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The Adversarial System in Polish Criminal Proceedings – An Analysis of the Amendments of 1 July 2015

I. Introduction

The Act of 27 September 2013 on the amendment to the Code of Criminal Procedure, Criminal Code and certain other acts[1] introduced significant changes to the model of Polish criminal proceedings. For example, the changes pertain to the perspective of the principle of the adversarial trial system.

The aforementioned Act was drafted by the Codification Commission for the Reform of Criminal Law, working in the Ministry of Justice. In the justification of the draft[2], the Commission indicated that the submitted draft aims to "remodel jurisdictional proceedings so that they are more adversarial in nature. This will create the best conditions for clarifying material truths, and for respecting the rights of the participants of the proceedings." As a consequence, a model of proceedings was presented in the draft, based on the assumption that

> evidentiary acts in the preparatory proceedings are, in principle, supposed to— to create the basis for prosecutor's submission (they are proceeded on for the prosecutor, not for the court), and only in exceptional cases – to the extent to which carrying it out before the court is not possible – will be used by the court for finding the facts of the case.

It was also emphasised in the justification of the draft that the above assumption "leads to shifting the responsibility for the outcome of the proceedings on the parties, and above all – because of the binding principle of the presumption of innocence – on the prosecutor."

The court should be an impartial arbiter who, after hearing evidence submitted by the parties, issues a fair sentence. At the same time, the changes proposed by the authors of the draft should result in accelerating the criminal proceedings. In the introductory part of the draft, the following idea was expressed:

> In the light of the structure of crime, and the intensity of crime wave, and the resulting changes to the nature of proceedings conducted by prosecuting agencies and the administration of justice, introducing these changes is necessary as – when introduced – they should prevent the excessive lengthiness of proceedings […].

II. The Amendments

1. Art. 167 CCP

The changes introduced by the abovementioned Act pertained, above all, to Art. 167 of the Code of Criminal Procedure (hereinafter referred to as "CCP"). This Article, which was binding until 30 June 2015, was worded as follows: "Evidence shall be taken upon a motion of the parties, the entity specified in Art. 416, or ex officio." In its current wording, Art. 167 § 1 CCP provides as follows:

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[1] Dz. U. (J. of laws) of 2013, item 1247.

[2] The draft is available on the web page of the Ministry of Justice, http://bip.ms.gov.pl.

> In the proceedings which were instituted upon an initiative of a party, evidence is heard by the court after it has been admitted by the presiding judge or the court. In the event that the party motioning as to the evidence failed to appear, as well as in exceptional cases justified by particular circumstances, the court may admit and hear the evidence ex officio.

Next, Art. 167 § 2 CCP provides the following:

> In proceedings before the court other than listed in § 1, and in preparatory proceedings, evidence is obtained by the trial agency conducting the proceedings. It does not exclude the right to submit the motion as to evidence by a party.

The above allows the conclusion that in court proceedings not initiated by the court ex officio[3] evidence is heard upon the motion from the parties to the proceedings. However, the amendment to Art. 167 CCP does not fully exempt the court from its obligation to have evidentiary actions ex officio. In exceptional cases justified by particular circumstances the court does hear evidence ex officio.

The following fragment of the justification of the abovementioned draft law deserves attention. It states that retaining, in exceptional cases, the possibility of admitting evidence – obtained ex officio – is to prevent the necessity of the court deciding "in deep conviction that whatever was established on the basis of evidence heard upon the motion of the parties, does not conform to the truth." Thus, the evidentiary initiative left with the court does not create a departure from the provision of the guaranteeing nature but – to the contrary – is intended to guarantee the implementation of the trial principle.

When this solution was discussed in legal publications within the framework of the draft law, a proposal was made to abolish the possibility of ex officio hearing evidence by the court, indicating that in the opposite case the planned amendment would be of ostensible nature, particularly considering the imprecise character of the expression: "exceptional, particularly justified cases."[4]

The amendments to Art. 167 CCP could prompt the temptation to give up the principle of substantive truth and to adopt the opposing principle of legal (formal) truth in criminal proceedings. In my opinion, such a solution would be neither desirable nor constitutionally admissible; thus, in the light of the constitutional roots of the principle of substantive truth, the resting of certain evidentiary initiative to the court is necessary.

Two judgements of the Constitutional Court, indicating the constitutional grounds for the principle of substantive truth, are particularly worth mentioning:

In its judgement of 18 February 2009[5], the Court stated that aiming at fast conclusion proceedings should not be associated with lesser attention to the correct interpretation and proper application of legal norms, and that the principle of the rapidity of proceedings should not lead to a conflict with reaching the truth in trial nor to the limitation of rights which are guaranteed by law to the parties to the proceedings.

The Constitutional Court has also referred to the concept indicating the rooting of the principle of substantive truth in Art. 45 para 1 of the Constitution (the principle of the right to a fair trial) in its decision of 7 March 2011[6]. In the reasons for the decision, the Constitutional Court included, inter alia, the following idea:

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[3] The proceedings instituted ex officio is e. g. the proceedings for the restoration of lost or destroyed files.

[4] See *A. Bojańczyk*, Reforma procedury karnej, legislacyjne déja vu, Rzeczpospolita of 29 April 2011.

[5] Kp 3/08, OTK ZU No. 2/A/2009, item 9.

[6] P 3/09, OTK ZU No. 2/A/2011, item 13.

> […] In the case considered, the Constitutional Court cannot examine whether – in the context of component elements of the right to a fair trial, and particularly of the obligation on the court to strive to come out with the decision conforming to substantive truth, stemming from it – the application of the questioned provision adopted by the court asking the question is admissible in the light of the Constitution.

Within the range of issues analysed in this paper, the position of the Constitutional Court corresponds to the ideas expressed in publications in the field of criminal procedure, indicating that the principle of substantive truth is a component-element of the principle of the right to a fair trial.

Giving up the principle of substantive truth was not the intent of the authors of the draft law. This appears from the justification of the draft where deliberations are made on the issue of compatibility of the proposed regulation with this principle. Certain anxiety was pronounced there as to the question whether the court, having to rely on the evidence heard upon the motions of parties, would not be forced to take the decision "in the situation where it lacks conviction as to whether the picture of events shown against the background of this evidence conforms to the truth."

As assessed by the authors of the draft, such danger is not real. They indicated that as it is just the hearing of evidence before an independent court, a fully adversarial manner would create the best conditions to arrive at the truth because it "forces the parties to undertake the effort aimed at convincing the court about their arguments."

The adopted amendment to Art. 167 CCP regarding the increased adversary character of proceedings thus consists in the change of method of arriving at the substantive truth in criminal proceedings. It therefore raises the question whether the accepted method would actually provide a strong enough guarantee of reaching the truth in criminal proceedings.

In the justification given in the draft legislation to the change of Art. 167 CCP it was indicated that the change of this provision involves the necessity of further legislative amendments including, e. g., "giving a new meaning to the in dubio pro reo principle." According to the previous wording of Art. 5 § 2 CCP "unresolvable doubts shall not be resolved to the prejudice of the accused." In accordance with Art. 5 § 2 CCP, the wording which was binding as from 1 July 2015 is as follows: "the doubts which were not removed in evidentiary proceedings are resolved to the advantage of the accused."

In essence, Art. 5 § 2 CCP assumes new content only after considering a change of Art. 167 CCP that is primal in relation to it. It is thus this provision which determines with whom the burden of proof lies.

The authors of the draft law amending the Code of Criminal Proceedings emphasised in its justification that Art. 5 § 2 CCP alone did not determine who is responsible for clarifying what had not been removed in the proceedings, indicating that "it does not rest with the court as it is not obliged to hear evidence ex officio." This statement could be open to doubt. It raises the question as to whether, in line with the proposed wording of Art. 167 CCP, in cases justified by exceptional circumstances, the court should be entitled, or obligated to hear the evidence ex officio. The cited fragment of the draft law seems to suggest that it is solely the right of the court. In my opinion, because of the constitutional dimension of the principle of substantive truth, the interpretation of this provision should be different: it should be assumed that in such situations the court is obligated to hear evidence ex officio[7].

Justifying the amendment to Art. 5 § 2 CCP, the authors of the draft law have also pointed out the modification involving the abandonment of the reservation saying that

[7] Also in the context of Art. 232 of the Code of Civil Proceedings. Supreme Court, judgement of 19 June 2009, V CSK 460/08, LEX No. 784972.

the doubts referred to in that provision are to be irremovable. Regarding this issue, the justification of the draft emphasises that the result of the amendment will be that "the prosecutor will bear the obligation to remove doubts (and in a substantive sense – also the defence counsel)." The amendment to Art. 5 § 2 CCP is thus linked to the issue of the burden of proof.

The drafters noticed that introducing the amendment will increase the range of obligations resting on parties in the field of providing evidence. The court will not – as a matter of principle – "relieve" them from hearing ex officio evidence helping to obtain findings in the proceedings which conform to the substantive truth.

Because of the above considerations, the amendment to art. 167 CCP pertaining to the activity of the court in criminal proceedings was coupled with certain guarantees for the parties.

Above all, the positions of the parties were strengthened by wider access to a professional court-appointed defender/attorney, and also by extending the system of instructions of the rights to which they are entitled, and on consequences of the choices made.

Because of the binding nature of the principle of presumed innocence, and of in dubio pro reo, the amendment to Art. 167 CCP, while lessening the burden on the court, will above all force the prosecutors to take an active stance.

A closer analysis of the general clause "in exceptional cases justified by particular circumstances" used in Art. 167 CCP is required as it is to indicate situations where this exceptional competence of the court comes into play.

In the Polish legal system, the idea of limiting the evidentiary initiative of the court is not new. It is known particularly in civil procedure. In civil proceedings, hearing evidence ex officio as a departure from the principle of adversarial proceedings is a means of last resort, taken into account only when there is no other possibility to prevent the risk of a wrong resolution to a given case. It is accepted that the court – acting ex officio under Art. 232 of the Code of Civil Proceedings – should display the evidentiary initiative only in certain particular circumstances[8].

The range of court obligations to engage in clarifying the circumstances of a case, as currently regulated in civil proceedings as well as the presentation of this obligation suggested in the draft prepared by the Codification Commission of Civil Law provides a valuable reference point for evaluating the proposal submitted in this regard for criminal procedure.

By comparison, it is worth pointing out the idea contained in the judgement of 25 August 2010 of the Court of Appeal in Poznań issued within civil proceedings. In the context of Art. 232 of the Code of Civil Proceedings it was stated that the obligation to hear evidence ex officio emerges, for example, when "a party is a helpless person, or the public interest or the interest of third persons not taking part in the proceedings are involved, or there is suspicion that the parties conduct a fictitious trial."

To assess if the above criteria given as examples are fitting for the transfer on the ground of criminal procedure requires considering the public-law nature of the subject matter of criminal proceedings.

As a consequence, assuming that the range of the court's obligation referred to in the draft of Art. 167 § 1 in fine CCP should be determined, inter alia, by the criterion of public interest, would mean that that obligation should be practically unlimited. Thence, viewing that the criterion as an independent criterion should, as a matter of principle, be rejected, particularly because it is above all, the public prosecutor who is the guardian of the public interest in a criminal trial. In some cases, the public interest could, neverthe-

[8] Cf., for example, Judgement of the Appeal Court in Poznań of cf. judgement of 25 August 2010, I ACa 573/10, LEX No. 756670.

less, be in favour of hearing evidence ex officio in proceedings on a public complaint instituted by a subsidiary prosecutor, and in proceedings on a private complaint taking place without the participation of a prosecutor.

In my opinion, the expression "exceptional case justified by particular circumstances" used in the draft of Art. 167 § 1 in fine CCP also includes the helplessness of the parties not using a representative for the trial. It pertains particularly to the helplessness of the accused who do not apply for a court-appointed counsel, and to whom the court is not under any obligation to provide such a counsel. Considering the fact that the Code of Criminal Procedure in the form binding from 1 July 2015 envisages broadening access to court-appointed counsels (at the stage of court proceedings, appointing such a counsel occurs upon the motion of the accused irrespectively of the financial position of the latter), and extending the case of obligatory defence, the necessity of pursuing evidentiary initiative because of the helplessness of a party will probably be rare.

The necessity to hear evidence ex officio on account of the interest of third persons not participating in the proceedings can occur more often[9].

The criterion of a suspected fictitious trial conducted by the parties can also be transferred on the ground of a criminal trial.

A significant indication for interpretation has been provided by the drafters themselves. Particularly worth mentioning is Art. 249a CCP added on 1 July 2015 which has the following wording:

> The grounds for the decision applying or extending preliminary detention should be only the findings made on the basis of evidence known to the accused and his/her defence counsel. The court also takes into account ex officio also these circumstances which the prosecutor has not disclosed, after they are disclosed in the court sitting, if they are advantageous to the accused.

With regard to incidental proceedings on temporary detention, legislators therefore assume that considering evidence ex officio should occur particularly when the "restoration" of the principle of adversarial trial is required, in situations when the accused cannot attempt efficient defence because of not knowing the evidence.

This ratio also emerges when the adversarial nature of a trial is limited by the involvement of state secrets.

Finally, the necessity for the court to hear evidence ex officio can also be implied by the risk of passing the period of limitation for a given offence.

One should also mention the idea contained in the judgement of 19 June 2009[10] where the Supreme Court indicated that the particular circumstance justifying the evidentiary activity of the court in civil proceedings is, e. g., "the suspicion that a party circumvents the law, in connection with the criminal proceedings taking place against it."

The situations, given as examples, explicitly indicate the lack of justification for the postulate of excluding any evidentiary initiative of the court in criminal proceedings, as was mentioned above.

[9] For example – protecting the right of the third party being the owner of an item at risk of forfeiture.

[10] V CSK 460/08, LEX No. 584780.

2. Art. 427 CCP

There is one more issue worth attention. By the Act amending the Code of Criminal Procedure Art. 427 CCP § 4 and § 5 were added. The first of the two is worded as follows:

> In court proceedings which were instituted upon the initiative from a party, no plea of the non-hearing of specified evidence if the party did not submit the motion as to evidence to this effect, nor plea of infringement of provisions pertaining to the activity of the court in hearing evidence, including also hearing evidence outside the evidentiary thesis, can be brought in the appeal.

Comparing the above regulation with the suggested wording of Art. 167 CCP could lead to the disturbing conclusion that, on the one hand, the legislators strive to retain the principle of substantive truth[11], allowing evidence to be heard ex officio "in exceptional cases justified by particular circumstances," but – on the other hand – they do not allow the possibility to question the decision of the court on the grounds that, despite the fact that the situation emerged in which the court should hear evidence ex officio, the court failed to do so and issued a decision not conforming to the truth.

If this conclusion is found to be valid it requires, however, taking into account the wording of Art. 427 § 5 CCP in its new form which reads as follows: "The provision of § 4 does not apply when the hearing of evidence is obligatory."

It is a question here, how the above provision should be understood, and particularly if this provision provides the grounds for questioning the hearing or non-hearing of evidence ex officio by the court "in exceptional case justified by particular circumstances."

On this point, the opinion expressed in legal publications is that if the intent of the legislators was to admit the possibility to submit such a plea in the appeal, then they would put the suitable provision in the form of an additional item within Art. 167 CCP[12]. As they did not do so, Art. 427 § 5 should be related solely to the obligatory pieces of evidence, such as expert evidence, in some cases – evidence from an environmental inquiry, evidence from the record of convictions for the circumstance of the perpetrator's relapse into crime[13].

Accepting the above position within the range in which it indicates the inadmissibility of an appeal in the situation pertained to in Art. 167 § 1 in fine, the grounds for such a decision by the legislators should be discussed.

In my opinion, the rejection by legislators of the possibility to raise in an appeal a plea of non-submission of evidence ex officio even though the situation mentioned in Art. 167 § 1 CCP in fine, i. e. in "an exceptional case justified by particular circumstances" has been triggered, is contrary to the Constitution. The situation to which Art. 167 § 1 CCP in fine pertains must be understood as marking an obligation rather than the right of the court. The components of the right to a fair trial (Art. 45 para 1 of the Constitution), including the principle of substantive truth, applicable here, pertain to the courts of both instances (Art. 176 § 1 CCP in conjunction with Art. 45 para 1 of the Constitution). It means that the criteria of determination whether the court is obliged to hear evidence ex officio, should be open to objectivised verification. Obviously, in the proceedings before the court of second instance, only the plea of non-hearing evidence can be raised. Hearing evidence above the obligation determined by the expression "in exceptional cases justified by particular circumstances" escapes control at the level of

[11] Nevertheless, the departure from this principle would not be possible because of its grounds rooted in the Constitution.

[12] Cf. *D. Świecki*, in: Kodeks postępowania karnego. Komentarz, J. Skorupka (ed.), Warsaw 2015, p. 1104.

[13] Cf. *Świecki*, fn. 12, p. 1104.

instance. There could be no way to accept the thesis saying that there is an obligation to omit such evidence despite the fact that hearing it would enable findings conforming to the truth.

Assuming that the decision issued in the first instance has been questioned because of infringements other than the plea of breaking Art. 167 § 1 CCP in fine, excluded by the legislators, the obligation of hearing evidence on the initiative of the court "in exceptional cases justified by particular circumstances," resulting from this provision will stand in the second-instance court proceedings.

In accordance with Art. 176 para 1 of the Constitution, the court proceedings shall have at least two stages. The component elements of the right to a fair trial (Art. 45 para 1 of the Constitution) also pertain to the court of second instance. In appeal proceedings, the court will thus, as a matter of principle, hear evidence on the initiative of the parties, and ex officio – "only in cases justified by exceptional circumstances." Here, attention should be turned to Art. 452 CCP which was amended by the abovementioned Act of 1 July 2015 broadening the admissibility of evidence before the court of appeal. In the wording binding after 1 July 2015, Art. 452 provides that "the court of appeal admits the evidence on a hearing, when it is not necessary to repeat the trial in its entirety. The evidence can be also admitted before the hearing." In the case of initiating the appeal proceedings and submitting a plea in appeal, particularly regarding the infringement of Art. 438 item 3 CCP (that an error has occurred in the determination of the fact situation as a basis for rendering the decision, if this may have affected the contents of this decision), the court of second instance will thus evaluate the circumstance, whether in the proceedings of first instance, the court implemented the order stemming from Art. 167 of the draft CCP. This will happen, because it is also that court to which the disposition of Art. 167§ 1 CCP in fine pertains

Failing to find grounds for a reformatory decision and remanding the case to the court of first instance, the court of appeal can formulate legal opinions and directions binding the court to which the case has been remanded for re-examination (Art. 442 § 3 CCP). If the direction is formulated requiring the completion of evidence, the court to which the case has been remanded will be obliged to hear the indicated evidence ex officio, because the court of second instance concluded that it was "an exceptional case justified by particular circumstances" which triggered the evidentiary activity of the court[14].

Instituting a second-instance proceedings on any grounds for appeal will result in the repeated triggering of the disposition of Art. 167 CCP as drafted.

When evaluating the exclusion of the possibility of submitting in an appeal a plea of submission or non-submission of an evidence on the court's own initiative in situations to which Art. 167 § 1 CCP in fine pertains, it should be reminded once again that the changes introduced on 1 July 2015 in criminal proceedings regarding the adversarial nature of the trial bring the criminal proceedings closer to civil proceedings. In the Code of Civil Proceedings there is no provision referring directly to the issue of suitability of hearing or not hearing evidence ex officio. Thus, it is just worth tracking how this issue is solved in legal practice. In the earlier-mentioned judgement of 19 June 2009[15], the Supreme Court stated:

[14] Also in *Świecki*, fn. 12, p. 1133.

[15] V CSK 460/08, LEX No. 584780.

> In accordance with the content of Art. 232 CCP, the court can be blamed for not admitting a piece of evidence ex officio even though there has been no obstacle to it, but it cannot be blamed effectively that it admitted a piece of evidence, i. e. that is used the discretional power given to it.[16]

The possibility of the plea of the infringement of the obligation to hear evidence ex officio was again indicated by the Supreme Court in its judgement of 11 January 2011[17].

The changes enhancing the adversarial nature of criminal proceedings merit approval. The thesis of the justification of the draft of the Act amending the Code of Criminal Proceedings, saying that broadening the adversarial nature of criminal proceedings creates the best condition for clarifying substantive truth, is convincing. It also corresponds with another objective of the reform which is to accelerate criminal proceedings.

The changes in terms of the principle of adversarial trial must take into account the public-law aspect of the nature of the subject matter of criminal proceedings. The principle of substantive truth cannot be given up in criminal proceedings. The fact that in criminal proceedings even the decisions made in consensual manner are limited by this principle, is characteristic.

In my opinion, there is no way of justifying the exclusion of the possibility to use the fact that the court has not heard evidence ex officio despite the emergence of circumstances which are referred to in Art. 167 § 1 CCP in fine. By adopting such a regulation, the legislators fell into contradiction. On the one hand, the legislation saw that in certain circumstances the activity of the court in the area of evidentiary activity is necessary to implement the principle of substantive truth, but, on the other hand, it allowed the lack of any consequences for the ongoing proceedings when the court did not show such activity in the situation when such circumstances were present.

III. Conclusion

The changes analysed in this paper pertain solely to the court proceedings which were instituted in the first instance after the amending act had become law, i. e. on 1 July 2015 or later. Thus, it is impossible to verify the assumption expressed in the justification of the Act stating that enhancing the adversarial nature of court trials should contribute to the acceleration of criminal proceedings.

[16] See also judgement of the Supreme Court of 14 March 2007, I CSK 465/06, OSP 2008, No. 11, item 123.

[17] I PK 152/10, LEX No. 738395.