

## UNCONVENTIONAL WAYS OF ADJUDICATION IN CRIMINAL CASES WITHIN THE SOLUTIONS IN THE POLISH TRIAL

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Criminal proceeding, because of the geographical location of Poland and the influence of the Continental legal culture resulting from it, has a relatively unambiguous juridical identity. Still in the times of development of the inquisitorial-adversarial formula for a trial (18th century), the basic assumptions of which are still valid although in a modified form, we were the state where the European ideal models of a new order in criminal law were not only well-known ones but also propagated and implemented within the bounds of possibility. The dialectics of history with its fundamental assumption of continuous transformation of reality was reflected in an extremely tragic way in Poland in the late 18<sup>th</sup> century. When other nations were developing and strengthening their states in the spirit of the Enlightenment at that time, Poland was losing its independence, thus the ideology of that time was an argument in striving for the state's integrity and independence rather than a programme of political and social transformation. The Enlightenment calls for rationalism and utilitarianism were of minor significance in the First Polish Republic while the idealistic concepts were relatively very important. They were reflected in the broadly exposed idea of "making the nation happy". The motive was a lead thread of "Zbiór praw sądowych" [Collection of court cases] by A. Zamoyski and its main thesis was that it is necessary to make laws "which should aim at the community's happiness, which should tie all the estates of the realm with a knot of common good"<sup>1</sup>. The codification initiatives emphasised the significance of moral arguments. H. Kołłątaj, during the Sejm session on 28 June 1791, said: "It is necessary (...) to pass moral acts that, through continuous education and uniform customs, would establish Poles' character, which is unstable, imitative and eager to change. Would you like the once established character to be spoiled? It is necessary to provide Polish nation with

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<sup>1</sup> *Zbiór praw sądowych przez ex kanclerza Andrzeja Zamoyskiego ordynata Zamoyskiego ułożony w roku 1778 drukiem ogłoszony [Collection of court laws developed by then-Chancellor Andrzej Zamoyski and published in 1778]*, Warszawa 1874, s. 5.

civil and criminal laws so that the former diligently safeguard justice among the citizens and the latter prevent crime”<sup>2</sup>. Apart from patriotic and civic motivation, there were prestigious motives for introducing reforms in the spirit of the Enlightenment connected with the honourable participation in the Republic of Letters. This meant confirmation of belonging to the European community, which was in Poland possible thanks to the Enlightenment and very well educated king Stanisław August Poniatowski<sup>3</sup>. At the end of the 18<sup>th</sup> century, despite an extremely unfavourable political situation, several legislative reforms were introduced in the Polish Republic, which reflect new political and social ideas. Their range and developed theories make historians speak of Polish Enlightenment, which exposes, apart from general proposals, ideas taking into account the specificity of our situation. The reforms were made in criminal law and resulted in many achievements in the field. Poland was one of the first countries in the world that abolished the use of torture in judicial proceeding and penalisation of sorcery (October 1776)<sup>4</sup>. It was done earlier only in England (1629), Prussia (1629) and Austria (spring 1776). William Coxe, a famous English writer, wrote about this event: “as expressive of his majesty’s right judgement as of his benevolence. It is an infinite satisfaction to see the rights of humanity extending themselves in countries, where they had been but little known; a circumstance that must cast a great reflection on those nations which, like France, have attained the highest pitch of civilisation, and yet retain the useless and barbarian custom of torture”<sup>5</sup>.

The movement for humanitarian criminal law had many powerful promoters in Poland, e.g. Sebastian Czochron, Tomasz Kuźmirski, Teodor Ostrowski, Józef Weysenhoff, Józef Szymanowski, Teodor Waga, Stanisław Konarski, Andrzej Stanisław Załuski, Stanisław Lubomirski, Franciszek Ksawery Dmochowski and others. A famous work of the time “Crimes and punishments” by Cesare Beccaria (1864) was well known to Polish representatives of the humanitarian movement. It was also taught at our universities (in the 18<sup>th</sup> century, 18 copies of the book were in the library of the Jagiellonian University and 14 copies in the library of the University of Warsaw).

The conclusion from the first part of the discussion is that Poland, always aspiring to belong to the western civilisation, in the late 18<sup>th</sup> century adopted the most significant achievements of juristic culture of the European continent to its legal order. The partitions of Poland precluded the implementation of the initiated reforms but a voluntary and complete return to those standards took place when Poland regained its independence in 1918. The dilemmas resulting from our geographical location have

<sup>2</sup> Mowa Hugona Kołłątaja na sesji sejmowej dnia 28.06.1791 [Hugon Kołłątaj’s speech at the Sejm session on 28 June 1791], [in:] *Kodeks Stanisława Augusta. Zbiór dokumentów [Stanisław August’s Code: Collection of documents]*, (ed.) S. Borowski, Warszawa 1938, p. 9.

<sup>3</sup> A. Zahorski, *Spór o Stanisława Augusta [Dispute over Stanisław August]*, Warszawa 1988, p. 7 and subsequent ones.

<sup>4</sup> The event was commemorated by coining a special medal with the following inscription: *Mękami wyciągać zawsze wątpliwe wyznania zbrodni, pociągać do sądu obwinionych o rzekome związki z mocą szatańską zakazał sejm roku 1776 na wniosek króla Stanisława Augusta [To obtain doubtful confession by means of tortures, to take to the court accused of alleged contacts with Satan, the parliament abolished it in 1776 by King Stanisław August’s suggestion].*

<sup>5</sup> W. Coxe, *Podróż po Polsce [Travels into Poland]*, [in:] *Polska stanisławowska w oczach cudzoziemców [Stanisław August Poniatowski’s Poland through the eyes of foreigners]*, Polish translation by E. Suchodolska, Warszawa 1963, vol. 1, p. 673.

never been connected with legal principles but only with a particular choice between the solutions preferred by the German or French legal doctrines. Close proximity of Germany was a natural factor in the perception of solutions developed there, which is reflected especially in substantive criminal law. German concept of criminal law dominated criminal Code of 1932, and French legal thought had greater influence on the content of Criminal Procedure Code of 1928. The interwar period was famous for many achievements in the field of law, to which many distinguished lawyers contributed. That is why the legislation of those times is believed to be a model for our times.

The above-mentioned dialectic variability of reality causes natural changes in law. Criminal proceeding is affected more often and to a greater extent than other fields because of the necessity of functional and pragmatic adjustment of its solutions to current conditions. In the 1990s, this phenomenon was greater than all the legal change processes before. It coincided with political transformation in Poland, however, was not a domain of only our reality. There are many references to its presentation but – in compliance with the title – I will focus on unconventional ways of adjudicating in criminal cases. Departure from classical forms of justice administration existing in the continental system started on a large scale in Poland when the Criminal Procedure Code of 6 June 1997 entered into force, i.e. on 1 September 1998<sup>6</sup>. It must be added that ideological arguments for new solutions had occurred many years before but formal conditions for the introduction of structural changes came into being with the new code. This circumstance is worth mentioning because in other states (e.g. Germany) real changes in the way of adjudicating in criminal cases preceded normative changes envisaging such a possibility. The application of plea agreements, which appeared in the procedural practice of German courts long before 2009, when *Strafprozessordnung* was admitted, is an example. The processes took place in Poland concurrently. They were based on the concept of restorative justice presented as an alternative to the classical idea of criminal law, i.e. the idea of retributive justice. Restorative justice has its roots in the Anglo-Saxon type of trial and this original model resulted in the development of criminal procedure towards the solutions of common law in many countries on the Continent. The adoption of some solutions of that model has not meant undermining the ethnic, continental principles of the criminal procedure in those countries, however, non-uniform share of culturally foreign, Anglo-Saxon juristic order in particular states caused the development of individual regulatory differences.

Two most important spheres of criminal process transformation can be distinguished. One concerns types of applicable procedures, the other – means of justice administration in criminal cases. In the former, the factor that recently influenced the change of the character of the criminal procedure to the greatest extent was the increase in the significance of the principle of contradictoriness in the traditionally inquisitorial-adversarial systems. As S. Waltoś writes, the history of criminal process describes competition between the principle of contradictoriness and the principle of the inquisitorial (investigative) system<sup>7</sup>. Poland is an example showing that changes within

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<sup>6</sup> Journal of Laws No. 88, item 553 with subsequent amendments.

<sup>7</sup> S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu [Criminal process: System outline]*, Warszawa 2013, p. 274. For more see: P. Hofmański, *Zasada kontradiktoryjności [Principle of contradictoriness]*, [in:] *System Prawa Karnego Procesowego [System of criminal procedure law]*, Volume III, Part I

that principle introduced by Act of 27 September 2013<sup>8</sup> influenced the construction of a trial and, as a result, the model of criminal proceeding, especially in the scope of proceeding before a court. While in the majority of continental European states the strengthening of the directive on contradictoriness had a neutral effect on the trial construction, in Poland the effect of the reform went beyond the framework of the former system<sup>9</sup>.

It must be noticed that the former regulatory model of the principle of contradictoriness, being in force before 1 July 2015, took into account all initial structural assumptions, especially Poland's belonging to the area of the continental legal culture. One of its basic indicators is a model of getting to the truth in the criminal proceeding different from that in the common law system. Partial decisions, on which the overall standard of the implementation of the principle of contradictoriness depends, were adequately incorporated into the framework, taking into account all the most important directives. They also took into consideration all the most important attributes of the principle, especially those connected with the implementation of the right to defence and partially also many other procedural entitlements. A series of amendments to Criminal Procedure Code have served that aim directly or indirectly since it entered into force in 1998. Some of them resulted from the adoption of the judgements of the European Court of Human Rights and the Constitutional Tribunal. The above-mentioned statements emphasised that in the period directly before the amendment to the CPC of 27 September 2015 entered into force, the principle of contradictoriness with respect to all its solutions was a coherent element of our (continental) legal order construction. It was expressed in binding guarantees ensuring the parties to the trial equal procedural position in it. The entitlements constituting the content of the principle of contradictoriness included first of all the right to defence, openness of the trial, access to information on available measures and other competences. Over the last years, most reformatory actions in the field of criminal process have focused on strengthening those directives, which resulted in the increased role of the principle of contradictoriness in the court proceeding. The system functioned in conjunction with the assumption that a court plays an active role in the jurisdictional proceeding. Pursuant to the continental concept of a trial, a court is eventually responsible for the outcome of the proceeding. In this model, the principle of factual truth is connected with the court's entitlement to actively try to discover it. In order to do this, a judge *ex officio* can examine evidence and interfere in the

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*Zasady procesu karnego [Principles of criminal process]*, (ed.) P. Wiliński and P. Hofmański, Warszawa 2013, p. 656 and subsequent ones.

<sup>8</sup> Journal of Laws, item 1247.

<sup>9</sup> M. Rogacka-Rzewnicka, Nowa kultura poszukiwania prawdy w procesie karnym w świetle nowelizacji kodeksu postępowania karnego na podstawie ustawy z 27 września 2013 roku. Perspektywa systemowa [New culture of seeking truth in the criminal proceeding in the light of the amendment to the Criminal Procedure Code under the Act of 27 September 2013: System-based perspective], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku. Księga jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. Urodzin [Polish criminal process in the light of the amendment of 2013. Professor Janusz Tylman's 90<sup>th</sup> birthday jubilee book]*, (ed.) T. Grzegorzczak, Warszawa 2014, pp. 107–124; *ibid.*, Zagadnienia uwarunkowań systemowych w realizacji zasady kontradiktoryjności w postępowaniu karnym [Issues of systemic conditions in the implementation of the principle of contradictoriness in criminal proceeding], [in:] *Przyszłość prokuratury po zmianach w 2015 r. Praca zbiorowa [Future of prosecution service after the amendment of 2015. Collective work]*, Warszawa 2015, p. 23.

evidentiary proceeding in other ways. Simultaneous binding of the principle of parties' active participation and of the inquisitorial system, giving a court a possibility of active involvement in the course of a trial, constitutes a dominant element of the characteristic of the continental type of criminal proceeding. The differences between particular states consist in the position of a cursor on the line of the two parallel assumptions. The principle of contradictoriness has a significant and exposed position in this model. It is difficult to question the thesis that contradictoriness serves discovering the truth best. S. Waltoś expressed this thought in the following way: "What can guarantee finding truthful, factual evidence more efficiently than the application of the Roman directive *audiatur et altera pars*, which is the essence of the principle of contradictoriness?"<sup>10</sup>. At the same time, it must be added that it is not expressed *expressis verbis* in the Criminal Procedure Code, although there is room in it designed for many key principles of criminal proceeding. The change in this direction was not considered even in connection with the latest reform, which exposed the importance of the principle of contradictoriness in the Polish criminal process, making it an engine of serious legal change that started on 1 July 2015.

It must be emphasised that strengthening the contradictoriness of a trial by the extension of its partial attributes has been a general European trend of recent years. The only exception was the Italian criminal process, in which the Anglo-Saxon model of contradictoriness was initially adopted but then the experiment was gradually abandoned<sup>11</sup>. The indicated direction of change dominating in continental Europe did not mean *a limine* simultaneous lessening of the role of a court. In the model adopted on the Continent, the functional relation between contradictoriness and the inquisitorial system did not consist in exclusion but supplementary co-existence of the two principles. In Poland, this model pattern was in force until 1 July 2015. The Act of 27 September 2013, which transformed the former system of classical continental framework of contradictoriness into a concept of Anglo-Saxon type of contradictoriness, introduced a radical change<sup>12</sup>. Article 167 § 1 CPC is mostly responsible for that change. The provision stipulates: "in the proceeding before a court, which was initiated on a party's initiative, evidence after its admission by a court president, a bench chair or a court, is examined by parties. In case a party

<sup>10</sup> S. Waltoś, Kontradukcyjność a prawda materialna [Contradictoriness and factual truth], [in:] *Kontradukcyjność w polskim procesie karnym [Contradictoriness in the Polish criminal process]*, (ed.) P. Wiliński, Warszawa 2013, p. 39; also see R. Stefański, Inicjatywa dowodowa w znolizowanym kodeksie postępowania karnego [Evidentiary initiative in the amended Criminal Procedure Code], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku... [Polish criminal process in the light of the amendment of 2013...]*, p. 175.

<sup>11</sup> M. Warchoł, Włoski proces karny [Italian criminal process], [in:] *System Prawa Karnego Procesowego [Criminal press law system]*, Volume II, *Proces karny-rozwiązania modelowe w ujęciu porównawczym [Criminal process – model solutions in legal comparison]*, (ed.) P. Kruszyński and P. Hofmański, Warszawa 2014, pp. 541, 544 and 619–622.

<sup>12</sup> M. Błoński, B. Najman, Inicjatywa dowodowa przed sądem pierwszej instancji w świetle zasady kontradukcyjności i szybkości postępowania. Wybrane zagadnienia [Evidentiary initiative before a court of first-instance in the light of the principle of contradictoriness and fast proceeding: Selected issues], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku... [Polish criminal process in the light of the amendment of 2013...]*, Inicjatywa dowodowa przed sądem pierwszej instancji w świetle zasady kontradukcyjności i szybkości postępowania. Wybrane zagadnienia, [in:] *Polski proces karny w świetle nowelizacji z 2013 roku... [Polish criminal process in the light of the amendment of 2013...]*, pp. 185–186.

filing an evidentiary motion has not appeared before a court, and in exceptional situations justified by extraordinary circumstances, a court may admit evidence and examine it *ex officio*". The regulation substituted for the former wording of Article 167 CPC, pursuant to which "evidence shall be taken upon a motion of the parties, an entity specified in Article 416 or *ex officio*" and caused a change in numerous regulations structurally and functionally connected with the discussed norm. Currently, the Polish Criminal Procedure Code assumes the broadest range of implementation of the principle of contradictoriness in comparison with the remaining legislatures of the continental legal order<sup>13</sup>. A new amendment has already been prepared in opposition to this direction. It envisages an entire return to the legal solutions for a criminal process that were in force before 1 July 2015. The reform is planned to enter into force on 1 April 2016, which in case of the principle of contradictoriness means restoration of its former, traditional form. This will mean that the short, less than yearly experience of the functioning of the new model of court proceeding in Poland, which is close to the Anglo-Saxon one, will not provide arguments for the assessment of change connected with the concept of contradictoriness. Although this aspect of the reform will most probably be just an episode, the problem of legal solutions' compliance with the conditions of the system in which they function should each time evoke reflection in the course of undertaken legislative actions. The system environment unwittingly determines specific choices in the field of legal solutions. It is a specific determinant of directions and scopes of legislators' freedom. It is not about determinants a priori delimiting free choice but about respecting the principles of legal order, the element of which is law as the entirety of its achievements and conditions. The continental model of law and the system of common law constitute the most characteristic and symptomatic juristic cultures of the contemporary world. The actual process of bringing the solutions of these two models closer is feasible and may be efficient only in particular frameworks. Within the scope of deeper structural conditions, its success is not obvious. Undoubtedly, it does not provide irrefutable examples. The adoption of typical Anglo-Saxon legal institutions in the continental European states took place with modifications, like in case of a jury, or was a failure, like in case of reception of full or very broad contradictoriness. There is a more complex background to these consequences and many diagnoses have been formulated in jurisprudence. Based on them one can state that the accusatory process is typical of societies with a particular sociological and cultural profile. This classification refers to the anthropological concept of societies by an outstanding French philosopher of Greek origin, Cornelius Castoriadis, although, because of obvious reasons, it cannot be thoroughly discussed in this article. According to M. Weber, on the other hand, the appellate model is typical of societies devoted to individualism and autonomy of individuals' will and marking success in rivalry with others. These qualities are commonly identified with states belonging to the area of common law<sup>14</sup>. M. Foucault, A. Garapon and J. Papadopoulos conducted interesting analyses of differences between Anglo-Saxon and continental systems from the same sociological and cultural perspective,

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<sup>13</sup> For more see: M. Rogacka-Rzewnicka, *Zagadnienia uwarunkowań systemowych... [Issues of systemic conditions...]*, p. 23 and subsequent ones.

<sup>14</sup> A. Mittone, La défense pénale en Italie, [in:] *La défense pénale, Actes du XIXème congrès de l'Association Française de Droit Pénal, Lyon, 19-20-21 November 2009*, Revue Pénitentiaire et de Droit Pénal, Numéro spécial 2010, p. 242.

which result in the provision of grounds for other methods of getting to the truth in a criminal process<sup>15</sup>. The diagnosis of a failure of the idea to expand the principle of contradictoriness in the Italian criminal process presented by A. Mittone in 1988 also confirms it. This author argues that the abandonment of the initial contradictoriness regulation similar to our current solution resulted from limited possibilities of adopting the new system because of totally different cultural features of the Italian society than in Anglo-Saxon ones, e.g. devotion to the idea of solidarity, catholic thought domination or the significance of the concept of non-antagonist conflict resolution<sup>16</sup>. I only signal the problem of non-legal factors participation in the development of global legal solutions, but I recognise its importance to drawing conclusions on the regulation of the principle of contradictoriness in this article.

The example of Italy is especially meaningful due to the fact that after the experiment of the adoption of the formula of contradictoriness to the Criminal Procedure Code of 1988, the formulas of Anglo-Saxon contradictoriness and abandonment of the directive on factual truth, relatively quickly, under the influence of criticism of the model expressed, inter alia, by the Constitutional Court of Italy, a withdrawal from those changes started. Although the above-quoted A. Mittone's statement is simplified, it is a diagnosis of the failure of the initial idea of contradictoriness in the Italian criminal process that is absolutely worth considering. The example should not be ignored in the course of designing the principle of contradictoriness in our Criminal Procedure Code.

The conclusion is that, based on the comparison of the examples of most often analysed legislations, the current normative state of the principle of contradictoriness in the Polish criminal proceeding goes beyond the limits of an average European standard. It assumes integration of this directive with inquisitorial-adversarial conditions for a trial expressed, on the one hand, by regulations allowing parties to exercise contradictory proceeding within their procedural entitlements and, on the other hand, broad possibilities of a court in order to discover the truth, which is essential for subsidiary judgements as well as judgements on the trial subject matter. A growing importance of the principle of contradictoriness of the criminal proceeding observed in other countries in recent years occurs at most as the strengthening of individual procedural guarantees within other procedural principles functionally connected with the directive on contradictoriness. The model of contradictoriness has not been changed anywhere, except Poland, which was the subject of my thorough study in the publications indicated in the footnotes. As it was already mentioned, after the initial introduction of the Anglo-Saxon model of contradictoriness in Italy, it proved to be deficient and infeasible.

Due to the fact that the amended procedure has been in force in Poland for only a few months and a planned temporariness of the current concept of contradictoriness, reaching any conclusions on the functioning of the new solution is neither possible, nor purposeful. Most probably, as far as this part of the regulation is concerned, there will be a revival of the legal solutions that were in force under the Codes of 1928 and 1969.

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<sup>15</sup> For more see: M. Rogacka-Rzewnicka, *Nowa kultura poszukiwania prawdy w procesie karnym...* [New culture of seeking truth in the criminal proceeding...], pp. 107–124.

<sup>16</sup> A. Mittone, *La défense pénale en Italie...*, p. 242.



With the introduction of the Criminal Procedure Code of 1997, new, not envisaged in the Polish law before, means of a plea bargain occurred<sup>17</sup>. Initially, these were two institutions: conviction without a trial (Article 335 CPC) and conviction based on the motion of the accused to be sentenced without evidentiary proceeding (Article 387 CPC). In both cases, their application was limited to petty misdemeanours (the former measure was applied to misdemeanours carrying imprisonment not exceeding five years, the latter to misdemeanours carrying imprisonment not exceeding eight years). After an initial reservation about the new possibilities of concluding trials and a conservative attitude of the proceeding organs as well as the parties to the proceeding, the significance of these measures quickly increased in the adjudication practice and they gained full approval. In the course of the successive amendments to the Criminal Procedure Code, the limits to a plea bargain were extended and the measure was admitted in more serious criminal cases. Today, there are almost no doubts that the institution is indispensable for appropriate administration of justice. Thanks to a plea bargain application, it was possible to overcome some problems of the Polish system of justice administration, especially those connected with the excessive length of the criminal proceedings. Nowadays, over 50% of criminal cases are concluded based on a plea agreement and, according to the authors of the amendment to the Code passed on 27 September 2013, eventually, it is to reach the level of 80%<sup>18</sup>. The estimate was calculated based on the forecast for new measures of concluding trials to be applied from 1 July 2015 and further extension of the range of the current regulation. It may be assumed that the current scope of admissibility of a plea bargain application is extremely broad. Based on that, a thesis was formulated that the directive on a plea bargain meets the criteria for recognising it as a major principle of the Polish criminal process<sup>19</sup>. The institution of a conviction without a trial (Article 335 CPC) is applicable to all misdemeanours, i.e. all acts carrying a penalty of imprisonment from two to twelve years, and a conviction based on the motion of the accused to be sentenced without evidentiary proceeding (Article 387 CPC) is possible in case of all crimes, including those classified as a felony. Based on that, it can be noticed that the idea of a plea bargain in Poland went beyond the limits established in the continental legal order. The initial concept of plea agreements assumed their application to petty crimes that are commonly committed, habitually performed by perpetrators, dealt with in a standard way and bothersome

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<sup>17</sup> There is extremely abundant literature devoted to the issue, including monographs (M. Zbrojewska, *Dobrowolne poddanie się karze w kodeksie postępowania karnego [Motion of the accused to be sentenced without trial laid down in the Criminal Procedure Code]*, Białystok 2002; E. Kruk, *Wyrok skazujący sądu pierwszej instancji w trybie art. 335 k.p.k. [First-instance court sentence based on Article 335 CPC]*, Zakamycze 2005; S. Steinborn, *Porozumienia w polskim procesie karnym [Plea agreements in the Polish criminal process]*, Zakamycze 2005; K. Girdwoyń, *Konsensualny wymiar kary. Instytucje powszechnego procesu karnego [Consensual penalty imposition: Institutions of common criminal process]*, Warszawa 2006).

<sup>18</sup> S. Waltoś, P. Hofmański, *Proces karny...*, s. 640.

<sup>19</sup> P. Wiliński, *Zasada konsensualizmu w polskim procesie karnym [Criminal process...]*, [in:] *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu [Supreme Court Judge Stanisław Zabłocki's jubilee book]*, Warszawa 2014, p. 593 and subsequent ones.



for law enforcement institutions<sup>20</sup>. The conditions for using the plea bargain mode are met in many states and they are reflected in limitations to the scope of statutory penalties prescribed and their individual amount within a given measure. In our Code, the sphere of limitation covers individual premises of admissibility of plea agreements that are strict and obligatory conditions in character. They show some differences as far as the scale of individual plea bargaining measures are concerned, correlated with the specificity of the stage of their application, but common requirements include: lack of doubts concerning the circumstances of a crime commission and the guilt of the perpetrator, a proceeding organ's conviction that, in spite of procedural simplification applied, the objectives of the proceeding will be achieved and the necessity of taking into account the interests of victims that are protected by law.

At the same time, in the situation with big possibilities of unconstrained development of the contents of a judgement, the provisions of the Code do not specify close directives for a court on a penalty imposition in a case conclusion based on a plea agreement. After 1 July 2015, courts possess a wide range of measures deciding on the legal position of the accused in a sentence rendered based on a plea agreement. *Expressis verbis*, it was envisaged in the Criminal Procedure Code that an agreement may also apply to the issue of court proceeding costs to be incurred by the accused. The most important, however, are the means of developing the contents of a judgement that are contained in the substantive criminal law, thanks to which the accused can make use of numerous benefits. Pursuant to Article 60a CC, a court is entitled, regardless of the conditions laid down in Article 60 § 1–4 CC, to apply extraordinary mitigation of a penalty, withdraw from a penalty imposition and impose only a penal measure, forfeiture or a compensation measure, with a reservation that, apart from extraordinary penalty mitigation, other legal concessions to the accused are applicable only when a misdemeanour he committed carries an imprisonment penalty not exceeding five years.

The new measures that entered into force on 1 July 2015 influence the current range of consensual proceeding in criminal cases. They include the institution laid down in Article 338a CPC, which is a specific variant of a conviction based on the motion of the accused to be sentenced without evidentiary proceeding, and a measure laid down in Article 59a CPC, which is called in jurisprudence “restitutive discontinuance”. The added provision of Article 338a CPC extends admissibility of a conviction based on the motion of the accused to be sentenced without evidentiary proceeding to the stage before a trial. Until 1 July 2015, such a possibility, pursuant to Article 387 CPC, was envisaged only at the stage of the hearing. The regulation allowing the accused to file a motion to issue a decision convicting him and sentencing to a specified penalty or a penal measure without evidentiary proceedings still before he is notified on the term of a trial is aimed at motivating the accused to file such motions at the earliest stage of the court proceeding. This results in the possibility of faster conclusion of the criminal proceeding, which is also important from the economic point of view. It must be added

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<sup>20</sup> M. Rogacka-Rzewnicka, *Obrońca i pełnomocnik wobec instytucji dobrowolnego poddania się karze* [Counsel for the defence and proxy vs. the institution of a motion to be sentenced without evidentiary proceeding], [in:] *Obrońca i pełnomocnik... [Counsel for the defence and proxy...]*, p. 258 and subsequent ones.

that the institution regulated in Article 338a CPC is applicable only to misdemeanours. In case of a felony, its application has been excluded.

A measure laid down in Article 59a CC is a typical manifestation of the consensual and restitutive direction in criminal law<sup>21</sup>. The provision stipulates: "If, before the first-instance hearing starts, the perpetrator who has not been convicted for a deliberate crime with the use of violence before, rectified the damage or compensated victims for doing wrong, a court shall, on the victim's motion, discontinue the criminal proceeding with regard to a misdemeanour carrying imprisonment not exceeding three years and a misdemeanour against property carrying imprisonment not exceeding five years as well as a misdemeanour specified in Article 157 § 1 (§ 1). In the event of a crime committed to the detriment of more than one victim, the condition for the application of the institution is rectification of the damage and compensation for doing wrong concerning all victims (§ 2). Pursuant to § 3 of the provision, a special circumstance giving grounds for the assumption that the decision did not comply with the need to achieve the objectives of a penalty is an obstacle to discontinuance.

The consensual trend is one of the most characteristic manifestations of the Polish criminal law transformation. Poland resembles other states in this field, with earlier reservations. The development of consensual attitude resulted not only in decrease in the importance of a classical trial and structural transformation of the criminal procedure, but also contributed to the change in criminal process philosophy. This extremely interesting motif may only be signalled but certainly deserves a thorough discussion.

It must be emphasised that when the Act was passed on 27 September 2013 and, to some extent, also when another Act amending criminal law was passed on 20 February 2015, it was not possible to predict that the multi-dimensional change in the Polish criminal procedure that was to redirect the principle of contradictoriness of criminal proceeding from the former continental form towards the Anglo-Saxon model will prove to be ephemeral to such an extent that nowadays we can only speak of it as a theoretical legal experiment. The new model of criminal proceeding being in force from 1 July 2015 does not allow for formulating any conclusions on the effects of the reform. When it was at the first stage of its implementation, it was almost certain that there would be a withdrawal from its directional assumption of strengthening contradictoriness of a trial as well as other solutions. The official bill to amend the Criminal Procedure Code and some other acts was ready on 23 December 2015. It is to enter into force on 1 April 2016.

The latest reform of the criminal procedure exerts direct influence on legal solutions within the subject matter of this article. Although the amendment has not been settled yet, it is very probable to be implemented, thus it is worth presenting, especially with respect to the part referring to the two unconventional instruments of resolving criminal cases that are discussed here.

As far as contradictoriness is concerned, an almost full revival of the solutions constituting determinants of this principle and its normative surrounding is envisaged. If everything did not take place in the circumstances of chaos and a legislative sinusoid, the change itself might be easily explained and rational arguments for it found. They

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<sup>21</sup> M. Królikowski, R. Zawłocki, *Prawo karne [Criminal law]*, C.H. Beck 2015, pp. 421–422.

are, *inter alia*, motives serving as grounds for developing criticism of the current form of the principle of contradictoriness. The above-mentioned most important argument of cultural and structural alienation of the Anglo-Saxon model of contradictoriness in countries representing the continental legal order requires exposing again. Therefore, the same reasons that were decisive for a polemic attitude towards the currently binding formula of contradictoriness influence the assessment of the latest bill with respect to the scope of revival of the former framework of functioning of the principle in the criminal process. Another task is to improve the conditions for the implementation of a contradictory trial in order to eliminate the deficiencies of the model that was in force before 1 July 2015, which were grounds for radical legal amendments to the Act of 27 September 2013.

The bill to change the Criminal Procedure Code of December 2015 envisages the limitation of consensualism in favour of the revival of the classical model of criminal cases resolution. This direction of change, motivated by excessive share of such measures in criminal substantive and procedure law and the resulting infringement of the objective of criminal proceeding, *i.e.* retribution for the commission of a forbidden act, includes proposals to repeal Article 59a CC, Article 60a CC and Article 338a CPC and to limit the application of Article 387 CPC.

As it was mentioned earlier, unconventional – in comparison with the classical concept of criminal law – procedures and means of response to crime are in general commonly accepted in the contemporary legal systems. Also, in accordance with the former statement, the scale of their application in other states includes a really smaller scope of possibilities with regard to the range of cases as well as sanctions. On the other hand, the legislator's argument of no compliance of this institution with the classical objectives of criminal law is questionable and, first of all, ignores current transformations of measures and forms of response to crime. As a result of postmodernist transformation of common criminal law, global transformations are taking place in this area. In fact, the key issue focuses on rational establishment of the limits for these processes. Looking from this perspective, one must approve of the proposal envisaged in Article 387 CPC to limit the application of a conviction based on a motion of the accused to be sentenced without evidentiary proceeding to crimes carrying imprisonment not exceeding 15 years instead of the present possibility of applying this mode even to a felony. On the other hand, other proposals to limit consensual modes are at least controversial. Admissibility of a motion of the accused to be sentenced without evidentiary proceeding filed at the earliest stage of the court proceeding under the provision of Article 338a CPC was excluded on *a priori* grounds. Such a possibility may be considered to be a desired one from the point of view of process economics if a case does not raise factual and legal doubts. The proposal to repeal Article 59a CC is not convincing, either, especially as it is in the situation when the regulation, undoubtedly with a certain potential, basically had no opportunity to be applied in practice. The proposal to repeal Article 60a CC is assessed similarly. The reason for giving up more lenient penalties accompanying plea agreements is not fully understandable. An issue that is exposed in the latest proposals to repeal Article 59a CC, Article 60a CC and Article 338a CPC is their non-compliance with the legislator's concept of criminal law. It seems that in the exposition of such an assessment, it is necessary to take into account various conditions of functioning of the

contemporary criminal process, including feasibility of the designed system based on calculation and empiric verification. It is recognised that the development of procedural consensualism to a great extent contributed to solving many problems connected with justice administration in criminal cases, which causes that this circumstance should not be ignored in the course of change development.

Summing up, it must be stated that the main theme of the article, apart from the issue strictly constituting its contents, discusses subsidiary issues, which hamper firmness of assessment and conclusions. This difficulty results first of all from instability or even unsteadiness of the criminal proceeding system in Poland. Since the Criminal Procedure Code was passed in 1997, stability in the sphere has not been achieved, and the last period can be called real legislative aberration. This state prevents a diagnosis of current assumptions and principles of our procedure. What is worst, however, is that the conducted legislative experiments have real influence on real people's lives.

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## UNCONVENTIONAL WAYS OF ADJUDICATION IN CRIMINAL CASES WITHIN THE SOLUTIONS IN THE POLISH TRIAL

### Summary

The article raises the issue of transformation of the ways of criminal adjudication and the use of various means of response to crime in the context of general statutory trends and specific solutions in the Polish criminal proceeding. The issues selected from the multiplicity and variety of potential research perspectives of the subject are the new form of the principle of contradictoriness and post-classic measures of justice administration in criminal cases. The legislative actions undertaken recently with regard to criminal proceeding are a common background of these issues.

*Key words: criminal process, trial, directions of transformation, principle of contradictoriness, plea agreements/bargains*

## ZAGADNIENIE NIEKONWENCJONALNYCH SPOSOBÓW ROZSTRZYGANIA SPRAW KARNYCH W ROZWIĄZANIACH POLSKIEGO PROCESU KARNEGO

### Streszczenie

Niniejsze opracowanie podejmuje zagadnienie transformacji sposobów rozstrzygania spraw karnych oraz stosowanych środków reakcji na popełniane przestępstwa w aspekcie ogólnych trendów ustawodawczych oraz specyficznych rozwiązań polskiego postępowania karnego. Pośród wielości i różnorodności możliwych perspektyw badawczych tej problematyki wybrano i bliżej omówiono nowy kształt zasady kontryktoryjności oraz postklasyczne środki realizacji wymiaru sprawiedliwości w sprawach karnych. Wspólnym tłem tych zagadnień są działania ustawodawcze w sferze procesu karnego, podejmowane w ostatnim czasie.

*Słowa kluczowe: proces karny, kierunki transformacji, zasada kontryktoryjności, porozumienia procesowe*