Ius Novum
2024, vol. 18, no. 1, pp. 80–98

LIMITS OF THE EVIDENCE INITIATIVE OF THE COURT OF FIRST INSTANCE AND THE RELIABLE EVIDENCE PROCEDURE

MAREK SKWARCOW*

DOI 10.2478/in-2024-0005

Abstract
This article aims to delineate the boundaries of the evidence initiative of the Court of the First Instance, which bears the responsibility to fulfil the goals of criminal proceedings, as outlined in Article 2 § 1 item 1 and § 2 of the Code of Criminal Procedure, from the perspective of evidence reliability, an essential component of the fair criminal trial concept. The court's evidentiary actions were thus examined through the lens of requirements stemming from Article 6(1) and (3) of the ECHR, especially the principles of independence, impartiality, adversarial process, immediacy, and access to criminal proceeding materials. The article adopts a dogmatic approach, building on an analysis of current national legal standards and the Rome Convention's provisions, viewed through doctrine and jurisprudence of national courts and the Court in Strasbourg. This makes the publication relevant for both legal scholars and practitioners involved in criminal proceedings. The analysis suggests that the court's initiative to introduce evidence, its methods of evidence gathering, and access to collected materials during proceedings must not curtail the rights of the parties, especially the accused, to conduct their evidentiary activities. Depriving the court of the primacy of independence and impartiality, restricting the parties' capacity to engage in dispute in favour of an inquisitorial jurisdictional body violates the right to fair evidentiary proceedings. The court, in safeguarding the principle of material truth, must remember its role as a justice administrator and balance all arguments accordingly. Seeking evidence solely to establish the accused's guilt contradicts the procedural function of adjudication and compromises the court's neutrality, making it an extension of the prosecution. Hence, a thorough elucidation of case circumstances by the court should not disempower the parties, particularly regarding their initiative to present evidence.

Keywords: criminal proceedings, evidence initiative of the court, impartiality of the judge, reliable evidence proceedings, the accused

* LLD, judge of Regional Court in Gdańsk, lecturer cooperating with the Faculty of Law and Administration of the University of Gdańsk (Poland), e-mail: marek.skwarcow@wp.pl, ORCID: 0000-0003-0626-2661

INTRODUCTION

In criminal proceedings, accurate factual findings are derived from evidence presented by procedural authorities, especially the court adjudicating at first instance When dispensing justice, the court must adhere to the objectives of criminal proceedings mandated by law, including obligation specified in Article 2 § 1(1) of the Code of Criminal Procedure[1] ensuring a precise criminal response in the process and rendering all decisions in accordance with the principle of substantive truth outlined in Article 2 § 2 of the Code of Criminal Procedure.[2] This grants the court an active role in evidentiary proceedings, independent of the evidentiary efforts of the parties. Furthermore, the court holds a dominant position, as although parties may submit evidence requests, only the court conducts evidence during hearings, including evidence requested by the parties.

Subsequent legislative changes[3] reinstated legal solutions shaping the main trial model, which were in force until 1 July 2015. Enacted through two extensive amendments to the Code of Criminal Procedure,[4] the brief period of limiting the court's evidentiary activity[5] in favour of granting parties broader rights to conduct disputes at the jurisdictional stage, thereby strengthening the adversarial nature of the main hearing, was short-lived.[6] In the current legal framework, Ryszard A. Stefański's viewpoint remains pertinent, suggesting that in trials before the court of first instance, the process is adversarial in nature with inquisitorial elements, similar to the theoretical model of a relatively inquisitorial trial, where parties have the initiative to provide evidence and present it, while the court is obligated to conduct it on its initiative if necessary to clarify case circumstances.[7]

In the present legal framework, shaped by the Act of 11 March 2016 which continues the provisions of the Act of 19 July 2019, there has been a clear resurgence

---

1 Act of 6 June 1997 Code of Criminal Procedure.

2 In line with the position expressed in the judgment of the Supreme Court of 3 October 2008, III KK 121/08, OSNKW, 2008, No. 12, item 101. Therefore, the basis for decisions in criminal proceedings should be factual findings that correspond to the truth, and it is the court's responsibility to strive to uncover it.

3 Act of 11 March 2016 amending the Code of Criminal Procedure and other acts (Journal of Laws 2016, item 437), and Act of 19 July 2019 amending the Code of Criminal Procedure and certain other acts (Journal of Laws 2019, item 1694).

4 Act of 27 September 2013 amending the Code of Criminal Procedure and other acts (Journal of Laws of 2013, item 1247) and Act of 20 February 2015 amending the Code of Criminal Procedure and other acts (Journal of Laws of 2015, item 396).

5 The amended Article 167 § 1 of the Code of Criminal Procedure stipulated that in court proceedings initiated at the behest of a party, evidence is taken by the parties after its admission by the presiding judge or the court. Should the party, at whose request the evidence was admitted, fail to appear, or in exceptional cases justified by special circumstances, the court shall take the evidence within the limits of the evidentiary thesis. In exceptional cases, justified by special circumstances, the court may admit and take evidence *ex officio*.

6 Indeed, the model limiting the court's evidentiary activity was in effect from 1 July 2015 to 15 April 2016, i.e. until the date of entry into force of the aforementioned Act of 11 March 2016.

7 Stefański, R.A., 'Referat rzetelne postępowanie przed sądem pierwszej instancji', in: Skorupka, J., Jasiński, W. (eds), *Rzetelny proces karny, Materiały konferencji naukowej Trzebieszowice 17–19 września 2009 r.*, Warszawa, 2010, pp. 61–65.

of the main hearing model, which was in effect until 1 July 2015. Introduced through two extensive amendments to the Code of Criminal Procedure on 27 September 2013 and 10 February 2015, the restriction of the court's evidentiary activity[8] in favour of granting parties broader rights to conduct disputes at the jurisdictional stage, thereby reinforcing the adversarial nature of the main hearing, was but a brief episode. Thus, the perspective articulated by Ryszard A. Stefański remains pertinent, suggesting that in trials before the court of first instance, these trials possess an adversarial nature with inquisitorial elements, aligning with the theoretical model of a relatively inquisitorial trial, wherein the onus of proof lies with the parties who present evidence, with the court obligated to do so on its own initiative, if necessary to elucidate the case's circumstances.

It is noteworthy that the relatively inquisitorial nature of the main trial, as aptly described by Ryszard A. Stefański, underpins the quest for truth in Polish criminal trials. This approach functioned under previously applicable procedural acts[9] and has been ingrained since the enactment of the Code of Criminal Procedure in 1997, thereby permeating the legal consciousness of judges presiding over criminal cases and constituting a significant element of their legal culture.

This approach has persisted since the enactment of the Code of Criminal Procedure of 1928, followed by the Code of Criminal Procedure of 1969, and remains in force under the current Code of Criminal Procedure of 1997. It must be emphasised that it has become deeply ingrained in the legal awareness of judges adjudicating in criminal cases, constituting a significant element of their legal culture.

When considering the court's evidentiary initiative, it is imperative to delineate its boundaries to ensure it does not undermine or exclude the rights of the parties to the proceedings. The limits of this activity are undeniably contingent on viewing jurisdictional proceedings through the lens of the validity of the concept of a fair criminal process, particularly a reliable evidentiary procedure. Such an approach is justified not only in theoretical considerations with regard to the main hearing model but should also serve as a guideline that will indicate the direction of potential changes that could attempt to return to certain provisions established based on the aforementioned acts of 27 September 2013 and 10 February 2015.

---

[8] The amended Article 167 § 1 of the Code of Criminal Procedure stipulated that in court proceedings initiated at the behest of a party, evidence is taken by the parties after its admission by the presiding judge or the court. Should the party, at whose request the evidence was admitted, fail to appear, or in exceptional cases justified by special circumstances, the court shall take the evidence within the limits of the evidentiary thesis. In exceptional cases, justified by special circumstances, the court may admit and take evidence *ex officio*.

[9] Ordinance of the President of the Republic of Poland of 19 March 1928 – Code of Criminal Procedure (Journal of Laws 1928, No. 33, item 313), Act of 19 April 1969 – Code of Criminal Procedure (Journal of Laws 1969, No. 13, item 69).

THE CONCEPT OF THE EVIDENCE INITIATIVE

The initial step for further deliberation is to ascertain the meaning of the concept of 'evidence initiative'. According to Marian Cieślak, the evidence initiative pertains to the one who introduces evidence into proceedings before a given procedural body.[10] In legal terms, the 'introduction of evidence' denotes the act of incorporating sources of evidence into a criminal trial within the framework of criminal procedural law, aiming to utilise the information derived from these sources in proceedings before a given procedural body, concerning the subject of proof (evidence) for the purpose of reaching factual findings.[11] As the court's commitment to obtaining true factual findings necessitates utilising all legally permissible means to secure evidence enabling such findings and rendering accurate and equitable decisions,[12] the initiative of proof constitutes a fundamental attribute facilitating the application of the principle of substantive truth. Thus, the described concept should be construed as the authority and competence of the competent body to introduce evidence into proceedings based on its jurisdiction to establish true factual findings, and the right to request the inclusion of evidence in proceedings by parties other than the procedural authorities. This encapsulates an evidentiary initiative in a strict sense. Within this framework, it is enacted based on the norm articulated in Article 167 of the Code of Criminal Procedure, which stipulates that evidence is obtained at the request of the parties or *ex officio*. Additionally, the court's evidentiary activity is governed by Article 366 § 1 of the Code of Criminal Procedure, which mandates that the presiding judge oversees the hearing to ensure all pertinent circumstances of the case are elucidated. However, the initiative of a procedural authority encompasses not only the right to introduce evidence but also the obligation to conduct evidentiary proceedings, thereby initiating an appropriate course of proceedings, including the method of obtaining evidence. This encompasses an evidence initiative in a broader sense.[13]

For the purpose of further examination, the concept of the court's evidentiary initiative will be construed in a broader sense. This entails not only the authority of this body to introduce specific evidence into the proceedings but, equally importantly, extends to the manner of its conduct. The method of taking evidence is closely tied to the principles of adversarial and direct nature. However, a broader interpretation of the concept of evidentiary initiative encompasses the adjudicating court's right to access the entire preparatory proceedings files. By scrutinising the case files, the court can evaluate the value and utility of the collected evidence for the purpose of reaching true factual findings and appropriately directing its own evidentiary activity.

---

[10] Cieślak, M., *Dzieła wybrane. Tom I. Zagadnienia dowodowe w procesie karnym*, Waltoś, S. (ed.), Kraków, 2011, p. 269.

[11] Woźniewski, K., *Inicjatywa dowodowa w polskim prawie karnym procesowym*, Gdańsk, 2001, p. 16.

[12] Gaberle, A., *Dowody w sądowym procesie karnym*, Warszawa, 2010, p. 56; Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., *Polskie postępowanie karne*, Warszawa, 2011, p. 493.

[13] Woźniewski, K., *Inicjatywa dowodowa*…, op. cit., p. 16; Kmiecik, R., in: Kmiecik, R. (ed.), *Prawo dowodowe. Zarys wykładu*, Kraków, 2005, p. 157.

THE CONCEPT OF THE RELIABLE EVIDENCE PROCEDURE

The fair criminal trial concept represents a set of universally understood values, sometimes viewed as a specific general clause.[14] Considering the varied interpretations and approaches to the fair trial concept in Polish procedural studies,[15] it is pertinent to acknowledge it as an element in describing the procedural model, and therefore a guiding principle for shaping the entire procedure. The nature of the process, whether adversarial or mixed, does not inherently specify the rules upon which its course is based or the values it embodies, as there may be a formally mixed process model that nonetheless lacks reliability and integrity. Regarding the mutual relationship between the concept of a fair trial and the principle of substantive truth, it can be asserted that the principle of substantive truth delineates the objective of the proceedings, while its method is governed by the concept of a fair criminal trial.[16] A modern process model should be characterised by at least two, and likely three features: structure, purpose, and method. Structurally, it is considered a mixed process. Its objective is the pursuit of material truth. Its method emphasises the reliability of the procedure.[17] An integral aspect of the fair criminal trial, evaluated from the standpoint of the court's evidentiary activity, is the reliable evidentiary proceedings. This concept facilitates the analysis of the provisions regulating evidentiary proceedings, as appropriately structured and conducted reliable evidentiary proceedings uphold the right to a fair trial.[18] There are reliable evidentiary proceedings *in abstracto* and *in concreto*. In the former, the term describes shaping evidentiary proceedings in a manner that allows for the implementation of fair trial standards. Reliable evidentiary proceedings *in concreto* are those assessed positively from the standpoint of Article 6 of the European Convention on Human Rights[19] (hereinafter 'ECHR') requirements and numerous procedural guarantees entitled to the party, particularly the accused, as emanating from procedural law. This approach is beneficial for further analysis, enabling examination of legal norms

---

[14] Wiliński, P., 'Pojęcie rzetelnego procesu karnego', in: Gerecka-Żołyńska, A., Górecki, P., Paluszkiewicz, H., Wiliński, P. (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa, 2008, p. 399.

[15] Cieślak, M., *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa, 1984, pp. 367–368; Wędrychowski, M.P., 'Prawo do "uczciwiej rozprawy" w Europejskiej Konwencji Praw Człowieka', *Przegląd Sądowy*, 1991, No. 2, p. 64; Barącz, M., 'Pojęcie i cechy "uczciwego procesu karnego"', *Państwo i Prawo*, 1991, No. 2, p. 75; Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa, 1994, p. 54; Hofmański, P., *Świadek anonimowy w procesie karnym*, Kraków, 1998, p. 36; Pagiela, A., 'Zasada "fair trial" w orzecznictwie Europejskiego Trybunału Praw Człowieka', *Ruch Prawniczy, Ekonomiczny i Społeczny*, 2003, No. 2, p. 125; Szymanek, J., 'Pojęcie rzetelnego procesu sądowego', in: Szymanek, J. (ed.), *Rzetelny proces sądowy. Doktryna. Prawo. Praktyka*, Warszawa, 2021, p. 33 et seq.

[16] Wiliński, P., 'Pojęcie rzetelnego…', op. cit., p. 407.

[17] Ibidem, p. 407, idem, 'Pojęcie rzetelnego procesu karnego', in: Wiliński, P. (ed.), *Rzetelny proces karny*, Warszawa, 2009, pp. 26–27.

[18] Lach, A., *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego*, Warszawa, 2018, p. 12.

[19] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, amended by Protocols No. 3, 5 and 8, and supplemented by Protocol No. 2.

influencing the court's evidentiary activity. Notably, judgments from both national courts and the European Court of Human Rights in Strasbourg (hereinafter referred to as 'the ECtHR'), which establish a direction in interpreting evidentiary law norms, are always made in specific cases. These determine whether the adjudicating court upheld the fair criminal trial standard and its element of reliable evidentiary proceedings. Thus, limits of the court's evidentiary initiative should be viewed through the lens of norms set out in Article 6(1) and (3) ECHR and the ECtHR interpretations, alongside decisions from appellate and Supreme Courts at the national level.

It is noteworthy to point out that, as noted by Arkadiusz Lach, the concept of a fair trial, particularly concerning evidence as outlined in Article 6 ECHR, is fundamentally a procedural guarantee of a formal nature. It does not assure accurate factual findings or correct application of substantive law, given the fact that ECHR uses the concept of a 'fair trial' rather than 'fair verdict', focusing on procedural rather than substantive justice.[20] This position has dominated the Court's jurisprudence with the landmark judgment in case *Anderson v. the United Kingdom*[21] becoming a reference for numerous subsequent decisions. In the commented case it was held that:

> 'This Court is not a court of fourth instance and will not intervene generally on the basis that a domestic court has come to a wrong decision. The domestic court heard all the evidence against the applicant and were therefore in the best position to rule on the admissibility of the evidence. There would not appear, therefore, to be any indication of a breach of Article 6 of the Convention.'

The primacy of national courts in assessing evidence, even that requested by a party, was affirmed by the Court in *Delta v. France*.[22] According to the ECtHR, only if decisions are deemed arbitrary or manifestly unreasonable, may there be a violation of Article 6(1) ECHR due to the failure to comply with the requirement of the prosecutor to prove guilt beyond reasonable doubt and the principle of *in dubio*

---

[20] Lach, A., *Rzetelne postępowanie…*, op. cit., p. 16.

[21] *Anderson v. the United Kingdom*, ECtHR decision of 5 October 1999, application no. 44958/98, similarly in the case of *Vidal v. Belgium*, judgment of the ECtHR of 22 April 1992, application no. 12351/86, in which it was stated: 'It is not the function of the Court to express an opinion on the relevance of the evidence thus offered and rejected, nor more generally on Mr Vidal's guilt or innocence.'

[22] *Delta v. France*, judgment of the ECtHR of 19 December 1990, application no. 11444/85, according to which: 'The admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for national courts to assess the evidence before them. […] The procedure laid down by law for the Criminal Court also applies in principle to the Court of Appeal, but subject to an important provision in the second paragraph of Article 513 of the Code of Criminal Procedure, which reads: Witnesses shall be heard only if the Court [of Appeal] so orders.' In the opinion of the Court, it is therefore not a court of appeal against the judgments of national courts and its task is not to control the correctness of factual findings and assessment of evidence – the Convention bodies can only examine the manner in which evidence was taken, and not its assessment by the national court, unless there has been gross dishonesty or arbitrariness. Similarly, in the case of *Doorson v. the Netherlands*, judgment of the ECtHR of 26 March 1996, application no. 20524/92.

pro reo.[23] This view was in particular confirmed by the Court in the civil cases *Van Kuck v. Germany*,[24] *Khamidov v. Russia*,[25] and in the case of *Berhani v. Albania*,[26] wherein the Court held that the applicant's conviction was based on unreliable evidence, considering the assessment of the evidence as arbitrary and violating Article 6(1) ECHR.

In light of Strasbourg jurisprudence, as far the issue of evidence admissibility is governed by national law and thus, national courts evaluate the evidence presented to them, determine facts, and interpret national law, it is impossible to ignore the issuance of judgments that may be characterised as 'appear arbitrary' or 'manifestly unreasonable' because they violate standard of a fair trial provided under Article 6(1) ECHR. Hence, the adjudicating court's evidentiary activity must necessitate conducting evidentiary proceedings in a manner such that, in the event of a conviction, there are substantive grounds for establishing the defendant's guilt. The evidence collected in the case is therefore intended to objectively and reliably uphold the obligation resulting from Article 6(2) ECHR, which guarantees the presumption of innocence of the accused. Thus, despite the absence of reference in ECHR provisions to the concept of 'justice of the verdict', the adjudicating court should be compelled to take the initiative in evidence collection, as it is then supposed to make factual findings that cannot be accused of being evidently unjustified decisions, and a conviction is intended to preserve the guaranteeing nature of the presumption of innocence. Consequently, notwithstanding the evidentiary activity of the parties, the court retains prerogative in its own evidentiary activity and must possess the means to ascertain the truth and issue a substantive verdict.

THE COURT'S EVIDENCE INITIATIVE AND THE RULES SHAPING THE RELIABLE EVIDENCE PROCEEDINGS

From the perspective of Article 6(1) ECHR and the proper execution of the court's evidentiary initiative, the right to have a case heard by an independent and impartial court is paramount, while from the standpoint of Article 6(3) ECHR, adherence to the principles of adversarial and direct nature as well as the right of access to the proceedings files are of significant importance. In the latter case, the previously mentioned right of the court to dispose of the case files should not impede the parties to the proceedings, especially the accused, from accessing the evidence collected in the case files.

According to the assessment of the requirements that an independent court should meet, this attribute of a judge's power should be considered on two levels. On the one hand, it concerns independence from the executive power (judicial independence), and on the other, independence from the parties and various pressure

[23] Nowicki, M.A., *Wokół Konwencji Europejskiej, Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa, 2010, p. 445.

[24] *Van Kuck v. Germany*, judgment of the ECtHR of 12 June 2003, application no. 35968/97.

[25] *Khamidov v. Russia*, judgment of the ECtHR of 15 November 2007, application no. 72118/01.

[26] *Berhani v. Albania*, judgment of the ECtHR of 27 May 2010, application no. 847/05.

groups (independence of the judiciary). The ECtHR formulates three conditions for judicial independence: examining the method of appointing judges and the duration of their term of office, mechanisms protecting judges against external pressure, and whether a given body (judge) appears to function independently.[27] This publication does not aim to evaluate legal solutions significantly undermining the guarantees of judicial independence, leading to a serious rule of law crisis in Poland.[28] Nevertheless, it cannot be ignored that only a judge independent of other authorities, particularly the executive power exercised by the Minister of Justice, not subject to their pressure and unrestrained by the threat of disciplinary punishment for offenses that do not fall into the category of 'obvious and flagrant offences to the law', meets the criterion of a judge functioning independently and capable of properly fulfilling the obligation to take the initiative in evidence collection. In other words, an independent judge is the cornerstone of a fair trial and fair evidentiary proceedings.

An impartial judge serves as a guarantor of the standard specified in Article 6(1) ECHR. The criterion of a judge's impartiality was carefully examined in the case of *Piersack v. Belgium*,[29] in which, according to the Court:

> 'Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (Article 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.'

The challenge of maintaining impartiality by a judge who initiates evidence provision is significant as his role extends beyond being a passive arbiter of the parties' dispute to actively collecting and conducting evidence. Since the judge is obligated to issue a judgement based on true factual findings, he must strive to uncover them. Thus, impartiality assessed in this manner should be understood as 'the opposite of arbitrariness'. Impartiality does not require complete detachment from the social or cultural context but demands a comprehensive analysis of relevant circumstances in a case.[30] Therefore, impartiality is a 'directive' guiding the court to maintain impartiality towards the parties and other participants in the process, without taking a directional stance towards the case itself.[31] Hanna Kuczyńska accurately portrays the role of an evidence-active judge, asserting that

---

[27] Nowak, C., 'Prawo do rzetelnego procesu sądowego w świetle EKPC i orzecznictwa ETPC', in: Wiliński, P. (ed.), *Rzetelny proces karny*, Warszawa, 2009, p. 106 and the large body of ECtHR case law cited therein.

[28] Judgments of the Court of Justice of the European Union: of 15 July 2021, C-791/19, and of 5 June 2023, I C-204/21.

[29] *Piersack v. Belgium*, judgment of the ECtHR of 1 October 1982, application no. 8692; and *Advance Pharma sp. z o.o. v. Poland*, judgment of the ECtHR of 3 February 2022, 1469/20.

[30] Jasiński, W., 'Zasada bezstronności', in: Wiliński, P. (ed.), *System Prawa Karnego Procesowego. Tom III. Cz. 2*, Warszawa, 2014, p. 1207.

[31] Waltoś, S., Hofmański, P., *Proces karny*…, op. cit., p. 229, the authors correctly assert that the concept of objectivity is broader than that of impartiality.

in the continental model, emphasis on the judge's internal, subjective attitude to the case may cause indifference despite the ability to influence the substance of evidence and knowledge of case files.[32] The court is meant to be impartial, yet actively involved in evidentiary proceedings. The continental model does not recognise the loss of impartiality by the court through its engagement in introducing evidence at trial.[33] This insight is pertinent when delineating the limits of a judge's impartiality concerning his involvement in evidence collection. While there is no doubt about the necessity of the judge's involvement in uncovering the truth, favouring one party or even providing 'relief' in the implementation of its evidentiary initiative should be deemed a violation of impartiality, both subjectively and objectively, exceeding the framework outlined in Article 6(1) ECHR.

Therefore, when analysing the limits of a judge's impartiality concerning his evidentiary activity, 'fundamental' decisions defining the court's obligations should be acknowledged. According to the Supreme Court:[34]

> 'The Polish legal system does not release the court from its duty to seek the truth as the foundation for its judgments, including through its evidentiary initiative, regardless of the burden of proof borne by the public prosecutor who may not demonstrate sufficient activity in this respect. Negligence in this area may undoubtedly constitute grounds for a cassation appeal.'

In another ruling, the Supreme Court stated[35]: 'The court (including the appellate court) is obligated to seek, *ex officio*, a comprehensive explanation of all the circumstances of the case. Failure to take the initiative in this direction in the circumstances of a specific case may be as a blatant violation of Article 167 of the Code of Criminal Procedure.'

However, the Supreme Court[36] recognises maintaining impartiality as a crucial limitation on court-initiated actions, stating:

> 'Courts administer justice, primarily tasked with evidence verification, whereas its collection and reporting are responsibilities of other entities or, in cases of auxiliary, subsidiary, or private accusations, other parties. Although deviating from such procedural role divi-

---

[32] Kuczyńska, H., *Analiza porównawcza modelu rozprawy głównej. Między kontradyktoryjnością a inkwizycyjnością*, Warszawa, 2022, p. 167.

[33] Ibidem, p. 184.

[34] Judgment of the Supreme Court of 19 March 1997, IV KKN 13/97, *Prokuratura i Prawo* – insert 1997/12, item 10.

[35] Judgment of the Supreme Court of 26 March 2003, V KK 382/02, LEX nr 80704, similarly in judgment of 29 April 2021, V KK 142/21, LEX nr 3215605, the Supreme Court held that: 'The provision of Article 167 of the Code of Criminal Procedure grants the procedural authority both the right and the obligation to detect and conduct evidence concerning the relevant circumstances of the case. The procedural authority is required to take *ex officio* all evidence necessary to ascertain the circumstances relevant to deciding on the guilt of the accused, the legal qualification of the acts he is accused of, and the issue of possible punishment (see the judgment of the Supreme Court of 7 June 1974, V KRN 43/74 , OSNKW, 1974, No. 11, item 212). The passivity of the parties in not demanding the taking of evidence did not absolve the court from taking the appropriate initiative to provide evidence. The lack of activity posed, *in concreto*, a real threat of issuing an unfair judgment, which necessitated the admission of certain evidence.'

[36] Decision of the Supreme Court of 18 November 2003, III KK 505/02, LEX No. 82314.

> sion might be understandable when these entities accuse without professional assistance (without attorneys), the court's evidence initiative manifestation, instead of the prosecutor or acting case representative, could face accusations of violating the principle of impartiality. It also involves the court maintaining equal distance from opposing parties' procedural interests. Given the appellate court's additional evidence-taking constraints concerning case essence, especially new evidence (Article 452 § 1 of the Code of Criminal Procedure) (repealed), arising from the two-instance judicial proceedings principle, admitting such evidence *ex officio* by the appellate court must be dictated by an extraordinary procedural situation, e.g., the risk of losing crucial new evidence if uncollected.'

The Court of Appeal in Kraków also acknowledges this interpretation of court impartiality.[37]

It is also worth noting that a significant departure from the obligation, emphasised by the Supreme Court, to comprehensively explain all the circumstances of the case, can be observed in the case law of the Courts of Appeal, particularly the Court of Appeal in Kraków.[38] In a well-established line of case law, it presents the view that: 'The evidentiary activity of the court over the evidentiary initiative of the parties (Article 167 of the Code of Criminal Procedure) is justifiable only when its absence poses a clear risk of judgment injustice as referred to in Article 440 of the Code of Criminal Procedure.' The Supreme Court perceives the limit of the first instance court's evidentiary activity through the lens of issuing an unfair judgment, declaring:[39]

> 'The adjudicating court is obliged to take the evidentiary initiative *ex officio* when parties do not take such initiative in circumstances justifying such action, and when failing to do so could lead to issuing a grossly unfair judgment. Hence, if a cassation appeal alleges neglect of Article 167 of the Code of Criminal Procedure (court's lack of evidentiary initiative), the appeal success fundamentally requires explaining why the party failed to initiate and linking it with the charge of breaching Article 440 of the Code of Criminal Procedure.'

---

[37] Judgment of the Court of Appeal in Krakow of 12 October 2017, II Aka 263/17, LEX No. 2678688, stating that: 'The court cannot be expected to take *ex officio* evidence that ought to be submitted by the parties to pursue their procedural interests, nor can the presiding judge of the chamber be expected to undertake this under Article 366 of the Code of Criminal Procedure. Doing so would undermine the court's position as a body that administers justice impartially, evaluates the evidence and claims of the parties, and decides on the validity of their arguments in a procedural dispute. It would reduce the court's role to merely searching for evidence and ensuring that one of the parties is right, allowing for the parties' passivity. This would mean a departure from the division of procedural roles, which is one of the cornerstones of the criminal process.'

[38] Judgments: of 29 December 1997, II AKa 229/97, *KZS* 1998/1, item 25, of 28 January 1998, II AKa 254/97, *KZS* 1998/3, item 45, of 12 April 2000, II AKa 6/00, *KZS* 2000/5, item 46, judgment of the Court of Appeal in Wrocław of 17 February 2016, II AKa 12/16, LEX No. 2008332.

[39] Decision of the Supreme Court of 16 December 2020, IV KK 479/20, LEX No. 3093387; a similar position was also held by the Supreme Court in its decision of 9 January 2019, II KK 466/18, LEX No. 2616213, stating that: 'The court of first instance does not violate the provision Article 167 of the Code of Criminal Procedure when it does not take the initiative to provide evidence *ex officio*, if it considers the evidence already collected in the case to be sufficient for delivering a fair judgment.'

Nonetheless, according to Andrzej Gaberle, adopting such a view would imply that it is possible to forego the initiative to provide evidence and for shortcomings to occur, particularly resulting in an error in factual findings. However, these errors cannot lead to upholding a 'grossly unfair' judgment.[40]

By promoting one of these concepts, the loss of the court impartiality violates the guarantee of conducting reliable evidentiary proceedings when the evidentiary initiative of this body aims solely at gathering evidence against one party, often the accused (only allowing evidence detrimental to them). The apparent 'taking over' the public prosecutor's role in the wake of their passivity or failure to present convincing evidence of guilt leads the court to side with the prosecutor and favour him over the weaker party, which is undoubtedly the accused, even when assisted by a defence attorney. The comprehensive clarification of the circumstances of the case, emphasised in the case law, must also never lead to a situation where the prosecutor adopts a passive stance and transfers the evidence initiative burden to the first instance court, thereby directing it solely in favour of one party. Hence, it is crucial for parties to demonstrate evidentiary activity in jurisdictional proceedings, with the court aiming to clarify all relevant case circumstances by supplementing parties' activities with its initiative, without replacing them. Only then will the court fulfil its adjudicating function, administering justice. Maintaining impartiality entails adhering to objectivity, requiring the court to consider circumstances favouring and countering the accused (Article 4 of the Code of Criminal Procedure). An ancillary criterion in assessing impartiality may be the structuring the court's evidentiary initiative in a manner that prevents issuance of a manifestly unfair judgment in the case referred to in Article 440 of the Code of Criminal Procedure. However, it is worth noting that the necessity of making true factual findings does not overly limit the court's scope of action in this matter.

Moving on to the next condition for the reliability of evidentiary proceedings – granting the right of access to evidence, it is worth making the following remarks. The provision of Article 334 § 1 of the Code of Criminal Procedure stipulates that the files of preparatory proceedings shall be transmitted to the court together with the indictment. From that moment, the court, having all the files from the first stage of the criminal trial, collects in these files all documents that arise in the course of the jurisdictional proceedings. The solution adopted in Article 334 § 1 of the Code of Criminal Procedure raises a legitimate question in the literature as to whether the judge's review of the entire preparatory proceedings file will allow them to remain impartial. Consequently, is an impartial judge one who, having knowledge of all activities carried out in the preparatory proceedings, will impartially verify their correctness as well as the results compliance with the true course of events, personally actively seeking evidence and continuing to build the criminal case files initiated by the prosecutor's office or the police?[41]

---

[40] Gaberle, A., *Dowody*…, op. cit., p. 77.

[41] Kremens, K., 'Dostęp sądu do akt postępowania przygotowawczego po nowelizacji k.p.k. – czego powinniśmy nauczyć się od Amerykanów', in: Wiliński, P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, p. 379.

Article 334 § 1 of the Code of Criminal Procedure entitles the court to use all the preparatory proceedings materials to subsequently construct jurisdictional proceedings files. This solution also raises the question of how a judge should behave impartially in the context of examining case files. Is an impartial judge one who has no prior knowledge of the case until entering the courtroom, or one who, aware of all activities carried out in the preparatory proceedings, impartially verifies their accuracy and compliance of their results with the true course of events, personally actively seeking evidence and further developing the files of a criminal case initiated by the prosecutor's office or the police?

Undoubtedly, even the most experienced and conscientious judge, when preparing for a trial, initially examines the validity of the evidence cited in support of the indictment, potentially concurring with the arguments contained therein. This could significantly impact their impartiality in its subjective aspect, even if maintaining objective impartiality in party assessment. The solution adopted in Article 334 § 1 of the Code of Criminal Procedure legitimises the 'all-knowing judge' model, as described figuratively by Hanna Kuczyńska, where knowledge originates solely from the files prepared by the public prosecutor. At the evidentiary stage in jurisdictional proceedings, the parties initially face unequal positions since the judge is acquainted with only one party's arguments before case examination.[42] This provision also reinforces judges' belief that, given the comprehensive and accusatory evidence-containing preparatory proceeding files, limiting trial evidentiary proceedings to this evidence presentation suffices, negating direct stage conduct. This approach evidently infringes the accused's defence right and nearly renders the adversarial principle implementation illusory.

These arguments underpin the assertion that in the 'all-knowing judge' model, where knowledge is drawn from files and significant evidence initiative is exhibited, ensuring the accused's comprehensive file and gathered evidence access is the only guarantee of the proceedings fairness. Lack of access to the case materials clearly precludes effective defence. The commented right of the accused results, on the one hand, from the principles of an adversarial process and equality of arms, and on the other hand, from the right to defence. In the light of the position of the ECtHR, it is important to allow access to the evidence and obtaining copies of the documents in order to prepare the defence, otherwise a violation of Article 6(1) and (3) ECHR may be established.[43] Access restrictions to case files may be justified by exceptional circumstances, such as national security concerns or the need to protect witnesses, but it is the court's duty to weigh these restrictions against the rights of the accused.[44] The situation where the prosecutor's office fails to disclose evidence from operational activities to the court of first instance, revealing it only before the court of appeal, is a clear example of a violation of the right to a fair trial.[45] According to

---

[42] Kuczyńska, H., *Analiza porównawcza…*, op. cit., pp. 349–351.

[43] *Foucher v. France*, judgment of the ECtHR of 14 January 2010, application no. 29889/04.

[44] *Jasper v. the United Kingdom*, judgment of the ECtHR of 16 February 2000, application no. 27052/95.

[45] *Rove and Davis v. the United Kingdom*, judgment of the Grand Chamber of 16 February 2000, application no. 28901/95.

the ECtHR, access to the case file on the part of the accused must also encompass the right to take notes to facilitate the defence. The inability to use personal notes, taken during the hearing or in the secret registry, to show them to the expert or to use them for any other purpose, effectively prevented the accused from using the information contained therein, as he had to rely solely on his memory.[46] In the Court's view, the role of the trial court is to weigh these exceptional grounds for refusing access to the case file against the accused's right to disclosure of relevant evidence, and to analyse the decision-making procedure to ensure that, as far as possible, it complies with the requirements of adversarial proceedings and equality of arms and incorporates adequate safeguards to protect the interests of the accused. Therefore, if the accused is denied access to the files, he or she has the right to demand that the court examine whether the application of surveillance measures was lawful and, secondly, whether it violates the principle of equality of arms.[47] The right to access the case files of an accused deprived of liberty is crucial to ensure the reliability of evidentiary proceedings. Submitting an appropriate application should result in the sending of materials to the penitentiary unit at every stage of the court proceedings, even if this involves certain difficulties related to the need to send the entire case file and the involvement of prison officers. It is of particular importance to ensure this right for the accused before the date of the hearing, during which they are to provide explanations and, possibly, respond to the evidence collected in the files. The accused's explanations are a unique means of defence in criminal proceedings, and they should submit them with full knowledge of the evidence collected in the case files.

Article 6(3) ECHR indicates the adversarial nature of the dispute as a criterion for deeming evidentiary proceedings reliable, pertaining to witnesses,[48] yet the ECtHR has expanded the concept of a witness, declaring that it includes victims, experts, and other persons testifying before the court.[49] The adversarial principle serves as a directive, allowing an entity directly interested in the proceeding outcome to engage in a procedural battle before an impartial court against an opposing entity for a favourable decision.[50] The activity of the parties carried out within the framework of this principle undeniably facilitates the implementation of the principle of substantive truth, because, as Stanisław Waltoś aptly points out, confrontation of contradictory statements before a reasonable judge is the optimal method to find the truth.[51] According to the ECtHR, as mentioned previously, the condition of detecting the substantive truth is not predominant, unlike the need to guarantee procedural

---

[46] *Luboch v. Poland*, judgment of the ECtHR of 15 January 2008, application no. 37469/05.

[47] *Leas v. Estonia*, judgment of the ECtHR of 6 March 2012, application no. 59577/08.

[48] Article 6(3)(d) states that everyone charged with a criminal offense has at least the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

[49] Lach, A., *Rzetelne postępowanie…*, op. cit., p. 72.

[50] Cieślak, M., *Polska procedura…*, op. cit., p. 254.

[51] Waltoś, S., 'Kontradyktoryjność a prawda materialna', in: Wiliński, P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, p. 39.

fairness, which was expressed in the following judgment:[52] 'It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence.' The ECtHR therefore emphasises that:[53] 'The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.' Hence, the adversarial principle guarantees familiarisation with the evidence collected in the trial and the statements submitted by the other party.[54] In the case of the main trial conducted in an adversarial manner with inquisitorial elements, the court's evidentiary activity restricts the activity of the parties.

Previously mentioned impartiality guarantees relate to ensuring adversarial nature of the process, since the evidentiary activity of the parties allows the court to uphold objectivity and impartiality attributes. From this perspective, since the adversarial nature facilitates learning and commenting on the other party's arguments, excessive evidentiary activity of the court means that the party is deprived of this right and, additionally, is unable to comment on the evidentiary activity of the court.

A misunderstood adversarial nature of court proceedings should never result in the accused and their defence attorney being in a dispute with the court rather than with the prosecutor. Such involvement of the court always poses a threat to the accused because, aside from contradicting principle of contentiousness, the accused does not have any legal instruments to effectively challenge the court's evidentiary activity. Additionally, the effect of this activity in terms of making factual findings will only be known to the accused when the judgment concluding the proceedings is delivered, along with the reasons stated in its written justification.

Therefore, the adversarial nature of the proceedings should not lead to a situation, as often seen in Polish courtrooms, where the parties, mainly the accused and their defence attorney, argue solely with the court instead of arguing with the prosecutor. Arguing with the court is a threat to the accused because, even if we overlook the distortion of the dispute's essence, the accused has no means to counter the court's evidentiary activities, especially since the outcomes of these activities, in the form of factual findings, will only be disclosed in the final judgment and the reasons provided in its written justification.

This condition of the adversarial nature of the process is emphasised by the ECtHR,[55] which points out that: 'both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. […] However, whatever method is chosen, it should ensure that the other party will be aware that observations have been

---

[52] *Rowe and Dawis v. the United Kingdom*, judgment of the Grand Chamber of 16 February 2000, application no. 28901/95.

[53] *Brandstetter v. Austria*, judgment of the ECtHR of 28 August 1991, application no. 11170/84.

[54] *Barbera, Messegue and Jabardo v. Spain*, judgment of the ECtHR of 6 December 1988, application no. 10590/83.

[55] *Brandstetter v. Austria*, judgment of the ECtHR of 28 August 1991, application no. 11170/84.

filed and will get a real opportunity to comment thereon.' In the case of the court's observations, it is difficult for the accused to comment on them during the hearing, and their arguments can only be presented during the appeal proceedings. At that stage, they must demonstrate the existence of a relative ground for appeal under Article 438 (2) of the Code of Criminal Procedure to the extent that it could have influenced the content of the contested judgment.

An example of the adversarial principle is the approach outlined in Article 370 of the Code of Criminal Procedure, which regulates the manner of interrogation, and the order in which questions are asked. In the current legal context, the provision formed by the amendment to the Act of 11 March 2016, restores the leading role of the chairman and other members of the adjudicating panel, in effect until 1 July 2015. It is important not only that Article 370 § 1 of the Code of Criminal Procedure gives the parties priority in questioning the person being interviewed and places the last exercise of this right with the members of the adjudicating panel, but also that Article 370 § 2a of the Code of Criminal Procedure states that, if necessary, members of the adjudicating panel may ask additional questions out of turn. It should also not be forgotten that if evidence is admitted *ex officio*, members of the adjudicating panel ask questions first. According to the Court of Appeal in Katowice,[56] violation of the order of questioning as provided in Article 370 of the Code of Criminal Procedure may lead to a breach of the procedural law provisions specified in Article 438(2) of the Code of Criminal Procedure, provided that the complainant demonstrates their impact on the judgment's content, and in particular, that by testifying fully in accordance with the order of questioning, the witness might have testified differently.

Another condition for the reliability of evidentiary proceedings is the broad consideration of the demands arising from the principle of directness. This principle aims to bring the adjudicating court examining a case as close as possible to the main fact, thereby shortening the chain of circumstances that connects the awareness of the procedural authority with the act under investigation.

There is a close relationship between the principles of adversarial proceedings and directness because the implementation of the first principle is only possible by observing the principle of directness in evidentiary proceedings. A dispute concerning the essence of the case can only be conducted by submitting evidence to the court for evaluation.[57] Therefore, the principle of directness requires the court to take evidence at the hearing, personally come into contact with the source of evidence and the means of proof, with primary evidence being the main means of proof on which its findings are based.[58]

The importance of the principle of directness can also be articulated as follows: while the principle of material truth determines the goal of evidentiary proceedings,

---

[56] Judgment of 28 April 2016, II AKa 92/16, LEX No. 2061873.

[57] Gardocka, T., 'Podstawowe zasady postępowania dowodowego na rozprawie głównej', *Studia Iuridica*, 1985, No. 13, p. 61.

[58] Cieślak, M., *Dzieła wybrane …*, op. cit., p. 171; Świecki, D., *Bezpośredniość czy pośredniość w polskim procesie karnym, Analiza dogmatycznoprawna*, Warszawa, 2013, p. 23; Waltoś, S., Hofmański, P., *Proces karny. Zarys systemu*, Warszawa, 2018, p. 267.

the principle of directness crucially dictates its method.[59] This method of conducting evidentiary proceedings is significant from the perspective of the considerations that interest the author because, in its current normative form, the legislator introduces so many restrictions on the direct taking of evidence that one might even be tempted to say that this rule currently has the status of an exception, while the indirect nature of the evidentiary proceedings is dominant. When analysing the current course of evidentiary proceedings in jurisdictional proceedings, the following important limitations of the principle of directness should be noted:

1. Article 374 § 1 of the Code of Criminal Procedure allows for the optional participation of the accused in the main hearing, and in the event of their failure to appear pursuant to Article 389 § 1 of the Code of Criminal Procedure, their previously submitted explanations are read.
2. Article 350a of the Code of Criminal Procedure gives the chairman of the adjudicating panel the discretion to refrain from summoning witnesses to the hearing who have been questioned, are staying abroad, or are to ascertain circumstances that are not so significant that it would be necessary to hear them directly at the trial, particularly those whom the accused did not mention in his explanations, except for persons who, pursuant to Article 182 of the Code of Criminal Procedure, have the right to refuse to testify.
3. Article 185a § 3 and Article 185c § 2 of the Code of Criminal Procedure require the court to waive the hearing at the trial and to reproduce the minutes of the hearing prepared in the preparatory proceedings as evidence from the injured party in a specific category of crimes, and to read the minutes of their hearing.
4. Article 391 § 1 of the Code of Criminal Procedure allows, to a wide extent under the conditions specified therein, for the witness's testimony to be read.
5. Article 392 § 1 of the Code of Criminal Procedure permits the reading at the main hearing of the reports from the hearings of witnesses and defendants, prepared both in the preparatory proceedings and before the court or in other proceedings as provided for by law, when the direct taking of evidence is deemed unnecessary and none of the parties present opposes, and the regulation provided for in Article 392 § 1 of the Code of Criminal Procedure applies to situations other than those specified in Articles 389 and 391.[60]
6. Article 393 of the Code of Criminal Procedure allows reading official and private documents, excluding previously mentioned ones, which include inspection, search, item seizure reports, expert opinions, institutes, facilities or institutions, criminal record data, community intelligence results, and private documents generated outside criminal proceedings.
7. Article 19(15) of the Police Act[61] in conjunction with Article 391 § 1 first sentence of the Code of Criminal Procedure, lays the foundation for reading all operational surveillance collected materials.

---

[59] Cieślak, M., *Polska procedura…*, op. cit., p. 330.

[60] Judgment of 31 October 2012, II AKa 121/12, LEX No. 1239834, judgment of the Court of Appeal in Łódź of 25 March 2014, II AKa 33/14, LEX No. 146933.

[61] Act of 6 April 1990 on the Police.

8. Article 394 of the Code of Criminal Procedure permits the court to abstain from reading aforementioned documents, introducing them into the trial by 'disclosing them' without reading, and Article 394 § 2 of the Code of Criminal Procedure further deviates from the directness principle, allowing minutes and documents reading at the hearing only upon a party's request, who previously had no access to the content, or when deemed necessary by the court.
9. Article 405 § 2 and 3 of the Code of Criminal Procedure dictates that at court proceedings' conclusion, all protocols and documents meant for hearing reading, previously unread, are disclosed without reading, encompassing:
   – evidence indicated by the prosecutor in the indictment, indictment, not requested for main hearing presentation, excluding evidence for which the court rejected the evidence application,
   – parties indicated in the evidence application that were included,
   – evidence admitted by the court *ex officio*.

In the current legal situation, the legislator grants the adjudicating court the right to initiate evidence, yet introduces numerous mechanisms for deviating from the directness principle, significantly undermining the method through which resolving the case according to the material truth principle is feasible. It is possible to structure proceedings where evidence is introduced and forms the judgment basis using the 'disclosed without reading' formula. This method of 'proving' in the main hearing currently applies to the accused's explanations, witness statements, expert opinions and other documents prepared in criminal proceedings. However, this undoubtedly deprives the accused of the right to initiate a dispute with the accusation, especially since the evidence conducted during the trial will be disclosed during the preparatory proceedings which, as already mentioned, are intended to support the thesis contained in the indictment. Such a method of taking evidence warrants assessment from the point of view of compliance with the guarantee of ensuring the accused's right to reliable evidence, implemented by ensuring the directness of the proceedings. Therefore, the ECtHR emphasises[62]:

> 'the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness's statement in court than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise. Among other reasons, this is because pre-trial questioning is primarily a process by which the prosecution gather information in preparation for the trial in order to support their case in court, whereas the tribunal conducting the trial is called upon to determine a defendant's guilt following a fair assessment of all the evidence actually produced at the trial, based on the direct examination of evidence in court.'

Bearing in mind that in Polish criminal proceedings the principle of free evaluation of evidence, as expressed in Article 7 of the Code of Criminal Procedure, mandates that the value of evidence is analysed through the prism of the rules set out in this provision, it is apparent that the significant impoverishment of evidentiary proceedings at the main hearing and the restriction to merely accepting the reports

62 *Erkapić v. Croatia*, judgment of the ECtHR of 25 April 2013, application no. 51198/08.

from the preparatory proceedings as disclosed distort the sense of conducting the hearing. This approach exceeds the framework of a trial conducted in accordance with the principle of directness. This, in turn, results in a violation of the right to fair evidentiary proceedings. It is challenging to presume that the court, by limiting itself to the 'evidence as disclosed, without reading it' approach, can reliably evaluate veracity and usefulness of such evidence for the purpose of issuing a fair judgment.

CONCLUSIONS

The observations made allow us to conclude that the basic element shaping the evidentiary initiative of the court of first instance, in line with the conditions of a fair criminal trial and reliable evidentiary proceedings constituting its element, is the judge's impartiality. Therefore, in response to the question posed at the beginning of the study – how far should the court's evidentiary initiative extend so as not to weaken or even exclude the rights of the parties to the proceedings – the following criteria are important: the limits of the evidentiary initiative are set by an impartial judge who guarantees the proper administration of justice. Compliance with this condition primarily involves maintaining impartiality in a subjective sense, i.e., the judge's personal belief about the case, but it also affects its objective aspect. The judge's impartiality ensures that the parties have the right to an adversarial hearing. The evidentiary activity of a judge, even if aimed at clarifying all important circumstances of the case, should complement the activity of the parties and must not lead to involvement in the dispute on the side of one of the parties, especially the prosecutor. Additional criteria ensuring the fairness of jurisdictional proceedings also include: ensuring that the parties have the right to access the case files and that the court has direct contact with the evidence at the hearing. Both factors contribute to providing the accused with the right to defence and an adversarial trial. The first one gives the accused a real opportunity to challenge the evidence forming the basis of the indictment, as the accused is aware of the evidence the prosecutor possesses. However, significant limitations in the application of the principle of directness, as currently provided in the Procedural Act, raise doubts about whether this method of introducing evidence at the main hearing aligns with the concept of a fair criminal trial, as they allow evidence to be considered as disclosed without reading, effectively all the evidence that the court is to consider, thus depriving the parties of the opportunity to conduct the dispute.

BIBLOGRAPHY

Barącz, M., 'Pojęcie i cechy "uczciwego procesu"', *Państwo i Prawo*, 1991, No. 2.
Cieślak, M., *Dzieła wybrane. Tom I. Zagadnienia dowodowe w procesie karnym*, Waltoś, S. (ed.), Kraków, 2011.
Cieślak, M., *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa, 1984.
Gaberle, A., *Dowody w sądowym procesie karnym*, Warszawa, 2010.

Gardocka, T., 'Podstawowe zasady postępowania dowodowego na rozprawie głównej', *Studia Iuridica*, 1985, No. 13.

Hofmański, P., *Świadek anonimowy w procesie karnym*, Kraków, 1998.

Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., *Polskie postępowanie karne*, Warszawa, 2011.

Kmiecik, R., in: Kmiecik, R. (ed.), *Prawo dowodowe. Zarys wykładu*, Kraków, 2005.

Kremens, K., 'Dostęp sądu do akt postępowania przygotowawczego po nowelizacji k.p.k. – czego powinniśmy nauczyć się od Amerykanów', in: Wiliński, P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013.

Kuczyńska, H., *Analiza porównawcza modelu rozprawy głównej. Między kontradyktoryjnością a inkwizycyjnością*, Warszawa, 2022.

Jasiński, W., 'Zasada bezstronności', in: Wiliński, P. (ed.), *System Prawa Karnego Procesowego. Tom III. Cz. 2*, Warszawa, 2014.

Lach, A., *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego*, Warszawa, 2018.

Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa, 1994.

Nowak, C., 'Prawo do rzetelnego procesu sądowego w świetle EKPC i orzecznictwa ETPC', in: Wiliński, P. (ed.), *Rzetelny proces karny*, Warszawa, 2009.

Nowicki, M.A., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa, 2010.

Pagiela, A., 'Zasada "fair trial" w orzecznictwie Europejskiego Trybunału Praw Człowieka', *Ruch Prawniczy, Ekonomiczny i Społeczny*, 2003, No. 2.

Stefański, R.A., 'Referat rzetelne postępowanie przed sądem pierwszej instancji', in: Skorupka, J., Jasiński, W. (eds), *Rzetelny proces karny. Materiały konferencji naukowej Trzebieszowice 17–19 września 2009 r.*, Warszawa, 2010.

Szymanek, J., 'Pojęcie rzetelnego procesu sądowego', in: Szymanek, J. (ed.), *Rzetelny proces sądowy. Doktryna. Prawo. Praktyka*, Warszawa, 2021.

Świecki, D., *Bezpośredniość czy pośredniość w polskim procesie karnym. Analiza dogmatycznoprawna*, Warszawa, 2013.

Waltoś, S., 'Kontradyktoryjność a prawda materialna', in: Wiliński, P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013.

Waltoś, S., Hofmański, P., *Proces karny. Zarys systemu*, Warszawa, 2018.

Wędrychowski, M.P., 'Prawo do "uczciwiej rozprawy" w Europejskiej Konwencji Praw Człowieka', *Przegląd Sądowy*, 1991, No. 2.

Wiliński, P., 'Pojęcie rzetelnego procesu karnego', in: Gerecka-Żołyńska, A., Górecki, P., Paluszkiewicz, H., Wiliński, P. (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa, 2008.

Wiliński, P., 'Pojęcie rzetelnego procesu karnego', in: Wiliński, P. (ed.), *Rzetelny proces karny*, Warszawa, 2009.

Woźniewski, K., *Inicjatywa dowodowa w polskim prawie karnym procesowym*, Gdańsk, 2001.

Cite as:

Skwarcow M. (2024) '*Limits of the evidence initiative of the court of first instance and the reliable evidence procedure*', Ius Novum (Vol. 18) 1, 80–98. DOI 10.2478/in-2024-0005