic project implemented by the Department of Criminal Procedure of the Faculty of Law of the University of Białystok[3]: "Is the Polish model of criminal appeal proceedings fair?" This subject is a topical issue since the Polish criminal procedure model has been subject to serious changes in the recent years. The amendment that came into force on 1 July 2015[4] (hereinafter referred to as the "July amendment") was intended to transform our criminal procedure into a more adversarial one. However, the amendment did not remain indifferent towards the appeal proceedings and has radically changed its model too in this regard. Such changes resulted directly from the need to expedite the appeal proceedings and to direct it to a greater extent towards amendment of decisions. Interestingly, whereas changes of the model of the main hearing towards the (increased) adversarial aspect have been withdrawn by another amendment of 15 April 2016 (hereinafter, the "April amendment"), the appeal proceedings model

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3 Research project "*Is the Polish model of appeal proceedings in criminal cases fair?",* programme: OPUS 8, panel HS5_4 criminal law, financed from the resources of the National Science Centre, head of the project: prof. zw. dr hab. Cezary Kulesza.

4 Introduced by two acts: 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.

has retained its form in a state not very different from the one envisaged by the July amendment.

The authors of the project performed a file study of a total sample of 595 court files selected from three appeal jurisdictions: Białystok, Łódź and Warsaw. The cases under analysis were divided into those subject to the regime preceding the changes introduced by Act of 11 March 2016[5] on the amendment of the Code of Criminal Procedure Act and certain other acts (the aforementioned "April amendment") and upon its entry into force on 15 April 2016, i.e. into cases in which a judgment by an appellate court was passed before 15 April 2016 (so-called "old" model of appeal proceedings) and cases in which the judgment by an appellate court was passed on 15 April 2016 or later (so-called "new" model of appeal proceedings). Such a way of compilation of data was based, among other things, on conclusions from the resolution by a panel of 7 judges of the Supreme Court of 29 November 2016, ref. no. I KZP 10/16. In connection with the discrepancies in interpretation of the law with regard to "whether in cases examined 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 had been submitted to the court before 1 July 2015, the applicable provisions governing the course of a criminal proceedings shall be those determined by the intertemporal rule expressed in Article 25(1) of the Act of 11 March 2016 on the amendment of the Code of Criminal Procedure Act and of certain other acts (*Journal of Laws* 2016, item 437), or by the rule specified in Article 27 of the Act of 27 September 2013 on the amendment of the Code of Criminal Procedure Act and of certain other acts (*Journal of Laws* 2013, item 1247)." The Supreme Court passed a resolution to which it has given the power of a legal principle. According to its content, "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

5 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.

and adjudication of a detention order had been directed to the court before 1 July 2015, the applicable regulations shall be those governing the course of a criminal procedure, introduced by the Act of 11 March 2016 on the amendment of the Code of Criminal Procedure Act and of certain other acts (*Journal of Laws* 2016, item 437), that is, as a rule – new regulations". This forced a change in the original assumptions by the authors of the grant, concerning the division of cases into those subject to the regime of "increased adversarial aspect" and those conducted under the regulations valid before 1 July 2015. Having divided the cases according to the new turning point, 232 cases conducted under regulations valid before 15 April 2016 as well as 363 cases conducted under the amended regulations were covered by the analysis. The table below shows the distribution of cases by appeal jurisdiction.

Table no. 1

	Łódź appeal jurisdiction	Białystok appeal jurisdiction	Warszawa appeal jurisdiction	Total
regulations valid before 15 April 2016	45 cases	93 cases	94 cases	232 cases
regulations valid after 15 April 2016	159 cases	119 cases	85 cases	363 cases
Total	204 cases	212 cases	179 cases	595 cases

Source: Authors' own study.

The file data presented herein have been supplemented by information, obtained pursuant to the Act on the Access to Public Information from three appellate courts covered by the study, concerning indication of proceedings durations, stability of decisions by the court of first instance, and kinds of decisions by the court of second instance, as well as concerning the number of cases submitted to the appellate court in the three relevant appeal jurisdictions – between 2007 and 2016. Additionally, the comparisons of proceedings durations have been based on annual statistical information published on appellate court websites (such information has been made available in the Białystok appeal jurisdiction for 2015-2018, in the Łódź jurisdiction for 2017-2018, and in the Warsaw jurisdiction for 2017-2018). The uneven distribution of

cases in individual appeal jurisdictions and upon division thereof based on the turning point in time resulted, above all, from limited access to court files and effective lack of possibilities to access all cases essentially fulfilling the requirements for being covered by the study. Therefore, comparing the data for the periods before the April amendment and after the introduction thereof, one should take account of the difference in the number of cases (which has been expressed by the authors of the comparisons, additionally providing a coefficient to facilitate the data analysis in the tables summarizing the studies).

Under the academic project, the authors have also requested judges of criminal appeal divisions of all common courts in Poland to complete a questionnaire of anonymous survey concerning fairness of appeal procedure. The questions in the questionnaire (20) concerned the assessment of changes in the criminal appeal proceedings, as introduced by the legislator. Answers were obtained from 143 judges, including 45 judges of appellate courts and 98 judges of regional courts.

According to the assumptions of the research grant, the questions in the case survey and in the questionnaires were developed so as to analyze the following aspects of fair appeal proceedings:

1) the activity of individual litigants bringing appeals and the extent of recognition thereof by courts (efficiency);
2) the frequency of occurrence of individual grounds for appeal in the procedural practice and the extent of recognition thereof by courts (including consensual modes);
3) the parties' initiative to adduce evidence and the scope of evidentiary proceedings before courts of appeal;
4) the duration of an appeal proceedings;
5) the cassation and amendment aspect in the case-law of courts of appeal;
6) the effect of the institution of the *reformationis in peius* prohibition on the appeals brought;
7) application of formal defence regulations in an appeal proceedings;

8) the mutual feedback between the elements of the adversarial main hearing model and an appeal proceedings;
9) the scope of cognition of a court of appeal.

This paper, summarizing the research, will partially reference the aspects above in the context of the recent changes in the Polish appeal proceedings model as introduced by the Act of 11 March 2016 on the amendment of the Code of Criminal Procedure Act and of certain other acts. A detailed discussion of the problems above will be found in the following chapters of the monograph. In these chapters, the authors will also briefly address the planned amendments of the Code of Criminal Procedure, as envisaged in the government bill of 4 December 2018 of the Act on the amendment of the Code of Criminal Procedure Act and of certain other acts, currently worked upon in the Sejm (document no. 3251).

Concerning appeal proceedings, the Act of 11 March 2016 retained the essential solutions of the model of this proceedings, in force since 1 July 2015. Changes only affected certain regulations, such as Article 427 of the CCP (annulment of section 4 concerning the prohibition of raising of pleas of evidentiary nature correlated with Article 167 of the CCP in the previous wording) or Article 452(2) of the CCP (dismissal of a motion as to evidence due to pointlessness of examination of evidence in the appeal instance in case of existence of premises for annulment of the decision). The assumption of the consecutive amendments was focus on the principle of amendment of decisions by the court of second instance. The legislator moved from the significant characteristics of the revision model of appeal proceedings towards the appeal model, by enabling the court of appeal to amend the judgment to the detriment of the defendant in case of change of factual findings made by the court of the first instance[6]. Such measures were largely intended to expedite the proceedings and, above all, to shorten it. Therefore, the 2016 amendments have not caused any departure from the amendment-based model of adjudication in an appeal instance, yet they maintained

6 S. Zabłocki, Między reformatoryjnością a kasatoryjnością, między apelacyjnością a rewizyjnością, (in:) P. Wiliński (ed.), Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach, Warszawa 2015, pp. 416-433.

the direction the legislator was heading for when introducing the July amendment. "However, the environment of those solutions has changed considerably, posing a question about the possibility of efficient functioning of the appeal model of appellate review under the conditions of inquisitorial system"[7].

The axis of the solutions affecting the appeal proceedings model is Article 437(2) of the CCP (in the wording introduced by the July amendment), which has limited the possibilities of issuance of cassation decisions by the court of second instance.

Table no. 2

Article 437 of the CCP before 15 April 2016	Article 437 of the CCP after 15 April 2016
§ 1. After an appeal was examined, the court rules to uphold, change or reverse the appealed judgment entirely or in part. The same applies to the examination of an appeal filed against the statement of reasons of a judgment. § 2. If evidence gathered in the case warrants it, the appellate court changes the appealed judgment by deciding differently as to the substance of the matter or reverses it and discontinues the proceedings. In other cases it reverses the judgment and refers the case to the court of first instance for the purpose of re-examination.	§ 1. After an appeal was examined, the court rules to uphold, change or reverse the appealed judgment entirely or in part. The same applies to the examination of an appeal filed against the statement of reasons of a judgment. § 2. The appellate court changes the appealed judgment by deciding differently as to the substance of the matter or reverses it and discontinues the proceedings. In other cases it reverses the judgment and refers the case to the court of first instance for the purpose of re-examination. A judgment may be reversed and a case referred for the purpose of re-examination only in the circumstances indicated in Article 439 § 1, Article 454 or if it is necessary to repeat the entire judicial process.

Source: Authors' own study.

The provision formulated in such a way does not restrict the court of second instance any more with regard to the possibility of amendment of decisions; here, the authors of the amendment have departed from the provision "if evidence permits to do so", imposing an *a quo* obligation of substantive examination of the case on the court, except the aforementioned exceptions: Article 439(1), Article 454, or if repeated conducting of the entire proceedings is necessary[8].

7 S. Steinborn, Wstęp, (in:) S. Steinborn (ed.), Postępowanie odwoławcze w procesie karnym – u progu nowych wyzwań, Warszawa 2016, p. 16.

8 C. Kulesza, Apelacja po nowelizacji – rozważania modelowe, (in:) A. Lach (ed.), Postępowanie karne po nowelizacji z dnia 11 marca 2016 roku, Warszawa 2017, p. 254.

With regard to appeal proceedings, as mentioned before, the legislator decided to essentially uphold its appeal/amendment model. In the opinion of the authors of the amendment, this is intended to expedite the appeal proceedings. Enabling the court of second instance to conduct an evidentiary proceedings, thus rectifying any possible errors by the court of the first instance, which are often so minor that annulment of the decision and referring the case back would only prolong the proceedings significantly, will increase the efficiency of this proceedings. The elements of inquisitorial system in the main hearing model, restored by the April amendment, were also to translate into the possibility of both admission of evidence adduced by parties and examination of evidence by the court ex officio in an appeal proceedings. In the opinion of the authors of the amendment of 15 April 2016, this model of conducting of evidentiary proceedings was not mutually exclusive with the assumed model of appeal proceedings. "Since the scope of powers of a court of appeal to examine a case in the second instance and substantive adjudication is a different thing than the way the factual basis of the contested judgment has been built"[9]. This only means that, apart from remedying of errors connected with the party's passivity before the court of the first instance, a possibility will also appear to remedy errors connected with insufficient activity of the court during an evidentiary proceedings and to formulate a plea in appeal on this basis. Therefore, one can assume that such solution only determines the mode of remedying of errors made before the court of the first instance. Thus, the court of appeal amends the contested decision, adjudicating differently concerning the substance, or annuls it and discontinues the proceedings; in other cases, it annuls the decision and refers the case back to the court of the first instance. However, annulment of the decision and referring the case back may only occur in situations specified in Article 439(1), Article 454 or if repeated conducting of the entire proceedings is necessary. For the same reasons, the court of appeal will also dismiss a submitted motion as to evidence.

The restoration by the April amendment of the wording of Article 167 of the CCP, valid before 1 July 2015 (restoring of *ex officio* adduction

9 Justification of the Act of 10 April 2016, Sejm Printing 207, p. 48.

of evidence by the court in every situation when this is necessary to explain the circumstances of the case) affected the repeal of section 4 of Article 427 of the CCP, which introduced restrictions in raising of pleas of evidentiary nature.

Table no. 3

Article 427 of the CCP before 15 April 2016	Article 427 of the CCP after 15 April 2016
§ 1. An appellant should indicate the decision or finding appealed, present the objections raised against the decision and state his demands. § 2. If the appeal is submitted by the public prosecutor, defence counsel or attorney, it should also contain a statement of reasons. § 3. In the appeal, an appellant may not raise an objection that specific evidence has not been taken by the court, if the party has not motioned for that, or an objection that the evidence has been taken despite the lack of the relevant, or that the evidence taken is outside of the limits of the motion. § 4. In proceedings before a court which has been initiated on the initiative of a party, an appeal may not be raised by the court for failing to provide evidence, if the party did not submit evidence in this regard, allegation of taking evidence despite the party's application in that undertaking, or also the alleged violation of the rules regarding court activity in the taking of evidence, including the taking of evidence outside the scope of the thesis. § 5. The provision of § 4 shall not apply if the taking of evidence is obligatory.	§ 1. An appellant should indicate the decision or finding appealed, and also state his demands. § 2. If the appeal is submitted by the public prosecutor, defence counsel or attorney, it should also present objections raised against the decision with reasons. § 3. The appellant may also indicate new facts or evidence, if he was unable to present them in the proceedings before the court of first instance. § 4. (*removed*) § 5. (*removed*)

Source: Authors' own study.

When analyzing the current wording of Article 427 of the CCP, one should pay attention to the fact that the content of section 1 of this provision has changed as well. The previous version of this article has been restored, imposing the obligation to formulate pleas in appeal exclusively on qualified entities. The provision concerning formulation of pleas raised against the decision was abandoned, although the substantiation of the previous version of this regulation (of 1 July 2015) stressed that this requirement was not intended to oblige the appellant to indicate the pleas precisely but to articulate what he demands (even

by his own words)[10]. To sum up the analysis of the regulation above, it is necessary to stress that the April amendment upheld the evidence preclusion introduced to the appeal proceedings by the July amendment.

The solutions in Article 427 of the CCP also affected the new wording of Article 433 of the CCP. In this case, as pointed out by C. Kulesza, one can speak of a return to the concept of total appellate control, additionally reinforced by the abolition of the limited prohibition of raising of evidentiary pleas in appeal, as indicated above (deletion of Article 427(4) of the CCP)[11].

Table no. 4

Article 433 of the CCP before 15 April 2016	Article 433 of the CCP after 15 April 2016
§ 1. The appellate court considers the case only within the limits of the appeal and objections raised, taking into consideration the contents of Article 447 § 1-3, and in a wider scope in the cases indicated in Article 435, Article 439 § 1, Article 440 and Article 455. § 2. The appellate court is obliged to consider all requests and objections made in the appeal, unless the law provides otherwise.	A§ 1. The appellate court considers the case only within the limits of the appeal, and if the appeal indicates objections against the judgment – also within the limits of the objections, taking into consideration the contents of Article 447 § 1-3. The appellate court considers the case in a wider scope in the circumstances specified in Article 435, Article 439 § 1, Article 440 and Article 455. § 2. The appellate court is obliged to consider all requests and objections made in the appeal, unless the law provides otherwise.

Source: Authors' own study.

As a consequence of the changes referenced above, a new wording has also been given to Article 434 of the CCP, specifying the *reformationis in peius* prohibition.

10 M. Fingas, S. Steinborn, Granice rozpoznania sprawy w instancji odwoławczej w świetle nowelizacji kodeksu postępowania karnego z dnia 27 września 2013 r. i 20 lutego 2015 r., (in:) P. Wiliński (ed.), Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach, Warszawa 2015, p. 488., D. Świecki, Postępowanie odwoławcze, (in:) D. Świecki (ed.), Postępowanie odwoławcze, nadzwyczajne środki zaskarżenia, postępowanie po uprawomocnieniu się wyroku i postępowanie w sprawach karnych ze stosunków międzynarodowych, Znowelizowany Kodeks postępowania karnego w pracy prokuratora i sędziego, Kraków 2015, p. 18.

11 C. Kulesza, Apelacja... *op.cit.*, p. 247.

Table no. 5

Article 434 of the CCP before 15 April 2016	Article 434 of the CCP after 15 April 2016
§ 1. An appellate court may render a judgment unfavourable to the accused only if the appeal was submitted against him. An appellate court may adjudicate only within the limits of the appeal and only if flaws have been pointed out in the appeal, unless the law provides that the judgment be issued regardless of the limits of the appeal and objections raised. § 2. An appeal unfavourable to the accused may result in a judgment in his favour, if the requirements laid down in Article 440 are fulfilled. § 3. *(removed)* § 4. If the accused was sentenced pursuant to Article 60 § 3 or 4 of the Criminal Code, or Article 36 § 3 of the Fiscal Criminal Code, an appellate court may render a judgment unfavourable to the accused regardless of the limits of the appeal and objections raised, also if the appeal has been submitted exclusively in favour of the accused who, after the judgment was issued, has retracted or significantly altered his explanations or testimonies. This does not apply to a grounded objection of violation of substantive law or to the circumstances justifying the reversal of the judgment by the appellate court, specified in Article 439 § 1. § 5. *(removed)*	§ 1. An appellate court may render a judgment unfavourable to the accused only if: 1) the appeal was submitted against him, and 2) within the limits of the appeal, unless the law provides that the judgment be issued regardless of the limits of appeal, and 3) if flaws indicated in the appeal have been identified, unless the appeal has not been lodged by the public prosecutor or attorney and objections have not been raised therein or the law provides that the judgment should be issued regardless of the objections raised. § 2. An appeal unfavourable to the accused may result in a judgment in his favour, if conditions referred to in Article 440 or 455 are fulfilled. § 3. (*removed*) § 4. With respect to accused sentenced by applying Article 60 § 3 or 4 of the Criminal Code or Article 36 § 3 of the Fiscal Criminal Code the appellate court may, regardless of the limits of the appeal and objections raised and also if the appeal was filed exclusively in favour of the accused, render an unfavourable judgment if after the issue of the judgment the accused retracted or significantly altered his explanations or testimony. This, however, does not apply if a founded objection of a violation of substantial law has been raised, or if the appellate court has found reasons justifying the reversing of the judgment defined in Article 439 § 1 § 5. (*removed*)

Source: Authors' own study.

Further referencing the solutions assumed since 15 April 2016, it should additionally be noted that the legislator decided to uphold Article 447(5) of the CCP in the hitherto wording. Despite the changes in the first-instance proceedings, pleas specified in Article 438(3) and 438(4) of the CCP, connected with contents of a concluded criminal-procedural agreement, as mentioned in Article 343, Article 343a and Article 387 of the CCP, still cannot serve as the basis of appeal.

Article 452 of the CCP has been amended as well. The grounds for amendment of this regulation point out that this is a particular premise allowing a court of appeal to dismiss a motion as to evidence due to the

pointlessness of examination of evidence in the appeal instance in the event of existence of a premise for annulling of the judgment[12].

Table no. 6

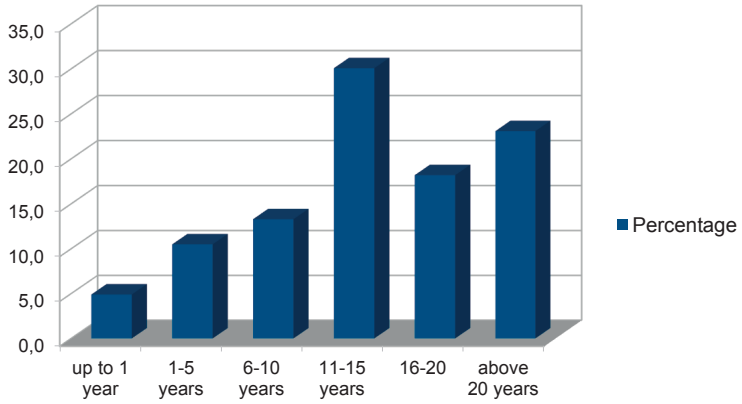
Articles 452 and 437 of the CCP before amendments	Articles 452 and 437 of the CCP after 1 July 2015	Articles 452 and 437 of the CCP after 15 April 2016
§ 1. An appeal court shall not be allowed to conduct evidentiary proceedings pertaining to the intrinsic nature of the case. § 2. In exceptional cases the appeal court, if it finds the completion of a judicial examination necessary, may nevertheless take evidence directly at the appeal trial, if this will expedite the judicial proceedings, and there is no necessity to conduct the whole of it, or a major part thereof, anew. Before the appeal trial, the court may also issue an order on the admission of evidence.. II. Article 437. (Types of ruling of the appeal court). § 1. After examining the appeal measure the court shall decide whether the decision subject to review shall be sustained, amended or reversed. The same shall apply to hearing an appeal measure filed against the statement of reasons for a judgement. § 2. If the assembled evidence warrants it, the appeal Court shall amend the decision subject to review, deciding differently as to is contents, or reverse it and discontinue the proceedings; in other cases it shall reverse the decision and remand the case to the court of the first instance for re-examination.	(§ 1 removed) § 2. Recognising the need for supplementing the judicial proceedings, the appeal court conducts evidentiary procedures at a trial, if this will expedite proceedings and there is no necessity to re-conduct the judicial proceedings in its entirety. Evidence may be admitted also before the trial II. Article 437 (Types of ruling of the appeal court). § 1. After an appeal was examined, the court rules to uphold, change or reverse the appealed judgment entirely or in part. The same applies to the examination of an appeal filed against the statement of reasons of a judgment. § 2. If evidence gathered in the case warrants it, the appeal court changes the appealed judgment by deciding differently as to the substance of the matter or reverses it and discontinues the proceedings. In other cases it reverses the judgment and refers the case to the court of first instance for the purpose of re-examination.	(§ 1 removed) § 2. The court of appeal dismisses an evidentiary motion if the taking of evidence by this court would be pointless due to the reasons set forth in Article 437 paragraph 2, second sentence. II. Article 437. (Types of ruling of the appeal court). § 1. After an appeal was examined, the court rules to uphold, change or reverse the appealed judgment entirely or in part. The same applies to the examination of an appeal filed against the statement of reasons of a judgment. § 2. If evidence gathered in the case warrants it, the appeal court changes the appealed judgment by deciding differently as to the substance of the matter or reverses it and discontinues the proceedings. In other cases it reverses the judgment and refers the case to the court of first instance for the purpose of re-examination III. Article 437 § 2 s. 2: Reversal of the judgement and referral of the case to the first instance may take place only in cases referred to in Article 439 para.1, Article 454, or if it is necessary to renew the judicial proceedings in their entirety.

Source: Authors' own study.

12 Justification..., *op. cit.,* p. 10.

The changes above have been subjected to in-depth assessment, both by the authors of the grant themselves – when examining case files and completing survey questionnaires – and by judges who evaluated the functioning of the amended regulations in an anonymous survey directed to them. More than a half of the surveyed judges (71.4%) had worked in court of appeal for more than 11 years, so they had the experience necessary to assess the current legal status, e.g. by comparing it with the previous one.

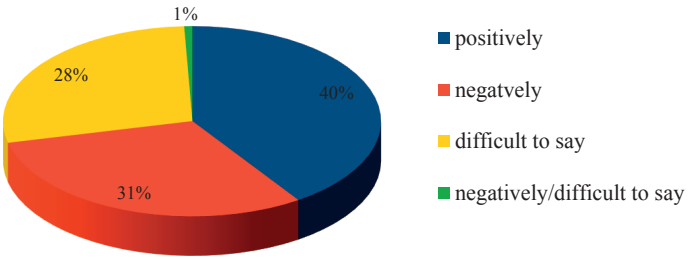
Figure no. 1. Work experience



Source: Authors' own study.

40.6% of judges have positively evaluated the appeal proceedings model shaped by the amendments of the Code of Criminal Procedure of 1 July 2015 and 15 April 2016 in relation to the previous model, in force until 30 June 2015. 30.8% of the surveyed have indicated they assessed the changes negatively, 28% marked the answer "difficult to say", and one of the surveyed picked "negative" and "hard to say" simultaneously.

Figure no. 2. How do you assess the model of appeal proceedings, as shaped by the amendments of the Code of Criminal Procedure of 1 July 2015 and 15 April 2016, in relation to the previous model (in force until 30 June 2015)?

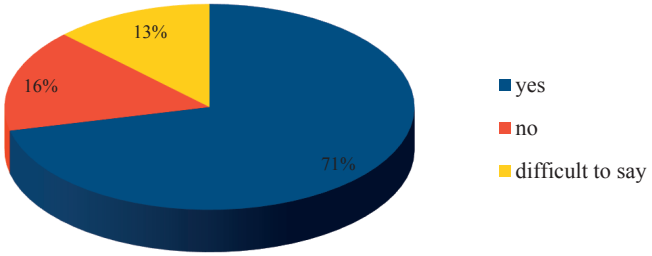


Source: Authors' own study.

In view of the results above, one should point out that a very large number of the surveyed was unable to determine whether they assessed the new appeal proceedings model positively or negatively. Such a large number of undecided persons being specialists in their field indicates that the period of validity of the changes in the criminal procedure was too short to unambiguously evaluate the remodelling of criminal proceedings in practice. The diversity of views among judges shows that the judicial environment did not evaluate the planned changes in an unambiguously positive way. Based on the following questions from the questionnaire, one should say that despite the ambiguous assessment of the entirety of changes introduced by the latest amendments, the judicial environment has a positive approach to individual regulations, such as the restriction in appeal against consensual judgments (Fig. 16), restriction of the possibility of cassation adjudication by a court of appeal (Fig. 13), the current wording of the reformationis in peius prohibition (Fig. 17) or the ne peius rules (Fig. 19) as well as the current regulations concerning enforced appearance of a person deprived of liberty at an appeal hearing (Fig. 18). A significant majority of the surveyed also point out that the expanded possibilities of examination of evidence are used in practice (Fig. 6). Moreover, 71.3% of judges assessed the introduced changes as significant for the appeal proceedings model, 16.1% stated that the changes were not significant, whereas 12.6% marked the answer "difficult to say". Therefore, regardless of the assessment of the

changes, most judges perceive them as significantly affecting the appeal proceedings model.

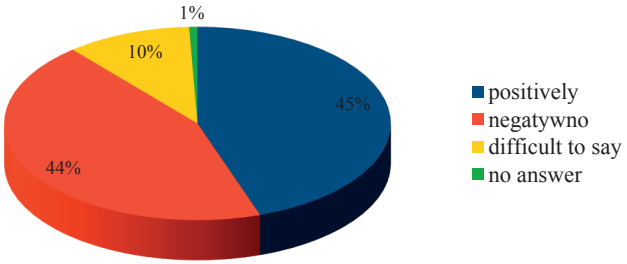
Figure no. 3. In your opinion, have the changes in the model introduced any significant differences in the functioning of appeal proceedings?



Source: Authors' own study.

A similar number of the surveyed judges has indicated the expansion of the possibility of conducting of evidentiary proceedings by a court of appeal as a positive (44.8%) and negative change (44.1%). One judge picked the answer "difficult to say". The obtained result is baffling and leads to a conclusion that judges are divided in their opinions on their evidence-related powers in the amended appeal model.

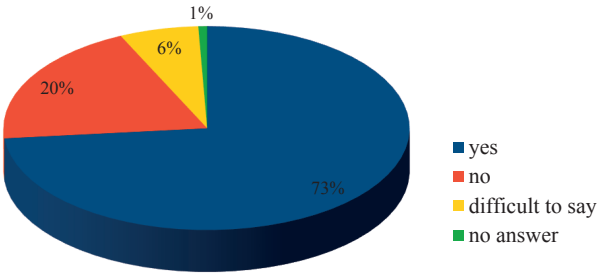
Figure no. 4. How do you assess the broadening of possibilities of conducting of evidentiary proceedings by a court of appeal?



Source: Authors' own study.

However, most judges claim they have sufficient possibilities of conducting of evidentiary proceedings (73.4%). Just 19.6% of the surveyed answered that their powers in this regard are too narrow, and 6.3% had difficulties addressing this question (1 surveyed judge did not express himself in this regard at all).

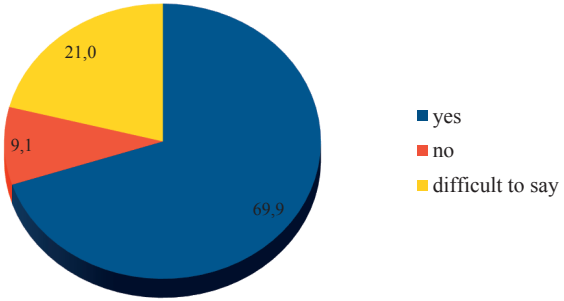
Figure no. 5. In your opinion, do courts of appeal currently have sufficient possibilities of conducting of evidentiary proceedings?



Source: Authors' own study.

The surveyed gave predominantly affirmative answers (69.9%) to the question "Do you believe that courts of appeal make use of the extended possibilities of conducting of evidentiary proceedings?" 9.1% of them stated that courts do not make use of the powers they have been granted, and 21% could not address this issue. The obtained result contradicts the findings from file studies, showing that courts of appeal benefit quite rarely from the extended possibilities of conducting of evidentiary proceedings (see Table 26).

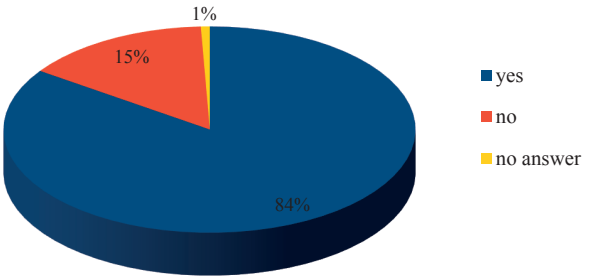
Figure no. 6. In your opinion, do courts of appeal make use of the extended possibilities of conducting of evidentiary proceedings?



Source: Authors' own study.

84.6% of the surveyed judges pointed out the necessity of evidence preclusion in an appeal proceedings. A small percentage (14.7%) does not see such a necessity and only one judge failed to pick any answer to this question. This may evidence a certain reluctance of the surveyed to introduce increased decision-amendment aspect of appeal proceedings, which, as shown by appeal models assumed e.g. in England (Crown Courts) or Russia, is related to a wide extent of conducting of evidentiary proceedings *ad quem* by courts, or even repetition of the entire judicial proceedings (see Chapter I of the monograph).

Figure no. 7. In your opinion, is evidence preclusion needed in appeal proceedings?

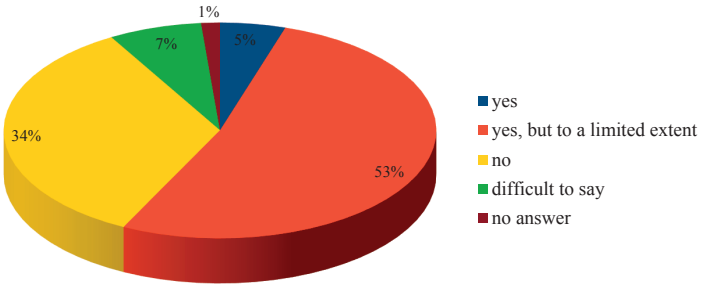


Source: Authors' own study.

4.9 % of the judges indicated that evidence preclusion is present in the current appeal proceedings model, while 52.4% claimed it functions

in a proceedings to a limited extent. 34.3% of the surveyed claimed that evidence preclusion is absent from our model of proceedings. 7% could not determine whether it exists in our model of appeal criminal proceedings, and two did not answer this question. Of course, such a diversity of answers may result from different understanding by judges of the concept of evidence preclusion, as this term was not defined in the question itself.

Figure no. 8. Is evidence preclusion present in the current model of appeal proceedings?

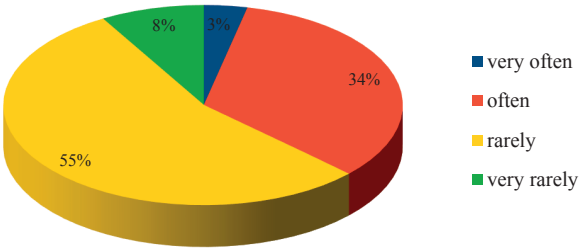


Source: Authors' own study.

The distribution of answers to the question "How often, in your opinion, does a court of appeal need to take the initiative to adduce evidence?" has turned out to be interesting. 3.5% indicated the answer "very often", 33.6% "often", 54.5% "rarely", and 8.4% "very rarely". This comparison remains somewhat contradictory to the answers to the preceding question (Figure no. 6) concerning the use of the possibility of conducting of evidentiary proceedings by a court of appeal. Therefore, the surveyed have predominantly indicated that courts of appeal make use of the powers given to them when conducting evidentiary proceedings, and simultaneously the largest percentage has also answered that such courts seldom take the initiative to adduce evidence. It seems that the differences in answers to this question may be seen to come from a different perspective assumed by the respondents when answering: addressing question from Figure no. 6, they could have treated it as a question about the general (abstract, so to speak) assessment of the introduced changes, while their answers to question from Figure no. 9

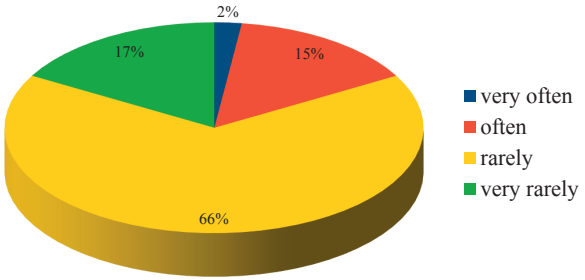
were based on their experience from their own judicature practice. The obtained result is essentially coincident with the findings from file studies, showing very little initiative to adduce evidence by a court of appeal (see Table 26).

Figure no. 9. In your opinion, how often is there a need for a court of appeal to take the initiative to adduce evidence?



Source: Authors' own study.

Figure no. 10. How often has the parties' initiative to adduce evidence in an appeal proceedings been useful in your work for resolution of the case?

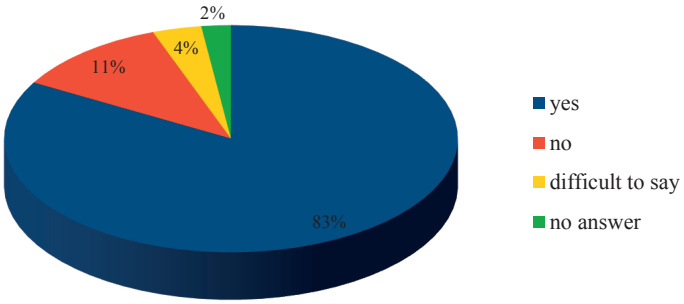


Source: Authors' own study.

The judges gave similar answers to the question about the usefulness of the initiative to adduce evidence by parties in an appeal procedure (Figure no. 10). The most frequent answer was "rarely" (66.4%). The remainder of the surveyed (2.1%) claimed the initiative of parties was very often useful for settlement of a case, 14.7% – that is was often useful,

and 16.8% - that it was useful very rarely. In this instance, the remarks concerning the previous question (Figure no. 9) will remain valid as well. It is also unquestionable that in order to draw reliable research results, one should rely not on general evaluation (Figure no. 6) but on personal (practice-based) negative assessment of the effect of initiative to adduce evidence by parties on settlement of appeal cases by judges.

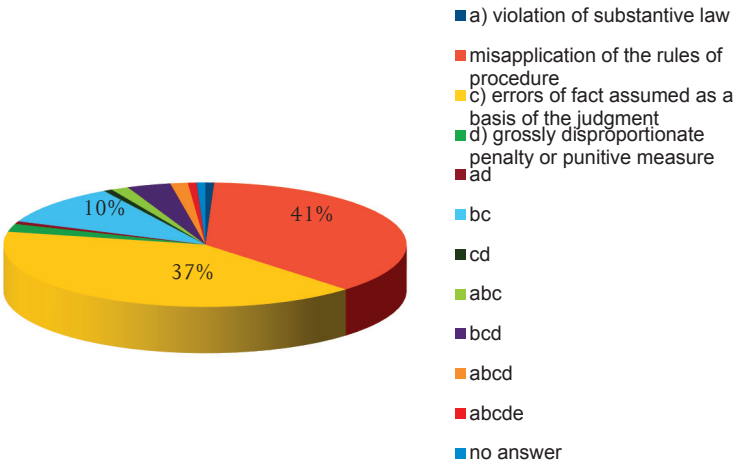
Figure no. 11. In your opinion, does every appellant need to indicate pleas in their appeal?



Source: Authors' own study.

Most of the surveyed judges (83.2%) advocated the necessity to indicate pleas in appeal by every appellant (Figure no. 11). A small percentage (11.2%) answered negatively to this question, 5 of the surveyed could not take a position, and three gave no answer. Such a distribution of answers indicates that the judicial environment, despite the provisions of the currently binding Code of Criminal Procedure, sees the necessity to indicate pleas for every appellant, rather than just for those represented by professional entities. Such a distribution of answers enables quite a far-reaching conclusion that abolition by the April amendment of the obligation to formulate pleas for every appellant has not found approval in the eyes of the judges. Not unimportant for the assessment of the obtained result may be the fact that formulation of such pleas by every appealing entity significantly improves the work of a court of appeal.

Figure no. 12. In your opinion, which of the pleas mentioned in Article 438 of the CCP is raised most frequently (individually or jointly with others) in appeals?

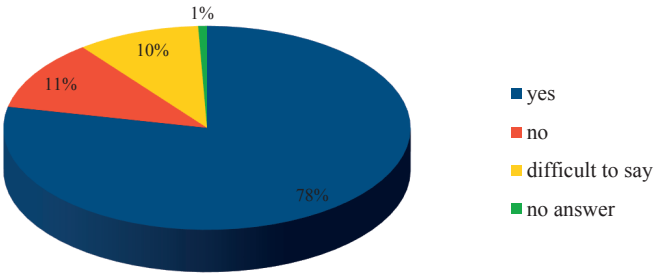


Source:Authors' own study.

According to the surveyed, the most frequently raised pleas in appeal are the plea of misapplication of the rules of procedure (37.1%) and the plea of errors in fact (40.6%) (Figure no. 12). The surveyed judges indicated that, apart from raising of the pleas above individually, appellants also base their appeals on both of them simultaneously (10.5%), combining them occasionally (3.5%) with the plea of grossly disproportionate penalty or punitive measure. One judge (0.7%) indicated violation of substantive law as an individual plea, three more (2.1%) did the same for grossly disproportionate penalty or punitive measure. Among the jointly raised pleas, the judges indicated the pleas of violation of substantive law and grossly disproportionate penalty (0.7%), the plea of errors in fact and grossly disproportionate penalty or punitive measure (0.7%), the compilation of the plea of violation of substantive law, misapplication of the rules of procedure, errors in fact, or all pleas (1.4% each). One judge (0.7%) indicated all pleas raised jointly, together with the "difficult to say" answer, while one (0.7%) failed to address the question. The resulting high percentage of the plea of errors in fact may also give rise to a conclusion about an increase in

the significance of appeal elements in the amended appeal proceedings, as this ground for appeal is typical of the appellate model[13]. The result is coincident with the findings from file studies, also showing that these two grounds for appeal are raised the most frequently (see Table 19).

Figure no. 13. In your opinion, does the regulation of Article 437(2), 2nd sentence, of the CCP actually restricts the possibility of cassation adjudication by a court of appeal?

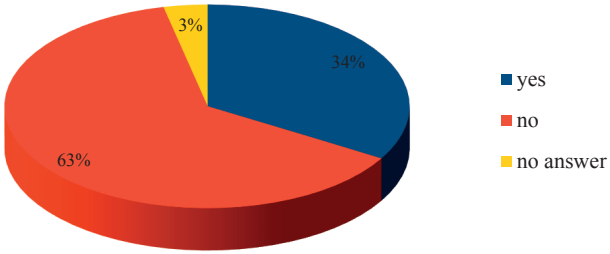


Source: Authors' own study.

Most judges (78.3%) indicated that the regulation of Article 437(2) sentence 2 of the CCP actually restricts the possibility of cassation adjudication by a court of appeal. 11.2% of the surveyed gave a negative answer to this question, 9.8% were unable to address it, and one of the surveyed did not pick any answer. Therefore, a conclusion comes to mind that the measure applied by the author of the bill in Article 437 of the CCP has achieved its goal and actually affected the change of the appeal model with regard to the amending/cassation aspect of adjudication.

13 See C. Kulesza, A.Niegierewicz, Błąd w ustaleniach faktycznych jako podstawa odwoławcza w perspektywie prawnoporównawczej (in:) Księga ku pamięci Prof. A. Murzynowskiego (in print).

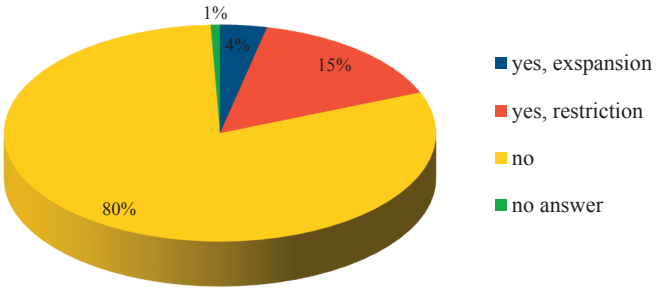
Figure no. 14. In the context of Article 437(2), 2nd sentence, of the CCP, does the necessity to conduct evidentiary proceedings concerning the substance of the case always cause a necessity to annul the judgment and refer the case back?



Source: Authors' own study.

33.6% of the surveyed indicated that the necessity of conducting of evidentiary proceedings concerning the essence of the case always causes the necessity of annulment of the judgment and referring the case back, while 62.9% claimed there is no such relation. 5 judges did not address the question (3.5%). Therefore, most of the surveyed cannot see any relation between the necessity of conducting of a proceedings concerning the essence of the case and annulment of the judgment and referring of the case back. Therefore, the surveyed judges usually leave the conducting of such proceedings within the competencies of a court of appeal.

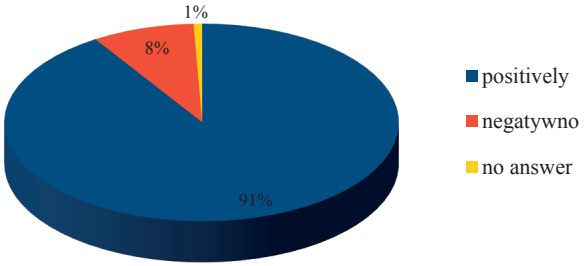
Figure no. 15. In your opinion, does the catalogue of absolute reasons for appeal from Article 439 of the CCP needs amendment?



Source: Authors' own study.

Most (80.4%) of the surveyed see no need to change the catalogue of absolute grounds for appeal, 15.4% would limit this catalogue, 3.5% would expand it. One judge failed to address the question. With view to the above, a conclusion comes to mind that the catalogue of absolute grounds for appeal, as contained in the code of criminal procedure, is a complete and sufficient catalogue.

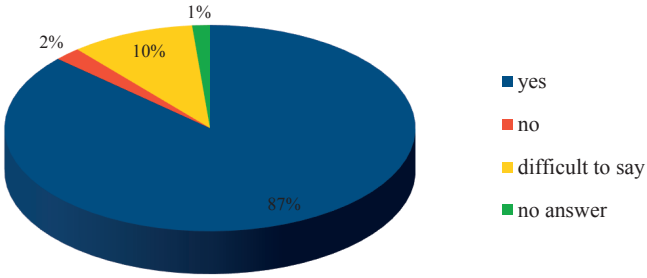
Figure no. 16. How do you evaluate the relevance of limitation of the possibility of appeal against consensual judgments (Article 447(5) of the CCP)?



Source: Authors' own study.

The majority of the surveyed (90.9%) assess the validity of the restriction of the possibility of appeal against consensual judgments (Article 447(5) of the CCP) positively, 8.4% had a negative attitude to this change, and 1 judge has not given any answer. On this basis, it can be concluded that the judicial environment has an affirmative attitude to the changes concerning appeal against consensual judgments, as introduced to the code.

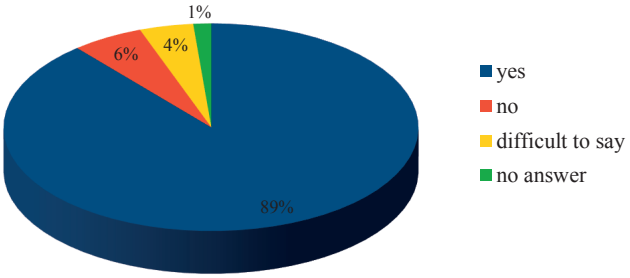
Figure no. 17. In your opinion, does the current wording of the reformationis in peius prohibition sufficiently guarantee the interests of the parties?



Source: Authors' own study.

Most of the surveyed judges (86.7%) assess the current wording of the reformationis in peius prohibition as sufficiently protecting the interests of the parties. Only 2.1% of the surveyed indicated the negative answer, 9.8% picked "difficult to say", while 1.4% did not answer.

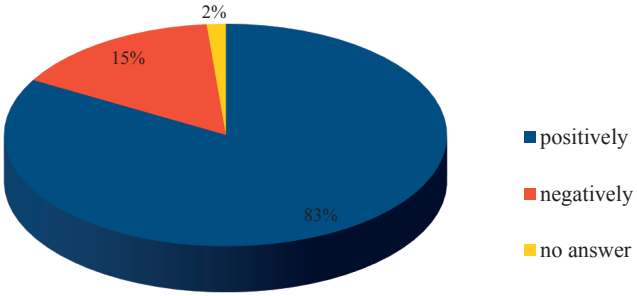
Figure no. 18. Are the current regulations concerning enforced appearance of a person deprived of liberty at an appeal hearing sufficient to ensure the right to defence?



Source: Authors' own study.

The majority of the surveyed judges (89%) regards the currently binding regulations concerning enforced appearance of a person deprived of liberty at an appeal hearing as sufficient for ensuring of the right to defence. Only 6% have doubts concerning such regulations and assess them negatively, 4% are unable to address this question, one judge did not answer. Such a large number of positive answers to the question above suggests that, despite introduction of certain restrictions with regard to enforced appearance of a person deprived of liberty at an appeal hearing (which had been intended to accelerate the proceedings), such restrictions, in the opinion of the surveyed, do not violate their right to defence.

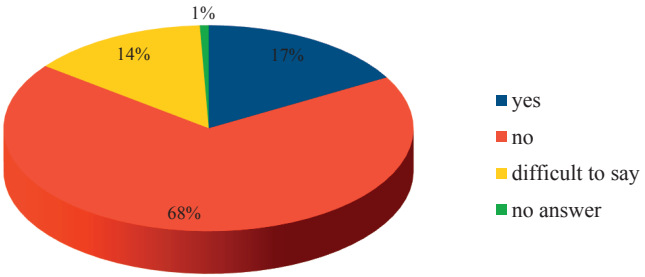
Figure no. 19. How do you assess the current wording of the ne peius rules in Article 454 of the CCP?



Source: Authors' own study.

The current wording of Article 454 of the CCP has been received positively by judges. 83.2% of them indicated that they assessed the current wording of the ne peius rules under Article 454 of the CCP positively, 15.4% - negatively, 1.4% did not answer. Such a result was unquestionably affected by the restriction of the scope of the *ne peius* prohibition, made by the July amendment, increasing the possibilities of decision amendment by courts of appeal.

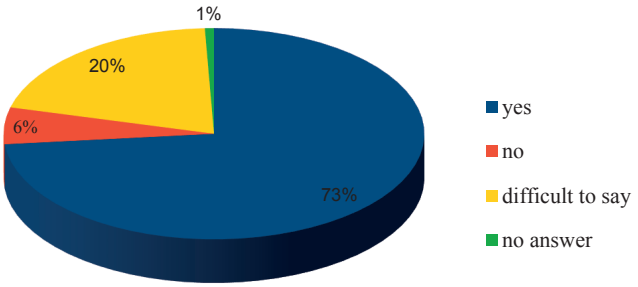
Figure no. 20. In your opinion, will introduction of complaint against the judgment by a court of appeal affect acceleration of the entire criminal procedure?



Source: Authors' own study.

The approach of the judges is completely different concerning the issue of complaint against a judgment by a court of appeal and its effect on the acceleration of the entire criminal procedure. Only 16.8% of the surveyed claimed that introduction of this complaint would affect the acceleration of the proceedings. The majority (68.5%) do not see any such relation. 14% of the survey found it difficult to take a position, one judge failed to answer. The overly short period of functioning of this institution prevents verification to what extent such an approach of the surveyed is reflected in the procedural practice and to what extent it constitutes expression of their negative attitude towards another extraordinary remedy in law, intended to revise their decisions.

Figure no. 21. In your opinion, is the Polish model of appeal proceedings fair?



Source: Authors' own study.

According to 73.4% of the surveyed judges, the Polish appeal proceedings model is fair. Only 5.6% claim it does not meet this standard, and 20.3% picked the "difficult to say" answer. One judge did not answer this question. Here as well, just like in case of answers to the questions concerning evidence preclusion (Figure nos. 7 and 8), the result could have been affected by the fact that the term "fairness of appeal proceedings" was not defined therein. Nevertheless, the authors of the survey had the right to assume that the surveyed, when answering such a general, summarizing question, would take account of problems (elements) included in previous detailed questions.

Moving in the next step to the analysis of court files, the first aspect they referenced was the duration of the proceedings. It is the duration of the proceedings that directly translates to the fulfilment of the principle of examination of a case within a reasonable time, and indirectly of the principle of fair criminal proceedings. As indicated by D. Vitkauskas and G. Dikov, "when analyzing the duration of a proceedings using quantitative research, i.e. in numerical form, one should still not forget about factors which may affect this duration, namely, the degree of complexity of the case, the defendant's behaviour and the manner of proceedings by procedural authorities, or the degree of vexation of the pending proceedings to the defendant"[14]. In view of the above, the authors of the grant, in the conclusions they draw, avoid categorical formulations concerning the duration of an appeal proceedings. Each proceedings would have to be analyzed for many factors, and conducting of such in-depth research was impossible. In order to increase the representativeness of the findings from the research under the grant, the authors, while developing comparisons of the duration of proceedings, also reached for statistical data published on websites of appellate courts. The authors also made use of public information concerning the period of 2007-2016, made available by the three researched appellate courts. Due to the lack of statistical reports for 2015-2016 on the website of the Łódź and Warsaw appellate courts, it was not possible to compare all data from all appeal jurisdictions. For comparison, only summaries from the Białystok appeal have been cited for the period of 2017-2018.

Data concerning the duration of inter-instance proceedings have been analyzed first.

14 D. Vitkauskas, G. Dikov, Ochrona prawa do rzetelnego procesu karnego w Europejskiej Konwencji Praw Człowieka, Strasburg 2012, p. 78.

Table no. 7

Duration of inter-instance proceedings for 2007-2016				
Duration	up to 2 months	over 2 months to 3 months	over 3 months to 6 months	over 6 months
Łódź appeal jurisdiction (2748 cases)	21%	41%	29%	9%
Białystok appeal jurisdiction (2453 cases)	53%	32%	14%	2%
Warszawa appeal jurisdiction (4364 cases)	13%	39%	36%	12%
Average	29%	37%	26%	8%

Source: Authors' own study.

Table no. 8

Duration of inter-instance proceedings for 2017-2018				
Duration	up to 2 months	over 2 months to 3 months	over 3 months to 6 months	over 6 months
Łódź appeal jurisdiction (788 cases)	18%	37%	31%	14%
Białystok appeal jurisdiction (466 cases)	42%	39%	15%	4%
Warszawa appeal jurisdiction (954 cases)	15%	35%	35%	15%
Average	25%	37%	27%	11%

Source: Authors' own study.

Table no. 9

Duration of inter-instance proceedings in Łódź appeal jurisdiction for 2014-2018				
Duration	up to 2 months	over 2 months to 3 months	over 3 months to 6 months	over 6 months
2014 (325 cases)	16%	38%	34%	12%
2015 (288 cases)	15%	42%	31%	12%
2016 (317 cases)	21%	41%	28%	9%
2017 (304 cases)	22%	40%	24%	14%
2018 (484 cases)	16%	36%	34%	14%
Average	18%	40%	30%	12%

Source: Authors' own study.

Based on the data above, it should be indicated that the duration of a inter-instance proceedings in 2007-2016 does not differ greatly from the average duration of such a proceedings in 2017-2018. In the period of 2007-2016, 65% of cases of inter-instance proceedings lasted on average between 2 and 6 months, and in 2017-2018, 64% of cases lasted between 2 and 6 months. The obtained data about the Łódź appeal jurisdiction do not vary significantly from the results cited above either, indicating that 70% of inter-instance proceedings in 2014-2018 lasted between 2 and 6 months.

Another aspect examined by the authors of the grant was the duration of the entire appeal proceedings, i.e. since the date of submission of the case in the second instance until the issuance day of the decision the second instance.

Table no. 10

Duration of appeal proceedings in Białystok and Warszawa appeal jurisdiction for 2007-2016						
Duration	up to 1 month	over 1 month to 2 months	over 2 months to 3 months	over 3 months to 4 months	over 4 months to 6 months	over 6 months
Białystok appeal jurisdiction (2432 cases)	15%	56%	19%	6%	3%	1%
Warszawa appeal jurisdiction (4336 cases)	15%	53%	24%	6%	1,7%	0,3%
Average	15%	55%	21%	6%	2,35%	0,65%

Source: Authors' own study.

Table no. 11

Duration of appeal proceedings for 2017-2018						
Duration	up to 3 months	over 3 months to 6 months	over 6 months to 12 months	over 12 months to 2 years	over 2 years to 3 years	over 3 years
Łódź appeal jurisdiction (618 cases)	426 (69%)	138 (22%)	39 (6%)	14 (2%)	1 (0,2%)	0
Białystok appeal jurisdiction (280 cases)	220 (79%)	44(16%)	7 (3%)	5 (2%)	3 (1%)	1 (0,35%)
Warszawa appeal jurisdiction (824 cases)	449 (54%)	281 (34%)	63 (8%)	27 (3%)	2 (0,24%)	2 (0,24%)
Average Białystok and Warszawa appeal jurisdiction	61%	29%	6%	3%	0,45%	0,27%

Source: Authors' own study.

Due to the divergent periods of time assumed in statistical reports of appellate courts as well as of data obtained under access to public information, it has proven impossible to fully compare the durations of appeal proceedings in 2007-2016 and 2017-2018. However, the available data enabled drawing of at least partial conclusions. Average duration of an appeal proceedings in the Białystok and Warsaw appeal jurisdictions in 2007-2016 was up to 3 months in 91% of cases, approx. 8% of cases were examined within a period ranging 3 and 6 months, and less than one percent took more than 6 months. Average duration of an appeal proceedings in the Białystok and Warsaw jurisdictions in 2017-2018 lasted up to 3 months in 61% of cases, between 3 and 6 months in 29% of cases, and above 6 months in approx. 10% of cases. Therefore, comparing the data above, one should point out that the duration of an appeal proceedings has relatively extended.

Another issue researched by the authors of the grant was the timeliness of preparation of reasons for the decision. The tables below present data referring to the Białystok appeal jurisdiction in 2015-2016 as well as all jurisdictions under analysis in 2017-2018.

Table no. 12

Timeliness of preparation of reasons for the decision in Białystok appeal jurisdiction for 2015-2016		
number of cases	within the mandatory time-limit	over the mandatory time-limit
284	243 (86%)	41 (14%)

Source: Authors' own study.

Table no. 13

Timeliness of preparation of reasons for the decision for 2017-2018		
appeal jurisdiction	within the mandatory time-limit	over the mandatory time-limit
Łódź (442 cases)	277 (63%)	165 (37%)
Białystok (300 cases)	269 (90%)	31 (10%)
Warszawa (636 cases)	443 (70%)	193 (30%)

Source: Authors' own study.

Comparing the data concerning the Białystok jurisdiction in 2015-2016 and in 2017-2018, one should point out that the quantity of reasons prepared within the mandatory time-limit has not changed and oscillates about 90% of cases. Due to the lack of data concerning the timeliness of preparation of reasons in the Łódź and Warsaw jurisdictions in 2015-2016, it is impossible to prepare conclusions concerning changes in these jurisdictions. However, it should be noted that the number of reasons prepared within the mandatory time-limit in the Białystok appeal jurisdiction in 2017-2018 has been higher than in the Łódź and Warsaw jurisdictions (approx. 70%).

Other data significant for the control of fairness of trial and examination of a case within a reasonable time include the time of examination of cases since the moment of submission thereof to the court of appeal until the moment of appointment of the first hearing of the trial (predominantly, a decision ending the case is issued in such situation). Referencing the data in this regard, obtained from the Białystok appeal jurisdiction in 2015-2018, a conclusion comes to mind that the lapse of time since the moment of submission to the court of appeal until the moment of appointment of the first hearing of the trial has not changed radically over the recent years, i.e. in the period of the reforms of breakthrough importance for criminal procedure, lasting on average between 1 and 3 months (approx. 85% of cases). Moreover, analyzing cases in the Białystok appeal jurisdiction, one should point out that the act of transfer of files between regional and appellate courts itself was very efficient, causing no delays or lengthiness of proceedings in this regard.

Table no. 14

Appointment of the first hearing of the trial (since the moment of submission of cases) in Białystok appeal jurisdiction for 2015-2016						
Duration/ number of cases	up to 1 month	over 1 month to 2 months	over 2 months to 3 months	over 3 months to 4 months	over 4 months to 6 months	over 6 months to 12 months
424	34 (8%)	259 (61%)	100 (24%)	23 (5%)	7 (2%)	1 (0,2%)

Source: Authors' own study.

Table no. 15

Appointment of the first hearing of the trial (since the moment of submission of cases) for 2017-2018							
Duration	up to 1 month	over 1 month to 2 months	over 2 months to 3 months	over 3 months to 4 months	over 4 months to 6 months	over 6 months to 12 months	over12 months
Łódź appeal jurisdiction (634 cases)	7 (1%)	249 (39%)	236 (37%)	68 (11%)	62 (10%)	11 (2%)	1 (0,2%)
Białystok appeal jurisdiction (480 cases)	22 (5%)	250 (52%)	150 (31%)	34 (7%)	18 (4%)	6 (1%)	0
Warszawa appeal jurisdiction (858 cases)	18 (2%)	233 (27%)	312 (36%)	165 (19%)	113 (13%)	17 (2%)	0

Source: Authors' own study.

Another aspect studied by the authors of the grant was the activity of individual parties to the proceedings bringing appeals and the extent of recognition thereof by courts (efficiency). The table below shows the data concerning the number of appeals brought by individual parties to the proceedings (their defenders or representatives). It clearly shows that the party appealing most frequently was the defendant's defender (in 83 % of cases). When analyzing the results above, one should keep in mind that a defendant is able to have three defenders simultaneously.

Table no. 16

Number of appeals	Łódź appeal jurisdiction (204 cases)	Białystok appeal jurisdiction (212 cases)	Warszawa appeal jurisdiction (179 cases)	Total (595 cases)	
defenders	210 (82,35%)	251 (84,22%)	179 (78,16%)	641 (number of entitled to appeal-771)	83%
public prosecutors	50 (24,50%)	56 (26,41%)	43 (24,02%)	149 (number of entitled to appeal -595)	25,04%
auxiliary prosecutor's representatives	11 (33,33%)	15 (33,33%)	15 (46,87%)	41 (number of entitled to appeal -110)	37,27%

Source: Authors' own study.

The next table shows the same data as in Table 16, broken down into cases conducted in accordance with the legal status preceding 15 April 2016 and those examined under the regulations which have come into force on 15 April 2016.

Table no. 17

Number of appeals model of appeal proceedings before 15.04.2016		Łódź appeal jurisdiction (45 cases)	Białystok appeal jurisdiction (93 cases)	Warszawa appeal jurisdiction (94 cases)	Total (232 cases)
	defenders	57 (80,28% of defenders)	125 (80,64% of defenders)	83 (70,33% of defenders)	77,03%
	Public prosecutors	13 (28,88 % of prosecutors)	26 (27,95% of prosecutors)	25 (26,59% of prosecutors)	27,58%
	auxiliary prosecutor's representatives	2 (28,57% of proxies)	7 (26,92 %) of proxies)	9 (50% of proxies)	35,29%
Number of appeals model of appeal proceedings after 15.04.2016		Łódź appeal jurisdiction (159 cases)	Białystok appeal jurisdiction (119 cases)	Warszawa appeal jurisdiction (85 cases)	Total (363 cases)
	defenders	154 (83,69 % of defenders)	126 (88,11% of defenders)	96 (86,48 % of defenders)	85,84%
	Public prosecutors	37 (23,27% of prosecutors)	30 (25,21 % of prosecutors	18 (21,17% of prosecutors)	23,41%
	auxiliary prosecutor's representatives	9 (34,61% of proxies)	8 (42,10 % of proxies)	6 (42,85 % of proxies)	38,98%

Source: Authors' own study.

The kinds of pleas in appeal raised by parties to the proceedings are shown in the table below.

As shown by the comparison, the most frequently raised pleas in appeal included the plea of misapplication of the rules of procedure, if it could have affected the content of the decision (58% of cases) and the plea of errors in fact assumed as the basis of a decision, if it could have affected the content of that decision (50% of cases). The obtained data correlate with the judges' answers to the question: "Which of the pleas mentioned in Article 438 of the CCP is, in your opinion, raised in appeals most frequently (individually or jointly with other ones)?" (Fig. 12). In both cases, the most frequently raised pleas are the plea of misapplication of the rules of procedure, if it could have affected the content of the decision, and the plea of errors in fact assumed as the basis of a decision, if it could have affected the content of that decision. The data obtained upon quantification of the questionnaires of surveys conducted among judges show that the most frequently raised plea in appeal is the plea of errors in fact, whereas the data from the court files point out the plea of misapplication of the rules of procedure.

Table no. 18

The most frequently raised grounds of appeal				
Grounds of appeal (art. 438 pkt 1)-4) CCP)	Defender	Public prosecutor	Auxiliary prosecutor	Total (595 cases, 831 appeals)
art. 438 pkt 1) CCP: "the provisions of substantive law were violated	108	42	19	169 (20,33%)
art. 438 pkt 2) CCP: the provisions of procedural law were violated, if this might have affected the contents of the judgment,	374	86	18	478 (57,52%)
art. 438 pkt 3) CCP the findings on which the judgment is based were established incorrectly, if this might have affected the contents of the judgment,	341	60	17	418 (50,30%)
art. 438 pkt 4) CCP: a penalty or a penal measure imposed is egregiously disproportionate or a preventive or other measure was incorrectly imposed or the court incorrectly failed to impose it.	243	49	7	299 (35,98%)

Source: Authors' own study.

Table no. 19

Effectiveness of grounds of appeal				
Grounds of appeal (art. 438 pkt 1)-4) CCP)	Defender	Public prosecutor	Auxiliary prosecutor	Total (595 cases, 831 appeals)
art. 438 pkt 1) CCP the provisions of substantive law were violated,	5	12	1	18 (2,16%)
art. 438 pkt 2) CCP: the provisions of procedural law were violated, if this might have affected the contents of the judgment,	17	10	2	29 (3,48%)
art. 438 pkt 3) CCP the findings on which the judgment is based were established incorrectly, if this might have affected the contents of the judgment,	19	4	1	24 (2,88%)
art. 438 pkt 4) CCP: a penalty or a penal measure imposed is egregiously disproportionate or a preventive or other measure was incorrectly imposed or the court incorrectly failed to impose it.	19	5	2	26 (3,12%)

Source: Authors' own study.

The table no. 19 describes the effectiveness of pleas raised by parties to the proceedings.

Summarizing the data above, one should point out that the pleas raised in the cases under analysis were characterized by low effectiveness. In no case have they exceeded 4%.

The tables below show the effectiveness of appeals brought by parties to the proceedings: the defender, the public prosecutor and the auxiliary prosecutor's representative respectively.

Table no. 20

Effectiveness of appeals-defender						
	Łódź appeal jurisdiction		Białystok appeal jurisdiction		Warszawa appeal jurisdiction	
	old model (45 cases, 57 appeals)	new model (159 cases, 154 appeals)	old model (93 cases, 125 appeals)	new model (119 cases, 126 appeals)	old model (94 cases, 83 appeals)	new model (85 cases, 96 appeals)
allowing the appeal	0	4 (2,59%)	8 (6,4%)	6 (4,76%)	6 (7,22%)	1 (1,04%)
dismissal of the appeal	36 (63,15%)	126 (81,81%)	52 (41,6%)	77 (61,11%)	47 (56,62%)	54 (56,25%)
allowing the appeal in part	5 (8,77%)	15 (9,74%)	33 (26,4%)	7 (5,55%)	30 (36,14%)	36 (37,5%)
other settlements	16 (28,07%)	9 (5,84%)	32 (25,6%)	36 (28,57%)	–	5 (5,2%)

Source: Authors' own study.

For defenders, the effectiveness of appeal was low – the percentage of decisions fully recognizing the appeal did not exceed 10% in any of the analyzed appeal jurisdictions. The percentage distribution of decisions partially recognizing the appeals turned out to be more favourable to defenders in the Białystok jurisdiction for cases conducted under the regulations valid before 15 April 2016 (26,4%) and in the Warsaw jurisdiction for cases conducted under both old (36,14%) and new (37,5%) regulations.

Table no. 21

Effectiveness of appeals – public prosecutor						
	Łódź appeal jurisdiction		Białystok appeal jurisdiction		Warszawa appeal jurisdiction	
	old model (45 cases, 13 appeals)	new model (159 cases, 37 appeals)	old model (93 cases, 26 appeals)	new model (119 cases, 30 appeals)	old model (94 cases, 25 appeals)	new model (85 cases, 18 appeals)
allowing the appeal	1 (7,69%)	8 (21,62%)	6 (23,07%)	7 (23,33%)	5 (20%)	2 (11,11%)
dismissal of the appeal	5 (38,46%)	18 (48,64%)	10 (38,46%)	11 (36,66%)	12 (48%)	6 (33,33%)
allowing the appeal in part	1 (7,69%)	7 (18,91%)	3 (11,53%)	4 (13,33%)	6 (24%)	7 (38,88%)
other settlements	6 (46,15%)	4 (10,81%)	7 (26,92%)	8 (26,66%)	2 (8%)	3 (16,66%)

Source: Authors' own study.

Appeals brought by public prosecutors were characterized by higher effectiveness than those by defenders, considering full recognition of the appeal. However, regardless of comparison of the effectiveness of appeals by these two groups of entities, the effectiveness of public prosecutor appeals was not high. Partial recognition of appeals by courts of the second instance took place relatively more often, in particular, in the Warsaw appeal jurisdiction in cases conducted under the amended regulations.

Table no. 22

Effectiveness of appeals – auxiliary prosecutor's representatives						
	Łódź appeal jurisdiction		Białystok appeal jurisdiction		Warszawa appeal jurisdiction	
	old model (45 cases, 2 appeals)	new model (159 cases, 9 appeals)	old model (93 cases, 7 appeals)	new model (119 cases, 8 appeals)	old model (94 cases, 9 appeals)	new model (85 cases, 6 appeals)
allowing the appeal	0	1 (1, 28%)	1 (14,28%)	0	2 (22,22%)	0
dismissal of the appeal	1 (50%)	4 (44,44%)	5 (71,42%)	3 (37,5%)	3 (33,34%)	5 (83,3%)
allowing the appeal in part	0	0	1 (14,28%)	3 (37,5%)	4 (44,44%)	1 (16,7%)
other settlements	1 (50%)	4 (44,44%)	–	2 (25%)	–	–

Source: Authors' own study.

When analyzing the next comparison, one should say that appeals brought by representatives of auxiliary prosecutors were characterized by relatively high effectiveness compared with appeals by other parties to the proceedings – in the context of partial recognition of an appeal by the court: 37,5% for the Białystok appeal jurisdiction in cases conducted under amended regulations and 44,44% for the Warsaw jurisdiction in cases conducted under the old regulations. The effectiveness of appeals in the context of full recognition thereof by the court was lower than in case of appeals by defenders and public prosecutors, and in the Warsaw jurisdiction it was zero in case of new model and 22,22% in case of old model.

The comparisons above, concerning the effectiveness of appeals (as well as the data presented below, concerning the stability of decisions) may only be treated as an illustration, and the resulting conclusions only in an ancillary manner, since it is impossible to categorically address these issues in case when the file study has only covered cases in which an appellate court fully upheld or amended the judgment by the court of the first instance. Such a selection of cases prevents a comprehensive approach to the matter of effectiveness of appeals, as well as of stability of decisions.

The data presented below, concerning the stability of decisions, have been obtained from the statistical data of the Appellate Courts, in order to reflect the issue to a fuller extent.

Table no. 23

Stability of decisions in Białystok appeal jurisdiction in 2016		
Kind of decision		334 appeals
Upholding of the appealed judgment		179 (59%)
Change of the appealed judgment	tightening the sentence	19 (6%)
	mitigating the sentence	72 (24%)
	acquittal	7 (2%)
Reversing of the appealed judgment and referring the case to the court of first instance for the purpose of re-examination.		13 (4%)
Other settlements		15 (5%)
Number of decisions		305

Source: Authors' own study.

Table no. 24

Stability of the appealed judgments of the district courts in Łódź and Warszawa appeal jurisdictions in 2016 r			
Kind of decision		Łódź appeal jurisdiction	Warszawa appeal jurisdiction
Upholding of the appealed judgment		420 cases (71%)	505 cases (63 %)
Change of the appealed judgment	tightening the sentence	15 cases (2%)	163 cases (20%)
	mitigating the sentence	72 cases (12%)	
	acquittal	4 cases (1%)	
Reversing of the appealed judgment and referring the case to the court of first instance for the purpose of re-examination		74 cases (13%)	121 cases (15%)
Other settlement of the case		7 cases (1%)	19 cases (2%)
Total		592 cases	808 cases

Source: Authors' own study.

Table no. 25

Stability of decisions in Białystok appeal jurisdiction in 2018		
Kind of decision		280 appeals
Upholding of the appealed judgment		194 (63%)
Change of the appealed judgment	tightening the sentence	20 (7%)
	mitigating the sentence	61 (20%)
	acquittal	4 (1%)
Reversing of the appealed judgment and referring the case to the court of first instance for the purpose of re-examination.		10 (3%)
Other settlements		17 (6%)
Number of decisions		306

Source: Authors' own study.

Table no. 26

Stability of the appealed judgments of the district courts in Łódź and Warszawa appeal jurisdictions in 2018 r.			
Kind of decision		Łódź appeal jurisdicton	Warszawa appeal jurisdiction
		527 appeals	571 appeals
Upholding of the appealed judgment		320 (69%)	210 (55%)
Change of the appealed judgment	tightening the sentence	13 (3%)	17 (4%)
	mitigating the sentence	53 (12%)	71 (18%)
	acquittal	5 (1%)	4 (1%)
Reversing of the appealed judgment and referring the case to the court of first instance for the purpose of re-examination.		34 (7%)	56 (15%)
Other settlements		36 (8%)	28 (7%)
Number of decisions		461	386

Source: Authors' own study.

Diversified data from particular appeal jurisdictions for years 2016 and 2018 make it impossible to clearly identify trends in the stability of the appealed judgment of the regional courts. One can only conclude that in both the "old" and "new" model of appeal proceedings, most decisions of the courts of appeal uphold the appealed judgments (from 55% in 2018 in Warsaw appeal jurisdiction to 69% in 2018 in Łódź appeal jurisdiction).

While analyzing the cases, the authors of the grant also focused on the activity of the parties to the proceedings in the context of physical presence of the defendant and defender at the hearing. The results of this analysis are shown in the table below.

Table no. 27

Participation of the accused and his defender in appeal hearing									
		Łódź appeal jurisdiction		Białystok appeal jurisdiction		Warszawa appeal jurisdiction		Total	
		old model	new model	old model	new model	old model	new model	old model (232 cases)	new model (363 cases
accused	voluntary participation	19	63	34	36	49	72	102 (43,96%)	171 (47,1%)
	obligatory participation due to the decision of the court / president of the court	2	6	1	2	1	0	4 (1,72%)	8 (2,2%)
	participation of the accused deprived of liberty on his / her request	4	18	22	17	13	13	39 (16,81%)	48 (13,22%)
	the appeal court refused the participation of the accused deprived of his liberty despite his request	4	12	5	8	3	2	12 (5,17%)	22 (6,1%)
	actual lack of participation despite such a possibility or obligation	24	79	40	79	6	18	70 (30,17%)	176 (48,48%)
defender	voluntary participation	41	70	38	54	81	78	160 (68,9%)	202 (55,6%)
	obligatory participation due to the act	20	82	45	43	9	1	74 (31,8%)	126 (34,7%)
	obligatory participation due to the decision of the court / president of the court	0	0	10	19	2	2	12 (5,1%)	21 (5,7%)

Source: Authors' own study.

When comparing the participation of the defendant and the defender at an appeal hearing in cases conducted under the old and new regulations, no distinct differences in the results can be seen. The only noticeable changes pertain to voluntary participation of a defender at the hearing – in cases conducted under the new regulations, the percentage of their participation has dropped, and the lack of the defendant's appearance, despite the possibility or obligation of appearance at an appeal hearing – in this situation, the percentage of cases has increased.

When analyzing the cases, the authors of the grant also focused on the course of evidentiary proceedings before the court of appeal, since the picture of evidentiary proceedings conducted before a court of the second instance determines the model of appeal proceedings in force

under a given legal system - "the extent to which a court of appeal itself determines facts, interprets the law or assesses the consequences of already determined facts, remained strictly related to the model". The initiative to adduce evidence by the parties and the court in the cases researched under the grant is shown in the table below.

Table no. 28

Subjects submitting evidentiary motions								
	Łódź appeal jurisdiction		Białystok appeal jurisdiction		Warszawa appeal jurisdiction		Total	
	before 15.04.2016	after 15.04.2016	before 15.04.2016	after 15.04.2016	before 15.04.2016	after 15.04.2016	before 15.04.2016 (232 cases, 347 appeals)	after 15.04.2016 (363 cases, 484 appeals)
defender	8	14	40	20	13	13	61	47
accused	1	5	2	2	1	2	4	9
public prosecutor	0	1	0	0	0	2	0	3
auxiliary prosecutor	0	4	0	0	0	0	0	4
auxiliary prosecutor's representatives	0	0	1	5	1	2	2	7
total	9	24	43	27	15	19	67 (29% cases, 19% appeals,)	70 (19% cases, 15% appeals)
ex officio	1	4	3	4	0	0	4 (2% cases)	8 (2% cases)

Source: Authors' own study.

The course of an evidentiary proceedings (decisions of the court concerning motions as to evidence) before a court of the second instance is illustrated by the table below.

Table no. 29

Decisions of the courts concerning evidentiary motions									
		Łódź appeal jurisdiction		Białystok appeal jurisdiction		Warszawa appeal jurisdiction		Total	
		before 15.04.2016	after 15.04.2016	before 15.04.2016	after 15.04.2016	before 15.04.2016	after 15.04.2016	before 15.04.2016 (232 cases, 347 appeals, 67 motions)	after 15.04.2016 (363 cases, 484 appeals, 70 motions)
allowing		4	12	9	14	7	9	20 (29,9%)	35 (50%)
dismissal	art. 170 CCP	3	7	10	11	7	8	20 (29,9%)	26 (37,1%)
	art. 427 § 3 CCP	1	2	0	0	0	0	1 (1,5%)	2 (2,9%)
	art. 452 § 2 CCP	0	4	0	0	0	0	0 (0%)	4 (5,7%)
	others	1	2	9	1	1	2	11 (16,4%)	2 (2,8%)
no data		0	3	15	1	0	0	15 (22,4%)	1 (1,4%)
number of motions		9	24	43	27	15	19	67	70

Source: Authors' own study.

Analyzing the tables above, the central conclusion is that despite the changes introduced in the appeal proceedings as a part of evidentiary proceedings before the court of second instance, the scope of this proceedings has remained narrow, and the initiative of parties has not increased.

To sum up the discussions above, one should consider it proper to reference certain general conclusions from the studies conducted under the grant.

1. The analysis of issues of crucial importance for fairness of the proceedings allows one to say that the Polish appeal proceedings model is fair.

2. The recent changes in the appeal proceedings model have not affected the duration of such proceedings significantly.
3. Moreover, the changes in the model of appeal proceedings have not affected the initiative to adduce evidence by parties to the proceedings or the scope of evidentiary proceedings before a court of appeal.
4. Unquestionably, courts do not show initiative to adduce evidence *ex officio* after the changes in regulations.
5. Neither have the changes affected the frequency of participation of parties in an appeal hearing.
6. In most cases, courts of appeal uphold judgments passed in the first instance.
7. The plea of misapplication of the rules of procedure should be mentioned as the most frequent ground for appeal, with the plea of errors in fact as the second most frequent one.

More detailed data and conclusions concerning individual aspects researched under the grant will be described in the following chapters of the monograph.

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THE ROLE OF REASONS FOR APPEAL IN THE AMENDED CODE OF CRIMINAL PROCEDURE[2]

I. Introduction

The current role of reasons for appeal in the amended Code of Criminal Procedure (hereinafter, CCP[3]) is becoming increasingly important due to the changes in regulations, determining the correctness and fairness of a conducted criminal proceedings. The recent significant changes[4] in the regulations of the CCP have introduced new principles in perception of the role of reasons for appeal, indicating the obligation to formulate the pleas to be made against the decision under appeal if the appeal comes from a professional. Prevention of referencing specific reasons for appeal has also become a significant limitation for appellants against judgments passed under consensual modes. What has changed as well is the paradigm of the *reformationis in peius* prohibition and of the role of a court of appeal as an organ before which evidentiary proceedings broader than before 15 April 2016 is admissible.

For these reasons, one should assess the role and importance of reasons for appeal on the basis of results of file studies from three appeal

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3 Act of 6 June 1997 r. – the Code of Criminal Procedure,Journal of Laws 1997 No. 89, *item* 55, as amended.

4 Introduced by: 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, 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 and 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.

jurisdictions (Łódź, Białystok and Warsaw) and results of questionnaire studies directed to judges of courts of appeal (appellate and regional),as well as statistical data concerning the data and opinions on the appeals brought by appellants. Thus, it will be possible to attempt an analysis of reasons for appeal in the context of effectiveness of pleas in appeal raised on the basis thereof, as well as in the aspect of efficiency of the pleas in appeal.

II. Reasons for appeal and the effectiveness of pleas in appeal

As early as the antiquity, Aristotle knew that "True knowledge is the knowledge of reasons". "Reasons" are understood as factors or sets of conditions causing specific results[5]. The search for "reasons" can pertain to all branches of science, as well as life. The case is similar in the legal science where specific powers, restrictions or legal situations may only take place upon fulfilment of appropriate preconditions. In an appeal proceedings, reasons for appeal are specific conditions, which, if fulfilled, may cause (or do cause) amendment or annulment of a judgment under appeal. Therefore, one can say that reasons for appeal and pleas based thereon constitute the essence of the entire appeal proceedings. In my opinion, although the provisions of Articles 438 and 439 of the CCP, governing relative[6] and absolute[7] reasons for appeal, are not addressed directly to the appellant but to the court of appeal, they nevertheless constitute grounds for formulation of pleas in appeal on the basis of the indicated reasons for appeal. Reasons for appeal constitute peculiar errors or defects that have resulted in passing of a judgment in the contested form[8].

Reasons for appeal constitute a possible basis for change or annulment of a decision. However, it is the court of second instance that

5 See: www.sjp.pwn.pl/sjp/przyczyna;2511925.html [accessed on: 16.01.2018 r.].
6 See S. Pawela, Względne przyczyny odwoławcze, Warszawa 1970, *passim*.
7 See Z. Muras, Bezwzględne przyczyny odwoławcze w polskim procesie karnym, Toruń 2004, *passim*.
8 See also D. Świecki, Postępowanie odwoławcze w sprawach karnych. Komentarz. Orzecznictwo, wyd. II, 2014.01.01, LEX/el.

performs an individual legal assessment of the reasons for defectiveness of the decision under appeal, as indicated in the appeal. Reasons for appeal may be examined with regard to both subjective and objective assessment. Under objective assessment, they will be reasons for appeal or grounds for appeal, whereas under the appellant's subjective assessment, reasons for appeal will constitute pleas. On the other hand, in the category of consequences, a plea may be considered in the objective aspect, since its result will only be assessed by the court of appeal, which is why a substantiated and effective plea can also be presented in the objective aspect, as a reason for appeal or a ground for appeal.

However, another part of the problem is the fact that the legislator failed to provide a legal definition of a "plea", which, consequently, means that appellants may have difficulties formulating it, not to say of doing so efficiently or effectively. Despite the lack of a legal definition of a "plea", it should be noted that in the Code of Criminal Procedure, Article 427(2), Article 433 (1), Article 434 (1), Article 439 (1), Article 447 (4), Article 453 (1), Article 455, and Article 457 (3), the legislator directly uses the term "plea". A view[9] has developed in the doctrine that "pleas" constitute the appellant's claims concerning errors made by the court of first instance. However, proper naming of a plea by an appellant is not particularly relevant, since the decisive factor is whether the error indicated in the appeal has actually occurred, rather than its name[10].

The literature points out the lack of sufficient information, resulting from the provisions of criminal procedure, which would pertain to the essence of pleas in appeal and grounds for appeal[11]. The claim that the legislator failed to enumerate the grounds on which an appeal may be

9 K. Marszał, S. Stachowiak, K. Zgryzek, Proces karny, Katowice 2003, p. 523; D. Świecki, Apelacja w postępowaniu karnym, Warszawa 2012, pp. 146-147.

10 S. Zabłocki, O niektórych zmianach wprowadzonych przez nowy Kodeks postępowania karnego w zakresie postępowania odwoławczego, PS 1997, no. 11-12, pp. 14-15;P. Hofmański, S. Zabłocki, Niektóre zagadnienia związane z granicami orzekania w instancji odwoławczej w procesie karnym (in:) Problemy stosowania prawa sądowego. Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi, (ed.) I. Nowikowski, Lublin 2007, pp. 191-192; M. Kondracki, Rola zarzutów odwoławczych w procesie karnym, Pal. 2009 no. 3-4, p. 87; The Supreme Court decision of 14 November 2001, III KKN 250/01 (KZS 2002, no. 7-8, item, Lex Polonica no. 356474); The Supreme Court decision of 15 October 2003, III KK 360/02 (OSNwSK 2003, item. 2141, LexPolonica no. 376611).

11 D. Świecki, Apelacja, *op. cit.*, pp. 146-147.

based[12] cannot be fully agreed with. It is unquestionable that the Code of Criminal Procedure does not literally foresee the indicated "pleas in appeal", yet it seems clear that they can be reasons for appeal which may result in annulment or amendment of the decision appealed against. And if this is the case, one should refer to the contents of Articles 438 and 439 of the CCP, governing relative and absolute reasons for appeal. With view to the above, one can give a definition of a "plea" as a default indicated in an appeal by the appellant, in his subjective opinion which can be based on reasons specified in the contents of Article 438 or 439 of the CCP; one should point out the significance of reasons for appeal in the amended CCP in the light of file and questionnaire studies conducted under this research project.

The results of file and statistic studies concerning the duration of an appeal proceedings and the stability of contested judgments by regional courts in the Białystok, Łódź and Warsaw appeal jurisdictions in 2016 and 2018 have been presented in the previous chapter of this monograph[13]. The statistical data show that on the national scale, the average number of brought appeals against judgments by courts of first instance is on the rise. Despite the relative growth of the number of brought appeals, they result in courts of appeal issuing more decisions upholding the judgment appealed against. Therefore, it means that appeals brought by appellants and the pleas in appeal against a given decision, contained therein, usually turned out to be unfounded. In 2016, most decisions by courts of appeal in the Łódź appeal jurisdiction, amounting to as much as 70%, upheld the judgment under appeal. However, in the same year yet in the Warsaw jurisdiction, decisions by courts of appeal from this area, upholding the judgment appealed against, comprised 62.5% of all issued decisions. In the Białystok jurisdiction in 2016, the stability of judicial decisions was lowest, since the number of decisions issued by courts of appeal from this area as a result of brought appeals in which the court of appeal upheld the judgments applied against was 55%.

12 D. Świecki, Apelacja, *op. cit*., p. 147.
13 See. K. Łapińska. "Changes in the Polish appeal proceedings model in the light of research results", Tables nos. 23-26, as included in this monograph.

On the other hand, speaking of the stability of judgments passed by courts of appeal (namely, Appellate Courts proper), among the data obtained in the mode of access to public information of the Appellate Court in Łódź from the area of the Łódź appeal jurisdiction between 1 July 2015 and 30 April 2017, 116 cassations were referred to the Supreme Court, where 101 decisions were passed dismissing the cassation, 11 decisions annulling the judgment and 4 decisions handled otherwise.

As shown by statistical data made available by the Appellate Court in Białystok from the area of Białystok appeal jurisdiction between 1 July 2015 and 30 April 2017, 103 cassations against judgments of the Appellate Court were referred to the Supreme Court which passed 81 decisions dismissing the cassation, 21 decisions annulling the judgment and 1 decision handled otherwise.

On the other hand, the information obtained from the Appellate Court in Warsaw shows that in its jurisdiction between 1 July 2015 and 30 April 2017, 174 cassations against judgments of the Appellate Court were referred to the Supreme Court which passed 146 decisions dismissing the cassation, 23 decisions annulling the judgment and 5 decisions handled otherwise.

In order to analyze the reasons for issuance by specific courts of appeal of decisions upholding, amending or annulling the judgments appealed against and referring the case back to the court of first instance, a file study using the quantitative and qualitative method had to be conducted.

As a result of applications by grant participants to regional courts in the area of Łódź, Białystok and Warsaw appeal jurisdictions for access to files of judicial cases in which appeals were brought, concerning offences specified in the Penal Code, in which these files had been referred back, upon examination of the appeal, to the Regional Court for execution in the period between 1 January 2014 and 31 December 2018 (regardless of the decision of the AC, as well as with reference numbers of appeal cases against aggregate sentences),access to 595 file cases was obtained.

Table no. 1. General information concerning the cases under analysis

General information concerning the cases under analysis (Total: 595 cases)		
Łódź appeal jurisdiction	Białystok appeal jurisdiction	Warsaw appeal jurisdiction
204	212	179

Source: Authors' own study.

On the basis of a thorough analysis of each brought appeal, results have been obtained with regard to pleas in appeal raised by appellants and the effectiveness thereof. As shown by the study of files from all three appeal jurisdictions – most pleas raised by appellants pertained to misapplication of the rules of procedure, affecting the contents of the judgment (478), and slightly less pleas, to errors of fact, assumed as a basis of the judgment and affecting its content (418). There were fewer appeals containing pleas of grossly disproportionate penalty (299). The least numerous were appeals in which the appellants alleged violation of substantive law (169). A difference in these results has only been recorded in the Łódź appeal jurisdiction where the plea most frequently raised by appellants has been the plea of errors of fact, with slightly fewer pleas of misapplication of the rules of procedure. However, the least frequently raised pleas in all areas are invariably grossly disproportionate penalty as well as violation of substantive law.

Usually, these pleas occurred individually, yet mixed pleas happened as well (usually, two of them: misapplication of the rules of procedure and errors of fact). Alternative pleas were very rare.

Table no. 2. The frequency of raising of specific pleas in appeal

Grounds of appeal (art. 438 pkt 1)-4) C.C.P.)	Total (595 cases, 831 appeals)
art. 438 pkt 1) C.C.P. "*the provisions of substantive law were violated*"	169 (20,33%)
art. 438 pkt 2) C.C.P. "*the provisions of procedural law were violated, if this might have affected the contents of the judgment*"	478 (57,52%)
art. 438 pkt 3) C.C.P. "*the findings on which the judgment is based were established incorrectly, if this might have affected the contents of the judgment*"	418 (50,30%)
art. 438 pkt 4) C.C.P. "*a penalty or a penal measure imposed is egregiously disproportionate or a preventive or other measure was incorrectly imposed or the court incorrectly failed to impose it*"	299 (35,98%)

Source: Authors' own study.

The examined appeals and pleas against the decision under appeal, contained therein, were recognized very rarely by courts of appeal. The conducted file studies show that the plea most frequently recognized by a court was misapplication of the rules of procedure (29) as well as grossly disproportionate penalty (24). Pleas less frequently recognized by the court were based on errors of fact (21) and violation of substantive law (18). Results in this area were similar in all three appeal jurisdictions.

Usually, these pleas were considered if occurring as mixed pleas.

Table no. 3. The efficiency of pleas raised by appellants

Grounds of appeal (art. 438 pkt 1)-4) C.C.P.)	Total (595 cases, 829 appeals)
art. 438 pkt 1) C.C.P. "*the provisions of substantive law were violated*"	18 (2,17%)
art. 438 pkt 2) C.C.P. "*the provisions of procedural law were violated, if this might have affected the contents of the judgment*"	29 (3,49%)
art. 438 pkt 3) C.C.P. "*the findings on which the judgment is based were established incorrectly, if this might have affected the contents of the judgment*"	24 (2,89%)
art. 438 pkt 4) C.C.P. "*a penalty or a penal measure imposed is egregiously disproportionate or a preventive or other measure was incorrectly imposed or the court incorrectly failed to impose it*"	26 (3,13%)

Source: Authors' own study.

III. The efficiency of pleas in appeal

The efficiency of pleas in appeal is unquestionably the intended purpose of every appellant, as it pertains to raising of pleas in an appeal in such a way as to achieve a specific effect – usually, to challenge a passed judgment, in accordance with the maxim "*Qui non appellat, approbare videtur sententiam*". Therefore, this purpose requires not only appropriate knowledge of the appellant in the area of the legal regulations in force but also knowledge of the role and significance of pleas in appeal, the principles of formulation of pleas, as well as appropriate time and resources to use such knowledge and skills[14].

In its judgments, the Supreme Court stressed that "a court of appeal has the right and duty to examine the case from the legal viewpoint, not only within the limits of an appeal but also ex officio- regardless of such limits – in order to determine whether or not there is a need to adjudicate in favour of the defendant, although the appeal has been brought to his detriment on each of the bases specified in Article 438 of the CCP"[15].

However, it is debatable whether the further so-called "total" review of the contested judgment by a court of appeal will still be valid, due to the introduced changes in regulations in the area of the appeal procedure, also including the amendment of the content of Article 433(1) of the CCP. It is also worth pointing out a thesis resulting from the decision by the Appellate Court in Gdańsk of 11 August 2016 concerning the file no. III AKz 521/16[16], according to which: "If a plea concerning the main decision, raised by the defender, is found unfounded and simultaneously no distinct pleas concerning the decision covered by the scope of appeal, strictly connected therewith, are indicated in an appeal, the court of appeal will not be obliged to revise the other decision with

14 See more about this: C. Kulesza, Efektywna obrona w postępowaniu przygotowawczym a favor procuratori, Prokuratura i Prawo no. 4, 2007, p. 7, and S. Barton, Mindeststandards der Strafverteidigung, Baden-Baden 1994, p. 38-40, J.H. Rutherford, Dziubak v. Mott and the Need to better Balance of the Indigent Accused, (in:) Minnesota Law Rewiew MLR 1993-1994 (vol. 78), pp. 1006-1008 and also about: C. Kulesza, Efektywność udziału obrońcy w procesie karnym w perspektywie prawnoporównawczej, Kraków 2005, *passim*.

15 The Supreme Court decision of 7 February 2008, IV KK 491/07, Legalis.

16 The Appellate Court in Gdańsk decision of 11 August 2016, III AKz 521/16, Legalis.

regard to any default specified in 438 of the CCP, but it should only examine whether or not it is affected by the default specified in Article 433(1) *in fine* of the CCP".

Therefore, it means that, generally speaking, a court of appeal is not obliged to review the entire judgment under appeal for any possible relative reasons for appeal, as mentioned in Article 438 of the CCP, but only for absolute reasons for appeal (art. 439(1) of the CCP), gross injustice of the judgment (Article 440 of the CCP), as well as with regard to Articles 435 and 455 of the CCP. However, it seems quite obvious that, if the judgment is appealed against by a so-called "non-professional" entity, the court of appeal will still be obliged to perform total review of the contested decision, also with regard to relative reasons for appeal pursuant to Article 438 of the CCP.

One should also point out the view of the Supreme Court concerning the plea of "violation of the rule of law" alone being raised by the appellant in an appeal. The Supreme Court has stated that "The plea of violation of the rule of law alone, raised with no specification whatsoever, will virtually never be effective. In fact, a plea formulated in such a way means referencing a standard understood as the idea of law, i.e. a sui generis higher-level norm, contributing to the model structure of a criminal procedure and, above all, performing the function of a source of interpretative directives (recommendations). In view of the above, the efficiency of a plea referencing violation of the rule of law requires complementation thereof by way of indication and demonstration of violation of these regulations of the binding procedural law system which give rise to specific, peculiar norms prescribing or prohibiting specific behavior in a specific procedural situation"[17].

The position of the Supreme Court in this regard points out not only the necessity of knowledge of precise wording of the content of legal provisions, but also of understanding thereof by the appellant for the sake of efficient formulation of pleas in appeal. It is also worth keeping in mind that the judicial case-law contains many principles in the light of which specific pleas based on reasons for appeal might

17 The Supreme Court decision of 28 June 2007, III KK 489/06, Legalis.

be deemed justified, and thus might be deemed efficient and effective. Referencing the principles described above, resulting from the line of cases of the Supreme Court and common courts, one should also take account of the results of the conducted study of files of judicial cases in which appeals were brought. The conducted file study essentially shows that regardless of whether such appeals were brought against judgments of regional courts or against judgments passed by district courts, the pleas most frequently raised in an appeal was the plea of misapplication of the rules of procedure and the plea of errors of fact assumed as a basis of the judgment and affecting its contents. However, these pleas were recognized least frequently by courts of appeal (both regional and appellate courts), and thus, they were neither effective nor efficient.

The efficiency of a plea is a peculiar evaluative category of irregularities invoked by appellants in an appeal, in order for such pleas to turn out justified in the opinion of a court of appeal, and thus to bring the expected result in the form of challenging of the judgment under appeal. It can be said that pleas in appeal, raised by appellants in specific appeals, may be efficient and effective if they take account of and appropriately apply the principles resulting from judicial case-law.

The efficiency of pleas in appeal depends on the fairness of the appeal procedure. Pleas in appeal determine the efficiency of the brought appeal. It is worth mentioning that in the judgment of 11 September 2018 (II KK 289/18)[18], the Supreme Court expressed a view that "*Analysis of the provisions of Article 433(1) of the CCP and Article 434(1)(3) of the CCP in conjunction with Article 427(1) of the CCP leads to a conclusion that so-called total appeal revision of a judgment by a court of first instance is possible if the entity preparing an appeal is only a party with no legal qualifications, e.g. the defendant or the auxiliary prosecutor, as well as in the event that the appeal does not raise any pleas against the decision but contests such a judgment in its entirety*". This means so-called "total appeal revision" only applies to non-professionals and circumstances when the appellant has appealed against the entirety of a judgment. The Appellate Court in Katowice had a similar opinion on 27 September 2017 (II AKa 457/17), also stating that "*Failure to formulate the pleas in an appeal prepared by a qualified entity causes such a procedural document to contain formal*

18 The Supreme Court decision of 11 September 2018, II KK 289/18, Legalis.

*defects of irremovable nature, preventing processing thereof, and, in fact, it cannot be deemed an appeal. Such defects cannot be validated by notice to remove them in the mode mentioned in Article 120(1) of the CCP"*19. This view confirms the essence of pleas in appeal and, simultaneously, the obligation for professionals to indicate the pleas raised against the decision under appeal.

In its judgment of 18 July 2018 (II AKa 122/18)[20], the Appellate Court in Warsaw has deemed that "*There can be no doubt that, pursuant to Article 427(2) of the CCP, it is the defender who is obliged to demonstrate why he disagrees with the judgment appealed against and to provide substantive argumentation in this regard. Challenging of the findings of the court of first instance cannot be limited to highly general statements*". In a judgment by the AC in Białystok of 31 January 2018 (II AKa 237/17)[21], this court stated that "*The appellant's obligation resulting from the contents of Article 427(2) of the CCP is to demonstrate why he disagrees with the judgment appealed against and to provide substantive argumentation in this regard.*"

This view is compliant with the results of the questionnaire study in which most judges claimed there was a necessity for every appellant to indicate pleas in appeal. This means that in order for the pleas in appeal to be efficient, they should be appropriately indicated by the appellant. In this regard, however, one should also take account of the results of the questionnaire study of judges with regard to the most frequently raised pleas in appeal. Judges of courts of appeal have stated that the most frequently raised plea in appeal is the plea of errors of fact affecting the contents of the judgment, which is consistent with the conducted file study of cases in which appeals had been raised, as referenced above. As shown by the file study, this plea is least frequently recognized by courts of appeal, which would indicate low efficiency of the pleas raised most frequently by appellants.

The case-law of the Constitutional Court points out that a remedy at law should be effective in the sense that it should enable substantive settlement of a case in an appeal proceedings, and also ensure actual and objective review of judgments in the second instance. The literature rightly points out that Article 6(1) of the ECHR pertains to the right to a

19 The Appellate Court in Katowice decision of 27 September 2017, II AKa 457/17, Legalis.
20 The Appellate Court in Warszawa judgment of 18 July 2018, II AKa 122/18, Legalis.
21 The Appellate Court in Białystok judgment of 31 January 2018, II AKa 237/17, Legalis.

fair hearing, and therefore, also to an appeal case if it is admissible[22]. The case-law of the Court formulates specific rights comprising the content of a more general right to a fair hearing, including: 1) equality at arms, 2) right of access to the file of the criminal case, 3) the defendant's right to be heard, 4) right to justification of the judgment, 5) the defendant's right of participation in the proceedings, 6) right to adversarial evidentiary proceedings, 7) the principle of *res iudicata*. These elements of the right to a fair hearing are usually prominently featured in the hitherto case-law of the ECtHR, yet this catalogue will be supplemented. Moreover, the rights mentioned above constitute not only elements of the right to a fair hearing but also elements of a broadly defined right to a fair judicial trial.

In an appeal proceedings, a court makes decisions concerning pleas raised against the defendant as well as such pleas being deemed justified or unfounded by courts of lower instances, which may significantly affect the defendant's situation. Therefore, different assessments by courts of appeal also affect the fairness of an appeal proceedings as well as potential factual and legal conditions of the efficiency of pleas in appeal raised by appellants.

Due to the fact that pleas in appeal are the essence of an appeal proceedings, one can state that the efficiency of pleas in appeal essentially determines the efficiency of the brought appeal. On the other hand, the efficiency of an appeal also depends on the fairness of the appeal proceedings, since the lack of fairness in an appeal proceedings will unquestionably affect the inefficiency of the brought appeals and pleas raised therein[23].

22 J. Skorupka, O sprawiedliwości procesu karnego, Lex 2013/el.

23 See more about this: C. Kulesza, "A conventional model of a fair appeal proceedings in the comparative perspective", chapter of this monograph.

IV. Reasons for appeal in the opinion of judges of criminal appeal divisions of regional courts and appellate courts

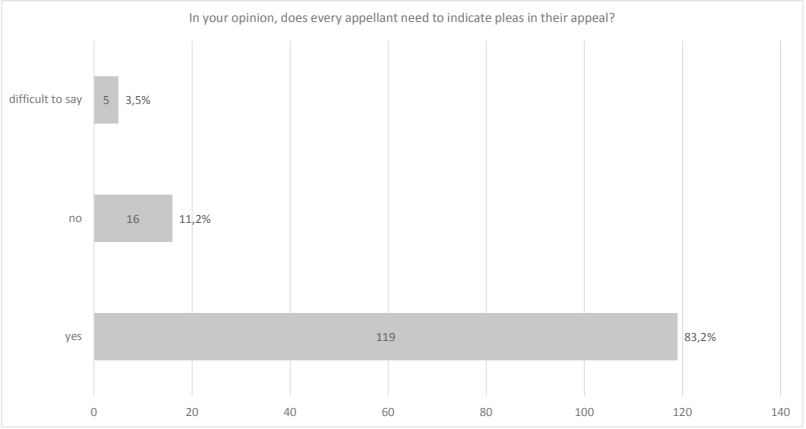
In order to examine whether the hitherto discussion and the conducted file study concerning reasons for appeal comply with the views of judges of courts of appeal in this regard, one should point out the results of the questionnaire study concerning:

1. The necessity of requirement for the appellants to indicate pleas in appeal;
2. The frequency of occurrence of specific pleas in appeal;
3. The catalogue of reasons for appeal;
4. The restrictions in appeal against consensual judgments (Article 447(5) of the CCP).

1. Assessment by judges of the necessity of requirement for the appellants to indicate pleas in appeal

For the discussion in this study, of particular importance is the issue of assessment by the surveyed judges of the necessity (requirement) for the appellants to indicate pleas in appeal mentioned in Article 427(2) of the CCP. The assessment of the necessity of indication of pleas in appeal by the appellant is related to the issue of fairness of an appeal proceedings, as well as the efficiency of pleas in appeal. The answers to the question posed to appellate judges indicate their views concerning recognition of a brought appeal in a fair and efficient way which should also be understood by a court of appeal. Therefore, this is an issue important for the practice of appellants and indicating circumstances when pleas raised in an appeal may be deemed efficient by a court of appeal. This applies, above all, to appellants who bring an appeal on their own behalf, as they are not obliged to indicate pleas in appeal (art. 427 § 1 CCP).

Figure no. 1. Assessment of the necessity to indicate pleas in appeal



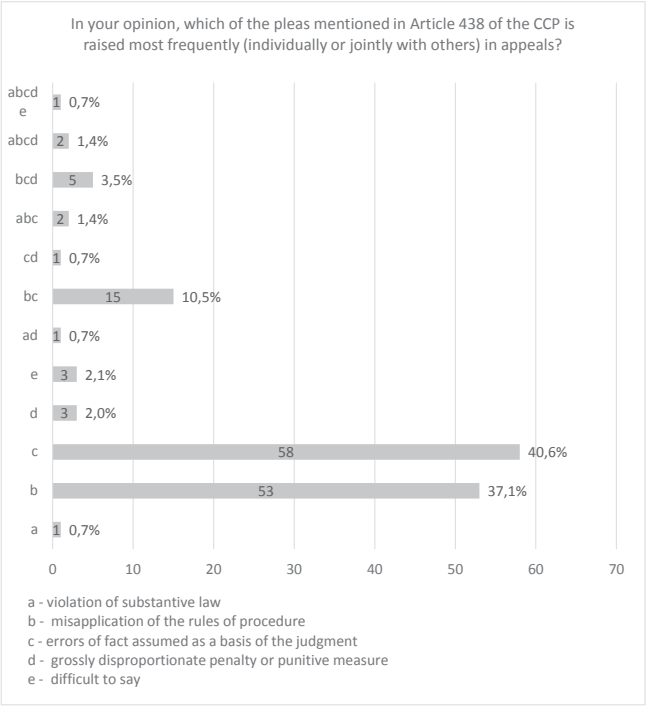
Source: Authors' own study.

Among 143 surveyed judges of courts of appeal from Poland, as much as 83.2% (i.e. 119 of them) have stated that every appellant should indicate the pleas in appeal, whereas only 11.2% (i.e. 16) stated that not every appellant should indicate the pleas in appeal.

2. Assessment by judges of the frequency of occurrence specific pleas in appeal

The perception by appellate judges of the issues concerning the frequency of occurrence of specific pleas in appeal affects the efficiency of pleas in appeal and the ensuring of fairness of an appeal proceedings.

Figure no. 2. Assessment of occurrence of individual pleas in appeal



Source: Authors' own study.

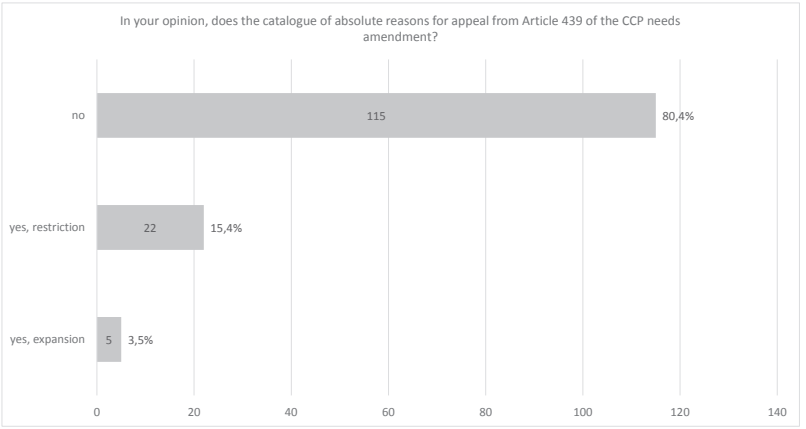
When asked about the frequency of raising of specific pleas in an appeal, most judges of courts of appeal, i.e. 40.6% (58) have declared that error of fact is raised most frequently. Slightly fewer, i.e. 37.1% (53) have assessed that the most frequently raised plea is misapplication of the rules of procedure, whereas for 10.5% of the surveyed judges (i.e. 15), the most frequent pleas were the mixed pleas of errors of fact and misapplication of the rules of procedure. Only 0.7% of the surveyed judges (i.e. 1) indicated the plea of violation of substantive law.

In this regard, the results of the questionnaire study are, as a rule, similar to the results of the file study and compliant with the results of the file study from the Łódź appeal jurisdiction.

3. Assessment by judges of the catalogue of reasons for appeal

The assessment of potential changes in the catalogue of absolute reasons for appeal, performed by judges of courts of appeal, directly affects both the efficiency of pleas in appeal and the fairness of the appeal proceedings. The opinion of judges in this regard is important due to the potential necessity of changes in the area of the law and recognition of actual raising of pleas based on specific reasons for appeal[24].

Figure no. 3. The assessment of changes in the catalogue of absolute reasons for appeal



Source: Authors' own study.

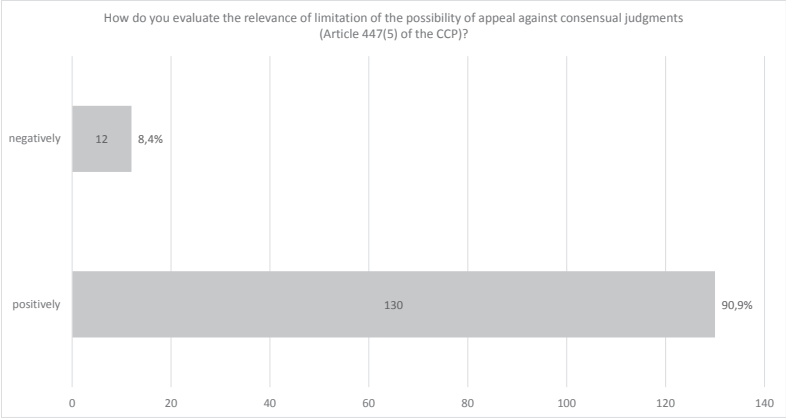
24 See more: I. Urbaniak-Mastalerz, Pomiędzy względnością a bezwzględnością przyczyn odwoławczych (in:) Problemy kontroli decyzji procesowych, D. Gil (ed.), Lublin 2017, p. 94, M. Fingas, Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym, Warszawa 2016, pp. 200-201, M. Cieślak, Podstawowe pojęcia dotyczące rewizji według k.p.k., Palestra 1960, no. 9, pp. 28-29, K. Marszał, S. Stachowiak, K. Zgryzek, Proces karny, Katowice 2003, p. 523; D. Świecki, Apelacja w postępowaniu karnym, Warszawa 2012, pp. 146-147, S. Zabłocki, O niektórych zmianach wprowadzonych przez nowy Kodeks postępowania karnego w zakresie postępowania odwoławczego, PS 1997, no. 11-12, pp. 14-15; P. Hofmański, S. Zabłocki, Niektóre zagadnienia związane z granicami orzekania w instancji odwoławczej w procesie karnym (in:) Problemy stosowania prawa sądowego. Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi, (ed.) I. Nowikowski, Lublin 2007, pp. 191-192; M. Kondracki, Rola zarzutów odwoławczych w procesie karnym, Pal. 2009 no. 3-4, p. 87.

Most surveyed judges of courts of appeal, i.e. as much as 80.4% (115), claimed that the current catalogue of reasons for appeal does not require any changes, and only 15.4% (i.e. 24) stated there was a need to restrict the catalogue of absolute reasons for appeal. Only 3.5% of the surveyed judges (i.e. 5) stated the current catalogue of absolute reasons for appeal needs expansion.

4. Assessment by judges of restrictions in appeals against consensual judgments, (Article 447(5) of the CCP)

The perception by appellate judges of the validity of restriction of the appellants' possibility to appeal against judgments passed in consensual modes affects their assessment of fairness of appeal proceedings, as well as of efficiency of pleas in appeal in specific cases. This issue is significant for understanding of the judgments passed by appellate judges, and thus also of their views concerning the restriction of pleas in appeal for appellants[25].

Figure no. 4. Assessment of the limitation of the possibility to appeal against consensual judgments



Source: Authors' own study.

25 See more about: C. Kulesza, I. Urbaniak-Mastalerz, *Kara szybka czy kara sprawiedliwa?* (in:) *Konsensualizm i kompensacja a podstawy odpowiedzialności karnej* (ed.) I. Sepioło-Jankowska, Warszawa 2016, pp. 148-163

Among 143 surveyed judges of courts of appeal from Poland, as much as 90.9% of them (i.e. 130) considered the restriction of the possibility to appeal against judgments passed in consensual modes to be valid, whereas only 8.4% (i.e. 12) of them expressed a different opinion.

V. Conclusions

Reasons for appeal and the effectiveness of pleas in appeal based thereon are unquestionably the most important issues concerning an appeal proceedings, as it is them that enable challenging of a contested judgment passed in court of first instance[26]. Therefore, the role of reasons for appeal, as well as of pleas based thereon, is very important and requires thorough analysis.

Numerous judicial decisions give rise to peculiar principles following which raised pleas may turn out effective and efficient. Based on judicial case-law, one can distinguish several principles of proper formulation of pleas in appeal: the principle of non-combination of the pleas of violation of substantive law and errors of fact, the principle of non-combination of the plea of violation of substantive law with the plea of violation of procedural law, as well as the principle of efficient raising of the plea of grossly disproportionate penalty[27].

However, the problem is that these principles are not uniformly complied with in the case-law of common courts and even of the Supreme Court, and are not fully confirmed by the results of the file study concerning pleas in appeal, conducted as a part of this project. However, the most recent[28] case-law of the Supreme Court indicates tendencies close to the results obtained from the file study, pursuant to which raising of mixed pleas (formerly deemed inadmissible) by

26 I. Urbaniak-Mastalerz, Pomiędzy względnością a bezwzględnością przyczyn odwoławczych (in:) Problemy kontroli decyzji procesowych, D. Gil (red.), Lublin 2017, p. 94. See also M. Fingas, Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym, Warszawa 2016, pp. 200-201, M. Cieślak, Podstawowe pojęcia dotyczące rewizji według k.p.k., Palestra 1960, no. 9, pp. 28-29.

27 Compare: I. Urbaniak-Mastalerz, Podstawy apelacji w znowelizowanym k.p.k. (uwagi na tle wyników badań aktowych (in:) Środki zaskarżenia po nowelizacji kodeksu postępowania karnego, A. Lach (ed.), Toruń 2015, pp. 97-109.

28 The Supreme Court judgment of 19 October 2016 , V KK 239/16, Lex.

appellants is admissible; namely, the pleas of violation of substantive law and errors of fact, as well as the plea of violation of substantive law and the plea of violation of procedural law, only if they will constitute so-called "alternative" pleas.

It is also worth pointing out that a court of appeal may make new findings concerning the perpetrator-related aspect of the offence, which may significantly affect the defendant's situation. The Court, in the judgment by the ECtHR of 6 July 2004 *in the Dondarini case* (complaint no. 50545/99, *Dondarini vs. San Marino*),has stated that when a court of appeal examines a case in the legal and factual aspect and performs a full guilt assessment, it cannot settle this matter without assessing the evidence from direct hearing of the defendant before a court of appeal. In such situation, the Court states it should do it, if only on its own initiative, and this violation is only absent if the defendant himself fails to appear at the appeal hearing, thus waiving his rights[29].

The file study conducted as a part of the project show that reasons for appeal, as well as pleas based thereon, raised against the decision under appeal, play a key role in an appeal proceedings. However, low effectiveness of pleas in appeal raised by appellants shows they are not made efficiently. This may be connected with the fact that appellants either fail to make use of the case-law of the Supreme Court and common courts or make errors in formulation of pleas in appeal. The raising of the most frequent pleas – violation of procedural law and errors of fact – by appellants may indicate lack of actual reference of errors made by the court to the realities of specific cases. Most frequently, appellants challenge the correctness of the performed appreciation of evidence (Article 7 of the CCP), simultaneously challenging the errors of fact assumed by the court. However, by doing so, appellants seem to polemically indicate that they disagree with the appreciation. Therefore, the appeal lacks reference to specific circumstances of the case and to the reason why the assessment made by the court is defective and incompatible with the principles of sound reasoning, principles of logic or indications of knowledge.

29 See more about: C. Kulesza, "A conventional model of a fair appeal proceedings in the comparative perspective", chapter of this monograph.

As shown by the conducted questionnaire study, judges of courts of appeal claim that appellants should indicate pleas. However, in lack of compulsory representation by a lawyer in the area of bringing appeals in all cases, this could be difficult to achieve. Yet it is an obvious fact that appellate judges would rather obtain specific indications about which irregularities the appellant alleges against the judgment. However, one can surmise that such a low effectiveness of pleas in appeal bears witness to insufficient knowledge of professional appellants in the area of reasons for appeal. Therefore, it is hard to require every appellant (also a non-professional) to understand the reasons for appeal and to be able to indicate the pleas in appeal.

As a rule, judges of courts of appeal have knowledge concerning which reasons for appeal are used by appellants as a basis to raise pleas in appeal. In this regard, the results of the questionnaire study are similar to the obtained results of the file study.

However, the results of the questionnaire study in the area of their assessment of the catalogue of absolute reasons for appeal are puzzling. Most appellate judges claim this catalogue does not require any changes. This would mean a lack of desire for changes in the area of absolute reasons for appeal and maintenance of the current status.

The results of the questionnaire study with regard to the assessment by judges of courts of appeal of the possibility to appeal against judgments passed in consensual modes are alarming as well. Most judges have positively assessed the changes in this regard, despite a significant restriction of possible reasons for appeal for appellants. This may indicate the reluctance of judges of courts of appeal to recognize the appeal and pleas contained therein, which also results from the studies.

Moreover, it is worth pointing out the bill of changes in provisions of the CCP (Government bill of 4 December 2018 of the Act on the amendment of the Code of Criminal Procedure Act and certain other parliamentary acts – print no. 3251) concerning reasons for appeal. This bill was submitted to the Sejm on 22 February 2019 and a report by the Subcommittee concerning this bill was submitted on 6 June 2019. The changes will be of particular importance for the role of pleas in appeal, as the bill includes a new section 3a in Article 427, following section 3,

reading as follows: "The plea of failure to examine the evidence ex officio cannot be raised in an appeal, unless the circumstance to be proven is of crucial importance for determination whether a prohibited act has been committed, whether it constitutes an offence and what offence it is, whether the prohibited act has been committed under circumstances mentioned in Article 64 or 65 of the Penal Code, or whether there are conditions to adjudicate a stay in a psychiatric institution pursuant to Article 93g of the Penal Code." However, this change does not seem to be favourable for appellants, since it is the court that is the host of a judicial proceedings and a party need not be represented by a professional. Moreover, this change is similar to one that was planned in the 2013 amendment of the CCP. At that time, that change faced criticism and was eventually not introduced. Moreover, a radical amendment of Article 438 of the CCP is planned as well, by introducing point 1, reading as follows: "infringement of substantial law in the area of legal qualification of the act attributed to the defendant", as well as point 1a, reading as follows: "infringement of the substantial law otherwise than indicated under point 1: "if it could have affected the contents of the decision". So far, the judicial doctrine and case-law were dominated by a well-founded belief that violation of substantive law always affects the content of a decision. Therefore, the projected change seems to be unfavourable to appellants. Moreover, in accordance with the new draft Article 447(6), pleas which may be recognized pursuant to Article 105, 420 or 626 of the CCP cannot constitute exclusive grounds for appeal.

To sum up, the conducted file and questionnaire study shows that the role of reasons for appeal and of the possibility of formulation of effective pleas in appeal based thereon is very important, since it determines the assessment of both the judgment passed by the court of the first instance and the course of a criminal procedure.

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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.

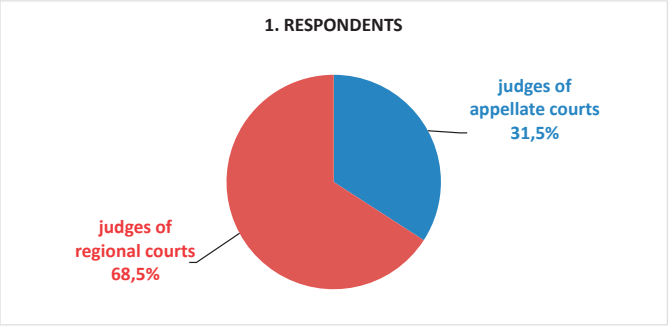
2. Basic methodological assumptions

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

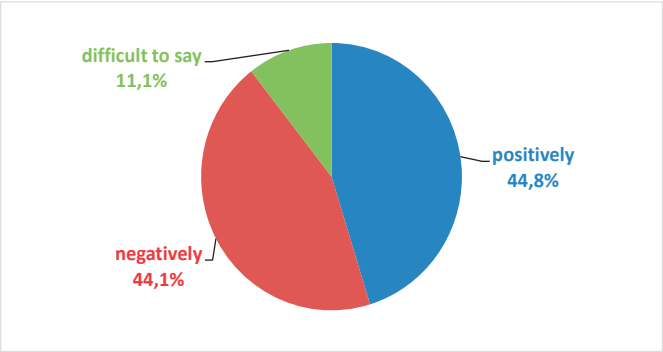
5 C. Kulesza, P. Starzyński, *Postępowanie karne*, Białystok 2018, p. 343.

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

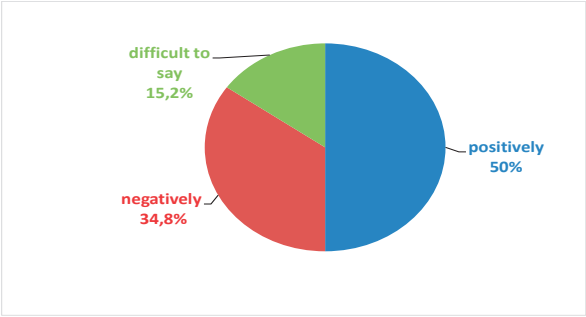


Source: Authors' own study.

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%).

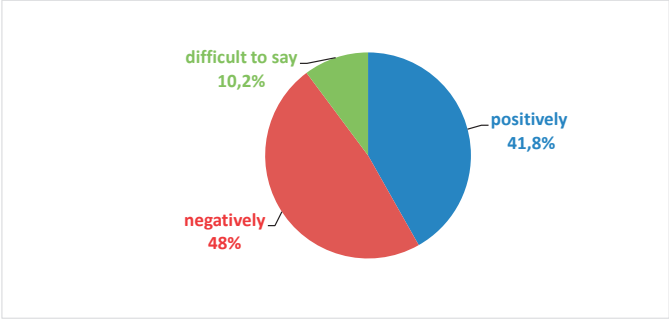
The results of the analysis of the judges' answers depending on the type of court in which they have adjudicated are slightly different, as shown by Figs. 3 and 4 below.

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

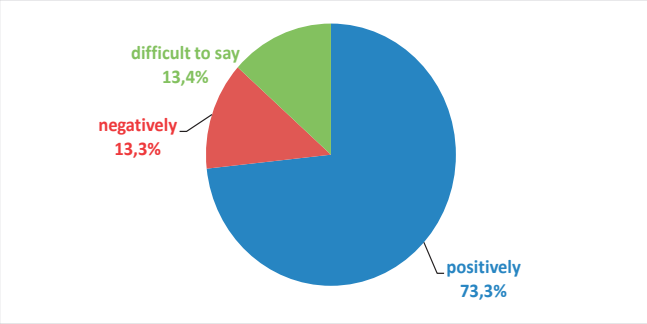


Source: Authors' own study.

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".

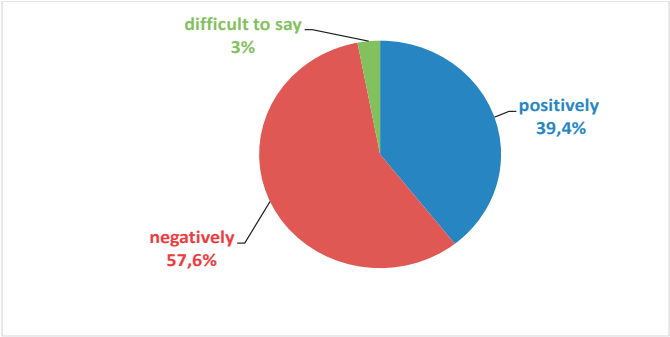
An interesting relation can also be noticed when analyzing the answers of the surveyed considering the criterion of their work experience, as shown by Figs. 5 and 6.

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.

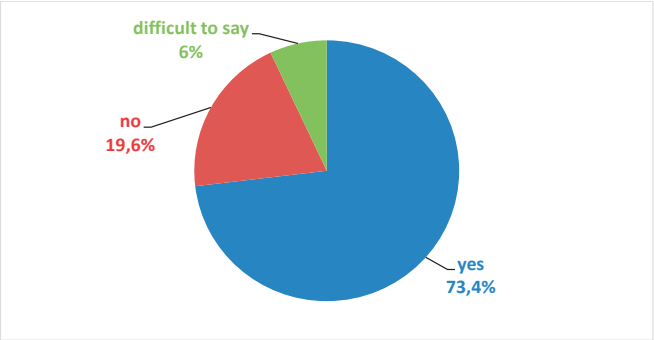
Judges whose work experience was not very long (1-5 years) have assessed this change positively (73.3%), a small minority of them have deemed it negative (13.3%), and a small portion of the surveyed (13.4%) answered "difficult to say". On the other hand, the most experienced judges whose work experience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

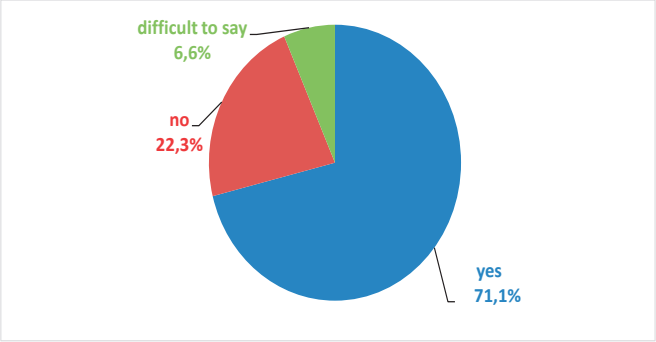
Figure no. 7. The judges' opinion concerning the possibility (author's emphasis)
of conducting of evidentiary proceedings before a court of appeal



Source: Authors' own study.

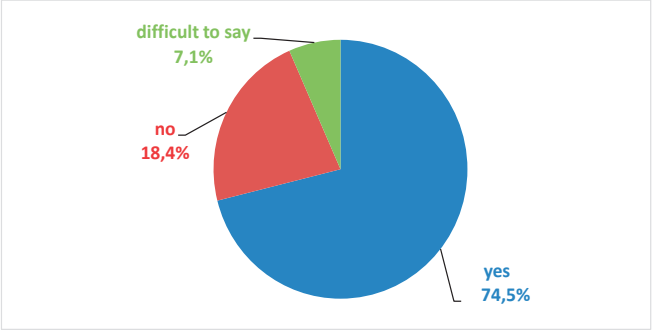
Most judges claim they currently have sufficient possibilities to conduct evidentiary proceedings (73.4%). Only 19.6% of the surveyed have answered that their powers in this regard are insufficient, and 6% had difficulties addressing this question. This trend also persists when broken down by the criterion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

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



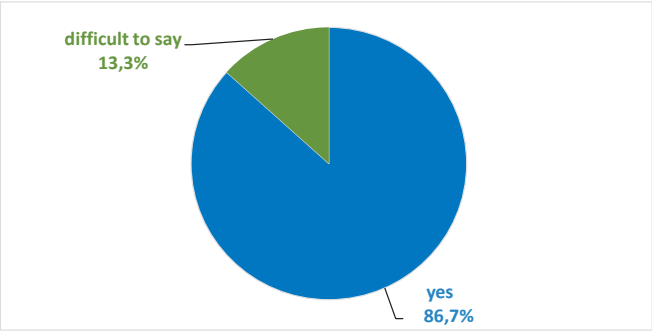
Source: Authors' own study.

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



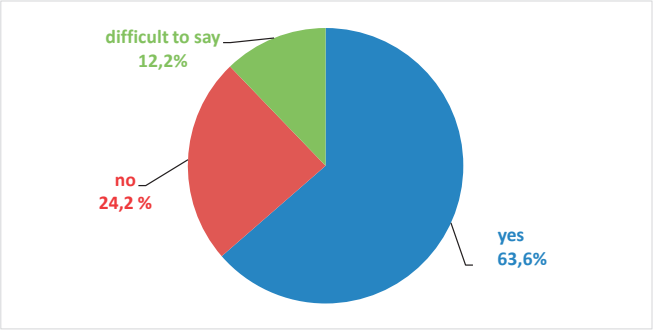
Source: Authors' own study.

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.

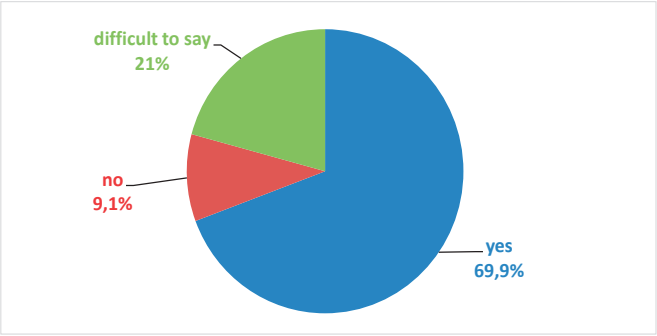
The majority of appellate court judges have also answered that they have sufficient possibilities to conduct evidentiary proceedings (71.1%), while 22.3% of the surveyed answered that their powers in this regard are too narrow (6.6% have no opinion in this regard). Regional court judges have also predominantly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

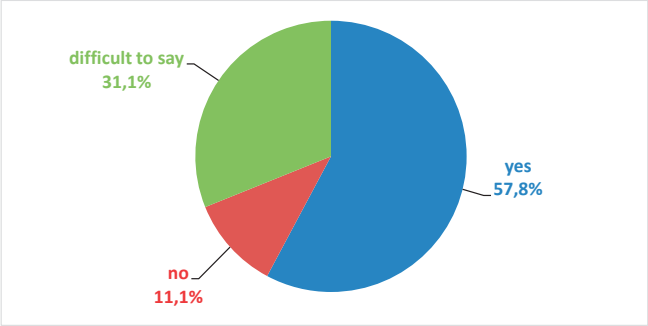


Source: Authors' own study.

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).

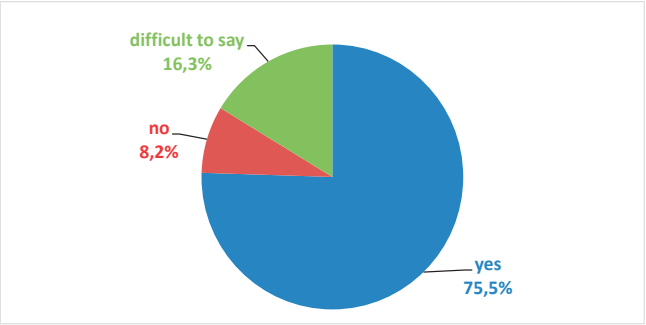
The general trend concerning the affirmative answer to the question formulated above also persists with the criterion of division by workplace – yet the percentage result looks slightly different for judges of appellate courts and of regional courts – as well as when broken down by work experience (Figs.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

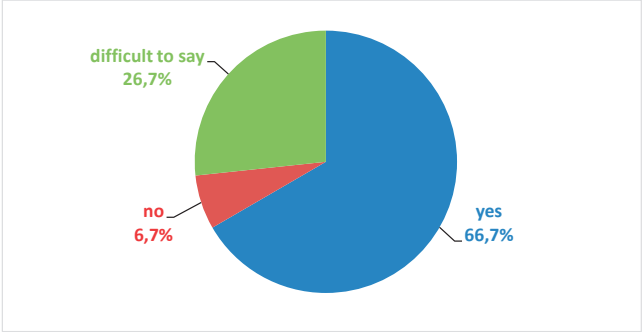


Source: Authors' own study.

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".

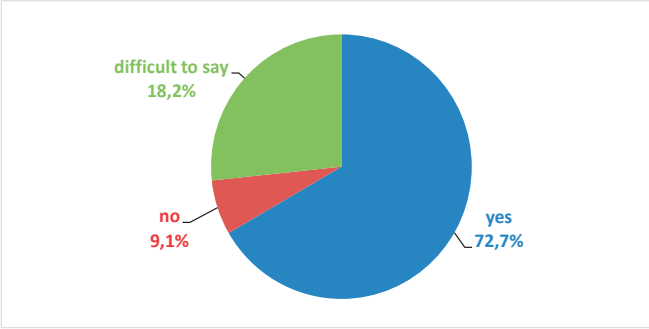
As shown by the diagrams below (Fig. 15-16), this trend is also preserved when the respondents are broken down by work experience. The majority (66.7%) of judges with a relatively short work experience (1-5 years) have stated that the possibilities of conducting of evidentiary proceedings, as broadened 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

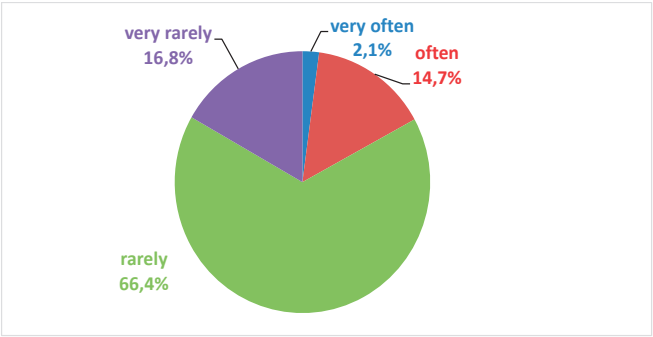
Source: Authors' own study.

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.

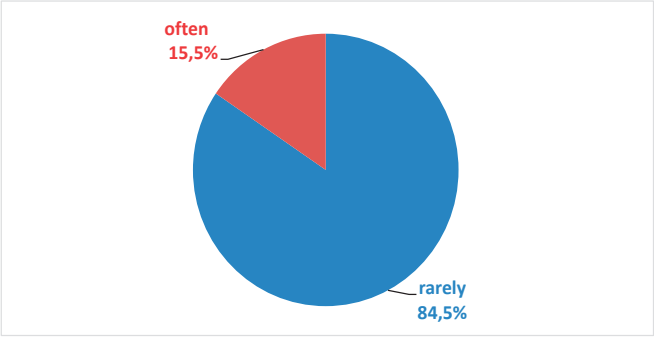
Figure no. 17. The judges' opinion concerning the usefulness of the parties' initiative to adduce evidence for resolution of a case



Source: Authors' own study.

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).

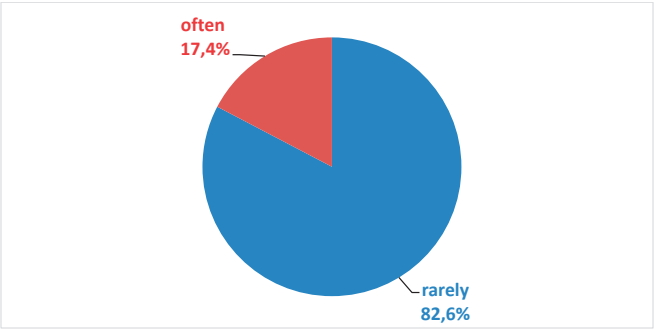
Figure no. 18. The opinion of appellate court judges concerning the usefulness of the parties' initiative to adduce evidence for resolution of a case



Source: Authors' own study.

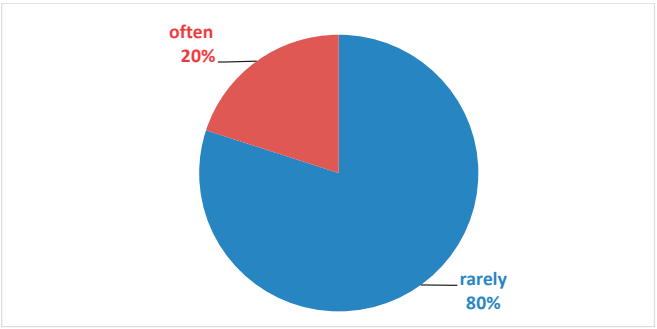
A total of 84.5% of appellate court judges have considered the parties' initiative to adduce evidence to be seldom useful, whereas 82.6% of regional court judges claimed the same. A small minority of both appellate court judges (15.5%) and regional court judges (17.4%) have deemed the parties' initiative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



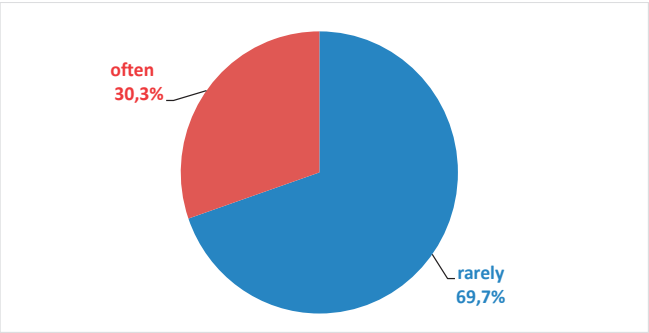
Source: Authors' own study.

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.

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.

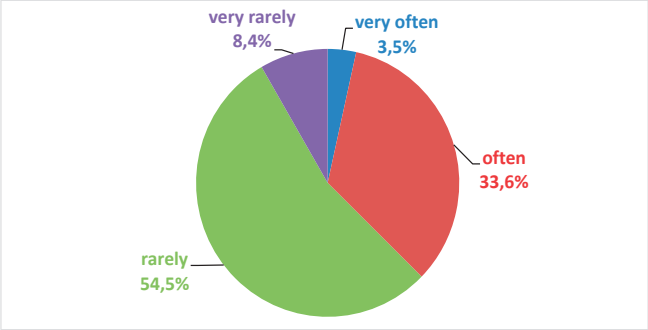
The obtained results concerning the usefulness of the parties' initiative to adduce evidence for resolution of a case are essentially convergent with the results of the file research, yet they contradict the answers to the previous question concerning the judges' opinion on the practical use of the extended 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

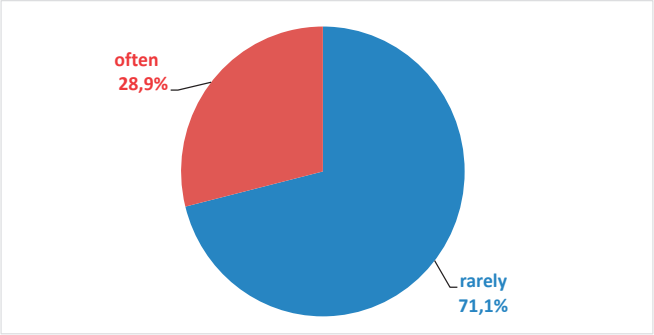


Source: Authors' own study.

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".

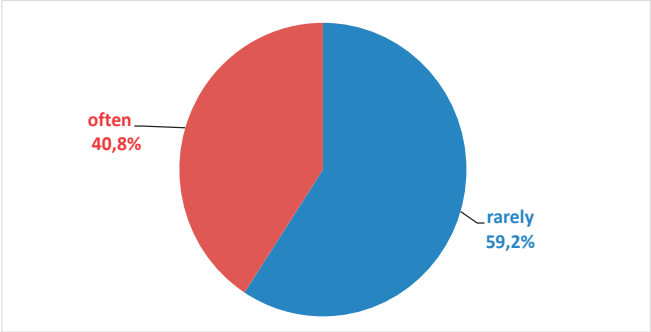
Summarizing and generalizing the negative and positive answers, the vast majority of the surveyed (62.9%) indicated that the need for a court of appeal to take the initiative to adduce evidence occurs rarely, and a minority (37.1%) have claimed such a need exists often. It is worth additionally analyzing 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.

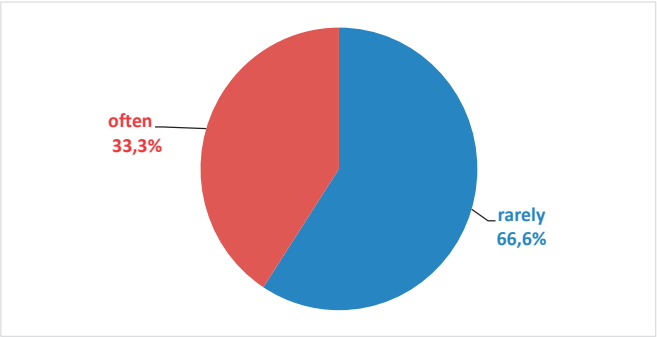
Figure no. 24. The opinion of regional court judges concerning the need for a court of appeal to take the initiative to adduce evidence



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).

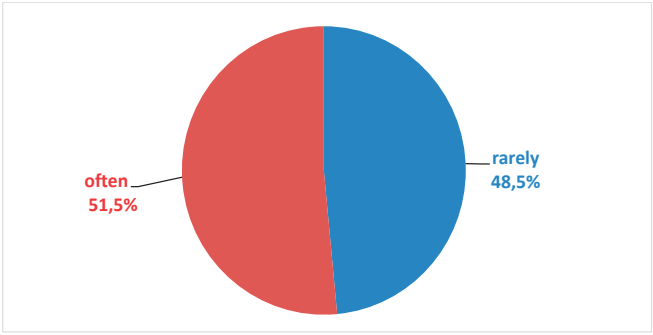
Figure no. 25. The opinion of judges with short work experience concerning the need for a court of appeal to take the initiative to adduce evidence



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.

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ON THE PROCEDURAL LIMITS OF INJUSTICE IN AN APPEAL PROCEEDINGS[2]

The model of appeal proceedings in the Polish legal system has undergone numerous changes over the recent years. One of the goals of the deep reform of criminal procedure of 1 July 2015, based on the adversarial principle, was the will to accelerate the criminal procedure.[3] There was a belief that an overly prolonged criminal procedure is caused by a practice present in courts of appeal, consisting in quite frequent decisions by courts of first instance to annul judgments and refer the case back for re-examination. This was to be prevented by a change in the area of appeal proceedings, consisting in limitation of cassation elements and application of solutions typical of the appeal model. It should be noted that the Act of 11 March 2016,[4] restoring the legal status valid before 1 July 2015, essentially upheld the regulations concerning the appeal-based appeal system.

The goal of the appeal proceedings is to fulfill the main objective of the criminal procedure, namely, implementation of an accurate penal response reflecting the principle of justice[5]. It should be noted that the Polish appeal proceedings model is based on the principle of right to appeal (revision of decisions), "consisting in the possibility to appeal

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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 Substantiation for the government bill of the Act on the amendment of the Penal Code Act and certain other acts, Sejm document no. 2393, www.sejm.gov.pl/Sejm7.nsf/druk.xsp?no.=2393. Amendments intended to accelerate proceedings were adopted by Act of 20 February 2015 on the amendment of the Penal Code Act and certain other acts (*Journal of Laws*, item 396).

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.

5 A. Gaberle, Z. Doda, Kontrola odwoławcza w procesie karnym, Orzecznictwo sądu Najwyższego. Komentarz. Vol. II, Warszawa 1997, p. 41.

against a decision passed by authorities acting in the first instance to the appeal instance."[6] Poland has a double-instance system, providing a possibility to rectify potential errors made by a lower tribunal. Simultaneously, it prevents arbitrariness of authorities conducting the proceedings. The double-instance principle is of guarantee nature.

The principle of right to appeal is legally defined; we will find it in the Constitution of the Republic of Poland, the Code of Criminal Procedure (CCP) and the regulations of international law. Article 176(1)[7] of the Constitution of the Republic of Poland states that a judicial proceedings has at least two instances, and also that each party has the right to appeal against judgments and decisions passed in the first instance (Article 78[8]). Similar rights are granted by the International Covenant on Civil and Political Rights in its Article 14(5),[9] stating that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Moreover, Article 3 of the Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms[10] states that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.

The constitutional principle of double-instance judicial proceedings is implemented in Article 425(1) of the CCP, enabling parties to bring a remedy against a decision passed in the first instance.

Pursuant to Article 433 of the CCP, a court of appeal examines the case within the limits of the appeal, and if the remedy indicates the pleas raised against the decision, also within the limits of the raised pleas; however, under certain circumstances, it has the option to go beyond the extent of this remedy (Articles 435, 439, 440 and 455 of the CCP).

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6 A. Murzynowski, Istota i zasady procesu karnego, Warszawa 1994, p. 204.

7 Constitution of the Republic of Poland, 2 IV 1997, Journal of Laws 1997, no. 78, item 483, as amended.

8 Constitution of the Republic of Poland, 2 IV 1997, Journal of Laws 1997, no. 78, item 483, as amended.

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

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

Under the legal status valid before 1 July 2015, there were differences concerning whether the direction of the appeal was affected by the so-called extent of remedy, as regulated in Article 433 of the CCP, in its wording before the amendment. The provisions of the CCP did not specified what should be understood as the extent of remedy. This is a disputed and controversial term. The literature on the subject distinguishes several stances in this regard. According to one of them, the extent of remedy was determined by four factors included in an appeal complaint, namely: the scope of appeal, the plea in appeal, motions in appeal, as well as the direction of the remedy. The second belief assumed that the extent of remedy was comprised by the scope of appeal, determined by the appeal motions and pleas in appeal, whereas the direction of the remedy was treated as a separate component of the scope of examination of the case[11]. There were also intermediate views, assuming that the extent of remedy is determined by two components: the scope of appeal and pleas in appeal, and that the essential component of the extent of remedy is the extended scope of appeal."[12] It seemed legitimate to state that "the essential elements affecting the extent of remedy include the scope of appeal and the direction of the remedy, and, to a limited extent, also the pleas raised in the remedy."[13] The Supreme Court regards the "extent of remedy" as a three-dimensional structure determined by:

- the direction of appeal, i.e. the relation of the remedy to the defendant's interests;
- the scope of appeal, i.e. indication whether the remedy covers the entirety or a part of the decision;
- pleas in appeal , i.e. a statement concerning the errors of the decision, included in the remedy."[14]

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11 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Komentarz do artykułów 297-467, Warszawa 2011, pp. 753-4.

12 K. Marszał, Zasadnicze składniki granic środka odwoławczego w procesie karnym, (in:) Księga pamiątkowa ku czci prof. Z. Dody, Kraków 2000, pp. 47-8.

13 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Vol. II. Komentarz do artykułów 297-467, Warszawa 2011, p. 754.

14 The Supreme Court judgment of 12 April 2001, file ref. no. III KKN 354/00, LEX no. 51922; The Supreme Court decision of 24 April 2013, file ref. no. V KK 367/12, LEX no. 1318219.

The amendment of 11 March 2016 changed Article 433 of the CCP, since the term "extent of remedy" was removed from this provision. However, it should be noted that the direction of appeal still plays a significant role in the system of instance revision of a decision, in view of the amendment of Article 440 of the CCP.

In the Code of Criminal Procedure of 1997,[15] the legislator regulated the institution of "gross injustice" of a decision in Article 440 of the CCP. This provision states that "If upholding of a decision would be grossly unjust, it is subject to amendment in favour of the defendant or to annulment, regardless of the scope of appeal and the raised pleas". Article 440 of the CCP plays an important role in the instance revision of decisions in a criminal procedure, constitutes a peculiar "safety valve",[16] and provides the court of appeal with an option to go beyond the extent of remedy, if upholding would cause gross injustice of the decision.

This norm operates the concept of gross injustice of a decision. However, it is impossible to find a statutory definition of "gross injustice" anywhere, yet we can derive it from the case-law of courts.[17]

The Act of 11 March 2016 on the amendment of the Code of Criminal Procedure Act as well as certain other acts,[18] coming into force on 15 April 2016, provided Article 440 of the CCP with a slightly changed form in relation to the Code of Criminal Procedure of 1997. Currently, if a court of appeal states that upholding of a decision would be grossly unjust, it may, regardless of the extent of appeal and the raised pleas, amend the decision passed in favour of the defendant, or annul it if the situation foreseen in Article 437(2), second sentence, has occurred. Since 1 July 2015, the provision of Article 437(2), second sentence, allows

15 Act of 6 June 1997 – Code of Criminal Procedure (Consolidated text – Journal of Laws 2017, item 1904, as amended.

16 M. Skwarcow, Glosa do wyroku SN z dnia 28 stycznia 2005 r., VKK 364/04, Gdańskie Studia Prawnicze- Przegląd Orzecznictwa 2005, no. 4.

17 See The Appellate Court in Gdańsk judgment of 29 May 2017, file ref. no. II AKa 17/17, LEX no. 2375020; The Supreme Court judgment of 10 March 1972, file ref. no. V KRN 21/72, published OSNKW 1972/9/143; Judgment by the Supreme Court of 3 June 2014, file ref. no. IV KK 437/13, LEX no. 1478714; The Supreme Court decision of 12 April 2018 r., file ref. no. II KK 422/17, published OSNKW2019/3/14.

18 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.

annulment of a decision and referral of the case back for re-examination in three cases only: finding of occurrence of an absolute reason for appeal (Article 439(1) of the CCP), finding of violation of *ne peius* rules under Article 454 of the CCP, and a necessity to repeat the proceedings in full. The substantiation for the bill of the act (Sejm of the 7th Term, Sejm Document no. 207 of 27 January 2016)[19] contains a provision that the above changes in the appeal proceedings are of corrective and ordering nature. These changes constituted the legislator's response to the criticism by doctrine representatives claiming that the provision of Article 440 of the CCP caused an inconsistency in the option for the court of appeal to issue cassation decisions (Article 437(2) of the CCP).[20] The amendment of Article 440 of the CCP provided the *ad quem* court with a possibility to conduct evidentiary proceedings ex officio under identical rules as for the *ad quo* court, if gross injustice of the decision has been observed. A court of appeal gained the same powers as a court of the first instance (Article 452 of the CCP). The amendment of Article 440 of the CCP is intended to prevent unnecessary lengthiness of a criminal procedure and to serve the implementation of the principle of speed.[21] However, there are doubts concerning the amending of decisions being only possible in favour of the defendant. What to do if the proceedings is grossly unjust for the aggrieved party, and the court has no grounds to annul the decision and refer the case back to the court of first instance?

Therefore, it would be appropriate to consider amendment of the content of Article 440 of the CCP in such a way as to enable the court of appeal, if a risk arises that the state of gross injustice of a decision may be upheld, to amend decisions both in favour and to the detriment of the defendant. The criterion of gross injustice of the decision should protect the interests of all participants of the proceedings, rather than just the defendant. This is, obviously, a concept requiring precise indication

19 Substantiation for the Government bill of the Act of 27 January 2016 of the amendment of the Code of Criminal Procedure Act as well as certain other acts, document no. 207, https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?no.=207.

20 See Substantiation for the Government bill of the Act of 27 January 2016 of the amendment of the Code of Criminal Procedure Act as well as certain other acts, document no. 207, https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?no.=207.

21 Substantiation for the Government bill of the Act of 27 January 2016 of the amendment of the Code of Criminal Procedure Act as well as certain other acts, document no. 207, https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?no.=207.

of criteria when such an unfavourable change would be possible and, simultaneously, determination of a catalogue of such situations when it would still be necessary to annul the contested judgment and refer the case back for re-examination, which is a more guaranteeing solution to the defendant. However, in cases of less importance, which, after all, can also be affected by grossly unjust decisions, it will not always be necessary to re-examine the case, and the economy of proceedings seems to argue in favour of such a limited possibility of amendment of a contested decision to the detriment of the defendant.

The prohibition of *reformationis in peius* is a prohibition of deteriorating the defendant's position in a proceedings when the decision has not been appealed against to the defendant's detriment. The doctrine[22] points out that the *reformationis in peius* prohibition is a very important institution, guaranteeing the defendant's right to appeal against an erroneous decision. It protects the defendant against more negative consequences in the proceedings and eliminates the risk which would be related to appeal against a decision in the defendant's favour in lack of certainty concerning the non-deterioration of the defendant's position only as a result of causing of appeal revision in his favour. Therefore, the *reformationis in peius* prohibition comprises the defendant's procedural guarantee that, as a result of appeal against a decision in his favour, the severity determined in the contested decision would not be increased. From this viewpoint, the provision of Article 440 of the CCP is related to the change of a decision appealed against in favour of the defendant, regardless of the extent of appeal and the raised pleas. However, this provision enables annulment of a contested decision in a situation foreseen in Article 437(2), sentence 2, of the CCP, provided that, additionally, the remedy is directed to the detriment of the defendant.

Therefore, the *reformationis in peius* prohibition protects the defendant even when, due to the appeal revision initiated thereby, the court of appeal concludes that the decision appealed against wrongly unburdens the defendant so drastically that upholding thereof would be grossly

22 K. Marszał, S. Stachowiak, K. Sychta, J. Zagrodnik, K. Zgryzek, *Proces karny. Przebieg postępowania*, Katowice 2012, p. 241.

unjust. However, the court must accept such a state of affairs and agree to such a gross injustice of the judgment upholding the decision by the court of the first instance, unless the other party has brought a remedy at law to the detriment of the defendant. Only then will a possibility open to assess whether the premises of annulment of the decision pursuant Article 440 of the CCP have arisen.

The provision of Section 1 of Article 434 of the CCP prohibits breaking of the direction of the remedy if the remedy has been brought in favour of the defendant.[23] The legislator allows for adjudication to the detriment of the defendant only when the remedy has been brought to his detriment. A completely different function is performed by Article 434(2) of the CCP, enabling the breaking of the direction of appeal, since it admits a possibility to adjudicate in favour of the defendant if the remedy is brought to his detriment. However, an additional statutory quantifier here is fulfillment of the premises of Article 440 of the CCP. To be precise, it should be noted this is formally not a norm included in the scope of the so-called *reformationis in peius* prohibition, and inclusion thereof in the section of this article is not fully justified.

"Injustice of a decision" as a ground for annulment thereof has already been present in the Code of Criminal Procedure of 1969.[24] The provision of Article 389 of the FCCP stated that "A decision is subject to change in favour of the defendant or to annulment, regardless of the extent of remedy, if it is obviously unjust". Making a comparison between the Code of Criminal Procedure of 1969 and the current one, we can see that the difference consists in the word "obviously" being replaced with "grossly". This change "is of substantive rather than just editorial nature, since the adjective 'gross' is connected with the nature of this injustice, which should be visible at first glance, immediate. Moreover, the gravity of the error which has caused this injustice is irrelevant, since every, even petty error, if obvious and causing injustice of the decision, may serve as a ground for adjudication beyond the

23 See the Supreme Court ruling of 20 July 2005, file ref. no. I KZP 20/05, published OSNKW 2005/9/76.

24 Act of 19 April 1969 – Code of Criminal Procedure, *Journal of Laws* no. 13, item 96 (hereinafter referred to as the FCCP).

limits of appeal and the raised pleas."[25] Gross injustice may refer to both violation of substantive law and misapplication of the rules of criminal procedure.[26]

This relates to errors which grossly violate the sense of justice.[27] Not only does "gross injustice" have to be "obvious" (i.e. "visible at first glance", "unquestionable"), but also to reflect a serious gravity of the error that became the basis for passing of a decision affected by "gross injustice". This does not relate to every "injustice" of a passed judgment but only to one which does not comply, for instance, with the fair trial principle."[28] The case-law of the Supreme Court shows that "gross injustice" must be clear (conspicuous) and significant.[29] In the opinion of K. Marszał,[30] a gross violation of the law occurs at the moment of violation of procedural guarantees or principles, the crux is the theoretical rather than actual impact of the issued decision. Such a violation would mean a far-reaching restriction in the area of bringing of a specific remedy.

The presented views found confirmation e.g. in the judgment by the Court of Appeal in Gdańsk of 11 December 2013,[31] stating that "The content of Article 440 of the CCP allows to state it does not only reference substantive but also procedural justice, with no need to demonstrate the actual effect of the observed error on the content of the decision. This is the case when a decision, due to its substantive content, does not require obvious intervention by a court of appeal, but issuance thereof was preceded by very gross errors of procedural nature." A different view of the issue of effect of errors in a decision was presented by the Supreme

25 D. Świecki (ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, published: LEX/el. 2019.

26 The Supreme Court ruling of 2 April 2012, file ref. no. III KK 98/12, LEX no. 1163194; M. Rogacka-Rzewnicka, *Kasacja w polskim procesie karnym*, Warszawa 2001, p. 225.

27 T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2009, p. 805.

28 Judgment by the Supreme Court of 3 June 2014, file ref. no. IV KK437/13, LEX no. 1478714.

29 See The Supreme Court judgment of 9 September 2011, file ref. no. IV KK 41/11, LEX no. 960544; Judgment by the Supreme Court of 3 April 1996, file ref. no. II KRN 2/96, LEX no. 26255.

30 K. Marszał, S. Stachowiak, K. Sychta, J. Zagrodnik, K. Zgryzek, *Proces karny. Przebieg postępowania*, Katowice 2008, pp. 241-2.

31 The Appellate Court judgment in Gdańsk of 11 December 2013, file ref. no. II AKa 394/13, LEX no. 1425380.

Court in its ruling of 12 May 2004,[32] noticing that an error must be actual and real, since it is insufficient to state a potential possibility of impact of the observed errors on the content of the decision.

"The exceptional nature of the provision of Article 440 of the CCP manifests itself in the possibility for a court of appeal to adjudicate regardless of the extent of appeal and the raised pleas, if this court considers upholding of the contested decision to be grossly unjust. It is not a violation of the law by any means if the court chooses not to use this possibility ex officio, since it is nothing more than an expression of the court's belief that the judgment is fair."[33] The provision of Article 440 of the CCP constitutes a right and obligation of a court of appeal to go beyond the extent of appeal and the pleas raised in the appeal, rather than a right of parties to demand the court to immediately go beyond the scope determined thereby.[34]

As mentioned many times in this study, Article 440 of the CCP determines the obligation of a court of second instance to revise the contested decision beyond the extent of appeal and the pleas. It should be kept in mind that, due to the amendment of 15 April 2016, Article 440 of the CCP was clarified by the addition that this may take place in the situation described in Article 437(2), sentence 2, of the CCP. Thus, the legislator introduced a closed catalogue enabling a decision to be annulled and a case to be referred back for re-examination. One should keep in mind that Article 440 of the CCP does not constitute an independent ground for annulment of a decision and referral of the case back. This requires additional fulfillment of one of the requirements mentioned in Article 437(2), sentence 2, of the CCP – finding of occurrence of an absolute reason for appeal (Article 439(1) of the CCP), finding of the need to break the *ne peius* rules (Article 454 of the CCP), or finding of a necessity to repeat the judicial proceedings.

As a part of the research project "Is the Polish model of criminal appeal proceedings fair?", implemented by the Department of Criminal

32 The Supreme Court ruling of 12 May 2004, file ref. no. III KK 38/04, published OSNwSK 2004/1/869.

33 The Supreme Court ruling of 13 February 2017, file ref. no. III KK 432/16, LEX no. 2224611.

34 The Supreme Court ruling of 8 October 2015, file ref. no. II KK 148/15, published OSNKW 2016/1/9.

Procedure of the Faculty of Law of the University of Białystok[35], 595 court files were studied, coming from three appeal jurisdictions: Białystok, Łódź and Warsaw. The cases subject to analysis were divided by time, into those in which the judgment was passed before 15 April 2016[36] and cases in which the judgment by an appellate court was passed on or after 15 April 2016. Such a manner of data aggregation was based on the conclusions drawn from the resolution by a panel of 7 judges of the Supreme Court of 29 November 2016, file ref. no. I KZP 10/16.[37] Upon division of the cases according to the new dividing date, the analysis covered 232 cases conducted under the regulations valid before 15 April 2016 and 363 cases conducted under the amended regulations of the Code of Criminal Procedure.

The table shows the distribution of cases in individual appeal jurisdictions.

Table no. 1

	Łódź appeal jurisdiction	Appelate Court in Białystok	Appelate Court in Warszawa	Total
regulations valid before 15 April 2016	45 cases	93 cases	94 cases	232 cases
regulations valid after 15 April 2016	159 cases	119 cases	85 cases	363 cases
Total	204 cases	212 cases	179 cases	595 cases

Source: Authors' own study.

As a part of the conducted file research, the questionnaire included a question concerning recognition of a case outside the extent of appeal and the raised pleas pursuant to Article 440 of the CCP. As indicated above, 595 cases were analyzed under the research, of which the plea of Article 440 of the CCP appeared only in 3 cases. All of those cases

35 Research project "*Is the Polish model of criminal appeal proceedings fair?"*, programme: OPUS 8, panel HS5_4 criminal law, financed from the resources of the National Science Centre, head of the project: prof. zw. dr hab. Cezary Kulesza.

36 Act of 11 March 2016 on the amendment of the Code of Criminal Procedure Act and certain other acts (Dz.U. z 2016 r., poz. 427) and after its entry into force on 15 April 2016.

37 See the content of this resolution in the study by K. Łapińska, "Changes in the Polish appeal proceedings model in the light of research results", published in the present monograph.

occurred in the Białystok appeal jurisdiction (2 before and 1 after 15 April 2016). This is a negligible number, which means that, as evidenced by the file research, courts are very cautious to apply Article 440 of the CCP.

Article 440 of the CCP unquestionably plays an important role in the appeal proceedings; as mentioned before, it is a "safety valve"[38] providing a court of appeal with an option to go beyond the extent of remedy if upholding would cause gross injustice of the decision. A decision should be deemed grossly unjust when it harms the social sense of justice,[39] violates the principles and the legal system. The provision of Article 440 of the CCP provides a court of appeal with a possibility to "rectify errors" made by the court of first instance, if any, which should result in a lower number of cassations brought to the Supreme Court.

As a result of amendment of the Code of Criminal Procedure (1 July 2015), the legislator changed the content of Article 523 of the CCP, in which article he indicated outright that a party cannot bring a cassation under the plea of violation of Article 440 of the CCP. Subsequently, as a part of amendment of the Code of Criminal Procedure (15 April 2016), sentence 2, stating that a party also cannot bring a cassation under the plea of violation of Article 440 of the CCP, was deleted from Article 523(1) of the CCP. Although a party could raise the plea of violation of Article 440 of the CCP in a cassation against judgments passed by courts of appeal until 30 June 2015, it did not have such a right anymore with regard to judgments passed by courts of appeal after that date, unless the time limit for the party to bring cassation passed after 14 April 2016.[40] However, it should be noted that the case-law of the Supreme Court (legal status valid before 1 July 2015) knew instances of recognition of a cassation based on the plea of violation of Article 440 of the CCP.[41]

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38 M. Skwarcow, Glosa do wyroku SN z dnia 28 stycznia 2005 r., VKK 364/04, Gdańskie Studia Prawnicze- Przegląd Orzecznictwa 2005, no. 4.

39 D. Świecki, Postępowanie odwoławcze w sprawach karnych. Komentarz. Orzecznictwo, Warszawa 2013, p. 229; T. Grzegorczyk, J. Tylman, Polskie postępowanie karne, Warszawa 2014, p. 859.

40 Resolution by 7 judges of the Supreme Court of 29 November 2016 – legal principle , file ref. no. I KZP 10/16, published OSNKW 2016/12/79.

41 See the Supreme Court judgment of 4 September 2014, file ref. no. V KK 222/14, LEX no. 1504601; The Supreme Court judgment of 22 May 2013 r., file ref. no. IV KK 138/13, LEX

The provision of Article 523(1) of the CCP in the new wording (15 April 2016) does not exclude the option for cassation to be based on the plea of violation of Article 440 of the CCP anymore.[42]

Under the currently binding legal status, Article 440 of the CCP may serve as a ground for cassation. "Since the obligation of a court of appeal when conducting instance revision is to analyze the decision subject thereto, also in the context of the rigours of Article 440 of the CCP (cf. Article 433(1) of the CCP), i.e. to determine whether upholding of the contested decision, in a situation of groundlessness of the remedy brought, will not be grossly unjust, the failure to apply the provision of Article 440 of the CCP (in spite of occurrence of the premises required by the act, if it is gross and causes a possibility of significant impact on the content of the judgment by the court of appeal) – may be a generally efficient basis for cassation."[43] The restoration of Article 440 of the CCP as a basis for a cassation plea of the party is a consequence of the return to the inquisitorial principle, also applicable to a court of appeal.

Additionally, it should be stressed that gross injustice of a decision (Article 440 of the CCP) is implementation of a fair criminal proceedings. The thesis of the Appellate Court in Lublin still remains relevant, stating that "The provision of Article 440 of the CCP does not permit the court examining a remedy to uphold a decision, both when it is grossly unjust in the substantive sense and also when the issuance of the contested decision has been preceded by procedural errors so grave that they cannot be reconciled with the essence and principles of a fair criminal proceeding, (…)."[44]

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no. 1504810; The Supreme Court judgment of 28 April 2010 r., file ref. no. II KK 47/10, LEX no. 8431173.

42 The Supreme Court ruling of 11 May 2017 , file ref. no. II KZ 11/17, LEX no. 2284184.

43 The Supreme Court ruling of 21 June 2016, file ref. no. V KK 126/16, LEX no. 2076400.

44 The Appellate Court in Lublin judgment of 10 November 1998, file ref. no. II AKa 103/98, LEX no. 38944.

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THE SCOPE OF RECOGNITION OF APPEALS AND KINDS OF DECISIONS BY COURTS OF APPEAL[2]

The doctrine has long been perceiving different possibilities of affecting the appeal proceedings, mainly pointing out the models of appeal, cassation and revision control of decisions. Appeal consists in examination of a case on its merits by a court of second instance as a result and within the extent of complaints by parties. The re-examination covers both factual and legal basis for the judgment. Appeal control, in the model of full appeal, means repeated examination of the entire case, whereas the court of appeal examines evidence and makes its own findings bases on this or already gathered evidence. Appeal control ends with issuance of a substantive decision, rather than referral of the case back for re-examination to the court of first instance. Currently, such a model of appeal proceedings has been assumed by the legislator in the civil procedure, assuming full possibility for a court of second instance to make factual findings. Therefore, making of own findings by a court of appeal, even ones differing from the claims of the appeal yet within the limits of the evidence of the case, cannot be regarded as violation of Article 378(1) of the Code of Civil Procedure, and consequently, it does not go beyond the extent of appeal.[3]

Another possible model of appeal proceedings – the model of cassation control of decisions – consists in examination of a decision solely from the viewpoint of legal correctness. This is not repeated trial of the case but appraisal of a contested judgment. There is no investigation of the case on its merits or examination of strict evidence concerning

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3 Ruling by the Supreme Court of 10 August 2018, I CSK 388/18, Legalis.

the essence of the case. Therefore, a cassation court does not adjudicate on its own – it either recognizes the cassation and annuls the contested judgment in full or in part, or dismisses the cassation.

Finally, the model of revision control of decisions assumes adjudication within the extent of appeal, legal and substantive control of the contested decision, annulment of the decision and referral of the case back for reexamination if any errors are found, and also, importantly, the option to adjudicate on the substance of the case, yet exclusively on the basis of factual findings assumed in the judgment by the court of the first instance, essentially only in the defendant's favour, and consequently, the inadmissibility of examination of strict evidence and making of factual findings on its basis.[4] Revision proceedings served as a basis for construction of extraordinary revision, controlling a judgment which has already become final, but based on the same grounds as ordinary revision.[5]

These introductory remarks are particularly necessary considering that, which has been stressed many times, appeal proceedings has undergone essential model transformations over the recent years. The goal of these changes was to increase the efficiency of this stage of proceedings, particularly through elimination of frequent annulment of first-instance court decisions and referral of cases back to be re-examined in the first-instance proceedings. Thus, as soon as in the first bill of the amendment of the Code of Criminal Procedure, finally adopted on 27 September 2013,[6] a necessity was pointed out to limit the lengthiness of the procedure through a new shape of the appeal proceedings model, in a manner enabling a broader scope of amendment of decisions, and therefore, limiting the cassation aspect of this proceedings as contributing to the prolongation of a criminal procedure.[7]

Leaving aside the corrections the legislator has introduced in the appeal proceedings model over the recent years, but already after 1 July

4 See A. Kaftal, *System środków odwoławczych w polskim procesie karnym,* Warszawa 1972, pp. 14-51.
5 S. Kalinowski, *Rewizja nadzwyczajna w polskim procesie karnym,* Warszawa 1954, p. 32.
6 *Journal of Laws* 2013, item 1247 with further amendments.
7 Substantiation for the Sejm document no. 870 (p. 3), including the first bill of the later amendment adopted on 27 September 2013 – Sejm of the 7th Term.

2015, i.e. the effective date of the amendment of 27 September 2013, one can assume without unnecessary controversies that the model of appeal-based adjudication in the appeal proceedings, as introduced on that day, was not only maintained but even intensified. The further part of the text will analyze the issue of the extent of examination of a remedy, the *ne peius* rules, as well as decisions issued by a court of appeal following the conducted appeal control. Due to numerous, albeit not fundamental changes, the description and characterization of legal institutions was conducted according to the legal status of 15 July 2019.[8]

The legal procedure doctrine points out that the principle according to which a court of second instance examines a case within the extent of a remedy has been introduced in the procedural act in 1969 and maintained in the following, currently binding code (Article 433(1) of the CCP). Although numerous statements of both doctrine and case-law concerning the extent of remedy appeared at that time, this term has remained one of the most disputed issues of procedural law until this day. Therefore, the legislator decided to finally eliminate the controversial term from the procedural act by the September amendment (2013). At that point, it seemed that the many years' discussion in this area, constituting a source of theoretical disputes, finally ended.[9] Nothing can be further from the truth, since although the September amendment introduced "extent of appeal and the raised pleas", as relevant terms, into the content of Section 1 of Article 433 of the CCP, the April amendment (2016) corrected the previously chosen solution, stipulating that a court of appeal examines a case within the extent of appeal, and if the pleas raised against the decision have been indicated in the remedy – also within the extent of the raised pleas, considering the content of Article

8 This reservation is especially significant, considering that another extensive amendment of the Code of Criminal Procedure is currently proceeded by the Sejm (Sejm document no. 3251 – Sejm of the 8th Term), foreseeing significant changes, also in the area of appeal proceedings, including limitation of the possibility to raise the plea of failure to examine evidence ex officio (Article 427(3a) of the CCP), dualization of the ground for appeal in the form of violation of substantive law by the court of first instance (Article 438(1) and 438(1a) of the CCP), limitation of the parties' initiative to adduce evidence (Article 452(2)(2) of the CCP), or radical restriction of barriers resulting from the *ne peius* rules (Article 454(1) of the CCP and repeal of Section 3 in this text entity). Entry into force of those and other changes will force asking of a new question about the fairness of the Polish appeal proceedings.

9 T. Grajcar, *Granice środka odwoławczego w świetle nowelizacji kodeksu postępowania karnego*, Prok, i Pr. 2015 r., no. 7-8, p. 44.

447 Sections 1-3 of the CCP, and to a wider extent, in cases indicated in Articles 435, 439(1), 440, and 455 of the CCP.

Therefore, it was rightly observed that the introduced solution has definitely relaxed the extent of appeal control in relation to how rigorously they have been determined in the September amendment. Concerning Article 433(1) of the CCP, the April amendment cannot be read in isolation from Article 427(1) and 427(2) of the CCP, which have also been amended simultaneously. Therefore, although every appellant since 1 July 2015 should have indicated the decision or finding appealed against, formulated the pleas raised against the decision or finding, and stated what he requested (Section 1), and if a remedy came from a public prosecutor, defender or representative, it should have also included a substantiation (Section 2), the situation changed radically since 15 April 2016. Now, the appellant should indicate the contested decision or finding, as well as specify what he requests (Section 1), and only if the remedy has been brought by a public prosecutor, defender or representative, it should also include an indication of specific pleas against the decision and a substantiation (Section 2).

The return to solutions valid before the entry of the September amendment into force means an essential change in the mode of appeal control conducted by the court of second instance, whereas the extent of such control is not only dictated by the wording of the provision of the parliamentary act but largely depends on the procedural tactic of the parties to a proceedings. These are authorized to raise pleas in appeal, yet this is not their obligation if they are not professional participants of the proceedings. If such an unprofessional party to the proceedings raises such pleas, they will determine the extent of the appeal control. If the party fails to do so, the appeal control, regardless of the direction of appeal, will take place within the extent of appeal with regard to the errors specified in Article 438 of the CCP, which opens a possibility to raise pleas in appeal after the expiry of the time limit for appeal.[10]

Similar conclusions may also be drawn reading the hitherto case-law. The analysis of the regulations of Articles 433(1) and 434(1)(3) of the

10 See D. Świecki, *Granice kontroli odwoławczej,* Białostockie Studia Prawnicze 2018, vol. 23, no. 1, pp. 179-80.

CCP in conjunction with Article 427(1) of the CCP leads to a conclusion that the so-called total appeal control of a judgment by a court of first instance is possible when the entity preparing a remedy is only a party with no legal qualifications, e.g. a defendant or an auxiliary prosecutor, and if this party fails to raise pleas against the decision in its remedy but appeals in full against the judgment under consideration.[11] Therefore, the interpretation of the provision of Article 433(1) of the CCP, assuming that the appeal should be recognized within the extent of appeal, yet with regard to all potential errors, including those which have not been raised, is admissible. However, such a total control is out of question if the defendant had a defender being a professional entity, who brought an appeal.[12] The change in the content of Article 433(1) of the CCP, that came into being on 1 July 2015, "broadened" the options to adjudicate to the defendant's detriment, whereas a condition for such adjudication to the detriment – apart from the scope resulting from the plea included in the appeal by a public prosecutor or a representative of an auxiliary (or private) prosecutor – was that the extent of this "additional" change should fall within the limits of presumptions determined by Article 447 Sections 1-3 of the CCP, and, secondly and fundamentally, that the plea of appeal to the detriment should be valid (i.e. the error in the appeal should be confirmed). Therefore, failure to state the validity of the error indicated in the appeal does not allow to adjudicate upon another decision covered by the extent of the presumption.[13]

It is only when the court of appeal concludes that the alleged error has occurred that the pleas in appeal are no longer binding, as they have already been considered. This, in turn, opens the way for further control, limited by the extent of appeal, subject to expansion pursuant to Article 447(1) and 447(3) of the CCP.[14]

In this context, it is necessary to draw several conclusions referencing the fairness of the of appeal proceedings model thus developed. The concept of fair trial is, obviously, not statutorily defined, but it is accurate to claim that it should be linked to the principle of loyalty

11 The Supreme Court ruling of 11 September 2018, II KK 289/18, Legalis.
12 The Appellate Court in Katowice judgment of 19 June 2017, II AKa 76/17, Legalis.
13 The Supreme Court judgment of 11 April 2019, V KK 159/18, Legalis.
14 D. Świecki, *Granice*…., p. 182.

towards participants of a criminal proceedings, the main assumption of this principle being the obligation to notify the parties of their rights and obligations, and also the requirement of fair proceedings towards the defendant and other participants of the procedure on the part of the court and procedural authorities.[15] A goal of existence of every judicial procedure is to ensure existence of clear procedural rules, creating a state of certainty and predictability. Only such conditions enable defence of a defendant on the basis of the criterion of its quality, understood as fairness and due diligence of a defender's rational activity, which is a necessary premise for the defender's effectiveness.[16] If a remedy is brought to the defendant's detriment by an unprofessional entity that simultaneously fails to indicate the pleas formulated against the contested decision, the defender (not to mention the defendant himself) is put in a situation far from optimal. It is hardly possible to prepare efficiently for defence when a procedural situation affected in such a way initiates total control to the defendant's detriment. Moreover, it is quite probable that the defender will face many rationally uno.esolvable conflicts and will be forced to rely on his cautiousness, experience and a stroke of luck, which criteria should not be reliable, let alone decisive, in the course of a criminal proceedings. Specifically, if a defender notices errors in a case, made by the court of first instance in favour of his client, and such errors have not been indicated in the appeal by the prosecution, then, if a possibility opens for the court of appeal to conduct total control to the defendant's detriment, the defender may either keep quiet about these errors and refrain from trying to convince the court of appeal they are of no great significance for the case, or engage in such a polemic (against errors observed thereby, yet not indicated directly in pleas of appeal), yet risking that he would not succeed but instead draw the attention of the court of appeal to an error the court might have not noticed otherwise. It should be recalled that the defender, pursuant to Article 86(1) of the CCP, may only undertake procedural actions in favour of the defendant. It is difficult to say how a defender should act in such a situation in order to still take action in the defendant's favour. Of course, opening of total

15 E. Skrętowicz, *Z problematyki rzetelnego procesu karnego* (in:) J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy,* Warszawa 2009, p. 21.

16 C. Kulesza, *Jakość obrony formalnej jako warunek rzetelnego procesu (refleksje prawnoporównawcze)* (in:) J. Skorupka (ed.), *Rzetelny proces*…, p. 151.

control to the detriment of the defendant puts him in a difficult situation as well, preventing him from actually preparing for defence in an appeal proceedings. Moreover, such a solution encourages parties, in a sense, to tactically play upon the course of an appeal proceedings, since it seems sensible from the viewpoint of each party to have a remedy brought also, or maybe even exclusively, by a non-professional entity, which, firstly, enables total control of this decision in every direction, and secondly, leaves the defender and the representative with freedom of formulation of any and all pleas on behalf of their clients, until the moment of examination of the remedy. Therefore, it is unknown under such arrangements what is the actual scope of the complaint and the extent it determines in an appeal proceedings. In such case, the appeal only initiates appeal control, but does not determine its extent even remotely, which fundamentally contradicts the principle of accusatorial procedure. It has been accurately pointed out that, in an exemplary situation, it can be assumed in case of an appeal proceedings that we have to do with the court of appeal being doubly bound by the principle of accusatorial procedure. Namely, it still remains bound by the principal complaint (indictment), and additionally by the extent of appeal complaint, i.e. an appeal or grievance.[17] However, under the currently binding legal status, it is possible that the bounds of the appeal complaint will be of extremely general nature, only limited to the extent and direction of the appeal. Finally, for completely unknown reasons, a defendant entrusting bringing of an appeal to his defender only, rather than exercising this right himself, will place himself in a worse situation than one who brings a general appeal in his favour against the entire judgment, requesting the court of appeal to conduct total control thereof in his favour. In the latter case, the scope of control is much broader, and moreover, this does not preclude the possibility to point out specific pleas against the contested decision to the court. From the systemic perspective, such a solution introduces inexplicable legal dualism in which equal entities in a similar situation may finally find themselves under completely different legal realities, directly translating into their rights and obligations. Under such a state of affairs, with so many reservations, it is hard to assume

17 C. Kulesza, *Zasada skargowości* (in:) P. Hofmański (ed.) *System Prawa Karnego Procesowego. Zasady procesu karnego.* Vol. III, (ed. P. Wiliński) part. 1, Warszawa 2014 , p. 613.

that the solutions adopted in the area of the extent of examination of a remedy fit within the standards of fair appeal proceedings.

Criminal procedure should be understood and regarded as an entirety, crowned a final decision reflecting the real factual findings in the case. Thus, the perspective of determination of substantive truth, i.e. the goal of the proceedings, materializes in a decision finally completing the proceedings. However, this does not mean that all stages of a criminal procedure carry an equal burden with regard to reaching the truth. It is obvious that the most significant role here is played by proceedings before the court of first instance. The appeal proceedings, also aimed at such a potential correction of the decision that it should fulfill the principle of substantive truth to the fullest extent possible, cannot assume the role of a proceedings before the first-instance court in this regard. This would result in appeal control being replaced, as a matter of fact, with first-instance adjudication by a court of appeal. Therefore, regardless of how far-reaching amendments of the contested decision are allowed by the appeal proceedings, it can never, so to speak, replace the proceedings before the court of first instance. Under the current legal status, this thought is exemplified by of Article 437(2), 2nd sentence of the CCP, foreseeing an exceptional necessity of annulment of a decision appealed against if it is necessary to repeat the proceedings in full. The situation when, for reasons attributable to the court of first instance, the obligation of conducting of the virtually entire judicial proceedings is borne by the appeal court, is unacceptable, since this is not the *ratio legis* of Article 437(2) of the CCP and the coupled Article 452(2) of the CCP. The goal of these provisions is to aim at supplementation of the evidence during the course of an appeal proceedings, and not to offset, in this proceedings, any clear instances of negligence on the part of the court of first instance, which have occurred at the stage of evidence-gathering and which, being gross, could have been decisive to or have decided on the content of a decision passed by this court.[18] Moreover, the constitutional standard resulting from the regulations of Articles 78

18 The Appellate Court in Szczecin judgment of 16 April 2018, II AKa 26/18, OSASzcz 2018 no. 2, item. 114.

and 176 of the Constitution[19] does not require every new – i.e. different from a view expressed in the first instance – finding by a court of second instance to be the object of appeal. The current wording of the provision of Article 437(2) of the CCP clearly shows the legislator's intent to limit of the cassation aspect and to make decision-amending into a principle. The latter inherently means making factual and legal findings by the court of second instance, different than those made by the court of first instance. However, the principle of double-instance legal proceedings (Article 176(1) of the Constitution) requires the legislator to provide access to the second instance (granting remedies at law to parties) and to entrust examination of a second-instance case to a higher tribunal.[20] When the restrictions from the Article 437(2), 2nd sentence of the CCP are respected, the principle of substantive truth is not reduced but only implemented in the course of a proceedings before the court of first instance.

An appeal proceedings, like the entire criminal procedure, always aims at determining the truth, regardless of whether it is based on the appeal-based or cassation model. Both models are merely means to an end, which is determination of the actual truth. The appeal-based model is more effective by nature, as it excludes multiple annulment of a contested decision and re-examination of a case by a court of first instance. However, this model also, paradoxically, increases the risk of a miscarriage of justice, since no further remedy at law is eligible against findings of a court of appeal, often very different from those made by the court of first instance. Therefore, a court of appeal bears a much greater responsibility for trying of a case, rather than just of a contested judgment.

Under the current legal status, introduced by the amendment of 11 March 2016, the appeal/amendment model of adjudication has still been preserved. However, the essential difference is the broad possibility

19 See also A. Żurawik, *Zaskarżalność wybranych orzeczeń w postępowaniu karnym: aspekt konstytucyjny,* Kwartalnik Prawa Publicznego 2012, no. 1, p. 194.

20 The Supreme Court judgment of 15 November 2017, IV KS 5/17, OSP 2018, no. 7-8, item. 74; incidentally, it should be noted that the requirement of entrustment of examination of a second-instance case to a higher tribunal requires, in turn, asking question about the constitutionality of the so-called horizontal instance, which issue is only being indicated here.

of conducting of evidentiary proceedings in the appeal proceedings – namely, through burdening the court, including a court of appeal, with the responsibility for the result of evidentiary proceedings (amendment of the content of Article 167 of the CCP) and abolition of the obligation to formulate pleas in appeal for private parties other than a public prosecutor. In this situation, the barriers for evidentiary proceedings in an appeal proceedings, as preserved in the parliamentary act, do not fulfill their role accordingly.[21]

Under the currently assumed model of appeal proceedings, a court of second instance has the obligation to supplement the evidence as a part of the conducted appeal control, regardless of the kind of judgment subject to this control. Only after performance of this action, the issue emerges of the scope of adjudication by the court of appeal in connection with an observed error of a nature of a relative reason for appeal. In case of an acquittal, a judgment discontinuing or conditionally discontinuing the proceedings, if there are grounds for conviction, the decision by the court of appeal may only be of cassation nature (Article 454(1) of the CCP). On the other hand, when a conviction has been appealed against, the court of appeal amends the decision (argument from of the Article 437(2), 2nd sentence *in fine* of the CCP). If, under the realities of the examined case, the obstacle to issuance of an amending decision was the categorical regulation of Article 454(1) of the CCP, the court of appeal should stress it clearly in its written argumentation. Such a reason to annul a decision and refer the case back for re-examination is a circumstance separate from the one specified in Article 437(2) *in fine* of the CCP – the necessity of reopening of the entire proceedings. Issuance of a judgment based on the grounds from Article 454(1) of the CCP may only take place when assessment of the realities of the case, performed by the court of appeal, leads to a conclusion there is a need to consider issuance of a conviction, whereas the court of second instance is not authorized to such adjudication due to the prohibition specified in this provision.

21 D. Świecki, *Zakres postępowania dowodowego w instancji odwoławczej* (in:) S. Steinborn (ed.) *Postępowanie odwoławcze…,* pp. 290-1.

The necessity to supplement the evidence, stated by the court of appeal when the subject of control is an acquittal, gives rise to the fact that, in the light of Article 437(2), 2nd sentence of the CCP, annulment of the judgment and referral of the case back for re-examination may only take place in the event indicated in Article 454(1) of the CCP. This, in turn, requires demonstration by the court of appeal that there are grounds for conviction, but this cannot be done in an appeal proceedings. However, if such a conclusion is to be correctly reached by the court of appeal when it finds gaps in the evidence, the court has first to fill these gaps itself, examining the missing evidence, and then subject it to assessment. Only when it is considered reliable and challenging the factual findings of the court of the first instance the court of appeal cannot change of its own because conviction is unacceptable anyway, it annuls the contested judgment and refers the case back for re-examination.[22]

The position developed in this manner was confirmed in a Supreme Court resolution, which clearly stated that the possibility of annulment of an acquittal, a judgment discontinuing or conditionally discontinuing the proceedings and referral of the case back for re-examination in connection with the *ne peius* rule expressed in Article 454(1) of the CCP (Article 437(2), 2nd sentence of the CCP) arises only when the court of appeal first removes all the errors found constituting one of the grounds for appeal specified in Article 438(1-3) of the CCP. Accordingly, it is necessary, still at the stage of the court of appeal decision, to supplement the evidentiary proceedings, make correct assessment of evidence and make correct factual findings. Only a subsequent determination that there are grounds for a conviction, which is prevented by the prohibition in Article 454(1) of the CCP, opens the possibility of annulling the contested judgment. The mere possibility that such a judgment may be issued in the repeated proceedings before the first instance court is not sufficient to assume that the *ne peius* rule rule expressed in Article 454(1) of the CCP has occurred.[23]

22 The Supreme Court judgment of 14 March 2018, IV KS 4/18, Biul. SN 2018 no. 7.
23 The Supreme Court resolution (7) of 20 September 2018, I KZP 10/18, Supreme Court bulletin 2018 no. 9.

The currently binding regulations lead to a hardly functional solution in which the court of appeal, in fact, due to the wording of Article 167 in conjunction with Article 458 of the CCP, has to assume the burden of verification of completeness of an evidentiary proceedings and potentially supplement it *in extenso*, only avoiding assumption of the role of a court of first instance this way. Therefore, this resembles the solution of Article 386(4) of the Code of Civil Procedure, foreseeing that a court of second instance may annul the judgment under appeal and refer the case back if the court of first instance fails to recognize the substance of the case or if issuance of the judgment requires the evidentiary proceedings to be conducted in full. Within the meaning of Article 386(4) of the Code of Civil Procedure, failure to recognize the essence of the case means a lack of decision concerning the object of the case, determined by the content and substantive-law basis for the plaintiff's request, as well as the defendant's substantive-law pleas or the resulting procedural pleas. It takes place when a court omits to examine them, groundlessly assuming there is a jurisdictional or procedural premise annihilating the claim, e.g. groundlessly refuses to continue the case, assuming lack of the parties' right of action, the effectiveness of a claim or the plea of expiry or remission of an obligation, the expiry of final dates, the earliness of action, or failed to recognize demands in the aspect of all claims of the plaintiff or the defendant's pleas, assessing they have not been submitted or they have been submitted but are subject to evidence preclusion. However, if the hitherto proceedings resulted in gathering of very extensive evidence, its expansion and assessment in the aspect of previously omitted claims and pleas of the parties is merely of supplementary nature, the court's claim of the possibility to deprive the parties of instance control is unjustified under this state of affairs [24].

Final conclusions included in the remedy do not constitute a binding indication for a court of appeal concerning the content of the final decision. The view that no provision of the Code of Criminal Proceedings makes the choice of the kind of the second-instance decision dependent on the motion in this regard, as included in the remedy, is still relevant. The kind of decision depends on the conditions currently enumerated

24 The Supreme Court ruling of 27 July 2018, V CZ 44/18, Legalis.

in Article 437(1) of the CCP. Whether the conditions indicated in this provision are met in a specific case is decided in the appeal instance, rather than by the assessment of a party submitting the remedy.[25] However, it should be noted that since annulment of a decision and referral of the case back for re-examination, pursuant to the content of Article 437(2), 2nd sentence of the CCP, may only take place in cases indicated in Articles 439(1) or 454 of the CCP, or if it is necessary to repeat the proceedings in full, such a narrowly defined catalogue of circumstances when issuance of a cassation judgment is necessary forces the appellant to attempt convincing the court of appeal to make such a decision. In other words, it seems that currently, the request for annulment of the contested decision and referral of the case back will require the appellant to provide additional argumentation indicating fulfillment of at least one of the premises specified in Article 437(2), 2nd sentence of the CCP. Obviously, the most controversial, due to its vagueness, is the necessity to repeat the entire proceedings in full, as indicated in this provision. It is accurately assumed that the necessity to repeat the proceedings in full, as mentioned in Article 437(2), 2nd sentence *in fine* of the CCP, as a cause of annulment of a contested judgment by the court of appeal and referral of the case back to the court of first instance for re-examination takes place when the adjudicating court of first instance has violated the rules of procedural law, resulting, under the realities of a specific case, in unfairness of the conducted judicial proceedings, substantiating the need to repeat, i.e. reopen all procedural actions comprising the judicial proceedings before the court of first instance. Obviously, an essential part of a judicial proceedings is the evidentiary proceedings. Nevertheless, the provision of Article 437(2), 2nd sentence *in fine* of the CCP implies this is not just about repetition of the evidentiary proceedings alone but repetition (reopening) of the entire judicial proceedings. Therefore, the necessity to repeat the proceedings in full may also be, as is accurately noticed, a consequence of the defectiveness of the course itself of a judicial proceedings conducted by the court of first instance, due to the violation of specific rules of proceedings (e.g. the defendant's right of participation in a hearing) by this court. The language context of the used phrase "in full" suggests it refers to the need to repeat the actions

25 The Supreme Court ruling of 10 May 1995, I KZP 9/95, Prok. i Pr. 1995, no. 9, item 13.

in a judicial proceedings for different reasons, both evidential and non-evidential.[26] Therefore, a court of appeal is to adjudicate on the merits, including to amend decisions, and only use cassation judgment by way of exception, namely, just in three cases, strictly determined by the legislator.[27]

Surveys conducted among judges seem to confirm that they do perceive and correctly identify the purpose of the modified model of the appeal proceedings. The wording of Article 452(1) of the CCP, which was continuously in effect since the entry into force of the Code of Criminal Procedure of 1997 up until 30 June 2015 prohibited a court of appeal from conducting evidentiary proceedings with respect to the essence of the case. The prohibition in Article 452(1) of the CCP was understood in such a way that evidence of key importance for the proceedings should not be brought for the first time before the court of appeal. This way, a party was deprived of the possibility of challenging correctness of assessment of the evidence and determinations made on its basis[28]. For many years, this interpretation shaped the understanding of the model of the appeal proceedings.

Currently however, when asked if, in the context of Article 437(2) 2nd sentence of the CCP, the necessity of conducting evidentiary proceedings on the substance of the case would always cause the necessity to annul a judgment and refer the case back for reexamination, a large majority of the surveyed judges (62.9%) gave a negative response. It seems that this result should be interpreted not only as correct understanding of the legislator's intention to increase importance of appeal proceedings and evidentiary proceedings conducted within its framework, but alsoas indirect acceptance of the new model of appeal proceedings. It should also be noted that only 33.6% judges gave a positive response to this question (therefore supporting the interpretation that is closer to the cassation model of appeal adjudication), while 3.5% did not answer this question at all.

26 The Supreme Court resolution (7) of 22 May 2019, I KZP 3/19, OSNKW 2019 no. 6, poz. 31, p. 8.
27 The Supreme Court judgment of 8 February 2019, IV KS 30/18, Legalis.
28 The Supreme Court ruling of 21 January 2015, V KK 371/14, KZS 2015/6/37.

As mentioned before, one of the circumstances substantiating annulment of a contested judgment and referral of the case back for re-examination is the occurrence of the *ne peius* barrier, as described in Article 454(1) of the CCP. The September amendment deleted Section 2 of this text entity, enabling the court of appeal to only impose a more severe penalty of imprisonment if the court has not changed the factual findings as assumed as a basis of the judgment under appeal. . Contrary to the surveyed judges, I am critical of this move of the legislator. A significant majority of judges (83.2%) approve of the new solutions of Article 454 of the CCP, which should be interpreted as a positive assessment of the possibility of correcting the contested decisions at the stage of appeal proceedings. However aggravation of a penalty should be possible in a proceedings, even if factual findings are changed, but only when – in my opinion – this penalty remains unchanged in terms of its kind, with only its severity corrected. . On the other hand, I understand a change of the kind of penalty not only as picking another penalty from the catalogue of penalties, specified in Article 32 of the Penal Code, but also as abandoning the institution of probation in case of a penalty of imprisonment. Therefore, the point is not to "surprise" the defendant with a penalty of imprisonment without conditional suspension, i.e. a penalty violating most deeply the constitutional freedoms of an individual, as late as at the stage of appeal proceedings. It should be remembered that a plea in appeal, based on the content of Article 438(4) of the CCP, requires indication of gross disproportion of the imposed penalty, but it no longer requires presenting a demand for the new severity, which would not be binding to a court of appeal anyway. A possibility of such a far-reaching correction of a judgment in an appeal proceedings, constituting a surprise for the defendant, seems impossible to be reconciled with standards of fair appeal proceedings.

Here, I would like to return for a while to the projected new wording of Article 454, covered by the Sejm document no. 3251 and currently undergoing the legislative process. Pursuant to the new proposal – grossly violating the fair trial standards – Article 454(1) will receive a new wording, enabling a court of appeal to sentence a defendant concerning whom the first-instance proceedings was conditionally discontinued; moreover, Section 3 will be repealed, enabling penalty aggravation in

an appeal proceedings through imposing a penalty of life imprisonment. Therefore, it is accurately pointed out that in Article 454, the proponents have suggested further restriction to the application of the *ne peius* rules in the appeal proceedings. Concerning the conditional discontinuance of a proceedings, such a decision is often a consequence of a peculiar agreement between a defendant and a prosecutor and it is passed at a session at which no evidentiary proceedings is conducted. In such situation, acquiescence to amendment-based change of a decision to the defendant's detriment for the first time by the court of second instance seems to be a misunderstanding. After all, it would be, in fact, first-instance adjudication, since no evidentiary proceedings was conducted previously in the first instance proper, since it had been deemed proper to conditionally discontinue the proceedings. Such a situation unquestionably goes against the flow of the hitherto constitutional case-law in relation to the issue of double-instance proceedings. For these reasons, it is hard to come to terms with the projected change. Moreover, it is impossible to approve of the acceptability of a situation when it is only the court of second instance, as a result of examination of an appeal, that amends a judgment in such a way that it imposes the most severe penalty on the defendant, in the form of life imprisonment. It should be kept in mind this is a peculiar kind of penalty, most severe both in the Polish legal order and in those of the vast majority of democratic countries of the world. This is why the importance of procedural circumstances under which this penalty may be imposed should be treated specially. Cases eligible for consideration of the most severe penalty constitute a margin of cases in criminal courts. Therefore, it seems that the judiciary and the society are able to bear the costs of those few annulled judgments per year in exchange for a guarantee of truly utmost caution before imposing the penalty of life imprisonment on someone.[29]

The discussion concerning the new appeal proceedings model and the related kinds of decisions by courts of appeal cannot be finally summed up without referencing complaint against a judgment by

29 D. Szumiło-Kulczycka, *Opinion on the bill amending the Code of Criminal Procedure Act and certain other acts, parliamentary print no. 3251*, Warsaw, 10 April 2019, pp. 37-38, www.sejm.gov.pl – accessed on 15 July 2019 r.

a court of appeal, also introduced by the April amendment. Pursuant to Article 539a(3) of the CCP, the complaint may only be submitted due to violation of Article 437 of the CCP or errors specified in Article 439(1) of the CCP. Therefore, although the complaint itself is among the institutions of extraordinary remedies at law and does not fit directly within the appeal proceedings, it is still inseparably connected therewith, as it closes the new appeal proceedings model, leaving no decisions which might prematurely annul contested rulings by courts of first instance beyond the restricted formal and legal control. It can also be clearly seen that the Supreme Court has – rightly – assumed the rigorous interpretation of the content of Article 539a(3) of the CCP, preventing the expansion of the extent of appeal of a complaint against a judgment by a court of appeal, thus effectively avoiding introduction of a third instance into the Polish appeal proceedings "through the back door". Among other things, this view consists of the expressed belief that the grounds for a complaint against a cassation judgment, as specified in Article 539a(3) of the CCP, do not generally authorize the Supreme Court to examine violation by a court of second instance of regulations determining the extent of recognition of a remedy and the extent of possible consequences of such recognition.[30] Moreover, it is assumed that, pursuant to Article 539a(3) of the CCP, a complaint against a cassation judgment may only be brought due to violation of Article 437 of the CCP or due to errors specified in Article 439(1) of the CCP. The catalogue of these grounds, due to the use of the word "exclusively" by the legislator, is closed. Therefore, it is possible for the appellant to raise the plea of violation of Article 437(2) of the CCP, stating that a cassation judgment may only be passed in cases indicated in Article 439(1) or 454 of the CCP, or if reopening of the entire proceedings is necessary.[31]

As shown by the research conducted under the project "*Is the Polish model of criminal appeal proceedings fair ?* most judges (78.3%) indicate that the regulation of Article 437(2), 2nd sentence of the CCP actually restricts the possibility of cassation-based adjudication by a court of appeal. Only 11.2% of the surveyed answered negatively to a

30 Resolution (7) of 22 May 2019, I KZP 1/19, OSNKW 2019 no. 6, item. 30, p. 1.
31 The Supreme Court judgment of 29 January 2019, IV KS 33/18, Legalis.

question formulated in such a way, and 9.8% were unable to address it. Therefore, one can rightly assume that the new solution, applied in Article 437(2), 2nd sentence of the CCP, has fulfilled the intended purpose and actually affected the change of the appeal model in the area of decision-amending and cassation aspects of adjudication[32]. On the other hand, judges have a completely different approach to the issue of a complaint against a judgment by a court of appeal and the effect thereof on the acceleration of the entire criminal procedure. Only 16.8% of the survey believe that introduction of this complaint will affect the acceleration of the procedure. Most, i.e. as much as 68.5%, do not see such a relationship, whereas 14% of the surveyed had difficulties taking a stance[33]. This opinion does not seem accurate and may indicate certain distance of appeal judges towards a new solution. Meanwhile, although the complaint does indeed prolong the proceedings temporarily (since a case after a cassation judgment is not directed instantly to the court of first instance but examined, to a limited extent, by the Supreme Court), it still significantly accelerates entire proceedings in case of elimination of an inaccurate cassation judgment. There can be no doubt that under such conditions, re-examination of a case in an appeal proceedings would still usually lead to quicker final completion of a proceedings than another, double-instance proceedings.

32 K. Łapińska, Changes in the Polish appeal proceedings model in the light of research results, Figure no. 13.

33 *Ibidem,* Figure no. 20.

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THE RIGHT TO DEFENCE IN AN APPEAL PROCEEDINGS IN THE CONTEXT OF RESEARCH FINDINGS[2]

1. Introductory remarks

The right to defence is an essential right of a defendant in a criminal proceedings, belonging to the sphere of human rights, foreseen by the Constitution and guaranteed by the Code of Criminal Procedure. It is also strongly featured in the international law – the International Covenant on Civil and Political Rights, in Article 14(3)(d), orders that a defendant should be notified of his right to have a defender[3]. On the other hand, Article 6(3)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees a defendant to have a right to defend himself in person or through a defender appointed thereby, and if the defendant does not have sufficient resources to cover the costs of defence – to benefit, free of charge, from the assistance of a defender appointed *ex officio*, if the interest of the administration of justice requires this[4]. However, distinction must be made between the right to defence and the very concept of defence, encompassing the entirety of actions taken in a criminal procedure in the defendant's interest, by the defendant or other authorized persons (Article 6 of the CCP). These actions are to be intended to confute the accusation or to diminish the defendant's responsibility accordingly and to reduce any procedural

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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 International Covenant on Civil and Political Rights of 19 December 1966 (Journal of Laws 1977, no. 38, item 167).

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

inconveniences[5]. The literature on the subject assumes a conventional division into substantive and formal defence. Substantive defence is understood as all activities undertaken by the defender and defendant, the defendant's statutory representative, the court, or sometimes even a public prosecutor, aimed at protection of the defendant's interests[6]. Formal defence, on the other hand, means the defendant's right to benefit from the assistance of a defender, appointed by choice or *ex officio*. Pursuant to Article 300 of the CCP, a suspect should be notified of this right even before proceedings with his first hearing in the case.

The current shape of the right to defense was unquestionably affected by two major amendments of the CCP, coming into force on 1 July 2015[7] and on 15 April 2016[8] respectively. The former, known as the „great reform of criminal procedure", modified the premises of obligatory defence and introduced changes in the area of appointment of an *ex officio* defender in a criminal procedure. Firstly, the previous premise of „juvenileness" of a defendant was replaced with indication of the upper limit of the defendant's age – completed 18 years of age (Article 79(1)(1) of the CCP). Secondly, grounds for obligatory defence due to premises occurring at the time of crime (point 3) and at the time of the proceedings (point 4) were separated. Since then, the premise specified in Article 79(1)(3) of the CCP referenced the contents of Article 31(1) and 31(2) of the Penal Code, whereas premises specified in point 4 referenced the assessment of the possibility for the defendant to exercise his right to defence in the course of a criminal proceedings, and to conduct individual and effective defence[9]. This amendment also narrowed the scope of obligatory defence in a proceedings before a regional court (Article 80 of the CCP), since the criterion of the freedom status of the defendant was eliminated (the "deprivation of liberty"

5 P. Hofmański, E. Sadzik, K. Zgryzek (eds.), *Kodeks postępowania karnego. Komentarz*, vol. I, Warszawa 2001, p. 49.

6 *Ibidem*, p. 202.

7 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; 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.

8 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.

9 Substantiation of the bill of 2012 on the amendment of the Code of Criminal Procedure Act and of certain other acts (Parliamentary printing no. 870, p. 10).

premise was deleted), only retaining the subject criterion, i.e. the raised charge ("crime"). Changes in this regard were closely connected with the change of the model of appointment of an *ex officio* defender in a judicial proceedings, pursuant to the new Article 80a of the CCP, leaving the defendant with a possibility to request appointment of a defender, regardless of his financial situation. Only at the stage of preparatory proceedings, appointment of an *ex officio* defender required demonstration of lack of possibilities to cover the costs of defence. A new wording was given to Article 81 of the CCP, referring to appointment of an *ex officio* defender in cases of so-called obligatory defence; moreover, Article 81a of the CCP was added, speaking of the manner of appointment of an *ex officio* defender .

Speaking of the "great reform of criminal proceedings", one cannot ignore the axis of this amendment, namely, the change of Article 167 of the CCP. The assumption of the proponents was to remodel the jurisdiction proceedings towards increased adversarial aspect, leading to shifting of the responsibility for the result of the proceedings from the court to the parties, and primarily – due to the binding principle of presumption of innocence – to the prosecutor. The court was to act as a passive arbiter who, upon examination by the parties of evidence previously adduced thereby and admitted by the court, would pass a just decision[10]. Under the adversarial procedure, evidence is examined by the parties, and only in exceptional cases, substantiated by special circumstances, the court could admit and examine evidence *ex officio*. These changes caused an increase of the role of a defendant and his defender in the main hearing, as well as adverse effects in an appeal proceedings in case of their passivity (see Article 427(3) of the CCP – new facts or evidence may only be indicated if they could not have been adduced in a proceedings before the court of first instance). A true exception in the previous rules of adduction of private evidence at a court hearing (it was not allowed to read private documents drawn up outside the criminal procedure and not for its purposes) was the amendment of Article 393(3) of the CCP, admitting such a possibility. In the proponents' opinion, this solution was to constitute one of the

10 *Ibidem*, p. 5.

elements providing the defence with a possibility of actual preparation for a court proceedings, which was particularly desired in the light of essential changes foreseeing the broadening of adversarial elements of this stage of proceedings[11].

The amendment of 1 July 2015 also assumed improvement and acceleration of the proceedings, by way of creation of a legal framework for broader application of consensual manners of completion of a criminal proceedings, and to a wider extent, of application of the idea of restorative justice[12]. It has significantly changed the substantive scope of Article 335 of the CCP, extending it to all misdemeanours, and simultaneously introduced a requirement for the defendant to plead guilty (Section 1). Moreover, under consensual modes, grounds for appeal were restricted in such a way that pleas specified in Article 438(3) and 438(4) of the CCP, connected with the content of the concluded agreement mentioned in Articles 343, 343a and 387 of the CCP (Article 447(5) of the CCP), could not serve as the grounds for appeal any more.

Significant changes also affected the appeal proceedings. Above all, the scope of evidentiary proceedings before the court of second instance was remodelled. Of the provision of Article 452 of the CCP, Section 1 was deleted; it had expressed the principle that a court of appeal cannot conduct evidentiary proceedings concerning the substance of the case. This regulation comprised a part of the cassation aspect of the appeal proceedings and clearly indicated the predominant revision function of a court of appeal[13]. The legislator decided to delete this solution, as it had created a dissonance between the right of the *ad quem* court to resolve the case on its merits (Article 437(2) *in principio* of the CCP) and its powers to directly learn the facts comprising the grounds for this decision[14]. Previously, a court of appeal could supplement the legal proceedings only by way of exception, examining evidence at the hearing, provided that two premises mentioned in Article 452(2) of the CCP were fulfilled, namely, if examination of evidence by the court of appeal would contribute to acceleration of the proceedings and if the conduct of a

11 *Ibidem*, p. 89.
12 *Ibidem*, p. 5.
13 D. Świecki, *Konstytucyjna zasada dwuinstancyjności*, p. 216.
14 A. Sakowicz, *Kodeks postępowania karnego. Komentarz 2018,* Legalis.

legal proceedings in full or in a significant part was not necessary. The amendment of Article 452(2) of the CCP allowed to state that the court of second instance became a more substantive court[15]. Admission of evidence before the *ad quem* court was limited by the content of Articles 433(1) and 427(1) of the CCP, imposing the obligation to formulate pleas on every appealing entity (rather than only a so-called professional entity, as before). Therefore, evidentiary proceedings before a court of appeal was determined by the limits of appeal and pleas raised in the appeal, and a fundamental role in this regard was played by Article 427(3) which pointed out (and still points out) that an appellant may indicate new facts or evidence if he could not have adduced them during the proceedings before the court of first instance[16]. Moreover, Article 427 of the CCP was supplemented by Sections 4 and 5, establishing the prohibition to raise pleas related to the court's evidence activity in a proceedings before a court, if it has been initiated on the party's initiative.

Another consequence of addition of Article 80a of the CCP was the amendment of the regulation of Article 450 of the CCP, obliging defenders appointed on this basis to participate in an appeal hearing. There was also an amendment of Article 451 of the CCP, setting a 7-day time limit for a defendant deprived of liberty to submit a motion for being brought to the appeal hearing. After the amendment, this provision still did not foresee obligatory bringing to the appeal hearing of a defendant requesting it if the defender's presence was considered sufficient. In the proponents' opinion, the changes introduced in this regard enabled more rational proceedings as a part of preparation of an appeal hearing, but also provision of the defendant and his defender with sufficient time to prepare for an appeal hearing[17].

However, not all changes discussed above have survived the following amendment of the CCP of 15 April 2016[18]. According to

15 *Idem.*
16 *Idem.*
17 Substantiation of the draft bill on the amendment of the Code of Criminal Procedure Act and of certain other acts (Sejm printing No. 870), p. 132.
18 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.

the legislator's assumption, the goal of the following changes was to modify the model of criminal procedure towards restoration of a more proactive role of the court during the course of a proceedings, aimed at providing the maximum degree of conformity of factual findings in the perspective of the substantial truth principle, and also increasing the efficiency of prosecution. The reform assumed a return to the criminal proceedings model preserving the superiority of substantive truth, in which the adversarial principle constitutes one of the procedural principles facilitating reaching the truth[19]. Moreover, there was a return to regulations predating the reform of 1 July 2015 in the area of Article 167 of the CCP. Accordingly, the legislator restored the obligation for the president of the adjudicating panel to ensure explanation of all significant circumstances of the case (Article 366(2) of the CCP), and also repealed Article 427(4) and 427(5) of the CCP. Access to an *ex officio* defender was also restricted through deletion of Article 80a of the CCP, thus restoring the obligation to demonstrate the defendant's assets at each stage of the proceedings (Article 78(1) of the CCP). Simultaneously, a change was also introduced in Article 451 of the CCP, assuming mandatory participation of an *ex officio* defender appointed pursuant to 80a of the CCP in an appeal hearing. A new, extraordinary remedy at law was also introduced, in the form of a complaint against a judgment by a court of appeal (Article 539a et seq. of the CCP). In the proponents' opinion, the appeal/amendment model of appeal proceedings requires introduction of an institutional mechanism to guarantee the decision-amendment aspect of adjudication[20]. Its essence consists in counteraction to lengthiness of a criminal procedure by way of violation by the court of appeal of the norm of Article 437(2) of the CCP and annulment of the judgment for re-examination in absence of premises to do so.

This article is intended to present issues connected with the broadly understood right to defence on the basis of findings from file research conducted under the research project under consideration, "*Is the Polish model of criminal appeal proceedings fair?*"[21] The file research was conducted in

19 Substantiation of the governmental draft bill on the amendment of the Code of Criminal Procedure Act and of certain other acts (Sejm printing no. 207), p. 1.

20 *Ibidem,* p. 11.

21 Research project "Is the Polish model of criminal appeal proceedings fair?", programme: OPUS 8, panel HS5_4 criminal law, financed from the resources of the National Science Centre, head

regional courts of the Białystok, Łódź and Warsaw appeal jurisdictions, and the test sample included a total of 595 cases (212 from the Białystok jurisdiction, 204 from Łódź and 179 from Warsaw). The results of this research have been presented in the article "*Changes in the Polish appeal proceedings model in the light of research results*" by Katarzyna Łapińska, as included in this monograph. For the purpose of the present study, the analysis covered the activity of the defendant and his defender at the stage of appellate proceedings, including initiation of an appeal proceedings, submission of motions as to evidence at the stage of proceedings before the *ad quem* court, as well as participation of the defendant and the defender in the appeal hearing, and also the efficiency of appeals and motions as to evidence submitted by defenders. The research results in this regard will be presented according to two legal statuses: before the amendment of the Code of Criminal Proceedings, which came into force on 15 April 2016[22], and after that amendment. Moreover, this article will include partial findings from questionnaire surveys implemented under the research project under consideration, on a sample of 143 judges of criminal appeal divisions of common courts, who have completed questionnaires of the anonymous survey concerning the fairness of appeal proceedings[23].

2. The activity of the defender and defendant

The case-law of the Supreme Court stresses that the right to defence should be of real nature, i.e. the defendant should have enough time to prepare for defence, including to agree upon the line of defence with his defender, as well as a possibility to defend himself in person, both before the court of first and second instance[24]. The exercise of the right to defense manifests itself, above all, in submission of motions as to evidence, asking questions to witnesses and experts, submission of explanations, addressing the examined evidence, participation in the closing arguments, as well as appeal against decisions. It is implied

of the project: prof. zw. dr hab. Cezary Kulesza.

22 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.

23 Detailed data are presented in the article by K. Ł., included in this monograph.

24 The Supreme Court judgment of 6 January 2014, V KK 323/03, Prok. i Pr. 2004, no. 5, item 3.

outright in Article 175(1) of the CCP that a defendant may apply passive defence through refusal to provide explanations or answers to the asked questions, without providing reasons. Therefore, exercise of these rights should not be considered a circumstance aggravating the defendant, which means it should not matter for the evaluation of the defendant's attitude or the penalty[25]. Although pleading guilty may constitute a circumstance mitigating the penalty, a lack thereof should not lead to a conclusion that such an attitude of the defendant may entail adverse results for him. On the other hand, it is debatable whether the right of silence includes a defendant's right to lie[26]. A view expressed in one decision seems accurate: namely, exclusion of responsibility for defamatory statements submitted as a part of the defendant's explanations is only possible on the basis of the right to defence when such defamatory statements serve the defence of the person submitting the explanations[27]. Significant changes in the area of responsibility for false testimony were introduced by amendment of Article 233 of the Penal Code, which came into force on 15 April 2016[28]. This provision was supplemented by a separate type of offence of false testimony or suppression of truth out of fear of criminal liability of the perpetrator or his closest relatives (Section 1a), covering factual states which had hitherto been assessed as remaining within the limits of the right to defence[29]. In the legislator's opinion, the views of the doctrine, according to which the broad right to defence grants a potential defendant with an unlimited right to lie, are unsubstantiated and wrongly identify the right to defence with a right to mislead procedural authorities in the extent exceeding the application of procedural institutions. Therefore, the proponent decided to consider the proceedings participant's behavior consisting in deliberately false testimony and misleading of a procedural authority, despite being

25 The Supreme Court judgment of 4 November 1977, V KR 176/77, OSNKW 1978, no. 1, item 7; the Supreme Court judgment of 5 February 1981, II KR 10/81, OSNKW 1981, no. 7-8, item 38.

26 A. Sakowicz, *Gwarancje i prawa oskarżonego w świetle kodeksu postępowania karnego* (in:) P. Hofmański, *System Prawa Karnego Procesowego. Vol. VI. Strony i inni uczestnicy postępowania sądowego*, Warszawa 2016, p. 766.

27 The Lublin Appeal Court judgment of 16 January 2014, II AKa 261/13, KZS 2014, notebook 5, item 77.

28 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.

29 A. Grześkowiak (ed.), *Kodeks karny. Komentarz 2019*, Legalis.

instructed on the right of refusal to testify or to answer questions, to be a prohibited act ranking as an offence[30].

Due to the scope of this study, attention should be paid primarily to the defendant's right of appeal against a decision issued by the court of first instance. The essence of the guarantee of the right of judicial revision has been expressed in Article 87 of the Constitution of the Republic of Poland, according to which, each party has the right of appeal against judgments and decisions passed in the first instance. The goal of the appeal proceedings is to enable a party to challenge a first-instance decision if it is unfair and has been passed in violation of the law[31]. An appellate proceedings is a kind of an appeal proceedings, comprising revision of a judgment passed before the *ad quo* court. The currently binding model of appellate proceedings in a criminal case references the model of classic appeal, characterized by examination of the case on its merits and amendment of decisions by the court of second instance, on the basis of evidence examined before this court if necessary[32].

The results of the file research conducted under the research project "*Is the Polish model of criminal appeal proceedings fair?*" allow one to draw conclusions concerning the activity of parties to the proceedings, including the frequency of initiation of appeal proceedings by individual entities. Table 1 below shows the number of appeals brought by individual entities: defender, public prosecutor, auxiliary prosecutor's representative, and defendant in courts from the area of the Łódź, Białystok and Warsaw appeal jurisdictions, as well as the ratio (percentage) of the number of appeals to all cases under research.[33]

30 Substantiation of the governmental draft bill on the amendment of the Code of Criminal Procedure Act and of certain other acts (Parliament printing No. 207, p. 19-21).

31 The Constitutinal Court judgment of 13 July 2009, SK 46/08, OTK-A 2009, no. 7, item 109.

32 J. Zagrodnik, *Metodyka pracy obrońcy i pełnomocnika w sprawach karnych i karnych skarbowych*, Warszawa 2016, p. 298.

33 These data, divided into cases pending in accordance with the legal status valid before 15 April 2016 and cases examined under the regulations coming into force after this date, are found in the study by K. Łapińska, "Changes in the Polish appeal proceedings model in the light of research results" as included in this monograph.

Table no. 1. Number of appeals brought by selected entities

	Łódź appeal jurisdiction	Białystok appeal jurisdiction	Warsaw appeal jurisdiction	Total number of appeals	Proceedings participants authorized to bring the appeal	Percentage ratio of the number of appeals to the number of cases
defender	210	251	179	641	771	83%
public prosecutor	50	56	43	149	595	25,04%
auxiliary prosecutor's representative	11	15	15	41	110	37,27%
defendant	10	10	28	48	824	6%

Source: Authors' own study.

The study above shows that the right to appeal against a decision has been predominantly exercised by defenders, since in all cases under analysis (595), they brought a total of 641 appeals, which, considering the number of all entities authorized to bring appeals (771), comprises an impressive result of 83%. Appeals by public prosecutors and representatives of auxiliary prosecutors accounted for 25% and 37,27% of the researched cases respectively. The smallest group were appeals brought by defendants themselves – only 6%; however, it should be kept in mind that the file research was conducted in regional courts as courts adjudicating in the first instance, so appeals against judgments of these courts were subject to mandatory representation by a lawyer. The essence of this compulsion is that the pleading should be drawn up and signed by a legal counsel or advisor[34]. This means that defendants were unable to effectively bring their appeals on their own. Nevertheless, the few personal appeals by defendants may evidence commitment to their own cases and attempts at individual defence. As pointed out by the case law, it is inaccurate to refuse receipt of an appeal drawn up by the defendant personally as brought by an unauthorized person, since the defendant is authorized to bring an appeal in his own right, and his document

34 The projected changes of the CCP foresee extension of this power to the counsellor of the General Counsel to the Republic of Poland as well (see Article 446(1) of the CCP in: Government bill of 4 Dec 2018 of the Act on the amendment of the Code of Criminal Proceedings Act and certain other acts – document no. 3251).

only fails to meet the formal requirements (mandatory representation by a lawyer). Before deeming such an appeal ineffectual, one should first request the author to remove the formal defects, i.e. to attach an appeal drawn up and signed by a legal counsel or advisor[35]. In the event that the defender has already brought an appeal in the given case, the defendant's pleading(appeal) is included in the file as supplementation of the defender's appeal[36]. Such a pleading may be revealed pursuant to the provision of Article 453(2) of the CCP in conjunction with Article 394 of the CCP, as including explanations, motions and declarations by the parties[37].

The conducted research clearly shows that it is defenders who initiate appeal proceedings most frequently.

3. The defendant's participation in an appeal hearing

Pursuant to 450(3) of the CCP, non-participation of parties, defenders or representatives duly notified of the date of an appeal hearing does not impede examination of the case, unless their participation is mandatory. A defendant's participation at an appeal hearing is generally his right rather than obligation. However, it may be mandatory if the president of the court or the court itself deems it necessary. A defendant deprived of liberty may participate in an appeal hearing at his own request submitted within 7 days since the serving date of the notification of receipt of the appeal. The defendant should be instructed on the right to submit such a motion. Failure to meet this time limit may cause the motion to be uno.ecognized, unless examination thereof does not cause a necessity to postpone the hearing. If this motion is submitted sufficiently in advance, so it would be possible to arrange for bringing

35 The Appeal Court in Cracow decision of 27 June 2003, II AKz 234/03, OSN Prok. i Pr. 2004, no. 4, item 29; the Cracow Appeal Court decision of 15 May 2001, II AKz 142/01, KZS 2001, no. 6, item 39; the Cracow Appeal Court decision of 6 May 1999, II AKz 107/99, KZS 1999, no. 5, item 39.

36 The Appeal Court in Cracow decision of 20 December 2007, II AKz 649/07, OSN Prok. i Pr. 2008, no. 9, item 37; The Cracow Appeal Court decision of 25 January 2007, II AKz 2/07, KZS 2007, no. 2, item 44.

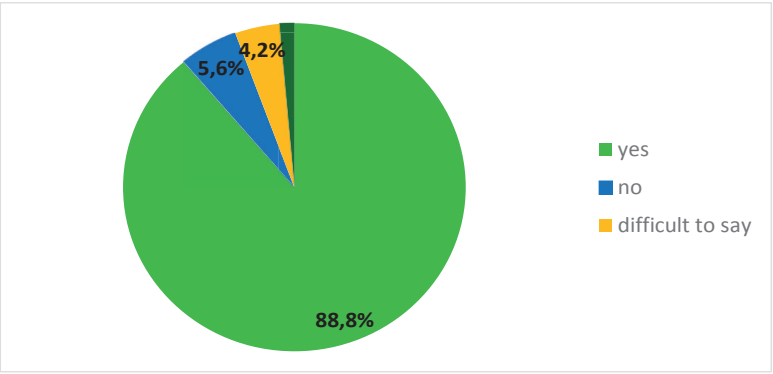
37 The Supreme Court judgment of 30 October 2014, II KK 88/14, Legalis; the Supreme Court decision of 12 December 2013, II KK 324/13, Legalis; the Supreme Court decision of 14 February 2013, II KK 141/12, Legalis; the Supreme Court judgment of 5 March 2008, III KK 446/07, OSNKW 2008, no. 1, item 530.

of the defendant to the hearing (this is mainly about the availability of escort), it should be recognized. However, the court may deem the presence of the defendant's defender sufficient and issue an appropriate decision to this effect. If the court does not order compulsory bringing of a defendant with no defender, an *ex officio* defender is appointed for him (Article 451 of the CCP).

The defendant's participation in an appeal hearing is of crucial importance from the viewpoint of the possibility of examination of evidence in an appeal proceedings. Although this right is limited by evidence preclusion under Article 427 (3) of the CCP, it does not prohibit the defendant to submit additional explanations. Moreover, the defendant and his defender have the right of final word – they cannot be barred from speaking after the speeches of other participants of the proceedings (Article 453(3) of the CCP). If the court examines evidence *ex officio*, the defendant's participation in the hearing enables him to address such evidence, and also to adduce other evidence to support his motions. The defendant may submit explanations, statements and motions to the minutes of the hearing, orally or in writing. Until the completion of the proceedings at the appeal hearing, he has the option to adduce new facts or evidence (of course, if he could not have adduced them in the proceedings before the court of first instance). The court, on the other hand, is capable of reopening the proceedings or of additionally allowing the participants of the proceedings to speak, until the judgment is pronounced. If the case is not of complex nature or there are no other important reasons to postpone the passing of the judgment (for a period of no more than 14 days), the court should draw up the judgment in writing immediately upon completion of the conference and vote. Upon pronouncement thereof, the president or one member of the adjudicating panel is obliged to state orally the most important reasons for the judgment. Therefore, the defendant's presence during the publication of the judgment enables him to learn the motives of the passed decision immediately. The president of the adjudicating board also instructs the parties present at the pronouncement on the validity of the decision by the court of second instance and on the right to bring a cassation.

Under the research project under consideration, the researchers asked judges of criminal appeal divisions of common courts to complete a questionnaire of an anonymous survey concerning fairness of the appeal proceedings. The surveyed judges were asked, among other things, whether the current regulations concerning bringing of a person deprived of liberty to an appeal hearing are sufficient to ensure the right to defence. The question included three answer variants: yes, no, difficult to say. A vast majority of the surveyed judges (88.8%) answered this question affirmatively, and only a few of them (5.6%) considered the currently binding regulations considering the option for a person deprived of liberty to appear at a hearing to be insufficient to ensure the right to defence. Only 4.2% were unable to answer this question unambiguously, and one judge gave no answer. Such a large number of positive answers to the question above allows one to say that the surveyed judges generally do not regard the restrictions applied by the legislator, concerning a motion for bringing to an appeal hearing (Article 451 of the CCP), as violating the right to defence.

Figure no. 1. Are the current regulations concerning enforced appearance of a person deprived of liberty at an appeal hearing sufficient to ensure the right to defence?



Source: Authors' own study.

The results of file research conducted as a part of the project under consideration also present the participation of defendants and defenders in an appeal hearing. As for the defendant's participation, the analysis covered such issues as: the nature of participation (optional or obligatory, pursuant to a decision by a court or the president of the court), motions of defendants deprived of liberty to be brought to an appeal hearing, a refusal to bring defendants to an appeal hearing despite the motion being submitted, as well as actual lack of participation despite having such a right or obligation. Table 2 below shows the defendants' participation in appeal hearings of courts from the Łódź, Białystok and Warsaw appeal jurisdictions, distinguishing the legal status before the CCP amendment which came into force on 15 April 2016 and the legal status after the amendment. Although this amendment did not change regulations concerning the defendant's participation in an appeal hearing, it has introduced several changes affecting the current form of appeal proceedings, due to which the researchers were interested whether or not these changes affected the increase in the defendants' interest in participation in a hearing before the court of second instance.

When comparing the defendant's participation in the appeal hearing in cases conducted under old (before 15 April 2016) and new regulations (after 15 April 2016), no clear differences in the results can be seen. Defendants whose participation at the hearing was optional were equally willing to participate, both before (44%) and after the amendment of the CCP (47%). With regard to individual appeal jurisdictions, differences are already discernible. They are most evident with the example of cases from the Warsaw appeal jurisdiction – after 15 April 2016, the percentage (in relation to all cases under research) of defendants who willingly appeared at the appeal hearing increased by more than half: from 46.8% to 82.3%. One should admit this result is impressive, given the remaining areas under research, presenting opposite tendencies. In courts of the Białystok appeal jurisdiction, after the amendment of the CCP, the percentage of those willing to appear at the hearing dropped from 36.5% to 30.2%. The case was similar in the Łódź jurisdiction – the defendants' interest in personal participation in a hearing dropped from 42.2% to 39.6%. The conducted research

show there was a small percentage of cases in the entire research area, in which a court or a president of the court considered the defendant's participation necessary (between 1.7% and 2.2%).

Table no. 2. The defendant's participation in an appeal hearing

	Łódź appeal jurisdiction (204 cases)		Białystok appeal jurisdiction (212 cases)		Warsaw appeal jurisdiction (179 cases)		Total (595 cases)	
Actual participation of the defendant at an appeal hearing or session	Before 15 April 2016 (45 cases)	after 15 April 2016 (159 cases)	before 15 April 2016 (93cases)	after 15 April 2016 (119 cases)	before 15 April 2016 (94 cases)	after 15 April 2016 (85 cases)	before 15 April 2016 (232 cases)	after 15 April 2016 (363 cases)
Optional participation	19 (42,2%)	63 (39,6%)	34 (36,5%)	36 (30,2%)	49 (46,8%)	72 (82,3%)	102 (43,96%)	171 (47,1%)
obligatory participation under a decision by the court / president of the court	2 (4,4%)	6 (3,7%)	1 (1,1%)	2 (1,7%)	1	0	4 (1,72%)	8 (2,2%)
participation of a defendant deprived of liberty at his request	4 (8,9%)	18 (11,3%)	22 (23,6%)	17 (14,3%)	13 (11,7%)	13 (12,9%)	39 (16,81%)	48 (13,22%)
participation of a defendant deprived of liberty refused by the court despite his request	4 (8,9%)	12 (7,5%)	5 (5,4%)	8 (6,7%)	3 (3,2%)	2 (2,3%)	12 (5,2%)	22 (6,1%)
actual absence despite such a possibility or obligation	24 (53,3%)	79 (49,7%)	40 (43%)	79 (66,4%)	6 (6,4%)	18 (17,6%)	70 (30,17%)	176 (48,48%)

Source: Authors' own study.

As for participation of defendants deprived of liberty in an appeal hearing, as a result of submission thereby of motions for being brought to the hearing, it was, in comparison with all cases respectively: 16.8% (before the amendment of the CCP) and 13.2% (after the amendment). Most of such participation forms were recorded in cases from the Białystok appeal jurisdiction, i.e. in a total of 39 cases (out of 212), which is 18.4% of all cases under research. Before the amendment of the CCP, this percentage in the same research area amounted to 23.6%. The lowest percentage of cases attended by defendants deprived of liberty

upon submission of an appropriate motion was recorded in the area of the Łódź appeal jurisdiction, where it was only 8.9% of all cases before 15 April 2016. Refusal to bring the defendant to an appeal hearing, despite submission of a motion in this regard, was generally not frequent. Before the amendment, negative decisions by courts appeared in 5.2%, and after the changes, in 6.1% of all cases under analysis. The most frequent reason for refusal to bring the defendant to the hearing was deeming the defender's presence sufficient.

The actual non-participation of the defendant at an appeal hearing (despite having such an option or obligation) correlates with results reflecting the optional and obligatory participation of defendants in the case. In as much as 48.4% of cases after the CCP amendment of 15 April 2016 and 30.2% of cases before the amendment, defendants did not appear at the appeal hearing, although they had such an option or were obliged to do so. When analyzing individual appeal jurisdictions, the lowest percentage of such cases was recorded in courts of the Warsaw appeal jurisdiction – just 6.4% before and 17.6% after the changes in the CCP. The highest percentage was recorded for the area of the Białystok jurisdiction – 43% and 66.4% before and after the amendment respectively. The conducted analysis leads to a conclusion that, upon comparison of both legal statuses, the defendants' interest in personal at appeal hearings was generally unchanged, so it was not conditioned by the changes brought by the amendment of 15 April 2016.

4. The defender's participation in an appeal hearing

Establishment of a defender or appointment of an *ex officio* defender authorizes them to act throughout the proceedings, also including action after the decision becomes final (unless it includes restrictions). It is worth stressing that a lack of a defender at the stage of a judicial proceedings in cases of so-called obligatory defence (Article 79(1) and 79(2) of the CCP and Article 80 of the CCP) or non-participation of the defender in actions in which his participation was obligatory is among the absolute reasons for appeal, as mentioned in Article 439(1)(10) of the CCP. The doctrine stresses this is also the case when the defender's role in a judicial proceedings has been performed by a

person unauthorized for defence pursuant to the provisions of the Legal Profession Law Act[38] (e.g. a legal counsel disbarred due to a prohibition of professional activity, imposed by final judgement of a court or by final disciplinary decision on removal from the legal profession[39]). The case-law of the Supreme Court has long presented the view that the essence of obligatory participation of a defendant' defender at a hearing is tantamount to creation of conditions for the defendant to exercise his full (both formal and substantive) right to defence[40]. This right is only preserved when the defender at the hearing has a real and full possibility to take all possible and necessary actions in the defendant's interest[41].

It is worth pointing out that a situation when a defender acts under the conditions of conflicting interests of the represented defendants is considered to be a state tantamount to a lack of a defender. Conflicting interests of defendants occur when defence of one defendant threatens the interest of another one or when explanations of one defendant, or evidence adduced thereby and examination thereof, threaten the interests of another defendant, resulting in a conflict of interests leading, under such conditions, to annihilation of the defender's role in the criminal proceedings[42]. In such a situation, the court, stating the conflict, issues a decision determining a time limit for the defendants to "establish other defenders" (Article 85(2) of the CCP). This phrase means that a defender who has represented two or more defendants so far cannot continue defence of any of them. This solution is intended to remove a suspicion that the defender could use the hitherto obtained information in breach of the interests of the defendant he would not defend during the further proceedings[43].

The defender's participation at an appeal hearing is mandatory in cases of so-called obligatory defence (Articles 79 and 80 of the CCP) and when the president of the court or the court itself deems it necessary. If the court does not order bringing of the defendant who has no defender,

38 Act of 26 May 1982 – The Legal Profession Law Act, Journal of Laws 1982, no. 16 item 124.
39 L. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz,* LEX 2015.
40 The Supreme Court judgment of 15 January 2008, V KK 190/07, OSNKW 2008, no. 2, item 19.
41 *Idem.*
42 The Supreme Court judgment of 26 October 1971, V KRN 375/71, OSNKW 1972, no. 2, item 36.
43 L. Paprzycki (ed.), *Kodeks …,* LEX 2015.

the court, the president of the court or a court referendary appoints an *ex officio* defender. In such a case, appointment of an *ex officio* defender is to compensate for the defendant's lack of possibility to appear at the hearing at which he wishes to appear but cannot because his bringing has not been ordered[44].

The file research conducted under the grant show the participation of defenders in appeal hearings under three different bases: optional participation, obligatory participation by virtue of the law itself, and obligatory participation based on a decision by a court or a president of a court. The table below (Table 3) shows the participation of defenders in hearings of courts from the area of the Łódź, Białystok and Warsaw appeal jurisdictions, distinguishing the legal status valid before the amendment of the CCP which came into force on 15 April 2016 and the legal status after this amendment.

Table no. 3. The defender's participation in an appeal hearing

	Łódź appeal jurisdiction (204 cases)		Białystok appeal jurisdiction (212 cases)		Warsaw appeal jurisdiction (179 cases)		Total (595 cases)	
Actual participation of the defender at an appeal hearing or session	before 15 April 2016 (45 cases)	after 15 April 2016 (159 cases)	before 15 April 2016 (93 cases)	after 15 April 2016 (119 cases)	before 15 April 2016 (94 cases)	after 15 April 2016 (85 cases)	before 15 April 2016 (232 cases)	after 15 April 2016 (363 cases)
Optional participation	41 (91,1%)	70 (44%)	38 (40,9%)	54 (45,4%)	81 (86,2%)	78 (91,8%)	160 (69%)	202 (55,6%)
Obligatory participation under the parliamentary act	20 (44,4%)	82 (51,6%)	45 (48,4%)	43 (36,1%)	9 (9,6%)	1 (1,2%)	74 (31,9%)	126 (34,7%)
Obligatory participation under a decision by the court or president of the court	0	0	10 (10,7%)	19 (16%)	2 (2,1%)	2 (2,3%)	12 (5,2%)	21 (5,7%)

Source: Authors' own study.

Comparing the defender's participation at an appeal hearing in cases conducted under the previous (before 15 April 2016) and new regulations (after 15 April 2016), differences between individual appeal

44 R. Stefański, *Obrona obligatoryjna w polskim procesie karnym*, Warszawa 2012, p. 73.

jurisdictions are visible. Regarding optional participation at a hearing, most defenders appeared before courts of the Warsaw jurisdiction – in as much as 91.8% of cases after and 86,2% of cases before the amendment. The case is different for defenders from the area of the Łódź jurisdiction before the amendment – they appeared voluntarily in 91.1% of cases, whereas after the amendment, the percentage more than halved, dropping to 44%. As for the Białystok jurisdiction, both before and after 15 April 2016, optional participation of a defender reached a similar level, i.e. 40.9% and 45.4% of cases respectively. To sum up all cases – optional participation of a defender before the amendment was at the level of 69%, whereas after the amendment, it was 55.6%.

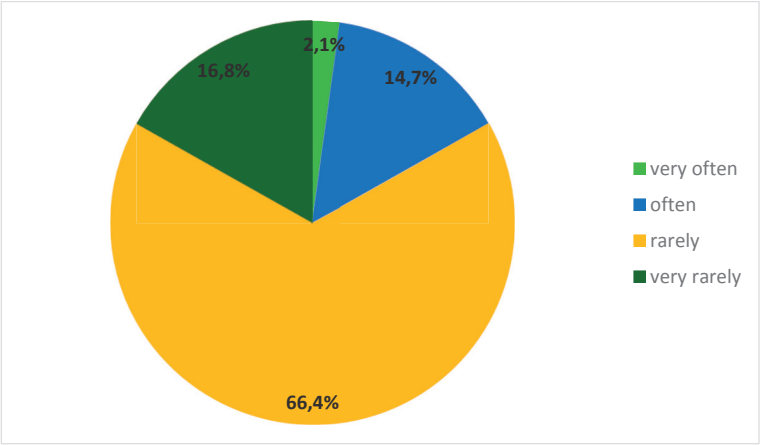
Courts or presidents of courts very rarely ordered obligatory participation of a defender at an appeal hearing. In total, such decision was made 33 times out of all 595 cases under analysis, comprising 5.2-5.7% of all cases. Interestingly, such a procedural decision was not recorded for the courts in the area of the Łódź appeal jurisdiction. Most of such decisions were made by the courts of the Białystok jurisdiction, namely, in as much as 16% of cases (after the changes of the CCP) and 10.7% of cases (before the changes).

As for the defender's obligatory participation by virtue of law, research results from the Warsaw jurisdiction stand out again in this regard – only 1,2% of cases after and 8.5% of cases before the changes obliged defenders to appear at an appeal hearing. On the other hand, results from the remaining research areas, i.e. the Białystok and Łódź appeal jurisdictions, look differently. With regard to the former, obligatory participation of the defender pursuant to legal regulations was recorded for 48.4% of cases before and 36.1% of cases after 15 April 2016. In the latter, this percentage reached 44.4% and 51.6% of cases respectively. The research above shows that defenders willingly participate in an appeal hearing, and courts (presidents of courts) extremely rarely decide upon their obligatory presence.

5. The defendant's and defender's initiative to adduce evidence

Under the research grant, the surveyed judges were asked how often the parties' initiative to adduce evidence in an appeal proceedings was useful in their work for resolution of a case. The question had four answer variants: very often, often, rarely, very rarely. Among the surveyed judges, as much as 66.4% considered the parties' initiative to adduce evidence in an appeal proceedings to be rarely useful for resolution of a case, and 16.8%, claimed it was useful very rarely. Only 2.1% claimed the parties' initiative in this regard to be useful very often in their work, whereas 14.7% considered this initiative to be useful often. The results presented below show that judges do not evaluate of the parties' initiative to adduce evidence positively (Fig. 2).

Figure no. 2. How often has the parties' initiative to adduce evidence in an appeal proceedings been useful in your work for resolution of the case?



Source: Authors' own study.

The surveyed judges have also been asked about the need of evidence preclusion in an appeal proceedings and whether, in their opinion, such preclusion occurs in a proceedings before the court of

second instance.[45] As much as 84.6% of the surveyed indicated the need for evidence preclusion, only a small percentage (14.7%) of judges gave a negative answer to this question, while one judge picked no answer at all. This may evidence certain reluctance of the surveyed towards increase of the decision-amending aspect[46]. Only 4.9% of judges indicated that evidence preclusion is present in the current model of appeal proceedings, whereas 52.4% of the surveyed claimed it functions in the proceedings to a limited extent. A considerable percentage of judges, 34.3%, claimed that evidence preclusion does not exist in the current proceedings model, whereas 10% were unable to say, and two failed to provide any answer to the question[47].

The file research conducted under the project also illustrate the scope of evidentiary proceedings before courts of appeal. In the light of the obtained results[48], most motions as to evidence in appeal proceedings were submitted by defenders; in total, their initiative was visible in 18% of the surveyed cases. The largest number of motions was submitted by defenders in the cases of the Białystok appeal jurisdiction, reaching as high as 60 (28.3%). The total number of motions they had submitted in all cases under analysis amounted to 107. The lowest number of motions for examination of evidence at the stage of proceedings before the court of second instance may be claimed by public prosecutors – only 1 motion out of 595 cases, which is just 0.2% of all cases. The activity of representatives of auxiliary prosecutors was not much higher, as they submitted a total of 14 motions as to evidence comprising only 2.3% of cases under research.

Moreover, the conducted research allows to check the efficiency of motions as to evidence, submitted at the stage of appeal proceedings.[49]

45 The results of answers to this question have been presented in this monograph, in the article by Katarzyna Łapińska.

46 *Idem.*

47 *Idem.*

48 Data on motions as to evidence submitted by individual entities (including defenders and defendants), distinguishing cases conducted pursuant to the legal status valid before and after the amendment of 15 April 2016, are found in this monograph, in the article by Katarzyna Łapińska.

49 The analysis of the research results with regard to the dividing date assumed in the project (before and after 15 April 2016) is found in this monograph, in the article by Adrianna Niegierewicz.

Table 4 below shows the number of motions as to evidence submitted by the defender and defendant, as well as the efficiency thereof.

Table no. 4. The efficiency of motions as to evidence submitted by the defender and defendant

	Łódź appeal jurisdiction (204 cases)		Białystok appeal jurisdiction (212 cases)		Warsaw appeal jurisdiction (179 cases)		Total (595 cases)	
	defender	defendant	defender	defendant	defender	defendant	defender	defendant
number of motions	22 (10,9%)	6 (3%)	60 (28,3%)	4 (1,9%)	26 (14,5%)	3 (1,7%)	108 (18,1%)	13 (2,2%)
recognized motions	11 (50%)	3 (50%)	15 (25%)	2 (50%)	10 (38,5%)	1 (33,3%)	36 (33,3%)	6 (46,1%)
dissmissed motions	6 (27,3%)	2 (33,3%)	29 (48,3%)	2 (50%)	16 (64%)	2 (50%)	51 (47,2%)	6 (46,1%)
no data	5 (22,7%)	1 (16,7%)	16 (26,7%)	–	–	–	21 (19,4%)	1 (7,7%)

Source: Authors' own study.

The presented results show that courts of appeal dismiss motions as to evidence, submitted either in an appeal or at an appeal hearing, generally more often. Out of 108 motions submitted by defenders, as much as 51 (47.2%) were dismissed, and only 36 (33.3%) were recognized. However, if we take a closer look at individual appeal jurisdictions, these results look slightly different. In the Łódź appeal jurisdiction, the percentage of recognized motions as to evidence, submitted by defenders and defendants, amounts to 50%. In the Białystok jurisdiction, only defendants may boast a similar result (2 out of 4 motions as to evidence were recognized), whereas defenders from this area had definitely worse effects (only 25% of their motions as to evidence were recognized by courts). Varied results, on the other hand, were obtained in the area of dismissal of motions as to evidence by courts in individual appeal jurisdictions. In the Łódź jurisdiction, 27.3% of motions submitted by defenders and 33.3% of motions by defendants were dismissed. In the Warsaw jurisdiction, on the other hand, the percentage of dismissed motions as to evidence submitted by defenders reached 64%, while in case of motions by defendants, it was 50%. The most frequent reasons for dismissal of motions were those specified in Article 170(1) of the CCP. Only in 4 cases (Łódź jurisdiction), the ground for dismissal was Article 452(2) of the CCP.

Although the general research findings present a low percentage of recognized motions as to evidence submitted by defenders (33.3%), the results from the area of the Łódź appeal jurisdictions look more favourably for applicants, since as much as 50% of motions were recognized there.

5. The efficiency of defender appeals

Another aspect researched by the authors of the grant was the degree of recognition by court of appeals submitted by individual entities (efficiency of appeals). Due to the scope of this study, the results presented in Table 6 below refer to the efficiency of appeals brought by a defender.[50]

Table no. 5. The efficiency of defender appeals

	Łódź appeal jurisdiction (204 cases)		Białystok appeal jurisdiction (212 cases)		Warsaw appeal jurisdiction (179 cases)		Total (595 cases)	
	before 15 April 2016 (45 cases)	after 15 April 2016 (159 cases)	before 15 April 2016 (93 cases)	after 15 April 2016 (119 cases)	before 15 April 2016 (94 cases)	after 15 April 2016 (85 cases)	before 15 April 2016 (232 cases)	after 15 April 2016 (363 cases)
number of appeals	57	154	125	126	83	96	265	376
recognition	0	4 (2,6%)	8 (6,4%)	6 (4,8%)	6 (7,2%)	1 (1%)	14 (5,3%)	11 (2,9%)
non-recognition	36 (63,1%)	126 (81,8%)	52 (41,6%)	77 (61,1%)	47 (56,62%)	54 (56,2%)	135 (51%)	257 (68,3%)
partial recognition	5 (8,8%)	15 (9,7%)	33 (26,4%)	7 (5,5%)	30 (36,1%)	36 (37,55%)	68 (25,7%)	58 (15,4%)
other settlements	16 (28,1%)	9 (5,84%)	32 (25,6%)	36 (28,57%)	–	5 (5,2%)	48 (18,11%)	50 (13,8%)

Source: Authors' own study.

The presented data show that defenders brought a total of 641 appeals in 595 cases. Although they manifested the highest activity in the area of initiation of appeal proceedings, the efficiency of their appeals was nowhere as impressive. The percentage of decisions fully recognizing the appeal never exceeded 10% in any of the appeal jurisdictions

50 Other data, concerning other entities and efficiency of their appeals, are presented in the article by Katarzyna Łapińska, tables nos. 21-22, as included in this monograph.

under research. However, if one keeps in mind the results of partial recognition (since the defenders' appeals very often raised alternative pleas and motions out of so-called "processual prudence", which are not recognizable in full), the situation looks much better here. For instance, as much as 37,55% of appeals were partially recognized in the Warsaw jurisdiction after 15 April 2016. The Białystok jurisdiction can also boast a decent result, having partially recognized 26.4% appeals even before the amendment of regulations. However, it is hard to ignore that most decisions by courts of appeal examined defenders' appeals negatively, dismissing them in full. The total percentage of such decisions reached 61,15%. In individual jurisdictions before and after the changes in the CCP, it looked as follows: 63.1% and 81,8% (Łódź), 41.6% and 61.1% (Białystok), 56,62% and 56,2% (Warsaw). It should be noted that such decisions were predominant in all research areas.

However, it cannot be ignored that the file research only covered cases in which the court of appeal fully upheld or amended a judgment by the court of first instance (generally, cases referred back were not researched due to problems with availability of their files). Such a selection of cases prevents a comprehensive approach to the issue of efficiency of appeals. Therefore, the comparison above, concerning the efficiency of appeals, should only be treated demonstratively, and any conclusions drawn should only be of auxiliary nature, since it is impossible to address these issues categorically.

6. Final conclusions

The basic goal of an appeal proceedings is to verify the correctness of a decision passed before the court of first instance, and therefore, to implement the requirements of fair trial and rights of the parties, including the right of double-instance proceedings and of revision of correctness of decisions made by procedural authorities[51]. The limits of adjudication of a court of appeal constitute the framework for exercise of the right to defence. However, exceptions from the rule of adjudication within the limits of appeal cannot deteriorate the defendant's procedural

51 S. Zabłocki, *Postępowanie odwoławcze w nowym kodeksie postępowania karnego. Komentarz praktyczny,* Warszawa 1998, p. 15.

situation. Although this cannot indeed be ruled out, if a decision favourable to the defendant, yet bearing an absolute reason for appeal, as specified in Article 439(1) of the CCP, has been annulled. However, pursuant to Section 2 of this provision, annulment of a decision, caused by occurrence of one of the premises specified in Article 439(1) pts. 9-11 of the CCP, may only cause annulment of a decision in favour of the defendant.

The great reform of criminal proceedings, which came into force on 1 July 2015, was directed towards remodelling of the criminal proceedings towards increased adversarial aspect. The quintessence of the changes was the new Article 167 of the CCP, constituting the "central axis" of the amendment. Since that moment, the initiative to adduce evidence was in the hands of the parties and it was them (particularly the public prosecutor) who carried the burden of proof. Consequently, the scope of evidentiary proceedings before a court of appeal was remodelled as well. The shaping of the model of appeal proceedings to enable a wider extent of decision-amending, and to limit the cassation aspect of this proceedings, was primarily intended to restrict the lengthiness of proceedings. However, it is hard to evaluate whether these assumptions materialized, given that the amendment was valid for little more than 9 months. Such a short effective period of a parliamentary act does not allow one to draw general conclusions concerning the purpose or efficiency of the changes. Similarly, regarding the file research conducted for the purposes of the research project, there were too few "adversarial" cases (in which the indictment was received before 01 July 2015, and the final judgment was passed until 15 April 2016) to draw constructive conclusions in this regard. Therefore, the next amendment of the CCP, coming into force on 15 April 2016, was chosen as a dividing line in time for presentation of the research findings.

15 April 2016 saw a return to the model of main hearing based on a dominant role of courts in examination of evidence, yet without simultaneous restriction of the parties' initiative to adduce evidence. However, the departure from the adversarial principle introduced on 1 July 2015 does not mean that parties and their representatives need not show any activity. Quite the opposite, since a court is only obliged to admit evidence ex officio if it determines that the hitherto evidentiary

proceedings has been incomplete and raised doubts concerning the factual state. One decision pointed out that "It is not the matter of courts to search for evidence but to verify the evidence adduced by parties pursuant to the principle of adversarial proceedings, also applicable under the pre-amendment procedural act"[52]. However, it should be noted after Ł. Chojniak that the amendment of the CCP of 15 April 2016 entails far-reaching consequences, consisting not only in obligation of the court and the president to show more activity in gathering of evidence and reaching of substantive truth(Article 366(1) of the CCP) but also in maintenance of the principle of lack of obligation for the defendant to appear at the hearing (Article 374 of the CCP), resignation from a wide access to defence and an *ex officio* representative (deletion of Articles 80a and 87a of the CCP), as well as admission of conduct of the hearing in absence of a public prosecutor, if the investigation has been completed in the form of an investigation[53]. Moreover, by introduced changes, the legislator modified the boundaries of appeal revision exercised by the *ad quem* court and redefined the formal requirements of an appeal (the lack of necessity of formulation of pleas by non-professionals should be evaluated positively from the viewpoint of the right to defence).

Therefore, the activity of the defender and the defendant remains the essence. After all, their role at the stage of an appeal proceedings is considerable. Additionally, the defender, as a professional, is obliged to formulate pleas and to substantiate the appeal. The ability of proper formulation and substantiation of motions as to evidence, raised at the stage of proceedings before the court of second instance, may affect their recognition by a court of appeal. However, the conducted research shows that the effectiveness of defenders' appeals is low. The vast majority of decisions by courts of appeal do not fully recognize appeals brought by defenders. Nevertheless, one should keep in mind that these statistics may differ from the reality due to the selection of cases for the research, obviously affecting the final conclusions concerning the effectiveness of defenders' appeals. Regarding motions as to evidence,

52 The Łódź Appeal Court judgment of 15 October 2015, II AKa 209/15, no. 11, item 36.

53 Ł. Chojniak, Prawa materialna versus kontradyktoryjność, czyli kilka krytycznych uwag na temat założeń oraz wybranych rozwiązań szczegółowych kolejnej noweli Kodeksu postępowania karnego z 11 marca 2016 r., (in:) S. Steinborn, K. Woźniewski (eds.), Proces karny w dobie przemian. Zagadnienia ogólne, Gdańsk 2018, p. 56.

submitted at the stage of appeal proceedings, the research findings show that courts of appeal dismiss the submitted motions more often, rather than recognizing them. The most frequent reasons for dismissal of motions were those specified in Article 170(1) of the CCP, while reasons under Article 452(2) of the CCP were definitely less frequent.

It should be stressed that the concept of efficient participation of a defender does not, by any means, apply to the final result of a proceedings but only to the option of uno.estricted taking of actions under the procedural rights[54]. The fact of efficiency stems from the fact of having a defender itself, since the defendant is provided with the necessary professional assistance in effective exercise of his rights[55]. As shown by the research conducted under the project, it is the defenders who initiate appeal proceedings most frequently and who show most activity in the area of submitted motions as to evidence. Although general research findings show a low percentage of recognized motions as to evidence submitted by defenders, the results from the area of the Warsaw and Łódź appeal jurisdiction indicate that half of all motions as to evidence submitted by the defence were recognized there. However, active participation of defenders will not always translate into an effect in the form of recognition of appeals. Most decisions by courts of appeal refused the defenders' appeals, dismissing them in full (as much as 63.9%).

The surveyed judges, asked how often the parties' initiative to adduce evidence in an appeal proceedings was useful in their work for resolution of a case, predominantly claimed it was seldom useful for resolution of a case, and a considerable part even stated it was useful very rarely. Few judges believed the initiative of parties in this regard was very often useful in their work, and slightly more claimed it was useful often. This evidences low evaluation of the initiative to adduce evidence, shown by parties in an appeal proceedings. The judges' answers to the question of the need of evidence preclusion in an appeal proceedings may evidence certain reluctance of the surveyed towards introduction of

54 C. Kulesza, *Obrońca*, chapter 10, (in:) P. Hofmański (ed.) *System Prawa Karnego Procesowego. Tom VI: Strony i inni uczestnicy postępowania karnego* (C. Kulesza ed.), Warszawa 2016, p. 927.

55 P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym*, Zakamycze 2005, p. 296.

increased decision-amending aspect of the proceedings. More than a half of the surveyed claim that evidence preclusion functions in an appeal proceedings to a limited extent, but there are also those who claim there is no evidence preclusion at all at this stage of the proceedings. So diverse answers lead to a conclusion that judges understand evidence preclusion differently. The vast majority of judges (88.8%) positively evaluate the current regulations concerning compulsory participation of a defendant deprived of liberty at an appeal hearing. They essentially do not consider the restrictions applied by the legislator in relation to the motion for bringing of a defendant to an appeal hearing to violate his right to defence.

Comparing the defendant's participation in appeal hearings in cases conducted under the regulations valid before and after 15 April 2016, there are no distinct differences in the results. Defendants whose participation at a hearing was optional were as willing to participate in it before the amendment of the CCP as after. The conducted analysis leads to a conclusion that the defendants' interest in their personal participation at an appeal hearing was essentially unchanged upon comparison of both legal statuses, so it was not affected by amendments brought by the Act of 11 March 2016. As for the defender's participation in an appeal proceedings, the conducted research shows that defenders are willing to appear at appeal proceedings, whereas courts (presidents of courts) order their mandatory participation extremely rarely.

Finally, it is worth pointing out that legislation works are currently in progress concerning amendment of the CCP in the area of, among other things, evidentiary proceedings before the *ad quem* court and acceleration of the proceedings aimed at appointment of an *ex officio* defender. The projected changes are related to Article 452(2) of the CCP, the new wording of which assumes that dismissal of a motion as to evidence by a court of appeal also takes place if the given piece of evidence was not adduced before the court of first instance, although the applicant could have adduced it then, or the circumstance to be proven is related to a new fact, not subject to the proceedings before the court of first instance, whereas the applicant could have indicated it then. A motion as to evidence cannot be dismissed on these grounds if the circumstance to be proven, within the limits of examination of

the case by a court of appeal, is of crucial importance for determination whether a prohibited act has been committed, whether it constitutes an offence and what offence it is, whether the prohibited act has been committed under circumstances 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[56]. As for the projected amendments concerning a public defender, they assume that if circumstances indicate the necessity of immediate assumption of defence, a motion to appoint a defender and other documents necessary to examine the motion may be transferred to the competent court by the authority in charge of the preparatory proceedings by facsimile or by email (Article 81a(3) of the CCP)[57].

56 Governmental draft bill of 04 Dec 2018 on the amendment of the Code of Criminal Procedure Act and of certain other acts (Printing No. 3251).

57 *Ibidem.*

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PROTECTION OF THE AGGRIEVED PARTY'S RIGHTS IN THE APPEAL PROCEEDINGS[2]

I. Introduction

The aggrieved party in an appeal proceedings has the same rights as in a first-instance judicial proceedings. Therefore, regulations which should be applied to aggrieved parties as participants of an appeal proceedings should be those shaping their rights and obligations, as included in the chapters of the Code of Criminal Proceedings Act of 6 June 1997[3], concerning procedure before the court of first instance, as well as in the general section of this legal act.

Despite the same catalogue of rights and theoretically the same capabilities to act, the role of the aggrieved party in an appeal proceedings is definitely smaller than in preparatory proceedings or a first-instance judicial proceedings. This results from the nature of the appeal proceedings, restricted to revision of procedural decisions passed in the first instance, with very limited evidentiary proceedings. Lack of the aggrieved party's interest in further proceedings often comes into consideration as well, especially if it is not this party or its representative that has been the author of an appeal against the judgment of the court of first instance. This should not wonder, especially in the context of generally low activity of parties in appeal proceedings, leaving the initiative in the hands of the court of appeal. Although the amendments of the Code of Criminal Procedure, as introduced between 2013 and

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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 Consolidated text Journal of Laws 2018, item 1987, as amended.

2016, foresaw an increase of the parties' initiative, allowing evidentiary proceedings before the court of appeal to be conducted to an extent wider than previously, the hitherto practice is no major breakthrough.

II. The aggrieved party in the Polish criminal proceedings

The aggrieved party in the Polish criminal proceedings is the topic of Chapter 4 of the Code of Criminal Procedure, in which it is defined as a natural person or a legal entity whose legal interest has been directly violated or threatened by a criminal offence. An aggrieved party may also be a state or self-government institution or another organizational unit without legal personality, granted with legal capacity by separate regulations (Article 49(1) and 49(2) of the CCP).

Another term quite similar to "aggrieved party" within the meaning of the Code of Criminal Procedure is the victimological term of "victim of crime". This is particularly clear in Article 2(1)(a) of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA[4], defining a victim as a natural person who has suffered harm, including physical, mental, moral or emotional harm or economic loss, which was directly caused by a criminal offence, as well as family members of a person whose death was directly caused by a criminal offence, if they have suffered harm as a result of that person's death. Pursuant to Article 2(1)(b) of the directive, family members include the spouse; a person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis; the relatives in direct line; the siblings and the dependants of the victim. However, under such understanding, the subjective scope of the term "victim" would be narrower compared with the "aggrieved party" which can also be a legal entity, a state or self-government institution or another organizational unit with legal capacity[5]. Under the Polish law, the term "victim" is much narrower than in the directive referenced

4 Official Journal of the European Union L 315, 14.11.2012, pp. 57-73.
5 A.Z. Krawiec, Małoletni pokrzywdzony w polskim procesie karnym, Toruń 2012, p. 111.

above. The Act of 7 July 2005 on the state compensation to victims of certain prohibited acts[6] states in Article 2(1) that a victim is a natural person who, as a result of a prohibited act, has died or suffered grievous bodily injury, disturbance of functioning of a bodily organ or health disorder, lasting for more than 7 days. Therefore, for the purposes of the procedure of granting of state compensation, the term "victim" has only been limited to natural persons aggrieved by gravest crimes against life and health.

An aggrieved party may be a natural person; however, this term has not been defined in the Code of Criminal Procedure or in any other legal act of statutory rank. It appears in the Civil Code Act of 23 April 1964[7], with title II chapter I under the heading "Natural Persons". Pursuant to Article 8(1) of the Civil Code, included in the chapter above, each human has legal capacity since their birth. Therefore, every human is a natural person, regardless of their age.

The second category of entities with the status of an aggrieved party includes legal entities, including, pursuant to Article 33 of the Civil Code, the State Treasury and organizational units granted with legal capacity by specific provisions. These are mainly provisions contained in parliamentary acts of systemic nature, governing the activity of individual types of organizational units, which, by clear instruction of a legal norm, grant legal capacity and capacity to undertake legal action[8]. Examples of such legal entities include territorial self-government units, joint-stock companies, limited-liability companies, banks, cooperatives, associations, funds, labour unions, employer associations, universities, parishes or religious orders[9].

Moreover, an aggrieved party may also be every state or self-government institution, as well as another organizational unit, granted with legal capacity by separate provisions (Article 49(2) of the CCP). Such an institution is an establishment of public nature, occupied with

6 Consolidated text Journal of Laws 2016, item 325.
7 Consolidated text Journal of Laws 2019, item 1145.
8 S. Szołucha, (in:) J. Skorupka (ed.), Kodeks postępowania karnego. Komentarz, Warszawa 2015, p. 188.
9 K.T. Boratyńska, (in:) A. Sakowicz, K.T. Boratyńska, A. Górski, M. Królikowski, M. Warchoł, A. Ważny, Kodeks postępowania karnego. Komentarz, Warszawa 2015, p. 159.

a specific category of matters, constituting an independent, legal and permanent structure. Therefore, the role of an aggrieved party in a criminal proceedings cannot be played by entities acting illegally, or by units only comprising a component of another institution or established *ad hoc*, only for the sake of fulfillment of a specific task[10].

On behalf of an aggrieved party which is not a natural person, procedural acts are performed by an authority authorized to act on its behalf (Article 51(1) of the CCP). This provision should also be applied to entities considered to be an aggrieved party by the Code of Criminal Procedure (Article 49(3) of the CCP), as well as to entities exercising the rights of the aggrieved party (Article 49(3a) and 49(4) of the CCP)[11].

Another part of the definition of an aggrieved party is the legal interest violated or threatened by the offence. This is an interest exclusively protected by specific provisions of substantive criminal law[12]. The judicial doctrine and case-law predominantly take the stance that this interest is covered by direct (particular, individual) object of protection, and consequently, the direct object of the attempt[13].

The final component of the definition of an aggrieved party is the directness of violation of or threat to the legal interest, the assessment of which is based on the analysis of circumstances of a specific act subject to the proceedings; in particular, the scope of protection and the relation between the attributes of the act and the threat to the legal interest of a specific entity[14]. The directness of violation of or threat to the legal interest of a given person was interpreted most accurately in the court

10 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Komentarz. Vol. 1, Warszawa 2004, p. 281.

11 *Ibidem*, p. 291.

12 See: A. Muszyńska, Naprawienie szkody wyrządzonej przestępstwem, Warszawa 2010, p. 104.

13 See: W. Posnow, Sytuacja pokrzywdzonego w postępowaniu przygotowawczym w polskim procesie karnym, Wrocław 1991, p. 12; K. Dudka, Wpływ prawa karnego materialnego na ustawową definicję pokrzywdzonego, (in:) Z. Ćwiąkalski, G. Artymiak (eds.), Współzależność prawa karnego procesowego i materialnego w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian, Warszawa 2009, p. 141; the Supreme Court resolution of 15 September 1999, I KZP 26/99, OSNKW 1999, no. 11-12, item 69; the Supreme Court decision of 23 April 2002, I KZP 10/02, LEX no. 53077; the Supreme Court resolution of 25 March 2003, I KZP 50/02, OSNKW 2003, no. 3-4, item 28; the Supreme Court resolution of 21 October 2003, I KZP 29/03, OSNKW 2003, no. 11-12, item 94.

14 B.T. Bieńkowska, M. Warchoł, Uzyskanie statusu pokrzywdzonego w postępowaniu przygotowawczym – uwag kilka, (in:) B.T. Bieńkowska, D. Szafrański (eds.), Problemy prawa

jurisdiction, indicating that there are no intermediate links in the relation between an act with specific offence attributes and the violation of or threat to this person's interest, which shows that the circle of aggrieved parties may only include the entity whose legal interest has been violated by a criminal act directly, rather than via threatening another interest[15].

Apart from the aggrieved party, participation in a criminal proceedings is open to entities who, while not directly being an aggrieved party, may exercise its rights under particular circumstances. Pursuant to Article 52(1) of the CCP, these may be the aggrieved party's closest relatives or dependants in case of the aggrieved party's death, as so-called substitute parties (if the aggrieved party was not a party to a criminal proceedings at the moment of death) or new parties (when the aggrieved party had already been a party to a criminal proceedings at the moment of death). However, if there are no closest relatives or dependants of the aggrieved party or such persons have not been disclosed, the aggrieved party's rights may be exercised by a public prosecutor, acting *ex officio*.

Another group of entities exercising the rights of an aggrieved party are statutory representatives and persons exercising care for the aggrieved party. If a natural-person aggrieved party does not have the capacity for procedural measures in a criminal proceedings, being a minor or being incapacitated in full or in part, their rights are exercised by their statutory representative (parents, a guardian appointed by a guardianship court or a custodian appointed by a guardianship court) or by a person under whose permanent care the aggrieved party remains (Article 51(2) of the CCP).

Pursuant to Article 51(3) of the CCP, the rights of the aggrieved party being an incapable person, particularly due to their age or health condition, may be exercised by a person under whose care the aggrieved party remains. Therefore, a person who is elderly or ailing to the extent that unaided performance of their basic functions is excluded or highly impeded, including a person who is mentally handicapped or suffering

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polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym. Część czwarta, Warszawa 2013, p. 38.

15 The Supreme Court decision of 25 March 2010, IV KK 316/09, OSNwSK 2010, no. 1, item 645.

from mental disorders, unless they have been incapacitated in full or in part, should be considered an incapable person. The participation of the person exercising care does not preclude personal exercise by the aggrieved party of their own powers, including effective submitting of a motion for prosecution in case of offences prosecuted on a motion[16].

III. Rights and obligations of an injured party in a criminal proceedings

An aggrieved party in a criminal proceedings conducted by public indictment due to harm itself is only a party to preparatory proceedings. In order to become a party to a judicial proceedings, the aggrieved party has to assume the role of an auxiliary prosecutor through submission, until the beginning of the legal proceedings, of a statement of their wish to act in this capacity (Article 54(1) of the CCP), or through bringing of an indictment to the court in case of repeated issuance of a decision on decline to institute or discontinuation of a proceedings within a month since being served the notification of such a decision (Article 55(1) of the CCP in conjunction with Article 330 § 2 of the CCP). In the former case, the auxiliary prosecutor is termed as a secondary one, and in the latter case – as a subsidiary one. Regardless of the manner of obtaining of the auxiliary prosecutor status, the aggrieved party has identical powers of a party. In particular, it can:

- submit procedural motions, including motions as to evidence (Article 368 of the CCP);
- be present at the entire hearing (Article 384(2) of the CCP) and generally at sessions of the court (Article 96(1) and 96(2) of the CCP);
- ask questions to examined persons (Article 370(1) of the CCP) and address each issue subject to resolution (Articles 367(1) and 367(2) of the CCP);
- deliver the summation (Article 406(1) of the CCP);

16 See: the Supreme Court judgment of 5 January 1973, III KR 192/72, OSNKW 1973, no. 4, item 49.

– at its own expense, receive one copy each of audio or video recording of a thus recorded procedural action (Article 147(4) of the CCP);
– bring an appeal against a judgment by the court of first instance (Article 444 of the CCP), a complaint against a summary judgment passed in a proceedings by writ of payment (Article 506(1) of the CCP), cassation against a valid judgment by a court of appeal, completing the proceedings, and against a valid decision by a court of appeal to discontinue the proceedings and apply a detention order specified in Article 93a of the Penal Code Act of 6 June 1997[17] (Articles 519 and 520(1) of the CCP), as well a motion for reopening of a judicial proceedings completed with a final decision (Article 542(1) of the CCP).

In a private-complaint proceedings, the aggrieved party, as a private prosecutor, is a party to the proceedings and has a similar scope of powers and obligations as an auxiliary prosecutor in a public-complaint proceedings, with consideration to differences between both proceedings.

An aggrieved party which has not acceded to the judicial proceedings as a party only has the powers clearly granted thereto by the provisions of the Code of Criminal Procedure and is termed as a quasi-party by the doctrine[18]. The catalogue of powers of the aggrieved party has been broadened following the latest criminal procedure reform, introduced by several legal acts: the Act of 27 September 2013 on the amendment of the Code of Criminal Procedure Act as well as certain other acts[19], Act of 20 February 2015 on the amendment of the Penal Code Act as well as certain other acts[20], Act of 11 March 2016 on the amendment of the Code of Criminal Procedure Act as well as certain other acts[21], and the Act of 28 November 2014 on the protection and assistance to the

17 Consolidated text Journal of Laws 2018, item 1600, as amended.
18 See: T. Grzegorczyk, (in:) T. Grzegorczyk, J. Tylman, Polskie postępowanie karne, Warszawa 2011, p. 310.
19 Journal of Laws 2013, item 1247, as amended.
20 Journal of Laws 2015, item 396.
21 Journal of Laws 2016, item 437, as amended.

aggrieved party and witness[22]. Some of them resulted from the necessity to adapt the provisions of the national law to the requirements of the Directive 2012/29/EU.

Above all, changes have covered certain regulations included in Chapter 4 of the CCP, concerning essential issues related to the aggrieved party. The wording of the provision defining the aggrieved party has changed in the extent concerning an entity without legal personality, making the acquisition of this status dependent on having the legal capacity. A significant change, resulting from the necessity to adapt the Code of Criminal Procedure to the definition of a family member from Directive 2012/29/EU, was addition in Article 52(1) of the CCP of the aggrieved party's dependant as a person authorized to exercise their rights in case of death. An analogous change affected Article 61(1) of the CCP, concerning the private prosecutor and his death during the course of a criminal procedure. Another amended provision of large significance for the protection of the interests of an aggrieved party in a criminal proceedings was Article 49a of the CCP. The legislator has extended the time limit for submitting a motion for imposing by the court of an obligation to redress the damage caused by the offence in full of in part or to compensate for the suffered harm (Article 46(1) of the Penal Code). Previously, the aggrieved party had to submit such a motion at the latest until the moment of completion of their first examination at the main hearing, whereas today, the motion can be submitted until the moment of closure of the judicial proceedings at the main hearing. This opens a possibility to also submit the motion under consideration in a reopened first-instance proceedings after the judgment is annulled by a court of appeal and the case is referred back. It should be noted that if the ordering of the obligation to redress the damage or compensate for the harm is significantly impeded, the court may, alternatively, order vindictive damages up to 200 000 zlotys on behalf of the aggrieved party, and if the aggrieved party has died as a result of the offence perpetrated by the convicted offender, vindictive damages on behalf of the closest relative whose life position has significantly deteriorated as a result of the aggrieved party's death (Article 46(2) of the Penal Code).

22 Journal of Laws 2015, item 21.

Another block of amended regulations is related to the auxiliary prosecutor, being the focus of Chapter 5 of the Code of Criminal Procedure. Due to the correction of the principle of accusatorial procedure and replacement of the institution of abandoning of prosecution by a public prosecutor with the institution of withdrawal of indictment, such institution binding the court adjudicating in the case (Article 14(2) of the CCP), a necessity has arisen to modify the provision concerning accession of an auxiliary prosecutor to the case. The new wording of Article 54(2) of the CCP provides an aggrieved party who has not exercised the powers of an auxiliary prosecutor before the withdrawal of the indictment by the public prosecutor with an option to submit a statement of accession to the proceedings as an auxiliary prosecutor within 14 days since they are notified of the withdrawal of the indictment by the public prosecutor.

If an aggrieved party acting as an auxiliary prosecutor or a private prosecutor has an insufficient command of the Polish language, they have been granted with additional guarantees, exceeding the hitherto norm of Article 204 of the CCP. Namely, a decision subject to appeal or completing the proceedings is served to such an entity jointly with a translation, and with the aggrieved party's consent, one may limit oneself to pronouncement of a translated decision completing the proceedings, if it is not subject to appeal (Articles 56a and 60a of the CCP). The regulation above results from implementation of Directive 2012/29/EU which, in Article 7, has guaranteed the right of oral and written translation to a victim of a crime.

A provision of key importance from the viewpoint of the aggrieved party's right of procedural information is Article 300(2) of the CCP, which has appeared in the Code of Criminal Procedure following the amendment of 27 September 2013. As many other regulations strengthening the procedural and non-procedural guarantees of the aggrieved party, it is an aftermath of Directive 2012/29/EU, establishing, in Article 4, a minimal standard of information to be offered to each victim by the competent authority from their first contact with this authority. Beside typical procedural powers concerning participation in legal proceedings, submitting of procedural motions, using a representative or interpreter, or participation in mediation with a suspect,

the Polish legislator, making new amendments of the provision under consideration, guaranteed the aggrieved party to receive information concerning the possibilities to use the procedural and non-procedural institutions recently introduced into the Polish legal system. Therefore, the aggrieved party should be instructed on the option of redress of the damage by the defendant or of receipt of state compensation, access to legal assistance, protection and aid measures mentioned in Act of 28 November 2014 on the protection and assistance to aggrieved parties and witnesses, support from the Victim Support Fund and the Post-Penitentiary Assistance Fund, as foreseen in Article 43(8) of the Executive Penal Code[23], the option of issuance of an European protection order, organizations of support to aggrieved parties, and the possibility of reimbursement of costs incurred in connection with participation in the proceedings. Moreover, the aggrieved party should be instructed on the contents of Article 337a of the CCP, i.e. on the necessity to notify them, at their request, by the procedural authority on the date and place of the hearing or session concerning conditional discontinuance of the proceedings (Article 341(1) of the CCP), conviction of the defendant without a hearing (Article 343(5) of the CCP), discontinuance of the proceedings pursuant to Article 17(1) items 2-11 or due to obvious lack of factual grounds for indictment, as well as on the charges of prosecution and the legal classification thereof.

Moreover, Directive 2012/29/EU has provided the victim with direct support of a person indicated thereby in contacts with a procedural authority (Article 3(3)) and in the activities of preparatory proceedings (Article 20(c)). It should be stated that the new Article 299a(1) of the CCP, guaranteeing that a person indicated by the aggrieved party may be present during actions involving this party in the course of preparatory proceedings, unless it prevents or significantly impedes the performance of the action, has fully adapted the national law to European standards.

The final example of reinforcement of the aggrieved party's position in the reformed Polish criminal procedure, worth presenting in this study, is the aggrieved party's option to bring objections against a motion for conviction of the defendant without a hearing (Article 343(2) of

23 Consolidated text Journal of Laws 2019, item 676, as amended.

the CCP). Such solution strengthens the aggrieved party's negotiating position in case of aspiration by the parties and the procedural authority to develop conditions of a sentence which would be acceptable to all interested parties without conducting a hearing. The court may only recognize a motion submitted by the public prosecutor and accepted by the defendant if the aggrieved party, duly notified of the date of the session, does not object it. In such a case, the interest of the aggrieved party is guaranteed even more strongly, thanks to the new wording of Article 343(1) of the CCP, enabling the court to make the acceptance of the motion for conviction without a hearing dependent on the redress of the damage in full or on compensation for the suffered harm by the defendant.

IV. The aggrieved party's activity in an appeal proceedings in the light of file research

According to the methodology assumed in this monograph, the analysis of research findings includes two periods for which the dividing date is 15 April 2016, i.e. the moment of entry into force of the latest parliamentary act reforming the Polish criminal procedure. Files of 595 criminal cases from courts of three appeal jurisdictions (Białystok, Łódź and Warsaw) were made available to the research team. In 232 cases (93 in the Białystok appeal jurisdiction, 45 in the Łódź jurisdiction and 94 in the Warsaw jurisdiction), the decisions by the court of appeal were passed before 15 April 2016, whereas in the remaining 363 cases (119 in the Białystok appeal jurisdiction, 159 in Łódź and 85 in Warsaw), they were passed after that date. In the tabular comparisons presented below, the letter "n" denotes the number of entities or appeals against decisions of courts of first instance, brought thereby. These numbers are compared with other data, which helps achieve of percentages enabling comparisons between individual appeal jurisdictions.

Table no. 1. Participation of an auxiliary prosecutor in the cases under research in absolute numbers and in %, compared with the number of cases in a given appeal jurisdiction

Appeal jurisdiction	Before 15 April 2016		After 15 April 2016		Total	
	n	%	n	%	n	%
Białystok	35	37.63	43	36.13	78	36.79
Łódź	12	26.67	68	42.77	80	39.22
Warsaw	32	34.04	19	22.35	51	28.49
Total	79	34.05	130	35.81	209	35.13

Source: Authors' study.

In order to draw conclusions concerning the aggrieved party's activity in an appeal proceedings, it is necessary to make an analysis of participation of this entity in the capacity of a party (more specifically, an auxiliary prosecutor) in the cases under analysis. The data obtained from the analysis of case files indicate relatively low interest of aggrieved parties in participation in judicial proceedings in the capacity of a party, i.e. an auxiliary prosecutor. Ratios for the period before 15 April 2016 are very similar, both for every appeal jurisdiction and for all three combined. Excluding the Łódź jurisdiction, where an auxiliary prosecutor appeared statistically in 1/4 of the analyzed cases, this ratio in the other jurisdictions and in total amounted to approx. 1/3. On the other hand, in cases where the court of appeal passed a sentence after 15 April 2016, deviations from the typical 1/3 ratio are more distinct – for the Łódź appeal jurisdiction, it exceeds 42%, and for the Warsaw jurisdiction, it only slightly exceeds 22%. Due to the fact that in the Łódź jurisdiction, distinctly more cases completed after 15 April 2016 were analyzed than before that date, the highest ratio in this appeal jurisdiction for the total number of examined cases, reaching 39%, is not surprising. Deviation in the opposite direction can be seen in the Warsaw jurisdiction where the ratio under discussion did not exceed 30%. Due to large discrepancies in the number of cases made available for research from individual jurisdictions, taking account of the dividing date of 15 April 2016, such results cannot be considered fully representative; nevertheless, the general trend of participation of auxiliary prosecutors at the level of 1/3

of cases evidences low interest of aggrieved parties in active participation in a judicial proceedings.

Table no. 2. Participation of a representative of an auxiliary prosecutor in the cases under research in absolute numbers and in %, compared with the number of cases in a given appeal jurisdiction

Appeal jurisdiction	Before 15 April 2016		After 15 April 2016		Total	
	n	%	n	%	n	%
Białystok	26	27.96	19	15.97	45	21.23
Łódź	7	15.56	26	16.35	33	16.18
Warsaw	18	19.15	14	16.47	32	17.88
Total	51	21.98	59	16.25	110	18.49

Source: Authors' study.

A more even distribution is shown by ratios of participation of auxiliary prosecutors' representatives in judicial proceedings. On the other hand, the values of those ratios are significantly lower for auxiliary prosecutors. Excluding the almost 28% share of representatives in examined cases from the Białystok appeal jurisdiction before 15 April 2016, values between 15% and 22% were recorded for all other cases. In total, considering all appeal jurisdictions and both periods of time, representatives of auxiliary prosecutors are appointed by about a half of all auxiliary prosecutors. Under the conditions of compulsory representation by a lawyer concerning appeals brought against judgments by regional courts, restrictions in the possibility of appeal by auxiliary prosecution are clear.

Table no. 3. The number of appeals brought in the cases under research by representatives of auxiliary prosecutors in absolute numbers and in %, compared with the total number of representatives

Appeal jurisdiction	Before 15 April 2016		After 15 April 2016		Total	
	n	%	n	%	n	%
Białystok	7	26.92	8	42.11	15	33.33
Łódź	2	28.57	9	34,62	11	33,33
Warsaw	9	50.00	6	42.86	15	46.88
Total	18	35.29	23	38.98	41	37,27

Source: Authors' study.

The ratio of appeals brought by representatives of auxiliary prosecutors has been designed slightly differently. They have been related to the number of representatives of auxiliary prosecutors appointed in individual appeal jurisdictions and in total. The activity of auxiliary prosecutors in this regard is highest in the Warsaw jurisdiction, where, on average, every second representative brought an appeal against a judgment of a court, regardless of the time period. In other jurisdictions, these ratios varied from approx. 27% to above 42% (Białystok). In total, in all three appeal jurisdictions, mainly through increased activity of representatives of the Warsaw jurisdiction, the above ratios slightly exceeded 37%.

If the total number of 41 appeals brought by representatives of auxiliary prosecutors is compared with all 595 examined cases, this ratio would only reach 6.89%.

Another issue of significance from the viewpoint of participation of the professional factor on the part of auxiliary prosecution in a criminal proceedings is the ratio of representation of auxiliary prosecutors by representatives to the total number of auxiliary prosecutors. In this case, two categories should be distinguished: representatives of choice and public representatives. It is not surprising that the latter case occurs only occasionally in the criminal proceedings – in the cases under analysis, it was generally below 5%, and exceptionally, in the Warsaw jurisdiction before 15 April 2016, it reached almost 10%. On the other hand,

analogous ratios concerning a representative of choice have a wide range of fluctuation: from slightly over 20% to almost 67%.

Table no. 4. The number of auxiliary prosecutors represented by representatives in absolute numbers and in %, compared with the total number of auxiliary prosecutors

Appeal jurisdiction	Before 15 April 2016				After 15 April 2016				Total			
	of choice		public		of choice		public		of choice		public	
	n	%	n	%	n	%	n	%	n	%	n	%
Białystok	17	48.57	2	5.71	15	34.88	1	2.33	32	41.03	3	3.85
Łódź	8	66.67	0	0.00	15	22.06	2	2.94	23	28.75	2	2.50
Warsaw	8	25.00	3	9.38	11	57.89	0	0.00	19	37.25	3	5.88
Total	33	41.77	5	6.33	41	31.54	3	2.31	74	35.41	8	3.83

Source: Authors' study.

Table no. 5. The scope of challenging by appeal by representatives of auxiliary prosecutors in absolute numbers and in %, compared with the total number of appeals brought by representatives of auxiliary prosecutors

Appeal jurisdiction	Before 15 April 2016				After 15 April 2016				Total			
	in full		in part		in full		in part		in full		in part	
	n	%	n	%	n	%	n	%	n	%	n	%
Białystok	3	42.86	4	57.14	4	50.00	4	50.00	7	46.67	8	53.33
Łódź	0	0.00	2	100.00	4	44.44	5	55.56	4	36.36	7	63.64
Warsaw	4	44.44	5	55.56	2	33.33	4	66.67	6	40.00	9	60.00
Total	7	38.89	11	61.11	10	43.48	13	56.52	17	41.46	24	58.54

Source: Authors' study.

The last of the presented ratios concerns the scope of challenging by appeal by representatives of auxiliary prosecutors in comparison with the total number of appeals brought thereby. These ratios are distorted due to a small number of the appeals brought, which surely affects the

large spread of results – between 0% and 50% in case of challenging in full, and between 50 and 100% in case of challenging in part.

Table no. 6. Grounds for appeal brought by a representative of an auxiliary prosecutor

Ground for appeal	Before 15 April 2016	After 15 April 2016	Total
Article 438(1) of the CCP	7	12	19
Article 438(2) of the CCP	6	12	18
Article 438(3) of the CCP	5	12	17
Article 438(4) of the CCP	6	1	7
Total	24	37	61

Source: Authors' study.

In 41 appeals brought by representatives of auxiliary prosecutors out of all 595 examined cases, a total of 61 grounds for appeal from Article 438 of the CCP were raised. Of interest is the total lack of pleas referencing absolute reasons for appeal under Article 439 of the CCP. Most frequently (19 cases), appeals were brought on the basis of Article 438(1) (violation of substantive law) as well as 438(2) and 438(3) of the CCP (misapplication of the rules of procedure, if it could have affected the content of the decision, and error in fact assumed as a basis of the decision, if it could have affected the content of the decision – 18 and 17 cases respectively). The pleas of grossly disproportionate penalty, punitive measure, vindictive damages, or wrong application or failure to apply a detention order, forfeiture or another measure (Article 438(4)) were only reported 7 times. Although the period after 15 April 2016 accounted for slightly more than 50% of the examined cases than before 15 April 2016, the grounds for appeal under Article 438(1), 438(2) and 438(3) of the CCP were raised twice as often at that time. An exception was the basis from Article 438(4) of the CCP, which was only referenced once after 15 April 2016, and 6 times in the previous period.

Among the violations of substantive law, the appeals predominantly referenced Article 46 of the Penal Code (as much as 13 times),

considered by appellants to have been wrongly not applied by the court. On its basis, the court may order in case of sentencing, and it orders at request of the aggrieved party or another authorized person, applying the provisions of the civil law, the obligation to redress, in full or in part, the damage caused by the offense, or to compensate for the suffered harm (Section 1), and if ordering of such obligation is significantly impeded, the court may decree vindictive damages up to 200 000 zlotys on behalf of the aggrieved party (Section 2). Moreover, in individual cases, representatives of auxiliary prosecutors referenced violations of the following provisions:

- Article 60(3) of the Penal Code (extraordinary mitigation of the penalty);
- Articles 296(1) and 296(3) of the Penal Code in conjunction with Article 9(2) (abuse of powers or breach of the duty and the resulting significant property damage as an unintentional act);
- Article 72(1)(8) of the Penal Code (suspension of enforcement of the penalty and obligation of the defendant for another appropriate behaviour during the probation period, which may prevent repeated offence);
- Article 69(1) of the Penal Code (suspension of enforcement of the penalty);
- Article 41(1) of the Penal Code (decision on prohibition to hold a specific post or to perform a specific profession);
- Article 156(1)(2) of the Penal Code in conjunction with Article 64(1) of the Penal Code (causing of grievous bodily injury as a repeated offence);
- Article 197 of the Penal Code (the crime of rape).

In case of misapplication of the rules of procedure, if it could have affected the content of the decision (Article 438(2) of the CCP), Article 7 of the CCP in conjunction with Article 410 of the CCP (the principle of free appraisal of evidence and the obligation to adjudicate solely on the basis of the entirety of circumstances revealed during the main hearing) was indicated most frequently (8 times). Moreover, grounds referenced quite often included misapplication of, among other things, the

principle of objectivity (Article 4 of the CCP), principle of independence of jurisdiction of a court (Article 8 of the CCP), provisions instituting the premises for discontinuance of a criminal proceedings (Article 17(1) of the CCP), the provision of ordering of vindictive damages on behalf of the aggrieved party, the obligation to redress damage in full or in part or to compensate for the suffered harm (Article 415(1) of the CCP), as well as provisions concerning dismissal of motions as to evidence (Article 170(1) and 170(2) of the CCP).

The most frequently indicated errors in fact assumed as a basis of the decision, if it could have affected the content of the decision, were related to assumption by the court of an insufficient value of the incurred damage, statement that the defendant acted unintentionally, improper findings in the area of compensation and damage, statement that the premises of the offence alleged to the defendant are not fulfilled, and, in general, improper appraisal of evidence by the court of first instance.

The pleas under Article 438(4) indicated adjudication of a grossly lenient penalty (4 cases) and a grossly low amount under the obligation to redress the damage.

In all cases where appeals had been brought by representatives of auxiliary prosecutors, the court of appeal only deemed six pleas valid – one each under Article 438(2) and 438(4) of the CCP before 15 April 2016, and one each under Article 438(1), 438(2), 438(3) and 438(4) of the CCP after 15 April 2016. The measure of minimal activity of representatives of auxiliary prosecutors is the number of motions for admission of new evidence in the appeal proceedings, of which only 9 were submitted in all cases (2 before 15 April 2016 and 7 after this date). It should be noted all those motions as to evidence were recognized by courts.

On the other hand, the efficiency of the brought appeals can be evaluated on the basis of a final decision issued by the court of appeal. Before 15 April 2016, 1 appeal was recognized in full, 24 were not recognized, whereas 5 were recognized partially. The court of appeal upheld 12 judgments, while it amended 6 in part and upheld them in the remaining extent. After 15 April 2016, only 1 appeal was recognized as well, 21 were not recognized, and 4 were recognized partially. 13

judgments were upheld, only 1 was annulled in full and referred back to the court of first instance, 2 were partially amended and upheld in the remaining extent, and 1 judgment was partially annulled.

A different issue is the practice of appeal against judgments passed by courts of first instance by public prosecutors in the context of action towards protection of the powers of the aggrieved party. From the viewpoint of the latter, appeal against judgments in the area of compensatory measures seems most important. When bringing appeals, public prosecutors referenced violation of substantive law under Article 438(1) of the CCP, and specifically, failure to apply Article 46 of the Penal Code, as the grounds for appeal, only in five cases before 15 April 2016 and in five cases after that date. Only one appeal brought before 15 April 2016 gave a positive effect. In other cases, the court of appeal did not recognize the appellant's request and upheld the decision by the court of first instance. On the other hand, the most frequent ground for appeals brought by public prosecutors was grossly disproportionate penalty (or, less frequently, another measure), considered by the appellant to be too lenient. In this case, 21 appeals in which at least one of the referenced grounds was related to Article 438(1) of the CCP were received before 15 April 2016, while after this date, there were 36 such appeals. The effectiveness of an appeal before 15 April 2016 was relatively low, since only 6 appeals were recognized by the court of appeal and the judgment was partially amended. After 15 April 2016, the efficiency clearly increased, since almost a half of all appeals (16) was considered.

V. Conclusions

The above analysis of findings from file research enables drawing of the following conclusions:

1. The participation of aggrieved parties in the capacity of auxiliary prosecutors in only every third case indicates moderate interest in active participation in a criminal proceedings. Wider admission by the legislator of examination of evidence in an appeal proceedings and restriction of the possibility of cassation

adjudication causing annulment of judgments and referring them back, in favour of far-reaching decision-amending aspect, has not caused any increase in activity on the part of auxiliary prosecution.

2. Using the assistance of a professional representative in less than every fifth case and by much less than a half of auxiliary prosecutors creates even greater barriers for active procedural activity, especially due to the fact of compulsory representation by a lawyer in the area of appeals brought against judgments passed by regional courts. Potential appointment of representatives who have never been occupied with the given case upon passing of an unfavourable judgment, for the purpose of bringing of an appeal, is potentially less efficient in terms of appeal proceedings in comparison with engagement of a legal counsel or advisor from the outset.
3. The ratio of appeals brought by representatives of auxiliary prosecutors to all cases under research is grossly low; it only reached 6.89%. On the one hand, it evidences large stability of first-instance decisions, satisfaction of aggrieved parties with proceedings results, and lack of significant errors made by the court of first instance. On the other hand, as referenced above, it can evidence low activity of auxiliary prosecutors whose role is possibly played by a public prosecutor. Representatives in the Warsaw appeal jurisdiction are surely more active bringing appeals than in the Białystok and Łódź jurisdiction.
4. The distribution of pleas raised in appeals by representatives of auxiliary prosecutors is very even. An almost equal number of violations of substantive law, misapplications of rules of the procedure, if they could have affected the content of the decision, as well as errors in fact assumed as the basis of a decision, if they could have affected the content of the decision, was raised in both periods under research. Pleas of grossly disproportionate penalty, punitive measure, vindictive damages or wrong application or failure to apply a detention order, forfeiture or another measure were less than half that number. The error most frequently appealed against by the auxiliary prosecution is, which comes as

no wonder, failure to apply or too narrow application of Article 46 of the Penal Code, allowing or outright obliging the court to order the obligation to redress the damage caused by the offence or to compensate for the suffered harm. Among violations of rules of the procedure, the most frequently indicated one was violation of Article 7 of the CCP in conjunction with Article 410 of the CCP, i.e. non-compliance with the principle of free appraisal of evidence and the obligation to adjudicate solely on the basis of the entirety of circumstances revealed during the course of the main hearing. It should be stressed that courts of appeal only recognized six pleas in all brought appeals.

5. The research recorded a negligible amount (only 9) of motions as to evidence, submitted to courts of appeal by representatives of auxiliary prosecutors. This does not give a good impression of the procedural activity of the auxiliary prosecution.
6. Very low effectiveness of appeals brought by representatives of auxiliary prosecutors was recorded. Out of all cases, only two such appeals were recognized in full, and more than a dozen were recognized only partially. A vast majority of appeals were not recognized, and the judgment of the court of first instance was upheld in full.
7. The activity of public prosecutors in case of appeal against judgments in favour of the aggrieved party is not high. In both periods under analysis, only five appeals brought indicated violation of substantive law through failure to apply Article 46 of the Penal Code and failure to order the obligation to redress the damage or to compensate as grounds for appeal, and there was only one case when such an appeal was recognized by a court of appeal. Appeals referencing grossly disproportionate penalty and requesting an increase thereof comprised the largest group in terms of number (21 before and 36 after 15 April 2016); simultaneously, they were a significantly more effective measure than appeals referencing violation of Article 46 of the Penal Code. 6 appeals were recognized before 15 April 2016 and as much as 16 after this date.

Appendix no. 1

SURVEY QUESTIONNAIRE

"The model of fair appeal proceedings in the Polish criminal procedure"

To whom it may concern,
As investigators under the research grant "*Is the Polish model of criminal appeal proceedings fair?*", implemented at the Department of Criminal Procedure of the Faculty of Law of the University of Białystok, under supervision of prof. zw. dr hab. Cezary Kulesza, as a part of the OPUS 8 programme and financed from the resources of the National Science Centre, we kindly ask you to complete the questionnaire of an anonymous survey concerning fairness of appeal proceedings. The questions are closed; please circle one answer variant.

1. How do you assess the model of appeal proceedings, as shaped by the amendments of the Code of Criminal Procedure of 1 July 2015 and 15 April 2016, in relation to the previous model (in force until 30 June 2015)?
   a) positively
   b) negatively
   c) difficult to say
2. In your opinion, have the changes in the model introduced any significant differences in the functioning of appeal proceedings ?
   a) yes
   b) no
   c) difficult to say
3. How do you assess the broadening of possibilities of conducting of evidentiary proceedings by a court of appeal?
   a) positively
   b) negatively
   c) difficult to say
4. In your opinion, do courts of appeal currently have sufficient possibilities of conducting of evidentiary proceedings?
   a) yes

b) no

c) difficult to say

5. In your opinion, do courts of appeal make use of the extended possibilities of conducting of evidentiary proceedings?

a) yes

b) no

c) difficult to say

6. In your opinion, is evidence preclusion needed in appeal proceedings?

a) yes

b) no

7. Is evidence preclusion present in the current model of appeal proceedings?

a) yes

b) yes, but to a limited extent

c) no

d) difficult to say

8. In your opinion, how often is there a need for a court of appeal to take the initiative to adduce evidence?

a) very often

b) often

c) rarely

d) very rarely

9. How often has the parties' initiative to adduce evidence in an appeal proceedings been useful in your work for resolution of the case?

a) very often

b) often

c) rarely

d) very rarely

10. In your opinion, does every appellant need to indicate pleas in their appeal?

a) yes

b) no

c) difficult to say

11. In your opinion, which of the pleas mentioned in Article 438 of the CCP is raised most frequently (individually or jointly with others) in appeals?

a) violation of substantive law

b) misapplication of the rules of procedure

c) errors of fact assumed as a basis of the judgment

d) grossly disproportionate penalty or punitive measure

e) difficult to say

12. In your opinion, does the regulation of Article 437(2), 2nd sentence, of the CCP actually restricts the possibility of cassation adjudication by a court of appeal?

a) yes

b) no

c) difficult to say

13. In the context of Article 437(2), 2nd sentence, of the CCP, does the necessity to conduct evidentiary proceedings concerning the substance of the case always cause a necessity to annul the judgment and refer the case back?

a) yes

b) no

14. In your opinion, does the catalogue of absolute reasons for appeal from Article 439 of the CCP needs amendment?

a) yes, expansion

b) yes, restriction

c) no

15. How do you evaluate the relevance of limitation of the possibility of appeal against consensual judgments (Article 447(5) of the CCP)?

a) positively

b) negatively

16. In your opinion, does the current wording of the *reformationis in peius* prohibition sufficiently guarantee the interests of the parties?

a) yes

b) no

c) difficult to say

17. Are the current regulations concerning enforced appearance of a person deprived of liberty at an appeal hearing sufficient to ensure the right of defence?

a) yes

b) no

c) difficult to say

18. How do you assess the current wording of the *ne peius* rules in Article 454 of the CCP?

a) positively

b) negatively

19. In your opinion, will introduction of complaint against the judgment by a court of appeal affect acceleration of the entire criminal procedure?

a) yes

b) no

c) difficult to say

20. In your opinion, is the Polish model of criminal appeal proceedings fair?

a) yes

b) no

c) difficult to say

Data of the person completing the questionnaire:

1. Workplace:

□ regional court	□ appellate court

2. Work experience at the court of appeal

□ up to 1 year	□ 1-5 years	□ 6-10 years	□ 11-15 years	□ 16-20 years	□ above 20 years

Appendix no. 2

Case no.	
Case ref. No.	
appeal	
court	
act alleged in the indictment	
act attributed in the judgment by the court of 1st instance / acquittal / discontinuance / conditional discontinuance	
sanctions adjudicated in the judgment by the court of 1st instance	
passing date of the 1st instance judgment	
drawing-up date of grounds for the judgment	
receipt date of the case at the court of appeal	
date of the judgment by the court of appeal	
number of annulments of the judgment by the court of 1st instance in the given case before the resolution of the examined appeal	

Question no.	Question content	Answer variants		a) defendant	b) defender	c) public prosecutor	d) auxiliary prosecutor	e) auxiliary prosecutor's representative
1	Proceedings participants authorized to bring the appeal							
2	Entity bringing the appeal							

3	Presence of a defender / representative of the party's choice							
4	Presence of a public defender / representative of the party							
5	Scope of the appeal	a) direction of appeal - to the detriment (1); in favour (0); not applicable (x)						
		b) in full						
		c) in part						
		d) no specific decision (applicable to cases subject to the regime of the Act of 11 March 2016)						
		e) grounds for the judgment alone						
		f) contested decision or finding (example answers: guilt; legal classification; penalty; punitive measure, compensatory measure, etc.)						
		g) the appellant's request						

6	Grounds for the brought appeal	a) Article 438(1) of the CCP						
		a') state the violated provision						
		b) Article 438(2) of the CCP						
		b') state the violated provision						
		c) Article 438(3) of the CCP						
		c') indicate the error						
		d) Article 438(4) of the CCP						
		d') specify the violation						
		e) Article 439(1)(1) of the CCP						
		f) Article 439(1)(2) of the CCP						
		g) Article 439(1)(3) of the CCP						
		h) Article 439(1)(4) of the CCP						
		i) Article 439(1)(5) of the CCP						
		j) Article 439(1)(6) of the CCP						
		k) Article 439(1)(7) of the CCP						
		l) Article 439(1)(8) of the CCP						
		ł) Article 439(1)(9) of the CCP						
		m) Article 439(1)(10) of the CCP						
		n) Article 439(1)(11) of the CCP						

7	Errors raised by the appellant or subject to consideration ex officio, to which the court has restricted the examination of the appeal pursuant to Article 436 of the CCP	a) Article 438(1) of the CCP						
		a') state the violated provision						
		b) Article 438(2) of the CCP						
		b') state the violated provision						
		c) Article 438(3) of the CCP						
		c') indicate the error						
		d) Article 438(4) of the CCP						
		d') specify the violation						
		e) Article 439(1)(1) of the CCP						
		f) Article 439(1)(2) of the CCP						
		g) Article 439(1)(3) of the CCP						
		h) Article 439(1)(4) of the CCP						
		i) Article 439(1)(5) of the CCP						
		j) Article 439(1)(6) of the CCP						
		k) Article 439(1)(7) of the CCP						
		l) Article 439(1)(8) of the CCP						
		ł) Article 439(1)(9) of the CCP						
		m) Article 439(1)(10) of the CCP						
		n) Article 439(1)(11) of the CCP						

8	Grounds for appeal, deemed valid by the court	a) Article 438(1) of the CCP						
		a') state the violated provision						
		b) Article 438(2) of the CCP						
		b') state the violated provision						
		c) Article 438(3) of the CCP						
		c') indicate the error						
		d) Article 438(4) of the CCP						
		d') specify the violation						
		e) Article 439(1)(1) of the CCP						
		f) Article 439(1)(2) of the CCP						
		g) Article 439(1)(3) of the CCP						
		h) Article 439(1)(4) of the CCP						
		i) Article 439(1)(5) of the CCP						
		j) Article 439(1)(6) of the CCP						
		k) Article 439(1)(7) of the CCP						
		l) Article 439(1)(8) of the CCP						
		ł) Article 439(1)(9) of the CCP						
		m) Article 439(1)(10) of the CCP						
		n) Article 439(1)(11) of the CCP						
9	Examination of the appeal	at a hearing (1); at a session (0)						

10	Return of the case file to the court of 1st instance pursuant to Article 449a of the CCP (applicable to cases subject to the regime of the Act of 27 September 2013)	yes (1); no (0); not applicable (x)							
11	Number of motions for admission of new evidence								
12	Number of motions recognized by the court of appeal								
13	Number of motions unrecognized under individual legal bases	a) Article 170 of the CCP							
		a') specify the section							
		b) Article 427(3) of the CCP							
		c) Article 452(2) of the CCP (applicable to cases subject to the regime of the Act of 11 March 2016)							
		d) another basis							
		d') specify the basis							
14	Ex officio admission of evidence in the appeal proceedings	yes (1); no (0)							
15	Actual appearance of the defendant at an appeal hearing or session	a) optional appearance							
		b) obligatory appearance under a decision by the court / president of the court							
		c) appearance of a defendant deprived of liberty at his request							
		d) appearance of a defendant deprived of liberty refused by the court despite his request							
		d') state the reason for refusal							
		e) actual absence despite such a possibility or obligation							
		e') state the cause, if possible							

16	Actual appearance of the defender at an appeal hearing or session	a) optional appearance						
		b) obligatory appearance under the parliamentary act						
		c) obligatory appearance under a decision by the court / president of the court						
17	Effect of the brought appeal	a) recognition						
		b) non-recognition						
		c) partial recognition						
18	Kind of decision issued by the court of appeal (caution: all components of variants e) to o), i.e. upholding, change and annulment, are always in part, not in full)	a) upholding of the contested decision (in full)						
		b) amendment of the contested decision in full						
		c) annulment of the contested decision in full and discontinuance of the proceedings						
		d) annulment of the contested decision in full and referral of the case back to the court of 1st instance						
		e) variant a) + b)						
		f) variant a) + c)						
		g) variant a) + d)						
		h) variant b) + c)						
		i) variant b) + d)						
		j) variant c) + d)						
		k) variant a) + b) + c)						
		l) variant a) + b) + d)						
		m) variant a) + c) + d)						
		n) variant b) + c) + d)						
		o) variant a) + b) + c) + d)						

19	Case examination outside the scope of appeal and the raised pleas (grounds)	a) Article 435 of the CCP						
		b) Article 439 of the CCP						
		c) Article 440 of the CCP						
		d) Article 455 of the CCP						
20	Departure from the *reformationis in peius* principle	yes (1); no (0)						
21	Indications for the court of 1st instance, re-examining the case following annulment of the judgment	yes (1); no (0)						
		if yes, describe briefly						

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