Adriana Sylwia Bartnik
Warsaw University of Technology

Katarzyna Julia Kowalska
University of Warsaw

THE ROLE OF LAY JUDGES IN THE PROCESS OF ADJUDICATION[1]

Although the paper addresses a very narrow issue – the role of the social factor in adjudicating – it fits well in the ongoing debate concerning the shape of reforms of the judiciary in Poland.

At the time the paper is being submitted for publication, legislative works are underway in the Sejm on, *inter alia*, a draft bill on amending the Law on the Organization of Ordinary Courts and numerous other acts (hereinafter: "the draft bill", Sejm paper No. 1491[2]). The draft bill was sent to the Sejm on 12 April 2017 and on 19 April it was directed to its first reading. Opinions on the proposed amendments were tendered by the Supreme Court, the National Council of the Judiciary, the Polish Bar Council, and the Institute of Law Studies of the Polish Academy of Sciences[3].

We believe that participation of the social factor in judicial procedures is important and any changes in this area require thorough scrutiny, based upon, on the one hand, a dogmatic analysis of the subject, and, on the other hand, the relevant research of sociologists and lawyers. This is even more so as the Polish research in sociology of law is considered classic in the field. It is significant that the highest award in sociology of law is named after Adam Podgórecki who devoted some of his work to the functioning of Polish courts, including the question of lay judges. Of relevance also are the voices expressed in public debate – for only such procedural changes which acknowledge the stance of the citizens, for whom judicial procedures should be transparent and, in their estimation, just, are

[1] The paper was written on the basis of A. S. Bartnik's doctoral thesis entitled *Rola ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, published as: A. S. Bartnik, *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, Warszawa 2009.

[2] Available on the Sejm's official website: www.sejm.gov.pl (accessed 23 March 2017).

[3] All of these opinions are available on the Sejm's official website: www.sejm.gov.pl (accessed 23 March 2017).

capable of functioning. This will, in turn, lead to a rise in trust among citizens to law enforcement, a rise in the overall feeling of justice and security of Poles. Aside from Podgórecki, also other sociologists and lawyers have done work on Polish judicial institutions – for instance, Jacek Kurczewski[4], Paweł Skuczyński, Krzysztof Pałecki[5], Elżbieta Łojko[6], Jan Winczorek[7], Paweł Maranowski[8]. Interestingly, this matter is often explored in reports and analyses of non-governmental organizations and watchdogs. The largest citizenly monitoring programme of court trials worldwide is underway in Poland[9].

Historically, the idea of participation of the social factor in the process of adjudication traces back to the 18th century. The Constitution of the Republic of Poland of 2 April 1997 (Polish Official Journal of Laws of 1997, No. 78, item 483) preserved the role of citizens in administering justice (Article 182). That role is not perceived uniformly in the literature. S. Waltoś, for instance, argued that society may participate in adjudicating and that the principle of cooperation between the citizenry and public institutions in prosecuting crimes is a fundamental element of criminal procedure. Such cooperation has adopted the following forms in the past:

– A purely social court (e.g. magistrates' courts in England);

– A juried court (with participation of lay judges alongside professional judges) – currently in existence in Poland;

– A full jury court – functioning in common law systems[10].

F. Prusak has approached the problem in a similar fashion (besides lay judges, to the social factor in administering justice he also adds jury courts, social organizations and auxiliary prosecutors[11]). A. Siemaszko refers the notion of a social factor merely to lay judges and jurors[12]. Divergences in perceiving the institution of social participation in governing can also be seen across legislative systems worldwide. The competences of lay judges differ not only according to the legal system in question, but also to the degree of democratization of law in a given state. These are not, however, the only determinants impacting the constitutional structure of the conception of a lay judge or its practical ramifications. By way

---

[4] J. Kurczewski, M. Fuszara, *Polskie spory i sądy*, Warszawa 2004.

[5] M. Borucka-Arctowa, K. Pałecki, *Sądy w opinii społeczeństwa polskiego*, Kraków 2003.

[6] E. Łojko, *Wizerunek zawodu sędziego w opiniach sędziów, prawników i społeczeństwa*, "Krajowa Rada Sądownictwa" 2010, Vol. 4, pp. 64–72.

[7] J. Winczorek, *O potrzebie badań empirycznych nad dostępem do prawa*, "Państwo i Prawo" 2016, issue 12, pp. 18–38.

[8] J. Winczorek, P. Maranowski, *Komunikacja w sądach po reformie kodeksu postępowania cywilnego z maja 2012 r.*, "Radca Prawny" 2014, issue 1, pp. 209–243.

[9] See: https://courtwatch.pl/baza-wiedzy/publikacje/ (accessed 23 May 2017).

[10] S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2005, p. 227.

[11] F. Prusak, *Komentarz do Kodeksu postępowania karnego*, Warszawa 1999.

[12] A. Siemaszko (ed.), *Ławnicy. Rezultaty badań empirycznych*, Warszawa 1994.

of example, S. Machura[13] and R. Wandall[14] have argued that in both post-Soviet states or young democracies and states with an established and independent judiciary most amendments to civil and criminal procedure consist in attempts to expedite the processes.

Findings presented in this paper are the fruit of research conducted by the authors since 2002[15] concerning Polish lay and professional judges as well as advocates and prosecutors. Trials in district courts are also within the remit of the study. All data obtained during the course of the research has been anonymized, including the names of places where surveys were undertaken. Research of S. Zawadzki and L. Kubicki[16] from the 1960s served as a starting point for the current study.

The latest legislative changes go in the direction of restricting the participation of the citizenry in the judicial process. Lay judges in criminal trials have been preserved almost only in the most severe cases[17]. The need for change has been explained by high costs of remuneration for lay judges as well as their lack of professionalism. Curiously, no efforts have been made in Polish history to remodel or strengthen the position of lay judges, alter the way they are selected or trained. Instead, all changes have consisted in, usually, undercutting their significance within the system of administration of justice[18]. This corollary is echoed by Juchacz who emphasizes that whilst many contemporary democracies are increasingly more open to letting citizens into the decision-making processes, no such tendencies (in fact, the opposite) are discernible in Poland[19], even though 2006 saw the introduction of public hearings into law[20].

The current Polish Code of Criminal Proicedure (Polish Official Journal of Laws of 1997, No. 89, item 555 as amended) envisages that lay judges adjudicate in cases related to felonies (Article 28 § 2, in a panel composed of one

---

[13] S. Machura, *Silent Lay Judges – Why Their Influence in the Community Falls Short of Expectations*, "Chicago-Kent Law Review" 2011, issue 86, pp. 769–788.

[14] R. Wandall, *Imprisonment. A Socio-Legal Study of Danish County Courts' Decisions to Impose Immediate Imprisonment*, Copenhagen 2004.

[15] Research funded by the State Committee for Scientific Research between 2004–2006 as project No. 1H02A03227, entitled *Instytucja ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, under the supervision of prof. Jacek Kurczewski.

[16] S. Zawadzki, L. Kubicki (eds.), *Udział ławników w postępowaniu karnym. Opinie a rzeczywistość*, *Studium prawnoempiryczne*, Warszawa 1970.

[17] Government draft bill on amending the Code of Civil Procedure, the Code of Criminal Procedure and numerous other acts (Sejm paper No. 639).

[18] More on this: A. S. Bartnik, *Sędzia czy kibic? Rola…*, *passim.*

[19] More on this: P. W. Juchacz, *Trzy tezy o sędziach społecznych i ich udziale w sprawowaniu wymiaru sprawiedliwości w Polsce*, "Filozofia Publiczna i Edukacja Demokratyczna" 2016, Vol. 5, issue 1, pp. 155–168.

[20] P. W. Juchacz, *Deliberatywna filozofia publiczna. Analiza instytucji wysłuchania publicznego w Sejmie Rzeczpospolitej Polskiej z perspektywy systemowego podejścia do demokracji deliberatywnej*, Poznań 2015.

judge and two lay judges), in cases concerning criminal offences for which the Act stipulates life imprisonment (Article 28 § 4, two judges and three lay judges); in addition, the court may, due to particular complexity of a case or to its importance, decide on hearing it in a panel of three judges or one judge and two lay judges (Article 28 § 3).

The Polish Code of Civil Procedure (Journal of Laws of 1964, No. 43, item 296) institutes the concept of lay judges in Article 47 § 2, which lays out the catalogue of cases which are heard in the court of first instance composed of one judge and two jurors. These are cases:

1) within the subject-matter and scope of labour law:

– determining the existence, establishment or expiry of an employment relationship, recognizing the invalidity of termination of an employment relationship, re-employment and restoration of previous work or salary conditions and jointly pursued claims and damages in the case of termination without just cause or illegal termination of an employment relationship,

– breach of the principles of equal treatment in employment and related claims,

– damages or compensation for harassment;

2) in the field of family relationships:

– divorce,

– legal separation,

– determining the ineffectiveness of the recognition of parentage,

– dissolution of adoption.

Furthermore, Article 509 of the Code states that cases concerning adoption in the first instance court shall be heard by a panel of one judge and two lay judges.

In spite of the above provisions, it is an observable tendency that lay judges are gradually being eliminated from the process of adjudication, regardless of which political faction happens to be in power. The legal community supports, by and large, the proposed changes, which is unsurprising considering that adjudication is deemed the ultimate accomplishment of a lawyer. Therefore, it would be puzzling if lawyers found any appeal in the model of social, non-lawyer adjudication[21].

An analysis of the latest amendments to the Code of Civil Procedure reveals that the legislator has begun to devote more attention to the interests of lawyers' associations and court statistics than to the interests of citizens and the social sense of justice[22]. A. Turska as early as 1970 noted that, as a rule, "the legislator,

[21] Comments by lawyers interviewed by the authors.

[22] We refer here to the 2004 amendments to the Code of Civil Procedure, especially to Articles 5 and 184. For more on this, see: G. Bieniek (ed.), *Komentarz do kodeksu cywilnego. Zobowiązania*, *Księga III*, t. 2, Warszawa 1999; W. Siedlecki, Z. Świeboda, *Postępowanie cywilne. Zarys wykładu*, Warszawa 2001; Z. Radwański., *Podmioty prawa cywilnego w świetle zmian kodeksu cywilnego przeprowadzonych ustawą z dnia 14 lutego 2003 r.*, "Przegląd Sądowy" 2003, issue 7–8; H. Pietrzykowski, *Prawo do rzetelnego procesu w świetle zmienionej procedury cywilnej*,

by bringing to life a group which adjudicates in a panel of professionals and lay judges, assigned to each of those components a different role in administering justice. To hold otherwise would lead to the conclusion that it was the legislator's intention to merely create a façade where the social component, unable to perform judicial duties due to a lack of legal training and education, must pretend to be a judge. Second, the lay judge and the professional judge are situated in the legal system in a way that reflects their separate, different organizational positions in the system of administering justice. This divergent position stimulates approaches characteristic of, on the one hand, the professional, and, on the other – the social component. Third, it is clear that the *ratio legis* of the legislator was, first and foremost, to create objective opportunities to render optimal decisions"[23]. These assumptions apply also in the current constitutional model.

Corollaries drawn in the course of the authors' research should be divided into the following categories, pertaining to, respectively:

1) the role of lay judges in their own opinions;
2) the actual role of lay judges in the process of adjudication;
3) lawyers' opinion on lay judges;
4) an assessment of legal provisions governing lay judges.

The notion of a lay judge is dramatically complicated. We found that the legislator assigned to lay judges a plethora of duties, and lay judges themselves take on a variety of additional tasks. A research team formed under S. Zawadzki and L. Kubicki at the Institute of Law Studies of the Polish Academy of Sciences distinguished three basic functions of a lay judge:

– social judge;
– a factor of social control;
– a connection with the society.

The researchers stressed that these functions are mutually inclusive to a certain extent, however the social control function is the boldest and most significant. It was defined in the following terms: "through his mere presence a lay judge (even where he does not fully realize it himself) influences the workings of the court in the direction of:

– a more meticulous consideration of a case (e.g. a judge who expects the presence of a lay judge prepares better in advance of a hearing);
– promoting the principle of judicial independence;
– bolstering the right of an accused to defend himself"[24].

"Przegląd Sądowy" 2005, issue 10; J. Mucha, *Nowe regulacje w kodeksie postępowania cywilnego*, cz. I, "Radca Prawny" 2005, issue 2.

[23] A. Turska, *Analiza odrębności postaw ławnika i sędziego zawodowego w orzekaniu*, (in:) S. Zawadzki, L. Kubicki (eds.), *Udział ławnika w postępowaniu karnym. Opinie a rzeczywistość*, Warszawa 1970, p. 195.

[24] S. Zawadzki, L. Kubicki (eds.), *Udział ławnika*..., p. 225.

Whilst 35 years ago lay judges considered this function as the most important, Bartnik's research shows that nowadays, although it could and should be at the forefront of the priorities, it is not realized in practice[25]. Both lay judges and lawyers interviewed testified to this corollary. Bartnik's hypotheses were confirmed in the 2009 study as well as the newest research from 2015–2017. In general, lay judges do not know what their duties are and training provided to lay judges fails to equip them with basic knowledge requisite to perform their functions. It is still true of contemporary lay judges that they are either unfamiliar with or they do not understand their tasks and obligations. An example is *votum separatum* – lay judges, even if they know that they are free to disagree with a professional judge regarding guilt or punishment, they perceive it as merely a possibility of voicing their opinion which need not be taken into consideration by the chairman of the adjudicating panel. Alongside the objective factor impacting the passivity of lay judges, noted above, Zawadzki and Kubicki also wrote about numerous subjective factors such as:

– lack of preparation of lay judges;

– inappropriate conduct of the judge.

Bartnik also pointed to those circumstances. A rather novel factor is the financial one – lay judges want to participate in adjudicating so much that in pursuit of additional income they would rather refrain from "interrupting" the professional judge so that they are assigned to court cases in the future. Research from 2009 and 2017 also appears to suggest that contemporary judges, advocates and prosecutors fail to appreciate the social control function of lay judges so much so that they do not even bother to disguise their lack of preparation, unfamiliarity with the case at hand or violations of procedures. Not without significance is, however, lay judges' participation in a deliberation if it occurs. For this is the forum where the judge may discuss, try out and explain his judgment. P. Skuczyński has contributed substantially to analyses of theories of argumentation and legal reasoning. He has argued that, pertinently to the subject of lay judges, "Argumentative rationality in this concept is not grounded in argumentative discourse through strict reflection, per K.-O. Appel, but in communicative activities where

---

[25] This corollary is drawn based upon the fact that the lay judges surveyed by the Institute of Law Studies of the Polish Academy of Sciences were aware that they could control the professional judge, whilst the lay judges I talked to were oblivious to that. Furthermore, professional judges stressed they ignore lay judges, and their presence is often treated merely as a procedural requirement. I interpreted professional judges' statements and reactions concerning lay judges in the context of their social control function as jokes. Whilst, theoretically, one could conceive of a scenario where the function is performed by a lay judge's mere presence, in practice a proper reaction from the controlled professional judge is requisite. Notwithstanding, professional judges insisted that a lay judge's presence did not in any way affect how they conduct trials. It is therefore our hypothesis that the lay judges interviewed do not, in general, perform the social control function.

discourse is an important linguistic game, as it justifies and critiques (argues for and against) problematized claims, however it is not the starting point"[26].

S. Zawadzki and L. Kubicki emphasized that the function of a social judge was realized by lay judges to a lesser extent than the social control function. This finding has been confirmed by Bartnik – for in practice a lay judge does not impact the process of adjudication although his position is, from the perspective of the law, equal to that of a professional judge throughout the trial and deliberations.

During interviews with lay judges it was attempted to discover whether and, if so, how responsible they feel for the judgment that they participate in handing down. They were asked questions such as "do you feel responsible for the judgment", with an intention to elicit from the interviewees a comment on judicial responsibility or their own sense of justice. The reality turned out to be more complicated. Lay judges found questions about responsibility for the judgment and responsibility stemming from the function they perform quite difficult. Perhaps one reason for that is related to difficulties with defining who they represent and who they shall serve. During interviews one could notice that lay judges did not connect the issues of responsibility for the judgment with a lay judge's responsibility in general. These issues were separate for them. One could sense that those lay judges for whom handing down a judgment was the central function of their job, and even those who perceived themselves as a full-fledged member of the adjudicating panel, often failed to understand why they were being asked about responsibility, as if adjudication did not give rise to such implications. Among the lay judges, who had already participated in adjudication, three types of senses of responsibility were differentiated[27]:

1) the ideal type – lay judges responsible for the judgment and their function;
2) the unclear type ("murky"), including:

– lay judges who felt full responsibility for their function accompanied by a relative[28] sense of responsibility for the judgment,

– full responsibility as a lay judge and no responsibility for the judgment[29],

– full responsibility as a lay judge and lack of awareness of or no responsibility for the judgment,

– relative responsibility as a lay judge and full responsibility for the judgment,

---

[26] P. Skuczyński, *Uzasadnienie refleksyjne i problem jego recepcji w teorii Roberta Alexy'ego*, (in:) K. J. Kaleta, P. Skuczyński (eds.), *Refleksyjność w prawie. Konteksty i zastosowa*nia, Warszawa 2015.

[27] Research undertaken between 2015–2017 confirmed Bartnik's typology from 2009.

[28] The word "relative" denotes such comments from lay judges as: "I think I slightly am", "I am partly", "perhaps I feel responsible", "it is just relative responsibility" etc.

[29] It should be noted that the typology was devised based upon lay judges' comments concerning accountability. A pilot study of previous term's lay judges at the criminal division of a district court separated the performance of the functions of a lay judges (described by the interviewees as "being a lay judge") from adjudication.

– relative responsibility as a lay judge and relative responsibility for the judgment,

– relative responsibility as a lay judge and no responsibility for the judgment,

– no responsibility as a lay judge and full responsibility for the judgment;

3) the antitype – lay judges who openly declared an utter lack of responsibility;

4) unaware lay judges.

As it was the case in 2009, also our current research evinces that lay judges had less problems with identifying who they felt they were accountable to – in general, to the judge and the society at large. Some lay judges declared accountability before the law, people who selected local councillors who then elected lay judges, themselves and their conscience, their own sense of justice or the system of administration of justice, the Minister of Justice and God. P. Skuczyński has noted that moral responsibility of professionals (which, by its nature, also touches upon professional accountability) is ambiguous: "the mere fact of being a member of society constitutes a condition of entering into numerous professional rules – these, however, should not be equated. This is so because many individuals do not perform any professional roles, and concepts which put such people outside of the ambit of society are commonly considered erroneous. Performance of a professional role is, therefore, added on top, as it were, of an individual's socialization. The former is one of the latter's types, a special one. Alongside professional roles there are others such as family, schools, churches and social organizations etc. Of course, one's occupation has, in contemporary times, sizable significance because of extensive functional diversification and divisions of labour. This is without prejudice to the fact, however, that it does not precede and is not primary as against other forms. This differentiation has fundamental significance for justifying universal moral responsibility"[30]. Consequently, the question of responsibility for the judgment should be studied not only in respect of lay judges but also professionals who perform their roles in the courtroom – professional judges, advocates and prosecutors.

Lay judges were also asked about when and how a judgment is formed. Based upon their responses, as well as the responses of judges, prosecutors and advocates, four potential moments of composing a judgment could be noticed:

– during deliberations;

– in between cases;

– conversations with prosecutors;

– voluntary acceptance of liability (plea bargain).

It is in the first two cases that lay judges have the largest chance to co-author the judgment. There are several types of deliberations: ranging from such that do

[30] P. Skuczyński, *Problem zakresu odpowiedzialności moralnej profesjonalistów i jego zastosowania w etyce prawniczej*, "Acta Universitatis Lodziensis. Folia Iuridica" 2015, issue 74.

not take place to full domination of the judge to the ideal type. Five types were distinguished:

– deliberation without deliberation;
– deliberation dominated by the judge;
– deliberation *pro forma*;
– the ideal type;
– deliberation and a discussion – bargaining.

Lay judges, who mentioned cases where a judgment was handed down without a deliberation, stressed that these were not common. They still do take place, however. The second type of deliberation – dominated by the judge – is one where the judge expresses his opinion and asks the lay judges whether they agree. Whilst describing this type, lay judges took notice of the judge's unkind demeanour, bossiness, boorishness and ruggedness as well as the pace of work at the court, and, as a result, a lack of time and unwillingness to discuss. Deliberations of the third type – the most common in practice – are still dominated by the judge, however some procedures are obeyed. Here, the professional judge expresses his opinion first, to then ask the lay judges whether and why they agree with his position. The fourth type – most commonly mentioned by professional judges – is present where all procedures are followed: the judge asks the lay judges for their opinion before presenting his own. Judges had full awareness of how a perfect deliberation should look like and in interviews they preferred describing the ideal type as enshrined in the provisions of the Code of Criminal Procedure, whilst avoiding discussing their own practice and experience. Nevertheless, they tended to assert that due to lay judges' inactivity they must float a proposition first to then have any discussion at all. The fifth type is a deliberation together with a discussion – deliberations where lay judges express their opinions, however they could be called bargains. The object of the bargain is normally the level of punishment – lay judges wish to lower or increase it. Researchers hoped this type would be ubiquitous and lay judges would manifest the most fervent activity at this stage of the adjudicating process. Unfortunately, the fifth type is very rare[31]. Lay judges tend to explain this lack of discussion by the judge's demeanour and personality, whilst judges – by lay judges' personality who, in their estimation, are badly chosen and too old, and are are said to have no ability to make independent decisions and to reason.

Another moment where a judgment is formed is a conversation between the judge and the prosecutor. Lay judges say that conversations in between cases often pertain to important questions, such as assessing the trustworthiness of a witness. Comments were mostly positive, and lay judges often confused remarks made by judges and prosecutors (sic!) during breaks in between cases with deliberations or mistakenly considered the former an element of the latter.

[31] The typology presented does not include numbers as the lay judges interviewed could not determine exactly which type of deliberation (and how often) takes place.

There are cases where the prosecutor agrees with the judge on the judgment to be handed down. Such cooperation is liked by lay judges even though they rarely contribute to these discussions. Such agreements are normally struck in between cases or before the commencement of a session. These informal conversations are significant when it comes to determining the practical role of a lay judge in court because, under the law, a professional judge adjudicated upon guilt and punishment together not with prosecutors but with lay judges. Everyday practice in courtrooms, however, suggests that exchanges between judges and prosecutors exert greater influence than deliberations with social lay judges. The following types of judge-prosecutor conversations were discerned:

– conversations on cases which have been closed but no judgment has been handed down;

– conversations on cases which are yet to be tried and a judgment is to be rendered;

– conversations on cases which are yet to be tried but no judgment will be rendered;

– conversations on other cases.

These dialogues have impact upon judgments because the judge derives therefrom information theoretically unconnected with the case, yet relevant to e.g. an assessment of the trustworthiness of a witness. It is also sometimes the case that the prosecutor voices his private opinions on the parties to the case, whom he may be familiar with from other disputes.

Considering that the described problems in judicial application of the law stem, to a large extent, from inadequate legal regulations governing the recruitment of lay judges, the legislator shall unify the law and specify where "judge" refers only to a professional judge or also to a lay judge. The existing imprecision in the law may be the basis for malpractice. The selection procedure of lay judges must be amended, in particular it must be clarified whether a member of a political party may be a lay judge (or propose his candidacy at all) or whether he must suspend his membership during his service. It is submitted that the best way to go with regard to the selection procedure would be to introduce a general election. Apoliticality should be imposed also upon the lay judges currently in office. Any and all information concerning the membership of a political party of a judge or lay judge should be publicly available so that if any suspicion arises, the parties to a case could demand that the composition of the adjudicating panel be changed at the beginning of their trial, not in the midst of it.

It must be noted that the authors of the draft bill mentioned at the outset of our discussion saw the necessity of amending the provisions that directly regulate the institution of the lay judge and its situation in courtrooms.

Chief emphasis of the proposed changes to the judicial system is put upon:

– changing the selection procedure of presidents and vice-presidents of courts towards strengthening the position of the Minister of Justice when it comes to

recruiting officials who ensure proper administrative conditions for common courts;

– introducing new instruments of internal and external supervision of the administrative activity of the courts by imposing upon presidents of the courts at all levels an obligation to submit yearly reports and by turning attention to irregularities in the courts' administrative activity;

– introducing, as a constitutional principle, random allotment of cases to judges and the principle of equal burden of cases for all judges, so as to ensure equal and just distribution of work across judges and guarantee impartiality to complainants and defendants.

Random allotment should also be applied to lay judges. Bartnik in 2009 found that the main criteria of selecting lay judges are their availability and professional judges' preferences. This is not conducive to lay judges' participation in adjudication. Perhaps the reform should strengthen the social factor in the system of administration of justice in the person of lay judges. Bartnik has maintained that the position of the lay judge as a guarantee of judicial independence is also to be bolstered. For a lay judge is not subordinated to the Minister of Justice, nor to the president of the court, the chairman of the division, or any other professional judge. Hence, the mere idea of collegial decision-making at any time, under any government and circumstance – may not only be a guarantee of independence, but also of reliability and a deeper analysis of the case and judgment.

Even though the picture of lay judges is not positive, Kubicki and Zawadzki were right in holding that the presence of lay judges adds a social, humane sense of justice to the process of adjudication that is consistent with the law and procedure. It follows that lay judges should be kept within the legal system and their rights and duties should remain unchanged (these should mirror and be equal to those of professional judges). The legislator shall focus on regulating the questions of responsibility (accountability), training and political party membership of lay judges. Therefore:

– general elections for lay judge positions should be instituted;

– the persons elected should be forced to waive their political party membership;

– publicly available information pertaining to lay judges' political affiliation should be collected, together with data concerning whether they performed any functions etc.;

– training sessions for lay judges should be conducted by institutions independent from courts which would put predominant emphasis upon the role and responsibility of lay judges.

By way of example, J. Kurczewski proposed that lay judges be transformed into jurors[32]. It is a suggestion worth discussing. Even though it would be implau-

[32] J. Kurczewski, *Rządy prawa*, "Res Publica" 1989, issue 3, p. 18.

sible in the current state of the law, it appears every now and again in public discourse and is often hailed as one which would increase the citizens' trust towards the judiciary. A sense of justice among the citizens of a given country is an ideal state to which all legislators should aspire. It is our opinion that this state is achievable only by basing all legislative changes upon the outcomes of broad public consultations with groups directly and indirectly interested in amendments to a given area of the law. It is our hope that good practices prevail.

The debate on the usefulness of lay judges in courts was triggered by practising lawyers. For in the common opinion a lay judge comes late to the courtroom, does not read case files, sleeps during trial and does not understand what happens during it. Notwithstanding, Bartnik has found that not all those allegations are serious, more than that: many of them are frequently posed against other legal professions – the charge of lack of familiarity with case files is, for instance, often addressed at advocates and prosecutors, whilst being late – at judges and advocates. Therefore, professionalism and preparation of lawyers is also wanting. This, however, does not warrant calls that these professions be scrapped, and knowledge and experience constitute a shield against such attacks. This is why we argue that lawyers should be provided with training on the foundations of the law and their rights and duties, which would facilitate them in fulfilling their functions and raise the quality of adjudication and performance of legal occupations in Poland[33]. A lay judge who comes from the outside world will then not be an alibi for unprepared advocates, judges or prosecutors. A trained social judge will be able to prevent judgments from being agreed upon between the prosecutor and the judge. The lay judge will be an institution that guarantees the society observance of procedures associated with adjudicating. Pertinently, "in the proceedings, a lay judge counteracts the routine of professional adjudication and provides a fuller and broader view of the case at hand, its circumstances and an assessment of the accused's behaviour"[34].

The foregoing arguments show that the concern that the social sense of justice may be eradicated from courts by peculiar legal reasoning and thinking is fully justified. If today's lay judges, as representatives of the society, fail to perform their role due to, *inter alia*, more and more expeditious court proceedings, observance of procedures and presence of a sense of justice in the process of a criminal trial are questionable where adjudication is left only to professionals. For whilst one may suspect that agreeing upon the outcome of a case does not violate the

[33] We would recommend training covering the basics of the law with an emphasis upon the criminal and civil procedures as well as the functioning of the system of administration of justice. Also, the law should specify which provisions apply exclusively to professional judges and which have within their ambit lay judges. This should be included within the curriculum of training sessions provided to lay judges. Such training should take place outside of courts, should not be led by judges, and should aim to raise lay judges' ability to make independent decisions.

[34] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2003, p. 231.

supreme rules of criminal trial due to the presence of a lay judge, lawyers should not be left alone in such a scenario. The mere idea of a lay judge is overwhelmingly correct also in the opinion of the proponents of abolishing it. So if the problem consists in mere malpractice, perhaps we should think about improvements instead of depriving the society of any say over the functioning of the judiciary.

THE ROLE OF LAY JUDGES IN THE PROCESS OF ADJUDICATION

Summary

The paper attempts to expound upon the actual and statutory role of lay judges in the process of adjudication. A theoretical model was confronted with the practice of making judicial determinations. The authors analysed the state of the law on the matter and the functions of lay judges accorded thereto by the legislator. In addition, as a result of extensive sociological-legal studies, a typology of the moments of composing a judgment (i.e. during deliberations; in between cases; conversations with prosecutors; voluntary acceptance of liability (plea bargain)) and of types of deliberations present in Polish courts (deliberation without deliberation, deliberation dominated by the judge, deliberation *pro forma*, the ideal type, deliberation and a discussion – bargaining) is described.

BIBLIOGRAPHY

Bartnik A. S., *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, Warszawa 2009

Bieniek G. (ed.), *Komentarz do kodeksu cywilnego. Zobowiązania. Księga III*, t. 2, Warszawa 1999

Borucka-Arctowa M., Pałecki K., *Sądy w opinii społeczeństwa polskiego*, Kraków 2003

Grzegorczyk T., Tylman J., *Polskie postępowanie karne*, Warszawa 2003

Juchacz P. W., *Deliberatywna filozofia publiczna. Analiza instytucji wysłuchania publicznego w Sejmie Rzeczpospolitej Polskiej z perspektywy systemowego podejścia do demokracji deliberatywnej*, Poznań 2015

Juchacz P. W., *Trzy tezy o sędziach społecznych i ich udziale w sprawowaniu wymiaru sprawiedliwości w Polsce*, "Filozofia Publiczna i Edukacja Demokratyczna" 2016, Vol. 5, issue 1

Kurczewski J., *Rządy prawa*, "Res Publica" 1989, issue 3

Kurczewski J., Fuszara M., *Polskie spory i sądy*, Warszawa 2004

Łojko E., *Wizerunek zawodu sędziego w opiniach sędziów, prawników i społeczeństwa*, "Krajowa Rada Sądownictwa" 2010, Vol. 4

Machura S., *Silent Lay Judges – Why Their Influence in the Community Falls Short of Expectations*, "Chicago-Kent Law Review" 2011, issue 86
Mucha J., *Nowe regulacje w kodeksie postępowania cywilnego*, cz. I, "Radca Prawny" 2005, issue 2
Pietrzykowski H., *Prawo do rzetelnego procesu w świetle zmienionej procedury cywilnej*, "Przegląd Sądowy" 2005, issue 10
Prusak F., *Komentarz do Kodeksu postępowania karnego*, Warszawa 1999
Radwański Z., *Podmioty prawa cywilnego w świetle zmian kodeksu cywilnego przeprowadzonych ustawą z dnia 14 lutego 2003 r.*, "Przegląd Sądowy" 2003, issue 7–8
Siedlecki W., Świeboda Z., *Postępowanie cywilne. Zarys wykładu*, Warszawa 2001
Siemaszko A. (ed.), *Ławnicy. Rezultaty badań empirycznych*, Warszawa 1994
Skuczyński P., *Problem zakresu odpowiedzialności moralnej profesjonalistów i jego zastosowania w etyce prawniczej*, "Acta Universitatis Lodziensis. Folia Iuridica" 2015, issue 74
Skuczyński P., *Uzasadnienie refleksyjne i problem jego recepcji w teorii Roberta Alexy'ego*, (in:) K. J. Kaleta, P. Skuczyński (eds.), *Refleksyjność w prawie. Konteksty i zastosowa*nia, Warszawa 2015
Turska A., *Analiza odrębności postaw ławnika i sędziego zawodowego w orzekaniu*, (in:) S. Zawadzki, L. Kubicki (eds.), *Udział ławnika w postępowaniu karnym. Opinie a rzeczywistość*, Warszawa 1970
Waltoś S., *Proces karny. Zarys systemu*, Warszawa 2005
Wandall R., *Imprisonment. A Socio-Legal Study of Danish County Courts' Decisions to Impose Immediate Imprisonment*, Copenhagen 2004
Winczorek J., *O potrzebie badań empirycznych nad dostępem do prawa*, "Państwo i Prawo" 2016, issue 12
Winczorek J., Maranowski P., *Komunikacja w sądach po reformie kodeksu postępowania cywilnego z maja 2012 r.*, "Radca Prawny" 2014, issue 1
Zawadzki S., Kubicki L. (eds.), *Udział ławników w postępowaniu karnym. Opinie a rzeczywistość. Studium prawnoempiryczne*, Warszawa 1970

KEYWORDS

lay judges, participation of the social factor in judicial proceedings, legislative changes, functioning of the system of administration of justice, justice

SŁOWA KLUCZOWE

ławnicy, udział czynnika społecznego w procedurach sądowych, zmiany legislacyjne, funkcjonowanie wymiaru sprawiedliwości, sprawiedliwość