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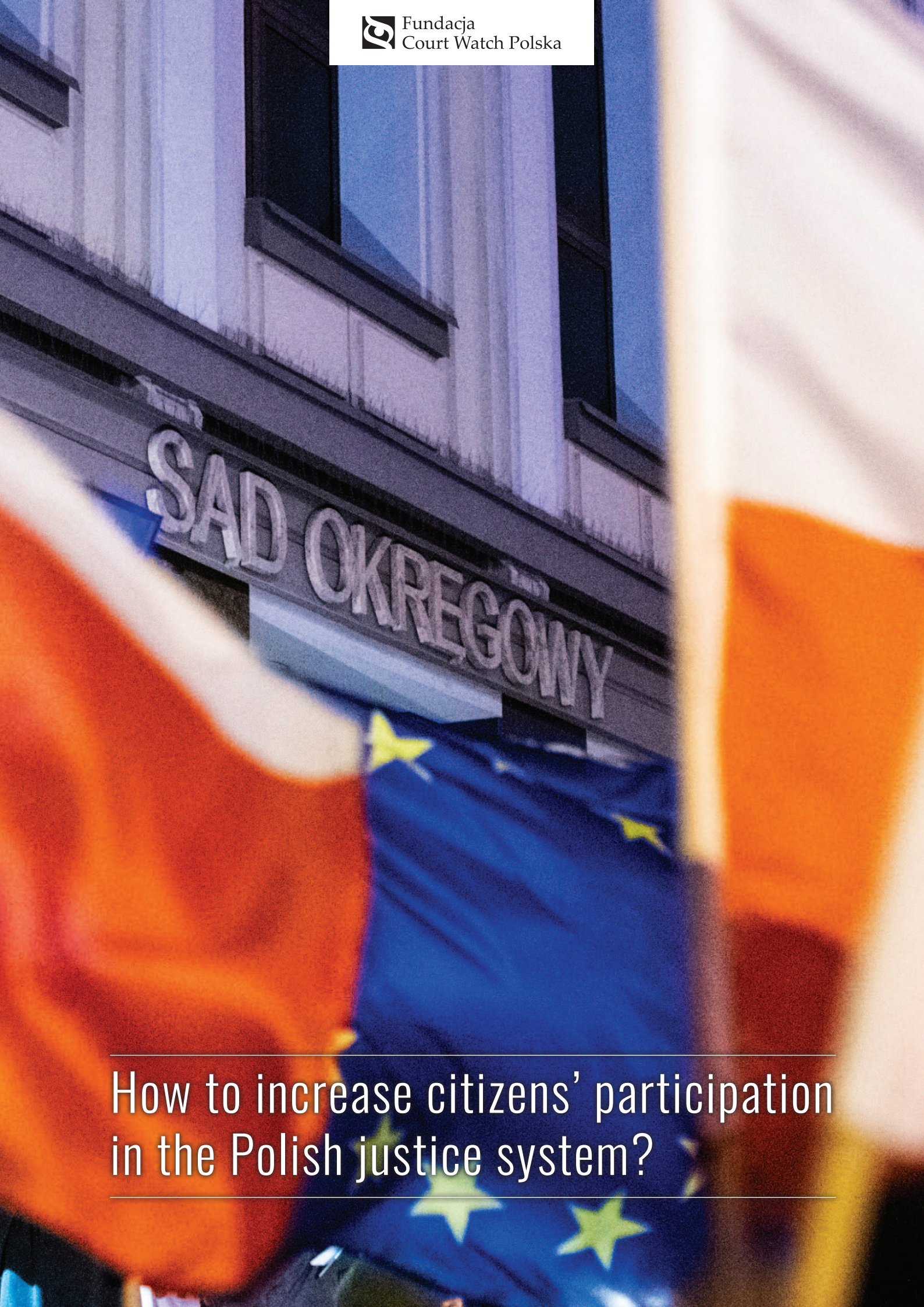

How to increase citizens' participation in the Polish justice system?

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Cover photo: Michał Kość / FORUM Polska Agencja Fotografów Sp. z o.o.

Printing: Pracownia Sztuk Plastycznych sp. z o.o.

www.courtwatch.pl

The publication was issued as part of the project *Research and analysis for the judiciary* financed by the National Institute of Freedom – Center for the Development of Civil Society from the funds of the Program for the Development of Civic Organizations for 2018-2030.

ISBN 978-83-959265-0-1
Toruń 2020

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Summary

The report discusses the issue of citizens' involvement in the justice system in Poland. It analyzes the current legal situation and the possibilities of increasing public participation in adjudication under the Polish Constitution. It considers variants of increasing the share of lay judges in examining cases of first instance, introducing only non-professional members into adjudication, as the so-called magistrates' courts, and the election of social judges in general elections.

Each of the solutions is accompanied by detailed recommendations aimed at achieving the overarching goal, i.e. increasing public confidence in the judiciary, as well as the necessary goal, i.e. maintaining or increasing the level of implementation of the right to a fair trial in Poland. The report concludes by presenting three models that should be taken into account when increasing the citizens' participation in the administration of justice. Two of them are historical Polish models – compromise courts and magistrates' courts. The third is an underestimated example in Poland of the effective citizens' involvement as justices of the peace in Great Britain.

The report has a formula of a *policy paper*. The reader will find an in-depth analysis of the issues raised in the publication prepared by the Court Watch Poland Foundation in cooperation with the Scientific Publishing House of the Nicolaus Copernicus University entitled „The citizens' participation in the administration of justice", scheduled to be published at the turn of 2020 and 2021.

The most important conclusions and recommendations

1. A wider participation of citizens in the judiciary can contribute to increase public confidence in the judiciary and the quality of the implementation of the right to a fair trial.
2. The condition for achieving these goals is introducing changes in the conditions of political and social consensus and carrying out this process in stages, gradually and with the use of a pilot.
3. The first stage should be to increase the involvement of citizens with the use of the existing institution of a lay judge, while simultaneously remodeling it.
4. Lay judges should be offered attractive training and development opportunities by gradually increasing their powers and enabling them to apply for the appointment of a magistrate.
5. The creation of a new institution of justices of the peace should be used to revive the Polish traditions of compromise courts and to promote social solutions for the amicable settlement of disputes.
6. The election of jurors and magistrates should be up to the citizens.
7. In order to limit election campaigns and provide substantive support in the selection of lay judges and justices of the peace, candidates should have their aptitude tested by a local advisory commission.

Introduction

One of the main goals of citizens' participation in the administration of justice is the legitimation of the judiciary. Montesquieu emphasized it emphatically in his work *About the spirit of the laws*, writing that it would be good for "the judges to be of the same status as the accused, or from their equal". The

jury based on this principle has been a huge success overseas. It plays an important role in the functioning of a legal system, in which successive amendments to the Constitution and court rulings have guaranteed the possibility of a broad appeal to the verdict of citizens in criminal and civil matters. Importantly, citizens sitting on the jury can acquit in the USA also in the event of a clear breach of the law by the accused. This institution, called the jury nullification, gives citizens the feeling that they are not defenseless against the arbitrariness of the authorities and that even the judiciary is under their control. Entrusting citizens themselves with so much responsibility for administering justice will certainly empower them and simultaneously legitimize the operation of the justice system in their eyes. On the other hand, Americans bear enormous costs for the operation of the jury system. In the field of socio-legal sciences and among practitioners, this institution is often criticized for unfair adjudication and supporting discrimination against minorities.

Although similar solutions are not completely alien to the legal systems of European countries (including Poland, in which for a short period after regaining independence in the territory of the former Austrian partition there were juries), today passing rulings by a court composed only of ordinary citizens is associated only with common law. In the family of states with statutory law, which includes Poland, professional judges are the first to guard objectivity. However, education and professionalism do not automatically guarantee social trust.

The research conducted at the request of the Court Watch Poland Foundation at the end of 2019 shows that Poles do not believe judges lack competence – 37% agree with the statement that judges are competent and well-prepared people, and only 21% are of the opposite opinion. However, in the case of answering the question whether judges can be trusted, an even distribution was reported – 28% of negative and positive answers. These results coincide with the previous CBOS findings on social trust in state institutions, according to which 33% of Poles declare trust in the courts, and 50% do not trust them. Personal experiences with the administration of justice may be the source of distrust. According to a study conducted for the Court Watch Poland Foundation, 72% of the working-age population had contact with the court. The survey shows that only 25% of Poles believe that judges treat everyone the same regardless of their status, and as many as 38% believe that they do not. The answer to this crisis of confidence may be to increase the participation of citizens themselves in the administration of justice.

Functions of citizens' participation in adjudication

Thanks to the participation of citizens in the administration of justice:

- social views on the application of law and the social hierarchy of values are taken into account in adjudication;
- the judiciary is made more sensitive to social issues;
- the court process is subject to civic control;
- the local and professional (non-legal) knowledge of social judges is used in adjudication;
- citizens' trust in the judiciary is increased;
- court judgments are rendered democratically legitimate.

The participation of lay judges in the bench is also a way to ensure that cases are resolved collegially. Collegiality, i.e. adjudication in multi-person benches:

- ensures that responsibility for the judgment is distributed among all members of the panel;
- promotes impartiality;
- fosters independence;
- protects squad members (especially professional ones) from routine.

It is also interesting to argue that the participation of citizens in the administration of justice is a necessary safeguard against the transformation of the rule of law into the rule of lawyers, and more specifically the rule of judges. The most sensible way to involve citizens in protecting the rule of law from transforming into the rule of judges seems to be to ensure that the public participate in or influence the appointment of judges.

Current state

The Polish Constitution of 1997 provides for the participation of citizens in the administration of justice. However, it does not specify in any way what this share is supposed to look like. The Constitution gives free rein to the legislator to determine the manner and level of citizens' participation in the administration of justice.

The participation of citizens in the administration of justice is regulated by law.

Art. 182 of the Polish Constitution

The constitution does not specify the form in which citizens should participate in the administration of justice. Some specialists deem it admissible for the social judges (lay judges) to participate in adjudication together with professional judges and citizens to adjudicate on their own, e.g. in the form of juries. Others point out that self-adjudication would no longer be just a participation, but an independent administration of justice. In the justification of one of its judgments, the Constitutional Tribunal also criticized, albeit laconically, the idea of entrusting the competence to settle cases of a given category only to citizens. On the other hand, the Constitutional Tribunal did not exclude in the same justification adjudication by jurors, which is in fact adjudication only by citizens (see the justification of the judgment from the Constitutional Tribunal of 29 November 2005, ref. P 16/04).

The current level of citizen participation in the Polish justice system

For several decades, the only form of citizen participation in the Polish administration of justice has been adjudication in some first-instance cases by mixed benches – composed of professional judges and lay judges. Lay judges have equal rights with professional judges when resolving cases. A juror may not, however, be the chairman of the judges.

Lay judges – also informally known as community judges – in common courts are elected for 4-year terms by municipal councils. The councils choose from among residents reported by presidents of courts, groups of 50 citizens or social organizations. Formally, a lay judge can be a person of flawless character (in practice – unpunished), with secondary education, aged 30 to 70. Persons working in courts, prison service or law enforcement agencies, as well as representatives of the legal professions and active local government officials are cannot candidate.

From the 1950s to the first decade of the 21st century, adjudication in the first instance by a mixed bench was the default procedure in Poland. All cases, apart from the exceptions provided for in the Act, were examined by a bench composed of at least one professional judge and two lay judges. As a result

of subsequent legislative changes, the share of lay panels in adjudication was gradually reduced. Currently, lay judges take part in adjudication exceptionally, in certain types of cases:

- **in criminal departments** in crime cases, e.g. homicide (bench: 1 professional judge and 2 lay judges, or bench: 2 professional judges and 3 lay judges, if the accusation concerns a crime for which the law stipulates life imprisonment);
- **in civil divisions** in some family matters, e.g. for divorce (bench: 1 professional judge and 2 lay judges);
- **in labor and social insurance departments** in certain employee cases, e.g. for compensation for the use of mobbing (bench: 1 professional judge and 2 lay judges with special knowledge of employee matters).

In economic matters, unlike in Poland before the war and currently, e.g. in Germany, jurors do not currently adjudicate. From 2018, lay judges also adjudicate in two new chambers of the Supreme Court. Unlike common courts, however, they do not have a majority in the bench of professional judges. They are elected by the Senate.

Possibilities to increase the participation of citizens in the administration of justice

Designing changes that are thoughtful and adequate to the needs of society and the judiciary is key to success in increasing the influence of citizens on the judiciary. How these changes will be introduced is also no less important. If this process is accompanied by a heated political dispute, the fate of these transformations after the change of power may be doomed. They will also lack the trust of various social groups necessary for the judiciary. The process of introducing new institutions must also take into account the interests of the structure in which they will be implanted, i.e. the common judiciary.

Increasing the participation of citizens in the administration of justice should be introduced gradually. This will allow them to distance themselves from political disputes, as well as gain the time needed to create the right tissue of norms and experiences. New institutions should be introduced as a pilot in a few selected district courts where favorable conditions will be identified. Only after gaining experience and solidification should

it be extended to other regions, so that possible mistakes in the project will not affect the inhabitants of the entire country. Thus, they will not use up the resources of enthusiasm and initial confidence that these transformations can potentially count on in the initial phase of operation.

Extending the participation of lay judges in adjudication

In order to increase the participation of citizens in the administration of justice, it is possible to restore the common participation of lay judges in examining first instance cases. This is the easiest way to achieve the title goal, because it does not require changes in the procedure and is based on the experience and institutional memory of courts from several years ago, when the participation of lay judges was more common. However, it should be remembered that it was not without reason that it was decided to limit the catalog of cases considered by mixed benches.

The restoration of the mixed bench as the default one must be preceded by a reflection on the reform of the institution of a lay judge. Even now, when the demand for lay judges is low, large cities often lack applicants. The jurors are most often people who have finished their professional activity. The low lump sum paid to them is a significant motivator for some people to take up this function. When there are no other motivations, a lay judge is passive and lacks independence, as he or she tries not to disturb the professional judges in their adjudication, so as not to risk that he or she will not be assigned further cases and will not have the opportunity to obtain a lump sum. The method of selecting lay judges also does not favor their independence, as they have to rely on the sympathy of local politicians sitting on municipal and city councils. Unlike professional judges, lay judges may be members of political parties, which contradicts the principle of apoliticality of judges:

> *A judge may not belong to a political party, trade union, or perform public activities incompatible with the principles of independence of the judiciary and judges.*
>
> art. 178 sec. 3 of the Polish Constitution

Firstly, it is crucial that the participation of lay judges in adjudication is eagerly supported by the public. Citizens would have to believe

that participation in adjudication by representatives of the broadly understood society would serve the protection of their rights and better administration of justice. Theoretically, with low rates of trust in the legal system, it should not be difficult. On the other hand, it should be remembered that Poles trust each other even less than the justice system. Mixed bench may in this situation be perceived as the most secure or give a feeling of security to the widest group of citizens. People of high status can feel safe with the chairman of the bench who is a lawyer, a professional with experience. On the other hand, for those who self-define themselves as representatives of disadvantaged classes, security may come from the presence of more "ordinary citizens". In this way, the mixed bench becomes the most universal. If the above hypothesis is true, jurors should not be elected by the elite, but randomly selected from among adult residents of the area competent for a given court, or should obtain a mandate of public support in the course of local direct elections.

Increasing the number of lay judges and their participation in the administration of justice must also be attractive for professional judges cooperating with them. For that to be the case, jurors need to be diligent in their role. It is therefore important to ensure their proper motivation. It can be cash, which means increasing the amount of the lump sum and/or the limit of returning lost income. It may be intangible and result, for example, from the high prestige of this function or non-cash benefits. The key issue, however, is how lay judges will be treated by high-profile professional judges.

Raising the prestige of the office of a lay judge would require well-designed and long-term popularization activities. Prestige depends largely on the cultural patterns that are prevalent in society. At present they do not provide lay judges with either high status or universal respect. This is one of the reasons why this civic activity is so little popular. Already today – with a relatively small quantitative demand for lay judges – courts in large cities are struggling with a shortage of applicants.

The easiest way to increase the motivation of lay judges and the supply of people willing to perform this function is to offer attractive benefits to community judges. Monetary remuneration should not, however, be an incentive to stand for a lay judge. On the other hand, performing this function should not involve any costs, as it would discriminate against the indigent. The optimal solution is to return the actually lost income to the limit of remuneration of a district court judge, with the simultaneous resignation from the payment of a lump sum for unemployed persons who, while on duty, do

not actually lose income from pensions or disability pensions. In a nutshell, the amount of the refund could be determined based on the amount of income from the last tax declaration of the lay judge divided by the number of working days in a given year. The return should apply not only to the session days, but also to adequate time spent reading the case files.

Attractive training and study visits should be a form of non-cash benefits and substantive support for lay judges. Offering lay judges an interesting training program combines two functions. First, it prepares people for their role and ensures a higher quality of cooperation between lay judges and judges and court staff. Second, it is an appreciation of their contribution to the administration of justice and a positive incentive for those who are well-motivated to perform the functions of social judge. The training should be as practical as possible and also include – preferably in the form of study visits – familiarization with the activities of the institutions of the court environment: professional representatives, prosecutor's office, police, prison service, probation officers, mediators, social assistance, alcohol problem solving commission, as well as non-governmental organizations taking participation in court proceedings, providing free legal assistance, admitting convicts to perform socially useful work or dealing with the re-adaptation of prisoners after leaving prison. It is also justified to allow lay judges to participate in training courses organized by courts and the National School of Judiciary and Public Prosecution for full-time court personnel. With lay judges in mind, these trainings should include current scientific knowledge on social problems and phenomena that determine crime and disputes that end in court, as well as on the psychology of participants in court proceedings.

Increasing the attractiveness of lay judges for the courts themselves and their staff can be achieved by gradual expansion of the competences of social judges, e.g. allowing them to perform some of the activities reserved today for the presiding judge, receiving statements under oath on their own (which could supplement or replace the controversial testimony in writing) or providing legal aid to other courts. Ultimately, the investment in the competences, motivations and knowledge of lay judges may and should lead to the crystallization of a group of people experienced enough among them to take over the function of chairmen of multi-person teams. This would allow for the gradual introduction of the so-called magistrates' courts in the form of a common court composed exclusively of social judges presided over by one of them.

Introducing justices of the peace in Poland

The jurors could adjudicate on their own over time, thus creating magistrates' courts composed solely of lay judges. The institution of the English *justices of the peace*, (Italian *giudice di pace*, Spanish *jueces de paz*) is present in the jurisdictions of many European countries (Great Britain, Italy, Spain, Belgium, Switzerland), but its competences may vary and range from administering justice in minor cases to activities similar to those performed in Poland by notaries or civil registrars. In other countries, justices of the peace have evolved into a different name (e.g. English justices of the peace are now more often called magistrates), although they are still performing a similar function.

A feature that unites all forms of magistrates is adjudication without the participation of professional judges and jurisdiction limited to cases of minor importance. The other two recurring features are [1] socialization – resulting, for example, from the involvement of people without formal legal education, but having authority, or the election of justices of the peace by universal suffrage, and [2] a focus on restoring the broken order, i.e. restorative justice. Justices of the peace are appointed practically everywhere for a specific period of time, that is, a term of office.

Delegating some court cases solely to non-professional judges does not have to mean a revolution and may take place through an evolutionary approach to such a situation under the current Constitution. The postulated creation of separate magistrates' courts, acting for example at local self-governments, following the example of the former magistrates' courts, is ruled out under the 1997 Constitution. The administration of justice through the new structure of the magistrates' courts is impossible unless Art. 175 of the Polish Constitution is amended. The magistrates' courts could, however, function as part of the common judiciary, just like the town courts, which functioned for some time after the liquidation of bodies of judges and had the status of divisions of district courts.

Based on the Constitution in force in Poland, it is permissible to entrust the administration of justice to a court that does not include a single professional judge. This is the case of deputy judges who are allowed to adjudicate on their own in district courts, although they are not judges in the constitutional sense – they are not appointed by the President and their term of office is limited in time. The Constitution also does not require, unlike judges of the Constitutional Tribunal, that the administration of justice is

pursued by persons with a specific level of legal knowledge.

Every lay judge elected for at least a second term of office could receive the lifetime status of a justice of the peace, following a positive opinion on his candidacy by the National Council of the Judiciary. However, the status of courts composed of no judge within the constitutional understanding could be questioned:

> *Judges are appointed by the President of the Republic of Poland, at the request of the National Council of the Judiciary, for an indefinite period.*
>
> Art. 179 of the Polish Constitution

It is not justifiable for all lay judges to be appointed for an indefinite period with the involvement of central bodies. In the event of increasing their participation in adjudication or transferring certain categories of cases to non-professional judges, their number would have to be significantly increased. Probably up to approx. 50 thousand people. Such a number of candidates could not be verified by the National Council of the Judiciary and the President would not be able to appoint them personally. It would also not be reasonable to grant the status of judge indefinitely to such a large number of people. The compromise solution is that the magistrates' court must include at least one person who has the status of a judge in the constitutional sense of the word.

A justice of the peace would be appointed for an indefinite period by the President at the request of the National Council of the Judiciary, but this would not relate to a guarantee of employment in court. The time of office would be determined by terms of office (as in the case of judges of the Constitutional Tribunal), for which the judge was elected by the local community. After their expiry, the judge would retain his title, but it would mean only limited benefits depending on the length of service in the judiciary, e.g. after retiring – 5% of the lowest salary of a district judge for each third and subsequent term of office worked in a court. Only a disciplinary court could deprive a justice of the peace of his status. Two criteria would have to be met when appointing justices of the peace: [1] such a person would be democratically elected at least a second time by the same community to act as a lay judge, which would give him democratic legitimacy and judicial experience; [2] such a person would have to submit his candidacy to the National Council of the Judiciary and, on the basis of objective criteria, such as an examination, be presented with a motion to the President to appoint them a justice of the peace.

Justices of the peace with legal education should be able to apply for the post of a district court judge after at least 5 years of service.

Adjudication by non-professional judges in cases where there are no complex legal problems may result in courts better fulfilling their role in society. The ability of non-professional judges to administer justice should be analyzed only from the point of view of the exercise by citizens of their right to a fair trial. Regardless of the bench in which it adjudicates, the court must meet the same conditions:

> *Everyone has a right to a fair and public hearing without undue delay by a competent, independent, impartial and independent tribunal.*
>
> art. 45 sec. 1. of the Polish Constitution

The issues of openness, jurisdiction and independence are determined by formal rules covering the system of common courts, regardless of the bench. A diverse group of players can be more impartial and independent than a single judge. On the other hand, in cases where there are no complicated legal problems, the lay committee can successfully provide the parties with a sense of justice, observing the universal principles of procedural fairness and referring in the ruling to generally applicable social norms in which statutory law is rooted.

The catalog of cases to be examined by the magistrates' courts cannot be limited to misdemeanors, as this would be an ineffective use of the institution's potential. Civil cases are the most numerous and growing category of cases. The magistrates' courts should adjudicate in cases where the value of the dispute is low. One, where most people would not choose to hire an attorney and would stand before the court on their own. Initially, it could be, for example, 10 thousand PLN and this amount could increase over time.

Extracting a catalog of cases to be examined by justices of the peace should be accompanied by informalization and simplification of procedures. As it is unreasonable for justices of the peace to specialize only in examining misdemeanors or civil cases, the procedure for both types of cases should be as unified as possible, simplified and, above all, less formalized. The most important goal of the procedures from the point of view of the interests of the judiciary should be to ensure that the parties experience the elementary components of procedural justice: the decent and equal treatment of defendants, the possibility of speaking – presenting their position (in writing or orally), explaining in an

understandable manner their rights and obligations during the proceedings and the meaning and motives of the settlement after its conclusion.

The priority task of justices of the peace should be a consensual conclusion of the case. There is a conflict of interest behind most of the cases brought to court. Since the case is taken to court, this conflict probably could not have been resolved amicably and there is a high probability that it has already turned into an interpersonal conflict. At this stage of the dispute, the mere deliverance of a fair settlement may not end the dispute. This means further social costs and the risk of initiating more cases by the same parties. Therefore, justices of the peace should not stick to the original subject matter of a case in the ongoing proceedings but try to understand its context. Thanks to this, they will be able to help the parties understand each other's arguments and resolve the conflict that was the cause or resulted from the case that had brought the parties to court. A measurable effect of these efforts, in the spirit of old Polish compromise courts, should be settlements concluded by the parties to civil cases, and in the event of offenses, voluntary submission to punishment, conditional discontinuation or waiver of the public prosecutor's demand to punish the accused.

The magistrates' court should only hear cases in a bench of three. Collegiality is the best safeguard for the impartiality, independence, and moderation of a court. The bench should always include at least one judge with the status of a justice of the peace. Depending on the adopted model of reaching the office of justice of the peace, an experienced chairman or a counsel at the magistrates' court with legal education should be responsible for the compliance with the law of both the proceedings and the judgment issued by the lay judge. The counselor would not sit on the adjudication bench but would attend the sessions and provide the court with office services.

If a court of the peace comes across a complicated legal problem, a professional judge should be able to join the bench to rule together with non-professional judges. The magistrates' tribunal should therefore not be able to refer the case to another bench. It helps avoid a situation that the institution of transfer of the case would be abused, and the justices of the peace could gain experience when deciding on more difficult cases with a professional judge.

Election of judges with public participation

An alternative, or possible to be used in parallel with the increase in the participation of citizens in adjudication, method of wider implementation of Art. 182 of the Polish Constitution is to increase the influence of society on the election of judges. Social research shows that the involvement of voters in the election of judges can have a positive impact on their legitimacy. However, such a system still remains only in few countries and even in them is in retreat, being replaced by a substantive choice. In this publication, we limit ourselves to analyzing the idea of general elections for lay judges and justices of the peace

The introduction of direct elections of lay judges and magistrates in Poland requires a careful analysis of the cost-benefit relationship of such a solution and the risks associated with its implementation, resulting from the current socio-political situation, in particular the polarization of public debate in Poland. The idea of the direct mandate resulting from democratic elections supports the implementation of the postulate. Such a choice – i.e., the acquisition by citizens of influence over the body of the judiciary – may also bring greater public interest in the activity of the judiciary and thus contribute to raising legal and civic awareness. The side effects of such a solution, which can negate or limit the benefits, speak against the general election of judges. The legitimacy resulting from the democratic election does not have to mean universal trust (see low level of trust in the Sejm). If the election takes place in an atmosphere of intense conflict and the support for various candidates becomes polarized, it can be expected that majority-elected judges will have a limited confidence-building potential among the part of the voters who voted against them. Competing for a position under the conditions of an election campaign may also lead to making promises to voters and making commitments that run counter to the principle of impartiality and independence of judges. Forming election committees to implement the campaign and obtaining funds for its implementation may result in conflicts of interest incompatible with working as a judge.

The non-profit nature of this service is an antidote to the risks arising from the selection of justices of the peace in free elections. One should also not be tempted to grant low stipends to social judges elected by popular vote. It will be an incentive only for people with low incomes, for whom the service does not negatively affect other sources of income, for example for the unemployed.

Another element that reduces the disadvantages of direct selection is the involvement of local advisory committees in the process. They would assess candidates' aptitude. Its result would determine the candidate's position on the election list, which would be arranged according to the evaluation result, not alphabetically. Such committees could be composed of representatives of legal circles and other specialists appointed by local government authorities, similar to those operating in Great Britain. The procedure and criteria for the recruitment of justices of the peace by local commissions should be uniform throughout the country, i.e. adopted by central bodies. Persons wishing to stand for the positions of lay judges and magistrates would have to be evaluated in good time. The committee would verify whether the applicants meet the requirements and implement a quasi-competitive procedure based on which it would establish rankings. In subsequent years, existing lay judges and judges of the peace who would like to remain in service would be placed at the top of the list, but with an annotation whether the commission recommends their re-election on the basis of visits to meetings with their participation and analysis of involvement in training and opinions of their work from various stakeholders (co-attorneys, officials, president of the court, defendants, attorneys). In this way, social judges could have strong democratic legitimacy, while limiting the phenomenon of election campaigns, as citizens could benefit from professional assistance in the election and it would be unprofitable to stand for election against the commission's opinion.

Selected historical and international models

In increasing the participation of citizens in the judiciary, Poland does not have to use foreign models. Until about 100 years ago, it was common for Poles to settle disputes before courts composed of other citizens. Importantly, they were voluntary, conciliatory and they were called compromise courts, and their judgments were generally respected. Looking for foreign inspiration, however, one should refer to examples in which the participation of citizens is not only marginal, and institutions such as justices of the peace are not criticized and gradually reduced (as it is the case in Spain or the USA). An example of an institutionally mature and constantly developed system of involvement of ordinary citizens in the justice system are *Magistrates' Courts* in Great Britain.

Compromise courts in the First Polish Republic and during the partitions

When the ideas of the Enlightenment reform of the legal system and the introduction of socialized courts to guard the peace spread across Europe, amicable settlement of disputes in Poland was already a centuries-old tradition. This was done by the so-called compromise courts. They constituted an institutional extension of the informal institution of "unity" outside the official courts, cultivated in Poland at least since the Middle Ages. The scope of cases that could be subject to an amicable settlement was very wide, and even contrary to the provisions in force from the 16th century, agreements were also reached in criminal cases.

Compromise courts were voluntary and established ad hoc by the parties from people trusted and respected in the local community. The *conciliators*, or from Latin *mediators* were often landowners, city officials, but also judges of the land and crown courts. It would not come as a surprise for a relative to be appointed as arbitrator. If necessary, the parties or the arbitrators selected by them also jointly appointed a super-arbitrator (German *oberman*) who chaired the meeting.

The parties were obligated to follow the rule of equality (regardless of the difference in status). If no settlement was reached during the proceedings, the compromise court could issue a judgment against which there was no possibility of appeal. The compromise worked out by the arbitration court (from Latin *compromissum*) was highly valued. Its execution was to be guaranteed by the parties' oaths and a deposit (required for the validity of the sentence by the Magdeburg municipal law), and in the event of failure to comply with severe penalties – including the death penalty.

The traditional institution was also characterized by confidentiality and a relative speed of dispute resolution. It was not very costly for the parties. The judges performed their function socially, and since the participants in the dispute had previously agreed to voluntarily submit the adjudication, state execution was not usually necessary. Therefore, the dispute before the arbitration court replaced or was conducted in parallel with the case before the official court. In order to initiate it, the parties to the dispute drew up an "clause" for an arbitration court, i.e. a specific agreement regulating the rules of procedure in a given case.

I really do not understand why everyone was flocking to these compromise courts then; probably to avoid a long and arduous procedure of poviat courts and provincial court chambers. Anyway, at that time, in all crown jurisdictions, the smallest case grew to enormous dimensions and could last not for years, but for decades [...]. Thus, local citizenship preferred to go to a compromise court in matters of less importance, where at least the decision was swift; every region of the country had its ordinarily elected arbitrators and super arbitrators, and it must be admitted that their decrees were abided by, even though the clause for the compromise court was private. Public opinion, highly respected at the time, would not have allowed a disregard for the civil court.

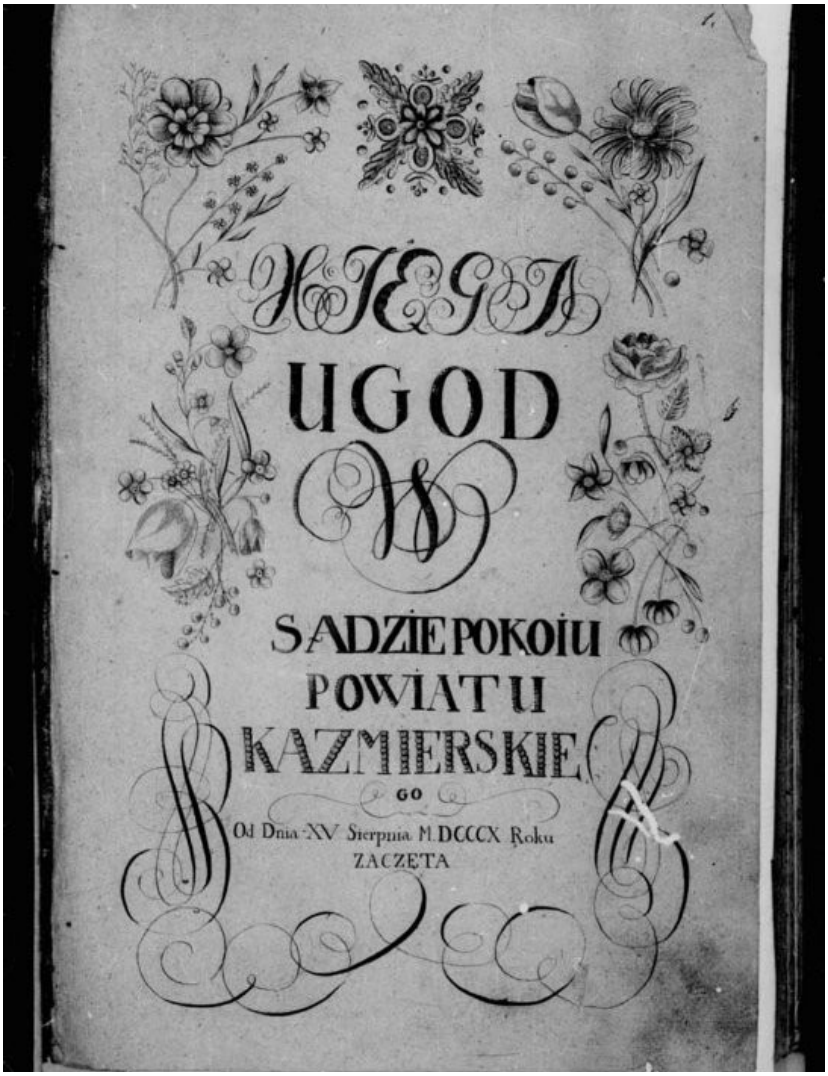
fragment of the memoirs of Józef Dunin-Karwicki (1833–1910)

Experts of old Polish arbitration courts agree that they performed not only a function of law enforcement and administration of justice, but most of all an integration function – maintaining social relations in the face of breaking norms or interpersonal disputes. An important element of the procedure in the arbitration court was mediating and explaining to the dispute parties the need for an amicable solution to the conflict. When issuing a judgment, these courts were guided not only by the rule of law, but also by the norms of equity, so that the manner in which the dispute was resolved would enable the parties to live in harmony later. The compromise courts expressed and consolidated a cultural pattern characteristic of Polish society, in which consent (peace) was one of the most important values.

Magistrates' courts in the Duchy of Warsaw

The ideas of introducing the institution of justices of the peace, following the example of England and post-revolution France, found their way to Poland. On the one hand, they were to be part of the state judiciary, and on the other hand, they were to have a democratic mandate (they would be elected by eligible citizens, not the ruler) and concentrate on reconciling the conflicting parties, "wishing to eradicate vexatious litigation." The introduction of the justice of the peace was included in the draft reform of the justice system to accompany the May 3rd Constitution. The partitions, however, interrupted the entire process of reforming the state and the First Republic did not have official magistrates' courts.

Picture 1: The title page of the Book of Settlements in the Court of Peace of the Kazimierz Poviat of 1810. In such documents, the agreements concluded before the justice of the peace and his sentences were recorded. Source: Files of the city of Kazimierz Dolny, reference number 35/37/0/5/264.



However, the idea of introducing magistrates' courts in Poland did not have to wait long for practical implementation. After the establishment of the Duchy of Warsaw in 1807, the Constitution and the codes issued by Napoleon were introduced. The post-revolution French judicial system was also adapted. The magistrates' courts were in it, as Anna Rosner wrote in *Historical Review* "the lowest courts covering the country with the densest network (they were organized in all poviats) and dealing with the largest number of cases (...). Their task was to have jurisdiction in small civil and criminal cases, as well as to conduct attempts to reach a settlement in non-contentious cases, falling within the competence of the second instance Departmental Tribunals. (...) [However]

in the Duchy [of Warsaw] – unlike in France – the magistrates' court was divided into two divisions: conciliatory and disputes. At the Conciliation Division, attempts were made to reach a settlement in cases falling under the Departmental Tribunal. This department was headed by a justice of the peace (...). The judge was elected by the assembly of the nobility, and the royal nomination was a confirmation of the election. (...) At the head of the second department – the disputed one, was an official unknown to the French judicial system – deputy judge. He was entrusted with the entire jurisdiction in civil and criminal matters, but at the same time a professional requirement threshold was set: after completing a law course, he was required to pass a theoretical exam and pursue court practice."

In 1811, 582 people were nominated for a 6-year term of a justice of the peace, who were to serve alternately in 111 judicial positions. This service, performed on a voluntary basis, also did not give great chances for promotion in the structures of the judiciary, e.g. for a paid place in the tribunal (only every twentieth justice of the peace was promoted higher). So, it was at best a source of prestige or a proof of its recognition. It was performed for social and patriotic reasons. During the times of the Duchy of Warsaw, only representatives of the nobility were elected justices of the peace. Often aged and in the past holding high offices, among them were voivodes, castellans, starosts, bishops, and even judges of the Crown Tribunal from the times of Stanisławów.

Justices of the peace in Great Britain

The United Kingdom is undoubtedly an example of a country whose judiciary is well assessed and at the same time relies on the socialized judiciary. This is a model of a different origin than the institutions sharing the features of the magistrates' courts that operated in Poland. It is therefore all the more worth discussing.

The lineage of the English institution of justices of the peace – just like the native institution of conciliators and compromise courts – dates to the medieval times. English justices of the peace, however, were from the very beginning the representatives of the ruler, and not the authorities elected from below. The justice of the peace was officially regulated in the 14th century:

> *In each county of England, one Lord will be appointed to keep the peace, and with him three or four of the most worthy in the county, with some scholars of law, and will be empowered to stop and prosecute criminals,*

rioters and all other barrators, as well as arrest them, put them in detention and punish them in accordance with their crime or misdemeanor; and imprison and properly punish in accordance with the laws and customs of the Kingdom, and according to what they feel would be best to do at their discretion and good advice.

excerpt from the Justices of the Peace Act of 1361

In the United Kingdom, more than 90% of criminal and misdemeanor cases, as well as most childcare cases, are dealt with by *magistrates' courts* – composed primarily of justices of the peace, now called *magistrates*.

Magistrates are members of local communities who do not need to have legal education and perform their duties as judges voluntarily alongside their normal professional activity. In England and Wales alone, there are 20,000. They can be reimbursed for costs and lost benefits, based on flat rates of approximately 1/10 of the monthly minimum wage for a full day of adjudicating, if their employer does not provide them with paid leave. Some employers support their staff in performing the role of judges and grant employees paid leave, treating it as an opportunity to improve employees' qualifications and build the image of a socially responsible company that supports employees in their civic activity.

Magistrates may or may not be lawyers. Above all, they are required to have appropriate intellectual and social competences. The choice of *magistrates* is performed by local advisory committees (there are 47 of them) composed of experts (including active *magistrates*), which conduct competitions for vacant positions based on both the analysis of submitted applications and job interviews as well as verification of the candidate's references (at least 3 recommending persons). The decision to appoint a justice of the peace is made on the basis of the commission's recommendation and is made by *Senior Presiding Judge* (the First President of the Supreme Court or the President of the National Council of the Judiciary may be considered as its equivalent in Poland).

English justices of the peace, after being sworn in, must undergo compulsory training, as well as take part in continuing training depending on their specialization. They adjudicate in benches of three, having an assistant with legal education in the courtroom at their disposal. In principle, the selection of benches considers the need to represent different genders, social and ethnic groups in the local community. *Magistrates* undertake to adjudicate for at least 13 days a year (it can also be 26 four-hour sessions), but in prac-

tice the average is 35 sessions, and the maximum limit is set to 70 sessions. After sitting as a member of the criminal tribunal, justices of the peace may, after having undergone appropriate training, become chairman of the bench, and specialize and judge in juvenile, family, and civil matters. *Magistrates* also sit in mixed benches (chaired by a professional judge) in appeals heard by regional courts. Therefore, it is an institution like a lay judge in Poland, but with additional competences to adjudicate in appeal cases and in first-instance cases in benches of three without the involvement of professional judges.

Justices of the peace enjoy a good reputation among the English public, although awareness that they are not required to have formal legal training is not universal. The number of appeals against their decisions to courts of second instance is surprisingly low and does not exceed 1%. The British magistrates' courts, however, struggle with staffing problems. Approximately 1,200 new *magistrates* are sworn in every year. However, this does not meet the needs and efforts are constantly being made to promote the service of justice of the peace in British society. For this purpose, a clear and helpful website has been established, which contains not only information, but also practical tools for self-assessment of their aptitude as judges. The promotion of citizens' participation in the administration of justice is also ensured by the national Association of Justices of the Peace.

About the Court Watch Poland Foundation

The Court Watch Poland Foundation is an independent non-governmental organization monitoring the implementation of the right to a fair trial in Poland. The Foundation's mission is to improve the functioning of the justice system in Poland based on empirical data and objective analyses. The Foundation conducts interdisciplinary research in cooperation with Polish and foreign research centers, develops and implements solutions to improve the implementation of the right to a fair trial, and conducts educational activities. The largest research program of the Court Watch Poland Foundation is the Civic Monitoring of Courts, under which the Foundation's observers visited over 43,000 court sessions. The activities of the Foundation have been recognized in Poland, *inter alia* by the Polish Business Council, and its original methodology is promoted in other countries by international organizations.

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Court Watch Poland Foundation

A structural problem of Poland is the low level of citizens' trust in the judiciary. Moreover, when, for example, in the Czech Republic, France, Germany or Sweden, trust in the judiciary is slightly higher than in other people, in Poland, trust in the courts is even lower than the already alarmingly low level of social capital. Lack of trust means that many people do not use the judiciary when it is needed. Too many Poles feel they stand no chance in the event of a dispute ending in court, ignore summonses, do not respect and do not follow sentences, and on the other hand, there are many people who turned the court into an escalation tool, not conflict resolution.

One of the ways to solve this problem is to expand the participation of citizens in the judiciary, e.g. by introducing justices of the peace in Poland, election of social judges in general elections or greater participation of lay judges in adjudication. For several decades, the only form of participation of citizens in the Polish judiciary has been adjudication in some first-instance cases by mixed benches – with the participation of lay judges elected by municipal councils.

This report discusses the above possibilities, putting them in the context of the current legal situation. Each solution is assigned detailed recommendations. It also presents an evolutionary model of achieving changes. The report concludes by presenting three models that should be considered when increasing the participation of citizens in the judiciary. Two of them are historical Polish models – compromise courts and magistrates' courts – operating on the Polish territory until the beginning of the 20th century. The third is an example of the effective involvement of citizens in the judiciary in Great Britain, which is underestimated in Poland. Feel free to read on.

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ISBN 978-83-959265-0-1