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Functioning of Procedural Agreements in the Polish Legal System in Comparison with the Solutions Adopted by German Legislation

Abstract: The history of consensual litigation in Polish criminal proceedings dates back to the 1990s. It is based on the assumption that the participants in the proceedings will come to an agreement on the resolution of the conflict, which will then be accepted by the court. This solution was most popular between 2010 and 2015. Since 2016, however, a change in attitudes towards consensual modes has been very noticeable. While the consensual method speeds up criminal proceedings, opponents point to shortcomings - there are even calls to abandon their use in Poland. In the Federal Republic of Germany, on the other hand, informal procedural agreements, called *Absprachen*, existed for several decades, and these agreements accelerated the course of proceedings. However, it was only decided to regulate this issue after several decades. In this article, I will characterise the reasons for the introduction and development of procedural agreements in the Republic of Poland and in the Federal Republic of Germany.

Keywords: consensual proceedings, Republic of Poland, Federal Republic of Germany, procedural solutions, comparative analysis

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Introduction

In the evolution of criminal procedure over the last decades, one can see a mutual convergence of European legal systems in criminal matters. This trend is of an objective nature, so to speak, resulting primarily from the processes of globalisation and the economisation of the process. It involves both legislative changes and changes in procedural practice. It is no different with consensual agreements.

In Western European countries, such as Germany, Italy or Spain, litigation agreements have a long history.[2] In contrast, consensual forms of ending criminal proceedings have only existed in Polish criminal procedure since 1 January 1998. After many intense discussions within the Codification Committee in the 1990s, it was decided to introduce procedural solutions that functioned well in other countries and contributed immensely to curbing the growth in crime. Following the example of other European countries, the Act of 6 June 1997, the Code of Criminal Procedure,[3] introduced two consensual institutions, constituting a novel aspect of the criminal process.[4] The precursors for the Polish legislator were primarily the Spanish institution known as *conformidad* and the Italian institutions known as *patteggiamento* and *processo abreviado*.[5] While the legal solutions introduced were novel, the agreements themselves between the participants in the process did not represent anything groundbreaking.

The main premise of consensual proceedings is that the litigants themselves come to an agreement on the resolution of the conflict, which is subsequently accepted by the court. According to S. Steinborn, a consensual agreement is an agreement that must be concluded by at least two litigants, within the limits of their

2 Katarzyna Urbanowicz, "Formy konsensualizmu procesowego w świetle ostatnich nowelizacji Kodeksu postępowania karnego," *Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM*, no. 6(2016): 257.

3 Journal of Laws of 1997, no. 89, item 555, hereinafter: Code of Criminal Procedure.

4 Stanisław Waltoś, "Nowe instytucje w kodeksie postępowania karnego z 1997 roku," *Państwo i Prawo*, no. 8(1997): 26–27.

5 Anna Malicka, "Koncepcja porozumienia w polskim postępowaniu karnym," *Wrocławskie Studia Erazmiańskie. Zeszyty Studenckie*, no. 1(2008): 192.

powers. It is based on the fact that in order to obtain a favourable procedural situation for themselves, and at the same time make concessions to the other party, the parties to an agreement reach a compromise on an issue of importance for the course of the criminal trial or the substantive outcome.[6] According to S. Waltos, a procedural agreement should be understood as an agreement concluded by accused with the public prosecutor and the injured party, or even the procedural authority. Under this agreement, in exchange for a specific performance by the accused, a more favourable outcome will be offered than the one that could have been expected without the conduct.[7]

On the basis of Polish procedural law, consensual forms of ending a criminal trial are the institutions of sentencing without a trial, functioning in two variants, i.e. with an admission of guilt by the accused (art. 335 § 1 of the Code of Criminal Procedure) and without an admission of guilt (art. 335 § 2 of the Code of Criminal Procedure) and without admitting guilt (Article 335 § 2 of the Code of Criminal Procedure), as well as the so-called voluntary submission to punishment, which is also possible in two variants, i.e. before the commencement of the trial (Article 338a of the Code of Criminal Procedure) and after the commencement of the trial (Article 387 of the Code of Criminal Procedure).[8]

In the Federal Republic of Germany, on the other hand, with a view to judicial efficiency, informal procedural agreements in trial were made possible as early as the 1960s. Among the most important procedural principles in the German legal system is the principle of concentration (from the German *Konzentrationsmaxime*), within which the injunction to speed up the process (from the German *Beschleunigungsgebot*) stands out. The best example

6 Sławomir Steinborn, *Porozumienia w polskim procesie karnym: skazanie bez rozprawy i dobrowolne poddanie się odpowiedzialności karnej* (Kantor Wydawniczy „Zakamycze," 2005), 30.

7 Stanisław Waltoś, "Porozumienia w polskim procesie karnym *de lege lata* i *de lege ferenda*," *Państwo i Prawo*, no. 7(1992): 36.

8 Piotr Karlik, "Postępowania szczególne," in *Polski proces karny*, ed. Paweł Wiliński (Wolters Kluwer Polska, 2023), 629.

of the implementation of this injunction is actually informal agreements (from the German *Abprachen*).[9]

It must be borne in mind that these were informal agreements. Therefore, the sentencing courts put pressure on defendants to plead guilty in order to simplify and speed up the trial. As early as the 1960s, this problem was recognised by the Federal Court of Justice (from the German Bundesgerichtshof[10]). Unfortunately, it was not resolved immediately, leading to constant pressure on defendants over the following decades.

It was not until the Federal Court of Justice's judgment of 28 August 1997 that the institution of agreements was 'legalised' in a way.[11] However, this was legislated much later, i.e. in 2009.[12]

The following part of the article will characterise the reasons for introducing and developing procedural agreements in the Republic of Poland and in the Federal Republic of Germany. This will make it possible to see significant differences in the approach to these institutions in the two different legal systems.

Sentencing Without Trial in Polish Criminal Proceedings

The institution of sentencing without trial is a basic form of procedural agreements. In its original wording, it applied to misdemeanours punishable by up to 5 years' imprisonment. As a result of successive amendments, the scope of application of the regulation was gradually extended until, in 2013, all misdemeanours were covered. Modifications introduced in 2015–2016 resulted in the implementation of two variants of this solution.[13]

9 Hans-Heiner Kühne, *Strafprozessrecht. Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts* (C.F. Müller, 2009), 146–50.

10 Abbrevation BGH.

11 Thomas Weigend, "Urteilsabsprachen in Deutschland," in *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, ed. Krzysztof Krajewski (Oficyna a Wolters Kluwer business, 2007), 309.

12 Kühne, *Strafprozessrecht*, 484.

13 Piotr Karlik, *Postępowanie konsensualne i szczególne w procesie karnym. Praktyczny przewodnik ze wzorami pism* (Wolters Kluwer Polska, 2017), 21.

In the first option, the accused admits his guilt. Moreover, in the light of his explanations, the circumstances of the commission of the offence and the question of guilt are not in doubt and his attitude clearly indicates that the objectives of the proceedings will be achieved. In the second option, on the other hand, the circumstances of the offence and the question of guilt are also not in doubt and his attitude indicates that the objectives of the proceedings will be achieved. However, in the second case, the condition of pleading guilty has been waived.[14]

This is a fundamental distinction that affects the subsequent stage of the proceedings. Even if the suspect admits guilt, the necessary steps must be taken to secure traces and evidence against their potential loss, distortion or destruction. This is important because a confession may only be a temporary procedural tactic for some suspects.

In the first option, the prosecutor applies to the court for a conviction and the imposition of penalties or other punitive measures agreed with the accused. This is not an indictment, but a surrogate indictment. The suspect has the opportunity to reach an agreement with the prosecutor on the sanction for the alleged offence. In doing so, the suspect may be assisted by a professional defence counsel. The prosecutor, on the other hand, is obliged to take into account the legally protected interest of the victim in this agreement.[15] This is important insofar as taking into account the legally protected interest of the victim is one of the main objectives of criminal proceedings.

In the second option, the prosecutor sends a simple indictment to the court, accompanied by a request for a conviction and the imposition of agreed penalties or other measures with the accused. This is quite exceptional, as, on the one hand, the guilt and the circumstances surrounding the commission of the offence are supposed to be beyond doubt and, on the other hand, the accused does not admit guilt. However, this can easily be explained. Sometimes a person admits to the act itself, but not to guilt. Moreover, it is the trial

14 Katarzyna Dudka, ed., *Kodeks postępowania karnego. Komentarz* (Wolters Kluwer, 2023), 750.

15 Dudka, ed., *Kodeks postępowania karnego*, 754.

authority that must be convinced of the absence of doubt, meaning the pre-trial investigator's belief is only subjective. Ultimately, the absence of contradictions between the accused's evidentiary statements and the findings made will eliminate any definitive doubts.[16]

One very important element of consensual proceedings is the application for conviction without trial. This is the case regardless of whether it is a standalone application or an annex to the indictment. It is subject to formal control, which is carried out by the president of the competent court or another authorised person. If all formal conditions are met, the case is referred to a hearing. This hearing may be attended by the victim, the prosecutor and the accused, i.e. the parties to the proceedings, about which they are informed in advance.[17]

It is the court's task to legalise such an agreement. At the same time, the court grants the prosecutor's application only if it is not opposed by the victim. The victim thus has the opportunity to have a real impact not only on the course of the proceedings, but also on the final content of the agreement.

The court may also make granting the application subject to a specific amendment or amendments being made to it. The role of the court is to ensure that the objectives of the proceedings are met. However, it should not be forgotten that any amendment to such an agreement must ultimately be approved by the accused.[18] However, it cannot be overlooked that in this case the accused's procedural position is not particularly strong, especially when he has already formally admitted to having committed certain criminal acts.

Therefore, the agreement reached must be balanced and should satisfy all parties. In the absence of any objection, the court passes sentence at a hearing. It is important that the court informs the defendant of the limited possibility of appealing against the verdict under this procedure, but this should be done before a final decision is reached. However, the court is not required to grant the

16 Dariusz Świecki, ed., *Kodeks postępowania karnego. Komentarz, Vol. 1: Art. 1–424* (Wolters Kluwer, 2024), 1223.

17 Jerzy Skorupka, ed., *Proces karny* (Wolters Kluwer Polska, 2022), 640.

18 Świecki, ed., *Kodeks postępowania karnego*, 1222.

prosecutor's application, which triggers further proceedings. If it was an independent complaint, the court returns the case to the prosecutor for further proceedings. However, the situation is different in the case of a motion attached to an indictment. In such a situation, the prosecutor merely supplements the indictment with the missing elements.[19]

Voluntary Submission to Penalty in Polish Criminal Proceedings

The second form of consensual proceedings is the institution of voluntary submission to punishment. Unlike the institution of conviction without trial, it is only possible at a later stage of criminal proceedings. Voluntary submission to punishment originates from the Fiscal Penal Code, which earlier allowed for the possibility to agree on criminal liability.[20]

Originally, it covered acts punishable by up to eight years' imprisonment. Over the years, numerous amendments extended the scope to cover all misdemeanours and then to include felonies. In 2016, it was finally established that voluntary surrender could apply to acts punishable by up to 15 years of imprisonment.[21] Moreover, the amendment of 27 September 2013 resulted in the stratification of this institution by introducing Article 338a of the Code of Criminal Procedure. Currently, voluntary surrender to punishment operates in two variants: before the trial begins and after the trial has already begun.[22]

19 Dariusz Świecki, "Ograniczenie podstaw odwoławczych do wniesienia apelacji w trybach konsensualnych (art. 447 § 5 k.p.k.)," *Przegląd Sądowy*, no. 9(2019): 26.

20 Karlik, *Postępowanie konsensualne i szczególne w procesie karnym*, 49.

21 Piotr K. Sowiński, "Kształtowanie się dobrowolnego poddania się karze w trybie 338a i 387 k.p.k. Kilka uwag na tle zmian 1997–2016," *Zeszyty Naukowe Uniwersytetu Rzeszowskiego*, no. 102(2018): 231, https://doi.org/10.15584/znurprawo.2018.23.17.

22 Urbanowicz, "Formy konsensualizmu procesowego w świetle ostatnich nowelizacji Kodeksu postępowania karnego," 266.

This institution also consists of an agreement between the participants in the proceedings on the issue of the final outcome, but the initiative for the agreement comes from the accused. This is a characteristic feature of this procedural solution. The accused is motivated by the possibility of obtaining a more favourable outcome. However, in this procedural arrangement, he or she is in a worse position than a suspect at the pre-trial stage negotiating a plea bargain without a trial. This concerns the inevitability of the accused suffering the consequences of his or her actions. Voluntary surrender is a kind of fallback option for the accused, the last possible option to enter into an agreement with the prosecutor.[23]

The accused has the chance to take the initiative only after the indictment has been brought before the court. Before being served with the notice of the date of the trial, the accused may submit a request for a verdict and imposing a specific penalty or measure, forfeiture or compensatory measure without taking evidence. This is the first variant of voluntary surrender to punishment set out in Article 338a of the Code of Criminal Procedure mentioned previously. It is important to note that the accused need neither plead guilty nor give an explanation at this stage.

The application submitted by the accused shall be subject to examination. If it meets all formal requirements and is fit for consideration, the application may be referred to a hearing. Such a hearing may be attended by the parties and even by a victim who has not yet acted as an auxiliary prosecutor. The aforementioned parties shall be served with a copy of the accused's letter in order to familiarise themselves with it and, ultimately, to be able to make their own submissions.[24]

To grant the application made by the defendant the court must be convinced of the circumstances of the offence and the defendant's guilt. Moreover, the attitude of the accused himself should suggest that the objectives of the

23 Ryszard A. Stefański and Stanisław Zabłocki, eds., *Kodeks postępowania karnego. Tom 3. Komentarz do art. 297–424* (Wolters Kluwer Polska, 2021), 861.

24 Katarzyna Dudka and Hanna Paluszkiewicz, *Postępowanie karne* (Wolters Kluwer, 2022), 543.

proceedings will be achieved. At the same time, granting the application is only possible if the prosecutor and the victim do not oppose it. Therefore, the proposal put forward by the accused should be carefully thought out. It must satisfy the legally protected interests of the victim as well as the prosecutor's expectations regarding the level of punishment. The defendant should be aware of the expectations of these parties in good time, which should result in a request for voluntary submission to sentence. The court may also grant a request after prior modification.[25]

However, before granting the application itself, the court is always obliged to inform the accused of the limited possibilities of appealing against such a judgment. If the court grants the defendant's request, it sentences him or her to the agreed punishment and imposes the accepted punitive and compensatory measures, as well as other incidental issues.[26]

There is a second option for voluntary surrender of sentence. A request for a conviction and the imposition of a specific sentence on the accused can also be made at a later date. The time limit is when the hearing of all defendants at the main hearing has been completed.[27] This is the final moment to conclude procedural agreements.

As with the first variant of voluntary surrender, such a request may relate to any offence punishable by up to 15 years' imprisonment. Moreover, the prerequisites for granting such a plea are almost identical to those for the previous option. The circumstances of the offence and the guilt of the accused cannot be doubted. At the same time, the achievement of the proceedings' objectives has not been tied to the offender's attitude. This is a rather questionable solution, and one which is difficult to justify.

The granting of the motion is possible if the prosecutor agrees and the victim, duly notified of the date of the hearing, does not object. This is a solution in-

25 Piotr Hofmański and Stanisław Waltoś, *Proces karny. Zarys systemu* (Wolters Kluwer, 2023), 313.
26 Karlik, "Postępowania szczególne," 635.
27 Skorupka, ed., *Proces karny*, 692.

troduced by the Act of 7 July 2022 amending the Act - Criminal Code and certain other acts.[28] The rules on procedural agreements have been amended numerous times, but this law significantly affects the scope of this institution. The amendment replaces the 'no objection' condition of the prosecutor at the defendant's request for a conviction with a 'consent' condition.[29]

It is worth pointing out that in the original wording of Article 387 of the Code of Criminal Procedure, the condition of consent was indicated. Realising that consent may generate protraction of consensual modes, by virtue of the amendment of the Code of Criminal Procedure of 10 January 2003, the legislator consciously abandoned the previously adopted solution, introducing 'no objection' for both the prosecutor and the victim.[30]

However, this is a problematic and even inconsistent change. If it was necessary to introduce the requirement of consent, instead of the absence of objection, the legislator, in order to guarantee the consistency of the legal system, should also make changes with regard to the institution of Article 338a in connection with Article 343a of the Code of Criminal Procedure. This is practically a dual solution, which has remained unchanged.[31]

At the same time, it is ultimately up to the court to grant the application. It has the power to make the granting of the application conditional on certain amendments being made to the application. In addition, the court is obliged to instruct the accused of the limited possibilities to lodge an appeal in respect of this form of consensual agreement.[32]

28 Journal of Laws of 2023, item 1860.

29 Joanna Mierzwińska-Lorencka, *Kodeks karny. Kodeks postępowania karnego. Podsumowanie zmian 2023* (Wolters Kluwer, 2024), 71.

30 Cezary Kulesza, ed., *Ocena funkcjonowania porozumień procesowych w praktyce wymiaru sprawiedliwości* (Oficyna a Wolters Kluwer business, 2009), 59.

31 Mierzwińska-Lorencka, *Kodeks karny*, 71.

32 Świecki, ed., *Kodeks postępowania karnego*, 1447.

Genesis of Informal Agreements (Absprachen)

In the interests of judicial efficiency, informal agreements were made possible in German trials as early as the 1960s. Informal agreements from the German *Absprachen* were both an expression of the order to expedite the trial (*Beschleunigungsgebot*) and a manifestation of economy in the broader sense (*Wirtschftlichkeit*).[33]

Yet the most important principles in the German criminal process are the principle of legalism, the principle of free assessment of evidence, the principle of openness, and the principle of the contradictory. For many German lawyers, reducing these in favour expedited proceedings was unnecessary, if not impossible. For this reason, informal agreements have become a problematic topic.

Agreements emerged in the context of identifying economic crimes, as the complex nature of the cases made the participants in these proceedings the most likely candidates for the kind of negotiations that would simplify the whole process. They were, however, kept secret. They were widely regarded as violating the principle of legalism and the basis for ex officio prosecution. For this reason the discussions held were not even minuted. Moreover, they took place outside the courtroom. As a rule, the accused was not involved in the negotiations, and, like the jurors, was subsequently informed of the results of the discussions.[34] This form of agreements led to many irregularities, above all, with pressure being exerted on defendants to plead guilty in order to simplify and speed up the trial.

Informal Agreements and Procedural Rules

The academic debate on the legitimacy and form of procedural agreements did not begin until the 1980s.[35] The importance of the problem is determined by the

33 Kühne, *Strafprozessrecht*, 152–54.

34 Stephen C. Thaman, "Plea Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases," *Electronic Journal of Comparative Law* 11, no. 3(2007): 43–44.

35 Julia Peters, *Urteilsabsprachen im Strafprozess. Die deutsche Regelung im Vergleich mit Entwicklungen in England & Wales, Frankreich und Polen* (Universitätsverlag Göttingen, 2011), 7.

fact that lawyers could not agree on the actual name of these agreements. Among the works on the subject from that period, one can find many terms such as negotiation, consent, transaction or agreement. Understanding the essence of an agreement depended primarily on the point of view of the author of the publication. This was the main reason for the diversity in the terminology.

Numerous critical discussions appear in the German literature. Many legal scholars opposed the development of procedural agreements in the criminal process. One of the main objections raised in the discussions was that the principle of material truth was not respected or even violated. It was argued that if the overriding objective of the negotiations being conducted is to save money and speed up the proceedings, a comprehensive clarification of the facts cannot be expected.[36] According to critics of the procedural agreements, this could lead to a selective perception of the entire proceedings being conducted.

The next plea was a violation of the principle of free assessment of evidence. In the case of such procedural agreements, the court does not rely on the entire body of evidence when deciding a particular case. The outcome of the discussions held outside the trial determines the outcome of the case.[37]

Procedural agreements were also found to be contrary to the principle of openness. This principle is explicitly stated in German procedural law. It serves first and foremost to control state power and to protect the individual against arbitrary actions taken by state authorities. The principle of openness is one of the fundamental principles of the German criminal process, and is also a mainstay of the rule of law and democracy. For this reason, procedural agreements have been subject to enormous criticism. The problem is that instead of being reached at the trial, agreements were reached 'in the back room'.[38] This practice raised justified doubts about the legitimacy of the discussions.

36 Ralf Tscherwinka, *Absprachen im Strafprozeß* (Peter Lang AG International Academic Publishers, 1995), 20.

37 Thomas Rönnau, *Die Absprache im Strafprozeß* (Nomos,1990), 155.

38 Werner Beulke, *Strafprozessrecht* (C.F. Müller, 1994), 376.

It was widely believed that the agreements were incompatible with the principle of legality. Opponents of the agreements unanimously reiterated that there could be no legality when opportunistic solutions were used arbitrarily. They considered it unnecessary and against the law.[39]

Informal Agreements in the Rulings of German Courts

The problem of informal agreements has been evident since the early 1960s. The constitutionality of procedural agreements was questioned, as was their legitimacy. In 1987, the Federal Constitutional Court of the German Bundesverfassungsgericht[40] ruled on the subject. The Constitutional Court of the Federal Republic of Germany held that the conduct of fair criminal proceedings in accordance with the supreme procedural principles does not preclude an agreement between the court and the trial participants. At the same time, the court should feel obliged to continue gathering evidence. The court cannot rely solely on the explanations of the accused.[41]

In addition, the problem of informal procedural agreements has been addressed on numerous occasions in the decisions of the Senates of the Federal Court of Justice. During the course of the 1980s and 1990s, these varied greatly. Over time, views have evolved: at times, it was argued that such procedural agreements were risky, at other times they were viewed extremely positively.

– A crucial moment was the decision of the Fourth Senate for Criminal Matters of the Federal Court of Justice on 28 August 1997.[42] On the back of this case, the Senate identified the necessary rules for a legal agreement:

39 Beulke, *Strafprozessrecht*, 378.

40 Abbrevation BVerfG.

41 Cezary Kulesza, "Porozumienia procesowe w europejskich systemach wymiaru sprawiedliwości," in *Porozumienia karnoprocesowe w praktyce wymiaru sprawiedliwości*, ed. Cezary Kulesza („Temida 2," Wydawnictwo Stowarzyszenia Absolwentów Wydziału Prawa Uniwersytetu w Białymstoku, 2010), 52.

42 Peters, *Urteilsabsprachen im Strafprozess*, 42.

- Agreement between the court and the defendant on the defendant's confession and the amount of the punishment must take place during the trial. This is a necessary element for the principle of openness to be respected. However, this does not exclude discussions held before or outside the trial as to the willingness to enter into trial negotiations.
- Importantly, the result of the agreement must be recorded in the minutes. This is essential.
- Yet the defendant's explanations alone cannot become the sole basis for a conviction. The court must remain faithful to the principle of material truth. It must thoroughly investigate the case, even if it is possible to reach an agreement with the accused. The evidence must be carefully gathered.
- Even in the case of a possible agreement, the principle of free evaluation of evidence must be upheld and implemented. This is one of the guiding principles of the German trial and no exceptions can be made to it.
- The court must take into account the guilt of the accused. In adjudicating the case, it cannot disregard this criterion. The same is true in the case of procedural agreements. Reaching a consensus does not affect the degree of guilt.
- A confession of guilt in the framework of the consensus reached can lead to a mitigation of the punishment imposed. It is possible even if practical considerations, rather than remorse, are behind the defendant's explanations. Drawing unfavourable conclusions from the defendant's behaviour alone during the proceedings is not possible. In addition, making promises about a possible reduction of the penalty for a guilty plea is also not permissible.
- It is impermissible for the accused to waive his right to appeal in exchange for a promise to reduce his sentence.
- In discussions, the accused must have free will. He cannot be threatened with a higher sentence, nor can he receive a number of promises with no payoff.

– If a consensus is reached at trial in this way, the court is bound by the provisions of the agreement. However, when new circumstances that could affect the final verdict come to light after the conclusion of the agreement, and these circumstances were previously unknown to the court, the authority may withdraw from the agreement.[43]

The Fourth Senate's resolution was welcomed by some of the doctrine. It provided certainty about the permissibility of the agreements. Some have even stated that the Federal Court of Justice is moving in the right direction.[44]

At the same time, the position of the Fourth Senate did not end the discussion on the appropriateness of procedural agreements in the German legal system. The strongest opponents of concluding agreements continued to criticize this solution. They described it as unacceptable, arguing that the rules indicated by the Fourth Senate were insufficient. Indeed, the indicated standard still has some shortcomings and contradicts existing legal principles.[45] This ruling has sparked renewed discussion on the admissibility of procedural agreements in criminal proceedings.

Another landmark moment was the March 3, 2005 ruling of the Grand Senate on Criminal Matters.[46] As part of a clarification of a legal issue submitted by one of the Chambers, it clarified the 1997 standard for entering into procedural agreements:

– The obligation to provide information cannot be viewed in a discretionary manner by the parties to the proceedings and the court.
– Fair and law-abiding criminal proceedings primarily serve to establish the circumstances necessary for a just verdict.
– Punishment is to be proportional to the guilt.

43 Kühne, *Strafprozessrecht*, 484.
44 Korinna Weichbrodt, *Das Konsensprinzip strafprozessualer Absprachen* (Duncker & Humblot, 2006), 158.
45 Bernd Schünemann, *Strafprozessuale Absprachen in Deutschland. Der Rechtsstaat auf dem Weg in die "Bananenrepublik"?* (Roderer Verlag, 2005), 10.
46 Agnes Saal, *Absprachen im deutschen und polnischen Strafprozess. Eine rechtsvergleichende Darstellung des Konsensualverfahrens* (Peter Lang, 2009), 55.

- The court must act diligently and must not rush.
- The defendant's confession must be checked for credibility.
- A guilty verdict cannot be the subject of a plea bargain.
- The punishment imposed must be neither excessive nor overly reduced. It is to be reasonable from the point of view of the law.
- The court may deviate from the agreement when new facts and evidence come to light.
- In addition, it is impermissible to agree to waive the right to legal protection.[47]

The Need for Regulation

After many years, a loophole was recognized in the absence of a statutory mandate for the institution of procedural agreements. The standards pointed out by German courts were insufficient. After March 3, 2005, it became clear that the time had come for legislative action. Representatives of the doctrine analysed what the final statutory regulation of such agreements should look like. For months, they drafted bills, yet none found recognition in the Bundestag. Each bill presented had shortcomings that prevented it from being passed.[48]

This situation continued for several years and it was not until July 29, 2009 that the Bundestag passed a law to regulate agreements in criminal proceedings. This entered into force on August 4, 2009,[49] and was based on the draft legislation submitted by the Ministry of Justice in 2006.[50] This law allows agreements on the course of the proceedings and their outcome, which the court may seek with the participants in the proceedings in the relevant cases, and makes clear that they do not violate the duty to clarify the facts of the case.

47 Saal, *Absprachen im deutschen und polnischen Strafprozess*, 66.
48 Peters, *Urteilsabsprachen im Strafprozess*, 57.
49 Dirk Sauer and Sebastian Münkel, *Absprachen im Strafprozess* (C.F. Müller, 2009), 92.
50 Kühne, *Strafprozessrecht*, 486.

The regulations clearly indicate what can be the subject of agreement and what cannot. They can only be legal effects, which are the elements of the judgment and related orders, other procedural measures relating to the court proceedings, as well as the procedural behaviour of the trial participants. An admission of guilt should be a component of the agreement. A guilty verdict or mention of waiver of legal remedies cannot be part of the agreement.[51]

In certain situations, at the trial stage the court may come to an agreement with the participants in the proceedings as to the further course and outcome of the proceedings. The court may set the upper and lower limits of the punishment. The rest of the participants in the proceedings can make their conclusions or observations. At the same time, in order to talk about a conclusion to an agreement, the prosecutor and the defendant must agree to it. The court can deviate from such an agreement when important facts have been omitted, or when new evidence has emerged. In addition, it is possible to appeal a conviction reached under the agreement.[52]

Undoubtedly, the above law was necessary. After years of discussion, it was decided to effect a legislative and regulatory intervention. This was a systemic solution based on the standards indicated by the German courts. In essence, this law can be described as a historical moment in the German criminal process.

Conclusions

The role of procedural agreements in both the Polish criminal process and the German justice system has evolved from an experimental approach to a widely accepted and frequently used solution. Such agreements have contributed to significantly speeding up criminal proceedings and thus reducing costs.

51 Martin Niemöller et al., *Gesetz zur Verständigung im Strafverfahren* (C.H. Beck, 2009), 155–60.

52 Sauer and Münkel, *Absprachen im Strafprozess*, 93.

At the same time, the speed of the proceedings should not affect the substantive quality of the settlement and the implementation of procedural principles. Procedural agreements cannot be viewed solely through the prism of the postulate of speeding up the proceedings. For this reason, it is extremely important to develop consensual methods in both the Polish system and in the German criminal process and do so sensibly. In addition, any amendments should be carefully considered in order to ensure stability and peace of mind for the public.

Consensual modes, known as criminal-procedural agreements, are an important institution in the Polish legal system. The purpose of consensual modes of completing criminal proceedings is primarily to speed up and reduce the costs of these proceedings following a shortened trial. A full evidentiary hearing, and sometimes even preliminary proceedings, are not held.

It can be argued that sentencing without trial and voluntary surrender of criminal responsibility have met the expectations set in 1997. When sentencing without trial is applied, most cases end at the first hearing. Under voluntary surrender of punishment, the jurisdictional proceedings are limited to one hearing.[53]

Procedural agreements are a topic frequently addressed in the Polish literature. The introduction of procedural agreements is largely driven by pragmatism stemming from the lack of need to resolve at trial cases referred to the court.

Consensual adjudication increases the acceptance of decisions made in criminal proceedings, when the parties (the defendant and sometimes the victim) gain influence over the shape of the decision. This is a major advantage of procedural agreements. Acceptance of the verdict and the punishment imposed by the convicted person impacts positively on its preventive purpose, a consequence of which is the small number of appeals against sentences handed down in consensual proceedings.

53 Michał Jankowski and Andrzej Ważny, "Instytucja dobrowolnego poddania się karze (art. 387 k.p.k.) i skazania bez rozprawy (art. 335 k.p.k.) w świetle praktyki. Rezultaty badań ogólnopolskich," *Prawo w Działaniu*, no. 3(2008): 131.

Procedural agreements are also widely discussed in the Federal Republic of Germany, where lawyers have emphasized the dangers of informal agreements. Over the years, they have voiced demands for statutory regulations aimed at preventing possible abuses in this area, the goal being to ensure minimum standards of the rule of law.

The need for statutory regulation of the issue was justified on the grounds of the defects of informal agreements (*Absprachen*) and reference was made to the demands for their formalization contained in BGH and BVefG case law and literature. In connection with the demands raised in the jurisprudence of the courts and the doctrine, the German legislator has made numerous attempts to regulate this issue by law.

The formalization of procedural agreements was seen as the best means to accelerate and streamline criminal proceedings. The consequence of reaching an agreement would be to avoid performing unnecessary actions by discussing the facts and evidence in advance.

It is the opinion of this author that consensual agreements will continue to play a significant role not only in the framework of Polish but also German criminal proceedings. It cannot be ruled out that new consensual solutions will emerge that will expand the current catalogue. A significant role in this regard will be played by the development of technology enabling remote communication.

Ultimately, aiming to increase the efficiency of criminal proceedings through the introduction of procedural agreements is a manifestation of the pragmatism of the Polish and German legislators. Pragmatism in this case can be equated with rationality. The actions taken by legislators are aimed at increasing the efficiency of the countries' legal systems.

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