

Judicial cognition in brief. The judicial scene after amendments to the Code of Criminal Procedure

Introduction

This paper does not claim to be an in-depth analysis of the issues related to the cognitive process in the criminal trial. However, it is a voice in the discussion on the amendments to the criminal procedure law introduced as of 1 July 2015.

The amendments entail a major ‘remodelling’ of the criminal trial and as such deserve to be given thought, in particular to its cognitive aspect. The study of the acts amending the Code of Criminal Procedure¹, and explanatory notes appended to them make it absolutely clear that the goal of the criminal trial is set to change. The court will no longer seek an answer to the question ‘What happened and how did it happen?’, but rather to the question whether the prosecutor, who bears the burden of proof in the formal sense, has proved that the defendant is guilty as charged. The search for the truth is thus defined differently in the new law of criminal procedure than it is in the regulation in force until 30 June 2015².

¹ The Act of 27 IX 2013 on Amending the Code of Criminal Procedure and Some Other Acts (J.L. 2013, item 1247) and the Act of 20 II 2015 on Amending the Criminal Code and Some Other Acts (J.L. 2015, item 396); both Acts entered into force on 1 July 2015 and amend the Code of Criminal Procedure of 6 VI 1997 (J.L. 1997 No. 89 item 555 as amended), hereinafter “CCP”.

² The fundamental principle of the forthcoming amendment of the law of criminal procedure is the heightening of the adversarial nature of that part of the criminal trial, which takes place before the court. The amendment has defined anew the duties of

In this connection, it becomes necessary to ask the question whether the model of judicial cognitive process, as described in *Poznanie sądowe a poznanie naukowe* (Judicial cognition and scientific cognition) by Maciej Zieliński³, is going to change. M. Zieliński's work centres on similarities and differences between two kinds of cognition: scientific and judicial. As the subject matter of cognition in a trial, the cited author considers specific fragments of reality (facts)⁴ and as the fact-finder, he considers these entities (persons or groups of persons) who are actually involved in the cognitive process or those who are expected (for instance, by reason of their being appointed for this purpose in one way or another) to participate in the cognitive process⁵. In this approach, both the court, as the determinative fact-finder⁶, and other persons or groups of persons, for instance, parties to the trial, are fact-finders.

The discussion on judicial cognition and the findings arrived at by M. Zieliński are grounded upon the former Code of Criminal Procedure⁷. The legislator at that time had other values, and other priorities and laid emphasis on altogether different aspects of the judicial process. Nonetheless, the model approach to judicial cognition taken by M. Zieliński is also now becoming a reference point in the discussions on plausible solutions and their assessments, which emerge from the current legislation as optimization models. The high citation frequency of M. Zieliński's work in authoritative writings on criminal procedure is related to the fact that he developed a workable concept apparatus to describe major cognitive process components. Owing to this, the relevant judicial cognition issues can be revisited today, regardless of the fact that the law of criminal procedure has completely changed. As a result, an appropriate discourse of judicial reasoning can be conducted, employing concepts defined by M. Zieliński.

the court and parties with respect to evidence. Under the new legislation the power to introduce evidence is shared by adverse parties to the trial who are expected to produce evidence in support of their contentions and rely on it at trial. The court, maintaining in this tripartite trial arrangement the position of an independent umpire, has practically lost the right to hear evidence on its own initiative.

³ M. Zieliński, *Poznanie sądowe a poznanie naukowe*, Poznań 1979.

⁴ *Ibidem*, p. 71.

⁵ *Ibidem*, p. 94.

⁶ A fact-finder whose findings actually count in arriving at a decision.

⁷ Code of Criminal Procedure of 19 IV 1969 (J.L. 1969, No. 13, item 96 as amended).

In the preliminaries to his study, M. Zieliński defined certain fundamental concepts such as the cognitive process framework, cognition subject matter and tasks, parties to the cognitive process (fact-finders) and cognitive directives. Due to the brevity of this paper, only some issues discussed by the cited author will be focused on. These, it will be argued, are of particular importance in motivating an analysis of the consequences for the model of judicial cognition after the acts amending the Code of Criminal Procedure enter into force.

1. In search of a model of judicial cognition

Formulating possible theoretical models of judicial cognition, M. Zieliński suggests that certain principles or models be taken into account, including especially those such as the accusatorial and adversarial principles, the principle of the discretionary exercise of their rights by the parties and the principle of truth. For it is on the position of these principles *vis-à-vis* one another and the force of each that the model of judicial cognition chosen by the legislator depends. It can therefore be a model in which the accusatorial principle is the kingpin or the adversary and party discretion principles come more or less to the fore, wherein the truth the cognitive process seeks is the formal truth (the more convincing argument wins) or the objective truth (the argument which is more consistent with the reality wins). Scrutinizing which principles and what degree of intensity the legislator encodes in the new provisions of the Criminal Procedure Code, one can easily see that judicial cognition in the criminal trial after 1 July 2015 will continue to be founded on the accusatorial principle. The principal accusatory pleading (it is no longer information only)⁸ gives an impulse to instigate jurisdiction proceedings and imposes on the court a duty to adjudicate on the case brought by a competent prosecutor. The limits within which the court is to hear a case, both with respect to persons and matters involved, are set by the prosecutor. It is he or she (albeit in a modified formula) who sets the range of the judicial cognition of reality and the matter at issue to be tried by the prosecutor and defendant before the

⁸ A motion by the prosecutor for a conditional discontinuance of proceedings and a motion for conviction under Art. 335 § 1 of the CCP (independent motion) are also principal accusatory pleadings.

court. Here, in turn, a space for the adversarial principle opens. It has been mentioned so often that it has become the catchword for the changes being introduced into the criminal trial⁹. For this principle is to define a new model of judicial proceedings in its normative and factual essence designed as a contest of two independent trial parties enjoying equal rights. Moreover, the crux of an adversarial system designed in this way is an almost complete diminution of the evidentiary initiative of the court. The principle of party discretion, which is not distinguished in the current criminal trial doctrine, is, however, noticeable as an element of the adversarial system¹⁰ and in the emerging trial configuration it acquires a great significance. For the parties play a decisive role in the new model of judicial proceedings (within the meaning discussed here – judicial cognition, to be precise). It is they who collect and present evidence, and after it is admitted by the court, rely on it in the course of the trial. The court is supposed to remain passive in this configuration. Its role is to assess evidence, i.e. to determine the logical value of somebody else's contentions. Can the court, as the determinative fact-finder, collect such a body of evidence that will enable it to find a real answer to the question of which contentions by the parties to the trial are true? Or is it absolutely deprived of any power to shape the factual basis of its decision?

In this connection, the new model of judicial proceedings is – as are previous ones – founded on the principle of objective truth. This is seen above all in the provision providing that all decisions are to be based on true findings of fact (Art. 2 § 2 of the CCP). This would preclude a belief that the legislator intends to deprive the court as being the determinative fact-finder of the possibility to search for appropriate cognitive sources. However, the truth the court is supposed to seek has less and less in common with the adequate cognition of a specific fragment of reality (searching for an answer to the question 'What happened and how did it happen?'). It will no longer be about the search for the absolute truth, which is the explicit goal of the trial now, but the confirmation of the thesis of the prosecution. In addition, such a confirmation is not defined as the goal of the trial but as a condition of holding the defendant

⁹ See the explanatory notes to the bill to amend the Act – Criminal Procedure Code and some other Acts; <https://bip.ms.gov.pl/pl/projekty-aktow-prawnych/prawo-kanne> (accessed: 5 VI 2015).

¹⁰ S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2013, p. 285.

criminally responsible¹¹. The activity of the trial parties in the search for evidence and their reliance on it in court has been modified; but the court has been left a limited possibility of obtaining evidence independently (that is on its own initiative) in exceptional cases justified by special circumstances¹².

Thus it appears that after 1 July 2015, the normative model of judicial cognition in criminal matters, as reconstructed from the relevant legislation, can be described as founded on the principles of accusatorial, adversarial and objective truth, imposing duties on the parties with respect to the collection and use of evidence, and subjecting the court to restrictions as far as evidence initiative is concerned. Furthermore, the model enjoins the subjects of cognition (fact-finders) to make true findings of fact which ought to underpin all trial decisions. In the model thus defined by statute, the subject matter of cognition is a fragment of reality, with its confines being set in actual fact by both trial parties and not only by the prosecutor. Admittedly, it is the accusatory pleading that sets the limits of controversy, but both parties are responsible for supplying evidence (albeit either exculpatory or inculpatory, depending on the division of trial roles) and relying on it before the court.

Is therefore the new model of jurisdiction proceedings (as the sponsors of the bills see it) at the same time a new (in the sense of being different from the existing one) model of judicial cognition? A cognitive process calls for performing certain acts in order to come to know certain facts. Such acts include the adoption of a specific conception of the cognitive process (e.g. choice of a specific tactic), accumulation of material to be examined, preparation of this material (both critically and technically) and formulation of specific conclusions (intermediate and ultimate)¹³. Undoubtedly, in judicial cognition, the court is both a fact-finder and a determinative fact-finder. It is understood as a court having jurisdiction or, even more specifically, the bench of this court appointed to hear a given case. It is bound to explain the matter and enter a judgment. Hence, only cognition performed by a body designated as

¹¹ P. Hofmański, *Zasada prawdy w postulowanym modelu procesu karnego*, in: *Pojęcie, miejsce i znaczenie prawdy w polskim procesie karnym*, red. J. Skorupka, K. Kremens, Wrocław 2013, p. 47.

¹² See Art. 167 § 1 of the CCP.

¹³ See M. Zieliński, *op. cit.*, p. 94.

a determinative fact-finder and as such appointed to perform cognitive acts may matter legally, that is, may enjoy appropriate legal relevance. Can other entities, in particular trial parties, together with the court, next to it, or even independently of it, conduct a cognitive process in respect of the same facts and in a legally binding manner? To a similarly framed question, however in a different normative reality, M. Zieliński answers in the negative. Although he recognizes trial parties (in a methodological sense) as 'forced'¹⁴ cognitive helpers of the court or the determinative fact-finder, he does not confer on them the role of determinative fact-finders in the sense that their cognition is neither independent nor legally relevant (binding). He does, however, notice the important role of trial parties in the area of conceptions and inferences¹⁵.

Will the role of trial parties in the new normative reality change? Taking over the competences to guide cognition (after all this is the essence of cognition in a given case, is it not?), will they keep the role of cognitive facilitators or will they become themselves determinative fact-finders? These questions are posed not only because the wording of some provisions of the Code of Criminal Procedure has changed. These questions arise above all from the explanatory notes appended to the proposed changes by the legislator. It follows from them clearly that the court will not help trial parties in collecting evidence, bearing out the claims of the prosecution or arguing against them. The authoritative literature on criminal procedure makes a distinction between the concepts of relying on a piece of evidence at trial and conducting evidentiary proceedings; the latter concept, being broader, is held to cover discovery, collection, preservation and revelation of evidence in a formalized way (defined in the provisions of procedural law), as well as the assessment of such evidence¹⁶. The crucial provision that has been amended is Art. 167 of the CCP. It not only settles the question now of who enjoys the so-called evidentiary initiative in a criminal trial, but also regulates the question of reliance on evidence. Specifically, it imposes the burden of active participation in the process of proving on a participant in the trial, depending on whether the trial

¹⁴ That is imposed on the court by the legislator if only by the range of duties assigned to them in the process of proving and the necessity to take into account their activity, e.g. dismissing an evidentiary motion filed by a party requires to give reasons, a mishandling of evidence may form grounds for appeal as a breach of procedural law, etc.

¹⁵ See M. Zieliński, *op. cit.*, p. 107 et seq.

¹⁶ R. Kmiecik, E. Skrętowicz, *Proces karny. Część ogólna*, Kraków–Lublin 1999, p. 282.

was commenced on the initiative of one of the parties, or not. Furthermore, a possibility has arisen for the parties to introduce so-called 'private evidence' or materials that are produced outside of the trial by the parties themselves, another trial participant or even by a person who does not appear at the trial¹⁷. The court, however, admits such evidence first and uses it (relies on it) – in accordance with its character – afterwards.

It is also assumed that evidentiary initiative and activity burden the parties in all judicial proceedings instituted on the initiative of a trial party. This applies to proceedings instituted by an accusation (public, auxiliary or private) and appellate proceedings as well as any and all interlocutory proceedings commenced by the motion of a party. Under the new CCP (Art. 167) evidentiary activity is the responsibility of both parties to the trial and not only of the party instituting it (prosecutor). The explanatory notes mentioned earlier maintain that the material burden of proof will weigh on the defendant more heavily than previously. However, the decision to introduce evidence to the trial (admit it at the jurisdictional stage) will continue to rest with the court (also with the president of the court or the presiding judge – depending on the phase of this stage of the trial). It is rather exceptional but admissible for the court to rely on a piece of evidence when the party which has filed a motion to admit the evidence fails to appear at the hearing. Then, the court must confine its use of the evidence to the point it is meant to prove as indicated in the evidentiary motion; otherwise, the court may use evidence on its own initiative only in exceptional circumstances.

Nowhere in the new provision and its entire normative 'context' can one find a hint of how the term 'relying on evidence' used in it is to be construed. For it appears that the term has acquired a different sense and is now to be used for the active participation of the parties in judicial proceedings. For there is nothing to indicate that the legislator indeed intends to entrust the parties with the conduct of evidentiary proceedings, even less so with the process of forming the factual basis of a decision (judicial cognition). One therefore has to concur with the opinion that the reliance on evidence at trial requires that a trial organ (here: the court) not be just a detached and passive observer of the use of evidence, but stay in the centre of this act and participate

¹⁷ See Art. 393 § 3 of the CCP.

in it actively¹⁸. The court must also adjust the manner of how the evidence is to be relied on at trial to the source and kind of evidence, and to come into direct contact with it¹⁹. Even if the trial parties influence the formation of a cognitive conception, as well as its possible modifications with their evidentiary motions and arguments, the direction of cognition stays within the competence of the court. Similarly, the parties may – with respect to inference – influence what conclusions are drawn from the source material and may (or it seems even that they have to), in accordance with their trial functions, subject it to criticism. This is after all what their trial dispute (discussion) is in part about and, presumably, also what the legislator expects, making the trial more adversarial.

2. Discussion and its significance

An interesting thread running through the discussion of a judicial cognition model, the discussion between fact-finders, is understood as a kind of confrontation of opposing contentions (assertions and arguments by one trial party inconsistent with assertions and arguments by the opposite trial party). Each trial party strives to have its contention considered legitimate. The discussion pending between the criminal trial parties is an important factor, facilitating cognition for the court as the determinative fact-finder. Studying this question, M. Zieliński sees a connection between the cognitive process and the holding of a discussion²⁰ or, more precisely, taking advantage by the court of the results of a discussion pending between the trial parties and of its relation to the court's own cognitive activity. The cited author notes that if the cognitive process is reduced to the determinative fact-finder (court) availing itself only of the results of somebody else's discussion, then the fact-finder as such will not perform any cognitive acts, but will concentrate all its effort on finding which of the arguing parties formulated legitimate contentions

¹⁸ M. Klejnowska, *Przeprowadzanie dowodów w procesie karnym w świetle nowelizacji Kodeksu postępowania karnego z 27 września 2013 r.*, in: *Postępowanie dowodowe w świetle nowelizacji Kodeksu postępowania karnego*, red. A. Lach, A. Bułat, Toruń 2014, p. 22.

¹⁹ Admissible 'indirect' reliance on evidence at trial does not mean anything else but a different 'indirect' manner of evidence perception, e.g. reading out the transcript of a witness testimony and not interviewing a witness in person.

²⁰ In connection with the broadly understood organization of a cognitive process, which he treats as an important structural element of judicial cognition.

(who 'won') and will accept these very contentions. Making the new model of a criminal trial adversarial might suggest that the model of judicial cognition discussed above has indeed been adopted. However, leaving a possibility for the court to conduct evidentiary proceedings on its own initiative in exceptional cases under special circumstances shows that the court is given an opportunity to pursue its own cognitive activity (albeit exceptionally). We do not witness here only a 'passive' use of the results of somebody else's discussion (by accepting the contentions of the party who has cited more persuasive arguments than the opposing party). The court is supposed to be active, not only through its own cognitive activity, but also by drawing support from the discussion between trial parties if only on heuristic ideas or ways to reach new cognition sources (e.g. by granting the evidentiary motions of the parties – 'admitting evidence').

In this respect, the issues related to the trend towards consensual decision-making look interesting; the more so as it has already gained much ground in Polish criminal procedure law. For it appears that the current model of judicial cognition can be aptly described by making a distinction between its two versions: one found in a confrontational and the other in a consensual trial. The former designates this trend in the cognitive process in which opposing arguments of the trial parties clash (under the rules of the adversarial system) and where the court as the determinative fact-finder assesses the arguments and assertions concerning the examined fragment of reality, being offered by the opposing trial parties. This trend (and at the same time a model of judicial cognition) is at work at a hearing. In the consensual trend, in turn, the model of judicial cognition assumes an entirely different aspect? The court still remains a determinative fact-finder, but the cognitive process is limited to the court's learning the contentions by the trial parties concerning the fragment of reality indicated by them. This view is supported by the provisions underlying the conviction of the defendant to the punishment or penal measure agreed with the prosecutor when the defendant pleads guilty²¹ or – without the need of express admission – agrees to the conviction²² or petitions to be so convicted²³. In such situations, prior to entering a judgment (which happens outside of a hearing, at a special sentencing sitting), the court does not conduct evidentiary proceedings

²¹ Art. 335 § 1 of the CCP.

²² Art. 335 § 2 of the CCP.

²³ Art. 338a of the CCP.

but accepts factual assertions proffered by the parties. From the point of view of the role of discussion in judicial cognition, in this case we are faced with a type of judicial cognition which consists in a passive acceptance of the findings of fact (assertions on a given fragment of reality) originating with both parties, their joint ones so to speak, as grounds for a decision. The conduct of the trial parties in each cognition trend is thus completely different. Significantly, in the consensual trend, one can hardly find any discussion between the trial parties, which is after all the essence of the adversarial system. On what is then the court, rendering a decision, supposed to base its conviction about the truth of the facts presented by the parties? Indeed, it does not even avail itself of the discussion between the trial parties. The trend of consensual decision-making, so considerably strengthened in the new criminal trial, relies in fact not on the results of cognition but rather on the consensus of the parties forming its essence. This, in turn, is no longer concerned solely with the sentence, but also with the circumstances of the commission of the offence, hence, with assertions about a certain fragment of reality.

Referring to M. Zieliński's findings, one can see that in judicial cognition, which is a set of conventional acts performed by competent persons or groups of persons and in accordance with a specific procedure, the terms 'legitimate assertion' and 'true assertion' are not one and the same. The former means the same as "an assertion which is obligatorily included among assertions forming the findings of fact on which the judgment is based"²⁴ (trans. – H.P.). In judicial proceedings, a fact described in a legitimate assertion will be considered as subsisting and will be included in the factual grounds of the judgment. It appears that this is the situation one will be faced with once the amendments under discussion enter into force.

3. Cognition and explanation of facts

The change of the paradigm of adjudicating in criminal matters, already noted in the literature²⁵, forces a question about the truth of the event upon which criminal responsibility of the accused is determined.

²⁴ M. Zieliński, op. cit., p. 196.

²⁵ P. Hofmański, S. Waltoś, *Tendencje rozwoju polskiego procesu karnego. Proces karny w XXI wieku*, in: *System prawa karnego procesowego*, t. 1, cz. 1, red. P. Hofmański, Warszawa 2013, p. 400 et seq.

There is an ongoing discussion in the doctrine of criminal law, inspired, among other things by the recent amendments to the law of criminal procedure, whether the principle of objective truth will, or should, be the most important principle in the normative model of a criminal trial.

If one adopts, after M. Zieliński, a view that the judicial cognition model introduces a peculiar and complex conventional paradigm of the validity of statements, taking into account normative, methodological and axiological elements²⁶, it will become clear that the new model of reformatory adjudication in a criminal trial makes no unambiguous reference to the requirement of finding the truth, satisfying itself with substitutes of truth. However, it seems that in the legislator's opinion the new solution that firmly sets in and expands on the trend of consensual adjudication is indeed a way of arriving at a judicial truth, albeit as its concept in the understanding of M. Zieliński and J. Wróblewski²⁷, rather than as understood by the representatives of the doctrine of the law of criminal procedure. Until now, Art. 2 § 1 para. 1 of the CCP has been rather uniformly construed, and its provisions have been understood as intending to shape the criminal proceedings in a way enabling to detect and convict the perpetrator and save the innocent from accountability; while Art. 2 § 2 of the same Code has been interpreted as obliging the parties to a trial to pursue to achieve the above state of art²⁸, so that all decisions delivered in a criminal trial be based on factual fact findings. Also the Constitutional Court (Trybunał Konstytucyjny) supports such interpretation of the principle, recognizing it as an element of the right to trial (Art. 45 of the Constitution)²⁹. However, opinions expressed in the context of the recent amendments being made to the law of criminal procedure, articulate an opinion that Art. 2 § 2 of the CCP does not call for the objective truth but the judicial truth³⁰, which in a certain way approximates the two rather distant views. This is because if one agrees that

²⁶ M. Zieliński, *op. cit.*, p. 197.

²⁷ *Ibidem*; who quotes J. Wróblewski, *Z zagadnień prawdy sądowej*, "Studia Kryminologiczne, Kryminalistyczne i Penitencjarne" 1975, t. 2, p. 23.

²⁸ The expressions „should” was used here within the meaning of a duty of the trial organs to take measures leading to discover facts corresponding to what really happened. Cf. A. Murzynowski, *Istota i zasady procesu karnego*, Warszawa 1994, p. 113 et seq.

²⁹ Cf. B. Nita, A. Świątłowski, *Kontrydktoryjny proces karny (między prawdą materialną a szybkością postępowania)*, "Państwo i Prawo" 2012, z. 1, p. 36 et seq.; The Constitution of the Republic of Poland of 2 IV 1997 (J.L. 1997 No. 78, item 483 as amended).

³⁰ See P. Kardas, *Projektowany model obrony z urzędu a zasada prawdy materialnej*, "Palestra" 2013, nr 5–6, p. 20.

what is being sought in a criminal trial is judicial truth established based on the application of a conventional system of evidentiary rules by which the court as a determinative fact-finder as well as the parties to the trial are bound, one will clearly see that this judicial truth, till date identified with formal truth (opposite to objective truth) is in fact nothing else but the truth, the establishment (detection) of which provides the court with grounds for adjudication. It may also be worthy a note that the principle of objective truth extends on reformatory adjudication as well as formal adjudication, and does not reduce the requirement of finding facts to serve as grounds for adjudication to the sentencing only (since the finding of facts is also required in the case of “any” decision, ruling or disposition).

On the theoretical plane, there exists a view that the above perception of judicial truth is not in contradiction to the possibility of implementing the objective truth principle. The latter is understood by the theorists of law as an order addressed to the bodies which apply law, obliging them to exercise due diligence to find facts that will be corresponding with the truth³¹. Although these deliberations are focused on judicial cognition, i.e. a proceeding at the jurisdictional stage that constitutes the central and basic element of the cognitive activity performed by judiciary bodies³² (which is at the same time the ultimate and binding cognition), in the new model of a criminal trial, actions leading to cognition will also be taken by organs which conduct preparatory proceedings, who, based on the results determined will decide whether to lodge a complaint (and if so, which one), and thus initiate the cognitive activity (stage), or not³³. Irrespective of which complaint will initiate the proceedings before court, though, the very judicial cognition cannot be a copy, or repetition of the way already made by the prosecution (or the reconstruction of the cognition process carried out during the preparatory proceeding)³⁴.

³¹ S. Wronkowska, M. Zieliński, Z. Ziemiński, *Zasady prawa. Zagadnienia podstawowe*, Warszawa 1974, p. 179.

³² M. Zieliński, *op. cit.*, s. 19.

³³ Art. 297 § 1 para. 5 of the Code of Criminal Procedure determines new tasks to be undertaken by the organs conducting preparatory proceedings such as collection and preservation of evidence in a durable form. This can be related to judicial cognition inasmuch that the durable form of evidence will be capable of being used indirectly (by reading out protocols) to confirm the grounds for a claim or complaint or to discontinue proceedings, as well as to put forward a motion requesting permission to use the collected evidence for presentation in the court.

³⁴ A totally different issue is a possibility of discovering, collecting and putting evidence into durable form in the course of preparatory proceedings, which should be related to judicial cognition inasmuch as the evidence in durable form and such evidence may

This is not only because courts are independent bodies in fact finding, but results from the new contradictory (adversarial) model of the main trial provided for in Art. 167 of the CCP.

Thus, passing on to the contradictory, or adversarial manner of cognition in criminal law (the symbolism of which is a new content of Art. 167 of the CCP), the distinctness of this model in relation to the consensual reformatory adjudication must be emphasized. This distinctiveness is not only the effect of participation in the trial parties acting as entities participating in the judicial cognition, who take over the evidentiary initiative, or the changed position of the court which is now to act as an independent arbitrator resolving the dispute between the parties. The change of the paradigm is connected among other things with the change in the access to information on facts and a new approach to the requirement of directness in the evidentiary proceedings.

4. Resource basis and its limitations

Describing the judicial cognition process, M. Zieliński drew attention to the determination and explanation of facts as an element of the process. Among the detailed cognition directives which he formulated, those especially noteworthy in the context of the amendments to the law of criminal procedure are directives referring to the building of a 'source base' i.e. the set of sources from which information about facts of our interest can be obtained³⁵.

Firstly, what needs to be noted is a statutory restriction of the accessibility of certain sources of cognition, i.e. the possibility of accessing them in the criminal trial. A few words of explanation are necessary here due to the amendments which the legislator has introduced in the criminal proceeding. First, however, it is worthwhile to recall that in judicial cognition, a dynamic access to the source³⁶ is overridden by a tetic possibility arising from the existence of binding legal norms which may eliminate some of the available sources with information on facts. This was emphasised by M. Zieliński who stated that "a legislator has a legally binding possibility of eliminating certain sources of cognition, even

subsequently be indirectly used (by reading out the protocol) for the building of a basis for the adjudication in the matter by court.

³⁵ M. Zieliński, *op. cit.*, p. 175 et seq.

³⁶ The author understands by that the accessibility to sources.

those available [...] from the set constituting someone's source base, also having no account for them in such a manner that having taken them into consideration might entail an accusation formulated by the audit bodies and consequently lead to setting aside a judicial decision whose actual state has been established, among other things, based on inadmissible cognition sources"³⁷ (trans. – H.P.).

Regarding the restrictions in the use of the source base, a new regulation should be noted, inserted to the Code of Criminal Procedure as an amendment of September 2013, namely Art. 168a of the CCP which provides a list of sources of information about facts that are not allowed. The normative approach to this prohibition is not perfect, which means that it will create doubts when it comes to practice, however, reading its literally one notices that a peculiarly approached prohibition has been introduced, regarding evidence obtained unlawfully, or more specifically, through the use of a prohibited act. The significance of this specific directive which shapes the process of judicial cognition is quite considerable. Its provision applies equally to the counsel for the defence, the suspect, the accused, the attorney of the accused, the prosecutor, as well as all other public organs performing whichever acts related to the trial as well as those outside the trial, i.e. acts which consist in an operational activity (cognitive activity) aimed at obtaining evidence³⁸. A change in the model of court proceeding and moving, in line with the contradictory trend, of the process of building the actual basis for adjudication into the hands of the trial parties means that those parties will be able to obtain and present to court information about facts (evidence) originating from different sources. However, where such evidence has been unlawfully obtained, it will be rendered inadmissible, and be eliminated as the court is not allowed to make use of such evidence. The regulation of Art. 168a of the CCP does not provide by statute for the prohibition of undertaking unlawful measures aimed at obtaining evidence needed in a trial process, but merely provides that such measures or actions taken are, by operation of the law ineffective as the evidence obtained through their application will be inadmissible and impossible to be used in the trial. It is also worth noting that this provision applies to both sides (parties), i.e. also the

³⁷ *Ibidem*, p. 176.

³⁸ Cf. P. Kardas, *Głos w dyskusji. Konferencja: Rola i zadania prokuratora w znowelizowanej procedurze karnej. Panel II Wpływ kontradiktoryjnego modelu rozprawy głównej na postępowanie przygotowawcze*, "Prokuratura i Prawo" 2015, nr 1–2, p. 226.

public prosecutor who, when collecting evidence for its presentation in court will also be obliged to use only that, obtained "legally". Another problem connected with the 'source' base, important for the process of its creation, is the regulation regarding the possibility of indirect recognition of fact. It should be explained here that in a criminal trial this is not about the possibility of using in the cognition process of indirect evidence (i.e. *prima facie* evidence) but about the method of evidencing as described in the doctrine of criminal law with the use of the principle of directness³⁹.

The principle of directness, despite the lack of a clear statutory definition has been and still is (also after the amendments to the CCP) seen as a principle shaping the evidentiary process in a criminal proceeding. An important element serving to describe this principle is a reference to its limitations rather than contents. This is a characteristic and, indeed traditional for Polish literature, approach to the principle of directness which is identified and described by pointing to its limitations.

It is understandable that while selecting a model of a criminal process and shaping the normative model of judicial cognition, the legislator did not adopt the principle of directness for the conducting of the evidencing process. It would not be justified to create the basis for adjudication by determination of facts obtained thanks to derivative proof. It would also be doubtful to attempt to reach the truth based on such methods of evidencing which do not foresee a direct contact of a given organ with the source of proof, or which prefer some other indirect links between the trial (process) organ and the fact being proved. This, however, does not mean that in the shaping of a model of criminal proceeding, solutions that constitute a justified derogation from directness understood as an obligation to make use of primary evidence and to eliminate all indirect links in the process of creating the evidentiary basis for adjudication cannot be employed.

Already at the time when the Code of Criminal Procedure of 1928 was binding as well as during the time when the Code of Criminal Procedure of 1969 was in force, derogations from the principle of directness were foreseen. The reasons that underlay this principle varied at different times when individual respective acts governing that principle applied, but in each case the dominating rule was that derogation was possible

³⁹ H. Paluszkiwicz, *Zasada bezpośredniości*, in: *System Prawa Karnego Procesowego*, t. 3, cz. 2, red. P. Hofmański, Warszawa 2013, p. 1005–1119.

or allowable only in strictly determined events and only where primary evidence was non-existent or not available for the court as a fact-finder. The circumstances that are today identified as limiting the principle of directness⁴⁰, are being currently supplemented also with circumstances relating to the new model of cognition of criminal matters (here referred to as the consensual trend of adjudication). Thus in the new model of an evidentiary proceeding conducted in the confrontational, adversarial manner as outlined in Art. 167 of the CCP and the new wording of Articles 389, 391, 393 and 394 of the CCP, the directives on the collecting as well as using the source base acquire a new meaning. What is worth mentioning here is a considerable weakening in the new model of the directive of judicial cognition postulating the use of primary information only (understood by M. Zieliński as a directive requesting exclusion from the data base of the secondary empirical information or, at least, securing priority to the primary information. The limitation of the principle of directness, on grounds of different circumstances including the non-articulated improvement or simplification of the criminal process (trial) has become, in the new normative model of judicial cognition, a binding directive.

5. Justification of statements of facts

Finally, one more issue needs to be added. Its importance has already been stressed by M. Zieliński when he wrote about the directives determining the justification of the statements of the facts. Judicial cognition, as well as scientific cognition, is connected with a duty and a defined need to substantiate statements made in the process of cognition. What is important here is the intra-subjective communication and control(ability) of statements (the knowledge acquired) and the subject involved in judicial cognition⁴¹. This extraordinarily interesting and complex problem will only be signalled here, and only in connection with the change in

⁴⁰ These are circumstances such as: disposing of evidence which by its very nature is derivative (e.g. an opinion of an independent expert), or in an event of non-availability of the primary evidence (e.g. the witness has passed away), or the impossibility of conducting an evidentiary process despite the fact that it exists (e.g. the witness does not remember), or the need to check or complete the evidence (e.g. there are inconsistencies in explanations), or an improvement of the criminal process, a need to protect a justified interest of a given participant of the process.

⁴¹ M. Zieliński, *op. cit.*, p. 130 et seq.

the wording of Art. 424 § 1 of the CCP⁴². In the descriptive layer of that provision the change in it seems to be of little significance. However, for the statutory model of judicial cognition whose structural element is the justifiability of the statements formulated by the cognition organ, this change seems to be of significant importance. Following M. Zieliński's view⁴³ that the rationale of a verdict covers not only the justification of the statements adopted as elements, i.e. the factual grounds for adjudication (verdict) and arguments which, in the opinion of the court as a determinative fact-finder, speak for accepting those statements, but also arguments quashing all contradictory arguments and the explanation of the legal grounds for the resolution of the matter, it must be noted that the obligation to provide reasons for the verdict does indeed mean formulation (making) and presentation of the justification of statements considered (accepted) by the court true. This does not apply only to the basic factual statements constituting the ultimate basis for resolving the matter but equally, to all other statements, and in particular to those justifying the final one (if that one was the subject of 'evidencing'). Leaving aside the fact that the legislator foresees situations in which the court may be released from the obligation to provide reasons for the decision (verdict), it must be emphasised, in the context of the amended law, that the court is released from the obligation to provide full explanation (reasons) underlying its decision. Such a regulation was already adopted earlier with regards adjudicating in the consensual mode, where it allowed to reduce the reasons for a decision to merely explaining the legal grounds and the verdict arrived at. In the doctrine, such a solution is regarded reasonable because a verdict in a consensual version is achieved as a result of a consensus reached with the accused. However, although the court is not, as a determinative fact-finder, released from the obligation to conduct a cognition process in any of the versions of reformatory adjudicating⁴⁴, as provided in directives applicable to it, it still may, as can be seen, significantly limit the extent of the justification of its statements. What the legislator requires, is that the reasons stated are concise. Such formulation of the requirement (concise) considered

⁴² Art. 424 of the CCP has been amended by the Act of 28 November 2014 on the protection and assistance to the victim and the witness (J.L. 2015, item 21) in force as of 8 April 2015.

⁴³ M. Zieliński, *op. cit.*, p. 135 et seq.

⁴⁴ Even in the consensual mode of adjudicating the court comes across, to a limited extent, evidence presented by the parties.

as a kind of a general clause⁴⁵ creates some doubts whether the postulate of intersubjective communicativeness and controllability of statements upon which the verdict has been made (and this postulate is an intrinsic element of judicial cognition) has been satisfied⁴⁶.

Conclusions

M. Zieliński's work *Poznanie sądowe a poznanie naukowe* is an ordered entirety. In an ideally methodological manner, the author leads the reader through the complexity of the matter analysed, pointing out to similarities, but first and foremost identifying the differences between judicial and scientific cognition. The deliberations presented in this paper, for which Zieliński's work was an obvious inspiration and point of reference, were not conducted in a manner compatible to M. Zieliński's conception of reasoning. The reason for that was not only the intended character of this paper, but also the desire to highlight in it only those new solutions introduced to the Polish law of criminal procedure, which, as an element of a broadly understood judicial cognition, may be supported by, or at least referred to, some of the theses formulated by M. Zieliński.

SZKIC O POZNANIU SĄDOWYM. KRAJOBRAZ PO NOWELIZACJI KODEKSU POSTĘPOWANIA KARNEGO

Streszczenie

Rozważania zawarte w artykule, inspirowane nowelizacją prawa karnego procesowego, prowadzone są w nawiązaniu do ustaleń prof. Macieja Zielińskiego (*Poznanie sądowe a poznanie naukowe*, Poznań 1979). Odwzorowany z nowych przepisów model normatywny poznania sądowego w sprawach karnych, oparty na zasadzie skargowości, kontradiktoryjności i prawdy materialnej, akcentuje obowiązki stron w zakresie aktywności dowodowej i jednocześnie ogranicza sąd w zakresie inicjatywy dowodowej. Przedmiotem tego poznania jest fragment rzeczywistości, a jego

⁴⁵ For more see T. Zieliński, *Klauzule generalne w procesie karnym*, in: *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia*, red. J. Czapska i in., Warszawa 2000, p. 784.

⁴⁶ The provision of Art. 424 of the CCP applies to other decisions as well, therefore the problem of a "concise" rationale seems of somewhat wider application, especially because Art. 425 § 2 of the CCP provides for a possibility of challenging the rationale of a given verdict.

granice są wyznaczone przez obie strony procesowe (podmioty poznawcze), nie zaś jedynie przez oskarżyciela. Model poznania sądowego występuje w dwóch wersjach – w procesie konfrontacyjnym i konsensualnym. Pierwszy to nurt procesu poznawczego, w którym dochodzi (w ramach procesu kontradiktoryjnego, podczas rozprawy) do starcia się przeciwstawnych argumentacji stron procesowych. To model poznania sądowego, w którym sąd jako podmiot poznający ocenia argumenty i twierdzenia o badanym fragmencie rzeczywistości przedstawione przez obie strony postępowania. W nurcie konsensualnym sąd jest podmiotem poznającym, lecz proces poznawczy ograniczony jest do poznania przez sąd twierdzeń stron procesowych, które dotyczą wskazanego przez nie fragmentu rzeczywistości. Jest to typ poznania sądowego polegający na biernym przyjęciu za podstawę rozstrzygnięcia ustaleń faktycznych (twierdzeń o danym wycinku rzeczywistości) pochodzących od obu stron (ich wspólnych). Nurt konsensualnego orzekania opiera się nie na wynikach poznania, lecz na stanowiącym jego istotę konsensusie stron dotyczącym rodzaju i wymiaru kary oraz okoliczności popełnienia czynu. W takim dominującym po nowelizacji modelu poznania sądowego fakt opisany w twierdzeniu zasadnym (co nie znaczy prawdziwym) będzie uznawany w postępowaniu sądowym za istniejący i zostanie włączony do podstawy faktycznej wyroku.

Słowa kluczowe: poznanie sądowe w procesie karnym – model poznania sądowego – podmiot poznawczy – proces konfrontacyjny – proces konsensualny