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MAGISTRATE IN POLAND: IF SO, WHAT KIND?

Summary
In an era of public debate about the desirability of introducing the office of a magistrate, this work is tempted to present several aspects of this judicial institution. Starting with the definition of a magistrate, a brief outline of the history of this judicial office in Poland provides the basis for the presentation of the author's thoughts and knowledge, who shares his ideas on the shape of the institution under discussion. It is worth mentioning that the author has been a justice of the peace in Canada since 1993, and before that was a judge of district courts and a provincial court in Poland. The concept of the work is based on spelling out the legal framework that would have to define how the courts (magistrates) are appointed, dismissed and placed in the structure of the judiciary. According to the author, the office of a magistrate should provide access to an independent court in accordance with the Constitution, the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is because a citizen has the right to a fair public hearing, which also must not be unreasonably protracted. If magistrates' courts are established in Poland, they should meet these criteria.
The work analyzes two ways of appointing magistrates. The author refers to the idea contained in the presidential draft of the relevant law, namely the election of magistrates for 6-year terms, as well as the possibility of appointing them by appointment. It also outlines the criteria to be met by a candidate for the position, as well as the scope of cases delegated to magistrates. For comparative purposes, the scope of the substantive jurisdiction of magistrates in Canada is described. Statistics were also provided, showing the extent to which the appointment of magistrates would relieve the burden on district courts.
Keywords: magistrate, history, Constitution, Charter of Fundamental Rights of the European Union, Charter of Fundamental Rights of the European Union, appointment, jurisdiction, statistics

According to the PWN *Dictionary of Polish Language*, a *magistrate* (also known as a justice of the peace) is: a "**non-professional judge adjudicating independently in small civil or criminal cases**"[1].

Outline of the history of the justice of the peace courts

The office of a magistrate in Poland existed as early as the 19th and first half of the 20th centuries. The first magistrate courts were established in 1807. *The rules for the device of the Governing Commission and other authorities subordinate to it* gave the justices of the peace only the power to unite the parties before the case was transferred to a land court for trial. Conciliation – as it might be called today – was mandatory before a case could be referred to a competent court[2]. Courts of peace were also written into the Constitution of the Duchy of Warsaw and King Frederick Augustus' decree of July 26, 1810. The Constitution of the Duchy of Warsaw of July 1807 introduced a new model of magistrates' courts; such courts adjudicated civil and criminal cases. Eventually, this instance of the judiciary was abolished in 1938.[3]

The magistrates' courts were divided into two divisions: conciliation and litigation. Proceedings in the conciliation department were presided over by a justice of the peace elected for a three-year term by the noble assembly, and formally such election was confirmed by royal appointment. The justice of the peace did not receive a salary for his activities, except for travel allowances. The decree of September 7, 1808, opened access to this office to "citizens without distinction of state of origin"[4].

Proceedings in the civil and criminal litigation division were presided over by an official appointed by the minister, known as a sub-judge. The sub-judge had to have completed a law course and passed an exam, as well as served an apprenticeship in court. It is worth mentioning here that at the same time, professional requirements were introduced for magistrates' court clerks, scribes, signers, bailiffs and janitors. The knowledge that was required of these court officers was knowledge of all the civil and criminal law systems that were in force in the lands that were part of the Duchy of Warsaw, the Napoleonic Code, the old Polish and Lithuanian law used in the auxiliary, and the Prussian and Austrian codes. Prussian criminal law and Austrian criminal law were applied in criminal law[5]. These courts were organized in such a way that the

[1] *Dictionary of Polish Language PWN*, https//sjp.pwn.pl (accessed 16.11.2022).

[2] Cf. *Materyały do dziejów Komisyi Rządzącej z r. 1807*, ed. M. Rostworowski, vol. I, published by the Academy of Arts and Sciences and the Society for the Promotion of Publishing of the Academy of Arts and Sciences, Krakow 1918, pp. 503–505, 213–516.

[3] Decision No. 22 of the Chief Director of the State Archives dated November 10, 2005, http://20090209.archiwa.gov.pl/repository/decyzje/nazwy_daty_sady_nr22-2005.PDF; Law of April 9, 1938 on Abolishing the Institution of Sworn Courts and Justices of the Peace, http://isap.sejm.gov.pl/Details Servlet?id=WDU1938024013+1938$05»401&min=1 (accessed here and on 24.11.2022).

[4] Decree of September 7, 1808, Journal of Laws of the Duchy of Warsaw, vol. I, pp. 0–114.

[5] *Organizacja sądownictwa cywilnego w Księstwie Warszawskim z 13 maja 1808 roku*, in: A. Heylman, *Historya organizacyi sądownictwa w Królestwie Polskim*, vol. I, in the printing house of the Bank of Poland, Warsaw 1861, pp. 23–31.

proceedings were simplified and accessible to the general public. According to the opinion of Wincenty Gawarecki: "The magistrates' courts were to serve the people, administering justice quickly, in proceedings that were easy and not costly, and that did not require intricate proceedings or great knowledge of the law"[6]. Between 1800 and 1812, the justices of the peace reached settlements in some 95,500 cases, while between 1816 and 1821, they reached settlements in 25,312 cases[7].

The importance placed on magistrates' courts at the time can be seen from the fact that of the 1,687 full-time positions available to the Ministry of Justice, 60% were allocated to these courts[8]. Appointments of magistrates were given to 582 people, but the position was held for terms of several months. One thousand one hundred twenty-one sub-judges were appointed. The service of a magistrate was to be a public and patriotic service, with no opportunity for a further career in the judiciary as a rule. Only 5.1% of magistrates have been given higher positions, such as judge of an appellate court or prosecutor at the Court of First Instance.

The situation was different for professional officials, such as the sub-judges. Among the 501 full-time employees of the magistrates' courts, 90 were promoted within the magistrates' courts, starting from signer to the position of sub-judge. In addition, 44.9% of magistrate court clerks were promoted to higher positions[9]. Therefore, one can conclude that the officials employed in these courts were treated as a forge of personnel for the judiciary. The *Report of the Deputation...* of 1810 stated that in the magistrates' courts "young students of the law are skilled, and by errors inseparable from inexperience are formed into fit judges."[10]. It is worth mentioning that 4.6% of magistrate court clerks were students at the Warsaw Law School[11].

The problem for these courts in the early 19th century was low salaries. A sub-judge in 1810/1811 could count on an annual salary of 2,000 zlotys. By comparison, a criminal sub-judge earned 3,500 zlotys, and a writer in a criminal court earned 4,500 zlotys a year. At the same time – by comparison – the translation of one sheet of legal text was valued by the Minister of Justice Feliks Franciszek Łubieński at 18 zlotys[12].

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[6] M. Krajewski, *„Wiadomość o sądzie pokoju" sprzed 200 lat Wincentego H. Gawareckiego: przyczynek do historii państwa i prawa Polski epoki rozbiorowej*, "Studia z Zakresu Prawa, Administracji i Zarządzania Uniwersytetu Kazimierza Wielkiego w Bydgoszczy" 2015, vol. 7.

[7] H. Gawarecki, *Wiadomość o sądzie pokoju*, Wydawnictwo Xieży Pijarów, Warsaw 1816, p. 44; S. Posner, *Ostatni raport Łubieńskiego*, "Gazeta Sądowa Warszawska" 1908, p. 273; *Obraz Królestwa Polskiego w okresie konstytucyjnym*, vol. 1, compiled J. Leskiewiczowa, F. Ramotowska, Państwowe Wydawnictwo Naukowe, Warsaw 1984, pp. 44, 112, 200.

[8] J. Godlewski, *Głosy posła mariampolskiego na sejmie roku 1811 w Warszawie*, Warsaw 1914, tab. D.

[9] A. Rosner, *Judges and clerks of the magistrates' courts in the Duchy of Warsaw*, "Historical Review" 1988, no. 79/4, pp. 659–684.

[10] BPAN Kraków, rkps 139, *Raport deputacji wyznaczonej dekretem królewskim z roku 1810 do zbadania reform koniecznych w Księstwie Warszawskim*, k. 72.

[11] A. Rosner, op. cit., pp. 659–684.

[12] J. Godlewski, op. cit.

The magistrates' courts consisted of conciliation, litigation and police departments, also known as the straight police court. In civil cases, these courts could rule when the value of the subject of the dispute did not exceed 160 zlotys. In criminal cases, on the other hand, they could award penalties of up to a 30 zlotys fine or up to 3 weeks in jail[13]. After hearing the case, the justice of the peace would issue a ruling, move the verdict to the next "audience", and issue a pre-state or state judgment. Civil tribunals and correctional police courts were the courts of appeal against such rulings. A firm verdict rendered in litigation could be appealed (within three months of service of the verdict) to the First Instance Civil Court.

It was also an important element of the institution of magistrates that parties could request the exclusion of both a particular magistrate and the entire court for the reasons outlined in Article 44 of the Code of Civil Procedure. These were reasons such as personal interest in the dispute, kinship in relation to the party, the fact that there was a criminal case between the party and the judge or a member of the judge's family before the end of the year, or if the magistrate received written advice in the case.

The magistrate court, its records and finances were managed by a scribe. The signer's duty was to ensure the security of the files and issue copies from the files in the disputed department[14]. This model remained in effect until 1876; afterwards, magistrates' courts modelled on the Russian model were introduced.

During the interwar period, a justice of the peace presided over hearings, with two jurors sitting on the panel hearing the case in addition to him. After 1927, magistrates heard cases on a one-person basis.

Magistrates were elected by the community of a particular judicial district. Candidates for the office had to be at least 30 years old, speak and write the Polish language, have a high school or college education and have an impeccable reputation. Parliamentarians, civil servants, active duty military, clergymen, lawyers or notaries could not run for office. The terms of office were five years[15].

Magistrates, often from noble backgrounds, sometimes went to unusual lengths to resolve property disputes by paying disputed amounts from their own resources[16]. At that time, the government, in the person of Minister Łubieński, tried to raise their rank by establishing the honorary badge of magistrate[17].

It is worth mentioning that not everyone was enthusiastic about the position of the undersheriff. The authors of the *Report of the deputation... to study the reforms needed in the Duchy of Warsaw* called for the abolition of this function. This is because they accused the sub-judges of drawing too low a salary that encourages abuse and depravity, young age and lack of experience[18].

[13] Sources vary from 5 days (A. Rosner, op. cit.) to 30 days (M. Krajewski, op. cit.).
[14] M. Krajewski, op. cit.
[15] From: Wikipedia, https://pl.wikipedia.org./w/index.php?title=Sedzia_pokoju&oldid=49996674.
[16] H. Gawarecki, op. cit., p. 43.
[17] Ibid., p. 46.
[18] BPAN Kraków, rkps 139, Voices of the Mariampol MP, k. 75–77.

Anna Rosner writes that two general values were in contention in the justice of the peace at the time: traditional and modern. Justices of the peace were appointed mainly from among the nobility, while for the position of magistrate's clerk, education was required, and noble background was not so important. The judges thus turned to traditional, pre-partition, state, nobility and old Polish values. On the other hand, officials represented stateless values introduced with Napoleonic law[19].

It is worth mentioning here Wincenty Hipolit Gawarecki, a criminal sub-judge of the Court of Correctional Policies of the Warsaw District of the Second Department, who at his own expense published the work *Message about the court of peace by Wincenty Hipolit Gawarecki criminal sub-secretary of the Court of Correctional Policies of the Warsaw District of* the Second Department, described by Miroslaw Krajewski[20], cited.

The office of the magistrate was preserved to some extent during the interwar period. This is what Piotr Fiedorczyk and Przemyslaw Kowalski write about it: "The authorities of the independent Polish state, by a decree of the Provisional Head of State of February 7, 1919, on the subject of the dislocation of courts, 13 repealed the aforementioned Provisional Regulations on the Dislocation of Courts of July 18, 1917 (Article 5). However, under Article 1 of the decree, the existing magistrate courts, district courts and appellate courts retained their previous seats and districts (*vide* the Łomża District Court). Warsaw remained the seat of the Supreme Court (Article 2). The creation of new courts and changes in the seats and districts of existing appellate and district courts were to be enacted by the Council of Ministers at the proposal of the Minister of Justice. With regard to the magistrates' courts, the Minister of Justice was to issue orders on the subject (Article 3)"[21].

Malgorzata Materniak-Pawłowska also writes about the magistrates' courts of the interwar period: "Non-professional judges performing activities in the common courts of the Second Republic include: sworn judges (functioning only in the former Austrian partition until 1938), commercial judges (adjudicating commercial cases throughout the country and the interwar period), bench judges (adjudicating in the pre-unification period only in the former Russian and Prussian partitions), and – not appointed in practice, although provided for by the 1928 Uniform Law on the System of Common Courts – magistrates (they should be distinguished from the judges of the lowest instance in the former Russian partition in the years 1918–1928, who also did not have to have a legal education, but were appointed by the state authority, while these were to be elected by the people)"[22].

[19] A. Rosner, op. cit., pp. 659–684.

[20] M. Krajewski, op. cit.

[21] P. Fiedorczyk, P. Kowalski, *Sądownictwo powszechne na terenie województwa białostockiego w II RP*, "Miscellanea Historico-Iuridica" 2012, vol. XI, http://repozytorium.uwb.edu.pl/jspui/bitstream/11320/1628/1/Miscellanea_T-11_14.pdf.

[22] M. Materniak-Pawłowska, *Zawód sędziego w Polsce w latach 1918–1939*, "Czasopismo Prawno-Historyczne" 2011, vol. LXIII(1), https://repozytorium.amu.edu.pl/bitstream/10593/1818/1/03_Materniak.pdf.

Magistrates' courts were eliminated from the judicial structure in 1938, as Piotr Fiedorczyk and Przemysław Kowalski, already quoted, write: "The Law on the System of the Common Courts of February 6, 1928 unified the common courts as of January 1, 1929. The organizational structure was as follows: municipal courts, district courts, appellate courts, and the Supreme Court. The magistrates' courts, as mentioned earlier, were being abolished on a grand scale as reform approached and were being transformed into municipal courts"[23].

Issues related to the establishment of magistrates' courts in Poland

The creation of a magistrate's office in Poland is currently under discussion. The idea is emerging in the public debate and is the subject of bills submitted to the parliament. Since I have been a practising justice of the peace in Canada since 1993, I decided, based on my own experience, to add my thoughts in this regard.

The most important thing, in my opinion, is to structure the justices of the peace in such a way that their compliance with the Constitution, the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms is not in the slightest doubt.

First of all, in a democratic state based on the law, it is inconceivable that there is a body ruling on behalf of the state in an unconstitutional manner. In particular, the civil rights and freedoms guaranteed by Articles 30 and 31 of the Constitution must not be violated, so if the cases to be transferred to the magistrates' courts are to concern the rights covered by these provisions, the magistrates' courts must take into account the above constitutional legal guarantees. Constitutional guarantees also apply to procedural matters. According to Article 45 of the Constitution, everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial and independent court. Future legislation on magistrate court proceedings must therefore respect these provisions.

One might ask whether, indeed, in cases of minor importance – and such would presumably be delegated to magistrates' courts to hear – it is essential for these courts to be so entrenched in the constitutional order. Even if we are inclined to say that, for example, speeding cases do not need to be heard in courts with the same degree of independence and independence as ordinary courts, practical considerations support the view that these must nevertheless be courts that fully meet the constitutional conditions enshrined in Article 45. Otherwise, a party in proceedings before such a court will be able to file motions to declare that the magistrate's court has no jurisdiction to hear any case. The basis for such a conclusion will be precisely the incompatibility of the empowerment of magistrates' courts with Article 45 of the Constitution, which will be treated as a violation of a citizen's fundamental right - the right to an independent court. This will result in the filing, initially on a small scale, of complaints or appeals to higher courts and perhaps even to the judicial bodies of the EU or the Council of Europe. It is to be feared that there will be a large number of such applications thereafter, leading to a significant slowdown of proceedings in

[23] P. Fiedorczyk, P. Kowalski, op. cit.

the category of courts in question, if not to their complete paralysis. Such appeals would flood the higher courts, as there is no doubt that one of the parties would appeal a ruling on jurisdiction to a higher court. Such an appellate authority, already being either a district or circuit court, would be forced to hear a large number of identical or similar-sounding appeals, which would reflect on the primary purpose of these courts, reducing their efficiency in basic adjudicatory activities.

The magistrates' courts would also have to be empowered to the extent that they take into account Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. They should ensure the right to an effective remedy and be impartial. Proceedings before the justices of the peace would have to be fair, public and concluded as quickly as possible. The accused would have to have access to legal assistance and advice. Proceedings before magistrates' courts should be guided by the principle of presumption of innocence. A party to the proceedings who does not speak Polish should be provided with the assistance of an interpreter[24].

It is clear that the regulations of the 1997 Polish Constitution and the basic legal acts of the European Union relating to the right of citizens to an independent court coincide.

If the magistrates' courts did not meet the conditions of independence and independence provided for in the above-mentioned regulations, this could lead to massive complaints to the Court of Justice of the European Union. In such a situation, until the first complaint was resolved, it would be unclear whether these courts should continue to function. While, on the one hand, this would save Poland from multiple rulings awarding damages in the event that the court shared the applicant's position, on the other hand, it would paralyze the work of these courts for the duration of the hearing of such a complaint.

An extremely important and contentious issue is how to appoint magistrates. However, many current press reports indicate that this should be done through elections. In my opinion, this does not seem to be the best solution. While it is tempting for citizens to influence such positions, in practice, these elections would be highly associated with the political parties or organizations taking part in them. It is difficult to imagine that any entity other than political parties or organizations would nominate candidates and have the resources and apparatus necessary to appear in the consciousness of a community enough to win such elections. Elected judges appointed in such a manner would probably not be seen as "social" or "popular" but as officials owing their appointment to a particular party. From there, it is very close to a judge's social connection to the local organization of a political party or other political entity with which the justice of the peace in question was affiliated or by which he or she was supported in elections. This, in turn, would inevitably lower the level of public confidence in the court among those who do not identify with a particular party. Courts operating without public trust could find themselves in a difficult situation – their

[24] https://bip.ms.gov.pl/Data/Files/_public/bip/prawa_czlowieka/convention_pol.pdf.

rulings would be questioned, and the outcome of cases judged not according to their state of evidence or law but by the parties' connections.

The tenure of magistrates is also a contentious issue. Elections, by their very nature, are not calculated to last "for life" but give the mandate to serve as a magistrate for a legally defined period of time; it can be assumed that this could be between 3 and 6 years. Then every 3–6 years, the magistrate courts would enter a period of paralysis of sorts. Judges at the end of their term would have doubts about the durability of their authority, while the parties would seek litigation tactics favourable to themselves. The ongoing election campaign could also undermine the competence of the justice of the peace that is still in office. In the case of the election of magistrates by local communities, the question of the magistrate's local jurisdiction will also arise. This is because such a judge will not be able to be posted to a territorial unit other than the one in which he was elected. Election by the local community can be understood as an authorization to adjudicate only in the area of the administrative unit in which the judge in question was elected.

Returning to the constitutionality of the office of magistrate, it is also important to keep in mind the possibility of challenging its very essence as unconstitutional. Judges of the current levels of the general judiciary are appointed on the proposal of the National Judicial Council by the President of the Republic of Poland. The election of a magistrate, on the other hand, can be considered invalid unless it meets, at least in the final, decisive phase of the procedure, the requirements of Article 179 of the Constitution. It is worth adding here that this provision excludes tenure. In practice, this means that a justice of the peace, once appointed, will hold office until the completion of his judicial service, and only then could the process of recruiting his successor begin.

Even if some form of the election were included in the process of appointing a justice of the peace, at the final stage, the candidate, for example, selected in municipal elections, would have to be presented to the National Council of the Judiciary for approval, and the appointment would be signed by the President of the Republic of Poland. Such a solution would also have the significant benefit of eliminating – or at least greatly minimizing – the politicization of elections at the local level. This would make it possible to apply to the selection of candidates the unified requirements necessary to receive such an appointment. The National Council of the Judiciary also has the instruments, I believe, to screen the candidacy for other important considerations, such as national security.

In my opinion, the most logical and simplest solution would be to use an analogous mode of appointment to the position of magistrate, which applies to the recruitment of district court judges. Such a solution automatically eliminates the problems described above. However, I realize that in the current discussion, the idea of electing magistrates has considerable support, so I proposed a way to elect them that combines both routes.

The Law on the System of Common Courts stipulates that the President of the Republic appoints district court judges, circuit court judges and appellate court

judges. It also specifies the requirements to be met by a candidate for the position of judge. These are possession of Polish citizenship only, an impeccable character, a completed law degree, the ability to perform judicial service and being at least 29 years old. Candidates are also required to pass a judge's or prosecutor's exam and serve as an assessor for three years.

One may wonder whether the requirement of prior service as a judicial assessor should be retained for appointment as a magistrate or whether adding performance as a magistrate for at least three years should be an additional qualifying path for subsequent appointment as a district court judge.

Magistrates are to have the same guarantees of judicial independence as judges at other levels of the general judiciary. For example, they are to be irremovable from their office except through disciplinary proceedings as a result of reaching retirement age or resigning from office. Loss of the position of a magistrate could also occur in the event of a final conviction or loss of Polish citizenship. Subsequent articles of the cited law set forth specific situations and conditions for early retirement, remaining in office until age 70 and returning to active judicial service. It is important, indeed crucial, to appoint magistrates in such a way that their legitimacy as judges resists attempts to undermine their status as judges. It would therefore have to be within the framework of existing Polish and EU law, as well as the European Convention on Human Rights.

A separate issue is the qualifications needed to be appointed as a magistrate. In countries where such an institution has a long tradition, the office was formed in the absence of qualified lawyers able and willing to perform this function. The lack of a sufficient number of lawyers in Poland is unlikely to be such a problem, so it can be hypothesized that the minimum requirement to take the position of magistrate should be a degree in law. In Poland, traditionally, a master's degree, which confirms the ability to independently research legal issues, is the generally accepted threshold for applying for admission to legal applications (judicial, prosecutorial, advocacy or legal counsel). The issue of determining the final level of professional qualifications will have to be dealt with by state administrative bodies, the National Council of the Judiciary, university law faculties and organizations of self-governing judges, prosecutors, lawyers and attorneys. In my opinion, it is only through such a developed consensus that magistrates will not find themselves in a situation where they will have to justify their competence to rule on cases under the jurisdiction of magistrates' courts.

An important – if not the most important – issue would be to determine the substantive and local jurisdiction of the magistrates' courts. There is no doubt that their jurisdiction should be subject to misdemeanour cases, as they are relatively simple[25]. The procedure used to hear this category of cases should assume that the vast majority of defendants will not have legal assistance in the form of a lawyer. Magistrates should therefore be trained to conduct hearings or sessions in such a way

[25] The author knows from practice that a case involving, for example, a traffic offense can be extremely complex on the side of factual findings and legal material, but the vast majority of this category of cases are uncomplicated and can be tried in a relatively short period of time.

that, while not giving legal advice, they also inform the parties as to the requirements of the procedure.

Magistrates' courts could also be entrusted with cases of preventive measure. As the law currently stands, court assessors cannot rule on these cases and others listed in Article 2 of the Law on the System of Common Courts. It is intended that magistrates will be "full-fledged" judges, so such a restriction would not have a significant justification; on the contrary, it would relieve the burden of this category of hearings and orders on higher judges. As for the adjudication of cases for the application or revocation of a preventive measure, the transfer of these requests to magistrates will allow them to be adjudicated more quickly, with the speed of proceedings being particularly valuable in these cases. This is because the court here decides on the freedom of a citizen who is innocent under the law in accordance with the guarantees contained directly in the Constitution and the Code of Criminal Procedure[26].

It will also allow the judge receiving the case for trial to take a fresh look. In large courts, to which a significant number of judges are assigned, this may not be as important as in small court units, where the likelihood that the same judge will hear an application to apply or revoke a preventive measure probably exists. The procedure for a preventive measure is normalized in quite some detail in the Code of Criminal Procedure, starting with Article 246 § 1, which refers to the possibility of filing a complaint with the district court against detention. The court then examines whether the detention was legitimate, legal and properly conducted. This provision allows the district court to hear a complaint against detention, as well as the pre-trial detention applied[27]. If the prosecutor does not release the detainee, he directs the court to apply for pre-trial detention[28]. It is worth pointing out here that the legislator envisaged the need for speedy proceedings in cases of pre-trial detention. The prosecutor's office has only 48 hours after the arrest to refer the case to the district court for consideration, while the court has only 24 hours to consider this request[29]. Decisions of the court are made at a session, which is entitled to be attended by the prosecutor, the suspect and the suspect's defence counsel. The grounds necessary for filing a motion for pre-trial detention are defined in Article 250 of the Code of Criminal Procedure. The request for pre-trial detention should indicate the evidentiary basis for the prosecution, the potential threat to the proper conduct of the proceedings, the reasonable possibility that the suspect will commit a new serious crime, and the legal grounds for justifying the request. If witnesses are threatened, their testimony is not made available to the defence. Article 258, on the other hand, limits the use of pre-trial detention. In order for pre-trial detention to be ordered, the court must determine that there is a fear of the suspect fleeing, of obstruction of justice, a charge of committing a crime punishable by a maximum penalty of more than eight years imprisonment or a sentence

[26] Law of June 6, 1997 – Code of Criminal Procedure, Dz. U. 1997 No. 89, item 555, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19970890555/U/D19970555Lj.pdf.
[27] Article 246 § 5 of the Code of Criminal Procedure.
[28] Article 247 § 5 of the Code of Criminal Procedure.
[29] Article 248 of the Code of Criminal Procedure.

of more than three years imprisonment imposed by the court of the first instance, or a well-founded fear that the accused of a crime or intentional misconduct will commit a crime against life or health or against public safety.

These circumstances are very similar in essence to the prerequisites for a preventive measure in Canadian law, where the court considers the risk of the defendant evading criminal prosecution (primary grounds), the risk of the defendant committing a crime or stalling (secondary grounds), and finally the seriousness of the alleged act (tertiary grounds). The Canadian court is also required to determine whether the prosecutor has gathered sufficient evidence (*prima facie* case). I mention this to show that Canadian magistrates, despite the fact that in large part they have no formal legal training, have been adjudicating these cases for many years, so such a solution in Polish conditions would also apply if magistrates became lawyers at the beginning of their judicial career.

Magistrates should also adjudicate limited criminal cases. These could be summary or private prosecution cases. While this would require full training in the adjudication of criminal cases, which would significantly increase the cost of initial and continuing education for such judges, it would also prepare them for possible further judicial careers and higher judicial positions. One might also consider entrusting them with adjudication of a limited category of family and guardianship law cases. For example, magistrates in the UK have had such subject matter jurisdiction for many years.

Magistrates in Canada have very limited – if any – jurisdiction to adjudicate family matters, and this is usually in emergency situations where there is no access to family court[30]. Some provinces have laws regarding threats or domestic violence, under which a magistrate can order the immediate removal of a suspect from their home or order the surrender of firearms in his possession. Other cases will include orders to take a child away from his or her parents if continuing to leave the child with his or her parents could cause a threat to the child's life or safety or an order to bring a child who has escaped from the custody of his or her parents or legal guardians. There seems to be no contraindication here to handing over such or a similar range of family and guardianship cases to magistrates in Poland.

The trial of civil cases by magistrates is a phenomenon found in countries originating from the Mediterranean legal tradition. Assuming, however, that only people with legal training become magistrates, one might be tempted to create something like Canada's Small Claims Courts, which hear civil lawsuits up to the amount of litigation set in the province. Currently, in Ontario, it is $25,000[31]. In Alberta $50,000[32]. In British Columbia, $35,000 in civil disputes are heard in district (provincial) courts and up to $10,000 in summary courts[33], in Newfoundland and Labrador in cases with up

[30] E.g., provincial laws on domestic violence, issuing a warrant to bring or take away a child.
[31] https://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/What_is_Small_Claims_Court_EN.html.
[32] https://albertacourts.ca/provincial-court/civil-small-claims-court.
[33] https://www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims.

to $25,000 in subject matter[34], in Manitoba up to $10,000[35]. Small claims courts are organizationally linked to the higher courts, with the exception of British Columbia, and are adjudicated by lawyers appointed as deputy judges. These are civil courts with a simplified procedure based on the use of generally available forms constructed for parties appearing in proceedings without a lawyer. Of course, there is no prohibition against having legal assistance in the form of an attorney, but the procedure is not very demanding, so it is not necessary. Similar solutions could be introduced in Poland by creating civil divisions in magistrates' courts.

The most important category of cases that should be transferred to the jurisdiction of future Polish magistrates' courts is, of course, misdemeanour cases. In this regard, it is worth quoting statistics: in 2016, criminal courts convicted 289,512 people[36] while adjudicating 72,496 cases related to traffic offences[37]. Transferring misdemeanour cases to magistrate courts would greatly relieve the burden on district courts. At this point, consider the following provision of the Code of Criminal Procedure: "Article 9 § 1. Misdemeanor cases shall be adjudicated in the first instance by the district court, subject to the cases specified in Article 10"[38].

The magistrates' courts could be placed in the existing structure of the general judiciary bodies. Such a solution was already in place when divisions were established in district courts to handle misdemeanour cases. After some time, however, this solution was abandoned. The second option would be to establish separate magistrate courts, but this would require an amendment to Article 9 of the Misdemeanor Procedure Law[39]. It seems that the rational solution would be to establish magistrate courts as divisions of district courts. This would not require changes to the law but would also leave these courts distinctly separate from the rest of the district court sphere.

The solution used in the province of Ontario is worth mentioning here. In the late 1990s, work began on transferring misdemeanour cases to local governments. It was adopted as a principle that such courts would be separated from the provincial criminal courts[40] administratively, but legally they would remain part of these courts. On the basis of agreements between the provincial authorities and individual local governments, "municipal" courts, and thus in practice, justice of the peace courts, were established. The judges therein are still magistrates appointed and paid under the Magistrates Act by the Ontario provincial government, but already the security of

[34] http://www.court.nl.ca/provincial/courts/smallclaims/procedures.html.

[35] http://www.manitobacourts.mb.ca/court-of-queens-bench/court-proceedings/small-claim-information-claims-filed-after-january-1-2015/.

[36] https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

[37] Statistics according to police, http://www.statystyka.policja.pl/st/przestepstwa-ogolem/przestepstwa-drogowe/122282,Przestepstwa-drogowe.html.

[38] Law of August 24, 2001 – Code of Conduct in Misdemeanor Cases, Dz. U. No. 106, item 1148, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20011061148/U/D20011148Lj.pdf.

[39] Ibid.

[40] Ontario Court of Justice.

the court building, matters of service personnel and prosecutors have been entrusted to the cities. The cities, in turn, received revenue from the operation of these courts in the form of fines and court fees, while the provincial government retained for its budget the restitution adjudicated ex officio on behalf of crime victims. Such a positioning of the magistrates' courts allowed them to maintain the principle of their independence and autonomy while at the same time ensuring their efficient operation while transferring potential revenue to the budgets of cities and municipalities.

It is also important to structure the procedure in such a way that it is as simplified as possible. There should be solutions to appear before the magistrate's court without representation in the form of a lawyer.

It would also be necessary to review the misdemeanour code of procedure from a procedural standpoint so as to allow cases to be heard in an efficient, fair manner that gives parties adequate opportunity to present their evidence and arguments to the court while allowing cases to be heard in a short period of time. For comparison, one can point to the practice of magistrates' courts[41] in Ontario, where magistrates hear up to 100 cases a day. Of course, even assuming the very high efficiency of the proceedings, this would not have been possible without the widely used settlements reached by the defendant with the prosecutor. This allows up to 90% of cases to be completed without a main hearing. A file – if the name can be used at all, for example, in a speeding case – is often a copy of a note made by a police officer and an excerpt from the manual for the radar or laser used by the police in the case. A typical main hearing in such a case lasts about 10–15 minutes. Ordering a break in the trial to continue is very rare[42]. Rulings are made orally immediately after the proceedings are completed, and the parties are heard. If appealed to a higher authority, the parties shall bear the cost of copies. In the event that it is necessary to draft a decision in writing, the magistrate, like any other judge, has the option, at his discretion, to postpone the announcement of the decision, but for a period of no more than six months.

Magistrates should also be authorized to decide all incidental proceedings in a case, such as admitting evidence, issuing a subpoena to a witness, issuing a search warrant, a warrant to bring in a witness, and applying pre-trial detention.

It also seems reasonable to include in their subject matter jurisdiction the right to rule on the constitutionality of legal provisions. It even follows from Article 8 of the Constitution[43]. Without diminishing the role of the Constitutional Court, one must ask whether the examination of the constitutionality of regulations on minor issues really needs to consume its time. Of course, it remains up to the legislative body to decide

[41] Formally, these are provincial courts; for simplicity, the author has chosen to use the name of justice of the peace courts.

[42] As a rule of thumb, a case referred to a main hearing should be completed within the time stipulated by the parties. For this purpose, a procedure is used that allows the parties to meet without the participation of the court (pretrial, resolution meeting), and in more serious cases - also with the participation of a magistrate (judicial pretrial).

[43] Article 8: "1. The Constitution is the supreme law of the Republic of Poland. 2. The provisions of the Constitution apply directly, unless the Constitution provides otherwise."

whether citizens are to gain an accessible and relatively easy legal path to ask such a question and obtain a judicial answer. In some regions of Canada, the magistrates' courts have such powers, and the system works well.

Draft law on magistrates' courts and amendments to certain other laws

The bill on magistrates is currently being submitted by the President of the Republic of Poland to the Sejm. It assumes the creation of the office of a magistrate as a separate level of the judiciary, which would entail amending the current law on the System of Common Courts. This project proposes that the salary of magistrates be equivalent to that of a district court judge. From the point of view of procedural economics, this lacks added value, as the cost to the Treasury would be similar to that of district courts. As tempting as this proposal may seem, from a practical standpoint, it would be simpler to appoint more district court judges.

The draft assumes a much larger scope of the substantive jurisdiction of the magistrate courts than the proposal presented in this article. The magistrates' courts would hear civil cases up to a dispute value not exceeding PLN 10,000 and criminal cases punishable by a fine, restriction of liberty or imprisonment for up to a year. It is not explicitly stated whether they would hear misdemeanour cases, but such a conclusion can be drawn from the catalogue of maximum penalties they could adjudicate. The introduction of civil cases into the jurisdiction of the magistrates' courts will result in the need for additional training of magistrates and the division of the magistrates' courts into civil and criminal "divisions" after some time. This is, of course, feasible but could raise the cost of operating the magistrate courts. The appeal procedure proposed in the draft is, in my opinion, correct and coincides with the practice of Canadian courts with which I am familiar.

The draft also provides a catalogue of requirements that candidates for the office of magistrate judge would have to meet. It is difficult to argue with conditions such as impeccable character, age 35, no criminal record, and a law degree. Two criteria, however, raise my concerns. First, the requirement to hold only Polish citizenship seems inadequate to modern reality. A huge number of Poles live in other countries and often decide to return permanently to Poland. Their children have dual citizenship by nature, and such a provision is detrimental to this group of Polish citizens. Poland is also currently a rather welcoming country for immigrants, and such a provision does not facilitate their assimilation. Secondly, the obligation to take a judge's or prosecutor's exam largely equalizes the qualifications needed to be appointed as a district court judge and a magistrate, so again the question of whether it would not be simpler to appoint more district court judges arises.

The draft submitted to the Diet proposes the election of justices of the peace, preserving the right of the President of the Republic not to appoint the candidate so selected, which to some extent casts doubt on the real meaning of the will of the voters. A justice of the peace elected for a 5-year term would be transferred to the position of district court judge upon completion of the term, in the event that he or she is not elected for another term. Such a structure will even discourage the best

possible performance of judges, offering an automatic promotion to those who have lost the trust of voters.

The bill also proposes amendments to other laws to bring them in line with the Magistrates Act[44]. All in all, the authors of the project present a very interesting concept of courts in Poland, certainly worthy of analysis and discussion.

Assumptions of the shape of future courts of justice in Poland

To summarize the aforementioned considerations, the following assumptions can be proposed for the organization of future magistrates' courts in Poland:

– these courts should be part of general courts, being separate organizational units or divisions of district courts;

– magistrates should be appointed in the same way as district court judges; the method of identifying candidates may ensure that local governments play some role in selecting candidates, e.g., by giving opinions on candidates;

– the requirement for candidacy for the position of magistrate should be a legal education and completion of a suitably modified application. At the same time, consideration could be given to establishing an apprenticeship program for future magistrates, with the possibility of undertaking additional apprenticeship training for those intending to upgrade their qualifications in order to apply for higher judicial positions;

– magistrates should have the same guarantees of judicial independence and autonomy as other judges ruling within the general judiciary;

– magistrates should be subject to the same standards of behaviour while serving as judges as other judges of common courts and be subject to the same disciplinary responsibility;

– procedures in the magistrates' courts should be based on misdemeanour proceedings;

– appeals against the decisions of magistrate courts should be heard by district courts, and in the event that they are established as divisions of district courts – by district courts.

To answer the question posed in the title, it can be concluded that the institution of a magistrate is most needed to fill the gap created after the abolition of the colleges for misdemeanours, which, as they did not fulfil the function of an independent court, could not function in democratic Poland. The scope and mode of operation of magistrates' courts should take into account the experience of other countries where magistrates have been operating for many years, successfully relieving courts at other levels of jurisdiction of minor cases. The above solutions are only a suggestion which may be helpful in the creation of magistrates' courts if such an institution is established in Poland.

[44] Draft Law on Magistrates' Courts and Amendments to Certain Other Laws, http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-577-2021/$file/9-020-5.

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