Criminal plea bargains in the English and the Polish administration of justice systems in the context of the fair trial guarantees

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CRIMINAL PLEA BARGAINS
IN THE ENGLISH
AND THE POLISH ADMINISTRATION
OF JUSTICE SYSTEMS IN THE CONTEXT
OF THE FAIR TRIAL GUARANTEES

(Collective work edited by Cezary Kulesza)

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INTRODUCTION

The term *fair trial* continues to be a source of many controversies in the Polish criminal process doctrine, especially with regards to its semantics[1]. Moreover, the Polish Code of Criminal Procedure (CCP) does not use the terms *justice* or *fairness*,[2] although some authors see it in the contents of art. 2 § 1 of the CCP which provides that the code is intended to give the criminal proceedings a form that will assure identification and prosecution of the perpetrators of crimes and prevent holding innocent persons responsible.[3]

Apart from conflicts in the doctrine regarding the nature of the notion of fair trial (as the supreme procedural principle, the method of defining the process model, or the proceeding method), one must see the source of the fair trial principle in the following acts of international law[4]: art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 and art. 14 of the International Covenant on Civil and Political Rights of 19 December 1966 (Journal of Laws of 1997, no. 38, item 167), as well as in Polish laws, most of all in art. 45 (1) of the Constitution of the Republic of Poland.

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1 See e.g.: M. Płachta, Rzetelny proces karny w Unii Europejskiej [Fair trial in the European Union], in: Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy [Fair trial. Anniversary book of Professor Zofia Świda], Warsaw 2009, pp. 28–32.

2 It is used only once, in a negative statement, in art. 440 of the Code of Criminal Procedure, which provides that a reason for a reversal of a decision is a situation where maintaining validity f a verdict that has been appealed against would be "grossly unjust." More information can be found in: P. Kruszyński: Kilka refleksji na temat art. 440 kpk. [A few thoughts on art. 440 of the CCP], in: Rzetelny proces karny. Księga jubileuszowa... [Fair trial. Anniversary book...], *op. cit.*, pp. 573–581; I. Hayduk–Hawrylak: Sprawiedliwej kary Conditio sine qua non [Conditio sine qua non of a fair penalty], in: Rzetelny proces karny [Fair trial], *op. cit.*, pp. 118–120.

3 P. Wiliński: Sprawiedliwość proceduralna a proces karny [Procedural justice and the criminal process], in: Rzetelny proces karny. Księga jubileuszowa… [Fair trial. Anniversary book...], *op. cit.*, pp. 85–86, and the literature referred to therein.

4 See also: M. Płachta, Rzetelny proces karny w Unii Europejskiej [Fair trial in the European Union], in: Rzetelny proces karny. Księga jubileuszowa… [Fair trial. Anniversary book...], *op. cit.*, pp. 28–44.

In relation to the topic of this monograph, defined in its title, one could conclude that the semantic meaning of the term *fair trial*, as pertaining to court hearings, does not apply to consensual forms of ending criminal proceedings in the Polish criminal process, as the use of such forms leads to the verdict being issued outside either the hearing (during a session – art. 335, 343, and 474 of the CCP)[5] or during the hearing but without presentation of evidence (art. 387 of the CCP). Consequently, another term, similar to *fair trial*, used in the doctrine and judicial decisions of the American judiciary, established in the 14th Amendment to the US Constitution, should be used, namely *due process of law*.[6]

This term is basically a synonym of the term fair trial used in European laws, under the influence of the European Convention on Human Rights; however, it also covers the stages of the process taking place outside of the court.[7] Nevertheless, American literature emphasizes that if the defendant admits guilt and agrees to *plea bargaining*, he or she relinquishes the *due process guarantees*, in particular the right of effective defence defined in the 6th Amendment to the US Constitution.[8]

The present monograph focuses on fair trial guarantees in the context of consensual process – ending forms provided for in the laws of England and Wales as well as Poland. It is the fruit of an exchange of opinions between the Department of Criminal Procedure of the Law

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5 See: H. Paluszkiewicz: Pierwszoinstancyjne wyrokowanie merytoryczne poza rozprawą w polskim procesie karnym [First – instance substantive verdicts outside of the hearing in the Polish criminal process], Warsaw 2008.

6 Concerning the term due process of law, compare e.g. B. Forst, Errors of Justice, Cambridge University Press 2004, pp. 11–16; R. Frase, Fair Trial Standards in the United States of America, in: The Right to a Fair Trial, D. Weissbrodt, ed., London 1997, pp. 31–81, and the judicial decisions referred to therein.

7 On the differences in the meaning of these terms, compare e.g. C. Kulesza, L. Łamejko, Prawo do obrony w świetle orzecznictwa Sądu Najwyższego USA i Trybunału w Strasburgu [The right to defence in the light of the decisions of the US Supreme Court and the ECtHR], in: E. Dynia, C.P. Kłak, eds., Europejskie standardy ochrony praw człowieka a ustawodawstwo polskie [European standards of protection of human rights and the Polish laws], Rzeszów 2005, pp. 51–53.

8 S.J. Schulhofer, Plea Bargaining as Disaster, Yale Law Journal 1992, vol. 101, pp. 1979–1981; F.A. Hessick, R.M. Sanfjani, Plea Bargaining and Convicting the Innocent: Role of the Prosecutor, the Defence Counsel and the Judge, Yale University Journal of Public Law 2001–2002, vol. XVI, pp. 189–190.

Faculty of the University of Białystok and Witold Pawlak and Francis Sheridan, judges of the Crown Court in London. We also invited representatives of the Law Faculty of the University of Warmia and Mazury to participate in the preparation of this monograph.

The selection of the English process for the purpose of comparing it with the Polish process was caused by two basic factors. First of all, the laws of England and Wales are the original source of European criminal plea bargaining, which later spread throughout the European continent, to include Poland. Secondly, the administration of justice systems typical of English–speaking countries have a centuries – long tradition of eliminating illegally obtained evidence, based on the American "fruit of the poisonous tree" doctrine. The problem with use of such evidence, which violates the fair trial guarantees, has become more pronounced in the recent years in Poland.

Such a concept of the monograph has determined its layout. The first chapter pertains to the plea bargaining procedure in the criminal process in England and Wales. The discussion in this part of the monograph focuses both the basic assumptions of this institutions and the modifications of its form caused by changes in the laws and the verdicts of English courts and the European Court of Human Rights in Strasbourg. It covers such problems as the dangers, resulting from the use of the plea bargaining procedure, to effective defence of the accused person and to impartiality of the court. The chapter points at the differences between the use of plea bargaining in the English and Welsh process and in the American process. The chapter also discusses decisions of the European Court of Human Rights in Strasbourg.

The second chapter pertains to the compliance of Polish criminal plea bargaining with the fair trial requirements from the point of view of their participants and the court. With reference to different interpretations of the notion of *fair trial* and its aspects in the Polish criminal process doctrine and the expanding interpretation of this matter in the decisions of the ECtHR, the author selected fair trial guarantees to be analyzed in the context of consensual modes of ending criminal proceedings. The research method adopted in this part of the monograph not only covered the literature and the judicial decisions, but also included an

analysis of the results of surveys conducted in the years 2006–2008 by the staff of the Department of Criminal Procedure of the Law Faculty of the University of Białystok among judges and public prosecutors from all parts of Poland, which concerned the functioning of criminal plea bargaining in the practice of the judiciary.

This chapter discusses the opinions concerning the compliance of plea bargaining with the fair trial requirements in the spectrum of such statutory fair trial guarantees as the principles of objective truth, presumption of innocence (in particular the *nemo teneteur* principle), the right to defence, the consideration for the rights of the victim, the ethics of the entities conducting the process, and the unwritten *pacta sunt servanda* principle.

Because the author of this chapter did not find it necessary to quote the provisions of the Polish Code of Criminal Procedure pertaining to this matter, they should be indicated in the introduction which lays out the boundaries of the research field. The key criminal plea bargains are those resulting in a motion for conviction without a hearing (art. 335 and art. 343 of the CCP) and in voluntary submission to a penalty (art. 387 of the CCP). According to art. 335 of the CCP, the public prosecutor may include in the indictment act a motion for issuing a convicting verdict and a sentence with the penalty or penal measure agreed with the defendant, for an offense carrying a penalty of no more than 10 years of imprisonment, without a hearing, if the circumstances of the offense raise no doubts and the attitude of the defendant demonstrates that the objectives of the proceedings will be achieved. Under art. 387 of the CCP, until the first examination of all the defendants during the main hearing is completed, the defendant who has been charged with an offense may make a motion for a convicting verdict with a specified penalty or penal measure without presentation of evidence. If the defendant has no legal counsel of his or her choice, the court may, upon the defendant's request, appoint an attorney. The court may grant the defendant's motion for a convicting verdict if the circumstances of the offense raise no doubts and the objectives of the proceedings will be achieved despite the fact that the hearing will not be conducted completely. Such a motion may be granted only provided that the public prosecutor and the victim, duly informed of the date

of the hearing and advised as to the possibility that the defendant will make such a motion, do not object to it (§ 2 art. 387 of the CCP). The court's decision regarding the granting of the motion for conviction without a hearing (art. 335 and art. 343 of the CCP) and the motion for voluntary submission to a penalty (art. 387 of the CCP) may depend on an agreement reached between the defendant and the victim and on completion of mediation procedures. This is why they have been discussed in this monograph.

The next chapters focus on the issue of elimination of illegally obtained evidence in the process in England and Wales (Chapter III) and in Poland (chapter IV). The common element for both the representative of the English judiciary and the representatives of the Polish legal doctrine is the matter of a compromise between fair trial guarantees pertaining to evidence (by making it prohibited to base courts' verdicts on evidence obtained in violation of law) and the requirements related to effective prosecution of offenders. The English and the Polish authors analyze this problem on the background of verdicts of domestic courts and the verdicts of the ECtHR.

The next parts of the monograph focus mainly on the Polish legislation and procedural practice in the area of plea bargaining in the context of fair trial guarantees. Chapter V discusses appeal proceedings pertaining to the so–called consensual verdicts from the perspective of the principle of fair trial. The author focuses on the *reformationis in peius* prohibition as the *conditio sine qua non* of the right to appeal against verdicts in criminal cases established in art. 2 (1) of Protocol no. 7, dated 22 November 1984, to the European Convention, which has been in force in Poland since 1 March 2003. This chapter discusses both verdicts of the ECtHR and the Polish Constitutional Tribunal.

Chapter VI discusses the essence and the significance of the institution of mediation in criminal cases in the light of the fair trial guarantees. The author analyzes the legal solutions, the statistical data pertaining to the use of this institution, and the differences between mediation and the standard criminal process. It is such differences that justify relinquishing the procedural institutions constituting the essence of a fair trial or a significant reduction of their application.

The monograph ends with Chapter VII which pertains to constitutional and international – law standards of plea bargaining in Polish criminal procedures in the light of proposed changes. The chapter constitutes a "cornerstone" for the earlier deliberations pertaining to the Polish legislation and process practices in this area. This chapter focuses not so much on defining the aforementioned constitutional and international – law standards of plea bargaining as on indicating which rights, among those constituting elements of the right to a fair trial, are the *signum specificum* of plea bargaining and are of fundamental importance to describe plea bargains as meeting the fair trial standards. These rights have been analyzed on the background of the changes to plea bargains recommended by the Penal Law Codification Committee.