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Juries and Justices of the Peace in the United States of America²

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Abstract

The paper shows an American model of the participation of the society in the administration of justice. It is crucial for the Polish discussion about the involvement of public factor in that manner. The analysis is divided between the constitutional right to trial by jury and the institution of justices of the peace, which is unique for the Anglo-Saxon legal system. Research conducted here is the result of a detailed analysis of the case law of the Supreme Court of the United States and selected state courts that shaped the views of the American academia on this issue. Hopefully, this brief study will help to reform the Polish judicial process.

Keywords: American constitutional law, trial by jury, justice of the peace, participation of the society in the administration of justice, US Supreme Court, right to a fair trial.

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Ławy przysięgłych i sędziowie pokoju w Stanach Zjednoczonych Ameryki

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Streszczenie

Praca ukazuje amerykański model uczestnictwa społeczeństwa w sprawowaniu wymiaru sprawiedliwości. Jest on istotny dla polskiej dyskusji o zaangażowaniu w tej materii czynnika publicznego. Analizę podzielono między konstytucyjnym prawem do procesu przed ławą przysięgłych a instytucją sędziów pokoju, która jest unikatowa dla anglosaskiego systemu prawnego. Przeprowadzone tutaj badanie jest wynikiem szczegółowej analizy kazuistyki Sądu Najwyższego Stanów Zjednoczonych oraz wybranych sądów stanowych, która ukształtowała poglądy amerykańskich badaczy na tę kwestię. Miejmy nadzieję, że niniejsze studium wspomże reformę procesu sądowego w Polsce.

Słowa kluczowe: amerykańskie prawo konstytucyjne, proces przed ławą przysięgłych, sędzia pokoju, uczestnictwo społeczeństwa w sprawowaniu wymiaru sprawiedliwości, Sąd Najwyższy USA, prawo do sprawiedliwego procesu.

Trial by Jury in American Legal System in the Historical Context

Just like³ other elements of the American legal system, the modern jury evolved out of solutions functioning in England. In the late 18th century, a prevailing view among the Enlightenment circles that shaped the vision of the state in England⁴ (but also to some extent in France) was that parliaments cannot be the sole guards of the rights and liberties of citizens. A crucial conviction was that citizens themselves should be given the power to provide justice in the event of the state's interference with a sphere of their dominion.⁵ Representatives of the American doctrine predominantly argue that participation of the jury in a trial before a court is one of the main manifestations of governance restricted by the will of the sovereign people and a realisation of the postulate of governance by, for, and at the request of the people.⁶ Contrary to what de Tocqueville thought about the popularity of this institution (i.e. the jury) in the 18th and 19th centuries, it stemmed primarily from the tendency – prevalent in the common law system – to confer powers to provide justice to persons who were not professionally trained to perform roles in the broadly understood judiciary.

However, it would be wrong to see direct involvement of people in the administration of justice as a result of a 'democratic breakthrough' in the 17th/18th-century England. The roots of this solution go back to the Norman invasion on the British

³ It must be noted that this article does not discuss two quite important issues: first of all, the institution of the grand jury in preparatory proceedings, which approves charges brought by the prosecution in a criminal trial, and secondly, the role of jurors in proceedings before the federal Supreme Court of the United States, which is limited to cases falling within the Court's original jurisdiction; see: L.F. Shelfer, *Special Juries in the Supreme Court*, "Yale Law Journal" 2016, 123, pp. 208–252.

⁴ In a dissent to judgment in the case *Cohen v. Hurley* of 1961, Justice Hugo Black argued that violations of the law to a trial before a jury committed by the Crown were a key factor that led to the colonisation of America (see: <http://caselaw.findlaw.com/us-supremecourt/366/117.html>, access: 2.04.2018).

⁵ N.S. Chapman, M.W. McConnell, *Due Process as Separation of Powers*, "Yale Law Journal" 2012, 121, p. 1705.

⁶ A.R. Amar, *Reinventing Juries: Ten Suggested Reforms*, "University of California Davis Law Review" 1995, 28, p. 1169.

Isles,⁷ and in the statutory aspect to the Great Charter of Freedoms, which guaranteed free subjects of the English monarch the right to a fair trial and judgment of their equals.⁸ The Founding Fathers assumed that one of the fundamental safeguards against a prosecution and conviction for uncommitted crimes, intended to eliminate the enemies of public authorities, is the provision of this type of control on the part of the society. The Supreme Court has frequently pointed that proceedings before jurors can serve as a dam against the dominant position of professional judges, which in many cases has adverse effects on the proceedings.⁹ Just like in the republican system, justice of the peace courts therefore was one of the main instruments for preventing despotism on the part of those in power.¹⁰ A prevailing view in the doctrine is that it was thanks to the English constitutional traditions that American citizens were provided such a wide access to trial before a jury in the United States.¹¹ The English influences in this regard stem predominantly from the system of the American science of law, which until the end of the 19th century was dominated by English thought, especially by Blackstone's *Commentaries*.¹² However, certain departures from regulations adopted in the metropolis were already visible in the colonial times. One example of such departures is introducing in several of the 13 colonies the requirement to empanel jurors from among persons residing in the closest vicinity of the place of the crime.¹³ A confirmation of the fundamental meaning of the English common law in the context of the institution of jurors in the United States can also be found in judgments issued before the federal constitution was enacted.¹⁴

⁷ Cf. F. Pollock, F. Maitland, *The History of English Law Before Time of Edward I*, Vol. I (2nd ed.), Cambridge 1895, p. 75; L.F. Potter Jr., *Jury Trial of Crimes*, "Washington and Lee Law Review" 1966, 23, p. 2; L.W. Levy, *The Medieval Origins of Trial by Jury*, [in:] R. Winters (ed.), *The Right to a Trial by Jury*, Greenhaven 2005, p. 19.

⁸ L. Spooner, *An Essay on the Trial by Jury*, Boston 1852, p. 29.

⁹ P.W. Sperlich, *Trial by Jury: It May Have a Future*, "Supreme Court Review" 1978, p. 196.

¹⁰ L. Spooner, op. cit., p. 29.

¹¹ Ch.W. Wolfram, *The Constitutional History of the Seventh Amendment*, "Minnesota Law Review" 1963, 57, pp. 641–642.

¹² P.D. Carrington, *Trial by Jury*, [in:] L.W. Levy, K.L. Karst (eds.), *Encyclopedia of the American Constitution*, Vol. 6, New York 2000, p. 2725.

¹³ F.H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development*, Lawrence 1951, p. 18; for a detailed analysis of the issue of place of residence in the context of the right to a jury trial in American colonies, see also: D.L. Kershen, *Vicinage*, "Oklahoma Law Review" 1976, 29, pp. 813–816.

¹⁴ It will be useful to first refer to the judgment of the Rhode Island Supreme Court in the case *Trevett v. Weeden* of 1786. The case involved a merchant who did not want to enter into trade relations with buyers using paper money, thus discriminating in favour of parties paying in full-bodied money. This was penalised by regulation adopted in Rhode Island, which provided that such

Juries in Modern American Constitutional Law

It should be pointed that the view¹⁵ that currently prevails in the American doctrine is that the importance of this form of dispute resolution at state and federal level is in decline. This view was indeed sanctioned by the Supreme Court as early as in the 1930s in judgment in the case *Patton v. United States*.¹⁶ Therein, the Supreme Court deemed that overlooking the voice of the society in a criminal case does not constitute a violation of constitutional rights of the accused as long as the accused consents to such a simplification of proceedings.¹⁷ This has been corroborated federal law provisions. In a criminal procedure, a waiver of jury in evidentiary proceedings – for the role of the jury is limited to this state of the procedure – must be approved by both parties to the proceedings and by the presiding judge,¹⁸ whereas in a civil trial approval from the judge is not required.¹⁹

As regards criminal cases, three key factors leading to them are stressed: the fact that jurors are eliminated from the majority of cases, as it is common for settlements to be reached between the prosecution and the defendant (this is permissible only when the indictment is approved by the grand jury²⁰); the use of this form of dispute resolution only in the event of a threat of imprisonment of at least 6 months; the introduction, in the 1960s, of the practice of changing court jurisdiction in such cases, and transferring these cases to federal courts in major cities, which leads to empanelling of jurors averse towards defendants coming from less industrialised regions.²¹ Meanwhile, in federal cases, what is paramount is the right of a professional judge

cases be decided by courts composed solely of professional judges, thus preventing defendants from getting the benefits of a guaranteed jury trial. However, the appellate court deemed that trial by jury is an ever-esteemed element of common law and hence it deserves special protection. Similar considerations were also presented in judgments in the cases *Holmes v. Walton* of 1780 and *Bayard v. Singleton* of 1787.

¹⁵ See a comprehensive study on the gradual marginalisation of this institution: R. Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, “William & Mary Bill of Rights Journal” 2014, 22, pp. 811–880.

¹⁶ *Patton v. United States* 281 U.S. 276 (1930).

¹⁷ S.A. Siegel, *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, “Santa Clara Law Review” 2012, 52, pp. 405–455.

¹⁸ Rule 23, Federal Rules of Criminal Procedure, in force as of 1 December 2016 (<https://www.law.cornell.edu/rules/frcrmp>, access: 10.04.2018).

¹⁹ Rule 38, Federal Rules of Civil Procedure, in force as of 1 December 2016 (<https://www.law.cornell.edu/rules/frcp>, access: 10.04.2018).

²⁰ *United States v. Booker*, 543 U.S. 220 (2005), after: S.A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, “William & Mary Law Review” 2014, 55, p. 1237.

²¹ R. Roots, *The Rise and Fall of the American Jury*, “Seton Hall Circuit Review” 2011, 8, p. 4.

presiding over a case to dissolve the jury upon a formal motion filed by one of the participants of the proceedings even after the evidentiary proceedings.²² Another factor that led to a gradual decrease of the role of the jury was also restricting the rights of jurors to adjudicate only on facts and not on law, which they had the power to do until the end of the 19th century.²³ As regards criminal procedures, the Supreme Court resolved this issue relatively recently in its judgments in the cases *Blakely v. Washington* and *Apprendi v. New Jersey*. The Court ruled that jurors adjudicate not only on the guilt of the defendant – which is their traditional role to do – but also on the legitimacy of increasing the penalty above statutory penalty limits.²⁴ Meanwhile, when it comes to civil cases, it was decided as early as in the 1930s that jurors should adjudicate on facts and that legal aspects should be left for ‘professional’ judges to handle.²⁵ One of the reasons for departing from jury trials is the costs thereof. It is commonly agreed that jury trial is far too cost-consuming. Given the lack of professional training of jurors, evidentiary proceedings before a jury yield unpredictable results. This is why parties, fearing an uncertain verdict, are reluctant to exercise their right to trial before a jury and instead frequently opt to resort to increasingly popular out-of-court conciliatory methods of dispute resolution, such as mediations or out-of-court settlement.²⁶ It is somewhat in response to these undeniable threats that the Supreme Court found that the federal constitution does not preclude questioning the verdict of the jury if the appellant argues that this verdict is glaringly incommensurate with the proceedings and evidence.²⁷

The ineffectiveness of proceedings with jury participation also stems from other issues. While the Supreme Court declared on numerous occasions that the right of jurors to adjudicate on guilt is a fundamental right of an American citizen, it was for a long period of time that the material scope of this right was not agreed upon. This meant that the intensity of the guarantee of this constitutional right was, in fact, determined by state legislatures.²⁸ It was not until the 1970s that the Court decided

²² S.A. Thomas, op. cit., p. 1237.

²³ R. Roots, op. cit., p. 5.

²⁴ *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

²⁵ *Baltimore & Carolina Line Inc. v. Redman*, 295 U.S. 654, 657 (1935), after: D.G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, “Hofstra Law Review” 1996, 25, p. 492.

²⁶ P.L. Murray, *The Disappearing Massachusetts Civil Jury Trial*, “Massachusetts Law Review” 2004, 89, p. 59.

²⁷ *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996); see: S. Landsman, *Appellate Courts and Civil Juries*, “University of Cincinnati Law Review” 2002, 70, pp. 893–895; J.E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, “Baltimore Law Review” 2002, 31, pp. 270–271.

²⁸ W. Pizzi, *Comparative Reflections on Duncan v. Louisiana and Baldwin v. New York*, “Loyola of Los Angeles International and Comparative Law Review” 2016, 38, pp. 95–96.

to define the factor of a 'serious crime'. In the case *Baldwin v. New York*,²⁹ the Court declared that serious crimes are those prohibited acts that are punishable by deprivation of liberty for at least 6 months. A year later, in the case *McKeiver v. Pennsylvania*,³⁰ the Court excluded juvenile trials from the constitutional requirement to guarantee a trial before a jury due to their educational character.³¹ This opinion gained the approval of the doctrine, supported by the logic of the functioning of separate courts for this group of perpetrators. Then many representatives of the legal circles were of the opinion that the introduction of a jury trial in juvenile courts will make juvenile trials similar to ordinary proceedings and hence further maintenance of courts specialising in this area will not be necessary.³²

Arguments raised in the discussion on the flaws and shortcomings of those frequently invoke the requirement of unanimous jury verdicts. The doctrine saw the requirement as too restrictive and sometimes leading to the ossification of proceedings.³³ The Supreme Court changed its position on the issue *a casu ad casum*. Eventually, in the early 1970s, it determined that it is not a requirement that determines whether a state court procedure is constitutional.³⁴ The Court pointed that in a criminal trial a guilty verdict against the accused is permissible by a vote of 10 to 2.³⁵ Meanwhile, in the case *Burch v. Louisiana*,³⁶ the Supreme Court deemed that the state statute that requires a conviction by five out of six jurors constitutes a threat to a constitutionally guaranteed fair trial even in the case of less serious offences. Irrespective of this line of judicial decision-making (which made it possible to adopt solutions streamlining the procedure at least in this respect), the federal legislature decided to introduce guarantees that ultimately sanction the requirement of una-

²⁹ *Baldwin v. New York*, 399 U.S. 66 (1970).

³⁰ *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The author's most important observations were presented on page 545 thereof. Justice Bluckmun refers to thirteen factors that distinguish juvenile cases from regular cases.

³¹ Justice SN William O. Douglas wondered – since jurors limit the power of a judge when he is biased or corrupt – why this guarantee should also not apply to juvenile delinquents. Similar doubts were raised in several judgments issued by state courts. When the option to directly sentence juveniles to deprivation of liberty was introduced into the New York procedure, the Supreme Court of the State of New York ruled that a public jury trial should be held in these types of cases (see: M.R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, "Nebraska Law Review" 2012–2013, 91, p. 40 et seq.).

³² O.W. Ketcham, *McKeiver v. Pennsylvania: The Last Word on Juvenile Adjudications?*, "Cornel Law Review" 1971–1972, 57, p. 565.

³³ L.B. Orfield, *Trial by Jury in Federal Criminal Procedure*, "Duke Law Journal" 1962, 29, p. 55 and case law from the beginning of the 20th century referenced there.

³⁴ *Sixth Amendment: Right to a Jury Trial*, "Supreme Court Review" 1979, p. 491.

³⁵ *Apadoca v. Oregon*, 406 U.S. 404 (1972).

³⁶ *Burch v. Louisiana*, 441 U.S. 130 (1979).

nimity in federal criminal cases. On the other hand, as regards civil cases, a possibility of a unanimous declaration by the parties, wherein the parties' consent to a majority verdict was introduced.³⁷ However, at state level, the general trend appears to be the opposite. Merely 18 of the states require unanimity in civil cases, and a unanimous verdict is preferred in another three. However, after a specific number of hours of deliberation, a non-unanimous verdict can be accepted.³⁸ In the remaining states, jury decisions are always made by a majority vote. Nevertheless, in criminal cases, state legislatures commonly accepted the federal standard (only Louisiana and Oregon do not require unanimity).³⁹

As for the number of jurors, it was traditionally agreed – in line with the English custom – that 12 jurors in a federal trial is the norm. However, in its judgment in the case *Williams v. Florida*,⁴⁰ the Supreme Court held that it is permissible to limit the number of jurors to six in all cases except for those where the prosecution demands a death penalty. This view meant breaking off from the almost 800-year-old tradition, however the Court found that since the Founding Fathers had not specified this issue further, they had not considered the size of the jury as a key element of the right to a trial by jury.⁴¹ The Court furthermore held that a six-person jury would not perform worse only because it was smaller in number. What is most important is that the procedure should ensure a sufficiently high level of deliberation, free from outside attempts at intimidation, and provide a fair possibility for obtaining a representative cross-section of the community.⁴² The same arguments were used as regards proceedings in civil cases.⁴³ This reasoning could lead to a further reduction in the size of juries and so the Court decided to set an arbitrary minimum limit in this regard in its judgment in the case *Ballew v. Georgia*,⁴⁴

³⁷ Accordingly, § 31 of Federal Rules of Criminal Procedure and § 48 of Federal Rules of Civil Procedure. Interestingly, in the context of the unanimity of jurors, the Supreme Court was firmer than in criminal cases, although this is most likely related to the fact that ever since the judgment in the case *American Publishing Co. v. Fisher* of 1897 the Court did not directly deal with this matter; see: D.A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, "Yale Law Journal" 2012–2013, 122, p. 889.

³⁸ S.S. Diamond, M.R. Rose, B. Murphy, *Revisiting the Unanimity Requirement: The Behavior of The Non-Unanimous Civil Jury*, "Northwestern University Law Review" 2006, 100, p. 203.

³⁹ *Ibidem*.

⁴⁰ *Williams v. Florida*, 399 U.S. 78 (1970).

⁴¹ Differently: A. Smith, M.J. Saks, *The Case of Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, "Florida Law Review" 2008, 60, pp. 446–447.

⁴² R. H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, "University of Pennsylvania Law Review" 1997–1998, 146, p. 626.

⁴³ *Colegrove v. Battin*, 413 U.S. 149 (1973).

⁴⁴ *Ballew v. Georgia*, 435 U.S. 223 (1978).

wherein it held that a six-person jury is the absolute minimum required to ensure a fair trial.⁴⁵

A fundamental element of a jury trial in the United States is the manner of empanelling of jurors. This was one of the methods of racial and economic discrimination that was most deeply entrenched in the society. The problem was solved in the context of direct economic discrimination in the late 1940s.⁴⁶ California, which introduced a prohibition on empanelling jurors from among persons who work for a daily wage – this was a group of less educated wage workers – was not the only state that restricted this right due to the economic situation of its citizens. For instance, in Vermont, jury service was limited to property owners or citizens paying taxes in a given circuit.⁴⁷ It was only several years after the enactment of Civil Rights Acts in the mid-1960s that the Supreme Court decided to address the other problem. In the cases *Carter v. Jury Commission of Green County*⁴⁸ and *Turner v. Fouche*,⁴⁹ it ruled that the composition of the juries on different cases ought to reflect the actual demographic structure of the population of the county.⁵⁰ The Supreme Court held that jurors should meet the following requirements: being at least 18 years of age; residing primarily in the judicial district for one year; being adequately proficient in English; being in good health.⁵¹ Persons who are currently subject to criminal or civil charges and persons convicted by a state or federal court to imprisonment of at least a year are obviously excluded from jury service.⁵² In cases where the public prosecutor seeks the death penalty, an exempting circumstance has been introduced, namely opposition to this sort of penalty. It is generally agreed that the participation of a person who is categorically opposed to the imposition of capital punishment

⁴⁵ R.H. Miller, op. cit., p. 629.

⁴⁶ The Supreme Court found that California law and federal provisions excluding from jury service persons who work for a daily wage was in violation of the Fourteenth Amendment to the Constitution of the United States. The Court held that the manner of compensating people for their work cannot affect the possibility to exercise one of the fundamental rights and duties of a citizen (on a both federal and state level), see: *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

⁴⁷ See: G. Sherr, J. Brinton, *Business and Jury Trial: The Framers' Vision Versus Modern Reality*, "Ohio State Law Journal" 2010, 70, p. 1064.

⁴⁸ *Carter v. Jury Commission of Green County*, 396 US 320 (1970).

⁴⁹ *Turner v. Fouche*, 396 U.S. 346 (1970).

⁵⁰ Likewise, as regards Americans of Mexican origin, in the case *Castaneda v. Partida*, 430 U.S. 482 (1977), after: M.S. Schultz, *The Jury Redefined: A Review of Burger Court Decisions*, "Law and Contemporary Problems" 1980, 43, p. 18.

⁵¹ *An Analysis of Alternative Constructions of the Requirement That Federal Jurors Be Competent Under State Law*, "Yale Law Journal" 1954–1955, 64, p. 1059 et seq.

⁵² 28 U.S. Code § 1865b) (<https://www.law.cornell.edu/uscode/text/28/1865>, access: 10.04.2018).

in a criminal trial would not guarantee the society and the accused the right to justice.⁵³

The first stage of jury selection consists predominantly in a clerk of the court drawing a group of potential jurors from among eligible citizens.⁵⁴ The legislature decided to adopt in this regard a closed list of criteria for exemption or disqualification from jury service. The exemption and disqualification criteria must be set out in the guidelines for selecting jurors in a specific court district, and a juror candidate must demonstrate that they have a hardship that will make it difficult for them to serve. The court may furthermore disqualify a prospective juror from jury duty if it is likely that the candidate will not be able to remain impartial or will obstruct proceedings. Additionally, a candidate may be disqualified at the request of a party in keeping with the conditions laid down in the law if there is a high risk of not keeping the proceedings, especially the bench conference, in secrecy. (However, the use of this instrument must be controlled and must remain within percentage limits set forth in the district guidelines.)

The next stage of the jury selection process is candidate interviews and potential elimination of some of the candidates by parties to proceedings to obtain a representative cross-section of the community. The prohibition of discrimination in the context of a jury trial, especially as regards the right to a jury duty summons also means that an individual or a group of persons may be excluded by the parties from participation in a specific case. This refers to this stage of proceedings, known as *voir dire*, where the parties eliminate a specific number of citizens summoned to do jury service. A solution that was rightly adopted is that for criminal cases, the regulation is far more rigorous. More specifically, a prosecutor seeking to exclude a juror must disclose a direct reason for doing so and thus reveal what may affect the juror's performance. In the case *Batson v. Kentucky* of 1986, the Supreme Court agreed with this point of view, but at the same time stipulated that it must not lead to discrimination on the grounds of race.⁵⁵ Nevertheless, practice has shown that race is indeed one of five most common factors that affect decisions taken by parties to proceedings in this regard, with other factors being sex, occupation, political affinity, and economic status. Research has shown that race is, in fact, the most

⁵³ See: M.S. Schultz, *op. cit.*, pp. 20–21 and case law referenced there.

⁵⁴ Pursuant to U.S. Code § 1863(b)(2), as a rule, the list of eligible citizens is identical to the voter registration list within the district or division. It should be stressed that although jury service is a privilege of an American citizen, it is also a duty. If a person selected ignores a jury duty summons and fails to report for jury duty, the court can impose a fine of up to \$1,000.

⁵⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986).

important for parties to proceedings, for it often entails further consequences that may be advantageous to one of the parties.⁵⁶

Justices of the Peace – American Experiences and Warnings

The institution of the justice of the peace was effectively introduced into the English legal system by Edward III of England, who issued the statute on the guardian of the peace in 1327, and in 1342 – the statute on the keepers of peace, whose jurisdiction was limited to criminal cases.⁵⁷ Over the course of centuries, the role of justices of the peace grew in England, culminating in the 17th century, when they were appointed by the monarch and were responsible for the administration of justice on behalf of the monarch in all sorts of cases, as well as for the safeguarding of public policy, enforcement of central policy, and supervision of the work of local officials of the Crown. Thus, they had the joint powers that are currently divided between representatives of the judiciary, executive branch, local administration, and police.⁵⁸ The central role of this institution in the metropolis translated into its growth in the colonies and in the independent American state.⁵⁹ The reason for the assignment of such great importance to justices of the peace was mostly attributable to the conditions in which authorities were functioning in North America of the 17th and 18th centuries. It must be remembered that the geographical distance between administrative centres and cities in the colonies must have made it difficult for the judiciary to work effectively. What must have further added to the difficulty was a relatively low number of lawyers trained to occupy roles in the judiciary. Yet, as it should be noted, during the Philadelphia Convention in 1787, the Founding Fathers chose not to include any references to justices of the peace in the federal constitution. This fact was something that the Articles of Confederation also remained silent about. The issues in question were regulated by the state constitutions that sanctioned the existing legal landscape for the most part.

The greatest doubts in the discussion on justices of the peace as a systemic issue arise in connection with their independence and impartiality. Representatives of the American doctrine pointed to potential violation of these guarantees due to the way

⁵⁶ See: J. Clark, M.T. Boccaccini, B. Caillouet, W.F. Chaplin, *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, "Criminal Justice and Behavior" 2007, 34, p. 645; see also: M.C. Farmer, *Jury Composition Challenges*, "Law & Psychology Review" 1976, 2, pp. 55–56.

⁵⁷ W.J. McKenna, *Justice in the Minor Courts*, "Temple Law Quarterly" 1952, 25, p. 436.

⁵⁸ J.R. McVicker, *The Seventeenth Century Justice of Peace in England*, "Kentucky Law Journal" 24 (1935–1936), p. 387.

⁵⁹ Ch.H. Smith, *The Justice of the Peace in the United States*, "California Law Review" 1927, 15(2), p. 118.

the system was financed. In a country as young as the United States at that time, maintaining an ever-growing bureaucracy would have been a major problem, hence the state and federal legislators alike opted to keep the traditional instruments. Thus, justices of the peace remained among public officials that were financed from fees paid by the parties before a case was resolved. This system had a number of hazards attached to it. First of all, it meant that the justices of the peace had to take on as many cases as possible, as this office was their main source of income, which could easily translate into a case overload and less than thorough and meticulous examination of all circumstances behind each case. Furthermore, it meant that a sort of campaigning was needed so that a maximum number of county residents⁶⁰ would decide to submit their disputes for the justices of the peace to resolve. At this point, it should be noted that, as a rule, the subjective cognition of courts of peace remained largely competitive in relation to 'professional' courts, whose judgments, although based on substantive foundations, were delayed in time.⁶¹ A prevailing view in the doctrine is that the competitive character of their jurisdiction led to legal and institutional chaos.⁶² As early as in the 1780s, eastern counties of North Carolina that were against the unionisation of the colonies enacted an illegal constitution which in § 15 stipulated that 'a [j]ustice of the peace shall not take or receive any fees, tokens of gratitude and favors in exchange for his service; other State officials shall receive adequate compensation and reimbursement of costs resulting from their job.'⁶³

Although it was common for justices of the peace to be financed from court fees, several states adopted other regulations. One of these states was West Virginia,⁶⁴ where – pursuant to the state's constitution – all costs in this regard were borne by county authorities. It should be pointed out that the Supreme Court never substantially considered the issue of the fee-based model of the compensation of justices of the peace. In the 1920s, the Court merely reviewed procedures that made the compensation of state officials contingent upon successful prosecution of individuals and considered these procedures to be unconstitutional.⁶⁵ However, in its judgment, the Supreme Court made direct reference only to the issue of the compensation

⁶⁰ Territorial jurisdiction of justices of the peace encompassed, depending on state law regulations, city districts, municipal districts or larger districts that make up counties.

⁶¹ J.D. Barnett, *Courts: Justice of the Peace Courts (Recommendations)*, "Oregon Law Review" 1942, 21, p. 382.

⁶² S.D. O'Connor, *Trends in the Relationship Between Federal and State Court in the Perspective of a State Court Judge*, "William and Mary Law Review" 1981, 22(4), p. 801.

⁶³ A. Ewing Jr., *Justice of the Peace: Bedrock of the Democracy*, "Tennessee Law Review" 1950, 21, p. 493.

⁶⁴ Article 8 of the Constitution of the State of West Virginia of 1872.

⁶⁵ *Tumey v. Ohio*, 273 U.S. 510 (1927).

of mayors deciding on cases related to prohibition. It is beyond any doubt that making the compensation of a justice of the peace contingent upon what decision he or she makes is in violation of the principle of impartiality derived from the Fourteenth Amendment to the Constitution of the United States. W.H. Taft ascertained that 'every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.'⁶⁶ The crux of the matter is therefore considering as violative of the federal constitution only those procedures that cause a justice of the peace in a criminal case to be biased while issuing a judgment due to the promise of a specific profit that will be delivered if a certain decision is issued.⁶⁷ Supreme courts of several states have spoken on numerous occasions on the possibility of applying the regulation of the Supreme Court of the United States with respect to their own internal regulations in this matter. The prevailing opinion was negative. The courts have considered that introduction of the guarantee of covering the costs of proceedings in the event of acquittal of the defendant by county authorities meant that the interests of the defendant were, in fact, sufficiently protected. This solution was in force for a number of years in Mississippi, Nevada,⁶⁸ Oklahoma or Virginia.⁶⁹ The issue of compensating justices of the peace for deciding on cases anchored in private law was usually peripheral in constitutional law analyses. Yet the issue was equally problematic as due to the fact of competing jurisdiction of justices of the peace. The justices could treat those plaintiffs differently, who supplied them with enough cases and thus ensured a regular, high income.⁷⁰

A fundamental feature of the institution of the justice of the peace is its unprofessional character. At the same time, this is yet another reason for a departure from this traditional institution.⁷¹ One consequence of the development of the legal system, as well as setting out provisions in great detail, was the need for a professional, substantive training of judicial roles. It should be noted that there are no written

⁶⁶ Opinion by W.H. Taft in the case *Tumey v. Ohio* (see: <https://supreme.justia.com/cases/federal/us/273/510/case.html>, access: 13.03.2018).

⁶⁷ N.H. McNeil, A.C. Schmid, *Constitutionality of the Fee System in Justice of the Peace Courts*, "Notre Dame Lawyer" 1954, 29, p. 440.

⁶⁸ *Stubbs v. Florida State Finance Co.*, (1935). The Court referred in this judgment to long-standing political practice dating back to the 1790s and concerning a formal requirement for recusal of a judge who was interested in a specific resolution.

⁶⁹ N.H. McNeil, A.C. Schmid, op. cit., pp. 441–442.

⁷⁰ G.L. Partain, *The Justice of the Peace: Constitutional Questions*, "West Virginia Law Review" 1967, 69, pp. 318–319; J.D. Barnett, op. cit., p. 382.

⁷¹ R.S. Keebler, *Our Justice of the Peace Courts: A Problem in Justice*, "Tennessee Law Review" 1930, 9, p. 12.

norms that would stipulate that it is necessary to have received legal training to be elected as a federal judge or a justice of the Supreme Court of the United States.⁷² However, as it turns out, practice at state level led to a situation where, especially in courts of peace, cases were decided by individuals with no education, which actually prevented them from adequately performing their duties. This has been explicitly shown by a statistical research carried out in West Virginia, in which questionnaires were sent out to almost 400 justices of the peace. Merely approximately 140 justices responded, of whom only one had a degree in law and had life and professional background suitable for his job.⁷³ A question that arises in this aspect is whether such regulations do, in fact, guarantee the due process of law. It has been pointed out that due to the lack of relevant education, the justices of the peace did not have knowledge of the case law of state and federal courts or of doctrinal output, as a result of which they issued decisions based on their common sense, good judgment or personal prejudice and bias against parties to proceedings.⁷⁴ That was also the case at federal level. The only requirements were being at least 21 years of age, combined with impeccable character and integrity.⁷⁵

The discussion on justices of the peace was joined by the Supreme Court of California, which in its decision in the case *Gordon v. Justice Court* of 1974⁷⁶ held that the common practice of leaving judicial decisions, especially in jail-carrying criminal cases, in the hands of persons lacking a degree in law violates the constitutional rights of the accused. The Court observed that such practice is violative particularly of the Fourteenth Amendment to the Constitution of the United States, especially the aforementioned principle of due process of law. The Court held that a minimum requirement in this regard should be for law-trained judges to preside over such cases unless the accused waives this right.⁷⁷ This view was not shared by the federal Supreme Court. In its judgment in the case *North v. Russell*,⁷⁸ the Court held that 'it must be recognized that there is a wide gap between the functions of a judge of

⁷² However, it was rare in the 20th century that a candidate without a degree in law would be elected. The last federal supreme court justice without a legal background was Stanley F. Reed, appointed in 1938 (see: J.D. Fassett, *New Deal Justice: The Life of Stanley Reed of Kentucky*, New York 1994).

⁷³ See: C.J. Davis, E.R. Elkins, P.E. Kidd, *The Justice of the Peace in West Virginia*, Morgantown, WV 1958; after G.L. Partain, op. cit., p. 323.

⁷⁴ R.J. Dolan, W.B. Fenton, *The Justice of the Peace in Nebraska*, "Nebraska Law Review" 1969, 48, p. 461.

⁷⁵ W.L. Murfree, *The Justice of the Peace: A Compendium of the Law Relating to Justices of the Peace – Their Powers and Duties – The Procedures in Justices' Courts, With Forms of Process and Entries Used Therein*, Saint Louis, MO 1886, p. 14.

⁷⁶ 12 Cal. 3d 323.

⁷⁷ Opinion by L.H. Burke in the case *Gordon v. Justice Court* (<http://online.ceb.com/calcases/C3/12C3d323.htm>, access: 13.03.2018).

⁷⁸ 427 U.S. 328 (1976).

a court of general jurisdiction, dealing with complex litigation, and the functions of a local police court judge trying a typical “drunk” driver case or other traffic violations (...).⁷⁹ It should not matter in this case that a lay judge may not be able to understand the arguments of a counsel, as judgments in criminal cases issued by these courts may be appealed against and such cases may be heard *de novo* by law-trained judges.

The decision was not unanimous, as justices Potter Stewart and Thurgood Marshall dissented. They noted that it is constitutionally inadmissible for a lay judge, e.g. a miner, without any legal training, to decide a criminal case. In their opinion, this regulation was in violation of the Sixth (right to a trial by jury) and Fourteenth Amendment to the United States Constitution.⁸⁰ This does not change the fact that even nowadays the Supreme Court has not taken a stance on this issue. Over the past few years, the Supreme Court has not spoken directly on the issue, though Justice Clarence Thomas included the opinion in one of the dissents that the demands placed on a charge in a case heard by a justice of the peace should be correspondingly lower than in the case of a common court, especially at federal level, thus sanctioning the lower qualifications of justices of the peace.⁸¹

Yet another characteristic feature of the institution of justices of the peace was the process of selection. The underlying assumption was that justices should be elected by citizens from the immediate vicinity. Back in the 18th and 19th centuries, solutions, wherein the right to create the make-up of a justice of the peace court was vested in the governor in co-operation with the state parliament, for instance, pursuant to § 33 of the Constitution of North Carolina of 1776⁸² (candidates were recommended by the General Assembly and commissioned by the Governor), were the exception. Selection by fellow citizens was largely based on respect and the popularity of candidates for the office in a frequently small community, leaving their substantive qualifications aside. Nowadays, as examples from contemporary state regulations referred to in the second part of this analysis will show, the legislators’ approach to these issues is gradually changing. Where a justice of the peace court is available, the procedure for the selection of justices of the peace is of fundamental importance, for only if the justice of the peace commands authority in his district, citizens submitting their disputes to a decision by the justice of the peace will feel bound by the decision, even if it is not in line with their expectations.

⁷⁹ Opinion by Chief Justice Burger in the case *North v. Russel*, pp. 334–335.

⁸⁰ Dissenting opinion by P. Stewart and T. Marshall in the case *North v. Russel*, p. 340–341.

⁸¹ Dissenting opinion by C. Thomas in the case *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), p. 15 (footnote 7).

⁸² *The Justice of the Peace (Notes)*, “North Carolina Law Review” 1904, 1(4), p. 158.

Progressive phasing out of assigning the least complicated cases to justices of the peace in the United States started in the second half of the 20th century. In 1965, the institution was nonetheless still popular, and only 14 out of 50 states decided to eliminate it (Alaska, North Dakota, Hawaii, California, Illinois, Missouri, New Jersey, Ohio) or gradually withdraw it from use (Kansas, North Carolina, Kentucky, Colorado, Michigan, Wisconsin).⁸³ In the years that followed, the process gained momentum, with virtually all states deciding to introduce restrictions in the functioning of these procedures in the 1970s and 1980s, leading to a considerable reduction in the availability thereof. K.E. Vanlandingham classifies the reasons for this trend in three key categories, as discussed above: incompatibility with the realities of a modern state, lack of professional qualifications and training, and – most of all – the system of court fees that constitute a source of income of justices of the peace and affect their impartiality.⁸⁴ He also adds the fourth factor, which appears to be somewhat marginalised in the discussion on the administration of justice. Deciding cases by justices of the peace indeed lacks the element of celebration that accompanies the majesty and solemnity of common courts, which undoubtedly translates into a declining social respect for the justice system.⁸⁵

So, perhaps there is no point in adopting such archaic solutions as the justice of the peace courts, and instead focus on streamlining the existing procedures and equip common courts with new powers that would limit the number of cases to be heard?

Bibliography

- Amar A.R., *Reinventing Juries: Ten Suggested Reforms*, "University of California Davis Law Review" 1995, 28.
- An Analysis of Alternative Constructions of the Requirement That Federal Jurors Be Competent Under State Law*, "Yale Law Journal" 1954–1955, 64.
- Barnett J.D., *Courts: Justice of the Peace Courts (Recommendations)*, "Oregon Law Review" 1942, 21.
- Carrington P.D., *Trial by Jury*, [in:] L.W. Levy, K.L. Karst (eds.), *Encyclopedia of the American Constitution*, Vol. 6, New York 2000.

⁸³ K.E. Vanlandingham, *The Decline of the Justice of the Peace*, "University of Kansas Law Review" 1964, 12, p. 389.

⁸⁴ See: *ibidem*, p. 389 et seq.; cf.: W.R. Furr, *Justice of the Peace in Virginia: A Neglected Aspect of the Judiciary*, "Virginia Law Review" 1966, 52, pp. 171–172.

⁸⁵ K.E. Vanlandingham, *op. cit.*, p. 392; Vanlandingham discusses a situation when a certain justice of the peace from Montana decided on one of his cases in his workplace, peeking his head out from under a car he was repairing.

- Chapman N.S., McConnell M.W., *Due Process as Separation of Powers*, "Yale Law Journal" 2012, 121.
- Clark J., Boccaccini M.T., Caillouet B., Chaplin W.F., *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, "Criminal Justice and Behavior" 2007, 34.
- Davis C.J., Elkins E.R., Kidd P.E., *The Justice of the Peace in West Virginia*, Morgantown, WV 1958.
- Diamond S.S., Rose M.R., Murphy B., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, "Northwestern University Law Review" 2006, 100.
- Dolan R.J., Fenton W.B., *The Justice of the Peace in Nebraska*, "Nebraska Law Review" 1969, 48.
- Ewing A. Jr., *Justice of the Peace: Bedrock of the Democracy*, "Tennessee Law Review" 1950, 21.
- Farmer M.C., *Jury Composition Challenges*, "Law & Psychology Review" 1976, 2.
- Fassett J.D., *New Deal Justice: The Life of Stanley Reed of Kentucky*, New York 1994.
- Furr W.R., *Justice of the Peace in Virginia: A Neglected Aspect of the Judiciary*, "Virginia Law Review" 1966, 52.
- Gardner M.R., *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, "Nebraska Law Review" 2012–2013, 91.
- Heller F.H., *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development*, Lawrence 1951.
- Keebler R.S., *Our Justice of the Peace Courts: A Problem in Justice*, "Tennessee Law Review" 1930, 9.
- Kershen D.L., *Vicinage*, "Oklahoma Law Review" 1976, 29.
- Ketcham O.W., *McKeiver v. Pennsylvania: The Last Word on Juvenile Adjudications?*, "Cornell Law Review" 1971–1972, 57.
- Landsman S., *Appellate Courts and Civil Juries*, "University of Cincinnati Law Review" 2002, 70.
- Lerner Lettow R., *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, "William & Mary Bill of Rights Journal" 2014, 22.
- Levy L.W., *The Medieval Origins of Trial by Jury*, [in:] Winters R. (ed.), *The Right to a Trial by Jury*, Greenhaven 2005.
- McNeil N.H., Schmid A.C., *Constitutionality of the Fee System in Justice of the Peace Courts*, "Notre Dame Lawyer" 1954, 29.
- McKenna W.J., *Justice in the Minor Courts*, "Temple Law Quarterly" 1952, 25.
- McVicker J.R., *The Seventeenth Century Justice of Peace in England*, "Kentucky Law Journal" 24 (1935–1936).
- Miller D.A.H., *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, "Yale Law Journal" 2012–2013, 122.
- Miller R.H., *Six of One Is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, "University of Pennsylvania Law Review" 1997–1998, 146.

- Murfree W.L., *The Justice of the Peace: A Compendium of the Law Relating to Justices of the Peace – Their Powers and Duties – The Procedures in Justices’ Courts, With Forms of Process and Entries Used Therein*, Saint Louis, MO 1886.
- Murray P.L., *The Disappearing Massachusetts Civil Jury Trial*, “Massachusetts Law Review” 2004, 89.
- O’Connor S.D., *Trends in the Relationship Between Federal and Stated Court in the Perspective of a State Court Judge*, “William and Mary Law Review” 1981, 22(4).
- Orfield L.B., *Trial by Jury in Federal Criminal Procedure*, “Duke Law Journal” 1962, 29.
- Partain G.L., *The Justice of the Peace: Constitutional Questions*, “West Virginia Law Review” 1967, 69.
- Pollock F., Maitland F., *The History of English Law Before Time of Edward I*, Vol. I (2nd ed.), Cambridge 1895.
- Potter L.F. Jr., *Jury Trial of Crimes*, “Washington and Lee Law Review” 1966, 23.
- Roots R., *The Rise and Fall of the American Jury*, “Seton Hall Circuit Review” 2011, 8.
- Schaffner J.E., *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, “Baltimore Law Review” 2002, 31.
- Schultz M.S., *The Jury Redefined: A Review of Burger Court Decisions*, “Law and Contemporary Problems” 1980, 43.
- Shelfer L.F., *Special Juries in the Supreme Court*, “Yale Law Journal” 2016, 123.
- Sherr G., Brinton J., *Business and Jury Trial: The Framers’ Vision Versus Modern Reality*, “Ohio State Law Journal” 2010, 70.
- Siegel S.A., *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, “Santa Clara Law Review” 2012, 52.
- Sixth Amendment: Right to a Jury Trial*, “Supreme Court Review” 1979.
- Smith A., Saks M.J., *The Case of Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, “Florida Law Review” 2008, 60.
- Smith Ch.H., *The Justice of the Peace in the United States*, “California Law Review” 1927, 15(2).
- Smith D.G., *The Historical and Constitutional Contexts of Jury Reform*, “Hofstra Law Review” 1996, 25.
- Sperlich P.W., *Trial by Jury: It May Have a Future*, “Supreme Court Review” 1978.
- Spooner L., *An Essay on the Trial by Jury*, Boston 1852.
- The Justice of the Peace (notes)*, “North Carolina Law Review” 1904, 1(4).
- Thomas S.A., *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, “William & Mary Law Review” 2014, 55.
- Vanlandingham K.E., *The Decline of the Justice of the Peace*, “University of Kansas Law Review” 1964, 12.
- Wolfram Ch.W., *The Constitutional History of the Seventh Amendment*, “Minnesota Law Review” 1963, 57.