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WITHDRAWAL OF THE INDICTMENT
BY PUBLIC PROSECUTOR**I. Introduction**

In the Polish criminal proceeding, there is a principle of accusatorality that means the opening of a court proceeding is based on the demand made by a legally entitled prosecutor or another entity (Article 14 § 1 of the Criminal Procedure Code). The basic form of accusation is an indictment¹. It plays the role of: (a) proceeding obligation, (b) proceeding impulse, (c) information, and (d) limitation of the right to accusation². A court is obliged to hear the case only within the limits of the indictment and cannot go beyond them³. The indictment specifies the subjective and objective scope of the court proceeding. The frames are specified by the incident described in the indictment and not by particular elements of the description⁴. However, the court is not bound by the description and legal classification of the act described by the prosecutor; it is bound by the act as an actual incident⁵.

In its classical form, the principle of accusatorality makes the initiation of a criminal proceeding and its continuation dependent on the initiative of a party to the proceeding⁶. In such a form, it does not take place in the Polish criminal proceeding in cases regarding crimes prosecuted *ex officio*, because – in compliance with Article 14 § 2 of the Criminal Procedure Code – dropping the charge by a public prosecutor does not bind the court. Thus, the court can continue the

¹ S. Waltoś, *Akt oskarżenia w procesie karnym* [Indictment in a criminal trial], Warszawa 1963, p. 10; M. Cieślak, *Polska procedura karna. Podstawowe założenie teoretyczne* [Polish criminal procedure – Basic theoretical assumptions], Warszawa 1971, p. 260; W. Sych, *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym* [The influence of the injured on the course of preparatory proceeding in the Polish criminal trial], Warszawa 2006, p. 219.

² S. Waltoś, *Akt oskarżenia...* [Indictment...], pp. 10–11.

³ S. Waltoś, *Akt oskarżenia...* [Indictment...], p. 12, K. Mioduski, *Akt oskarżenia* [Indictment], WPP 1953, No. 3, p. 263, Supreme Court ruling of 10 October 2010, III KK 97/10, OSNKW 2011, No. 6, item 50, Supreme Court ruling of 7 April 2009, II KK 329/07, LEX No. 507942.

⁴ Supreme Court ruling of 30 October 2012, II KK 9/12, LEX No. 1226693.

⁵ Supreme Court ruling of 21 September 2006, V KK 10/06, LEX No. 196961.

⁶ M. Cieślak, *Polska procedura karna...* [Polish criminal procedure...], p. 258.

proceeding although the public prosecutor recognized no ground for maintaining the indictment. As a result of this solution, the public prosecutor stops being a complainant. Having filed a complaint to the court, they lose control over the complaint⁷ and are only a party to the proceeding. They cannot make the court desist from prosecution only because the charges are withdrawn⁸. Thus, it is a deviation from the principle of accusatoriality⁹.

II. Dropping the charge by a public prosecutor

Dropping the charge is a prosecutor's statement on desisting from supporting the previously filed indictment. The Criminal Procedure Code does not directly specify the effects of a public prosecutor's decision in that respect. The solution raises doubts resulting from Article 14 § 1 *in fine* of the CPC, which directly says that the dropping of the charge does not bind the court.

The doctrine highlights that the court:

- 1) can discontinue the proceeding or continue it¹⁰;
- 2) is obliged to continue the proceeding and can discontinue it only if other reasons to discontinue are revealed¹¹.

In the event of the former, attention is drawn to the fact that the regulation would have no sense if, in spite of the public prosecutor's withdrawal, the court was obliged to continue the proceeding. Discontinuation or continuation of the proceeding should depend on the court's assessment, which should take into account how advanced the proceeding is¹².

In the event of the latter, it is pointed out that the withdrawal of an indictment cannot cause its annihilation and create a situation defined in Article 17 § 1

⁷ I. Nowikowski, *Odwolalność czynności procesowych stron w polskim procesie karnym* [Revocability of the parties' proceeding actions in the Polish criminal trial], Lublin 2001, p. 94, Supreme Court ruling of 12 November 1996, II AKa 298/96, OSN Prok. i Pr. 1997, No. 6, item 25.

⁸ F. Prusak, *Postępowanie karne. Wprowadzenie, Zasady procesu karnego* [Criminal proceeding – Introduction – Criminal trial rules], Warszawa 2001, p. 179.

⁹ M. Cieślak, *Odstąpienie oskarżyciela publicznego...* [Public prosecutor's withdrawal...], p. 16; S. Waltoś, *Proces karny, Zarys systemu* [Criminal trial – System outline], Warszawa 2009, p. 281; Z. Gostyński [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M.R. Kmiecik, [in:] R. Kmiecik, E. Skrętowicz, *Proces karny, Część ogólna* [Criminal trial – General issues], Warszawa 2006, p. 84; I. Nowakowski, *Odwolalność czynności...* [Revocability of...], p. 95. In the doctrine, there are also standpoints that...

¹⁰ M. Cieślak, *Odstąpienie oskarżyciela publicznego od oskarżenia* [Dropping the charge by a public prosecutor], Pal. 1961, No. 1, p. 15, *ibid.*, *Polska procedura karna...* [Polish criminal procedure...], p. 264.

¹¹ W. Daszkiewicz, *Oskarżyciel w polskim procesie karnym* [Prosecutor in the Polish criminal trial] Warszawa 1960, p. 177 and next; J. Tylman, *Zasada legalizmu w procesie karnym*, Warszawa 1965, p. 138; S. Stachowiak, *Funkcje zasady skargowości w polskim procesie karnym* [Function of the principle of accusatoriality in the Polish criminal trial], Poznań 1975, p. 58.

¹² M. Cieślak, Z. Doda, *Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (I półrocze 1977 r.)* [Review of rulings of the Supreme Court with respect to criminal proceeding (1st half of 1977)], Pal. 1978, No. 1, pp. 37–38.

point 9 of the CPC¹³. In the judicature, it is assumed that: “The fact that there is a principle of accusatoriality in the criminal proceeding (Article 6 of the CPC – at present Article 14 § 1 [comment by R.A.S.]) does not mean that dropping the charge by a public prosecutor is a negative prerequisite for criminal proceeding as defined in Article 11 point 4 (at present Article 17 § 1 point 9 [R.A.S.]) of the CPC and oblige the court to discontinue the proceeding. It apparently results from Article 36 of the CPC (at present Article 14 § 2 [R.A.S.]), in accordance with which dropping the charge by the public prosecutor does not bind the court. The provision should be read in the context of Article 361 § 2 of the CPC (at present Article 414 § 1 second sentence [R.A.S.]) establishing an obligation to issue an acquittal in case of circumstances defined in Article 11 point 1 of the CPC (at present Article 17 § 1 point 1 and 2 [R.A.S.]), thus, e.g. when the incident did not take place or the given person did not commit the act”¹⁴. It is accurately stated in the doctrine that dropping the charge by a prosecutor does not constitute a negative prerequisite for the proceeding and does not bind the court, and the court is always obliged to examine legal and actual grounds for such a withdrawal. While enforcement agencies are obliged to initiate criminal proceeding in case of crimes prosecuted *ex officio*, and a public prosecutor is obliged to file an indictment, on the other hand, somewhat symmetrically, there is an obligation to desist from prosecution or drop the charge if there are no sufficient grounds for it¹⁵.

Dropping the charge – despite the opinion presented in the doctrine¹⁶ – is not equivalent to the withdrawal of the indictment¹⁷. Contrary to what is said, dropping the charge does not result in the annihilation of the charge, although a public prosecutor expressed a will not to prosecute¹⁸. This does not result in the abandonment of the prosecution¹⁹. It is rightly pointed out that a public prosecutor stops supporting the charge but the complaint contained in the indictment does not stop existing. The legally entitled prosecutor’s complaint exists in spite of his/her behaviour, as

¹³ Supreme Court ruling of 28 December 1976, VI KRN 286/76, OSNKW 1977, z. 3, item 25 with glosses by J. Bednarzak, OSPiKA 1977, No. 11–12, p. 501–503; S. Stachowiak, OSPiKA 1977, z. 11–12, pp. 503–505 with comments by A. Kafarski, *Przegląd orzecznictwa Sądu Najwyższego z zakresu postępowania karnego (za I półrocze 1977 r.)* [Review of rulings of the Supreme Court with respect to criminal proceeding (1st half of 1977)], NP 1978, No. 9, p. 1325, W. Daszkiewicz, *Przegląd orzecznictwa Sądu Najwyższego (prawo karne procesowe – I półrocze 1977)* [Review of rulings of the Supreme Court (criminal procedure law – 1st half of 1977)], PiP 1989, No. 4, p. 37.

¹⁴ Supreme Court ruling of 7 April 1994, II KRN 18/94, OSNKW 1994, No. 5–6, item 35 with a gloss by K. Woźniowski, Pal. 1995, No. 11–12, p. 231 and Inf. Pr. 1995, No. 1–3, item 262.

¹⁵ S. Stachowiak, Gloss on the Supreme Court ruling of 9 July 1997, V KKN 67/97, Prok. i Pr. 1998, No. 7–8, p. 89.

¹⁶ E. Skrętowicz: *Słowo wstępne*, [in:] *Kodeks postępowania karnego* [Criminal Procedure Code], Kraków 1997, p. 9–10.

¹⁷ M. Cieślak, Z. Doda, *Przegląd orzecznictwa...* [Review of rulings...], Pal. 1978, No. 1, pp. 37–38.

¹⁸ S. Śliwiński, *Polski proces karany przez sądem powszechnym, Zasady ogólne* [Polish criminal trial before a common court – General issues], Warszawa 1948, p. 104; J. Tylman, *Zasada legalizmu w procesie karnym* [Principle of legalism in a criminal trial], Warszawa 1965, p. 137.

¹⁹ F. Praškiewicz, J. Tylman, *Zmiana oskarżenia w procesie karnym powszechnym* [Change of indictment in a common trial], ZN U Nauki Humanistyczno-Społeczne. Prawo 1958, No. 9, p. 191.

they do not have to maintain the same attitude throughout the whole proceeding²⁰. It is rightly assumed in the doctrine that Article 14 § 2 of the CPC does not apply to the withdrawal of the indictment but to the function of prosecution at the stage of the juridical proceeding, the aim of which is to support the filed indictment²¹. Dropping the charge has an effect *ex nunc*. This means that dropping the charge by a public prosecutor does not result in ineffectiveness of the indictment. The court is not authorised to discontinue the proceeding because of the lack of a public prosecutor's complaint²², because the indictment continues to exist²³.

III. Withdrawal of the indictment

The Act of 27 September 2013 amending the Criminal Procedure Code and some other acts²⁴ substituted the concept of “dropping the charge by a public prosecutor” with “a withdrawal of an indictment by a public prosecutor”. It is connected with the increase in contradictoriness of the juridical proceeding. In the explanatory statement to the Bill it was pointed out that “Contradictoriness also assumes, bigger than currently, freedom of the parties to decide on the scope and of their participation in the proceeding (which applies to parties other than the prosecutor) and broader control over the subject-matter of the proceeding (which applies to a prosecutor). Because of that, it was necessary to propose a new wording of the draft Article 14 § 2 of the CPC and constitute the possibility of withdrawing the indictment by a public prosecutor”²⁵.

1. The essence of indictment withdrawal

The word “withdrawal” means “return to a former state”²⁶. The withdrawal of the indictment means that there is a return to the situation before the indictment was filed, i.e. there is a legal state as if the indictment had not been filed. The

²⁰ S. Stachowiak, *Funkcja zasady skargowości w polskim procesie karnym* [Function of the principle of accusatoriality in Polish criminal trial], Poznań 1975, p. 58; *ibid.*, Gloss on the Supreme Court ruling of 28 December 1976, VI KRN 286/76, OSPiKA 1977, No. 123, p. 503.

²¹ I. Nowakowski, *Odwolalność czynności...* [Revocability of...], p. 100.

²² I. Nowakowski, *Odwolalność czynności...* [Revocability of...], p. 102; A. Gaberle, *Leksykon polskiej procedury karniej* [Lexicon of Polish criminal procedure], Gdańsk 2004, p. 134.

²³ F. Praškiewicz, J. Tylman, *Zmiana oskarżenia...* [Change of indictment...], p. 191; W. Daszkiewicz, *Odstąpienie oskarżyciela publicznego od oskarżenia a zasada legalizmu* [Dropping the charge by a public prosecutor and the principle of legalism], Pal. 1961, No. 8, p. 44; S. Stachowiak, Gloss on the Supreme Court ruling of 9 July 1997..., p. 91.

²⁴ Journal of Laws of 2013, item 1247, cited later as the amendment.

²⁵ *Uzasadnienie projektu ustawy o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw* [Explanatory statement to a bill amending the Act on the Criminal Procedure Code and some other acts], (the Sejm paper No. 870), p. 168.

²⁶ *Praktyczny słownik współczesnej polszczyzny* [Practical Dictionary of the Contemporary Polish Language], (ed.) H. Zgólkowa, vol. 7, Poznań 1996, p. 276.

complaint is annihilated and loses its legal validity. The withdrawal is effective *ex tunc*. This way, the indictment became a proceeding act that is revocable. A complaint in the form of an indictment is necessary not only to initiate the proceeding but also to continue it. The scope of public prosecutor's control over the indictment has changed. The public prosecutor's right to withdraw the indictment means that he/she does not lose control over this proceeding act after it has been filed in court and the indictment does not become a being independent of the organ that filed it in court. Having filed it in court, he/she has control over it.

It is rightly stated in the literature that a withdrawal of an act serves the removal of the results of that act, deprives the act of importance to the proceeding and is aimed at the future²⁷. Since a withdrawal of an act makes it non-existent, there is a proceeding obstruction in the form of a lack of a legally entitled prosecutor's complaint (Article 17 § 1 point 9 of the CPC). "The withdrawal of the indictment – as the explanatory statement to the Bill emphasises – will mean the necessity to discontinue the proceeding based on Article 17 § 1 point 9 of the CPC due to the lack of an entitled prosecutor's complaint. The solution is indispensable in order to avoid situations, in which the court – which as a rule does not prove *ex officio* – would find itself in the event the prosecutor resigns from supporting the indictment"²⁸.

The consequences of the withdrawal of an indictment are different from those of dropping the charge. In the event of a withdrawal of an indictment, the court cannot continue the proceeding because, due to the negative proceeding prerequisite in the form of a lack of an entitled prosecutor's complaint, it is obliged to discontinue the proceeding based on Article 17 §1 point 9 of the CPC. It cannot do this – see below – directly after a withdrawal of the indictment by the public prosecutor because a subsidiary prosecutor may support the charge.

Withdrawing the indictment, a public prosecutor resigns from the right to a complaint. In accordance with Article 14 § 1 sentence III of the CPC, an indictment against the same person in connection with the same act cannot be filed again. The discontinuation of the proceeding by court results in a state of previously binding judgement (*rei judicatae*).

A withdrawal of the indictment with the consent of the accused can take place at every stage of the proceeding before the court of the first instance, thus also just before the end of the juridical proceeding after all the circumstances have been explained. In connection with that, a question arises what ruling should the court issue when the collected evidence clearly indicates the accused has not committed the act imputed to them. The issue is connected with the concurrence of proceeding prerequisites, which result in different proceeding consequences. Taking into account the prerequisite in the form of a lack of an

²⁷ I. Nowakowski, *Odwolalność czynności...* [Revocability of...], p. 101.

²⁸ *Uzasadnienie...* [Explanatory statement...], p. 168.

entitled prosecutor's complaint, the court should discontinue the proceeding, but taking into account the lack of evidence for the crime commitment or that it was committed by the accused, the court should acquit the accused.

In the literature, the issue of the concurrence of prerequisites is solved in various ways. It is assumed that:

- 1) In the case of the concurrence of prerequisites resulting in different proceeding effects, it is necessary to – in accordance with the principle of the strongest legal effect – take into account all the prerequisites in question and rule in agreement with the prerequisite resulting in the most important proceeding consequences; but, in the case of the concurrence of a formal proceeding prerequisite with the substantial condition of responsibility, it is necessary to discontinue the proceeding even if the case has been completely solved (the principle of the superiority of formal assessment)²⁹;
- 2) In the event of the concurrence of the acquittal prerequisite with another prerequisite resulting in discontinuation, it is necessary to discontinue the proceeding because guilt can be settled only in an admissible proceeding, but the solution applies only to discontinuation of the proceeding until the court proceeding starts, and when the court is convinced that there was no abolition of the presumption of innocence, it should rule acquittal because in public opinion it counts for more than discontinuation³⁰;
- 3) The most important prerequisite is taken into consideration³¹;
- 4) The prerequisite resulting in the most important consequences is accepted; the proceeding cannot take place in a situation when it is found that an act has not been performed and in such a case formal prerequisites are not important.³²

It is unacceptable to base on the principle of formal assessment priority because it strikes with too far-reaching formalism and does not take into account the interests of the accused. With respect to this stand, the negative proceeding prerequisite of an absolute character causes that the proceeding cannot take place³³ and makes it impossible to launch and conduct the proceeding in any legal proceeding situation and adjudicate on the substance of the case, which is admissible only in a correct proceeding, and a defective proceeding is when there

²⁹ M. Cieślak, *Polska procedura karna...* [Polish criminal procedure...], p. 422; *ibid.*, *Nieważność orzeczeń w procesie karnym PRL* [Invalidity of rulings in criminal trials in the People's Republic of Poland], Warszawa 1965, p. 72–73; *ibid.* *Zbieg warunków negatywnych w postępowaniu* [Concurrence of negative conditions in the proceeding], NP 1958, No. 9, p. 35.

³⁰ S. Waltoś, *Proces karny...* pp. 476–477.

³¹ S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego, Komentarz* [Criminal Procedure Code – Commentary], Warszawa 1996, p. 33.

³² R.A. Stefański, *Zbieg przyczyn umorzenia postępowania przygotowawczego* [Concurrence of reasons for discontinuation of preparatory proceeding], *Prok. i Pr.* 2000, No. 4, pp. 74–75.

³³ M. Cieślak, *O przestankach procesowych w polskim postępowaniu karnym* [On juridical premises in Polish criminal proceeding], *PiP* 1969, No. 12 [in:] M. Cieślak, *Dziela wybrane* [Selected works], vol. IV, Kraków 2011, p. 281.

is a proceeding obstacle³⁴. Discontinuation of a proceeding that is in its advanced stage, directly after a negative formal proceeding prerequisite has been found, would make the accused unable to be cleared of all groundless accusations. It is rightly emphasised in the doctrine that there would be an evident limitation of the right of the accused to obtain a substantial ruling in the proceeding that has been launched against him/her and this might lead to the unjust rulings³⁵.

It might seem that the interest of the accused is not important if they give their consent to a withdrawal and this way agree for a discontinuation of the proceeding instead of an acquittal. The conclusion is inappropriate because the accused can give consent to the withdrawal of an indictment, as they are not sure whether an acquittal will be ruled. They choose the withdrawal option that, in their opinion, is favourable to them because it guarantees they are not going to be sentenced.

The supporters of other solutions, although they provide various arguments, in fact represent the same stand that in the above-discussed case, the court is obliged to rule an acquittal and cannot discontinue the proceeding based on the lack of an entitled prosecutor's complaint. An acquittal ruling is most important and causes the furthest-reaching consequences.

The doctrine assumes a limited admissibility of issuing a substantial ruling, in spite of the fact that a negative proceeding prerequisite has been found, namely when it is revealed after all the proceeding activities and the collection of evidence have been completed. This kind of situation creates conditions for examining *in merito* grounds for charges³⁶. Thus, it is not possible to discontinue the proceeding in a court case quoting the lack of an entitled prosecutor's complaint if the analysed and assessed circumstances do not make it possible to prove somebody's guilt or create doubts whether the act occurred at all. Due to that, the proceeding can be concluded with a substantial ruling of an acquittal.

2. Conditions for the withdrawal of an indictment

In accordance with the wording of Article 14 § 2 of the CPC, a public prosecutor can withdraw an indictment:

- until the start of a court proceeding during the first main hearing;
- in the course of court proceeding in the court of first instance with the consent of the accused.

³⁴ K. Marszał, *Przedawnienie w prawie karnym* [Limitation in criminal law], Warszawa 1972, p. 105.

³⁵ Supreme Court resolution of 13 March 1997, I KZP 1/97, OSNKW 1997, No. 5–6, item 42 with comments by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 1997 rok* [Review of resolutions of the Criminal Chamber of the Supreme Court with respect to criminal proceeding law – 1997], WPP 1998, No. 3–4, pp. 159–160.

³⁶ M. Cieślak, *Polska procedura...* [Polish procedure...], pp. 420–421; R. Kmiecik, E. Skrętowicz, *Proces karny, Część ogólna* [Criminal trial – General issues], Kraków–Lublin 1996, pp. 206–207.

The accused has no influence on the withdrawal of an indictment before the start of a court proceeding, i.e. the indictment official presentation (Article 385 § 1 of the CPC). It can take place without their consent. It is possible only during the first main hearing. The main hearing was defined as “the first”, which means “the first in a row, order, sequence referring to number one”³⁷, “occurring before all the other in a numerical, digital or alike order”³⁸. The linguistic meaning indicates that it is the first chronological hearing. It is not possible to withdraw the indictment during the hearing that takes place later, after a break, although the court proceeding did not start during the previous hearing because this one is not the first hearing actually. The hearing conducted after the break even as a continuation is not the first one but a successive one. The same applies to a proceeding after the quashing of the judgement by the court of the second instance or the Supreme Court and referring the case to the court of the first instance for re-hearing. In such case, the entitlement is not revived. It was highlighted in the explanatory statement to the amending Bill, which says: “it will not be accessible after the quashing of a judgement and referring the case for re-hearing”³⁹.

The accused has a considerable influence on the withdrawal of the indictment after the start of the court proceeding because it can be implemented – in accordance with Article 14 § 2, sentence II, of the CPC – only with their consent. The consent of the accused as a condition of a withdrawal of an indictment is in the interest of the accused, who may be interested in finalising the trial and an acquittal judgement; while a withdrawal of the indictment in general results in the discontinuation of the proceeding, which can make some difference. The doctrine rightly highlights that one of the fundamental rights of the accused in the court proceeding is the right to judgement, i.e. the right to a substantial settlement of the case⁴⁰. It is rightly pointed out that in the explanatory statement to the amending Bill that: “It is assumed that in the course of trial, the withdrawal of the indictment is admissible only with the consent of the accused (draft Article 14 § 2, second sentence, of the CPC), because otherwise, with the use of a unilateral proceeding act, a public prosecutor would be able to lead to the discontinuation of the proceeding in a situation when proving the prosecution theses before court faced difficulties. In such a case, a person accused of crime should have the right to acquittal, which is a better vindication than a discontinuation of the proceeding due to the withdrawal of an indictment”⁴¹.

³⁷ *Praktyczny słownik współczesnej polszczyzny* [Practical Dictionary of the Contemporary Polish Language] (ed.) H. Zgólkowa, vol. 28, Poznań 2000, p. 315.

³⁸ *Mały słownik języka polskiego* [Small dictionary of the Polish Language] (ed.) B. Dunaj, Wilga 2007, p. 455.

³⁹ *Uzasadnienie...* [Explanatory statement...], p. 168.

⁴⁰ W. Daszkiewicz, *Odstąpienie oskarżyciela publicznego od oskarżenia a zasada legalizmu...* [Dropping the charge by a public prosecutor and the principle of legalism...], p. 40.

⁴¹ *Uzasadnienie...* [Explanatory statement...], p. 168.

In Article 14 § 2, sentence II, of the CPC, unlike in the case of the withdrawal of an indictment before the start of the court proceeding, there is a lack of a reservation that it applies to the first main hearing. *Prima vista*, it seems the condition does not apply to a withdrawal of an indictment after the start of a court proceeding. It is a right observation because it would be difficult to find reasonable prerequisites of the elimination of such a possibility during a successive hearing or in the course of one resulting from the quashing of the judgement and referring the case for re-hearing. It may be aimless to conduct a sometimes long trial that would be concluded with an acquittal when a public prosecutor comes to a conclusion that there is a lack of evidence to convict the accused and would like to withdraw the indictment with the consent of the accused who is interested in the fast conclusion of the trial.

The withdrawal of an indictment with the consent of the accused is admissible in the course of the court proceeding, i.e. not later than the court decides to close the trial (Article 405 of the CPC). In Article 14 § 2, sentence II, of the CPC, it was directly stated that it could take place *verba legis* “in the course of a trial”. It is not possible in the prosecutor’s speech, which is made after the court proceeding has been closed (Article 406 § 1 of the CPC).

The clear meaning of the expression in Article 14 § 2 of the CPC that an indictment may be withdrawn *verba legis* “before the court of the first instance” is that filing such a statement in the proceeding before the court of appeal is inadmissible.

The discussed conditions for the withdrawal of an indictment are formal in character. The act does not say anything about substantive conditions. There is no information in what circumstances a public prosecutor is entitled to withdraw the indictment. Undoubtedly, the conditions are the same as those applicable in the case of dropping the charge. In both cases it is a situation when in the public prosecutor’s opinion there are no grounds to support the indictment. A public prosecutor represents the State and should not support prosecution when the evidence does not prove the grounds for prosecution. Supporting the indictment in spite of apparent facts – as it is rightly stated in the doctrine – is erroneous and socially destructive because it undermines the authority of the State organs acting as public prosecutors and shakes the belief in their (especially the prosecutor’s) impartiality⁴².

It is assumed in the doctrine that the dropping of the charge – which *mutatis mutandis* can be applied to the withdrawal of an indictment – can take place if, in the public prosecutor’s opinion:

- prosecution is undesirable;
- the evidence the prosecutor possesses is apparently insufficient, seeming or false⁴³.

⁴² S. Stachowiak, Gloss on the Supreme Court ruling of 9 July 1997..., p. 90.

⁴³ M. Cieślak, *Odstąpienie oskarżyciela publicznego od oskarżenia* [Dropping the charge by a public prosecutor], Pal. 1961, No. 1 [in:] M. Cieślak, *Dziela Wybrane...* [Selected works...], p. 182.

A prosecutor – in accordance with Article 32 item 2 of the Act of 20 June 1985 on the Public Prosecution Service⁴⁴ – is obliged to drop the charge if the results of the trial do not confirm charges. Although the directive applies to a public prosecutor, taking into account that other prosecutors may perform these activities (article 32 item 1 of the Act on the Public Prosecution Service), it is necessary to apply it to other prosecutors, too. It is rightly emphasised that a prosecutor drops the charge in the case when it is apparent that the accused did not commit the crime or there is no sufficient evidence for further prosecution or adjudicating is inadmissible because of a proceeding obstacle⁴⁵.

In the literature, the possibility of a withdrawal of the indictment because of a negative proceeding prerequisite has been called into question. There are opinions that in such a situation, a prosecutor acting as a proponent of the rule of law should file a motion to discontinue the court proceeding based on the adequate negative proceeding prerequisite⁴⁶. This is, in my opinion, what a prosecutor should do only if the negative prerequisite is further-reaching than a lack of a legally entitled prosecutor's complaint.

The withdrawal of the indictment is in the form of a statement, which can be made in writing or orally and noted in the minutes (Article 116 of the CPC). It can be filed after the receipt of the indictment by the court because then the case is pending. It can be filed during the preparatory proceeding stage before the main hearing or during the main hearing. The Act does not require that prosecutors justify the withdrawal of the indictment but due to the educational role of the main hearing they should give reasons for filing the statement. It should be always connected with a precise and sufficient explanation of the decision.

It does not have to be connected with a motion to discontinue the proceeding based on the lack of a legally entitled prosecutor's complaint because this effect results from the Act (Article 17 § 1 point 6 of the CPC).

IV. Scope of withdrawal

An indictment can refer to more than one accused person (objective/personal scope) and two or more crimes (subjective/substantial scope). In connection with that, a question is asked: Must the whole indictment be withdrawn or is it possible to withdraw the part of the indictment referring to a particular accused person or some charges? Article 14 § 2 of the CPC speaks about a withdrawal of an indictment, which suggests the withdrawal of the whole one. The provision does not speak about a physical withdrawal of the document from court

⁴⁴ Journal of Laws of 2011, No. 270 with amendments that followed.

⁴⁵ J. Tylman, *Zasada legalizmu...* [Principle of legalism...], pp. 137–138.

⁴⁶ M. Cieślak, *Odstąpienie oskarżyciela publicznego...* [Dropping the charge by...], p. 182.

but a return made in an ideal sense. A different interpretation of the phrase would lead to a situation in which a public prosecutor would have to support prosecution of the accused or the act in spite of their strong conviction that it is groundless, and this would be in conflict with the prosecutor's tasks, which do not consist in supporting an indictment at all costs, but in acting as an organ of the State in compliance with the rule of law (Article 2 of the Act on the Public Prosecution Service). It is rightly emphasised in the doctrine that in the trial, a prosecutor strives for objective truth and should ensure that a crime perpetrator is justly punished and an innocent person is not convicted⁴⁷. That is why a prosecutor is obliged to file such a statement in the case he/she believes there are no substantive or formal prerequisites for criminal conviction. A public prosecutor is responsible to take into account all the circumstances in favour of the accused or to their disadvantage (Article 4 of the CPC), and this principle is connected with undertaking steps that are adequate to the real and objective assessment of circumstances.

In the case of an indictment of a complex subjective, objective or subjective-objective character, it is possible to withdraw an indictment completely or partially. In the latter case, it can refer to some of the accused or some of the charges.

V. Victim's role

A withdrawal of an indictment does not require the injured person's consent, independent of their status in the court proceeding. But this does not mean that they have no influence on the further course of the proceeding. The Criminal Procedure Code enables victims to act as subsidiary prosecutors and support an indictment. In the explanatory statement to the Bill, it is emphasised that: "The new formulation of Article 14 § 2 of the CPC requires the protection of the interests of a subsidiary prosecutor, who should not be deprived of their rights due to a withdrawal of an indictment by a public prosecutor"⁴⁸.

In the case when the injured persons act as subsidiary prosecutors together with a public prosecutor, after the withdrawal of the indictment by the public prosecutor, they act on their own. In accordance with Article 54 § 2, sentence I, of the CPC, the withdrawal of the indictment by a public prosecutor does not deprive subsidiary prosecutors of their rights.

In the situation when the injured did not act in that role, they can obtain the status of subsidiary prosecutors if within 14 days from the notification of the

⁴⁷ S. Waltoś, *Problemy prawnoprocesowe przemówienia prokuratora na rozprawie głównej* [Legal and proceeding issues connected with the prosecutor's speech during the main hearing], NP. 1969, No. 5, p. 723.

⁴⁸ *Uzasadnienie...* [Explanatory statement...], p. 168.

withdrawal of the indictment by the public prosecutor they file a statement that they join the proceeding as subsidiary prosecutors (Article 54 § 2, sentence II, of the CPC). In the case the public prosecutor withdraws the indictment and the victims do not participate in the proceeding as subsidiary prosecutors, they are notified of the right to file a statement on joining the proceeding as subsidiary prosecutors. They have to do this – as it was already stated above – within 14 days from the notification of the withdrawal of the indictment by the public prosecutor. It is a preclusive deadline. Failure to meet it results in the loss of the right. When the statement is filed, the proceeding continues with the participation of the injured as an active party to the proceeding.

Due to the fact that after the withdrawal of the indictment by the public prosecutor the victim acting as a subsidiary prosecutor can support the prosecution, the court does not discontinue the proceeding based on the lack of a legally entitled prosecutor's complaint, but takes another decision that depends on whether a subsidiary prosecutor has already taken part in the proceeding. In the case the victim has acted in that role, the proceeding is continued, of course without the participation of the public prosecutor. If the withdrawal took place during the main hearing, the proceeding is continued. The Criminal Procedure Code does not rule to start the proceeding from the very beginning.

In the situation when a subsidiary prosecutor has not taken part in the proceeding so far, the judge rules a break and orders that the injured party is notified about the withdrawal of the indictment by the public prosecutor and the right to file a statement on joining the proceeding as a subsidiary prosecutor (*arg. ex* Article 54 § 2, sentence II and Article 16 § 2 of the CPC). In the case the statement is filed, the trial – in accordance with Article 402 § 2 of the CPC – is continued, and started from the beginning only when the bench has changed or the court decides to do so. In general, the court should decide to start the proceeding from the beginning in the case the public prosecutor withdraws the indictment after the examination of all the evidence and just before the trial is closed. A substantive support of the prosecution by the subsidiary prosecutor in such a case would be illusive.

If a victim does not file a statement on joining the proceeding as a subsidiary prosecutor in due time, the court discontinues the proceeding based on the lack of legally entitled prosecutor's complaint (Article 17 § 1 point 9 of the CPC).

VI. Conclusion

The Amendment of 2013 substitutes “the dropping of the charge by a public prosecutor” for “a withdrawal of an indictment”, which is in agreement with the essence of an accusatory proceeding, because in a juridical proceeding a complaint belongs to a public prosecutor who initiates a court proceeding by

filing a indictment. Failure to bind the court by the dropping of the charge by a public prosecutor (Article 14 § 1 of the CPC before the Amendment of 2013) was in conflict with the essence of the principle.

A withdrawal of an indictment by a public prosecutor causes a discontinuation of the proceeding based on the lack of a legally entitled prosecutor's complaint (Article 17 § 1 point 9 of the CPC), which is in complete compliance with the principle of accusatoriality. It does not infringe the interests of the injured party, who can continue to support prosecution as a subsidiary prosecutor. At the same time, a withdrawal of an indictment in the course of the juridical proceeding requires obtaining the consent of the accused.

WITHDRAWAL OF THE INDICTMENT BY PUBLIC PROSECUTOR

Summary

The article discusses the issue of a withdrawal of an indictment by a public prosecutor, which was introduced to the Polish criminal proceeding by the Act of 27 September 2013 amending the Act on the Criminal Procedure Code and some other acts, which will enter into force on 1 July 2015. The essence of a withdrawal of an indictment, conditions for it, its scope and the role of the injured persons are discussed and a comparison with the former solution of dropping the charge by a public prosecutor is presented.

COFNIĘCIE PRZEZ OSKARŻYCIELA PUBLICZNEGO AKTU OSKARŻENIA

Streszczenie

Przedmiotem artykułu jest cofnięcie przez oskarżyciela publicznego aktu oskarżenia wprowadzone do polskiej procedury karnej ustawą z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, które wejdzie w życie w dniu 1 lipca 2015 r. Została omówiona istota cofnięcia aktu oskarżenia, warunki i zakres jego cofnięcia oraz rola pokrzywdzonego. Porównano także tę instytucję z dotychczas obowiązującym odstąpieniem oskarżyciela publicznego od oskarżenia.

LA RÉTRACTION DE L'ACTE D'ACCUSATION PAR UN ACCUSATEUR PUBLIC

Résumé

L'objet de l'article concerne la rétraction de l'acte d'accusation par l'accusateur public introduit dans la procédure pénale polonaise par le droit du 27 septembre 2013 vu le changement du droit – le Code de la procédure pénale et quelques autres droits – qui entre en vigueur le 1^{er} juillet 2015. L'auteur parle de l'essentiel de rétraction de l'acte d'accusation, des conditions et du champ de sa rétraction et aussi du rôle de l'endommagé. Il a comparé cette nouvelle institution avec la rétraction de l'accusation actuellement obligatoire fait par l'accusateur public.

АНУЛИРОВАНИЕ ОБЩЕСТВЕННЫМ ОБВИНИТЕЛЕМ ОБВИНИТЕЛЬНОГО АКТА

Резюме

Предметом статьи является аннулирование общественным обвинителем обвинительного акта, введённое в польскую уголовную процедуру законом от 27 сентября 2013 г. об изменении закона – УПК, а также некоторых других законов, которые войдут в жизнь 1 июля 2015 г. Оговорена суть аннулирования, условия и сфера его аннулирования, а также роль потерпевшего. Данный институт подвергнут сравнению с применяемым до сих пор отказом общественного обвинителя от обвинения.