The rule of legalism (mandatory prosecution) in Polish criminal law

ヤツェック, イジドルチェク
ウーヅ大学

https://doi.org/10.15017/10735

出版情報：法政研究. 73 (4), pp.27-50, 2007-03-20. 九州大学法政学会
バージョン：
権利関係：

ARTICLE

The rule of legalism (mandatory prosecution) in Polish criminal law

Jacek Izydorczyk

1. Although the history of modern criminal procedural law is not so long, the Polish criminal law has existed as long as Poland itself, i.e. over 1000 years[1]. There are five main periods of Polish law found to coincide with the history of Poland. The first period (966-1795) embraces laws of the Kingdom of Poland. The second period in legal history (1795-1918) embraces foreign rules, when Poland was partitioned and occupied by Russia, Germany and Austria. As a result, different foreign criminal regulations were enforced in Poland during this time. The third period (1918-1939) embraces the law of the so-called Second Republic (up until 1795 Poland was a constitutional monarchy). The fourth period (1939-1989) embraces criminal laws under totalitarian systems. Finally, since 1989 Poland has embraced modern and democratically introduced laws, among them its criminal law (now referred to in Poland as the Third Republic).

Old Polish criminal law and procedure during the first period were very modern and humane if we look at criminal laws of other countries. For example, everyone knows the famous concept of *Habeas Corpus*, a writ or order issued by a court to a person having custody of another, commanding him or her to produce the detained person in order to determine the legality of the detention. The writ of habeas corpus is of English origin (the earliest use of the writ

[1] J. Bardach, B. Lesnodorski, M. Pietrzak, Historia ustroju i prawa polskiego, Warszawa 1998; K. Koranyi, Powszechna historia prawa, Warszawa 1976; J. Lukowski, H. Zawadzki, A concise history of Poland, Cambridge University Press, 2006. W. Wagner, Polish law throughout the ages, California: Hoover Institute Press 1970.

was as a constitutional remedy against the tyranny of the English Crown took place in the latter part of the 16th century – *the Habeas Corpus Act of 1679*). Its original purpose was to liberate illegally detained persons, and it is still a protection against arbitrary imprisonment[2]. However, in the old Polish law such regulations were introduced during the years of 1425-1433 (in some groups of bills) – *Neminem captivabimus nisi iure victum*[3].

As stated above during the years of 1795-1918 different foreign criminal regulations were enforced in Poland. After World War One (in 1918) Poland had three different criminal procedural codes: the Russian Code of 1864, the German Code of 1877 and the Austrian Code of 1873[4]. The new Polish criminal procedural code was not prepared until 1928. Thus, since 1929 (when it entered into force[5]) Poland has had this new code of criminal procedure (the criminal penal code – most modern in Europe – did not enter into force until 1932). However, there were differences within military criminal procedure. To remedy this, a new Military Code of Criminal Procedure was prepared and finally entered into force in 1936.

After the Second World War (1939-1945), Poland had to change the law (especially the criminal law) because of the political situation in this part of Europe (Poland lost independence). Formally, the codes of 1928 (procedural one) and 1932 (the penal code) were not deregulated by new legal regulations and there were so many amendments that actually changed all Polish criminal law, entirely.

In 1969, there was enormous reform of the Polish criminal law and on January 1st, 1970 three new codes entered into force: the penal, procedural, and the

---

2 "Habeas Corpus." MicrosoftR Encarta® 2006 [DVD]. Redmond, WA: Microsoft Corporation, 2005.

3 T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005; J. Izydorczyk, Stosowanie tymczasowego aresztowania w polskim postepowaniu karnym, Krakow 2002.

4 P. Stebelski, Komentarz do austryackiego postepowania karnego, Lwow 1901 r.

5 A. Mogilnicki, E. S. Rappaport, Ustawy karne Rzeczypospolitej Polskiej (tom I), Kodeks postepowania karnego – cz. II motywy ustawodawcze, Warszawa 1929.

penitentiary code. The latter was something new because never before in Poland had penitentiary regulations entered into forced as a code. Such regulations had always taken the form of a bill, a few bills, or even some minor legal acts[6].

Finally, since 1989 we have had in Poland (and all over Eastern Europe) the newest period of history of law. Because of enormous political changes, there was urgent need to prepare dramatically new criminal codes, which together constitute Poland's current criminal system. This goal was accomplished on June 6th, 1997. Finally, in 1998 three new criminal codes entered into force – the penal, procedural, and penitentiary codes. In 1999 the Code of Criminal Fiscal Law was prepared (there is specific regulation in one code of material and procedural fiscal law, i.e. tax crimes and other financial crimes against treasury of the state and so-called fiscal crimes and procedure) along with the Procedural Code of Misdemeanors in 2001 (in Poland misdemeanors are not crimes but other minor acts against the law)[7].

Today the criminal system in Poland consists of: The Penal Code of 1997 (*Kodeks Karny*), The Criminal Procedural Code of 1997 (*Kodeks Postępowania Karnego*), The Criminal Penitentiary Code of 1997 (*Kodeks Karny Wykonawczy*), The Code of Misdemeanors of 1971 (*Kodeks Wykroczeń*), The Procedural Code of Misdemeanors of 2001 (*Kodeks Postępowania w Sprawach o Wykroczenia*), The Code of Criminal Fiscal Law of 1999 (*Kodeks Karny Skarbowy*) and, The Bill of Juvenile Procedure of 1982 (*Ustawa o Postępowaniu w Sprawach Nieletnich*)[8]. There are also some other bills on the structure of criminal courts and military

---

6 Code of Criminal Procedure of the Polish People's Republic, Warsaw 1979.

7 There is still urgent need for preparing an entirely new code of misdemeanors (actually, the draft is in its final stage) and a new law of juvenile procedure. Of course, since 1989 and 1997 these old bills have been changed many times (there are some groups of amendments). T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005.

8 B. Holyst, Kryminalistyka, Warszawa 2000; B. Holyst, Kryminologia, Warszawa 2004; B. Holyst, Suicydologia, Warszawa 2002; B. Holyst, Wiktymologia, Warszawa 2000; Prokuratura - Ustawa. Regulamin. Inne przepisy (ed. W. Czerwinski), Torun 2000. http://www.stat.gov.pl/; http://www.ms.gov.pl/.

courts, structure of prosecutor offices, structure of the Police, Military Police, Agency of Internal Security and other specific criminal regulations. However, the most important bill is, of course, the new Constitution of Poland (1997)[9].

2. The Polish Criminal Procedural Code (CPC of 1997) consists of Parts, Chapters and Sections. There are fifteen Parts, seventy-five Chapters and approximately 673 Sections (approximately, because of many amendments to the code in 2000, and especially in 2003-2005).

The Parts of the Criminal Procedural Code (CPC of 1997) are the most important, because there are groups of Chapters, in every Part of the code. The CPC of 1997 describes: Part One – General Regulations; Part Two – Criminal Court; Part Three – Participants Of A Trial, Attorneys-At-Law; Part Four – Legal Acts, Sentences, Terms, Protocols; Part Five – Evidences; Part Six – Coercive Measures; Part Seven – Preparatory Proceedings; Part Eight – Proceedings Before A Court Of The First Instance; Part Nine – Appellate Proceedings; Part Ten – Simplified Proceedings; Part Eleven – The Cassation And The

[9] Although the Polish Criminal Procedural Code of 1997 is relatively new legislation, since 1998 there have been amendments to the code. The most important are amendments between the years of 2000 and 2003 (the newest amendments of 2004-2005 were introduced because of some European Union's regulations). In 2000, there was a need to change some regulations according to the procedure at the Polish Supreme Court (*Sad Najwyzszy*), and detention pending trial procedure. Lawmakers agreed that the Supreme Court as a highest court in Poland should preside only in specific cases – cassations (in the Polish criminal procedure there are only two judiciary instances, however in civil procedure there are actually three instances). Moreover, there was no need to use the Court of Cassation (the highest court of error) to prolong some terms of detention pending trials. That is why these regulations on the detention pending trial also changed in 2000 (the amendments to the Polish Criminal Procedural Code of 1997, on July 20th, 2000). Actually, the justices of the Polish Supreme Court had prepared the draft of this new law. They just had experience with this institution and institution of the void. It was obvious that at the Polish courts the cassation and the void had been overused. According to the detention pending trial it was agreed among criminal lawyers that the Supreme Court should be no longer the court which prolongs the detention pending trials (there is no such specific obligation in the international criminal law). Now, these detention pending trail cases go to the appellate courts. Besides, amendment to the criminal procedural code of 2003 has been to – in opinion of lawmakers – simplify the Polish criminal procedure and criminal trials. First, the institution of the void exists no longer. Moreover, the preparatory stage is entirely changed, now. As just stated above there are also some new important regulations relating to trial procedure. All these changes are in support of the primary goal to simplify the criminal procedural law. However, there are of course no changes to the Polish law that would restrain defendants' rights.

Resumption Of Legal Proceedings; Part Twelve – Some Proceedings After The Judgment; Part Thirteen – Criminal Procedure In Cases Of International Relations; Part Fourteen – Costs Of Action; Part Fifteen – Proceedings of The Military Courts[10].

3. Rules of criminal procedure mostly contain the same main ideas of a criminal law. It is true that if someone knows the rules of a law or a code – such a person also knows the law or the code exactly. The rules (principles or legal grounds) decide how a law really "looks" and how such a law really "acts", in a specific country. However, there is always one but very important condition – if we know a rule of a criminal procedure we have to know if there are any exceptions to such a rule. For example someone may assure us that in his or her country the principle of presumed innocence governs, however, there may also be some other regulations in existence, which could allow for the torture of a defendant. In such a situation we actually can conclude that there really is no principle of presumed of innocence, because this one exception permitting the torture of a defendant totally destroys the essence of presumed of innocence[11].

The Polish criminal procedural law is governed by legal rules as follows:

1) The Material Truth. Section 2. CPC reads, every decision according to a criminal case must be in compliance with the all facts (facts are always true). Of course, we can (and we must) punish a defendant when we are absolutely sure he or she is guilty, but when we are not absolutely sure of his or her guilt such a person should be exculpated[12].

---

[10] J. Bratoszewski, L. Gardocki, Z. Gostynski, S. M. Przyjemski, R. A. Stefanski, S. Zablocki: Kodeks postepowania karnego – komentarz (tom I-II), Warszawa 1998 r.; P. Hofmanski, E. Sadzik, K. Zgryzek: Kodeks postepowania karnego – komentarz (tom I-II), Warszawa 1999 r.; S. Zablocki: Postpowanie odwoławcze w kodeksie postpowania karnego po nowelizacji, Warszawa 2003.

[11] In Poland there is of course the principle of presumed of innocence. Article 40. of the Polish Constitution says no one may be subjected to torture or cruel, inhumane, or degrading treatment or punishment. The application of corporal punishment shall be prohibited. Furthermore, Article 42.3. of the Polish Constitution says everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.

2) The Free Evaluation Of Evidence. The rule is described by regulations of Sections 7. and 424. CPC. The first one reads that a court must create its opinion on all evidences presented at the court. Such opinion is quite free but always under rules of logic, knowledge and life experience of the judge. Section 424. CPC describes what should be written in every sentence (an explanation for the second instance court and for parties of a criminal trial, especially the defendant)[13].

3) The Objectivism. The rule is described by the regulations of Section 4. CPC. It says every court should always remember about all evidences – evidences in favor of the defendant and evidences disadvantageous for him. However, such a rule also needs to have some other supplemental legal regulations – just in case of improper but still possible situations. The Criminal Procedural Code of 1997 regulates it in the Sections 40.-43. Here are described the legal and very old institutions of *Iudex Inhabilis* (a judge "who is partial" to a case or a person) and *Iudex Suspectus* (a judge who is "under suspicion of partiality")[14].

4) The Directness. There are actually three rules, which together create one main rule of directness. First, every court should rely only on evidences that were introduced during criminal trial at the court. Second, every court (judge) should personally evaluate all evidences. Finally, every court should rely on evidences that are "from first hand". As stated above, there is no one specific section in the Criminal Procedural Code, which creates the rule of directness. The first of the three rules above is described by Section 410. CPC – every sentence should be based on evidences revealed at the court. The

---

[12] *Zasada Prawdy Materialnej, Prinzip der materiellen Wahrheit.* (Shigemitsu Dando, Japanese criminal procedure, translated by B. J. George, New York 1965, at 174-176; T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005).

[13] B. Holyst, Kryminalistyka, Warszawa 2000; T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005.

[14] T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005; E. Skretowicz, *Iudex inhabilis i iudex suspectus* w polskim procesie karnym, Lublin 1994.

second one obliges the court to hear personally all witnesses of a case. The third establishes that when there are evidences that are "first hand" these evidences must be used in the criminal trial. For example, we have to hear an "eye witness" – *Testis Ex Visu* if there is any, but not a witness who only heard about the crime – *Testis Ex Auditu.*[15].

5) The Accusatorial Process. In Poland a court is not allowed to start a trial – there must be an indictment. There is also no legal institution of an inquiry judge (for preparatory proceedings). The rule is pointed out in the Section 14. CPC[16].

6) The Contestability. The rule states that parties in a criminal trial are equal and a court is impartial (it is above the case and parties). It also outlines that each case is a case of parties not a case of a court, so that each party should bring evidence to the court that is in their own legal interest[17].

7) The Equality Of Parties. This rule means that parties of a criminal trial

---

[15] There are also some exceptions to the rule of directness. These exceptions are necessary in every criminal law because of possible difficulties during the gathering of evidences (Sections 389., 391., and 393. CPC). T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005; E. Skretowicz, Wyrokowanie sadu pierwszej instancji w sprawach karnych, Lublin 1984.

[16] An indictment has different roles. First, it starts the criminal process, an indictment also points to what should be discussed during a criminal trial. It also precisely describes the crime and the suspect person, and moreover it also points out evidence, which should be presented during a trial. It must also be pointed out that there are different ways to execute a criminal prosecution. Common to most charges warranting criminal prosecution (i.e. manslaughter or robbery) is the public process, which is used when a criminal prosecution starts without, or even against the will of involved parties, for example against the will of a victim of robbery. The next process of a criminal prosecution is also public however; there must be a motion of a victim, for example – a crime of rape. Finally, there is the private process, when only a motion of a victim is needed to start a criminal trial. Such a person writes a private indictment (very informal) and pays some small fee. (B. Holyst, Wiktymologia, Warszawa 2000; T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005).

[17] The Polish criminal trial almost always follows the rule of contestability, but there are some exceptions that can occur when other rules are applied such as the rules of material truth and legalism. Of course, parties of a criminal trial have the right to bring evidence to court. They also have the right to petition in a criminal case, the right to examine (ask) witnesses, expert witnesses and other parties, the right to appeal, and so on. However, as stated above, Polish criminal courts are able to bring evidence even without a motion of a party – this is an essential exception from the "pure" model of the rule of contestability. The new Polish Criminal Procedural Code of 1997 was prepared to further serve the goal of lawmakers to strengthen the principle of contestability. Although there are still some exceptions, the rule is stronger than as previously defined in the former Code of 1969. (T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005).

always have equal legal (procedural) rights before an independent court. These rights are not the same but are always equal in meaning of law to one another (i.e. the prosecutor and defendant have the same "legal weapons"). There is no one specific section of the Criminal Procedural Code of 1997 that specifically describes the rule of equality of parties. It is of course a constitutional rule though. We know this by pointing to section 367. CPC. It reads that every party of a criminal trial is able to answer on every question and make any desired statement during his or her criminal trial[18].

8) The Presumption Of Innocence. Every defendant is innocent until the criminal trial ends and final verdict declares he/she is actually guilty. Such a rule existed even in the Roman law as "*Praesumptio Boni Viri*" (every citizen is a decent man). By examining this rule we can observe an enormous difference between a criminal law and an administrative law. There is no principal of presumption of innocence in administrative law. However, in a modern criminal trial very specific procedures are put into place to ensure consistent and humane trials. Throughout both the history of the World and the theory of criminal trial, there have been three pervasive points of view regarding a suspect on trial: 1) presumption of innocence; 2) presumption of guilt (in every totalitarian system); 3) and so-called "half sentences" (*Absolutio Ab Instantia*). It must be stated here, that depending on how a country chooses to approach the presumption of a defendant's innocence, it is easily determined the kind of criminal law in existence in that land – civilized or inhumane. In Poland, of course, there is the rule of presumption of innocence. It is described in Section 42. of the Polish Constitution of 1997 and in Section 5. § 1. CPC[19].

---

[18] It must be also stated that, while the prosecution and defense have similar legal measures, there are some specific regulations that favor the defense: so-called *Favor Defensionis*. Although there is the general rule of equality of parties in the criminal trial, a defendant also has many minor privileges during his trial. For example, defendant's right to have the final statement during a criminal trial. (T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005).

[19] Such a rule also exists in the international law and, as stated above, it is the most important rule for every criminal law. Moreover, it has significant influence over other

9) In Dubio Pro Reo. The rule is strictly derived from the principle of presumption of innocence. It states that irresolvable doubts during a criminal trial shall not be resolved by a court (or a prosecutor during preparatory proceedings) against the defendant (Section 5. § 2. CPC). However, every court and every judge should remember that such a rule refers only doubts, which are irresolvable. The rule is not for convenience of judges or prosecutors; the rule *In Dubio Pro Reo* simply creates a fair criminal trial[20].

10) Onus Probandi (Burden Of Proof). In the Polish criminal trial, the burden of proof is always on the prosecutor's side. It is a prosecutor's obligation to bring evidences to the court and convince the judge that a defendant is guilty[21].

11) The Right To Defense. This rule has two theoretical aspects: first, the "material" aspect where the defendant is allowed to defend himself without help of an attorney-at-law; and second, the "formal" aspect where the defendant is allowed to defend himself with professional help of an attorney-at-law. There are many sections of the Code that create the rule of right to defense but the most important is Section 6. CPC. It states that an accused person has the right to defend himself during a criminal trial. Moreover, an accused person is allowed to take a legal (professional) advice of an attorney-at-law. Since it is one of a few very fundamental rights of a defendant, it is described in the international law, also. Of course the rule of right to defense is one of the main rules described in the Polish Constitution. The Constitution reads (Article 42.) – Only a person who has committed an act prohibited by a statute in force at the

---

criminal regulations. Where there is presumption of innocence – there is no place for torture and other inhumane measures. (Brunon Holyst, Comparative criminology, Lexington Books, 1982; B. Hołyst, Kryminologia, Warszawa 2004; J. Izydorczyk: Stosowanie tymczasowego aresztowania w polskim postepowaniu karnym, Krakow 2002; J. Izydorczyk: Praktyka stosowania tymczasowego aresztowania (na przykladzie sadow Polski centralnej), Lodz 2002; T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005).

[20] T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005.

[21] In the Polish criminal law, there is only one exception to the rule of *Onus Probandi* – section 212. of the Penal Code of 1997 (very specific crime – the crime of slander). T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005.

moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law. Anyone against whom criminal proceedings have been brought shall have the right to defense at all stages of such proceedings. Defendant may, in particular, choose counsel or avail himself – in accordance with principles specified by statute – of counsel appointed by the court. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court[22].

12) The Public Trial (Open For People And Media). The rule says that every courtroom should be open for publicity when there is no exception described by the law. It is very important for fair trial (there are some exceptions regarding trials of sex crimes). In the theory of law, there are two aspects of the principle of public trial. First, the "wide" aspect is a trial open for publicity. Second, the "inside" aspect of public trial is a trial open for parties of the criminal trial. According to the second aspect, all parties of the criminal trial are allowed to be at the courtroom during a criminal trial even when the media is not allowed, as is the case with a crime of rape or extremely cruel manslaughter. They are also allowed to read their criminal files, take notes, and for a small fee ask for photocopies of the files. However, while deliberation of the judges is always confidential, announcement of a sentence is always public. The first aspect of the principle of public criminal trial (freely allowed publicity) is the very important Section 355. CPC, which reads a criminal trial is open for publicity and parties of a trial. Another Section (357. CPC) allows media (press, journalists) to enter to the courtroom and film a criminal trial

[22] As stated above there are specific regulations that comprise the rule of *Favor Defensionis*. Although in every civilized criminal law there is the rule of equality of parties, a defendant has many minor privileges during his trial (many other regulations that give the defendant more rights then other persons in criminal process). Those regulations exist thanks to the most important rule – the rule of right to defense. (T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005).

assuming the court agrees (there are also some other regulations of the Press Law of 1984). Overall, Article 45. of the Polish Constitution says that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Exceptions to the public nature of hearings may be made for reasons of morality, state security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly[23].

13) The Oral And (Or) In Writing Process. Section 365. CPC reads that a criminal trial is to be oral. There are also other regulations which statute the rule of an oral trial. However, there are many and different minor regulations that require some acts of the trial to occur in writing. For example, an indictment is always a written document (Section 331. CPC), as same as an appeal (section 428. CPC). Besides, it is also obvious that protocols are always written legal documents[24].

14) The Concentration Of A Criminal Trial. Section 2. CPC says how a criminal trial should be conducted. First, it must last not too long because it is against the rule of the state of law and also costs money of tax-payers. In addition, Section 297. CPC, describes the time limits of the preparatory proceedings, which must end as soon as possible. The reasons are evident. Of course, there are some exceptions because not every criminal trial is simple. There are possible difficulties in terms of evidence and other possible obstacles (many witnesses to hear, and others). That is why Section 401. CPC and Section 404. CPC regulate legal institutions' interruption of a trial (in Poland up to 35 days) and respite (postponement) of a trial. These procedural situations could occur during a criminal trial when there is insufficient evidence or another equally important cause to interrupt, or even respite, a trial presents itself[25].

---

[23] T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005; B. Hołyst, Kryminologia, Warszawa 2004.

[24] T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005.

[25] Nevertheless, one of the most important regulations in the Polish criminal law is that the

4. The last rule and very important one is the principle of legalism (mandatory prosecution, *Zasada Legalizmu, Legalitaetsprinzip*)[26]. According to the criminal law the rule of legalism says – where there is a crime there must be always a criminal prosecution[27].

A contradictory principle is the rule of opportunism (discretionary prosecution, *Zasada Oportunizmu, Opportunitaetsprinzip*)[28], which means that: where there is a crime there must be a criminal prosecution only if a public prosecutor (or even a Police officer in some legal systems) is convinced there is need to prosecute and punish a defendant[29].

Such principle (the mandatory prosecution) existed even in the ancient Roman law – but only according to serious crimes (*minima non curat preator*). Modern legal definitions of principles of legalism and opportunism were created by scholars in XIX century in Germany. The term "opportunism" was first introduced by J. Glaser (*Prinzip der Strafverfolgung. Kleinere Schriften,* in 1860) and term "legalism" was initial introduced by H. Gross in 1861, during Second Conference of German Lawyers[30].

Criminologists who prefer mandatory prosecution then principle of the opportunism (and the all criminal system of opportunism) point that a state has not only a right to punish criminals but also an *obligation* to punish them. A state should protect decent people through public order, prosecution of criminals and finally through just punishments. If there are dangerous acts prohibited by

---

same judges of a criminal court must preside until the sentence is delivered. The criminal law prohibits any change to who acts as judge during the trial. The legal consequence is always the reopening of the trial. (T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005).

[26] Shigemitsu Dando, Japanese criminal procedure, [translated by B. J. George], New York 1965; J. Tylman, Zasada legalizmu w procesie karnym, Warszawa 1965.

[27] The principle of legalism is so-called a rule of criminal procedure. Another rule – the principle of legality is a rule of criminal (penal, material) law. It says: no crime and no punishment without law. (Shigemitsu Dando, The criminal law in Japan. The general part, [translated by B. J. George], Littleton 1997).

[28] Shigemitsu Dando, Japanese criminal procedure, [translated by B. J. George], New York 1965.

[29] J. Tylman, Zasada legalizmu w procesie karnym, Warszawa 1965.

[30] T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005; J. Nowotny, Zsada legalnosci i oportunizmu w procesie karnym, Krakow 1909.

criminal law (i.e. crimes) – sanctions against those who acted against the law always should be imposed mandatory. Moreover there are also other very important reasons: what about so-called "common sense of justice" among citizens ? Why there are some offenders who never faced responsibility ? Do really people find such a situation just ? Do really such a condition can be called: justice ?

Contrary, criminal lawyers who prefer the opportunism, point that criminal justice system should focus mainly on most dangerous crimes. It is impossible to prosecute all crimes so better is to forget about small ones and look for "real ones" and punish "big" criminals. Besides, every criminal prosecution and trial costs money of tax-payers. We should not ("pro-opportunism" lawyers say) encumber criminal justice system, because it is redundant and pointless.

In some countries mandatory prosecution governs, but in some others, the principle of opportunism is the main rule. Of course, always it is a decision of lawmakers. Such a decision is based on legal tradition or history of a state (but sometimes it is against the legal tradition and is based just on a lawmakers' decision, actually political one). For example now in France the opportunism is an official rule. However most countries (formally with criminal law systems govern by the rule of legalism) nowadays prefer the opportunism and create some regulations (through amendments to laws) when it is possible not to prosecute a criminal in some specific cases (very often just euphemistic called "exceptions"). In consequence – because of such changes to laws – those criminal procedures become in real, systems of the opportunism. It should be stressed here that very often main reason for such changes to criminal laws is just expense of a prosecution and a trial.

Totally different (and of course very wrong situation) is when there is so-called "real opportunism". For example the police do not start an investigation because some police officers do not want to be "overworked". It is actually considered illegal, but such distortions are still possible in every country.

Moreover such "deformities" of a criminal trial are very dangerous for rules of law and even public trust in a criminal justice system[31].

In Poland, traditionally governs the principle of legalism (mandatory prosecution). The Section 10. of the Criminal Procedural Code of 1997 reads – a prosecutor and the Police must start a criminal procedure trial (preparatory stage) if they have an information about a crime. Moreover a public prosecutor is obliged to prepare a case for a criminal court, write an indictment, and prosecute a defendant during a trial. No single offender can be freed from criminal responsibility. And finally when there is an acquittal sentence of a court of first instance (or according to public prosecutor's opinion a punishment is too lenient) a public prosecutor must appeal and endeavor for condemnation sentence at an appellate court.

But in Poland the rule of mandatory prosecution governs only so-called public prosecution. It was stated above that there are three types of prosecution in Poland (Section 12. and 13. of the Criminal Procedural Code of 1997)[32]. First – private prosecution (i.e., less important crimes and very personal ones, like crime of slander), second – public prosecution with a motion of a victim (serious crimes but very "specific" ones, because there is jeopardy that a victim can be re-victimized by the criminal trial, i.e. sex crimes), and third – public prosecution (most often, according to serious crimes). So-called private prosecution starts criminal trial without a participation of a public prosecutor. There is only a private indictment, very informal one. A person (a victim) writes a private

---

[31] T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005; B. Holyst, Wiktymologia, Warszawa 2000; J. Tylman, Zasada legalizmu w procesie karnym, Warszawa 1965. It must be stated here that unfortunately it happens sometimes in Poland, also. I know (personally) cases when police officers "advised" a victim of a theft just do not report the crime. Another case, when police officers "asked" a victim of a minor crime (also theft) to wait some time (until the victim can report the crime) because police officers were "busy". Moreover, it is not uncommon. Some "stubborn" victims sometimes were waiting for four-five hours. In effect, nowadays is not rare that citizens who did not insure their property just do not report minor crimes. They say: "they do not want any problems", or "it is waste of time", or they just do not believe that Police will find their property and a criminal. Ironically – some police officers seem to enjoy such situation.

[32] B. Holyst, Wiktymologia, Warszawa 2000.

indictment and pays some small fee (today 300 PLN – about 10 000 ¥). Because private indictments tend to be relatively less important and concerned to "personal crimes" (such as a personal insult), the fee is primarily intended to reduce the occurrence of barratry[33]. So-called public prosecution but with a motion of a victim starts preparatory proceedings and a victim's motion is an obligation for a prosecutor and the police to provide the case. The last one and most common – public prosecution is conducted even when a victim does not want to prosecute an offender (most crimes, i.e. manslaughter, robbery, and so on).

Of course, likewise in Poland where traditionally subsist public prosecution (and principle of legalism is very characteristic for the model of criminal trial) there are some exceptions to the general rule[34]. However it is very important to point here that those exceptions do not "destroy" (change) the fundamental rule of mandatory prosecution and do not turn the Polish criminal trial into the system of opportunism.

First exception is regulation of Section 1. of the Polish Criminal Code of 1997. It reads: "an act is not a crime when social danger of a crime is minimal" (additional explanation of this term is in Section 115.2 of the Criminal Code). Such regulation exists because in Poland we have so-called "material definition of a crime". In countries of so-called "formal definition of a crime" the law does not recognize "less important crimes". In consequence in such countries there is an urgent need to use the opportunism, because it is impossible to prosecute every single and often very unconvincing crime.

Second exception is the probation (Section 66. of the Criminal Code of 1997)[35]. Important is to mark here that legal institution of probation definitely is not against the rule of mandatory prosecution. In Poland, even when a court

---

[33] And it works. (M. Cieslak, K. Lojewski, Pisma procesowe w postepowaniu karnym – wzory i komentarz, Warszawa 1990; T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005).

[34] A. Murzynowski, Istota i zasady procesu karnego, Warszawa 1994 r.

[35] R. Goral, Kodeks karny – praktyczny komentarz, Warszawa 2002.

decides about the probation in favor of a defendant, there is still a judicial procedure (public trial) and criminal judgment. A court describes in such adjudication a defendant and his crime. Only one (but still great) favor for a defendant is: usually thanks to the probation there is no punishment.

Next, there are some other exceptions in the Polish criminal law. Section 11. of the Criminal Procedural Code of 1997 reads – when there is a crime of punishment up to 5 years of imprisonment there is no need to prosecute a criminal in case when he/she was sentenced before (for another crime) and the first punishment is very severe (for example 25 years imprisonment). Still there is also one additional and vital condition of the Section 11. of the Criminal Procedural Code: a victim does not oppose against such a privilege for a defendant.

A very new and very dangerous regulation for the Polish traditional model of criminal justice is section 325f. of the Criminal Procedural Code of 1997 (amendments of 2003) which states: "when there is very low possibility to find an offender who committed a crime the police is allowed to remit an inquiry". Only obligation for the police in such situations is just to catalog such a case in so-called "registry of crimes". Formally the police must again and again look for a criminal who committed the crime but according to the procedure of the Police Law of 1990 (not any more according to the Criminal Procedural Code). Of course there is right of plaint (appeal) against such a decision, but in real life Section 325f. of the Criminal Procedural Code seems to be overused by the police. Unfortunately, it must be acknowledged here that nowadays in Poland the police definitely do not have excellent results of its fight against offenders and criminality.[36]

There are also some other regulations in the Polish law, like Section 21. of the

[36] See for example statistical data on ascertained crimes in completed preparatory proceedings and rates of detect-ability of delinquents in ascertained crimes in 2004. Total – 1 461 200 (56.2%); of which: Homicide: 900 (90.8%); Damage to health: 15 800 (87.8%); Participation in violence and assault: 14 300 (75.8%); Drug crimes (The Anti-drug Law of 1997): 59 400 (96.

Juvenile Law of 1982. It is obvious that procedure according to juvenile offenders is utterly different that a regular procedure according to adult offenders, there are also different goals of those separate procedures. Besides, there is no mandatory prosecution according to misdemeanors (Section 10. of the Code of Misdemeanors of 2001). It must be stressed here once again, that in Poland principle of legalism was introduced only for public prosecution of crimes. Misdemeanors in the Polish criminal system are not crimes (like for example in the French legal system).

It is important also to notice that there are now in Poland postulates of some scholars who want to introduce to our criminal law the principal of opportunism. Moreover, there are even some demands to introduce the legal institution of plea bargaining. However (and hopefully), it seems that such proposals are impossible to accept in Poland because it would change the Polish criminal law, entirely. Besides, such ideas (like especially introducing plea bargaining) are totally opposite to the Polish legal tradition and completely against another very important legal rule in Poland – the material truth (*Zasada Prawdy Materialnej, Prinzip der materiellen Wahrheit*).

It was pointed above that in other countries (for example France) govern the opposite principle of the opportunism. In common law countries criminal trials look totally different than in so-called continental's law countries like Germany, France, and Poland. But even in Anglo-Saxon's law countries now is very strong desire for mandatory prosecution, but only according to some specific

---

5%); Rape: 2200 (82.7%); Theft: 339 100 (19.9%); Burglary: 266 600 (21.1%); Robbery, theft with assault and criminal coercion: 48 600 (50.4%); Economic crimes: 11 900 (86.2%). The "rate of detect-ability of delinquents" is the relation of the number of detected crimes in a given year (including crimes detected after resumption following discontinuous) to the total number of crimes ascertained in a given year, plus the number of crimes recorded in commenced proceedings and discontinued in previous years due to undetected delinquents. The "ascertained crime" in an event, which after the completion of preparatory proceedings was confirmed as a crime. (Information regarding ascertained crimes and rates of detect-ability of delinquents in ascertained crimes has been prepared on the basis of Police statistics, supplemented with information on investigations conducted by the public prosecutor's offices and family courts on juvenile proceedings: The Central Statistical Office of Poland, /http://www.stat.gov.pl/; and The Ministry of Justice of Poland, /http://www.ms.gov.pl/).

crimes: domestic violence, child abuse or so-called hate crimes. Some authors point that mandatory prosecution of spouse abuse can be the primary response to the subordination of women[37]. However, it should be kept in mind that maybe such regulations are going to work but it is important to ask here why to prosecute (mandatory) only a spouse but not other offenders; just because there are strangers ? Of course there are some criminal cases when relatives can easily threat victims, terror them. But such differences in prosecuting crimes (and actually very outstanding exceptions) can be dangerous for a fair trial. Furthermore, such adjustment seems to be inequitable.

In my opinion the mandatory prosecution's legal system consequently seems to be a just system, much more fair then system of the opportunism. It is also important to notice that even in "opportunistic" criminal procedures some authors point that in many criminal cases victims are just aware that contacting the police about crimes was useless and some feared they would be re-victimized by the criminal process[38]. Such tragic decisions of victims are always in favor of criminals; and particularly lack of obligation for the police and public prosecutors to pursue offenders might only multiply victim's feeling of criminals' impunity.

A very interesting is the criminal regulation of Japan[39]. Western authors even point that Japan is "heaven" for the police and "paradise" for prosecutors, because the criminality rate is low and power of the justice system, especially prosecutors is enormous[40]. Of course the Japanese criminal system is mostly

---

[37] Kent Roach, Criminology: four models of the criminal process, Northwestern School of Law Journal of Criminal Law and Criminology, Winter, 1999.

[38] Probably such wrong situations occur in every country. (Kent Roach, Criminology: four models of the criminal process, Northwestern School of Law Journal of Criminal Law and Criminology, Winter, 1999).

[39] Criminal Statutes I, Ministry of Justice, Japan 1970; Criminal Justice in Japan, Ministry of Justice, Japan 1970: A. Didrick Castberg, Japanese criminal justice, New York 1990; Shigemitsu Dando, Japanese criminal procedure, translated by B. J. George, New York 1965; Shigemitsu Dando, The criminal law in Japan. The general part, [translated by B. J. George], Littleton 1997; A. Didrick Castberg: Japanese criminal justice, New York 1990; David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002.

[40] David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002,

famous because of suspension of prosecution and very low rate of "not guilty" judgments[41]. Suspension of prosecution is just excellent example of the principle of opportunism. It means that public prosecutor can drop cases even when there is enough evidence to secure a conviction. In Japan – scholars say – this wide discretionary power granted to public prosecutor has a significant role in encouraging suspect's rehabilitation. This system is advantageous in disposing of cases flexibly according to the seriousness of individual offences and the criminal tendency of each suspect and in giving them the chance to rehabilitate themselves in society (section 248 of the Japanese Criminal Procedural Code)[42].

Fortunately, there are also some "secure measures" in the Japanese criminal law – so called: Notification Program for Victims and Prosecution Review Commission[43]. The Notification Program for Victims was launched on 1 April 1999 and has been expended thereafter. In accordance with the Criminal Procedural Code a public prosecutor must promptly notify the complainant, accuser or claimant of the result of disposition. In particular, on request of the complainant, accuser or claimant a public prosecutor must inform these persons of the reasons why the case was not prosecuted. The Prosecution Review

---

at 21-27 and 47. David T. Johnson points that five features of the Japanese prosecutor's work environment make Japan paradise for prosecutors: low crime rates, light caseloads, quiescent politics, enabling law and the absence of juries.

41 T. Kawaide, Concurrent national and international criminal jurisdiction and the principle *„ne bis in idem"* in Japan, Revue Internationale de Droit Penal – International Revue of Penal Law 2002/73; J. Mark Ramseyer, Eric B. Rasmusen, Why is the Japanese conviction rate so high ?, The University of Chicago The Journal of Legal Studies, January 2001; Criminal Justice in Japan – United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), 2005, http://www.unafei.or.jp/; White Paper on Crime 2003 – Changing Nature of Heinous Crimes and Countermeasures against Them, http://hakusyo1.moj.go.jp/; B. Holyst: Japonia – przestepczosc na marginesie cywilizacji, Warszawa 1994 r.; K. Karolczak: System konstytucyjny Japonii, Warszawa 1999 r.; J. Widacki: Przestepczosc i wymiar sprawiedliwosci karnej w Japonii – zarys problematyki, Lublin 1990 r.

42 Criminal Justice in Japan – United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), 2005, http://www.unafei.or.jp/. Section 248. of the Japanese Criminal Procedural Code reads: In case it is unnecessary to prosecute according to the character, age and environment of an offender, the weight and conditions of an offence as well as the circumstances after the offence, the public prosecution may not be instituted. (A. Didrick Castberg: Prosecutorial independence in Japan, UCLA Pacific Basin Law Journal, Fall 1997).

43 Mark D. West, Prosecution Review Commissions: Japan's answer to the problem of prosecutorial discretion, Columbia Law Review, April 1992.

Commission is to maintain the proper exercise of the public prosecutors' power by subjecting it to popular review. There is a Prosecution Review Commission in each district court, which consists of eleven members selected from among persons eligible to vote for the members of the House of Representatives of the Diet. It is empowered to examine the propriety of decisions by public prosecutors not to institute prosecution[44].

Western scholars point that there are many implications of the power to suspend prosecution in Japan. The first one is leniency of prosecution, second one is reduce burden on the corrections system resulting from this leniency, and finally – opportunity for many offenders to escape the stigma of a criminal trial[45]. It seems that suspension of prosecution evidently helps Japanese prosecutors to achieve their remarkable score of "guilty sentences"[46]. For sure, it is also an important part of whole philosophy of criminal justice in Japan.

However, every country is different. Ironically, in Poland those scholars who are strongly in favor of the principle of opportunism mostly want to introduce some legal ideas from the United States (unfortunately Japanese regulations are very little known in Poland). Those scholars say that such a rule (the opportunism) will help us to fight against most important crimes; it will help to focus on them. They point we should concentrate only on most dangerous crimes. Of course it is very important to overpower such crimes and such criminals but we also ought to remember about other felonies and common citizens. Do they really agree with such ideas ? It is obvious the police must look for killers, robbers and white-collar-crime offenders, but thieves are also criminals. Lack of reaction from the state (actually lack of justice) can make them more and

---

[44] Criminal Justice in Japan – United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), 2005, http://www.unafei.or.jp/; David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002, at 222-224.

[45] A. Didrick Castberg: Prosecutorial independence in Japan, UCLA Pacific Basin Law Journal, Fall 1997.

[46] It is not difficult to imagine what a Japanese prosecutor feels when there is an acquittal sentence.

more impudent. Much worse – such attitude of the police and public prosecutors might entirely destroy citizens' trust in the criminal system as a whole and finally destroy even credit in justice itself. We should not slight for such jeopardy. And something very important – the American criminal system is famous because of plea bargaining. I would say that plea bargaining is something like the "purest" example of the rule of opportunism[47]. However, for criminal lawyers educated in civil law countries and more over – a country of mandatory prosecution (like Poland), plea bargaining is something what even looks like a caricature of criminal law. Maybe it helps to save money of tax-payers, but is it still real criminal justice ?[48]

Moreover – the rule of opportunism is different in different countries, for example in the United States and in Japan. In those two criminal systems there is such a rule (opportunism) but in my opinion it seems that in the United States it is a matter of the law (and of course legal tradition), but in Japan it is also a matter of the culture. Of course, Poland is a civil law country and the United States' legal tradition is different than the Polish legal tradition but the cultures and values in those countries are the same – based on Christianity (i.e. Western standards). In Japan history and development of the law was different. Confucianism of course influenced also the Japanese legal culture. For exam-

---

[47] In the United States vast majority of criminal cases are settled through plea bargaining, with only about 10% of all felony cases going to trial. There is no plea bargaining in Japan but some American scholars have suggested that a form of plea bargaining does in fact place in Japan, because lenient treatment in return for a confession is a form of plea bargaining. But of course it is not a "real" legal institution of plea bargaining. Moreover, defendants in Japan have little with which to bargain. (See A. Didrick Castberg: Prosecutorial independence in Japan, UCLA Pacific Basin Law Journal, Fall 1997). David T. Johnson boldly points that prosecutors in Japan do plea-bargain. But in plea bargaining in Japan is unlike American plea bargaining several important respects. There are notable differences in quantity (less common in Japan that in the United States), style (plea bargaining in Japan is more tacit, more consensual and less concessionary), and attitude (the Japanese suspect's subjective experience of plea bargaining is more likely to combine self-interest with feelings of remorse). There is also a difference in the degree of pressure that prosecutors use to obtain admissions of guilt. (See more: David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002, at 245-248).

[48] On American plea bargaining "in action" see David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002. Especially some examples of plea bargaining (rather real "bargains") seem really shocking for a European lawyer.

ple, Japanese ideology of harmony more emphasizes common interest then individual one[49]. In Japan very important is rehabilitation of an offender; and in practice – when an offender pleads guilty a Japanese prosecutor very often believes in his/her rehabilitation[50]. Generally speaking, for Western criminal lawyers (and common people) punishment seems to be much more important[51]. Remorse, compensation and apology play a minimal role or even any, in prosecutorial decision-making and sentencing in Western countries[52].

As stated above, in Poland the rule of legalism is traditionally extremely important. I can say it is even our philosophy of criminal law and procedure. In my humble opinion – a very good philosophy. Unfortunately, there is still possibility that this system might be changed. Such a decision (on changing the system of mandatory prosecution in Poland into system of the opportunism) would be dangerous, mostly for victims and their rights. I can even risk an opinion that such a legal reform would "resolve" problem of criminality only according to official statistical data. It was stated above that probably in every country exists something like a "real opportunism" – of course illegal but sometimes quite common. In Poland, "legal opportunism" probably will help

---

[49] A. Didrick Castberg, Japanese criminal justice, New York 1990, at. 102. See also: Roger J. Davies, Osamu Ikeno, The Japanese mind – understanding contemporary Japanese culture, Tuttle Publishing 2002.

[50] Japanese prosecutors recognize that severe criminal sanctions, especially imprisonment have the capacity to harm offenders, families and communities. The harsh punishment is always costly, often ineffective, and sometimes criminogenic. And moreover, according to such ideas, leniency avoids unnecessary stigmatization and enables them to maintain bonds with work, family, friends and community. (David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002, at 190-191).

[51] See: David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002, at 182-183. But of course among scholars (professionals) there are different views and opinions on criminology and penology. It is also very well known opinion that "though punishment is one method of building up anti-criminal attitudes in the general public, it is not the most efficient method for preventing crime. The development of habits and attitudes by education, by the spreading traditions, by the contacts and interactions between those who appreciate the values and those who do not is probably a more efficient method." (See: Edwin H. Sutherland, Donald R. Cressey, Principles of criminology [Fifth Edition], Chicago-Philadelphia-New York 1955, at 590).

[52] A. Didrick Castberg: Prosecutorial independence in Japan, UCLA Pacific Basin Law Journal, Fall 1997. The author accurately points that the Japanese Police and prosecutors seem to be quite confident that they can distinguish the truly remorseful from those who only pretend to be. But it is still possible that some criminals who are good actors can slip through the system.

only some police officers and even some prosecutors to show how great their achievements are. I described above a new regulation in Poland (Section 325f. of the Polish Criminal Procedural Code of 1997) and I can say that new law just does not work[53]. And that regulation was the first big breach to the main rule of legalism in Poland. What will happen in the future ? Some say: in a democracy, everything is possible.

5. In conclusion, it is very important to accentuate here that what is working in Japan or in the United States might does not work in Poland. An old Latin adage says: *Quod medicina aliis, aliis est acre venenum* (what is medicine to some, is bitter poison to others). Definitely the saying is worth to remember.

There are quite different legal traditions, well different history and sometimes totally different cultures[54]. For example in Japan remorse, manifested by the offender's own statements and behavior, as well as apology (*shazai*) and compensation (*higai bensho*) to the victim are extremely important, not only in influencing the prosecutor's suspension decision but also in influencing the actions of the police and the sentencing decisions of judges in cases where indictments are made[55]. Besides in Japan, such a legal institution prevents offenders from re-offending by rehabilitating and reintegrating them into society[56].

Of course, also in Poland such ideas are important; and remorse of a defendant is significant. However the rule of mandatory prosecution means that there must be always prosecution, then an indictment, further public criminal trial, and finally – a righteous sentence. An honest remorse of a defendant can be

---

53 T. Grzegorczyk, J. Tylman: Polskie postepowanie karne, Warszawa 2005, at 30.

54 See more: Melissa Clark, Caught between hope and despair: an analysis of the Japanese criminal justice system, Denver Journal of International Law and Policy, Fall 2003; Daniel H. Foote, The benevolent paternalism of Japanese criminal justice, California Law Review, March 1992; David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002.

55 A. Didrick Castberg, Prosecutorial independence in Japan, UCLA Pacific Basin Law journal, Fall 1997.

56 David T. Johnson: The Japanese way of justice. Prosecuting crime in Japan, Oxford 2002.

granted of a lenient punishment or even probation (when it is allowed by the law) but never should grant a criminal of full forgiveness without any consequences of his/her crime. I would say: to forgive a criminal is entitle only a person who was harmed by the criminal's action – i.e. a victim of the crime. Never somebody else (in the victim's name), like for example a public prosecutor, or even much worse – a police officer. Of course, in every criminal law exists so-called "individual prevention", but still exists so-called "general prevention" too, and the latter is not at all less important then the first one. By the way – Aristotle (384 BC – 7 March 322 BC) once said: punishment is also a medicine...