

# PARTICIPATION OF LAY JUDGES IN CRIMINAL PROCEEDINGS IN POLAND AND GERMANY

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## 1. INTRODUCTION

Over the recent years, the number of lay judges participating in criminal proceedings in Poland and Germany has been observed to decrease. Trials are becoming the exclusive domain of professional judges, which deserves criticism. The first threat to the quality of adjudication is connected with the fact that a professional judge in the course of everyday work develops and consolidates certain patterns of thinking and adjudicating, which he can then automatically and without change transfer onto cases that are significantly different. If someone constantly deals with the same type of cases, a risk occurs that they will be judged with the use of the same methods. Admission of lay judges to adjudication may serve getting off beaten tracks in judges' thinking; they bring in a new perspective to criminal proceedings, which can be different from the way of thinking typical of a professional judge. Obviously, the selection of the right people for lay judges to play the role of partners to professional judges and not just passive spectators is the necessary requirement for the inclusion of lay judges into the adjudicating process. Secondly, in the situation when professional judges dominate courts, there is a risk that administration of justice will depart from society's expectations, which can have a detrimental effect on the citizens' approval and trust in the court system. This threat manifests itself especially on the plane of imposing penalties. Both Polish and German criminal

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law gives judges discretion in this area. If penalties imposed by professional judges are too severe or too lenient, it will result in the society's negative opinions about the justice system. Lay judges may counterbalance this threat thanks to their participation in adjudication and influence on imposed penalties. These are just two of many arguments for lay judges' participation in criminal proceedings, which will be discussed below. However, even those arguments constitute a sufficient reason for analysing the legal grounds for lay judges' participation in criminal jurisdiction in the two states. It should be emphasised, at the same time, that the issue has not been the subject matter of a comparative analysis so far.

## 2. CASES HEARD WITH LAY JUDGES' PARTICIPATION

### 2.1. GERMANY

Lay judges adjudicate in Germany in criminal proceedings carried out before local courts (*Amtsgericht*) and state courts (*Landgericht*), i.e. the counterparts of Polish regional and district courts.

In cases tried before a local court, a bench with lay judges adjudicates, unless it is stipulated in statute that a professional judge must hear and decide in a criminal matter (§28 German Courts Constitution Act, hereinafter: GVG). The members of a lay judge bench are one professional judge who is also a presiding judge and two lay judges (§29(1) first sentence GVG). In more complex matters, the adjudicating bench can be extended, i.e. one more professional judge can be added (§29(2) GVG), which forms the "extended bench". Simply speaking, one can state that a regional court hears and decides matters as a lay-judge bench in cases in which the criminal offence carries a penalty of deprivation of liberty that exceeds two years but does not exceed four years, and in case of conviction for felonies, imprisonment does not exceed four years (two years' limit: §28 in conjunction with §25(2) GVG; four years' limit: §74(1) second sentence GVG), i.e. not in petty offences but in connection with medium-gravity offences.<sup>1</sup>

It should be noticed that the threshold of two years of deprivation of liberty constitutes a key limit in German criminal law because the execution of a penalty may be conditionally suspended only in case it does not exceed two years (§56(2) German Criminal Code, hereinafter: StGB). In other words, the members of the public must participate in trials concerning felonies and ones which carry a penalty of deprivation of liberty exceeding this threshold, i.e. excluding the possibility of conditional suspension of penalty execution.

It should also be taken into account that the German definition of a felony is much broader than the Polish one. In Poland, a felony is a prohibited act carrying a penalty of deprivation of liberty for at least three years or a stricter penalty (Article 7 Polish Criminal Code, hereinafter: CC). In German law, in order to recognise a prohibited act as a felony, an offence must carry a penalty of deprivation

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<sup>1</sup> W. Beulke, *Strafprozessrecht*, Heidelberg: C.F. Müller, 2016, nb. 40.

of liberty for at least one year or a stricter penalty laid down in statute (§12(1) StGB). That is why, e.g. a robbery is not a felony in Poland because the minimum penalty is two years' imprisonment, but in Germany it is, although the minimum penalty is twice lower (Article 280 §1 CC, §249(1) StGB).

Lay judges' participation in criminal proceedings in a state court is even broader. They participate in first-instance as well as second-instance proceedings.

In the court of first instance, all proceedings are conducted before a bench with lay judges because they take place in the "grand criminal division". The grand criminal division is composed of three professional judges and two lay judges (§76(1) first sentence, *in principio* GVG). At the opening of the main proceedings, the grand criminal division rules on its composition during the main hearing (§76(2) first sentence GVG). There are three cases in which it must rule that the composition remains unchanged during the main hearing, i.e. includes three professional judges and two lay judges:

- when a criminal division with lay judges hears and decides on one of 30 serious criminal offences enumerated in statute (§74(2) GVG), especially murder and various intentional crimes resulting in death (§76(2) third sentence, item 1 GVG);
- when the order of placement of a dangerous criminal in preventive detention, its reservation or the order of placement in a psychiatric hospital is expected (§76(2) third sentence, item 2 GVG);
- when the participation of a third judge appears necessary due to the scale or complexity of the case (§76(2) third sentence, item 3 GVG). The criterion, as a rule, is fulfilled when the main hearing is expected to last longer than ten days or the grand criminal division has jurisdiction as an economic offences division (§76(3) GVG).

If the criminal proceedings do not concern any of the three above-mentioned cases, the grand criminal division rules that it will be composed of two professional judges and two lay judges (§76(2) fourth sentence GVG).

Secondly, lay judges also adjudicate in the court of second instance, namely when a small criminal division has jurisdiction. It is composed of a presiding judge and two lay judges adjudicating in proceedings concerning appeals against a judgement of a criminal court judge or of a court with lay judges (§76(1) first sentence, second part GVG). However, appeals against a sentence of an extended bench with lay judges (§29(2) GVG) are heard by the "extended small criminal division" composed of two professional judges and two lay judges (§76(6) first sentence in conjunction with (1) first sentence, item 2 GVG).

In general, since 1924, a tendency to narrow the scope of criminal cases in which lay judges adjudicate has been observed.<sup>2</sup> At present, they participate in ca. 20%<sup>3</sup>–30%<sup>4</sup> of criminal proceedings.

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<sup>2</sup> Th. Rönna, *Grundwissen – Strafprozessrecht: Schöffen*, Juristische Schulung No. 6, 2016, p. 501.

<sup>3</sup> *Ibid.*

<sup>4</sup> H. Satzger, *Die Schöffen im Strafprozess*, Juristische Ausbildung No. 7, 2011, p. 520.

## 2.2. POLAND

In Poland, lay judges' participation in criminal proceedings is even smaller. Since the 1980s, the scope of criminal proceedings with non-professional bench participants has been systematically limited,<sup>5</sup> and the reform of 2007<sup>6</sup> has almost completely eliminated them from regional courts. At present, they participate in some trials before district courts and only exceptionally in cases tried by regional courts. In addition, unlike in Germany, benches with lay judges take part in first-instance proceedings, thus only professional judges hear appeals.

As far as regional courts are concerned, as a rule, an adjudicating bench is composed of one professional judge but because of special complexity of a case or its significance, a court may decide that a bench of three judges or one judge and two lay judges should hear it (Article 28 §3 Criminal Procedure Code, hereinafter: CPC). Special complexity of a case may result from factual or legal circumstances and occurs when it is necessary to determine a complicated and multi-thread state of facts as well as when a case requires the resolution of a very complicated legal issue.<sup>7</sup> Special significance of a case may result from its unprecedented nature<sup>8</sup> or extraordinary media coverage<sup>9</sup>.

On the other hand, the regulation concerning district courts is much more complex. Also as far as those courts are concerned, as a rule, one professional judge hears a case in first instance. However, there are three situations in which benches with lay judges adjudicate.

Firstly, a court may decide that a bench composed of three judges or one judge and two lay judges hear a case due to its special complexity or significance (Article 28 §3 CPC). Thus, it is a rule identical to that in a regional court.

Secondly, a district court in a bench composed of one judge and two lay judges adjudicates in cases concerning felonies (compare, Article 28 §2 in conjunction with Article 25 §1(1) CPC), thus in matters concerning serious offences.

Thirdly, in cases concerning offences that carry a life sentence, a bench of two judges and three lay judges adjudicates (Article 28 §4 CPC). In practice,<sup>10</sup> it concerns murder trials and, since 2017,<sup>11</sup> causing serious damage to health resulting in death.

<sup>5</sup> For more on this issue, see S. Waltoś, *Ławnik – czy piąte koło u wozu?*, [in:] T. Grzegorzczak (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tyłmana*, Warsaw: LEX, 2011, pp. 526–527.

<sup>6</sup> The reform introduced by the Act of 15 March 2007 amending the Act: Code of Civil Procedure, Act: Criminal Procedure Code and some other acts, *Journal of Laws [Dz.U.]* No. 112, item 766.

<sup>7</sup> P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*, Vol. 1, Warsaw: Wydawnictwo C.H. Beck, 2011, Article 28, nb. 5; W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz*, Warsaw: LexisNexis, 2014, Article 28, comment 4; compare, A. Ważny, P. Czarnecki, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw: Wydawnictwo C.H. Beck, 2016, Article 28, nb. 9.

<sup>8</sup> D. Świecki, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warsaw: Wolters Kluwer, 2017, Article 28, comment 23.

<sup>9</sup> A. Ważny, [in:] A. Sakowicz (ed.), *Kodeks postępowania...*, 2015, Article 28, nb. 2.

<sup>10</sup> Other offences for which the penalty may be imposed including, e.g. initiation or conducting a war of aggression (Article 117 §1 CC), are not common in judicial practice.

<sup>11</sup> Amendment to Article 156 §3 CC, which entered into force on 17 July 2017 on the basis of the Act of 23 March 2017 amending the Act: Criminal Code, the Act on misdemeanour procedure concerning minors and the Act: Criminal Procedure Code, *Journal of Laws [Dz.U.]*, item 773.

Summing up, in Poland, lay judges participate in adjudicating benches hearing cases concerning the most serious offences such as, e.g. murder (Article 148 CC), trafficking in persons (Article 198a CC), rape of a minor under the age of 15 (Article 197 §3(2) CC) and, secondly, in trials which are especially complicated or of great significance. One must admit that, this way, lay judges participate in the proceedings that evoke the strongest emotions in society and receive media coverage. In spite of that, the trials account for a small percentage of all criminal proceedings and their number seems to be unimportant in the light of proceedings concerning thefts or drink driving. It is estimated that lay judges participate in adjudication of less than 0.6% of all first-instance criminal proceedings in total.<sup>12</sup>

### 3. LAY JUDGES SELECTION

Due to the fact that regulations on the selection of lay judges in the two states demonstrate many specific differences, only some of them will be analysed.

#### 3.1. PROCEDURE

##### 3.1.1. GERMANY

In Germany, the municipal assembly compiles a list of the prospective lay judges, from which a committee at the local court selects the necessary number of them (details in §36 and the following GVG) for a five-year term (§ 42(1) first sentence GVG). However, the regulation is based on the assumption that might work in the smallest municipalities at the most.<sup>13</sup> In accordance with it, councillors know citizens well and can indicate people who can hold the posts. It is worth drawing attention to the directive the municipal assembly should follow when compiling the list of candidates. In accordance with the provision, "(...) it should adequately reflect all groups within the population in terms of sex, age, occupation and social status" (§36(2) first sentence GVG). According to the standpoint presented in the German literature, an attempt to fully implement this requirement would be a disproportionately difficult challenge, which is in practice unattainable. That is why, the directive is just a proposal for a municipal assembly, a pattern to be pursued, and only most flagrant violations of the directive result in negative legal consequences.<sup>14</sup> For instance, it would be inadmissible to select candidates at random, e.g. from the list

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<sup>12</sup> For S. Waltoś' estimation based on data of 2008, see *W dziesięciolecie obowiązywania kodeksu postępowania karnego*, PiP No. 4, 2009, p. 6; by this author, *Lawnik...*, p. 528; S. Waltoś, P. Hofmański, *Proces karny. Zarys wykładu*, Warsaw: Wolters Kluwer, 2016, nb. 502.

<sup>13</sup> W. Degener, [in:] J. Wolter (ed.), *SK-StPO. Systematischer Kommentar zur Strafprozessordnung. Mit GVG und EMRK*, Vol. 9, Köln: Carl Heymanns Verlag, 2013, §36 GVG nb. 3; strictly, M. Jaeger, *Ganz normale Leute*, Frankfurter Allgemeine Zeitung of 26 December 2015, <http://www.faz.net/aktuell/politik/inland/schoeffen-manchmal-maechtiger-als-der-richter-13975600.html> [accessed on 12/01/2018].

<sup>14</sup> W. Degener, [in:] J. Wolter (ed.), *SK-StPO...*, §36 GVG nb. 9.

of residents.<sup>15</sup> Apart from that, however, the Act gives municipalities considerable discretion in compiling the list of candidates. The obligation of proportional representation of particular groups of citizens is also addressed to the committee at the local court, which takes final decisions and selects future lay judges from the list prepared by the municipal assembly (§42(2) GVG). A new committee at the local court is appointed each time<sup>16</sup> when new lay judges must be selected, i.e. every five years (§40(1) GVG). It is composed of nine members: one judge of the local court who is a chairman, one administrative official of self-government administration or state (*Land*) administration designated by the state government and seven upstanding individuals.

The judge who is a chairman of the committee is designated in the annual plan of tasks adopted by the local court presidium (compare, §21(1) first sentence GVG). The governments of the particular constituent states usually<sup>17</sup> do not select a public administration representative to be a member of the committee on their own but they use the statutory entitlement to issue statutory instruments transferring the burden of it onto the highest level authorities of constituent states, usually ministries (see, §40(2) second and third sentence GVG). The administrative official does not have to be designated by name; a particular post held in administration constitutes sufficient designation.<sup>18</sup>

Upstanding individuals are selected from the residents of the district of the local court jurisdiction by the representative body elected in the general election<sup>19</sup> and representing the administrative subdivision (*unterer Verwaltungsbezirk*). The structure of the territorial self-government varies in different constituent states so the name and the body of self-government may be different, too. Usually, it is a municipality council (*Kreistag*).<sup>20</sup> Upstanding individuals are elected by a two-thirds majority of the present members, however, at least, by half of the statutory number of members (§40(3) first sentence GVG).

### 3.1.2. POLAND

On the other hand, in Poland, the commune (*gmina*) council appoints lay judges on its own. However, the council does not select candidates but court presidents, associations, organisations, trade unions and groups of at least 50 commune residents who have the right to vote designate them (Article 162 §1 of the Law on the common courts system, hereinafter: LCCS). Before the selection, a team appointed by the

<sup>15</sup> Federal Court of Justice judgement of 30 July 1991, 5 StR 250/91, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 38, beginning p. 47, p. 48.

<sup>16</sup> There are no contraindications to reappointment of the same people to the commission after a five-year term, see M. Goers, [in:] J.-P. Graf (ed.), *Strafprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, München: Verlag C.H. Beck, 2018, §40 GVG nb. 3 with further references.

<sup>17</sup> *Ibid.*, §40 GVG nb. 11.

<sup>18</sup> Federal Court of Justice judgement of 2 December 1958, 1 StR 375/58, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 12, beginning p. 197, p. 203.

<sup>19</sup> Compare, Article 28(1) second sentence German Basic Law (GG).

<sup>20</sup> Compare, Ch. Barthe, [in:] R. Hannich (ed.), *Karlsruher Kommentar zur Strafprozessordnung mit GVG, EGGVG und EMRK*, München: Verlag C.H. Beck, 2013, §40 GVG nb. 2a; W. Degener, [in:] J. Wolter (ed.), *SK-StPO...*, §31 GVG nb. 9.

commune council assesses the candidates (Article 163 §2 LCCS) so that councillors have general knowledge about them when voting. The principle of proportional representation of the community known in Germany is not applicable in Poland. It is enough to look at the list of entities entitled to designate candidates to notice that the Polish legislator thought about the selection of activists, persons involved in the work for the local community and not about a cross-section of society. In addition, the entitlement of court presidents to designate candidates indicates that the selection of experienced, verified lay judges again does not raise objections of the legislator. Polish law does not envisage any time limits to holding the position of a lay judge; one term lasts four years (Article 165 LCCS) and the appointment for successive terms is admissible, however, this does not mean that the function should become a regular profession.<sup>21</sup>

### 3.2. CANDIDATES' CONSENT

The basic difference between the two countries concerns voluntariness to hold the function of a lay judge. In Poland, a future lay judge's consent (or initiative) is an indispensable condition for his appointment. On the other hand, in Germany, a lay judge may be appointed against his will and may have to play that role obligatorily. The instrument should be applied carefully because, regardless of the burden for a citizen concerned, compulsion to hold the post raises questions about the prospective lay judges' motivation and their positive attitude to the duties.<sup>22</sup> It seems to be very doubtful whether an unwilling citizen with a negative attitude will hold this post in a satisfactory way. That is why, it seems reasonable that a commune compiling the list of candidates should, first of all, take into consideration candidates who volunteer and persons designated by local organisations. One must admit that compulsion used as a last resort, when other methods fail, solves the problem of shortage of lay judges, which is present in Poland.<sup>23</sup> Gross remuneration for a lay judge's day's work, which is PLN 80.19 now in 2018,<sup>24</sup> does not encourage citizens who are professionally active to take days off to serve in court (Article 172 §1 LCCS) and lose remuneration from a company (Article 172 §2 LCCS). That is why, the picture of Polish lay judges does not match the principle of proportional representation of the population. Among all lay judges during the present term

<sup>21</sup> Judges answering a survey questions, J. Ruszewski, P. Sitniewski, were absolutely against this solution, *Wybór czynnika społecznego w postępowaniu sądowym na obszarze właściwości Sądu Apelacyjnego w Białymstoku – raport z badań*, Samorząd Terytorialny No. 10, 2013, p. 78.

<sup>22</sup> Polish professional judges taking part in a survey emphasise that they believe that the most important features of a good lay judge are motivation to work, preparation to a trial and being acquainted with files, see J. Ruszewski, P. Sitniewski, *Wybór czynnika...*, p. 78.

<sup>23</sup> See, e.g. A. Łukaszewicz, *Ławników mniej, niż to wynikało z zapotrzebowania*, Rzeczpospolita of 22 November 2011, <http://www.rp.pl/artukul/757842-Lawnikow--mniej--niz-to-wynikalo-z-zapotrzebowania.html> [accessed on 12/01/2018]; by this author, *Sędzia będzie się musiał liczyć z ławnikiem*, Rzeczpospolita of 10 July 2016, <http://www.rp.pl/Sedziowie-i-sady/307109985-Sedzia-bedzie-sie-musial-liczyc-z-lawnikiem.html> [accessed on 12/01/2018].

<sup>24</sup> The level of compensation is updated each year in accordance with Article 172 §4 in conjunction with Article 91 §1c LCCS.

(2016–2019), i.e. not only those adjudicating in criminal matters, pensioners account for 43% of them, disabled pensioners for 5%, employees for 37%, entrepreneurs and freelancers for 6%, and the unemployed for 8%.<sup>25</sup>

### 3.3. FORMAL REQUIREMENTS

#### 3.3.1. GERMANY

Due to the fact that all social groups should be represented in the service of lay judges in Germany, the formal requirements for their appointment must be rather basic.<sup>26</sup> Apart from German citizenship (§31 GVG), they are as follows: a person cannot be deprived of the capacity to hold public office and there cannot be investigation proceedings pending that may result in loss of that capacity (§32 GVG), the person must have the capacity to freely dispose of his assets, be the resident of the county, be between 25 and 70 years of age, be in good health (all these conditions are laid down in §33 GVG), and there is an unwritten requirement of “special loyalty to the Constitution”.<sup>27</sup> Moreover, relatively recently, a new requirement has been added to statute, which is worth making a few comments about because it perfectly shows how strong the pursuit of proportional representation of all social groups is in Germany. A regulation which entered into force in 2010 introduced “sufficient knowledge of German” as a requirement for lay judges (§33(5) GVG in the new wording<sup>28</sup>). Before this amendment, the dominating standpoint<sup>29</sup> in accordance with the Imperial Chamber Court,<sup>30</sup> the former counterpart of the Federal Court of Justice, had assumed that a citizen who did not know German could hold the office of a lay judge with the assistance of an interpreter. In the face of numerous occurrences of that,<sup>31</sup> the legislator introduced the requirement of knowledge of German but indicated in the justification for the amendment that ability “to communicate and read a text concerning everyday life” is sufficient, thus the knowledge of legal language is not necessary.<sup>32</sup> Apart from that, no other restrictions on holding the office

<sup>25</sup> Data provided by the Ministry of Justice on the authors’ request.

<sup>26</sup> Compare, J. Bader, *Die Kopftuch tragende Schöffin*, *Neue Juristische Wochenschrift* No. 41, 2007, p. 2966.

<sup>27</sup> Not regulated directly in GVG, but introduced by the Federal Constitutional Court in its ruling of 6 May 2008, 2 BvR 337/08, *Neue Juristische Wochenschrift* No. 35, 2008, p. 2569, nb. 19.

<sup>28</sup> Amended by the Act of 24 July 2010 (Federal Law Gazette [Bundesgesetzblatt] I, p. 976) entering into force on 30 July 2010.

<sup>29</sup> See, a good review of posts together with sources presented by W. Degener, [in:] J. Wolter (ed.), *SK-StPO...*, §31 GVG nb. 4.

<sup>30</sup> Imperial Chamber Court judgement of 7 January 1898, Rep. 4565/97, *Entscheidungen des Reichsgerichts in Strafsachen*, Vol. 30, beginning p. 399, pp. 399–400; the judgement concerns a person holding the then office of the sworn juror.

<sup>31</sup> D. Gittermann, [in:] E. Löwe, W. Rosenberg, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz*, Vol. 10, Berlin, New York: Walter De Gruyter, 2010, §33 GVG nb. 7.

<sup>32</sup> Bundestag paper 17/2350, p. 5.



were introduced, e.g. the minimum education level, minimum skills or knowledge,<sup>33</sup> which should not surprise because a different attitude would be in conflict with striving to include all social groups.

It is also worth adding that until 4 November 2017, there was a formal requirement concerning the tenure of lay judge service in Germany. In accordance with the repealed §34(1.7) GVG,<sup>34</sup> the selection of a given lay judge for the third term in criminal courts was inadmissible. After two successive terms, there had to be a break and only after it could a lay judge hold the office again for two terms. In the justification for the Bill amending the Act, it was pointed out that it was to “prevent selecting the same person as a lay judge in criminal courts again and again and this way guarantee the society’s participation in criminal jurisdiction to a greater extent than so far”.<sup>35</sup> Again, the pursuit of society’s representation is evident in Germany, which is not so clearly indicated in Poland. Since 5 September 2017, instead of a strict ban on a lay judge’s third term in criminal courts, lay judges have had the right to refuse to hold this office in criminal courts for the third successive time (§35(2)(a) GVG). It must be reminded that a lay judge may be obliged to hold the office against his will. The legislator revealed in the justification to the Bill that the reason is to make it possible for involved, wilful and experienced lay judges to continue participating in adjudication in criminal matters. At the same time, thanks to the right to refuse, those who do not want to hold the office will not be burdened with it for over ten years. Thirdly, municipalities will have less work compiling the lists of candidates because they will not have to eliminate people for whom it would be a third successive term in office.<sup>36</sup> It is not difficult to notice that the first reason, i.e. admission of experienced and motivated lay judges to adjudication for a long time, is similar to the solutions adopted by the legislator in Poland.

### 3.3.2. POLAND

In Poland, the formal requirements that lay judges must meet (Article 158 LCCS) are similar to the German ones, although it is not difficult to notice some specific differences (e.g. in Poland, there is no requirement of capacity to freely dispose of one’s assets). An interesting Polish condition, which is not laid down in German statute, is, apart from an impeccable character,<sup>37</sup> secondary education. At first glance, the requirement may come as a surprise if one takes into account that in case of the President of the Republic of Poland or a member of parliament, there

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<sup>33</sup> Compare, the Imperial Chamber Court judgement of 7 January 1898, Rep. 4565/97, *Entscheidungen des Reichsgerichts in Strafsachen*, Vol. 30, beginning of p. 399, pp. 399–400.

<sup>34</sup> The reform was introduced by the second Act on strengthening the procedural rights of the accused in criminal proceedings and on the amendment of lay law of 27 August 2017, *Federal Law Gazette [Bundesgesetzblatt]* I, p. 3295.

<sup>35</sup> Justification for the government Bill, *Bundestag paper* 7/551, p. 99.

<sup>36</sup> Justification for the government Bill, *Bundesrat paper* 419/16, p. 28.

<sup>37</sup> However, non-introduction of this criterion as a formal requirement does not mean that the features of a lay judge’s character are unimportant for his selection.

is no minimum education requirement.<sup>38</sup> It can be explained only by the fact that lay judges are expected to have a certain minimum of competence and, statistically, proper education increases probability of meeting this condition. However, it seems obvious that the connection between a lay judge's education and his ability to hold the office should not be overestimated.

Summing up, one can say that the Polish legislator does not strive to achieve the proportional representation of particular social groups but is looking for the most competent candidates.

#### 4. STATUS

Comparing the status of lay judges in criminal proceedings in Poland and Germany, at first sight one can notice many similarities. Both legal systems guarantee lay judges' independence (Article 169 §1 LCCS, Article 97(1) German Basic Law, hereinafter: GG,<sup>39</sup> §45(1) first sentence in conjunction with §25 German Judiciary Act, hereinafter: DRiG). Adjudicating matters, lay judges hold an office of a judge equal to professional judges and their votes have the same weight (Article 4 §2 LCCS, §30(1) GVG). As the number of lay judges exceeds the number of professional judges in some benches, it is possible that lay judges will outvote professional judges. In both situations, lay judges' participation is limited to adjudication in the course of the main hearing (Article 169 §2 LCCS, Article 28 CPC, §30(2), §76(1) first sentence GVG). Only a professional judge may be the presiding one.

However, there is an interesting difference concerning access to files. In Poland, the members of the adjudicating bench, i.e. also lay judges, have the right but also a duty to get acquainted with evidence that is in the files. The duty is laid down directly in the Polish Criminal Procedure Code (Articles 7, 92 and 410 CPC<sup>40</sup>) and is recognised as an obvious requirement.<sup>41</sup>

In Germany, the situation is more complicated. In-depth presentation of the development of case law and doctrines<sup>42</sup> would go beyond the framework of this

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<sup>38</sup> That is why, critically on this criterion: A.S. Bartnik, *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP*, Warsaw: Trio, 2009, p. 188.

<sup>39</sup> Lay judges are also judges in the meaning of Article 97(1) GG, see W. Meyer, [in:] I. von Münch, Ph. Kunig, *Grundgesetz. Kommentar*, Vol. 2, München: Verlag C.H. Beck, 2012, Article 97, nb. 12; Ch. Hillgruber, [in:] Th. Maunz, G. Dürig, *Grundgesetz. Kommentar*, Vol. 5, München: Verlag C.H. Beck, September 2017, Article 97, nb. 20.

<sup>40</sup> Supreme Court judgement of 5 November 2008, V KK 146/08, OSNKW 2009, No. 1, item 9.

<sup>41</sup> See, M. Domagalski, *Ławnik bierze udział w rozprawie, choć nie zna sprawy*, Rzeczpospolita of 30 November 2014, <http://www.rp.pl/artykul/1144937-Lawnik-bierze-udzial-w-rozprawie-choc-nie-zna-sprawy.html> [accessed on 12/01/2018].

<sup>42</sup> D. Gittermann presents a review of opinions, [in:] E. Löwe, W. Rosenberg, *Die Strafprozeßordnung...*, Vol. 10, §30 GVG nb. 4–10; broadly on the issue in R. Börner, *Die Ungleichheit des Schöffen. Schöffen als Garanten der Unmittelbarkeit*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 122, No. 1, 2010, pp. 157–198; Th. Hillenkamp, *Zur Teilhabe des Laienrichters*, [in:] H.-J. Albrecht et al. (ed.), *Internationale Perspektiven in Kriminologie und Strafrecht. Festschrift für Günther Kaiser zum 70. Geburtstag*, Berlin: Duncker & Humblot, 1998, pp. 1437–1459.

article. In the former case law, it was assumed that lay judges were not authorised to have access to files and providing them with information about their contents was recognised as the violation of the principle of the proceeding directness (§249 German Criminal Procedure Code, hereinafter: StPO) and oral form of the proceedings (§261 StPO).<sup>43</sup> The difference in authorisation to access files between professional judges and lay judges was justified by an argument that in case of lay judges, there is a greater threat that the files will prejudice them.<sup>44</sup> However, already in the early 1960s,<sup>45</sup> the case law practice started to moderate this ban. The famous case of the admission of lay judges' access to the script of the contents of a sound recording may be an example.<sup>46</sup> Some authors predict that the process of changes in the Federal Court of Justice case law is heading towards granting lay judges the same rights of access to files as professional judges have in order to stick to the principle of equality of the two groups of judges in accordance with §30 GVG.<sup>47</sup>

## 5. LAY JUDGES' REMUNERATION

There are enormous differences between Polish and German lay judges as far as the system of their remuneration is concerned. In accordance with §55 GVG, German lay judges are paid compensation in accordance with the provisions of the Court Payment and Reimbursement Act (hereinafter: JVEG). Pursuant to §15(1) JVEG, lay judges are entitled to the following benefits:

- 1) Reimbursement of travel expenses covering real costs incurred up to the maximum value of first-class train fare (§5(1) JVEG). In case of travel by one's own car, a lay judge is reimbursed 30 cents per kilometre (§5(2) first sentence (2) in conjunction with §1(1.2) JVEG) plus the cost of car park tickets (§5(2) first sentence *in fine* JVEG).
- 2) Compensation for serving as a lay judge in the municipality in which he neither lives nor works. It is paid only in case a lay judge serves away from his own municipality for more than eight hours. Within this benefit, a lay judge is paid an allowance (*Tagegeld*) and reimbursed the cost of overnight accommodation (§6(1) and (2) JVEG). The allowance, in accordance with §9(4a) Income Tax Act (EStG), accounts for:

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<sup>43</sup> Imperial Chamber Court judgement of 8 February 1935, 4 D 787/34, *Entscheidungen des Reichsgerichts in Strafsachen*, Vol. 69, beginning of p. 120, p. 124; Federal Court of Justice judgement of 5 January 1954, 1 StR 476/53, *Entscheidungen des Bundesgerichtshofes in Strafsachen*, Vol. 5, beginning of p. 261, pp. 262–263; Federal Court of Justice judgement of 17 November 1958, 2 StR 188/58, *Entscheidungen des Bundesgerichtshofes in Strafsachen*, Vol. 13, beginning of p. 73, pp. 74–75.

<sup>44</sup> Compare, Federal Court of Justice judgement of 5 January 1954, 1 StR 476/53, *Entscheidungen des Bundesgerichtshofes in Strafsachen*, Vol. 5, beginning p. 261, p. 262.

<sup>45</sup> Starting from the unpublished Federal Court of Justice judgement of 23 February 1960, 1 StR 168/59; thus, W. Degener, [in:] J. Wolter (ed.), *SK-StPO...*, §30 GVG nb. 9.

<sup>46</sup> Federal Court of Justice judgement of 26 March 1997, 3 StR 421/96, *Entscheidungen des Bundesgerichtshofes in Strafsachen*, Vol. 43, beginning of p. 36, p. 39.

<sup>47</sup> W. Degener, [in:] J. Wolter (ed.), *SK-StPO...*, §30 GVG nb. 15; C. Roxin, B. Schünemann, *Strafverfahrensrecht. Ein Studienbuch*, München: Verlag C.H. Beck, 2017, §46 nb. 6.

- EUR 24 per whole day (24 hours) spent away from domicile or the place where he regularly works;
- EUR 12 per day of arrival and departure if a lay judge spent the night on the same day, the day before or the next day away from his home;
- EUR 12 for a calendar day when he spent more than eight hours but less than 24 hours away from home.

They are reimbursed the cost of overnight accommodation, provided they were really incurred and were necessary (§6(2) JVEG).

- 3) Reimbursement of other expenses, including e.g. the cost of organising substitution (childcare, cover for them at work), is subject to §7 JVEG.<sup>48</sup>
- 4) Compensation for the loss of time accounts for EUR 6 per hour of lay judge's service (§16 JVEG). Compensation for the loss of time is paid, regardless of compensation for the loss of remuneration (§18 first sentence JVEG) or inability to perform household chores (§17 first sentence JVEG). The time is counted in the manner favourable to a lay judge and is not limited to the time spent on lay service literally. It is necessary to quote the regulation concerning all compensations measured in hours, i.e. also benefits discussed below. Pursuant to it, the whole time of a lay judge's involvement, including the time of travelling and waiting,<sup>49</sup> but not exceeding 10 hours per day (§15(2) first sentence JVEG), is counted. Every started hour is counted as a whole one (second sentence) so, if a lay judge was involved in the service for five hours and ten minutes, he will be paid for six hours.
- 5) Compensation for inability to perform household chores accounts for EUR 14 per hour if a lay judge has his/her own multi-person family household and one of the following requirements is fulfilled:
  - a lay judge does not work to earn a living, or
  - he/she works part-time and serves as a lay judge after regular working time (§17 first sentence JVEG).

In case a lay judge works part-time and is not able to work because of lay service, he/she is entitled to compensation for every day of lay service (not exceeding ten hours) minus daily time indicated in the employment contract (§17 third sentence JVEG). Thus, if a lay judge having a multi-person family household and working four hours a day takes a day off because he/she has to spend nine hours for lay service, he/she will be paid compensation for inability to perform household chores for five hours (EUR 70 in total) and a compensation for the loss of remuneration for the remaining four hours (see, sub-par. (6) below).

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<sup>48</sup> In more detail on the issue, see M. Giers, [in:] N. Schneider, J. Volpert, P. Fölsch (ed.), *Gesamtes Kostenrecht. Justiz. Anwaltschaft. Notariat*, Baden-Baden: Nomos Verlag, 2017, §7 JVEG.

<sup>49</sup> The Polish legislator determines a much shorter period for which a lay judge is entitled to compensation: it concerns the performance of activities in the court literally, i.e. participation in the hearing, the meeting and discussion on the judgement, participation in the development of sentence justification and participation in a lay council meeting if a lay judge is its member (Article 172 §3 LCCS). Defining the time precisely has no practical significance because the compensation is a lump sum for the whole day of service.

Lay judges are not entitled to this benefit if they are reimbursed the cost of organising the cover for them at work (§17 fourth sentence JVEG), i.e. for instance in case of hiring a person to look after the household when a lay judge serves, he/she may request a lump sum of EUR 14 per hour of his/her real service or remuneration of the real expenses incurred for hiring a substitute.

- 6) Compensation for the loss of remuneration covers the actual gross remuneration, including voluntary social insurance contribution paid by the employer. As a rule, the maximum compensation threshold for the loss of remuneration accounts for EUR 24 per hour (§18 first sentence JVEG). However, the maximum threshold may be raised for lay judges who are often called to lay service. And thus, the maximum compensation threshold may be raised to:
- EUR 46 per hour if a lay judge serves 20 days within the same proceedings or loses remuneration for six days within 30 successive days (i.e. in practice, he/she is requested to serve for six or more days in the period of 30 days) – §18 second sentence JVEG.
  - EUR 61 per hour if a lay judge is requested to serve for 50 days within the same proceedings – §18 third sentence JVEG.

Undoubtedly, in the light of German solutions, finance provided for lay service in Poland is very poor. In Poland, a lay judge is paid a gross lump sum of PLN 80.19 per day.

## 6. ARGUMENTS FOR LAY SERVICE

Both in Polish and German doctrines, numerous arguments are raised for the participation of lay judges in justice administration.

### 6.1. CONSTITUTIONAL REQUIREMENTS

First of all, constitutional requirements are quoted as arguments for maintaining the office of lay judges. Participation of the citizenry in justice administration helps to avoid excessive influence of professional judges on the state and is subject to supervision exercised by the nation.<sup>50</sup>

However, it is necessary to distinguish between the requirements of the German and Polish Constitutions because they are quite different.

In the German doctrine of constitutional law, a question is raised whether lay judges' participation in jurisdiction finds its grounds in the Basic Law. According to some authors, the principle of democracy or the principle of the nation's sovereignty (Article 20(2) first sentence GG) absolutely requires that the citizenry should be present in jurisdiction.<sup>51</sup> However, the dominating standpoint, especially of the

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<sup>50</sup> B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw: Wydawnictwo C.H. Beck, 2012, Article 182, nb. 1; for a short presentation of the German standpoints, see W. Degener, [in:] J. Wolter (ed.), *SK-StPO...*, §28 GVG nb. 6–7.

<sup>51</sup> For brief information about this opinion, which lost its importance in the course of time in favour of reference to tradition, see W. Degener, [in:] J. Wolter (ed.), *SK-StPO...*, §28 GVG nb. 7;

Federal Constitutional Court, does not result in far-reaching consequences of those principles. The Federal Constitutional Court is of the opinion that, although the Basic Law envisages the office of a lay judge, it does not require that it should exist. From the constitutional perspective, the legislator may involve non-professionals in jurisdiction but, equally well, adjudication may be left within the exclusive competence of professional judges.<sup>52</sup> Most authors also point out that the office of a lay judge is deep-rooted in the tradition,<sup>53</sup> but not in the Basic Law.<sup>54</sup>

On the other hand, the Constitution of the Republic of Poland directly guarantees the participation of the citizenry in the administration of justice. Article 182 of the Constitution reads: "A statute shall specify the scope of supervision by the citizenry in the administration of justice". The Constitution leaves it for the legislator to determine in detail the participation of the citizenry (instead of lay judges, there might be a jury<sup>55</sup>). The legislator has also the discretion to choose the scope in which the citizenry participates in the administration of justice. The threshold is very low: the Polish Constitutional Tribunal only ruled that "it is not possible to totally exclude citizens from this function (administration of justice) nor to limit their participation so that it would become only symbolic".<sup>56</sup> However, if one takes into consideration the fact that lay judges participate in less than 0.6% of criminal proceedings, a question arises whether marginalisation of non-professionals from criminal proceedings is still in compliance with that modest constitutional guarantee.<sup>57</sup>

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H.-H. Kühne, *Laienrichter im Strafprozeß?*, Zeitschrift für Rechtspolitik No. 9, 1985, pp. 237–238 with references provided therein.

<sup>52</sup> Federal Constitutional Court resolution of 9 May 1962, 2 BvL 13/60, Entscheidungen des Bundesverfassungsgerichts, Vol. 14, beginning p. 56, p. 73; Federal Constitutional Court ruling of 17 December 1969, 2 BvR 271, 342/68, Entscheidungen des Bundesverfassungsgerichts, Vol. 27, beginning p. 312, pp. 319–320; Federal Constitutional Court resolution of 26 May 1976, 2 BvL 13/75, Entscheidungen des Bundesverfassungsgerichts, Vol. 42, beginning p. 206, pp. 208–209; Federal Constitutional Court ruling of 30 May 1978, 2 BvR 685/77, Entscheidungen des Bundesverfassungsgerichts, Vol. 48, beginning p. 300, p. 317.

<sup>53</sup> A short historic outline of the institution in particular branches of German jurisdiction, e.g. in U. Kramer, *Soll der Staat sich heute noch ehrenamtliche Richter leisten?*, Deutsche Richterzeitung No. 4, 2002, pp. 151–152.

<sup>54</sup> Thus, e.g. P. Rieß, [in:] E. Löwe, W. Rosenberg, *Die Strafprozeßordnung...*, Vol. 1, Berlin: New York: Walter De Gruyter, 1999, Einl. Abschn. I nb. 30 with references provided therein.

<sup>55</sup> B. Banaszak, *Konstytucja...*, Article 182, nb. 2; W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw: LEX, 2013, p. 241. The legislator has chosen the former solution in Article 4 §1 LCCS.

<sup>56</sup> Constitutional Tribunal judgement of 29 November 2005, P 16/04, OTK-A 2005, No. 10, item 119, Journal of Laws [Dz.U.] No. 241 item 2037.

<sup>57</sup> The doctrine is careful when formulating this type of criticism; see, a very conservative and indirect opinion by S. Waltoś, *W dziesięciolecie...*, pp. 6–7; also, carefully, from the point of view of a judge M. Celej in an interview: J. Kroner, *Lawnicy – niechciani społeczni sędziowie*, Rzeczpospolita of 10 March 2008, <http://www.rp.pl/artukul/104288-Lawnicy---niechciani-soczekni-sedziowie.html> [accessed on 12/01/2018]. The criticism of lay judges' marginalisation, which is not in compliance with the Constitution, can be found in the literature about civil procedure and this is due to excessive limitation of the scope of cases adjudicated on with the participation of non-professional judges, M. Orecki, *Instytucja ławnika sądowego w postępowaniu cywilnym. Uwagi de lege lata i de lege ferenda*, Przegląd Sądowy No. 7–8, 2012, pp. 171–172. Lay judges participate in judging in less than 10% of civil lawsuits, K. Knoppek, *Udział obywateli*

## 6.2. POSITIVE IMPACT

The second basic argument for the participation of lay judges is that it has a positive impact on the quality of judicial decisions: they offer a new attitude to matters, provide wisdom and life experience, demonstrate values and opinions typical of the public and this way counterbalance purely legal, hermetic reasoning typical of professional judges.<sup>58</sup> Just the presence of non-professionals has an impact on the way in which professional judges hear cases. Non-professionals can make them work more thoroughly and formulate their thoughts clearly, because professional judges must explain lay judges their solutions in such a way that they understand and recognise them as convincing. This way, lay judges constitute a supervisory mechanism over professional judges.<sup>59</sup> A potential discussion is especially valuable because a varied group's discourse may result in more thought devoted to decisions taking into account many points of view and mainly in-depth analyses.

Thirdly, a positive influence of lay judges in a different sphere is pointed out, i.e. a court's influence on the society. Thanks to the participation of representatives of the community, the public's legal awareness and its trust in the judiciary are rising.<sup>60</sup> This positive impact mostly concerns lay judges for whom direct involvement in criminal proceedings makes it possible to look into the unclear world of law. The understanding of the reality of a courtroom is transferred to other people, e.g. to members of their families and acquaintances they talk to about their experiences gathered during the lay service.<sup>61</sup> It should be remembered that the presence of lay judges increases the whole community's trust in jurisdiction because it removes a dichotomy between "them" (judges) and "us" (ordinary people). Bringing an adjudicating bench closer to the public results in greater approval of judgements by the community.<sup>62</sup> This comment is valid in case of parties to the proceedings and other people personally involved in them. What decides on the approval of the judgement is not only its content (namely, whether the sentence is in conformity with the interest and belief of a given person) but also the procedure based on which a court has adopted the solution. The people involved and interested in the sentence

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*w sprawowaniu wymiaru sprawiedliwości w postępowaniu cywilnym*, Ius Novum special issue, 2014, p. 26.

<sup>58</sup> Compare, T. Ereciński, J. Gudowski, J. Iwulski, [in:] J. Gudowski (ed.), *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, Warsaw: LexisNexis, 2009, Article 4, nb. 5.

<sup>59</sup> J. Turek, *Ławnik – sędzia – przysięgły*, Monitor Prawniczy No. 24, 2009, p. 1326; H. Bietz, *Laienrichter zwischen Macht und Ohnmacht? Ehrenamtliche Richter fordern bessere Informationen*, Deutsche Richterzeitung No. 4, 1987, p. 164.

<sup>60</sup> M. Malsch, *Democracy in the Courts. Lay Participation in European Criminal Justice Systems*, Farnham: Ashgate 2009, p. 194; T. Ereciński J. Gudowski, J. Iwulski, [in:] J. Gudowski (ed.), *Prawo o ustroju...*, Article 4, nb. 6; J. Turek, *Ławnik – sędzia...*, p. 1326; J. Bader, *Die Kopftuch...*, p. 2966; this assumption does not work in practice, according to A.S. Bartnik, *Sędzia czy kibic?...*, p. 194; also critically, U. Kramer, *Soll der Staat...*, p. 153.

<sup>61</sup> M. Malsch, *Democracy...*, p. 2.

<sup>62</sup> Compare, P. Rieß, *Prolegomena zu einer Gesamtreform des Strafverfahrensrechts*, [in:] H. Hassenpflug (ed.), *Festschrift für Karl Schäfer zum 80. Geburtstag am 11. Dezember 1979*, Berlin, New York: Walter De Gruyter, 1980, pp. 217–218.

are more willing to approve of an adjudication that is even unfavourable to them if they are convinced that it results from a fair trial,<sup>63</sup> and lay judges' counterbalance to professional judges helps to achieve that objective.

A lay judge's positive experience may also contribute to the building of active society involved for the benefit of the community without compulsion imposed by the state. Lay service reminds and teaches that that involvement in state matters does not have to be limited to casting a vote in the election but can also take place by more direct exercise of the powers vested in the nation. Direct participation in exercising authority also shows citizens that the administration of justice is not something separate from the society but created by citizens. An opportunity to get involved in a court for the common interest is an expression of the power vested in the hands of citizens as well as partial responsibility for the community, which a lay judge takes on together with the office.

## 7. CONCLUSIONS

The above analysis shows that the special role of lay judges has been much more strongly exposed in the German legal system. Although the reduction of lay judges' participation in criminal proceedings is also observed in Germany, their participation is still considerable. In the light of the presented analysis, a conclusion can be drawn that the Polish legislator should consider participation of lay judges in criminal proceedings, especially at the regional courts level. Current regulations have led to total marginalisation of lay judges' role in criminal proceedings, which raises considerable constitutional doubts. Moreover, one should draw attention to the fact that regional courts in Poland may adjudicate on a penalty of deprivation of liberty of up to 15 years.<sup>64</sup> It seems that long-term imprisonment sentences require that many people consider them because they strongly interfere into the rights and freedoms of convicts. It seems right to approve of the German regulations, which in case of a predicted penalty of deprivation of liberty exceeding two years (and thus not subject to suspension) and in case of felonies require the participation of lay judges.<sup>65</sup> They play a role of a specific safeguard which guarantees that long-term imprisonment will not be imposed too hastily.

<sup>63</sup> M. Malsch, *Democracy...*, pp. 13–14.

<sup>64</sup> The German local court is not competent to impose a penalty of more than four years' deprivation of liberty (§24(2) GVG).

<sup>65</sup> In case of a prediction that the imposed penalty for a crime will not exceed two years' deprivation of liberty, one professional judge is competent to hear the case. However, it must be emphasised that he can adjudicate on a penalty of deprivation of liberty even for four years on his own (§24(2) GVG grants the local court this power without distinction concerning the type of adjudicating bench: one professional judge or lay bench). Therefore, if the initial prediction of penalty occurs to be too lenient and the adjudicating judge decides to impose a penalty exceeding two years' imprisonment but not more than four years' imprisonment, he can do this on his own and does not have to refer the case of a lay bench; see, Federal Court of Justice ruling of 6 October 1961, 2 StR 362/61, *Entscheidungen des Bundesgerichtshofes in Strafsachen*, Vol. 16, beginning p. 248, pp. 249–250; Ch. Barthe, [in:] R. Hannich (ed.), *Karlsruher Kommentar...*, §24 GVG nb. 14 with further references therein.



The potential extension of lay judges' participation in the Polish legal system should be accompanied by the development of a system of lay judges' selection that would ensure the right representation of the community. The present solution resulting in the fact that half of them are pensioners should meet criticism. Lay judges should represent all social groups above the age of 25. Overrepresentation of elderly people is absolutely groundless. The limitation of lay service to two terms should also be considered. A person taking part in criminal justice administration for a long time, in the same way as a professional judge, is exposed to a threat of falling into a routine and treating matters conventionally, which is not conducive to criminal justice administration.

A *sine qua non* condition for the extension of lay judges' participation in criminal proceedings in Poland is the change in the system of financing lay service. In this area, fundamental differences occur between the Polish and German criminal law systems. In Poland, the rules for compensation do not encourage anybody who is employed to serve as a lay judge. The remuneration is a lump sum so only people whose financial situation is worse and those for whom the "sacrifice" of one working day is not a problem can be attracted. As a result, people who work and are well paid for their job will not be interested in lay service. In Germany, a lay judge's remuneration is not a lump sum like in Poland and it compensates the real loss in remuneration for work and expenses incurred in connection with lay service. In addition, a lay judge is awarded an extra compensation for the loss of time (EUR 6 per hour). Apart from people with really high income, German lay judges benefit from the service and get paid better than at work. Thus, in Germany, lay service may be attractive not only to pensioners and the unemployed but also to people professionally active in various fields of social life. This makes it possible to engage people from various professional groups, which is an opportunity to build up a representative criminal justice administration system.

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## PARTICIPATION OF LAY JUDGES IN CRIMINAL PROCEEDINGS IN POLAND AND GERMANY

### Summary

The article analyses the participation of lay judges in criminal proceedings in Poland and Germany from the comparative perspective. In both countries, there has been a visible tendency over the years to reduce the participation of lay judges in criminal judicature. Whereas in Poland their role is so marginalised that it raises doubts about its constitutionality, lay judges

still play a significant role in German criminal proceedings, and there are numerous arguments in favour of their participation in trials. The rules concerning the remuneration for lay judges constitute a significant problem of the Polish system, which discourages professionally active people from holding the office. In Germany, on the other hand, the rules on the remuneration and compensation, as well as other mechanisms are designed to ensure that lay judges mirror all groups in society.

Keywords: lay judges, criminal law, jurisdiction, participation of the citizenry, criminal proceedings, adjudicating benches, access to files, remuneration

## UDZIAŁ ŁAWNİKÓW W POLSKIM I NIEMIECKIM POSTĘPOWANIU KARNYM

### Streszczenie

Niniejszy artykuł stanowi prawno-porównawczą analizę zagadnienia udziału ławników w postępowaniu karnym w Polsce i w Niemczech. W obu państwach na przestrzeni lat widoczne są tendencje do ograniczania tego udziału. O ile jednak w Polsce rola ławników została zmarginalizowana w stopniu budzącym wątpliwości natury konstytucyjnej, to ich udział w niemieckich postępowaniach karnych jest nadal znaczny, za czym też przemawiają liczne zalety sędziów nieprofesjonalnych. Bolączką polskiego systemu jest ukształtowanie systemu finansowania ławników, który zniechęca do pełnienia urzędu osoby aktywne zawodowo. W Niemczech natomiast, poprzez zasady wypłaty rekompensat oraz inne rozwiązania, kładzie się nacisk na to, by urząd ławnika sprawowały osoby reprezentujące pełny przekrój ludności.

Słowa kluczowe: ławnicy, prawo karne, wymiar sprawiedliwości, czynnik społeczny, postępowanie karne, składy orzekające, dostęp do akt, rekompensata

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