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DEVELOPMENT OF THE INSTITUTION OF COURT PROCEEDINGS DURING THE FIRST INSTANCE MAIN HEARING

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1.

A trial is the most important part of the main hearing[1] before a first instance court, which should be associated with the fact that it is this part of court proceedings where evidence is examined in order to establish the truth concerning a criminal case brought before the court by a competent prosecutor. Both, inter-war doctrine representatives and contemporary authors noticed that.[2] In the period when the Criminal Procedure Code of 1928 (CPC) was in force, according to L. Peiper,[3] the trial was composed of the reading of an indictment, the statement made by the accused and the further hearing of evidence. The above-mentioned reading of the indictment for a long time used to be a point of reference which established precisely the moment of the initial part of the trial within the first instance hearing. A. Mogilnicki recognised only this part of the trial as "an indispensable component", which a court did not have the right to abandon even with the consent of the parties,[4] and S. Glaser classified as activities typical of the course of the first instance hearing.[5] In K. Marszał's

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1 The adjective "main" used to refer to hearing before a first instance court is to distinguish this type of hearing from the hearing in appellate or cassation proceedings; compare, S. Śliwiński, *Proces karny. Przebieg procesu i postępowanie wykonawcze* [Criminal proceedings: course of a trial and executive procedure], Warsaw 1948, p. 57.

2 See, inter alia, W. Jasiński, [in:] K.T. Boratyńska, Ł. Chojniak, W. Jasiński, *Postępowanie karne* [Criminal procedure], Warsaw 2013, p. 300.

3 L. Peiper, *Komentarz do kodeksu postępowania karnego* [Commentary on the Criminal Procedure Code], Kraków 1933, p. 500.

4 A. Mogilnicki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Kraków 1933, p. 625.

5 S. Glaser, *Polski proces karny w zarysie* [Outline of Polish criminal proceedings], Kraków 1934, p. 256.

opinion, the reading of the indictment constituted a stage of a trial which he treated as a sub-stage of the hearing.[6]

Until 1 July 2015, the first instance hearing used to start with the reading of an indictment. This was laid down in the provisions of the successive Criminal Procedure Codes, i.e. Article 333 CPC of 1928, Article 332 §1 CPC of 1969 and Article 385 §1 CPC of 1997 in the wording from before the reform of September 2013. After the September amendment entered into force, "a concise presentation of charges" substituted the reading of the indictment. Despite the changes that took place in this area, this part of the first instance hearing, regardless of the way of presenting the stand of the public prosecution representative, remains – what E. Kruk rightly notices in the doctrine – "an important point in a trial" serving "to highlight its adversarial and contradictory character".[7] Both activities, i.e. the reading of an indictment and the presentation of charges can be analysed as the maintenance of the prosecutor's stand expressed earlier in his written application and, consequently, its further support in the proceedings.

As S. Kalinowski rightly states, a trial starts with the moment of "starting to read an indictment" not with the moment of finishing it,[8] which at present should also concern the presentation of charges. T. Grzegorczyk also believes that a trial starts with the reading of an indictment not after this activity, which means that the beginning of it also means the beginning of a trial.[9] Therefore, the reading of an indictment as well as the current presentation of charges are both activities performed in the course of a trial, not just before it, within the first stage of the first instance hearing (Chapter 44 CPC of 1997), which is confirmed by the statutory system and the placement of Article 385 in Chapter 45 CPC, instead of Chapter 44 CPC.

2.

Neither the reading of the indictment nor the presentation of charges takes place during the sittings, even if they were sessions where a court may adjudicate (*vide*: Article 341 CPC, Article 343 in connection with Article 335 §1 or §2 CPC, Article 343a §1 in connection with Article 339 §3a and Article 338a CPC of 1997). Before 1 July 2015, there was no need to read an indictment again in case of the extension of charges during the proceedings by a prosecutor acting in accordance with Article 398 CPC, i.e. when, based on circumstances that were revealed in the course of a trial, there was a possibility of charging the accused, with his consent, with "another act apart from the one listed in the indictment", and there was no need to conduct preparatory proceedings concerning

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6 K. Marszał, *Proces karny* [Criminal proceedings], Katowice 1997, p. 371.

7 E. Kruk, *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżania uprawnionego oskarżyciela w polskim procesie karnym* [Indictment as the implementation of an authorised prosecutor's right to prosecute under the Polish criminal law], Wydawnictwo UMCS, Lublin 2016, p. 225.

8 S. Kalinowski, *Postępowanie karne. Zarys części szczególnej* [Criminal procedure: outline of special part], PWN, Warsaw 1964, p. 178.

9 T. Grzegorczyk, *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz* [Criminal Procedure Code and Act on turning the state's evidence: Commentary], Wolters Kluwer, Warsaw 2008, p. 814.

that act (§1). The reading was useless in the face of the fact that a court proceeded based on a verbal charge formulated by a prosecutor in the course of the hearing in the presence of the accused. The accused not only accepted the state of affairs but could also get acquainted with the charge at the moment of its recording in the minutes, which should take place "in a possibly detailed way" as laid down in Article 148 §2 first sentence CPC with the maintenance of the right of the accused to demand its recording in a more detailed way ("in full detail") because it was a matter undoubtedly concerning his "rights and interests" (Article 148 §2 second sentence CPC).[10] In such a situation, there was also no need to read an indictment again because the act remained unchanged. In the past, however, the legislator decided that there was no need to read an indictment again also in case of filing "a new or additional indictment" by a prosecutor, which took place when the hearing was adjourned. The adjournment of a hearing made a verbal extension of charges in accordance with Article 398 §1 CPC impossible. As a result, in the face of revealing new circumstances being grounds for the extension of the accusation with a charge of another act, a prosecutor had to file an "additional" or "new" indictment in accordance with Article 398 §2 CPC, maintaining the possibility of choosing one of the two forms. In the literature, attention is drawn to the fact that an "additional" indictment should cover only the extended charge, not charges listed in the original indictment. On the other hand, a "new" indictment should accumulate all charges, i.e. the former and the extended ones.[11] Although both indictments, i.e. "additional" and "new" ones, were supervised in accordance with Chapter 40 CPC of 1997,[12] none of them was subject to additional promulgation during the hearing, which was possible and necessary due to their innovative character and the functions of activities in accordance with Article 385 §1 CPC.

Also after 1 July 2015, it has not been envisaged to present charges of one of the indictments filed in accordance with Article 398 §2 CPC in a way indicated in the amended Article 385 §1 CPC. It would be possible, however, with a simultaneous reservation that the activity would not require to re-start court proceedings that started earlier with the presentation of charges listed in the original indictment now substituted (the "new" one) or extended (the "additional" one). All those who doubt whether such a presentation of a new charge is necessary in case of a delivery of an indictment to the accused in accordance with Article 398 §2 CPC with a result from Article 353 §2 CPC should be reminded that also an original indictment must be delivered, which is not in conflict with the presentation of its charges at the beginning of the hearing. Thanks to that, one of the elements of the principle of openness in its external aspect is observed. Only charges laid down in Article 398 §1 CPC are made public. The legislator, however, does not call their verbal presentation during the hearing a "presentation of charges" and does not require that a prosecutor should be "concise".

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[10] *Ibid.*, p. 241.

[11] *Ibid.*, p. 243.

[12] F. Prusak, *Komentarz do kodeksu postępowania karnego* [Commentary on the Criminal Procedure Code], Vol. I, Wydawnictwo Prawnicze, Warsaw 1999, p. 1073.

3.

The activity laid down in Article 385 §1 CPC of 1997 starts a trial not only at the first instance hearing but also when the hearing is conducted again after its adjournment (Article 404 §2 first sentence CPC), after overrunning the deadline for the adjournment of issuing a sentence (Article 411 §2 CPC) and after a reversal and remanding a matter by an appellate court to a lower-level one for further consideration (Article 442 CPC).[13] The reading of an indictment concerned the whole indictment with the exception of the elements referring to technical aspects connected with summoning witnesses or expert witnesses and a list of evidence to be revealed. It was necessary to read this part of an indictment that allowed identification of a prosecutor and the accused as well as determination of charges and their legal classification. The presentation of charges, on the other hand, is an oral quotation of data concerning the accused and acts he/she is accused of from the perspective of facts and norms.

4.

The reading of an indictment or the presentation of charges in the face of a delivery of a copy[14] of the indictment to the accused (Article 338 §1 CPC) might seem a useless element of court proceedings. However, it is not so, because thanks to the presentation of the accusation, a court is ascertained that the content of the accusation, at least from that moment, becomes known to the accused, which is an obligatory condition for effective defence. Also openness of proceedings requires that this part of a trial remains. Only this way, may the public gathered in a courtroom learn what the subject to consideration is and the prosecutor's oral statement strengthens his position and emphasises his prosecuting role.[15] Undoubtedly, the prior delivery of a copy of the indictment to the accused was one of the arguments for giving up its reading and introducing the presentation of charges to substitute for it.[16]

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[13] L.K. Paprzycki, [in:] J. Grajewski, L.K. Paprzycki, M. Płachta, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. I, Kraków 2003, p. 954.

[14] A public prosecutor is obliged to attach to the indictment "one copy of this act for each accused, and in a case laid down in Article 335 §2 [CPC] also for each aggrieved"– Article 334 §2(2) CPC. In case the accused does not have "sufficient" competence in Polish, such an act shall be translated into the language the accused knows – compare Article 72 §3 CPC.

[15] S. Kalinowski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, M. Mazur (ed.), H. Kempisty, M. Siewierski, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 1976, p. 452. Similarly R.A. Stefański, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński (ed.), S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. II, Warsaw 2004, p. 683.

[16] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz do art. 1–467* [Criminal Procedure Code: Commentary on Art. 1–467], Vol. I, Wolters Kluwer, Warsaw 2014, p. 1287.

5.

The binding provision of Article 385 §1 CPC of 1997 clearly indicates who is responsible for the presentation of accusation during the first instance main hearing, which was not laid down in Article 333 of the pre-war CPC. As a result, there was a situation in which either a presiding judge or another judge, or even a recording clerk read an indictment,[17] which S. Śliwiński considers to be the result of the document being at a court's disposal. The present legislator to some extent copies the solution of Article 332 §2 CPC of 1969 but uses a more adequate term "counsel for the prosecution" instead of the term "prosecutor", which does not match the procedural status of a person presenting accusation before court. The above-mentioned Article 332 §2 CPC of 1969 made it necessary to read a prosecutor's indictment abandoning this rule "in another case", which should be understood as a situation when a prosecutor did not take part in the hearing. In such a case, the reading of an indictment was the responsibility of "a presiding judge or one of the other members of the bench", however, the choice of one of them was left to their discretion because the legislator did not make any reservations regarding this matter, and the order in which they were listed was not indicative. The reading of the indictment by one of the judges constituted an admissible alternative only when it was possible to conduct a hearing without a public prosecutor's presence.

The introduction of a principle to Article 385 §1 CPC that first a prosecutor used to read an indictment and now he presents charges without indicating that it concerns only a public prosecutor causes that, depending on the mode of the proceedings, this rule may be applied to any other counsels for the prosecution, including an auxiliary (subsidiary) prosecutor or a private prosecutor.[18] L.K. Paprzycki notes that, despite the lack of a clear norm, an agent (proxy) of the auxiliary prosecutor or a private prosecutor may perform this activity based on the granted power of attorney.[19] T. Grzegorczyk also approves of the opinion because in such a case an agent does not act on his behalf but on behalf of this power grantor.[20]

Although most prosecutors perfectly know that after calling the case before the court and checking the balance of persons and assets, there is time to present charges, they cannot start this activity until a presiding judge rules that, which is one of the indicators of his role to manage the hearing and all the procedural activities in the course of it (Article 366 §1 in connection with Article 372 CPC).

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[17] Frankly speaking, the author also admitted a possibility of reading of the indictment by a public prosecutor, however, he considered this from the perspective of infringement of provisions, classifying it within a group of "irrelevant" departures from procedural rules binding in the area. See, S. Śliwiński, *Proces karny...* [Criminal proceedings...], p. 61.

[18] L.K. Paprzycki, [in:] J. Grajewski et al., *Kodeks postępowania...* [Criminal Procedure...], p. 954. Similarly P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz do art. 297–467* [Criminal Procedure Code: Commentary on Art. 297–467], Vol. II, C.H. Beck, Warsaw 2007, p. 432.

[19] *Ibid*.

[20] T. Grzegorczyk, *Kodeks postępowania karnego...* [Criminal Procedure Code...], Warsaw 2008, p. 815.

Despite the discretionary power of the body, it is not possible to imagine a situation where a presiding judge does not decide to let a prosecutor present the accusation in an appropriate moment of the hearing.

6.

M. Marszał notices that the reading of an indictment constitutes one of the possible solutions to the presentation of accusation in the course of the hearing.[21] A verbal presentation is a form competitive to it and, as this author notes, is connected with the risk of *a priori* imposing an accusation thesis on a court before it gets acquainted with facts, which depends on powers of persuasion and eloquence of the person presenting an accusation.[22] The Polish legislator responded to this risk on 1 July 2015. The criticism of the former solution – as excessively formal and conducive to excessive length of this early stage of the court proceedings – led to substituting the presentation of charges with the reading of an indictment, provided that the activity cannot be abandoned. The amendment of September 2013 assumed that this stage of the hearing would be improved, which is manifested in the directive that the presentation of charges should be "concise". This requirement was not expressed in relation to a prosecutor reading an indictment at the beginning of a trial because it was the representation of a written form, which could not be shortened. This does not mean that similar attempts to accelerate the activities of the initial stage of the court proceedings had not been made before. The latest were undoubtedly: the consent to give up reading of the justification for an indictment and to quote the most important grounds for the accusation laid down in Article 332 §2 second sentence CPC of 1969 and the original version of Article 385 §2 CPC of 1997. While Article 332 §2 second sentence CPC of 1969 allowed such an operation in connection with every justification, Article 385 §2 CPC of 1997 in the wording laid down in the Act of 10 January 2003 diversified the situation depending on the volume of this justification. As a rule, every type of reading could be skipped but only in case of "especially extensive" justifications it was not necessary to obtain the "consent of the parties present". However, in case of other (not extensive[23]) justifications, consent was necessary in order to omit its reading. The measure used by the legislator in Article 385 §2 CPC in connection with the consent to abandon reading the justification for an indictment was "special extent" of the document and not the level of the matter complexity, which made it possible to practically specify the volume as over "a few dozen (at least thirty) pages of typescript".[24]

In both cases, the abandonment of reading the justification was facultative in character and "the presentation of grounds for accusation" substituted for the unread

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[21] K. Marszał, *Proces...* [Criminal...], p. 371–372.

[22] *Ibid.*

[23] Also called "typical", see P. Piszczek, [in:] B. Bieńkowska, P. Kruszyński (ed.), C. Kulesza, P. Piszczek, *Wykład prawa karnego procesowego* [Lecture on criminal procedural law], Białystok 2003, p. 369.

[24] *Ibid*., p. 955.

justification. The Act did not allow, however, for the limitation of the presentation of grounds for accusation to those "most important".[25] The characteristic feature of the solution under Article 332 §2 second sentence CPC of 1969, apart from the possibility of non-reading of every item of justification for an indictment criticised in the doctrine,[26] was that a prosecutor alone made the adequate decision and a court was deprived of the influence on the form of presentation of this part of the accusation chosen by him, although, as S. Kalinowski noticed, the reading of the justification, because of its descriptive character, was important mainly for the public gathered in court.[27] A prosecutor's discretion and a lack of need for consulting it with a court and the other parties resulted in doubts about the right of the accused to demand that a prosecutor read the full justification of an indictment or at least some of its fragments, which M. Marszał approved of,[28] and R.A. Stefański questioned[29].

Both weaknesses were to some extent resolved in Article 385 §2 CPC of 1997 in the wording of the amendment of 10 January 2003. Although the provision still did not determine who would be to make a decision on using the envisaged possibility, it might be thought that it could not be the same party to the criminal proceedings who had the right to give consent to or deny it. Inclusion of a prosecutor among the parties specified in Article 385 §2 CPC deprived him of the possibility of deciding on the application of the simplified mode of presenting the accusation also where the justification was "especially extensive". In the light of this solution, L.K. Paprzycki notices that "the presentation of grounds for accusation" is nothing else but "indication, in a verbal address, of the most important facts (circumstances) concerning an act a perpetrator is charged with in the indictment and basic evidence confirming a prosecutor's findings concerning the act and its legal classification".[30] In this state of facts, also the opinion that quoting the grounds for accusation cannot cover evidence and arguments not listed in the written justification for an indictment was valid.[31] T. Grzegorczyk, on the other hand, demanded safeguarding the interest of the persons present in the courtroom expressed in "adequate informing [them] about the content of the accusation and evidence that constitutes grounds" for the accusation.[32]

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[25] P. Hofmański (ed.) et al., *Kodeks postępowania...* [Criminal Procedure Code...], p. 433.

[26] There was a proposal to limit such an opportunity in practice and not include cases legally and factually complicated. Compare, S. Kalinowski, *Rozprawa główna w polskim procesie karnym* [Main hearing in the Polish criminal procedure], Wydawnictwo Prawnicze, Warsaw 1975, p. 113.

[27] S. Kalinowski, *Postępowanie karne...* [Criminal procedure...], p. 179.

[28] K. Marszał, *Prawo karne procesowe* [Criminal procedure law], PWN, Warsaw 1988, p. 429.

[29] R.A. Stefański, *Prokurator w postępowaniu karnym przed sądem I instancji* [A prosecutor in criminal proceedings before the first instance court], Prokuratura i Prawo No. 1, Warsaw 1997, p. 52.

[30] L.K. Paprzycki, [in:] J. Grajewski et al., *Kodeks postępowania...* [Criminal Procedure...], p. 954.

[31] R.A. Stefański, *Prokurator...* [A prosecutor...], p. 51.

[32] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal procedure], LexisNexis, Warsaw 2005, p. 711.

7.

Presentation of charges in accordance with Article 385 §1 CPC should be made in a "concise" form. A presiding judge may, within his powers, call to order an excessively eloquent prosecutor if this is the only possible way to implement the "conciseness" of the presentation. This does not mean, however, constant interference in his speech or depriving him of the right to speak. The call for "conciseness" concerns "charges", which means that it must be an element of the accusation and all charges. Striving for "conciseness" in the presentation of the accusation, one cannot omit any charges, even those least serious, because the Act does not provide any grounds for doing that nor does it give grounds for the abandonment of activities under Article 385 §1 CPC, even with the consent of the parties. In the face of the obligation to deliver a copy of the indictment to the accused (Article 338 §1 CPC), a "concise" way of presenting charges cannot be recognised as a form that is in conflict with Article 6(3a) ECHR, which requires that the accused be informed about the accusation "in detail".

Informing about the accusation in detail means the necessity to notify the accused of the grounds for the accusation, i.e. "material facts alleged against him which are at the basis of the accusation" and about the nature of the accusation, i.e. "the legal qualification of these material facts". The Strasbourg authorities recognise this information as "an essential prerequisite" for fair criminal proceedings.[33] A trial must be limited only to persons and acts contained in the accusation, which results from the initiation- and programme-related function of the indictment.[34] However, attention should not be drawn to small differences between orally presented charges (Article 385 §1 CPC) and the indictment (Article 332 §1 CPC) because the content of the latter has a decisive importance. It is where the act the accused is charged with and its legal classification are specified in a "thorough" way (Article 332 §1(2) CPC), which is a synonym of the term "in detail" as used in the Convention.[35]

8.

E. Kruk also notices the changes introduced to Article 385 §1 CPC in 2015, recognising that they were caused by the change of the model of the hearing.[36] Although the author does not define what change she means, it seems that Article 385 CPC in the shape of the regulation from the September amendment was to contribute to the increase of the first instance hearing contradictoriness as well as the strengthening of

[33] ECtHR judgement of 25 July 2000 in the case *Mattoccia v. Italy*, Application No. 23969/94, LEX No. 76748.

[34] M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Polish criminal procedure: basic theoretical assumptions], Warsaw 1984, p. 282.

[35] P.K. Sowiński, *Uprawnienia składające się na prawo oskarżonego do obrony. Uwagi na tle czynności oskarżonego oraz organów procesowych* [Entitlements giving the accused the right to defence. Comments based on activities performed by the accused and criminal procedure bodies], Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów 2012, p. 105.

[36] E. Kruk, *Skarga oskarżycielska...* [Indictment as the implementation...], p. 227.

a court's position, which was to take place as a result of discharging it from activities that might have impact on its impartiality. Thus, it was decided to abandon a possibility of presenting accusation *in subsidium* by the members of the bench, although at the stage of work on reforming criminal proceedings, there was a proposal, in connection with the changes resulting in the lack of obligation of a prosecutor's participation in the hearing in public prosecution cases (Article 46 CPC), to assign this task to a recording clerk, which was to be performed in accordance with Article 385 §1 second sentence CPC.[37]

Unfortunately, the legislator returned to the idea of a court's participation in the presentation of accusation assumptions in March 2016. In accordance with a new editorial unit §1a added to Article 385 CPC, a presiding judge, substituting for a prosecutor absent from trial, is to present charges and it also is to be done in a "concise" way. This solution, although allows smooth transition to the next stage of the hearing also in the absence of a prosecutor, makes a judge perform activities that are in conflict with the adjudicating function, which weakens the position of a court and introduces a useless inquisitorial element to this part of the court proceedings.[38] And a separation of the procedural functions is conducive to impartial adjudication.[39] Article 385 §1a CPC is undoubtedly a result of liberalised rules for a public prosecutor's participation in the hearing in cases where the preparatory proceedings finished as an investigation (Article 46 §2 first sentence CPC). Ceding the obligation of concise presentation of charges to a presiding judge in accordance with Article 385 §1a CPC does not match the re-interpretation of the principle of §1 of the same provision, which links the commencement of the first instance hearing with the presentation of charges by a public prosecutor and not by any of the entitled parties to the criminal proceedings, even as subsidiary ones. The above should result in a change of the content of subsequent paragraphs of Article 385 CPC. And thus, the provision should have the following wording: "§1. A court hearing shall start with a concise presentation of accusation charges" and "§1a. A prosecutor shall present charges, and in case he does not participate in the hearing, a presiding judge shall do this".

Undoubtedly, the presentation of prosecution charges in a way laid down in the provision of Article 385 §1 CPC amended on 1 July 2015 better matches a verbal model of the hearing laid down in Article 365 CPC. D. Świecki believes that, because of a general character of the norm laid down in Article 385 §1a CPC, the provision should be also applied in the summary proceedings.[40] As a result, the author calls for repealing Article 517a §2 CPC, stipulating the possibility of "reading the charges" by a reporting clerk, because this way "the inconsistency of the normative solutions

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[37] *Uzasadnienie do projektu nowelizacji k.p.k. w redakcji z kwietnia 2011 r.* [Justification for the Bill amending the Criminal Procedure Code, edited in April 2011], p. 49.

[38] See, T. Grzegorczyk, J. Tylman, *Polskie postępowanie...* [Polish criminal...], p. 710.

[39] W. Jasiński, [in:] P. Wiliński (ed.) et al., *System Prawa Karnego Procesowego. t. III, cz. 2: Zasady procesu karnego* [Criminal procedural law system; Vol. III, part 2: Criminal trial rules], LexisNexis, Warsaw 2014, p. 1214.

[40] D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz do zmian 2016* [Criminal Procedure Code: Commentary on the amendments of 2016], Vol. I to art. 385, Wolters Kluwer, Warsaw 2016.

adopted" in March 2016 would be eliminated.[41] The inconsistency lies in retaining the activity of "reading" prosecution charges in accordance with the summary proceeding rules, while the "presentation" of them substitutes for "reading" in accordance with standard proceeding rules. Even a preliminary analysis of Article 517a §2 CPC convinces us that we really deal with a solution that is some kind of an anachronism and a relic of the time when such "reading" was a rule, regardless of the mode of the proceedings. Still, is the proposed change necessary and possible? Remembering about the reservations I made in connection with the participation of judges in the presentation of prosecution charges, it seems that in case of assigning a reporting clerk a task of presenting prosecution theses, other solutions are excluded because of functional reasons. It is hard to imagine a situation in which a reporting clerk, not knowing the case, can speak about the accusation. As far as this post is concerned, reading is the only possible form of presenting accusation in this specific mode. Taking into consideration the relatively uncomplicated character of conclusions laid down in Article 517d §1 CPC, the activity should not result in the lengthening of the proceedings. The fact that Article 517a §1 CPC refers to the application of the provisions for standard proceedings to summary proceedings also causes that reading charges in accordance with Article 517a §2 *in fine* CPC commences a trial in a case subject to adjudication in accordance with the provisions laid down in Chapter 54a CPC.

9.

The "special importance" of the moment of a court trial commencement[42] is emphasised by the fact that it is an event marking the expiry of some strict procedural time limits. This event differentiates the situation of the aggrieved who desires to withdraw his application for prosecution (Article 12 §3 first sentence CPC), and a public prosecutor who abandons accusation and wants to withdraw the indictment (Article 14 §2 first and second sentence CPC). Moreover, a motion to exclude a judge filed in accordance with Article 41 §1 CPC after the deadline is left without adjudication, unless the reason for exclusion took place or was acknowledged after the date (§2). Only until the commencement of a trial at the first instance hearing in the case where a public prosecutor has filed an indictment, may the aggrieved file a declaration on his will to participate in it as an auxiliary (subsidiary) prosecutor (Article 54 §1 CPC), and in the case where the aggrieved acting as an auxiliary (subsidiary) prosecutor has filed the indictment, another aggrieved may join the pending proceedings (Article 55 §3 CPC). Until that moment, in the case conducted due to a private indictment, another aggrieved as a result of the same act may also join the pending proceedings (Article 59 §2 CPC). In the same proceedings, a private prosecutor does not need to get the consent of the accused to withdraw from accu-

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41 *Ibid*.

42 T. Grzegorczyk, *Kodeks postępowania karnego...* [Criminal Procedure Code...], Warsaw 2014, p. 1286.

sation if the prosecutor files adequate declaration before the trial starts (Article 496 §2 CPC). Until that moment, in the proceedings conducted in that mode, the accused may file a reciprocal indictment concerning the act under the private accusation and being in connection with the act he is charged with (Article 497 §1 CPC). In case the seven-day period between the delivery of a notification of the term of the hearing to the accused or his counsel for the defence and this hearing expires, they may effectively, but only until the activities under Article 385 §1 CPC are initiated, apply for adjournment of this hearing (Article 353 §2 CPC). Recognition that an act the accused committed is a misdemeanour after the commencement of a trial causes that the same bench of a court, not transferring the case to another competent court, continues to hear it in accordance with the Misdemeanour Procedure Code (Article 400 §1 CPC). The commencement of a court trial is, in connection with the occurrence of circumstances laid down in Article 17 §1(1) and (2) CPC, an event separating discontinuance of the proceedings from the acquittal of the accused (Article 414 §1 CPC) and delimiting effective objections to a summary judgement (Article 506 §5 CPC).

10.

It might seem that following a concise presentation of prosecution charges in proceedings based on the principle of contradictoriness, there should also be at least some space for a presentation of a relevant stand of the accused. This does not take place although the provision of Article 338 §2 CPC of 1997 grants this party to the proceedings a possibility of filing a written response to the indictment, which – apart from the response to an appellate measure (Article 428 §2 CPC) – seems to be a manifestation of a broader right to a reply.[43] Although such a reply, due to its facultative nature, is not a necessary element of every criminal proceedings, even where it has been filed, a presiding judge is focused on the information about its content (Article 385 §2 CPC). According to the doctrine, the presentation of information about the content of the reply to an indictment cannot consist in reading the reply *in extensor*, but only in the presentation of the arguments contained in it, which does not exclude citing some fragments.[44] In some sense, it seems to demonstrate the legislator's rather reluctant attitude to this form of a statement made by the accused, and in fact a reply to the indictment gives the accused an opportunity to express his attitude towards the indictment, "preventing one-sidedness of the picture of the proceedings created by this document in the eyes of a court at the starting point of the judicial examination of the case[45]". The Codification Committee working on the reform of 2013 did not do much to increase the importance of a reply to an indictment, although its main assumption was to increase contradictoriness of

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[43] P.K. Sowiński, *Uprawnienia...* [Entitlements...], p. 682.

[44] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Zakamycze, Kraków 2005, p. 942.

[45] R.A. Stefański, [in:] J. Bratoszewski et al., *Kodeks postępowania karnego...* [Criminal Procedure Code...], Vol. I, Warsaw 1998, p. 190 ff.

the first instance hearing, which should result in granting the accused the right to present the most important theses of his/her reply to an indictment or in obliging him/her to submit his/her reply to a court in as many copies as necessary to deliver them to the other parties to the proceedings. Only in such a situation, would maintaining the provision of Article 385 §2 CPC in its present wording make sense as other parties would receive a copy of the reply to an indictment, about which at present a presiding judge just informs.[46]

11.

It is not accidental that not earlier than after a concise presentation of charges at the first instance hearing, a presiding judge addresses[47] a question to the accused whether she/he pleads guilty to an act (Article 386 §1 CPC). In fact, the Act does not specify the kind of act but it seems useless in a situation where the matter of the trial is precisely determined in the prosecutor's accusation.[48] The provisions that are in force now, contrary to Article 332 §1 CPC of 1969, do not require that a presiding judge ask the accused whether she/he has understood the content of the accusation although such an inquiry would be purposeful, especially in the face of the fact that only the accused who understands the accusation can effectively challenge it in the proceedings. From the normative point of view, A. Ważny is not right to state that before continuation of the hearing the accused should declare that "she/he has understood the content of the accusation",[49] because no provision of the CPC of 1997 stipulates such an obligation. As I have mentioned above, if at present judges ask the accused about the level of his/her understanding of the indictment, they do that because they are used to doing it rather than because of an obligation.[50] T. Grzegorczyk is also for asking the accused whether she/he has understood the indictment whenever the issue raises doubts,[51] however, he does not call for an amendment to the provision. On the other hand, according to R.A. Stefański, in case the accused reports any doubts concerning the accusation, a presiding judge should solve the problem "explaining the content of charges to the accused".[52] A chronicler's duty is to remind the furthest reaching solution to this issue laid down in Article 679 of the Russian Act on criminal procedure

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[46] Compare, P.K. Sowiński, *Uprawnienia...* [Entitlements...], p. 690 ff.

[47] From the point of view of the accused and their right to defence, the instruction that they have the right to give evidence and refuse to give evidence or answer questions is also crucial.

[48] Compare the Supreme Court ruling of 13 November 2003, WK 19/03, OSNwSK 1/2003, item 2413.

[49] A. Ważny, *Czy przyznanie się oskarżonego do winy warunkuje stosowanie instytucji określonej w art. 387 k.p.k.?* [Is pleading guilty by the accused a condition for the application of the solution laid down in Article 387 CPC?], Prokuratura i Prawo No. 6, Warsaw 2003, p. 136.

[50] P.K. Sowiński, *Uprawnienia...* [Entitlements...], p. 652.

[51] T. Grzegorczyk, *Kodeks postępowania karnego...* [Criminal Procedure Code...], Warsaw 2008, p. 816.

[52] R.A. Stefański, [in:] J. Bratoszewski et al., *Kodeks postępowania karnego...* [Criminal Procedure Code...], Vol. II, Warsaw 1998, p. 263.

that was temporarily in force on the territory of Congress Poland (Kingdom of Poland), which apart from reading an indictment and a prosecutor's accusation aloud, also assumed additional "summarising of the essence of the accusation" to the accused by a presiding judge.

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DEVELOPMENT OF THE INSTITUTION OF COURT PROCEEDINGS DURING THE FIRST INSTANCE MAIN HEARING

Summary

The paper discusses the development of a part of a trial commencing what is undoubtedly the most important phase of the first instance court hearing. At present, it is the presentation of prosecution charges by the counsel for the prosecution, however, before the amendment of September 2013 to the Criminal Procedure Code came into force, the activity had consisted in the reading of an indictment. The author criticises the possibility of presenting accusation by a member of the bench in case of a prosecutor's absence because it is a solution that is in conflict with the adjudication function and may have a negative impact on the assessment of a court's impartiality. The presentation of accusation is important not only from the point of view of the right of defence of the accused but also from the perspective of the principle of openness, especially in its external aspect. The commencement of a trial alone is an event, which the legislator relates with the passing of deadlines envisaged for some procedural activities. The author discusses the issue of presenting accusation in the context of informing the accused about prosecution charges against him "in detail", which Article 6 (3a) ECHR defines as one of the conditions for a fair trial.

Key words: accusation, indictment, reading of an indictment, presentation of prosecution charges, court's impartiality, contradictoriness and openness of court proceedings, accuracy of accusation, fair trial, prosecutor, the accused, reply to an indictment

KSZTAŁTOWANIE SIĘ INSTYTUCJI ROZPOCZĘCIA PRZEWODU SĄDOWEGO NA PIERWSZOINSTANCYJNEJ ROZPRAWIE GŁÓWNEJ

Streszczenie

Tekst omawia kształtowanie się czynności rozpoczynającej najważniejszą fazę rozprawy głównej przed sądem pierwszej instancji, jaką jest niewątpliwie przewód sądowy. Obecnie czynnością tą jest przedstawienie zarzutów oskarżenia przez oskarżyciela, jednak przed wejściem w życie nowelizacji k.p.k. z września 2013 roku czynność ta polegała na odczytaniu aktu oskarżenia. Krytycznej ocenie poddano możliwość zaprezentowania oskarżenia przez członka składu orzekającego pod nieobecność oskarżyciela, gdyż jest to rozwiązanie niezgodne z funkcją orzekania oraz mogące negatywnie wpływać na ocenę bezstronności sądu. Prezentacja oskarżenia jest ważna nie tylko z punktu widzenia prawa oskarżonego do obrony, lecz również z perspektywy zasady jawności, zwłaszcza w jej zewnętrznym aspekcie. Samo rozpoczęcie przewodu sądowego jest zdarzeniem, z którym ustawodawca wiąże upływ terminów przewidzianych dla dalszych czynności procesowych. Omówiono problematykę prezentacji oskarżenia w kontekście „szczegółowości" przedstawienia zarzutów oskarżenia oskarżonemu, co art. 6 ust. 3 lit. a EKPC czyni jednym z warunków rzetelnego procesu karnego.

Słowa kluczowe: oskarżenie, akt oskarżenia, odczytanie aktu oskarżenia, przedstawienie zarzutów oskarżenia, bezstronność sądu, kontradyktoryjność i jawność procesu sądowego, szczegółowość oskarżenia, rzetelność procesu karnego, oskarżyciel, oskarżony, odpowiedź na akt oskarżenia