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THE NON-PROFESSIONAL JUDGE AS A COMPONENT OF CIVIC CULTURE IN POLAND

Abstract. The objective of the paper is to present the role of the non-professional judge in Poland as an important manifestation of civic culture based on citizens' activity in the sphere of justice among other things. The paper also highlights the importance of an appropriate selection of citizens who are to adjudicate and possibly place restrictions on access to judicial functions using the example of Polish law. The last part addresses the problem of the gradual reduction of the participation of lay judges in the Polish justice system and the controversial attempts to halt this trend, such as the introduction of lay judges to the Supreme Court and the start of discussions on the introduction of the justice of the peace to common courts.

Keywords: civic culture, courts, lay participation, non-professional judge, system of justice.

Introduction

A non-professional judge is defined as a person who adjudicates alongside professional judges, most often without professional qualifications to do so, and who performs his or her function as a voluntary, nonprofessional person without remuneration. Non-professional judges are not a uniform group. Their position, the scope of adjudicating and the way they fulfil their duties in a specific system of law most often depend on historical circumstances and on whether the legal system derives from a common or a civil law tradition (Goldbach, Hans, 2014).

There are basically three models of non-professional judge: the justice of the peace or lay magistrate, who deals with cases at the lowest level of the judiciary in England, Wales, Scotland, New Zealand, and some US states (e.g. Texas, Utah, West Virginia), Australia, Canada and France (*juge de proximité*), a member of a jury found in legal systems of approximately 50 countries such as the United States, the United Kingdom and

former British colonies in Africa, parts of India, Canada, Australia, New Zealand, and some Caribbean and South American countries, France, Spain, several post-Soviet countries (including Russia, Ukraine, Kazakhstan, Armenia, Azerbaijan and Georgia), South Korea, and a lay judge in a mixed panel with professional judges present in many European countries, including Germany, Austria, France, Italy, Greece, Portugal, Sweden, Norway, Finland, Denmark, Poland, the Czech Republic, Slovakia, Hungary, post-Yugoslavian countries, Japan (Bartnik, 2009; Goldbach, Hans, 2014; Kovalev, 2010).

The aim of this paper is to discuss the function of a non-professional judge as an important manifestation of civic culture in Poland. The paper presents arguments in favour of a wider admission of citizens to the justice system. This is to stimulate individual social activity, which is one of the determinants of a democratic culture which underpins an advanced democracy. The article also stresses the importance of an appropriate selection of citizens for adjudicating and placing possible restrictions on access to judicial functions using the example of Polish law. The last part of the article deals with the problem of the gradual restriction of the participation of lay judges in Polish judicial proceedings and the controversial attempts to halt this trend.

A brief overview of the status of non-professional judge

A non-professional judge who is an informed and committed citizen, regardless of the model of participation in adjudicating, should protect the accused against violations of his or her rights by the executive power, that is to say, in a sense, control authorities, guarantee the fair and lawful delivering of judgments, boost confidence in public institutions and strengthen the legitimacy of the authority and its transparency in the eyes of the public, and act as a link between justice and the public (Hostettler, 2004; Pożaroszczyk, 2013; Roumier, 2003; Sikich, 2013).

Social control consists not only in the presence of citizens in the composition of a court and their participation in all procedural acts, but also in the possibility of actively influencing the course of a proceeding and its result. Lay persons support and enhance democratic political institutions and act as a check on authority. They balance the power imbued in prosecutors and professional judges. By contributing to decisions that directly affect the people, they engage in an act of self-governance, re-establishing the people's sovereignty. They also act as conflict resolvers by finding so-

lutions to conflicts between the state and the defendant and by reaching a verdict even in difficult and complex cases (Goldbach, Hans, 2014).

The function of being a link between the justice system and society is related to the fact that a lay citizen brings to adjudicating cases not only his/her own life experience and knowledge but also an opinion and a sense of justice of the social group in which he or she lives. On the other hand, when the trial is finished, he or she returns to the community, shares the lessons he/she learned about the law, and transfers to the society his/her own opinions, evaluations and experience of adjudicating cases, as well as a point of view and criminal policy of the legislature and representatives of the criminal justice system. According to the idea of appointing a person to this post, he or she has the task of representing society (Małolepszy, Głuchowski, 2018; Prusak, 1975; Ziółkowska 2014). Lay participation in court is also a safeguard against technocracy as it makes the proceedings more easily understandable, brings a broader life experience into the court and is a link with the common sense of justice (Diesen, 2001).

Non-professional judges, therefore, have two faces they are: representatives of the “third power” and, at the same time, a social factor, representatives of the society that appointed them and which they represent in a way. The appropriate selection of members of the jury or lay judges gives democratic perspective on the legal system. Lay citizens drawn from a representative cross-section of the population are in a better position to express the full range of the community’s views. However, sometimes there are legal or factual constraints (criteria), which can create preferred treatment for certain segments of the population, and even politicise the selection process. For example in Norway, a nomination committee picks candidates for lay judges from among registered political party members, and in Sweden lay judges are elected by the political parties (Diesen, 2001; Goldbach, Hans, 2014). In Poland, lay judges are proposed by groups of citizens or by social organisations excluding political parties. They are elected by the legislative bodies of the local government – the town and commune councils, which themselves come from the general elections voted in by citizens. Thus, it can be stated that the representatives of the society (in this case, individual local communities) elect on behalf of the citizens further representatives of the society to exercise judicial power.

In the Polish justice system, according to Article 165 §1 of the Act of 27 July 2001 – Law on the Organisation of Common Courts¹ the term of office of regional and district court lay judges is four calendar years. A lay judge may be selected if he/she is a person who meets the following requirements (Article 158 §1): 1) is a Polish citizen and enjoys full civil

and full public rights; 2) is a person of integrity; 3) is over 30; 4) has been employed, has operated a business activity or has resided in the place where they apply for the post for at least a year; 5) is not older than 70; 6) is able, as regards their health condition, to perform the duties of a lay judge; 7) has completed at least secondary education. The lay judge appointed to adjudicate in cases within the scope of labour law should have particular knowledge of labour-related disputes (Article 158 §3).

A lay judge shall not be a person who (Article 159 §1): 1) is employed in a common court, other court, or the public prosecutor's office; 2) is a member of a body, against the decision of which the initiation of court proceedings may be requested; 3) is a police officer or holds a post related to the prosecution of offences or petty offences; 4) is an advocate or a trainee advocate; 5) is a legal counsel or a trainee legal counsel; 6) is a clergyman; 7) is a soldier in active military service; 8) is a prison service officer; 9) is a commune, district or province councillor.

Councils of communes within the local competence area of regional and district courts select lay judges to such courts, by a secret ballot. Prior to the selection, the council of the commune appoints a committee, which presents its opinion about the proposed candidates at a session of the council, in particular in terms of fulfilling the requirements specified in the act. The number of lay judges selected by particular councils of communes to all courts acting within the local competence area of the regional court, including the number of lay judges to adjudicate in cases within the scope of the labour law, is determined by the board of the regional court; the number of lay judges of particular district courts is determined upon consultation with the presidents of such courts. Candidates for lay judges may be proposed to the councils of communes by presidents of competent courts, associations, other social and professional organisations registered under the provisions of law, with the exclusion of political parties, and by at least fifty citizens having the right to vote, residing permanently in the commune making such selection (Articles 160–163).

A candidate for lay judge may not propose himself or herself but may propose that the above entities propose him or her. It is significant that candidates for lay judges cannot be proposed by political parties or organisations established by law itself, such as professional self-governments (e.g. doctors, pharmacists, nurses and midwives, construction engineers, or legal professionals). In practice, the notion of other social and professional organisations includes entities subject to registration in the National Court Register, which include, in particular, associations and their local units with legal personality, farmers' caucuses, farmers' associations, agri-

cultural caucuses and organisations, craft guilds, chambers of commerce and services, transport associations, other business organisations, trade unions and their organisational units with legal personality, associations of employers, physical culture associations, sports associations, entities which under special provisions are subject to entry in the National Court Register, public benefit organisations without legal personality (including ecclesiastical), and other legal persons being public benefit organisations (including ecclesiastical) (Chmielowiec, nd).

The democratic process of selecting lay judges faces problems in practice resulting from imprecise procedures and unmeritorious factors at the stage of assessing candidates by a committee of the council of the commune. A vast variety of practices adopted in respective councils of the commune, as well as – in extreme cases – applying the criteria of decision-maker's political or personal sympathies towards specific candidates are observed (Bartnik, 2009). Even now, when political parties are formally excluded from the possibility of proposing candidates, there are no obstacles to force through 'yours' in the course of the committee's work on opinions, and then during the final voting by a council of the commune. The proposed modifications to the method of selecting jurors in Poland, such as the general elections, drawing from among members of a local community, similar to the procedure of selecting the jury, selection by proper courts, or an exam for a lay judge. However, the disadvantages outweigh the undoubted advantages (Kuźelewski, 2016).

Non-professional judge and civic culture

Modern democracy is based on civic society, whose concept is ambiguous and not easy to define (Kastrati, 2016; Krasnowolski, 2014; Podemski, 2014). Nevertheless, the main determinants of a civic society are: the exercise of sovereign power by a nation through its representatives; the operation of authorities under established law; the existence of a system of legal protection of citizens' fundamental rights and freedoms with institutions that guarantee their observance; and legal guarantees of citizens' participation in society. The latter component is visible in two areas: firstly, civic group activity, e.g. activity in non-governmental organisations of a civic nature or within local communities, and secondly, individual social activity. The basis for the formation of civic society is civic culture as a participatory culture, i.e. a set of recognised and socially accepted values, beliefs, specific attitudes and patterns of behaviour. It is a bridge between the conscious and

responsible participation of individuals in society and the recognition and fulfilment of their duties towards the state and society (Wasilewska, 2019). Such an obligation and, at the same time, the privilege of individual civic activity is to perform the function of a lay factor in the administration of justice in the most important manifestation of this, namely the function of a non-professional judge.

Civic culture is the final stage of participatory culture, and the latter is one of the three types of political culture, which also includes parochial political culture and subject political culture. In a participatory political culture, citizens have a sense of real influence on social decisions and are more actively involved in public life. This establishes the standard of a competent citizen who contributes to a civic culture and behaves loyally to the democratic system as a whole (Almond, Verba, 1989). In other words, civic culture is considered to be a broader phenomenon than the political culture that is one of the elements of the latter. Civic culture includes all civic functions which depend on values such as engagement, cooperation, trust, tolerance and the level of competence in public affairs (Wnuk-Lipiński, 2005). Regardless of the theory and the way in which it is expressed, the essence of a civic culture lies primarily in the participation of citizens in public life (Czerwiński, 2019; Mach, Manterys, 2016). The consumer society is one of the causes of the disappearance of the competent citizen (Przybyszewski, 2016).

Therefore, the participation of citizens in the administration of justice alongside professionals should be considered a manifestation of a mature civic culture. The debate in favour of the ever-increasing involvement of citizens not only in the processes of democratic law making, but also in the application of the law within the executive and judiciary is becoming increasingly evident in countries with an established democratic system. The democratisation of state institutions in this respect is intended, among other things, to increase their public legitimacy (Juchacz, 2016).

It should also be stressed that a prerequisite for democracy is the formation of a democratic culture based on self-help, widespread participation in social (civic) institutions, and the will and ability to improve the operation of state authorities (including the judiciary) (Abramowski, 2012). Although such a form of civic participation may involve greater decision-making costs than in the traditional top-down model, it is considered a value in itself, an element of democratic and civic culture. It can certainly bring about a positive change in the way that any power, including judicial power, is exercised (Burdziej, 2014). Therefore, in spite of the fact that the participation of citizens in adjudicating generates additional costs associated with the operation of the judiciary (in Poland, this includes monetary compensa-

tion for the time of performing activities in court, a lump sum to cover the costs of travelling to court by means of local transport to perform activities in court, a daily allowance and reimbursement of travel and accommodation costs, and costs associated with the activities of selecting a citizen for such a function), it is worth maintaining the institution of non-professional judges in the legal systems.

In the context of citizens' participation in the administration of justice, the importance of the discourse undertaken during the creation of trial decisions is also emphasized, from which the society acquires knowledge and is able to formulate its own beliefs and assessments on the operation of the justice system (Malsch, 2016). Such decision making embraces many of the features of deliberative democracy as a diverse set of viewpoints which can be brought forward and evaluated through reason-based discussion of jurors or members of mixed courts (Goldbach, Hans, 2014).

(Anti)reforms on lay participation in judicial proceedings in Poland

In view of the conclusions reached from examining the background of civic culture, the idea that the increase of the participation of the civic factor in the exercise of justice is the remedy for the low level of legitimacy, and the credibility of the judiciary should be supported. The citizens in a democratic state should not only be the addressees of the law but also its creators, including participation in its application (Juchacz, 2016). Unfortunately, as far as Poland is concerned, the opposite can be observed in recent years, especially in criminal proceedings. Under the Act of 15 March 2007 amending the Code of Civil Procedure, the Code of Criminal Procedure and Some Other Acts² lay judges have been removed from the district courts which adjudicate in most criminal cases. Currently, pursuant to Article 28 §1 of the Act of 6 June 1997 – Code of Criminal Procedure³, one professional judge has become the main body in the first instance. Lay judges adjudicate in the panel of one judge and lay judges only in cases of felonies, i.e. crimes punishable by a minimum of 3 years imprisonment (Article 28 §2 of the Code of Criminal Procedure) and in the panel of two judges and three lay judges in cases of felonies punishable by life imprisonment (Article 28 §4 of the Code of Criminal Procedure).

Critics of such a drastic limitation of citizens' participation in the administration of justice, which resulted in a decrease in the number of citizens serving as lay judges from about 55,000 in the second half of the 1990s

to about 14,000 in 2015, indicate, among other things, a contradiction with the spirit of Article 60 of the Polish Constitution of 2 April 1997⁴. This provision guarantees every citizen the access to public service. The reduction of the role of citizens in adjudicating also results from a very general regulation of Article 182 of the Polish Constitution which refers to the ordinary law (“participation of citizens in the administration of justice is determined by law”). Although in Article 4 §1 of the Law on the Organisation of Common Courts unequivocally results in the rule that Polish courts adjudicate in mixed panels (“Citizens participate in administering justice by acting as lay judges in hearing cases before courts of first instance, unless acts provide otherwise”), the reservation of an exception character (“unless the acts provide otherwise”) was used by the legislator to reverse this rule. Currently, the vast majority of cases submitted to Polish courts are heard by one judge (without the participation of lay judges) (Eichstaedt, 2011).

The Act of 27 September 2013 amending the Code of Criminal Procedure and Some Other Acts⁵ has not changed much in this respect. Pursuant to the amended Article 28 §3 of the Code of Criminal Procedure, lay judges adjudicating in criminal cases were theoretically reinstated in regional courts. Currently, each court of first instance (both regional and district), due to the special complexity of the case or its importance, may decide to hear it in a panel of three judges or one judge and two lay judges. The problem is that district courts handle cases with less serious offences, which by their very nature rarely meet the requirement of particular complexity or seriousness, and the extension of the court is optional by way of exception. This does not bode well for a significant increase in the number of cases adjudicated by lay judges.

Criticism of the constant downgrading of the role of lay judges over the last two decades in Poland has not resulted in a thorough reform in this area. The only, and, moreover, peculiar, undertaking by the Polish legislature adopted under the Act of 8 December 2017 on the Supreme Court⁶ was to introduce lay judges to the Polish Supreme Court for the first time in its history. However, the lay judges of the Supreme Court are in the minority of judges, and the body selecting them is made up of politicians from the Polish Senate, which raises concerns about the politicisation of the Supreme Court (Waltoś, Hofmański, 2018). The role of the lay judges of the Supreme Court is limited to deciding on a new kind of appeal measure in the Polish criminal process, which is an extraordinary complaint, and to examining certain disciplinary cases. Pursuant to Article 94 §1 and §2 of the Supreme Court Act, an extraordinary complaint shall be heard by the Supreme Court in a panel of two judges of the Supreme Court adjudicating

in the Extraordinary Control and Public Affairs Chamber and one lay judge of the Supreme Court, and if the extraordinary complaint concerns a decision made as a result of proceedings in the course of which the Supreme Court issued its ruling, the case shall be heard by the Supreme Court in a panel of five judges of the Supreme Court adjudicating in the Extraordinary Control and Public Affairs Chamber and two lay judges of the Supreme Court. With respect to disciplinary matters, unless the act provides otherwise, the Supreme Court shall adjudicate in a composition of two Supreme Court judges adjudicating in the Disciplinary Chamber and one lay judge of the Supreme Court (Article 59 §2).

It has been correctly decided that it is unreasonable to allow citizens to adjudicate in the Supreme Court (Wiliński, Karlik, 2016) is because the Supreme Court is a “court of law” and not a “court of fact”. The cases it deals with require a great deal of legal knowledge and experience in adjudication, not civic sensitivity and life experience.

Closing remarks

The admission of lay citizens to adjudicating in judicial proceedings is an important guarantee of democratisation of the justice system. When judging together with professional judges, non-professional judges constitute the so-called third authority and, at the same time, exercise control over the judiciary. Regardless of the role in which they perform their function (lay judge, jury member or non-professional justice of the peace), they are also the link between the justice system and society. By representing the public in the judiciary, they are an important manifestation of participatory democracy, and by engaging in discourse on the assessment of evidence and the resolution of a case with the other members of the court’s panel, they strengthen deliberative democracy.

These guarantees, as well as the wide availability of society to play a role of social factor within the judiciary, and democratic procedures for the selection of non-professional judges and independence and equality with professional judges in adjudicating, are necessary but insufficient conditions for the developing civic culture. A high level of activity by citizens who will actually make use of the opportunity to stand as non-professional judges and to perform their duties with devotion and commitment is also required. The passive role of citizens, participation in the justice system only *pro forma*, puts into question the concept of civic culture and civic society.

Under an undemocratic regime of so-called popular democracy, the Polish justice system gave citizens broad opportunities to participate in adjudicating but did not encourage them to be more active in this area. Poland's return to the family of democratic countries not only did not bring about major changes in this regard, but there has even been a decline. The participation of lay judges in court proceedings was significantly reduced by changing the principle of mixed panels of one judge and two lay judges to one professional judge. The recent introduction of lay judges to the Supreme Court does not change the unfavourable trend, which has not yet happened in the history of this body. The lay judges of the Supreme Court are to adjudicate in a small number of proceedings concerning an extraordinary complaint against a ruling made by the Supreme Court and in disciplinary cases of judges and selected legal professions. In addition, contrary to previous tradition, they will constitute a minority in panels dominated by professional judges.

Another unreasonable idea for strengthening the role of the social factor in the justice system is the proposal to introduce the institution of a justice of the peace in Poland. Such a concept was put forward by politicians from the Kukiz'15 party and has recently become the subject of work by a team set up at the Ministry of Justice (Kruszyński, Jabłoński, nd). It is pointed out, however, that under Article 182 of the Polish Constitution, the full transfer of adjudication to citizens would go beyond the principle of participation in the administration of justice and the auxiliary role of the social factor, and would become the administration of justice in its full form by citizens themselves (Kosonoga, 2017; Wiliński, Karlik, 2016).

On the other hand, there is some optimism due to the fact that the integration and consolidation of the community of Polish non-professional judges has begun as a result of the establishment in 2013 of a nationwide association called the National Council of Non-professional Judges. The association was admitted to the European Network of Associations of Lay Judges in 2014. It is to be hoped that the institutionalised representation of Polish lay-judges will have the determination to lead to a reform that will be part of increasing the legitimacy of the judiciary in the eyes of citizens. A symbol of such reform could be the official designation of lay judges as non-professional judges (Juchacz, 2016).

N O T E S

¹ Consolidated text Journal of Laws of 2020, item 2072.

² Journal of Laws 2007, No. 112, item 766.

³ Consolidated text Journal of Laws 2020, item 30, as amended.

⁴ Journal of Laws 1997, No. 78, item 483, as amended.

⁵ Journal of Laws 2013, item 1247, as amended.

⁶ Consolidated text Journal of Laws 2019, item 825, as amended.

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