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Stanislaw Pomorski

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## COMMENT

# Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description

### INTRODUCTION

**T**HE PARTICIPATION of laymen in the administration of justice has long been a subject of controversy, particularly in those countries where trial by lay judges has become a standard mode of proceedings. Two basic forms of lay participation in the

THE AUTHOR: STANISLAW POMORSKI (Master of Law, Doctor of Law, University of Warsaw, Poland) is an Associate Professor of Law at the Rutgers University, Camden.

administration of justice in contemporary legal systems may be distinguished. The first is the system of mixed tribunals composed of professional and lay judges sitting together and deciding all relevant issues of fact and

law. This system, which has been deeply rooted in the German legal history,<sup>1</sup> still prevails in several Central, Eastern, and Northern European countries.<sup>2</sup> The second is the system of trial by jury, which even at the height of its acceptance on the European continent, never attained the position that it occupies in the English speaking world. Nowadays, on the European continent, as Professors Casper and Zeisel put it:

. . . the jury is in eclipse. Only Austria, Norway, a few jurisdictions in Switzerland, and Belgium have retained the jury.

The jury has thus maintained its position mainly in the orbit of the common law. . . . More than ninety percent of the world's criminal jury trials, and nearly all of its civil jury trials take place in the United States and it is here that the problem of lay participation in the judicial process has been posed and discussed most sharply.<sup>3</sup>

<sup>1</sup> J. P. DAWSON, *A HISTORY OF LAY JUDGES*, 94-115 (1960).

<sup>2</sup> H. KALVEN and H. ZEISEL, *THE AMERICAN JURY*, 13-14 (1966).

<sup>3</sup> G. Casper and H. Zeisel, *Lay Judges in the German Criminal Courts*, I(1) *THE JOURNAL OF LEGAL STUDIES*, 135 (Jan.1972). For a general discussion of the histori-

The experience of a foreign country concerning lay participation in the judicial process may thus be of some theoretical and practical relevance to an American legal audience.

This discussion will start with a general outline of the legal role of lay judges in Poland, it then reveals certain opinions prevailing within the legal profession concerning their activities, and finally contrasts the legal model with the real functioning of lay participation in the administration of criminal justice.

## THE LEGAL FRAMEWORK

Before World War II Poland had a jury system functioning on a very limited territorial and jurisdictional basis. It was totally abolished in 1938 along with the institution of justices of the peace.<sup>4</sup> Beginning in 1944 a system of mixed trial courts composed of professional and lay judges was gradually introduced. In 1950 the trial by mixed tribunals became the standard mode of trial in civil and criminal cases,<sup>5</sup> a pattern shared in principle by all socialist countries.<sup>6</sup>

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cal development of lay participation in the administration of justice see: J. P. DAWSON, *supra* note 1.

For a general historical survey of lay participation in the administration of justice in the last two centuries, written from the Marxist point of view, compare: B. Lesnodorski, *Czynnik społeczny w sadach na przestrzeni dwu stuleci* (XVIII-XX) (Lay Element in Courts During Two Centuries), *PANSTWO I PRAWO* (No.3 1966).

<sup>4</sup> The Law of April 9, 1938; *THE JOURNAL OF LAWS OF THE POLISH REPUBLIC* (since 1952, *THE JOURNAL OF LAWS OF THE POLISH PEOPLE'S REPUBLIC*), No. 24, Item 213, [hereinafter cited as J.L.]

<sup>5</sup> Laws of July 20, 1950, which introduced substantial changes into: 1) The Law on Court Organization, 2) Code of Criminal Procedure, 3) Code of Civil Procedure, J.L. No. 38, Items 347, 348, and 349.

<sup>6</sup> M. RYBICKI, *Lawnicy ludowi w sadach PRL*, (People's Lay Judges in The Courts of the Polish People's Republic) 24,93ff (1968); K. Gurner *Schöffen und Volksgericht*, (1958); B. Lesnodorski, *supra* note 3, at 506.

For the discussion of lay judges' participation in the Soviet courts see: L.S. SHEININ, *PEOPLE'S COURTS IN THE USSR*, 18 ff (1957); G. Z. ANASHKIN, *Narodnye zasedateli v sovetskom sude*, (1960); S. KUCHEROV, *THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION*, (1970); H.J. Berman, *Introduction to Soviet Criminal Law and Procedure*, in: H.J. BERMAN and J.W. SPINDLER, *SOVIET CRIMINAL LAW AND PROCEDURE*. The RSFSR Codes (2d ed. 1972).

It should be emphasized at this point, that lay participation in the administration of justice is considered, by the legal theory in socialist countries, to be one of the most fundamental features of the judicial system of those countries. See: S. Zawadzki, *Instytucja lawnika ludowego jako przedmiot badan* (The Institution of the People's Lay Judge — the Subject Matter of the Research) in: S. ZAWADZKI and L. KUBICKI, *UDZIAL LAWNIKOW W POSTEPWANIU KARNYM. OPINIE A RZECZYWISTOSC* (Participation of Lay Judges in Penal Proceedings — Opinions and Real Facts) 6 (L. Kubicki ed. 1970); see also *CONSTITUTION OF THE POLISH PEOPLE'S REPUBLIC* (1952), Art. 49.

The standard trial court is composed of one professional judge and two lay judges, called in Polish legal terminology people's assessors.<sup>7</sup> In capital cases a panel is enlarged to two professionals and three laymen.<sup>8</sup> Polish lay judges, unlike those in some other countries such as the Federal Republic of Germany or Czechoslovakia,<sup>9</sup> do not participate in appellate review.<sup>10</sup> Polish law allows an exclusion of lay judges from two general categories of trials:

- 1) The trial of certain petty offenses, specifically listed in the Code of Criminal Procedure;
- 2) Cases considered by the president of the court to be of overwhelming factual or legal complexity.

The former may be tried in the summary proceeding by a single professional judge,<sup>11</sup> the latter by a panel of three professional judges.<sup>12</sup> All capital cases, no matter how complex, must be tried by the mixed tribunals composed of the professional and lay judges. The decision to employ exclusively professional judges in these two categories of cases is generally within the nonreviewable discretion of the president of the court, a power regarded by some as inconsistent with the democratic principle of popular participation in the administration of justice.

Lay judges participate in about 50 percent of all criminal trials, which constitute approximately 200,000 cases a year.<sup>13</sup> The president of a court assigns lay judges by names to particular cases.

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<sup>7</sup> The Law of December 2, 1960, on People's Lay Judges in Regular Courts; J.L. No.54, item 309, art.1; CODE OF CRIMINAL PROCEDURE, The Law of April 19, 1969, J.L. No. 13, item 96, [hereinafter cited as CCP, art. 19 Para. 1.]

<sup>8</sup> CCP, art. 19 Para. 2.

<sup>9</sup> Casper and Zeisel, *supra* note 3, at 141-43; Zawadzki, *Model ustrojowy sadow ludowych w swietle przeprowadzonych badan prawnempirycznych* (A Model of a Lay Judge in the Light of Legal and Empirical Research) in: ZAWADZKI and KUBICKI, *supra* note 6, at 239.

<sup>10</sup> A question of the participation of lay judges in appellate review of criminal cases has been raised in Polish and Soviet literature. Compare, for instance: RYBICKI, *supra* note 6, at 169; ZAWADZKI, *supra* note 9, at 239; I.D. Perlov, *Problemy dalneishego rozvitiia demokraticeskikh osnov ugolovnogo sudoproizvostva v svete programy KPSS*, SOVETSKOE GOSUDARSTVO I PRAVO, 97ff (No.1 1963).

<sup>11</sup> CCP, arts. 419; 429, Para 1; 433, Para 1; 447, Para 3; 455. See also S. WALTOS *Postepowania szczegolne w procesie karnym* (Special Proceedings in Criminal Cases), at 135, 233, 285, (1973).

<sup>12</sup> CCP, art.19 Para. 1.

<sup>13</sup> ZAWADZKI, *supra* note 6, at 6. Lay judges are elected by people's councils for a term of three years at the district and province level (*powiat* and *wjewoodztwo* in Polish) from among candidates proposed by the populace at meetings held in factories, offices, and other places of employment and in rural communities. Every citizen of a good reputation who is 26 years of age or over is eligible for this function. See: The Law of December 2, 1960, *supra* note 7.

The only relevant guideline given by the law is that a lay judge should be assigned in principle for twelve days a year, but the number of days may be increased by the president of a court for "important reasons."<sup>14</sup> The lay judges have the same power as the professional judges with one exception — they cannot preside. They participate in deciding all issues of law and fact and, along with the professional judge, decide on guilt or innocence, as well as on the sentence. Each member of the mixed tribunal may write a dissenting opinion.<sup>15</sup> The law thus mandates a balance between the professional and the lay elements within the mixed tribunal. Although the former has more extensive legal experience, and enjoys a more influential position as the presiding judge, the latter prevails in number and may outvote the professional, while the power to dissent is preserved for both.<sup>16</sup>

The role of lay judges in the mixed tribunal is multifaceted. They represent the general population and are thus supposed to exercise some sort of check and supervision upon all the law enforcement agencies involved in the judicial process. The participation of community representatives is thought to enhance the moral prestige of the court and to strengthen its independence both from the executive and from private pressures. Lay judges are also supposed to bring into the decision-making process values, opinions, and moral intuitions prevailing among the population. They should bring to the court the unbiased "fresh look" of an average citizen and should counteract, if necessary, the bureaucratic leanings of the professionals. It is widely acknowledged

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The following sociodemographic data concerning persons elected to be lay judge in 1965-67 term may be of interest: almost 48,000 lay judges have been elected for the term, 75.3 percent of them men and 24.7 percent women; education level: elementary — 39.6 percent, secondary — 42.4 percent, higher (university level) — 9.6 percent; other 8.4 percent; social and occupational background: workers (blue collar) — 23.4 percent, peasants — 8.5 percent, intelligentsia (white collar) 57.1 percent; others — 11.0 percent; party affiliation: Polish United Workers' Party — 50.7 percent, Democratic Party — 2.8 percent, United Peasants Party — 6.9 percent, no party affiliation 39.6 percent. Only 34.1 percent of lay judges elected for the 1965-67 term had been elected once or more for the prior terms. See: RYBICKI, *supra* note 6, at 255.

<sup>14</sup> The Law of December 2, 1960, *supra* note 7, art. 3. The system of assignment of lay judges to particular cases seems to be objectionable because of its arbitrariness. It definitely enhances the influence of the professional element on the outcome of the cases. It has been established that professional judges take advantage of the system. For a further discussion and criticism of the system compare: L. Kubicki, *Udział lawników w orzekaniu* (Participation of Lay Judges in Adjudication): ZAWADZKI and KUBICKI, *supra* note 6, at 75.

<sup>15</sup> The Law of December 2, 1960, *supra* note 7, art.2; CCP, art. 101.

<sup>16</sup> ZAWADZKI, *supra* note 6, at 25.

that professional judges engaged in the routine disposition of criminal cases over a long period of time may experience a diminution of sensitivity. Accordingly, it is thought that the confrontation of a professional with a non-professional attitude might provide a healthy balance.<sup>17</sup> The viability of the model outlined above depends on many extra-legal factors, including the quality of people elected to be lay judges and the attitude of the professionals toward them.

In moving from the theoretical to the practical aspect of the issue, reliance is placed on a major study undertaken by the Institute of Legal Sciences of the Polish Academy of Sciences from 1964 to 1967. The results of this remarkable research effort were published in 1970 by Professor Sylwester Zawadzki and Dr. Leszek Kubicki<sup>18</sup> who directed the project.

#### LAY JUDGES: AN OPTIMISTIC SELF-ANALYSIS AND A CRITICAL EVALUATION BY THE LEGAL PROFESSION

The lay judges' role will now be scrutinized by contrasting their self image with pertinent opinions prevalent within the Polish legal profession (including professional judges, prosecutors, and defense attorneys).

The self image of lay judges surveyed is very positive, the overwhelming majority believe that they exert substantial and beneficial influence on the verdicts by bringing them into harmony with public opinion at large.<sup>19</sup> The legal profession is, on the other hand, less enthusiastic. Although the majority of legal professionals polled support the *idea* of lay participation in the administration of criminal justice (seventy-five percent judges and about sixty-five percent prosecutors and defense attorneys), they are extremely critical of the actual implementation of the idea. Forty-six percent of professional judges polled do not be-

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<sup>17</sup> *Id.* at 26.

<sup>18</sup> S. ZAWADZKI and L. KUBICKI, UDZIAŁ LAWNIKÓW W POSTĘPOWANIU KARNYM, OPINIE A RZECZYWISTOŚĆ. STUDIUM PRAWNOEMPIRYCZNE (Participation of Lay Judges in Penal proceedings — Opinions and Real Facts. A Legal and Empirical Study) 332 (L. Kubicki ed. 1970). The book includes an English and a Russian summary. See also: S. Zawadzki and L. Kubicki, *L'élément populaire et le juge professionnel dans la procédure pénale en Pologne*, REVUE DE DROIT PÉNAL ET LA CRIMINOLOGIE, 919-935 (1969-70).

<sup>19</sup> See for general discussion of the opinion survey: M. Borucka-Arctowa, *Rola ławnika w świetle poglądów samych ławników oraz przedstawicieli środowiska prawniczego* (The Role of Lay Judges in the Light of Their Own Opinions and in the Light of Opinions of the Legal Profession) in: ZAWADZKI and KUBICKI, *supra* note 6; compare also: Kubicki, *supra* note 14, at 68 ff.

lieve that lay judges have any influence on the verdicts. Eighty-five percent of defense attorneys and seventy-three percent of prosecutors believe that lay judges influence the verdicts only rarely.<sup>20</sup> This situation is generally attributed to the low quality of people elected to be lay judges.<sup>21</sup> Nevertheless, a substantial number of respondents concluded that the very presence of lay judges in a panel does have some beneficial influence on the administration of justice. It was emphasized that lay participation brings the verdict into accord with public opinion. Such interaction was said to contribute to the better work of professional judges who, as the result of lay participation, have to be better prepared for the trial and must articulate their positions with more precision. A relatively large number of professional judges, twenty-five percent, believe that the participation of lay judges enhances the court's independence.<sup>22</sup> This opinion is quite widely shared by two other branches of the legal profession, the prosecutors and defense attorneys.<sup>23</sup> Also, lay participation constitutes a good defense for a professional judge against official criticism of a verdict since he may argue that the people's assessors outvoted him.<sup>24</sup> Two statements made by the professional judges during the interviews are worthy of quotation:

The fundamental merit of this legal institution (lay judges' participation) is the greater independence of a lay judge. It is true that professional judges are also independent and, according to the law, nobody may blame them for rendering this or that kind of a verdict, but besides the law there also exists a criminal policy, which hampers a professional judge. . . .<sup>25</sup>

A professional judge is responsible to his superiors for the realization of criminal policy. A lay judge does not care about criminal policy, and this makes him totally independent.

The latter of these statements was made by a professional judge in his thirties, a member of the party.<sup>26</sup>

It is a generally prevailing conviction among the members of the legal profession that lay judges are more lenient on the issue of guilt as well as on the matter of the sentencing.<sup>27</sup> It is believed

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<sup>20</sup> *Id.*

<sup>21</sup> M. Borucka-Arctowa, *supra* note 19, at 40.

<sup>22</sup> *Id.* at 41.

<sup>23</sup> *Id.* at 44.

<sup>24</sup> *Id.* at 42.

<sup>25</sup> M. Borucka-Arctowa, *supra* note 19, at p. 42 f.

<sup>26</sup> *Id.* at 42.

<sup>27</sup> *Id.* at 56. Compare also: L. Kubicki, *supra* note 14.

by some, especially by those who are opposed to the idea of lay participation, that lay judges are more emotional in their decisions, and that their leniency is one-sided and unreasonable. It is argued therefore, that wholly professional tribunals are preferable.<sup>28</sup>

#### INFLUENCE OF LAY JUDGES ON THE VERDICTS RENDERED WITH THEIR PARTICIPATION: AN OBJECTIVE VIEW

How then does the model outlined at the beginning of the present comment and the opinions presented above relate to reality? It would be fair to conclude, generally, that the real facts are far from the ideal embodied in the model and that they are considerably more positive than the rather pessimistic views of the members of the legal profession polled in the survey.

Let us look first at the interaction between laymen and professional judges during the deliberations on the verdict. Direct observations have been carried out in 257 cases by apprentices, candidates for judicial positions, working as clerks of the court.<sup>29</sup> Secrecy of the deliberations, required by the CCP (art. 95) has been preserved because reports did not disclose the identity of cases observed and did not identify names of the persons participating. The objectivity of the data is considered very high because nobody from the panel, either professional or lay judges, was aware that observation was going on.

In about sixty percent of sample cases the reported deliberation process was clearly dominated by the professional judge, who usually discouraged the active participation of the lay judges.<sup>30</sup>

In the remaining forty percent of cases lay judges participated in the deliberations as equal partners of the professional judge. They freely discussed all relevant issues, often arguing with the

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<sup>28</sup> Kubicki, *supra* note 14, at 101; Zawadzki, *supra* note 9, at 230. For the exposition of an opinion opposed in principle to lay participation in the administration of justice see: S. Mickiewicz, *De scabinis*, PALESTRA (No. 3 1957).

<sup>29</sup> Heavy reliance has been placed on a leading Polish scholar's brilliant discussion of an empirical study of 257 trials. See: Kubicki, *supra* note 14; see also by the same author: *Z problematyki badan empirycznoprawnych nad udzialem lawnikow w postepowaniu karnym* (Some Problems of Empirical Research on the Participation of Lay Judges in Criminal Proceedings), PANSTWO I PRAWO (No. 1, 1967); Kubicki, *Udzial lawnikow w postepowaniu karnym w swietle obserwacji* (Participation of Lay Judges in the Criminal Proceedings in the Light of the Observations) PANSTWO I PRAWO (No. 6, 1967).

<sup>30</sup> Kubicki, *supra* note 14, at 80.



professional judge and expressing their independent opinions.<sup>31</sup> It was reported that verdicts in this group of cases were often reached either by the lay judges' outvoting the professional judge<sup>32</sup> or by compromise. It is noteworthy that:

All the members of a panel discussed freely the case [even] arguing with each other. Lay judges wanted to impose a suspended sentence, the professional judge (a woman) opposed a suspended sentence as too lenient. She pointed out that she had recently imposed a lot of suspended sentences and would be criticized by her superiors for excessive leniency. Finally she consented.<sup>33</sup>

The suspended sentence was imposed unanimously.

An overall analysis of the trials reported reveals that lay judges had a clear influence on the verdicts in almost forty percent of the cases.<sup>34</sup> Though this is far from the ideal, the forty percent figure is significant, especially since it represents only an *explicit* influence. There must also be a substantial amount of a latent influence in many of the remaining cases.<sup>35</sup> It seems, at any rate, that an allegation made by so many members of the legal profession, that lay participation in the judicial process is a matter of appearance rather than of substance, has proved unfounded. The influence of Polish lay judges on the verdicts, seems on the basis of the above findings, to be quite meaningful and substantially greater than in the Federal Republic of Germany.<sup>36</sup>

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<sup>31</sup> *Id.* at 83. Dr. Kubicki distinguishes generally four types of deliberations: (1) Those absolutely dominated by the presiding judge who takes no account whatever of the opinions or even of the very presence of the lay judges . . . (2) Deliberations visibly dominated by the presiding judge, who observes certain formal elements of the deliberations when the lay judges are somewhat active, but nevertheless imposes his opinion in a visible manner . . . (3) Deliberations during which the presiding judge leaves to the lay judges the initiative to propose the settlement of the case where they do not avail themselves of this opportunity . . . (4) Deliberations during which genuine discussion starts and develops, where lay judges express their personal opinions and views without first knowing the opinion of the presiding judge (i.e. without his undesirable suggestions) and wherein the views of all participants are aired in the discussion. The proportions between these four types of deliberations were found as follows: Type (1) — 20.6 percent; Type (2) — 31.1 percent; Type (3) — 8.0 percent; Type (4) — 40.3 percent. Compare also: Zawadzki and Kubicki, *supra* note 6, (a summary in English at 325).

<sup>32</sup> Lay judges formally outvoted professional judges in 16 cases representing 6.3 percent of all the cases studied. Kubicki, *supra* note 14, at 93.

<sup>33</sup> *Id.* at 84.

<sup>34</sup> Compare an analytical table reproduced by Kubicki, *supra* note 14, at 103.

<sup>35</sup> Zawadzki, *supra* note 9, at 229; Kubicki, *supra* note 14, at 105.

<sup>36</sup> Casper and Zeisel, *supra* note 3.

There is a striking coincidence between the number of deliberations which were not dominated by the professional judge, and the number of verdicts influenced by lay judges. This seems to confirm the hypothesis that the attitude adopted by the professional judges toward lay judges is vital in gauging effective lay participation.<sup>37</sup> In the overwhelming majority of cases lay judges exerted their influences on the verdict *in favor of the defendant* in about seventy-five percent of cases in which an influence of lay judges was reported.<sup>38</sup>

Some interesting socio-demographic correlations were established, three of which deserve mention. Lay judges belonging to the older age groups as well as those having better education proved to be more influential. Higher education has a high correlation to more lenient attitudes. Women, especially older ones, are more lenient than men.<sup>39</sup>

The sentencing decision seems to be the area in which lay judges are most actively involved and in which they exercise their strongest influence. Seventy percent of those cases involving sentencing decisions were influenced by lay judges in favor of the defendant. In sixteen percent of such cases lay judges influenced the sentence in favor of the prosecution.<sup>40</sup> The differences found in so many cases between the professional and lay judges on the issue of sentencing are rooted in the fact that lay judges seem to be guided more by the personal circumstances of the defendant and his subjective fault than by the nature of his act and criminal policy considerations.<sup>41</sup> On some issues lay judges are noticeably opposed to the officially established criminal policy. For example, they do not seem to agree that stealing of social property should be punished more severely than stealing of personal property, rather they favor the opposite view.<sup>42</sup>

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<sup>37</sup> Kubicki, *supra* note 14, at 104.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 103.

<sup>41</sup> ZAWADZKI, *supra* note 9, at 233. Compare also a very interesting study by Dr. A. Turska: *Analiza odrebności postaw lawnika i sedziego zawodowego w orzekaniu* (The Analysis of Divergent Attitudes of Lay and Professional Judges in Adjudication) in: ZAWADZKI and KUBICKI, *supra* note 6, at 159-99.

<sup>42</sup> Compare for a general discussion: A. Turska, *Opinie i postawy lawnikiow wobec sadu, ustawodawstwa karnego i polityki karnej* (Opinions and Attitudes of Lay Judges in Respect of the Court, Criminal Legislation and Penal Policy) in: ZAWADZKI and KUBICKI, *supra* note 6 at 107-58. It is rather striking that similar attitudes seem to prevail among the general population at large; cf. M. Borucka-Arctowa, *Swiadomosc prawna w procesie przemian spoleczenstwa socjalistycznego* (Bada-

Those findings have been confirmed by the independent study on lay judges' attitude toward purposes of criminal punishment. Their prevailing view is that the purpose of criminal punishment is rehabilitation and individual deterrence rather than retribution and general deterrence.<sup>43</sup> Lay judges did, however, favor more severe sentences than professional judges for crimes against the person, against public order and for some crimes against personal property, especially those involving violence (robbery).<sup>44</sup> The same general trends, although less clearly marked, have been noted in Professors Casper and Zeisel's study of the lay judges in the German criminal courts.<sup>45</sup> Rarely did the lay judges have an influence on the decision concerning guilt. In those cases where they did, as a rule, they influenced the decision in favor of the defendant: ten percent as compared with two percent of the decisions influenced in favor of the prosecution.<sup>46</sup> In a major American study on the jury it was established that juries usually adopt more favorable decisions for the defendant than professional judges on the issue of guilt. There, the extent of the divergence was found to be higher: nineteen percent in favor of the defense and only three percent in favor of the prosecution.<sup>47</sup>

An analysis of cases where the professional judge, having been outvoted by lay judges, filed a dissent, established that appellate courts sustained lay judges' positions in forty-two percent of the cases.<sup>48</sup> Thus, disparities between lay and the professional judges, rooted in their backgrounds and attitudes, are significantly reflected in their approaches toward the criminal process. Such a confrontation of different attitudes and opinions within the mixed tribunals found in more than half of the cases studied seems to be healthy and of high social value.

Against the background of a very briefly outlined Polish experience two questions of more general nature may be raised. First, the relative virtues and vices of two basic forms of lay participation in the administration of criminal justice, that is, the

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*nia empiryczne Instytutu Nauk Prawnych PAN*) (Legal Consciousness in the Process of Changes of Socialist Society. An empirical study by the Institute of Legal Sciences of the Polish Academy of Sciences) *PANSTWO I PRAWO* 12, note 9 (No. 7, 1972).

<sup>43</sup> A. Turska, *supra* note 42, at 128-30, 140.

<sup>44</sup> *Id.* at 133 ff; Kubicki, *supra* note 14, at 104.

<sup>45</sup> Casper and Zeisel, *supra* note 3, at 172.

<sup>46</sup> Kubicki, *supra* note 14 at 103.

<sup>47</sup> Kalven and Zeisel, *supra* note 2.

<sup>48</sup> Kubicki, *supra* note 14, at 100-103.

mixed tribunal system versus a jury system. It goes without saying that in making such a comparison the national traditions and emotional attachments of the population should be taken into account. The second question, of more immediate interest and of more practical significance, concerns lay participation in the sentencing decision. The sentencing system has been most sharply discussed in the United States in recent years, one of the main issues being how to reduce judicial arbitrariness.<sup>49</sup> One possible solution could be the creation of mixed sentencing panels composed of the professional and lay element. Polish as well as West German experiences may be interpreted as rather encouraging in this respect.

To the objection that the decision making, with respect to the sentence, requires the expert knowledge of the professional judge one may answer in the words of Casper and Zeisel: "With respect to criteria underlying sentencing practices among which individual and general deterrence play important if often irreconcilable roles, the professional judge can hardly claim to be an expert, simply because nobody is."<sup>50</sup>

This view seems a bit extreme. Uniformity and enforcement of certain generally established policies are not unimportant objectives in sentencing decisions. In mixed panels the professional judge would probably stand for them. On the other hand concern about the individual, unique qualities of each case, particularly regarding circumstances related to the personality of the defendant and his future life, seem to be of high social value and are thought of as the bailiwick of the laymen.

Reconciliation of general and individual deterrence, as criteria underlying sentencing practices, may be much easier to achieve if they are advocated by different persons within one collective decision making body. Finally, it is worth noting that lay participation in decision making on the criminal sentence is quite well-rooted in the American legal tradition. Before the U.S. Supreme Court decision in *Furman v. Georgia*, 92 S.Ct. 2726 (1972), a majority of states permitted the jury to recommend or fix punishment in capital cases. In about one-quarter of the states the jury determines the type and length of punishment for some or all offenses, and in Tennessee the jury is required to fix the sentence in all

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<sup>49</sup> See, for example: M. E. FRANKEL, *CRIMINAL SENTENCES, LAW WITHOUT ORDER* (1973).

<sup>50</sup> CASPER and ZEISEL, *supra* note 3, at 164.

cases.<sup>51</sup> Laymen compose grand juries which hand down indictments and parole boards, making important sentencing decisions, are typically composed of laymen. In addition, the citizens of Vermont may find themselves on mixed tribunals as assistant judges functioning with the professional judge in criminal cases.<sup>52</sup>

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<sup>51</sup> THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE — TASK FORCE REPORT: THE COURTS 26 (1967)

<sup>52</sup> VMT. CONST. Ch. 2. §§ 35, 45, 49 1793 (*as amended to 1964*).

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