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The Participation of a Social Factor in Criminal Proceedings in the Light of Court Judicature

Abstract: The paper presents the problem of the perceived participation of social factor in a criminal trial compared to the existing jurisdiction of common courts and the Supreme Court. The article is an attempt to assess the extent and type of participation of social factor in criminal proceedings, pointing out both new opportunities and constraints for all participants to the process. These issues will also be examined on the basis of jurisprudence.

Keywords: social factor, criminal procedure, assumptions, jurisdiction

1. Introduction

Participation of social factor in criminal proceedings derives from the necessity to maintain standards of a democratic state of law, where punishment means an appropriate response of the society to a crime committed by a perpetrator¹.

For the above reason, the doctrine underlines a binding force of a specific principle of the participation of social factor in a criminal trial², grounded in Art. 182 of the Polish Constitution³. This Article stipulates that the participation of the citizenry in the administration of justice is statutorily specified.

1 See more: L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2006, p. 66; A. Murzynowski, *Istota i zasady procesu karnego*, Warszawa 1984, p. 222; F. Prusak, *Czynnik społeczny w procesie karnym*, Warszawa 1975, p. 6; K. Wieczorek, *Udział czynnika społecznego w orzekaniu w polskim i amerykańskim procesie*, Warszawa 2012, p. 9.

2 A. Sakowicz, (in:) A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz 2016*, Warszawa 2016, p. 24-25.

3 *Journal of Law* No. 78, item 483 as amended.

The Code of Criminal Procedure⁴ (hereinafter the CCP) sets forth in Art. 3 that within the scope laid down in the legislation, criminal proceedings shall be conducted with the participation of a representative of the community. However, this regulation fails to specify the scope of social factor participation in criminal proceedings.

On the other hand, certain forms of the participation of social factor in the Polish administration of criminal justice may be found in different parts of the Code of Criminal Procedure. Therefore the scope of participation of social factor in a criminal trial should be defined precisely including previous and current court rulings.

For the above reasons, there is a need to analyze the relevant case law to find out not only how the principle of the participation of social factor in a criminal trial is interpreted, but also with regard to possibilities of practical participation of the citizenry in criminal cases. The opinions expressed in the doctrine are not uniform with reference to the issue of embracing other procedural forms of cooperation between the community and the justice system by a common rule of the participation of social factor in a criminal trial⁵. Thus this study will be an attempt at resolving the issue of the participation of the above factor in a criminal trial from the perspective of court rulings.

2. Social factor in a criminal trial

Undeniably, the participation of social factor in a criminal trial may be manifested in different forms⁶ depending on the interpretation of this notion. In a broad sense, the scope of “participation of social factor” concerns forms of procedural cooperation which encompass: 1) the principle of a court audience, 2) the institution of a social representative, and 3) participation of lay judges in a criminal trial. In a narrow sense, the scope of “participation of social factor” is limited to a possibility of participation of a social representative in criminal proceedings⁷ and the assurance of the participation of lay judges in criminal cases. Nevertheless, one should support the opinion of the doctrine’s representatives according to which a court audience, i.e. the principle of transparency, is the effect of the participation of the community in a criminal trial. Procedural bodies should engage citizens into cooperation in criminal proceedings following the principle of cooperation between the society and institutions in the prosecution of crime⁸. Thus it means that the notion and scope of the “participation of social factor” in a criminal trial should be interpreted broadly.

4 Uniform text: Journal of Laws of 2016, item 1749.

5 Also see: A. Sakowicz, (in:) A. Sakowicz (ed.) *Kodeks...*, *op. cit.*, p. 25.

6 K. Wieczorek, *Udział...*, *op. cit.*, p. 10.

7 W. Daszkiewicz, *Proces karny. Część ogólna*, tom I, Poznań 1996, p. 121-122; T. Grzegorzcyk, *Kodeks postępowania karnego. Komentarz*, tom. I, Warszawa 2014, p. 56; P. Hofmański, E. Sadzik, K. Zgrzyzek, *Kodeks postępowania karnego. Tom 1. Komentarz do artykułów 1-296*, Warszawa 2011, p. 50.

8 K. Marszał, *Proces karny*, Katowice 2013, p. 59-60; K. Marszał, *Proces karny. Zagadnienia ogólne*, Katowice 2008, p. 44; I Krześniński, *Ławnik ludowy, czyli ławnik*, „*Rzeczpospolita*” 2003, No. 6; S. Waltoś, *Proces karny*, Warszawa 2016, p. 240-246.

2.1. The principle of a court audience as a form of the participation of social factor in a criminal trial

The literature points out that the broadest form of the participation of social factor in a criminal trial is a possibility of participation of citizens in public court hearings⁹. The principle of an open hearing results directly from the content of Art. 355 of the CCP; it is further defined in Art. 356 of the CCP by referring it only to those who have attained maturity (adulthood) and are unarmed. However, pursuant to the content of Art. 356 § 2 of the CCP, with the permission of a presiding judge, a trial held in open court may be also attended by minors and persons legally obligated to carry arms.

Moreover, persons in a condition incompatible with the court's dignity shall not be admitted to the trial (Art. 356 § 3 of the CCP).

The issue of open court and an ensuing possibility of the participation of citizens in court sessions *de lege lata* in criminal cases was debatable. The reasoning to the resolution of the Supreme Court of 25 March 2004¹⁰ pointed out that Art. 96 of the CCP merely specifies entities or subjects (parties and other individuals) who are entitled to take part in the session. It was noticed, however, that this provision also entails that each court session is accessible not only to the parties and individuals who are not the parties specified in Art. 96 § 1 of the CCP, but also third parties – audience – whose presence is not excluded by any provision of the Criminal Procedure Act. What is more, the Supreme Court pointed out in the above decision that the exclusion of an open hearing may only be effected on the basis of the provisions of Chapter 42 of the Code of Criminal Procedure which are applied analogously in the same cases as the exclusion of an open court session. The Supreme Court looked for the support of this opinion in the content of Art. 45 par. 1 of the Constitution, which enshrines a “public hearing of a case” but not an open court session, as well as in Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹¹.

The Court of Appeal in Katowice expressed an opposite opinion in its decision of 8 December 2010¹², 18 January 2011¹³ and 14 September 2011¹⁴. According to the last decision thereof, Art. 96 of the CCP envisages the participation of the parties and individuals who are not the parties in court sessions in a suitable scope whereas this provision does not entail the participation of audience in sessions. In other words, according to the Court of Appeal in Katowice, there are no grounds to transfer regulations concerning external openness of hearings to sessions.

9 K. Wieczorek, *Udział...*, *op. cit.*, p. 11.

10 Supreme Court's Resolution of 25 March 2004, I KZP 46/03, OSNKW 2004, No. 4, item 39.

11 Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284).

12 Decision of Court of Appeal in Katowice of 8 December 2010, II S 69/10, Lex No. 1642329.

13 Decision of Court of Appeal in Katowice of 18 January 2011, II AKz 880/10, Lex No. 1681030.

14 Decision of Court of Appeal in Katowice of 14 September 2011, II S 40/11, Lex No. 1544218.

Due to discrepancies of opinions within the scope of external openness of sessions, the Supreme Court issued a resolution on this matter on 28 March 2012 on the basis of Art. 60 § 1 of the Act of 23 November 2002 on Supreme Court¹⁵ and the application of First President of Supreme Court of 19 December 2011 for the resolution passed by seven judges of Supreme Court. The Supreme Court claimed in the conclusion to this resolution that “1. In criminal proceedings, open sessions are those where a court “hears or resolves a case” in the meaning of Art. 42 § 2 of the Act of 27 July 2001 on the Common Courts Organization (Journal of Laws No. 98, item 1070 as amended). 2. The notion of a “case” interpreted under the content of Art. 45 par. 1 of the Polish Constitution means a case within the scope of the subject of the proceedings as well as incidental issue which is connected with a possible interference in the sphere of fundamental rights enshrined by the provisions of the Constitution. 3. Exclusion of an open session in which a court either hears or resolves a case is admitted solely in cases specified in the Act (Art. 42 § 3 of the Act on the Common Courts Organization)”¹⁶.

On the other hand, with regard to the prerequisites of the exclusion of openness, the Court of Appeal in Białystok expressed an opinion in the judgment of 19 March 2015 according to which even strong stress connected with the defendant’s statement made in court publicly is not the reasons for the exclusion of an open hearing. The Court claimed in the above cited judgment that “with regard to the defendant and her personal profile, it can be said that each public statement about the act evoked strong stressful reactions, which could be identified with the prerequisites of the exclusion of the public. The exclusion of openness occurs solely in cases specified in the Act – Art. 360 of the CCP”¹⁷.

On the other hand, in accordance with the thesis of the Court of Appeal in Szczecin, expressed in the judgment of 6 November 2014 in the case II AKa 198/14, “1. An open hearing, as a special element of transparency of the system of justice, contributes to the fulfilment of the purpose of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, i.e. a fair trial, the guarantee of which is one of the basic principles of a democratic society. Procedural guarantees envisaged in the norm of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with regard to the defendant (fair trial) are also applied in relation to the person subject to lustration proceedings. 2. In a democratic state of law, general pronouncement of materials generated by communistic secret service as state secret as well as restricting the person who is subject to lustration access to case files, is not consistent with the principle of fair lus-

15 Uniform text: Journal of Laws of 2013, item 499 as amended.

16 Resolution of 7 Judges of Supreme Court, Criminal Chamber, of 28 March 2012, OSNKW 2012, No. 4, item 36, Legalis No. 440090.

17 Court of Appeal in Białystok’s judgment of 19 March 2015, II AKa 29/15, KZS 2015, No. 9, item 58, Legalis no 1241695.

tration proceedings including the principle of equality of arms. 3. If the Act orders a judgment to be served together with reasoning, the action pursuant to the content of Art. 100 § 5 of the CCP is admissible solely if an open hearing has been excluded whereas the ground thereof was the provision of Art. 360 § 1 point 3 of the CCP¹⁸.

In the ruling of 30 September 2009, the Supreme Court decided that “a judgment is always announced openly (publicly) even if an open hearing as well as the reasons for judgment have been fully excluded (Art. 45 par. 2, sentence 2 of the Polish Constitution, Art. 364 § 2 of the CCP). Thus if the so called conclusion of a judgment containing elements specified in Art. 413 of the CCP, i.e. including a name, surname and other data identifying the defendant (Art. 413 § 1 point 3 of the CCP), and description and legal evaluation of a deed the defendant has been accused of by the prosecutor (Art. 413 § 1 point 4 of the CCP) must be announced openly (publicly) for constitutional reasons whilst court proceedings should be carried out promptly and without undue delay, a person who assigned a confidentiality clause to pleadings containing these data (or his or her superior) is obliged to give their consent to change or cancel this clause within the above scope before an indictment is brought¹⁹.

Moreover, some attention should be paid to the content of Art. 360 of the CCP, amended under the Act of 5 August 2016 on the Amendment of the Code of Criminal Procedure, Act on the Profession of a Physician and Dentist and the Act on the Rights of Patients and Patient Ombudsman²⁰, on the exclusion on an open hearing. A previous obligatory nature of the exclusion of openness, which resulted from § 1 of this provision on the ground of fulfilled prerequisites listed in points 1-4 thereof, has become optional. Furthermore, the catalogue of prerequisites allowing the court to exclude an open hearing has been changed too. Even though after the changes introduced in 2016 the circumstances of the exclusion of an open hearing listed in § 1 above have been extended by a possibility of “an insult to decency”, other prerequisites have been maintained²¹. Although a decision to exclude openness is vested in a first-instance court, a role of a prosecutor seems to be superior because pursuant to the content of § 2 of the above provision, if a prosecutor objects to the exclusion of openness, a hearing shall be held publicly. The prosecutor’s opinion and his or her objection to the exclusion of an open hearing is, therefore, of key importance after the changes introduced in 2016.

18 Court of Appeal in Szczecin’s judgment of 6 November 2014, II AKa 198/14, KZS 2015, no 4, item 115, Legalis No. 1219084.

19 Supreme Court’s judgment of 30 September 2009, I KZP 13/09, OSNKW 2009 No. 11, item 93, Legalis No. 171979.

20 Journal of Laws, item 1070.

21 See more: M. Zimna, Wylączenie jawności rozprawy jako gwarancja ochrony interesów uczestników postępowania karnego, “Prokuratura i Prawo” 2016, No. 9, p. 87-108.

2.2. The institution of a community representative as a form of social factor participation in a criminal trial

A possibility of participation of a social organization representative in a criminal trial is regulated in the provisions of Art. 90-91 of the CCP²² as well as Art. 271 § 1 of the CCP (social organization guarantee). Pursuant to the reading of Art. 90 § 1 of the CCP, such participation should be petitioned if it is necessary to protect community or individual interests within the statutory purposes of such an organisation, especially in matters pertaining to the protection of human rights and freedoms.

On the other hand, pursuant to the new reading of Art. 90 § 2 of the CCP, in their petition, a social organisation shall indicate a community or individual interest within the statutory purposes of this organisation and designate a person who is to represent this organization. A certified copy of the articles of association or another document regulating this organization's activity shall be enclosed to the petition. A representative of a social organization shall file his or her power of attorney in writing with the court.

Pursuant to Art. 90 § 3 of the CCP, the court shall admit a representative of a social organization to participate in a case if at least one of the parties thereto gives their consent. The party may withdraw their consent at any time. If only one party does not agree for a representative of a social organization to participate in the case, the court shall exclude him or her from the participation in a trial unless his or her participation in court proceedings is in the interests of justice.

Furthermore, under § 4 of the above provision, the court shall admit a representative of a social organization to participate in a case regardless of a lack of consent of the parties thereto if it is in the interest of justice. However, pursuant to the content of § 5, the court shall refuse to admit a representative of a social organization to participate in a case if a community or individual interest indicated in the petition has been found not consistent with the statutory purposes of this organization or it is not connected with the case being heard.

According to § 6, the court may limit a number of representatives of a social organization participating in a case if it is necessary to secure a proper course of proceedings. The court shall then request the prosecutor and the defendant to suggest not more than two representatives of social organizations who could take part in the case. If there is more than one defendant or more than one prosecutor in the case, each of them can suggest one representative. Failure to indicate a representative shall be deemed as a withdrawal of consent to his or her participation in the case. Regardless of the parties' opinion, the court may decide about continued participation of in-

22 See more: M. Tomkiewicz, *Udział przedstawiciela społecznego w procesie karnym*, "Prokuratura i Prawo" 2012, No. 7/8, p. 107-120 and literature quoted therein; K. Woźniewski, *Przedstawiciel społeczny*, (in:) C. Kulesza (ed), *System prawa karnego procesowego*, v. VI, Warszawa 2016, p. 1254-1290 and literature quoted therein.

dividual representatives of social organizations if their participation is in the interest of justice.

Procedural rights of a representative of a social organization ensue from the content of Art. 91 of the CCP and encompass the following possibilities:

- participation in a trial;
- making statements;
- submitting written motions.

Despite the indicated scope of rights envisaged for a representative of a social organization in a criminal trial, the relevant literature has pointed out that the institution of a community representative is a dead object²³.

In the judgment of 29 October 2003 the Court of Appeal in Krakow ruled that “the court shall not control how the participants to the proceedings exercise their rights even if a community representative has limited his or her activity to the cooperation with the defendant’s Defence Counsel”²⁴. It implies that a possible activity of a community representative may be limited to cooperation with one of the parties to criminal proceedings. If so, a representative of a social organization may fulfil a role of a specific additional “assistant” of litigants; all the more, also because presently a consent given by one of the parties to the participation of a community representative in a criminal trial ensues an obligatory duty to admit him or her to participate in the proceedings.

The above thesis is confirmed by the objection raised by the complainant in the cassation in effect of which the Supreme Court issued a decision on 10 January 2007²⁵. The attorney of a private prosecutor filing the above complaint alleged violation of Art. 90 § 3 of the CCP, which occurred through failure to admit a representative of a social organization in the proceedings, in result of which there may have arisen negative consequences affecting the parties which, in turn, may have caused possible detriment to the interest of justice.

Even though neither the attorney’s cassation nor the alleged prevention of the participation of a community representative in the case have been allowed by the Supreme Court, a possible activity of a social organization representative in a criminal trial has been underlined this way.

On the other hand, in the judgment of 30 June 2014 the Court of Appeal in Warsaw ruled that “Art. 91 of the CCP clearly limits the rights of a community representative to possible participation in a trial, making statements and submitting written motions. The right to make a statement cannot be identified with the right to ask questions to witnesses or suspects, or offer evidence”²⁶. However, we should remem-

23 M. Tomkiewicz, *Udział...*, *op. cit.*, p. 108.

24 Judgment of Court of Appeal in Krakow of 29 October 2003, II AKa 175/03, KZS 2004, No. 4, item 43, Lex no 118903.

25 Decision of Supreme Court of 10 January 2007, V KK 290/06, Lex No. 569221.

26 Judgment of the Court of Appeal in Warsaw of 30 June 2014, II AKa 78/14, Lex No. 1496107.

ber that written motions submitted by a community representative may be an important source of information both about possible evidence and the opinion on the case. This, in turn, may affect the first-instance court's requirement to provide evidence.

After the amendments to the Code of Criminal Procedure of 2016, a reversal of the obligation to declare the participation of a community representative in a criminal trial in due time (i.e. before the opening of court proceedings) may affect the participation of a higher number of community representatives in a criminal trial who fulfil a role of additional judicial assistants not only of the court but litigants too.

A social organization may play an important role when the institution of a personal guaranty is applied. Art. 271 of the CCP is of a hybrid nature and lists two categories of entities authorized to offer a guaranty. A social organization is included in the second category²⁷. Pursuant to Art. 271 of the CCP, a guaranty may be given by a social organisation of which the defendant is a member, upon the motion of such persons. Such a guaranty shall state that the accused will appear whenever summoned and will not unlawfully obstruct the course of the proceedings. Furthermore, § 2 of the above provision stipulates that the collective or social organisation shall enclose an excerpt from the minutes containing a resolution on undertaking such a guaranty to the motion requesting that guaranty be accepted.

Assuming the function of a social guarantor, a social organization and a person acting on its behalf as a guarantor are obliged to ensure that the defendant will appear whenever summoned by the court and will not unlawfully obstruct the course of the proceedings (because pursuant to § 3, the motion requesting that guaranty be accepted should indicate the person who will undertake the duties of a guaranty-provider; such a person shall make a statement to the effect that he or she accepts such duties). A social guarantor is obliged to immediately notify the court or prosecutor about the defendant's doings he or she is aware of which aim at evading the obligation to appear as summoned, or otherwise unlawfully obstruct the proceedings. The relevant case law implies that, generally, there is one requirement to provide a guaranty – the defendant should be a member of a community providing the guaranty²⁸.

2.3. Participation of lay judges as a form of social factor in a criminal trial

Within the context of social factor participation in a criminal trial, as far as criminal proceedings' objectives are concerned, the participation of this factor in sentencing itself is of utmost importance. Under the Code of Criminal Procedure, a court may be composed of two types of benches: it may be solely composed of a professional factor, or a professional and social (lay judges) factor as well. It should be noticed here that the importance of lay judges has been recently more and more

27 K. Dudka, *Praktyka stosowania nieizolacyjnych środków zapobiegawczych w polskim procesie karnym*, Warszawa 2016, p. 112-113.

28 Resolution of Supreme Court of 27 September 1980, U 1/80, OSNKW 1980, No. 10/11, item 79.

undermined whereas the scope of cases they may adjudicate while sitting in a bench²⁹ has been diminishing, the effects of which are far-reaching³⁰.

Pursuant to Art. 4 § 2 of the Act of 27 July 2001 on the Common Courts Organization³¹ (hereinafter CCO), when resolving a case, lay judges are vested with the same rights as judges (essential issues connected with sentencing will be discussed later).

Relevant case law mostly refers to the composition of courts while marginally treating the validity of the participation of lay judges therein, merely indicating formal prerequisites of their participation included in the provisions of the CCP. The Supreme Court has expressed its opinion thereon many a time in the following way: “there are no better or worse benches; there are only right and improper benches. The legislator distinguishes benches with regard to a forum (court), phase of proceedings, alleged deed, and likely and actually imposed punishment”³². It is worth noticing here that the judicature does not emphasize the participation of lay judges in resolving cases in the context of the idea of a civil community and significant functions it fulfils such as social control or liaison between the court and community.

In the decision of 22 April 2009 (where the Defence Counsel of the person convicted in cassation alleged the infringement of, among others, Art. 439 § 1 point 2 in connection with Art. 3 of the CCP) the Supreme Court ruled that the allegation is groundless because “contrary to the claim made by the author of cassation, the composition of the court in the case was not improper; therefore the claim that the court heard the case without the participation of lay judges is groundless”. The Supreme Court believed that the above provisions would have been infringed only if the bench had actually lacked lay judges while the verdict had been passed by one professional judge. Yet as it ensued from the case files’ analysis, the names of lay judges were omitted in the record of the trial by mistake, which was then corrected by the Order of 5 March 2008 including the content of the clerk’s statement as of the same day [...]. The judgment of 19 November 2007 is signed by the lay judges, whose signatures are placed beside the presiding judge’s signature. According to the Supreme Court, negligence involving the omission of lay judges’ surnames in the record of the trial cannot be identified with the absolute cause of the decision’s reversal mentioned in Art. 439 § 1 point 2 of the CCP³³. Diminishing the importance of lay judges, the above judgment points out a distinct opinion functioning in the doctrine with regard to the perception of a social factor in a trial as a manifestation of maintained standards of a democratic state of law³⁴.

29 K.T. Boratyńska, Ł. Chojniak, W. Jasiński, *Postępowanie karne*, Warszawa 2012, p. 67.

30 See more: S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, wyd. 12, Warszawa 2016, p. 242; S. Waltoś, *W dziesięciolecie obowiązywania Kodeksu postępowania karnego*, “Państwo i Prawo” 2009, No. 4, p. 6.

31 Uniform text: *Journal of Law* of 2015, item 133 as amended.

32 Decision of Supreme Court of 30 October 2014, I KZP 22/14, OSNKW 2015, No. 1, item 2.

33 Decision of Supreme Court of 22 April 2009, III KK 5/09, OSNwSK 2009, No. 1, item 944, Legalis No. 444075.

34 A. Murzynowski, *Istota i zasady procesu karnego*, Warszawa 1984, p. 222.

Within the above scope, the case law is not uniform. In the judgment of 29 August 2013³⁵, the Court of Appeal in Białystok ruled that “each composition of the bench contrary to the Act elicits the necessity to reverse the judgment under appeal. It should be indicated that the content of Art. 28 of the CCP makes the composition of the bench dependent on the category of a case being resolved”. According to the Supreme Court’s case law, if the court resolved a case in the bench composed of lay judges (Art. 28 § 2 of the CCP) while it should have heard a case under the content of Art. 28 § 1 of the CCP in the bench consisting of one judge, the judgment under appeal should be reversed. A court of appeal is obliged to examine the regularity of a bench composition to monitor the occurrence of one of the absolute prerequisites of an appeal. A court of appeal should establish such facts *ex officio* regardless of the limits of appellate measures³⁶.

The Court of Appeal in Warsaw adopted a similar opinion claiming that “each composition of the bench resolving a case different from the one specified in Art. 28 of the CCP is not right. It refers to the situation when it is not envisaged by the Act, or stipulated in the Act but not referring to a given category of cases. Thus each composition of the bench contrary to the Act elicits the need to reverse the judgment under appeal”³⁷.

Some attention should be paid to the opinions that are well-established in the judiciary and which refer to the causes of extended bench composition, i.e. participation of lay judges therein. A criminal act itself is of decisive importance in this aspect rather than a forecast of legal evaluation in the indictment³⁸.

The Court of Appeal in Krakow considers the above issue in the following way: “a legal evaluation included in the indictment is not a final settlement with regard to the composition of a bench. This evaluation is only a proposed legal assessment of the alleged act, which by all means does not bind the court. The court may change this evaluation not only in the judgment but also during the initial examination of the prosecution; thus the court may verify it if it is wrong, which will ensue the scope of the court jurisdiction (Art. 339 § 3 of the CCP). It does not bind the court in further proceedings (Art. 347 of the CCP). Evaluating if the bench has been properly composed (Art. 439 § 1 point 2 of the CCP), a criminal act is of decisive importance therein, and neither the act’s description nor legal evaluation proposed in the indictment bind the court”³⁹.

The above opinion has also been supported by the Supreme Court, according to which “if a specific composition of the bench depends on the type of a case to be tried (Art. 28 § 3 of the CCP), a criminal act whose commitment is indicated in the indict-

35 Judgment of the Court of Appeal in Białystok of 29 August 2013, II AKa 161/13, Lex No. 1372238.

36 Decision of Supreme Court of 30 October 2014, I KZP 22/14, OSNKW 2015, No. 1, item 2.

37 Judgment of the Court of Appeal in Warsaw of 7 December 2012, II AKa 356/12, Lex No. 1240281; and: Judgment of the Court of Appeal in Lublin of 29 September 2009, II AKa 192/09, Lex No. 550483.

38 Judgment of the Court of Appeal in Warsaw of 7 December 2012, II AKa 356/12, Lex No. 1240281.

39 Judgment of the Court of Appeal in Krakow of 25 January 2005, II AKa 252/05, KZS 2006, No. 1, item 35.

ment decides whether the bench “has been improperly composed” (Art. 439 § 1 point 2 of the CCP). However, neither the act’s description nor legal evaluation proposed in the indictment – similar to deciding upon the court’s jurisdiction - bind the court⁴⁰.

Case law is uniform in relation to the above issue, i.e. an extended composition of the bench is decided by a possibility of accepted legal evaluation of the deed itself, which justifies the necessity to resolve the case in the adopted composition of the bench. A specified bench is determined by the committed criminal act, i.e. a factual event rather than a description of the act or legal evaluation included in the indictment. The bench resolving a case is not bound in any way by the above⁴¹. However, it is not explicit with a decisive statement contained in Art. 28 § 4, where this matter refers to a criminal deed punished by a life sentence⁴².

Due to a number of decisions within the scope of issuing an aggregate sentence, this issue appears to be problematic and worth analyzing. Two different case laws can be distinguished herein. The Court of Appeal in Krakow treated this issue in the following way: “Passing [...] an aggregate sentence when one of the sentences subject to aggregation has been passed in the first-instance court in an extraordinary bench composed of two judges and three lay judges as the case involved a crime statutorily punished by twenty five years of imprisonment or life sentence, is still a resolution of the case involving this crime because it is the case where criminal liability for this crime is resolved. Especially when the prerequisite to resolve the case in an extended bench is grounded not only in the type of a criminal deed but the ensuing punishment as well”.

Thus it seems that a correct interpretation would be the one according to which provisions on an extraordinary extended bench may be applied, i.e. Art. 28 § 3 of the CCP⁴³. On the other hand, the Court of Appeal in Katowice, in the judgment of 9 December 2010⁴⁴ presents this issue in the following way: “Resolving a case on passing an aggregate sentence, a first-instance court does so each time in a bench composed of one judge even if a life sentence can be passed pursuant to the regulation resulting from the provision of Art. 88 of the Criminal Code; therefore the provision of Art. 28 § 4 of the CCP does not apply here”. It appears that the issue has been decided by the Supreme Court’s decision which briefly stated that “A first-instance court resolves a case on passing an aggregate sentence in a bench composed of one judge (Art. 28 § 1 of the CCP), or in a bench composed of three judges if the case is particularly complex (Art. 28 § 3 of the CCP)”⁴⁵.

40 Resolution of Supreme Court of 16 November 2000, I KZP 35/00, Lex No. 44025.

41 M. Krudysz, Wpływ zakazu reformationis in peius na skład sądu pierwszej instancji ponownie rozpoznającego sprawę, Lex/el. 2015.

42 R.A. Stefański, Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2000 r., WPP 2001, No. 2, p. 74.

43 Judgment of the Court of Appeal in Krakow of 25 January 2005, II AKa 252/05, KZS 2006, No. 1, item 35.

44 Judgment of the Court of Appeal in Katowice of 9 December 2010, II AKo 395/10, KZS 2011, No. 5, item 109.

45 Decision of Supreme Court of 30 October 2014, I KZP 22/14, OSNKW 2015, No. 1, item 2.

With regard to cases involving crimes statutorily published by a life sentence, Art. 28 § 4 of the CCP envisages an extended bench composed of two judges and three lay judges. Due to this provision, discrepancies have emerged in the criminal procedure, i.e. whether legal evaluation and description of a deed included in the indictment decide about the composition of a bench of a first-instance court specified in Art. 28 § 4 of the CCP, or is it a procedural situation that occurred after the reversal of a district court's first judgment due to the examination of an appeal submitted by the defendant's defence counsel and the functioning of an indirect ban of *reformationis in peius* in re-examination (Art. 443 of the CCP)⁴⁶. With regard to this, we can notice two opinions in the judicature. According to the first one, this ban does not affect the composition of a bench.

In the judgment of 17 September 2008⁴⁷, the Court of Appeal in Wrocław decided that "The ban of *reformationis in peius* does not affect the scope of the provision of Art. 28 § 4 of the CCP. Due to the above, a case involving a crime statutorily punished by a life sentence will always be resolved by the bench composed of two judges and three lay judges; including situations when due to Art. 443 of the CCP, a first-instance court cannot pass a sentence stricter than the one reversed by the court of appeal in effect of an appeal submitted solely for the benefit of the defendant". The simplest example thereof can be the Resolution of Seven Judges of Supreme Court of 19 March 1970⁴⁸: "In cases involving crimes statutorily punished by death penalty, a first-instance court always resolves the case in a bench composed of two judges and three lay judges".

It can be noticed that the judicature attaches considerable importance to providing each member of a bench with a possibility to participate in the whole trial. Supreme Court's case law is significant in this respect. According to the Supreme Court, "if a bench must be changed, it is necessary to start proceedings again from the beginning to provide each member of the bench passing a sentence with a possibility of participating in the whole trial and hearing evidence on pain of the judgment's reversal"⁴⁹.

With regard to the issue of equal rights enjoyed by lay judges and judges (Art. 4 § 2 of the CCO), this term implies that in passing a sentence lay judges' votes carry the same force as the vote of a professional judge. Due to the proportion in a number of lay judges to professional judges, lay judges may be outvoted by a professional judge in individual cases⁵⁰.

46 M. Krudysz, *Wpływ...*, *op. cit.*

47 Judgment of the Court of Appeal in Wrocław of 17 September 2008, II AKa 170/08, Lex No. 457797.

48 Resolution of Supreme Court of 19 March 1970, VI KZP 27/69, Lex No. 18057.

49 Judgment of Supreme Court of 6 May 2003, III KK 73/03, Lex No. 78396; and judgment of Supreme Court of 29 September 2010, III KK 59/10, Lex No. 612458.

50 G. Ott, (in:) A. Górski (ed.), *Prawo o ustroju sądów powszechnych. Komentarz*, Lex 2013.

3. Conclusion

The participation of social factor in a criminal trial may play an important role, most of all, through the observation of a hearing by citizens and direct impact on the resolution of a case by lay judges composing a bench. It is also significant that the legislator has not precisely determined a possible activity of a community representative in a criminal trial, which provides a broad spectrum of his or her possible participation in proceedings.

The literature points out that the principle of audience (openness) of a hearing is the broadest manifestation of social factor participation in a criminal trial. An important aspect of the participation in court proceedings is the fact that a court may permit representatives of the radio, television, film production and the press to make video and sound recordings of the course of the trial if this is warranted by legitimate public interest; moreover, if it does not obstruct the hearing and is not contrary to an important interest of the participant thereof (Art. 357 § 1 of the CCP). This way, a greater number of recipients may learn about the course of a trial. Furthermore, they may pursue their own analyses and evaluations thereof with regard to judges' independence, impartiality and sovereignty.

A community representative may play a role of a specific litigation assistant of the parties or justice system because, generally, he or she does not have to be objective. It should also be noticed that the possibility of participation of a community representative in a criminal trial in the form of making statements and submitting written motions may bring significant information to criminal proceedings.

Referring to the participation of lay judges in criminal proceedings, divergent case laws are often noticeable. Although case law connected with the extended composition of a bench (lay judges) is uniform (possible adoption of a legal evaluation of a deed which justifies the need to resolve a case in a specific bench decides about the extended composition of a bench; the court is bound neither by the description of a deed nor its legal evolution), there have emerged discrepancies related to the possible extension of a bench with regard to passing an aggregate sentence and impact of banned *reformationis in peius* on the extended composition of a bench. It appears that within the first aspect (i.e. the extended bench with regard to passing an aggregate sentence), the concept of a bench composed of one judge has prevailed regardless of the envisaged punishment whereas a possibility of a bench composed of three judges occurs solely in particularly complex cases. As far as the impact of a ban of *reformationis in peius* on the composition of a bench is concerned, it is difficult to distinguish "more popular case law". It appears, however, that more recent case law has been more inclined to support the claim according to which a ban expressed in Art. 443 of the CCP does not co-shape the court's jurisdiction and composition of a bench.

Referring to the above mentioned issue of equal rights enjoyed by lay judges and judges, it should be noticed that the fact that lay judges cannot preside over a hearing and deliberations does not diminish their position with regard to sentencing at all because the principles of vote on a verdict do not privilege a presiding judge – his or her vote carries the same weight as the vote of other members of a bench. A problematic issue is, among others, access of lay judges to confidential information, which has been revealed by the analysis of relevant case law. In the same period of time, judicature contains completely divergent interpretations of this right with regard to lay judges. Thus it is difficult to find and adopt one of them as a “better” one. Yet it can be depicted that distinct interpretations of law govern these two discrepant interpretations. The opinions which do not require lay judges undergo security (screening) procedure are, most of all, based on the linguistic and system interpretation whereas contrary opinions – on the functional interpretation connected with the importance of information subject to special protection⁵¹.

Even though changes of 2016 within the scope of Art. 90 of the CCP do not *de facto* concern increasing procedural rights of a community representative in a criminal trial, they do confirm that he or she may play a role of a specific litigation assistant of the party. Such an attitude is justified by the eliminated prerequisite of the “importance” of individual interest it protects as well as the above mentioned consent of one of the litigants to the participation of a community representative in a criminal trial, which introduces his or her obligatory admission to participate in a case.

Moreover, the Code of Criminal Procedure, amended within the scope of Art. 360 through changing the prerequisites to exclude an open hearing from absolute to relative, may contribute to a declining number of cases where an open and public hearing will be excluded. Nevertheless, it is debatable whether a superior role of the prosecutor in this aspect should prevail over a decision of the court resolving the case.

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