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The Participation of the Social Factor in Sentencing in the Historical and Law-Comparative Perspective

Abstract: The article concerns the historical and comparative analysis of the institutions of jury and lay judges as basic forms of the participation of social factor in sentencing, referring mostly to English, German and Russian examples. The article discusses both advantages and disadvantages of these institutions as well as procedural issues of their functioning and the jurisprudence of the European Court of Human Rights in regard to this matter. In conclusions, a fundamental role of public participation in sentencing as the indication of democratic exercise of power is emphasized.

Keywords: lay judges, jury, England and Wales, Germany, Russia, trial

1. Introduction

Traditionally, community may participate in sentencing assuming one of the three variants below¹:

- 1) “total” participation in the form of community courts composed solely of non-professional subjects,
- 2) participation within mixed courts, i.e. professional judges and lay judges,
- 3) participation in the form of the jury functioning on the basis of the principle of division of powers between magistrates (“judges of fact”) and professional judges (“judges of law”).

¹ B. Janusz-Pohl, Zasada udziału czynnika społecznego, (in:) P. Wiliński (ed.), System prawa karnego procesowego. Tom III. Cz. 2. Zasady procesu karnego, Warszawa 2014, p. 1438-1439. Referring to models of social factor participation in court benches, see more in: K. Wieczorek, Udział czynnika społecznego w orzekaniu w polskim i amerykańskim procesie karnym, Szczecin 2012, p. 15-20.

2. Trial by jury

Taking into account the historical development of community participation, we should start our considerations herein from the institution of the trial by jury. Its homeland is England, where it has been in operation for over 800 years². Its popularity as a form of direct democracy mainly derives from the jurors' independence and a possibility of intuitive action. Since the 13th century, the jury has become a popular form of the public system of justice thousands of jurors and defendants have taken part in. Despite its disadvantages, the jury has been widely considered by the community as an institution of vital importance to guarantee a defendant a reliable trial. The current subject literature also points out religious roots of the jury in England³.

Hence already at the beginning of its existence, the jury expressed social will in the justice system whereas jurors often acquitted individuals accused by the Crown of murder and theft (app. 50% of cases) in trials by ordeal. With regard to murder, jurors were able to differentiate between manslaughter and homicide whereas in cases about theft they lowered the value of stolen property (*pious perjury*)⁴, thanks to which the defendant could avoid death penalty. At the time of its utmost importance in the 18th century, the jury used to acquit defendants in many political cases and petty theft cases. Lord Devlin described these times in the following way: "So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives"⁵.

It is worth adding that apart from the jury deciding about the defendant's guilt after a trial in the form of a sentence (called petit jury), English legislation had known the institution of Grand Jury before the issue of 1933 Administration of Justice Act, which provided initial supervision of the prosecution in the most important cases and decided whether the prosecution collected sufficient evidence to continue the trial⁶.

Nowadays, the principles of qualification for jury service and its operation are specified in Juries Act 1974, which envisages that a juror may be a randomly selected person from a larger group of citizens randomly selected from a larger group by a judicial officer (acting on behalf of the Polish equivalent of Attorney General). This

2 Referring to historical development of the jury in criminal cases in Great Britain see: J. Morgan, W. Forsyth, *History of Trial by Jury*, New York 1875, p. 159-177; J. Hostettler, *The Criminal Jury Old and New. Jury Power from Early Times to the Present Day*, Winchester 2004, p. 16-124; G. Andoor, *Laien in der Strafrechtsprechung. Eine vergleichende Betrachtung der Laienbeteiligung an deutschen und englischen Strafgerichten*, Berlin 2013, p. 31-41.

3 See, e.g.: J.Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (Yale Law Library Series in Legal History and Reference), Yale University Press, New Haven-London, p. 27-90.

4 J. Hostettler, *A History of Criminal Justice in England & Wales*, Hampshire 2009, p. 125-145.

5 J. Hostettler, *The Criminal Jury...*, *op. cit.*, p. 141.

6 First Grand Juries appeared in the 12th century during the reign of King Henry II while procedures of their operation were determined during the reign of King Henry III in 1216-1217. To find out more about the history of Grand Jury in England see: W.J. Campbell, *Eliminate the Grand Jury*, "Journal of Criminal Law & Criminology" 1973, vol. 64, p. 175-177.

group is composed of randomly selected citizens from up-to-date lists of parliamentary or local government electors⁷.

As mentioned before, an usher selects members of a specific jury to a specific case whereas parties and their litigation friends have access to the list of potential jurors, which allows them to take advantage of the procedure of challenging some jurors or the entire jury if they present a challenge for cause⁸. Apart from this, only the prosecution is entitled to the right to stand by a juror, which is independent of a challenge for cause, under which the prosecutor may request a challenge of a specific juror without giving any reason before the jurors are sworn. If the prosecutor makes such a challenge, the juror is automatically replaced by another one from the jury in waiting⁹. However, the prosecutor must show a cause of challenge should the entire jury panel be exhausted without a full jury being obtained. The judge to hear a case is also entitled to the right to stand by a juror¹⁰.

Juries Act 1974 requires 12 jurors to sit on the jury but in practice 11 or even 10 jurors often adjudicate.

If a sufficient number of jurors capable of hearing a specific case cannot be summoned, an exceptional procedure of ad hoc appointment may be applied in order to make up the number of jurors by summoning any person in the vicinity, a process known as "praying a tales". It was applied by Judge Andrew Barnett in Salisbury Crown Court in June 2016, when he realized that he was 3 jurors short. Not to delay the trial, he sent his clerk to the street who obtained a consent of only one passer-by to join the jury while the trial had to be adjourned anyway in order to verify two other jurors from Winchester¹¹.

A professional judge is in charge of a hearing, where after preliminary speeches and presentation of evidence first by the prosecutor and then the defence, both these parties deliver their final speeches: counsel for prosecution sums up his case and counsel for defence sums up his case. A final and very important stage of a trial before Crown Court is judge's summing up, where the judge draws jurors' attention to legal issues and helps them analyse the facts¹². He or she will explain then the judge's

7 To find out about the principle of participation of citizens in juries and a possibility of discharging them from this duty see: K. Girdwoyń, *Sądownictwo w Anglii i Walii*, (in:) P. Kruszyński, P. Hofmański (ed.), *Proces karny. Rozwiązania modelowe w ujęciu prawnoporównawczym. System Prawa Karnego Procesowego*, v. II, Warszawa 2014, p. 724-726 and literature cited there.

8 To find out about the selection of jurors and their challenge see: J. Sprack, *A practical approach to criminal procedure*, Oxford 2008, p. 294-300; K. Girdwoyń, *Sądownictwo...*, *op. cit.*, p. 784-786 and literature cited there.

9 It is a panel of 20 or more jurors who are either in the court when the defendant does not plead guilty, or they are summoned to court after it is known whether the defendant pleads guilty or not, J. Sprack, *A practical approach...*, *op. cit.*, p. 294-295.

10 It is worth adding that for centuries the Defence had the right to challenge a certain number of jurors from a jury without giving a reason. It was enough for the Defence Counsel to say "challenge" directly before a panel juror was sworn, and he or she was replaced by another one. This institution was called a challenge without cause or peremptory challenge and since it was quite often abused it was abolished under Criminal Justice Act 1988, J. Sprack, *A practical approach...*, *op. cit.*, p. 296-297.

11 Halsbury's Laws of England, vol. 11(3), p. 1289.

12 J. Sprack, *A practical approach...*, *op. cit.*, p. 314-347; K. Girdwoyń, *Sądownictwo...*, *op. cit.*, p. 791-793 and literature cited there.

and jurors' role emphasising that although jurors decide about facts, they are bound by the judge's instructions on legal issues and evidence. Moreover, the judge explains the essence of a tried offence and its elements to be proved. The judge's summing up must also explain who bears a burden of proof and its standards (beyond reasonable doubt). The judge may recommend jurors to acquit the defendant but he or she cannot order them to return a verdict of guilty¹³.

Jurors deliberate in a separate jury room without the presence of a professional judge or other people¹⁴. Until 1967 (i.e. before Criminal Evidence Act 1967 came into force), English trial required jurors' unanimity to pass a sentence. This solution was criticized in the literature due to a possibility of one juror blocking the case resolution on the one hand, and lack of responsibility of single jurors for anonymous sentence on the other hand¹⁵.

Presently, pursuant to Art. 17 (1) of Juries Act 1974, the verdict is agreed if in a case where there are not less than eleven jurors, ten of them agree on the verdict (i.e. 11:1, 10:2, 10:1); and in a case where there are ten jurors, at least nine of them must agree on the verdict. In all these situations, the foreman of the jury must state in open court the number of jurors who respectively agreed to and dissented from the verdict (Art. 17 (3) Juries Act 1974) for the verdict to be binding. In principle, jurors only state a defendant is "guilty" or "innocent", but sometimes they may choose a third option – find the defendant innocent as charged but guilty of another, less serious offence. The judge, generally, must accept the jury's verdict even if he or she disagrees with it, but sometimes they are not obliged to accept the verdict passed first time¹⁶. It occurs when:

- jurors passed a verdict on indictment they were not authorized to pass (e.g. for an act that has not been covered by the indictment). Then the judge orders jurors to deliberate again,
- when the verdict was ambiguous, e.g. when the statement of "guilty" or "innocent" was accompanied by comments evoking doubts as to the appropriate content of the verdict which the judge should explain.

The relevant literature indicates that if the jury changes their decision after the judge refused to accept their first agreed verdict, the second verdict has effects. If the jury does not change their verdict, it should be accepted¹⁷.

13 House of Lords in Wang case (2005) UKHL 9.

14 J. Sprack, *A practical Approach...*, *op. cit.*, p. 339-342.

15 J. Hostettler, *The Criminal Jury...*, *op. cit.*, p. 130-131.

16 J. Sprack, *A practical approach...*, *op. cit.*, p. 367; K. Girdwoyń, *Sądownictwo...*, *op. cit.*, p. 795-798 and literature cited there.

17 J. Sprack, *A practical approach...*, *op. cit.*, p. 367.

The institution of the jury in England and Wales was subject to serious criticism in the 20th century, which also brought about postulates to abolish it. The most important arguments of its opponents embraced, among others¹⁸:

- perverse verdicts characteristic of the 800 years long tradition of the jury, in particular unfair acquittals and sentences. Surveys carried out, for instance, in the 1970s confirmed that such phenomena occurred quite frequently from the litigants' point of view whereas imperfect appeal procedures did not prevent it¹⁹,
- full discretion and confidentiality of decisions made by jurors meant that jurors were not obliged to explain verdict's motifs, which arouse fear as to its compliance with the institution of a reliable and fair trial enshrined in Art. 6 of ECHR. Apart from this, it is argued that confidentiality prevents the presiding judge from assuring that jurors comply with court procedures²⁰,
- high social costs of this institution's operation ("the jury-luxury").

Nevertheless, the above arguments do not change the fact that trials by jury have been an inherent element of English legal tradition for over 800 years, and every year over 200.000 citizens do jury service.

With regard to the efficiency of the jury in the English contemporary system of justice, research published by Ministry of Justice in February 2010 indicate that such courts are efficient because if jurors are sworn, they reach a verdict in due time in 99%. On the other hand, when the jury encounters problems to agree on a verdict (so called hung jury), in most cases a verdict is reached, at least with regard to some charges²¹. The above research confirm that the greatest proportion of convictions by the jury refers to cases which carry a high probability of the occurrence of proximate evidence (most often physical evidence) incriminating the defendant (in case of theft, drug trafficking, forgery, fraud and blackmail). Whereas the lowest conviction rate occurs in cases when jurors must be certain as to the mens rea of a defendant or victim (a threat of murder, manslaughter or attempted murder). Hence the data suggest that the conviction rate by the jury is connected with the nature of legal issues jurors must resolve to find the defendant guilty of a specific crime as well as the nature of evidence they are presented with²².

18 See: J. Hostettler, *The Criminal Jury...*, *op. cit.*, p. 145-154. Juries in the USA are subject to similar critique, where the "erosion" of this institution is depicted: S.D. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, "The Social Justice Law Review" 2002, vol. 5, p. 1-62.

19 J. Baldwin, J. McColvin, *Trial by Jury: Some Empirical Evidence on Contested Criminal Cases in England*, "Law & Society Review" 1978-1979, vol. 13, p. 860-889.

20 P.S. Ferguson, *The criminal jury in England and Scotland: the confidentiality principle and the investigation of impropriety*, "International Journal of Evidence & Proof" 2006, vol. 10, p. 16-211.

21 C. Thomas, *Are juries fair?*, Ministry of Justice Research Series 1/10, London 2010, s. 25-28, <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf> (08.02.2016).

22 *Ibidem*, p. 29-31.

At the same time, the above research concluded that contrary to public opinion and earlier government's reports, the juries more often convict than acquit rapists whereas the conviction rate for other serious crimes (homicide, manslaughter, attempted murder or grievous bodily harm) is lower than for a rape²³.

As far as appeals against jury verdicts are concerned, we should point out guidance set by the Appeal Court's case law, which provides an opportunity of grounding the appeal upon mistakes committed during a first-instance trial. With regard to judicial mistakes, the most frequent appellate objections refer to mistakes made in the judge's summing up such as: wrongly specified crime elements, failure to allow the jury to deliberate on the basis of substantive evidence presented by the defence, and omission to instruct the jury about the burden and/or standard of proof²⁴. Other objections refer to procedural faults committed during a trial, e.g. allowing the prosecutor to correct the indictment if it evokes a possibility of injustice, admitting (unlawful) inadmissible evidence, lack of an appropriate response to jurors' comments, or failure to include statutory rules of majority voting. Nevertheless, such objections will only be recognized as grounds of an efficient appeal provided they affect conviction, that is the answer to the question: was the conviction safe²⁵?

Important Appeal Court's case law guidance is a question whether Defence Counsel's ineptitude and negligence during a trial may be a reasonable ground of an appeal²⁶.

In the context of a critique of jury trials in England and Wales, it should be emphasized that, until 1938, interwar Poland had an institution of trials by jury as well. Some of the objections raised against this institution embraced its following faults, among others²⁷:

- questions asked jurors by professional judges lead to a number of errors and irregularities, which results from the fact that jurors do not know law and do not understand legal effects of answers given to these questions,
- it has been noticed that in the continental trial, despite the assumption that jurors are to be “judges of fact” whereas professional judges “judges of law”, actually quite often jurors decided about the law under continental Europe's provisions of law (not knowing it) whereas professional judges decided about facts,
- jurors decided about guilt whereas professional judges about punishment; and this dualism was harmful due to a close connection between guilt and punishment,

23 *Ibidem*, p. 31-32.

24 To find out about the notion of burden and standard of proof in English trial see: R. Munday, *Evidence*, Butterworths 2003, p. 61-98 and case law cited therein.

25 J. Sprack, *A practical approach...*, *op. cit.*, p. 482.

26 *Ibidem*, p. 482-483 and case law cited therein.

27 S. Śliwiński, *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Warszawa 1947, p. 145-147.

- the experience of the jury operation revealed that jurors' verdict was often merely accidental; jurors showed dependence on a number of external factors, and in particular they were not able to oppose public opinion,
- in continental systems terms of office of trials by jury were only cyclical (in the Anglo-Saxon system jurors are summoned to a specific case), which contributed to proceedings protraction and prolonged defendant's detention²⁸.

In contemporary Europe trials by jury, in principle, follow English solutions. They were introduced ages ago (e.g. in France after the Great French Revolution under *Code d'Instruction Criminelle* of 1808) due to similar reasons, i.e. increased impact of citizens on the system of criminal justice.

An interesting example of the connection between the institution of trials by jury and development of democracy and civil rights is the Russian Federation (hereinafter RF). In Russia such courts were introduced by the Code of Criminal Procedure of 1864 and survived until 1918. They were reintroduced under the new RF Constitution in 1993, which introduced an adversarial model of proceedings based on the American system thus replacing soviet inquisitorial-adversarial litigation (Art. 15 of the Code of Criminal Procedure of RF of 5 December 2001, and Art. 193 of RF Constitution). Initially, trials by jury as an inherent element of the adversarial system were introduced in the 1990s in nine Federation Republics, and then in all others. The last republic where trials by jury were established as late as 2010 was Chechnya²⁹. Defendants have the right to select a trial by jury only in case of serious crimes punished by deprivation of freedom for minimum ten years. Defendants have the right to choose either a trial by jury or before a court composed of a professional judge and two jurors, which they should be instructed about.

The rules of jury selection and summoning have been specified in Art. 325 of the RF Code of Criminal Procedure similar to the English trial. Yet twelve jurors are selected by a judge out of minimum twenty candidates while two persons fulfil a role of alternate jurors. The selection is based on questions a judge asks candidates in a meeting whereas the parties have the right to submit justified motions to challenge individual candidates (Art. 327-328 of RF Code of Criminal Procedure)³⁰.

A course of trial is similar to trials before other benches because after reading the indictment, if the defendant does not plead guilty, first the prosecutor presents his or her evidence to be followed by the defence (Art. 273-274 of RF Code of Criminal Procedure)³¹. After the parties' final speeches, the bench president shortly summarizes the course of the trial and parties' positions, asks jurors questions about the

28 Similar faults of trial by jury were also indicated in Polish postwar literature, see, e.g.: W. Daszkiewicz, *Proces karny. Część ogólna*, Warszawa 1996, p. 116-118.

29 V. Turanjanin, *European Systems of Jury Trial*, "US-China Law Review" 2015, vol. 12, p. 202-204.

30 B.T. Biezliepkin, *Kommentarij k ugołowno-processualnomu kodeksu Rossijskoj Fiedieracii*, Moskwa 2016, p. 415-419.

31 *Ibidem*, p. 362.

crime, the defendant, his or her guilt as well as mitigating and incriminating circumstances. The judge draws jurors' attention to the importance of presumption of innocence and a ban on the presumption of guilt when the defendant takes advantage of the right to remain silent as his or her defence³². In principle, an unanimous verdict of the jury should be reached within three hours of a secret debate (in a separate jury room), and after the lapse of this time, majority votes decide. A professional judge is bound by the jury's decision of either guilt or innocence of the defendant, and he or she passes a sentence on this basis³³.

The jurors' verdict may be appealed against to the Supreme Court on the grounds of violation of law, incorrect application of criminal law, violation of provisions on the procedure, or if the verdict is not fair. The Appeal Court (after the amended appeal procedure in 2013) reviews evidence and may repeat the entire litigation which, as pointed out in the comments, is contrary to over 150 year-long tradition of trials by jury whose verdict, in principle, was not subject to an appeal³⁴.

However, the Russian subject literature criticizes the institution of trials by jury as a manifestation of social factor's participation in sentencing due to its limitation, vulnerability to be influenced by political power, and lack of genuine social respect, which makes it a pretence of democracy³⁵. It is emphasized that jurisdiction of such courts has been excluded since 2009 in cases regarding terrorism, which was found consistent with the RF Constitution by the Constitutional Tribunal under the judgment of 19 April 2010³⁶. Apart from this, in principle, this institution can solely be applied to Russian citizens while only native Russians may serve as jurors³⁷.

I believe it is now worthwhile pointing out the European Court of Human Rights (ECHR) case law referring to the compliance of sentencing by jury with Art. 6 of the European Convention of Human Rights (ECHR). The Court generally believes that States – parties to the Convention – enjoy significant discretion with regard to the choice of a specific system of criminal justice which should assure their compliance with a fair trial principle. The Court further notices that pursuant to Art. 6 par. 1 of ECHR, no right to be tried by a jury has been introduced. In this context, "the Court had to assess the decision-making procedure to ensure that it complied with the Convention requirement of adversarial proceedings and incorporated adequate safeguards to protect the interests of the accused, taking into account special circum-

32 *Ibidem*, p. 427-431.

33 *Ibidem*, p. 432-438.

34 *Ibidem*, p. 442. To find out about the procedure of appeal in the contemporary Russian trial, see a monograph: A. W. Kudriawcew, W.P. Smirnow, *Appielacjonnoje proizwodstwo w ugołownom processie Rossiji*, Moskwa 2013.

35 See the results of research cited in a monograph: Y. Cheryachukina, *The Jury System in Russia: Perceptions & Attitudes Toward Criminal Trials*, New York 2007, p. 111-131, and V. Turanjanin, *European Systems...*, *op. cit.*, p. 205.

36 F.F. Davis, S. Tyulkina, *Undermining Trial by Jury in Russia in Counterterrorism and the Wider Criminal Law*, "Vienna Journal on International Constitutional Law" 2014, vol. 8, p. 393-415.

37 N. Kvalew, *Jury Trials for Violent Hate Crimes in Russia: Is Russian Justice only for Ethnic Russians?*, "Chicago Kent Law Review" 2011, vol. 86, p. 669-687.

stances, nature and complexity of a given case”³⁸. However, in the case *Taxquet v. Belgium*, the Court held that there had been a violation of Article 6 § 1 of the Convention on account of failure to adjust individual questions asked by a professional judge to jurors regarding each defendant, in effect of which there was lack of adequate procedural safeguards to enable the accused to understand reasons for jury’s guilty verdict³⁹.

3. Courts of lay judges (assessors)

Courts of lay judges (assessors) originated in Germany, which evokes a short analysis of the participation of social factor in this system of justice. Similar to English trials by jury, German trials by jury and courts of lay assessors are deeply rooted in history and tradition as principal institutions of social impact on the justice system in Middle Ages and subsequent centuries based on trials by ordeal⁴⁰.

Initially, German Code of Criminal Procedure (StPO) envisaged participation of two types of social judges in a criminal trial: lay judges (assessors) (*Schöffen*) and jurors (*Geschworenen*). Similar to present honorary judges (*ehrenamtlichen Richtern*), lay assessors sat in a bench together with a professional judge enjoying the same rights (except access to case files). As far as trials by jury are concerned, which were competent to adjudicate in cases involving the most serious crimes, initially (similar to English and French systems), there was a division of tasks between professional judges and lay assessors: a jury composed of twelve jurors decided about guilt themselves whereas three professional judges decided about punishment⁴¹.

In contemporary German trial, there are only lay assessors who fulfil this function honourably enjoying the same rights as professional judges while deciding about guilt and punishment (§ 30 and § 77 item 1 of the German Act of 9 May 1975 on the System of Courts – GVG); they are also independent to adjudicate within the same scope as professional judges (§ 45 item 1 of the German Act of 19 April 1972 on Judges – DriG)⁴². As emphasized by the German subject literature, participation of

38 Decision of ECHR as of 28th May, 2013 in the case of Warecka K., Twomey, Cameron and Guthrie v. the United Kingdom, Lex No. 1318103. In this case ECHR decided that failure to disclose materials not regarding the defendants’ guilt or innocence by the prosecution whilst disclosing only those materials referring to the contact of the defendants with the jury, in effect of which the jury was dismissed and the trial was continued before a professional judge sitting alone, complied with Art. 6 of ECHR.

39 ECHR’s judgment of 16th November, 2010 in the case of *Taxquet v. Belgium*, a complaint No. 67318/09 and 2226/12, Lex No. 131803.

40 To find out about the history of social factor participation in sentencing in Germany before the adoption of the Code of Criminal Procedure (StPO) of 1877, see: F.Ch. Grube, *Richter ohne Robe. Laienrichter in Strafsachen im deutschen und anglo-amerikanischen Rechtskreis*, Frankfurt am Main 2004, p. 35-59; B. Linkenhein, *Laienbeteiligung an der Strafjustiz. Relikt des bürgerlichen Emanzipationsprozesses oder Legitimation einer Rechtsprechung “Im Namen des Volkes”?*, Berlin 2003, p. 49-92; H. Lemke-Küch, *Der Laienrichter – überlebtes Symbol oder Garant der Wahrheitsfindung?*, Frankfurt am Main 2014, p. 9-89; G. Andoor, *Laien in...*, *op. cit.*, p. 23-30.

41 C. Roxin, B. Schünemann, *Strafverfahrensrecht*, München 2009, p. 32-33 and literature cited therein.

42 W. Grikschat, A. Luthke, F.-W. Dopatka, I. Müller, *Gesellschaft, Recht und Strafverfahren. Eine Einführung in die Strafjustiz für Schöffen und andere Interessierte*. Opladen 1975, p. 47-49.

lay assessors in a criminal trial contributes to, most of all, social understanding of the essence of law observance and enhancing social trust in the system of justice⁴³. Nevertheless, it is also pointed out that this function can only be correctly implemented provided community judges possess “institutionally developed self-awareness” (*institutionell fundiertes Selbstbewusstsein*), which, however, does not occur in Germany (opposite to the USA). Thus sentencing, lay assessors are generally dominated by professional judges and they rarely challenge their opinions. One of the reasons for this phenomenon is the fact lay assessors do not know case files, which only a professional judge has access to⁴⁴.

Relevant literature and case law even point out that if a lay assessor reads the indictment and preliminary procedure results before they are read aloud, he or she can be challenged from the trial; the same as a peculiar “pre-judgment” (*Vor-Urteil*) about the defendant’s guilt assumed by a lay assessor on the basis of the trial’s press coverage⁴⁵.

Moreover, it is pointed out that due to a limited scope of procedural knowledge of lay assessors and, concurrently, an important role of their votes in verdict deliberation (including a possibility of *votum separatum*), lay assessors are “both a chance and danger” for defence counsels. It is emphasized that lay assessors often pay attention to insignificant details of a case, they are easily affected by pressure and emotions, or likes and dislikes, which may introduce irrational decision-making elements to the verdict (*irrationale Entscheidungselemente*)⁴⁶.

Already in the 1990s the German literature mentioned psychological conditions of cooperation between lay assessors and professional judges that were manifested in the latter ones’ domination over lay assessors during a trial and verdict deliberation as well as their low activity during litigation. The reasons for such passivity of lay assessors were difficulties to communicate with professional judges resulting from, among others, lay assessors’ low self-esteem, or an objective degree of case complexity⁴⁷.

Low activity of lay assessors during a trial often generates objections of a “sleeping juror” (*„schlafende Schöffe“*) raised in appeals. Court case law reveals that such grounds of an appeal are found reasonable only if a juror “was sleeping for a long time” and did not follow significant parts of the trial, which causes essential evidence problems for the appellants⁴⁸.

Polish Constitution of 2 April 1997⁴⁹ does not univocally settle the scope of a social factor participation in the system of justice. As emphasized by the doctrine, it re-

43 *Ibidem*, p. 9-12.

44 C. Roxin, B. Schünemann, *Strafverfahrensrecht...*, *op. cit.*, p. 33 and literature and case law cited therein.

45 H. Dahs, *Handbuch des Strafverteidigers*, Köln 2005, p. 68 and 142 and case law cited therein.

46 *Ibidem*, p. 131.

47 Ch. Renning, *Die Entscheidungsfindung durch Schöffen und Berufsrichter in rechtlicher und psychologischer Sicht*, Marburg 1993, p. 176-309, 531-536.

48 H. Dahs, *Handbuch...*, *op. cit.*, p. 586 and case law cited therein.

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

sults from Art. 182 of the Constitution that neither full elimination of participation of the citizenry in the administration of justice nor its limitation to a symbolic role is possible. A similar opinion is held by the Constitutional Tribunal⁵⁰.

A role of lay assessors in criminal cases is specified by the Act of 6th June, 1997 – Code of Criminal Procedure (CCP)⁵¹, whose Art. 3 stipulates that within the scope laid down in the legislation, criminal proceedings shall be conducted with the participation of a representative of the community. These limits are currently much narrower with regard to lay assessors' participation in sentencing than at the moment of the CCP coming into force on 1st September, 1998⁵². As indicated in the comments thereto, a limited principle of citizenry participation in sentencing enshrined by Art. 3 of the CCP of 1997 as compared to the CCP of 1969 mainly results from a critical assessment of lay assessors' participation in the administration of criminal justice and ensuing postulates to limit this institution⁵³. Fundamental and furthest reaching changes in the limited participation of lay assessors in criminal cases were brought by the amended CCP under the Act of 15th March, 2007 amending the Code of Civil Procedure, the Code of Criminal Procedure and Some Other Laws⁵⁴, in result of which two benches of lay assessors were envisaged. The first one – ordinary or common, to decide in cases involving serious crimes (Art. 28 § 2 of the CCP), and the second one – extended, to decide in cases involving crimes punished by a life sentence (Art. 28 § 4 of the CCP). In effect thereof, the participation of lay assessors in sentencing has been marginalized. Nowadays, we may even talk about a radical limitation (if not complete exclusion) of the principle of citizenry participation in the administration of justice⁵⁵.

As emphasized in the doctrine, the participation of lay assessors make all participants of litigation carry out their activities with more diligence, enhances independence of the adjudicating bench, and hampers the exertion of pressure upon the court⁵⁶. Lay assessors themselves perceive their function, most of all, as a chance to learn about the law and social problems, manifestation of the citizenry's participation in ruling, and a guarantee of "not letting a legal paragraph rise above life in a court". Nearly half lay assessors (44%) studied by A.S. Bartnik claimed that the juror's opin-

50 See: Constitutional Tribunal's judgment of 29 November 2005, P 16/04, OTK-A 2005, No. 10, item 119.

51 Journal of Laws No. 89, item 555 as amended.

52 See: S. Waltoś, Ławnik – czy piąte koło u wozu?, (in:) T. Grzegorzczak (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tyłmana*, Warszawa 2011, p. 526-527.

53 See: J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Tom I. Komentarz do art. 1-424*, Warszawa 2013, p. 54-55 and literature cited therein.

54 Journal of Laws No. 112, item 766.

55 See, e.g.: W. Jasiński, *Bezstronność sądu i jej gwarancje w polskim procesie karnym*, Warszawa 2009, p. 263-264.

56 See, e.g.: D. Pożaroszczak, *Refleksje na temat udziału ławników w polskim procesie karnym*, (in:) B.T. Bieńkowska, D. Szafranski (ed.), *Problemy prawa polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym*, Warszawa 2013, p. 176-180 and literature cited therein.

ion affected a verdict while almost three quarters (74%) were aware of the fact that a juror may disagree with the judge⁵⁷.

Moreover, the relevant literature emphasizes that a significant factor impacting lay assessors' engagement is an attitude of professional judges sitting in a bench. However, presidents (vice presidents or judges) of district and regional courts of Białystok Appeal Court quite pessimistically perceive the function of lay assessors because only 50% of respondents evaluate jurors' work well whereas as many as 35.71% believe the institution of lay assessors should be completely abolished in the Polish legal system⁵⁸.

With regard to the rights enjoyed by lay assessors in a criminal trial, in the Polish trial, as mentioned before, they are generally entitled to the same rights as professional judges (Art. 4 § 2 of the Law on Common Courts Organization). However, lay assessors can neither preside over a bench nor carry out judge's activities outside a trial (Art. 169 § 2 of the Law on Common Courts Organization). Opposite to German lay assessors, they have the right to access case files. Even though all lay assessors studied by A.S. Bartnik were aware of their right to read case files and ask questions during a trial, they, generally, hardly ever take advantage of such a possibility or of other rights⁵⁹. Lay assessors' passiveness during a trial is affected by three factors: a lay assessor, professional judge and judiciary. Lay assessors themselves do not perform their role appropriately; they do not prepare for trials and their work is limited to attending the trial⁶⁰.

4. Final comments

The above historical and comparative analysis of law ensues a conclusion according to which the institution of a jury established as early as Middle Ages in England and Wales as well as the institution of trials by lay judges (assessors) in continental Europe (in Germany) expressed the same idea: to ensure the impact of social factor on the system of justice.

As indicated in the subject literature, nowadays, the most significant difference between the institution of a trial by lay assessors in Poland and a trial by jury in the USA is a peculiar division of the function. As far as trials by jury are concerned, the function of a professional judge deciding about the law is distinguished from the function of a juror as a judge of the fact⁶¹. Another important feature of the classi-

57 See A.S. Bartnik's research: *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, Warszawa 2009, p. 105-110.

58 P. Sitniewski, *Analiza wyników ankiet w zakresie wyboru ławników, jakości ich pracy oraz funkcjonowania w ramach wymiaru sprawiedliwości*, (in:) J. Ruszewski (ed.), *Ławnicy – społeczni sędziowie w teorii i praktyce*, Suwałki 2011, p. 77-86, 92, 97 and the results of research cited therein.

59 To find out about the rights and duties of a lay assessor, see, e.g.: K. Wieczorek, *Udział czynnika społecznego...*, *op. cit.*, p. 43-46.

60 As concluded by A.S. Bartnik: "Therefore this social voice is dumb while social context of judgments is an illusion" – see: A.S. Bartnik, *Sędzia...*, *op. cit.*, p. 113.

61 K. Wieczorek, *Udział...*, *op. cit.*, p. 160-161.

cal Anglo-Saxon model of a trial by jury is its “intuitive” sentencing on the basis of a principle of unlimited discretion to assess evidence because jurors do not have to justify the agreed verdict. In effect thereof, there is a lack of a sense of responsibility for a verdict (particularly if it is passed unanimously, thus incognito) among twelve jurors summoned just once to judge a specific case. Nevertheless, we should draw attention to the Spanish trial, where juries, re-instated in 1995 (after sixty years of Franco regime), are obliged to justify their verdict whereas jurors can use judicial clerk’s assistance while drafting it (Art. 60 of the Act on the System of Trials by Jury – *Ley Orgánica del Tribunal del Jurado* of 22nd May, 1995). What is more, a professional judge may order jurors to correct their verdict if it violates substantive or procedural law, or a guilty verdict is not consistent with the facts⁶².

Furthermore, jurors deliberating together with professional judges hold joint and several responsibility for a correct resolution of not only the defendant’s guilt but also his or her criminal liability; they are generally dominated both during a trial and verdict deliberation by a professional factor.

Nowadays, we can talk about certain convergence of both models of social factor participation. Verdicts passed in trials by lay assessors are subject to full appeal control with regard to both regularity of the establishment of facts and compliance with the law. As mentioned before, even though a jury’s verdict in the English trial may be, in principle, appealed against on the ground of procedural objections or challenges, in Russia such a verdict may be fully controlled by the second-instance court. As far as the impact of professional judges upon juries’ verdicts is concerned, the judges can disregard verdicts which were reached with the violation of the law, and order jurors to deliberate again in order to correct a wrongly taken decision. It is worth adding that during a verdict deliberation jurors can contact a presiding judge through an usher in order to explain procedural and evidence issues.

Hence also in the 21st century we can say that the impact of a social factor on the administration of justice is the “litmus paper” of democratic ruling in a given country. Nevertheless, it is real impact because, as confirmed by the example of Russia, even trials by jury may transform into a façade institution hiding non-democratic state structures.

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62 V. Turanjanin, *European Systems...*, *op. cit.*, p. 200-202.

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