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FROM "WAIVER OF INDICTMENT" TO "WITHDRAWAL OF INDICTMENT". REMARKS ON ARTICLE 14 § 2 OF THE CRIMINAL CODE

The last reform of criminal proceedings "saved" Art. 14, § 2 of the Criminal Code[1], that had been amended on the 1 July 2015[2], and it implemented an institution responsible for "withdrawal of indictment" to the criminal trial, thus replacing the so called "waiver of indictment" being present therein at that time. Even though verbs used in the name of these institutions, such as "to waive" and "to withdraw" in the Polish language mean similar actions[3], coming down to "cancellation" or "resignation from something", however, the *modus operandi* of these institutions is based on a different algorithm. Such a discrepancy also reflects a normative sense of replacing one of these institutions with another, even though it is obvious that in both of these institutions it is all about the public[4] prosecutor's resignation from further accusation support. If the indictment stands for the public prosecutor's aim to pass judgement on and convict the accused person, at the time the former "waiver of indictment" and current "withdrawal of indictment" attest to a kind of *désintéressement* on his part to complete the process, on terms and within limits, which the same public prosecutor previously identified in the prosecution complaint he had signed.

In a sense, Art, 14, § 2 of the Criminal Code could be undoubtedly defined as the so-called "orphan", after the major amendment of the criminal process was

[1] The Act of 6 June 1997 of the Criminal Code Procedure (Dz.U. 2018, Item 1987).

[2] Art. 1, point 3 of the Act of 27 September 2013, on the amendment Act – Criminal Code Procedure and some other Acts (Dz.U. Item 1247 as amended).

[3] Dictionary of the Polish Language, https://sjp.pwn.pl/sjp/cofnac;2449585.html and https://sjp.pwn.pl/szukaj/odst%C4%85pi%C4%87.html (23.07.2018).

[4] Art. 14, § 2 of the Criminal Code discusses this prosecutor, while § 1 of this regulation about "authorized prosecutor". The scope of application § 2 is narrower than § 1, even though auxiliary and private prosecutor still retained the right to "waiver of indictment" (Art. 57, § 1 and Art. 496, § 1 of the Criminal Code).

implemented by the Act of 27 September 2013. The aforementioned amendment assumed a significant contradictory nature of the jurisdictional phase of the criminal process, to which, in a summary, the independence of the parties to the proceedings and a serious limitation of the possibility of initiating evidentiary activities by the ex-officio court were supposed to lead. One of the ways of increasing the parties' activity was granting the public prosecutor (and the auxiliary prosecutor) the right to free disposal of the prosecution complaint, which was to make him an entity fully responsible for the fate of the accusation. Such a full responsibility for an indictment expresses non-duplication in the amended Art. 14, § 2 of the Criminal Code *passusu* on the so-called "non-binding of the court" with a statement of the public prosecutor, which previously used to be a weakness of the institution's waiver of indictment. *Clou* of the change, which was made on the basis of Art. 14, § 2 of the Criminal Code comes down to a significant reduction of the court's role, which has become the recipient of the parties' statements: the public prosecutor and defendant, and also the statement of the injured party (Art. 54, § 2 sentence two of the Criminal Code) and depriving the aforementioned procedural authority of any control instruments in relation to the decisions of the public prosecutor. In the opinion of K. Dudka, such actions caused "a significant increase of the parties' disposition, perceived as the right to alteration by its own actions to the work and outcome of the trial"[5]. Such an increase applies not only to the public prosecutor, but also to the accused and injured party, who in spite of the expiry date pursuant to Art. 54, § 1 of the Criminal Code, gains a new chance to proceed with the case.

Article 14, § 2 sentence three of the Criminal Code prohibits "re-indictment against the same person for the same act". If re-indictment of such an act is "unacceptable", then the resulting situation can be considered in terms of *sui generis* irrevocability of the declaration of the indictment's withdrawal. However, the aforementioned irrevocability will only be characterized by a revocation that previously became effective against its occurrence – next to the public prosecutor's declaration of resignation from supporting the indictment. Further prerequisites in the form of failure to state by the injured party's auxiliary prosecutor to not to declare the will to join the proceedings in this capacity (Art. 54, § 2 sentence two of the Criminal Code) and additionally the consent of the accused party, when the withdrawal of indictment took place after the expiry date indicated in Art. 14, § 2 sentence two of the Criminal Code. Such a solution is consistent with the generally accepted belief that cancellation of an activity "is excluded when the effects are associated with its activity"[6].

[5] K. Dudka, *Rola prokuratora w znowelizowanym postępowaniu karnym*, „Prokuratura i Prawo" 2015, No. 1–2, pp. 63–63.

[6] I. Nowikowski, *Odwoływalność czynności procesowych stron w polskim procesie karnym*, Lublin 2001, p. 19. Similarly: K. Marszał, *Proces karny*, Katowice 1997, p. 234.

According to the prohibition, included in Art. 14, § 2 sentence three of the Criminal Code to these public prosecutors who effectively withdrew from a criminal trial, it could therefore be said about irrevocability of the declaration of the indictment's withdrawal *in genere*? In the absence of an explicit code provision, in the doctrine, there are two positions on the revocability of procedural actions by both parties. According to the first of them, whose advocate is S. Waltoś, in a criminal trial there is a regulation that deprives the parties – with the exceptions clearly specified in the Act – the right to revoke their procedural statements, what is dictated by the need to ensure "a sense of security for [other] participants of the proceedings"[7]. The opponents of such a view, and there is a vast majority of them, recognize that it is the lack of express statutory prohibition that opens up the possibility for the parties to revoke the declaration. The mere performance of the action being currently cancelled was a manifestation of their right[8]. The same authors treat the legislator's indication of cases, expressly allowing the revocation of a procedural Act by a party, not as exceptions to the unwritten rule prohibiting *in genere* cancellation of a procedural Act, but as a specification of the conditions and effects, various for the activities, referred to, among others, in Art. 12, § 3, Art. 14, § 2, Art. 431, § 1 or Art. 506, § 5 of the Criminal Code and hence requiring separate treatment. One may express the view that, on the basis of a short recapitulation of the doctrine views as to the revocability of the parties' procedural Acts, no statutory provision prevents the public prosecutor from revoking the declaration of withdrawal of the indictment, as long as the aforementioned revocation has not become effective. The measure of such an effectiveness will be the discontinuance of criminal proceedings, which occurs in accordance with the relevant court decision and not as a result of the withdrawal itself, which is an important, but not the only prerequisite for such a termination of the proceedings in the case. By way of example, two of his statements can be submitted to the court in succession, the second of which – before the court took steps to inform the injured party about the possibility of proceeding with the case pursuant to Art. 54, § 2, sentence two of the Criminal Code – notifies the court about the change of the previous position and will to further support of the accusation. Admittedly, such lability will not be an exemplar of the prosecutor's acquaintance with this case and his preparation to become a prosecutor in the same case. However, the court will have to take into account the change of its position and proceed further.

The doctrine notes that the moment at which the public prosecutor may revoke his earlier statement on the indictment's withdrawal will be either a decision to discontinue or petition for order about the discontinuance of the proceed-

[7] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2016, p. 60.

[8] For example: K. Marszał, *Proces karny*, p. 234; K. Dudka, H. Paluszkiewicz, *Postępowanie karne*, Warszawa 2017, p. 217.

ings by the court[9], or in the event that the order becomes final[10]. It is also noted that the cancellation of the indictment's revocation does not contradict the prohibition pursuant to Art. 14, § 2 sentence three of the Criminal Code which takes place in the case where there was no "re-indictment", and the court still proceeds on the basis of the same complaint[11]. I myself am in favor of considering the date of the decision to discontinue the proceedings as the cut-off date, however, what about the actions performed by the injured party and the accused party, referring to withdrawal and the revocation of withdrawal of the indictment by public prosecutor? In the case of the injured party, who made a statement about proceeding with the case of the auxiliary prosecutor, much will depend on whether the deadline pursuant to Art. 54, § 1 of the Criminal Code has already expired. If the aforementioned deadline has not yet expired, such a statement will have an impact on the injured party, who as a consequence will be able to proceed as an outside prosecutor, and not as an auxiliary one, what was his primary intention. On the other hand, if the deadline pursuant to Art. 54, § 1 of the Criminal Code has already expired, then the statement itself and further actions performed by the injured party should be treated as the ones without legal consequences, were undertaken by a person who had not effectively acquired the status of a party to the proceedings. Regardless of which of those situations are to be faced, the court will be obliged to instruct the injured party pursuant to Art. 16, § 2 of the Criminal Code for in both of these cases, he will hold a position of a "participant in the proceedings". The consent of the accused party, defined as the unsubstantiated one, will not be relevant in the aforementioned case. If, however, which cannot be excluded while considering the broadly defined time frame for the revocation of the indictment ("in the course of the trial before the court of the first instance"), the public prosecutor again would like to waiver the indictment, then the court should again repeat its actions in the proceeding pursuant to Art. 14, § 2, sentence two and pursuant to Art. 54, § 2, sentence two of the Criminal Code. Previous consent of the accused party, defined as "consumed" for the purpose of the first withdrawal of the indictment, will not be used a second time. It should be noted here that the consent of the accused party is not a condition for revoking the withdrawal of the indictment, even though the withdrawal itself is an Act "in favor" of the accused party. In such circumstances, the aforementioned Act does not provide a similar solution to the one pursuant to Art. 430, § 3 of the Criminal Code, where the appeal brought in favor of the defendant cannot be withdrawn without the consent of the accused party.

[9] E. Kruk, *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżania uprawnionego oskarżyciela w polskim procesie karnym*, Lublin 2016, p. 262.

[10] K. Dąbkiewicz, comment on Art. 14 of the Criminal Code, LEX 2015, t. 6, https://sip.lex.pl/#/commentary/587682716/480156 (30.10.2019).

[11] E. Kruk, *Skarga oskarżycielska*…, p. 262.

The accused party in the right to consent pursuant to Art. 14, § 2, sentence two of the Criminal Code is not limited by any circumstances and the fact that it is a person subject to obligatory defense. However, if there is a circumstance pursuant to Art. 79, § 1, point 3 or 4 of the Criminal Code and while obtaining such a consent should be preceded by particularly cautious instruction about its effects. Consent may be expressed only by the accused party, who cannot delegate entitlement in this respect to a defense counsel. In a sense, it is therefore a "personal" right and not the only exception to the rule that the defense lawyer has procedural rights analogous to the rights of his client. Such a consent determines the effectiveness of the withdrawal of an indictment only when it is withdrawn "in the course of a trial before the court of the first instance" and when the aforementioned court does not require when the withdrawal took place before the initiation of the court proceedings. Consent must be explicit, for the Act does not provide in this situation the so-called "no objection". It cannot also be expressed on a condition or have a deadline. The fact that it is required for an Act that is actually a statement made for the benefit, is the will to ensure the accused party, whose case has entered the stage of open examination, the possibility of full exoneration, which in the common opinion is a judgement of acquittal (*vide*: Art. 414, § 1 sentence two of the Criminal Code). At the time when the statement on the withdrawal of the indictment was submitted "in the court proceedings", it is the court that asks the accused party to express their position in this matter, as it is the court that conducts the proceedings. The court is unable to delegate this obligation to the prosecutor. The accused's statement is of procedural nature and cannot be made outside the trial. The Act does not provide for a priori addressing the accused party with an inquiry, whether he would be willing to consent to a revocation, even if the public prosecutor anticipates such an eventuality. If the public prosecutor partially revoked the indictment, the consent should adequately cover that part of the accusation that the prosecutor will no longer support. Although there is no relevant regulation in this regard, if the prosecutor withdraws the indictment before the trial, the court should notify the accused party of this action, for this situation is relevant to his defense and constitutes a kind of "a complement" of the notification made under Art. 334, § 3 of the Criminal Code. However, unlike the notification that the indictment was sent to the court, notifications about the withdrawal of the indictment should be made not by the public prosecutor, but by the body currently responsible for the stage of the process in which the withdrawal took place.

Article 14, § 2 of the Criminal Code distinguishes two moments of the withdrawal of the indictment, that is "until the commencement of the trial at the first main hearing" (Art. 14, § 2, sentence one of the Criminal Code) and "in the course of a trial before the court of the first instance" (Art. 14, § 2, sentence two of the Criminal Code), which may raise doubts as to whether such withdrawal is still possible after the closure of the trial pursuant to Art. 405 of the Criminal Code?

It seems that such a possibility should be allowed even in the final votes phase, otherwise it would be necessary to reopen the trial pursuant to Art. 409 of the Criminal Code only for the purposes of the relevant declaration by the public prosecutor, what may be done successfully in the closing speech. However, it is a different matter whether it is placed under the disposition – Art. 14, § 2, sentence two of the Criminal Code of withdrawal of the indictment made "in the course of a court hearing". Will the withdrawal of the indictment made after the end of this procedure also be the subject to the consent of the accused party? Bearing in mind that from the perspective of the accused party, the norm contained in Art. 14, § 2, sentence two of the Criminal Code primarily serves as a warranty, enabling full exoneration of charges instead of discontinuing criminal proceedings, it should be assumed that these reasons do not lose any of its relevance even after performing the actions pursuant to Art. 405 of the Criminal Code. Similar view in the doctrine is also expressed by M. Kurowski, who claims that the opposite interpretation, although in line with the literal wording of Art. 14, § 2, sentence two of the Criminal Code, "would lead to absurdity"[12].

The solution contained in Art. 14, § 2, in relation to Art. 54, § 2, sentence two of the Criminal Code, according to which the effectiveness of one activity and (withdrawal of the indictment) depends on giving (consent of the accused party) or not making other (statement about proceeding with the case as an auxiliary prosecutor), is not all that new. The legislator also contains it in Art. 60, § 4 of the Criminal Code, and the period between these events is a period of a specifically understood suspension of the procedural activity and an informal postponement of the decision by the court to discontinue criminal proceedings. The withdrawal of the indictment itself does not result in the discontinuation of criminal proceedings under the law, for it may only take place in accordance with the court decision, after the fulfillment – depending on the circumstances of the case – its two conditions. The first of them is defined as a positive one and concerns withdrawal of the indictment (Art. 14, § 2, sentence one of the Criminal Code). On the contrary, the second one is considered as a negative condition and concerns a failure to submit a statement by the non-injured party in order to proceed with the case as an auxiliary prosecutor, or three premises, including two positive ones, referring to withdrawal of the indictment and consent of the accused party, and negative one, related to the failure to submit the aforementioned statement by the injured party (Art. 14, § 2, sentence two, in relation to Art. 54, § 2, sentence two of the Criminal Code). The relationship between the discontinuation of the procedure and the activities undertaken or not undertaken by the participants becomes complicated when in a given case there is already an auxiliary prosecutor, for he does not lose its powers, to be more precise he ("does not lose any entitlement") due to the withdrawal of the indictment by the

[12] M. Kurowski, comment on Art. 14 of the Criminal Code, Lex 2018, t. 18, https://sip.lex.pl/#/commentary/587388334/565445 (27.07.2018).

public prosecutor (Art. 54, § 2, sentence one of the Criminal Code). This means that the proceedings are not discontinued as a consequence of the withdrawal of the indictment, and eventually any subsequent discontinuation of these criminal proceedings would be a result of not earlier "withdrawal", but "waiver of the indictment" by an auxiliary prosecutor, who stayed with this case after public prosecutor's "withdrawal" (Art. 57, § 1 of the Criminal Code). At present, "waiver of indictment[13]" is an activity reserved in principle for prosecutors other than the public ones (Art. 57, § 1 of the Criminal Code – an auxiliary prosecutor; Art. 496, § 1 and Art. 497, § 2 of the Criminal Code – private prosecutor). The only exception is when a private prosecutor is charged by a private procurator, who took a private criminal act to prosecution and „waives the indictment", not "withdraws the indictment". Undoubtedly in the solution provided in Art. 60, § 3 and 4 of the Criminal Code, there is a certain inconsistency; if one of the ways to commence private prosecution proceedings by a procurator is to bring the accusation, then maybe a better solution would be granting him the right to withdraw his own prosecution, especially that the following actions with the participation of the injured party do not differ from those undertaken after the revocation of the indictment (*vide* – Art. 60, § 3 and 4 of the Criminal Code). The injured party who has not filed an indictment may, within the deadline of 14 days from the date of being notified by the prosecutor's withdrawal from the accusation, file an indictment or a statement that upholds the accusation as a private one. However, if he does not submit such a declaration, the court or legal clerk discontinues the proceedings.

In order to avoid actions dictated by procedural tactics and in order to protect the accused party from another trial, regulation of Art. 14, § 2 sentence three of the Criminal Code – in the event of withdrawal of the indictment – prohibits such a complaint from being brought again for the same Act and against the same accused party[14]. Guided by the nature of the Act prosecuted ex-officio and guided by the fact that a relevant standard is included in Art. 14, § 2 of the Criminal Code, this prohibition is directed to the public prosecutor, what does not deprive him of the possibility of re-entering the proceedings, if an auxiliary prosecutor waived the indictment. This is the only way to interpret the content of Art. 57, § 2, which requires the prosecutor to be notified about this fact (sentence one) in order to enable him to proceed with a case (sentence two). Provision of Art. 57, § 2 sentence two concerns the proceedings of the case, expressed in the present tense, in which the public prosecutor "does not take part in", and not about such proceedings in which the same public prosecutor "did not take part in"

[13] In the event of a withdrawal of indictment by a public prosecutor, making an evident declaration of will is required. However, in the case of private prosecutor, the Act sometimes allows implied withdrawal in the event of unjustified failure to appear by this prosecutor and his representative at a judicial case conference (Art. 491, § 1 of the Criminal Code).

[14] M. Kurowski, comment on Art. 14 of the Criminal Code, Lex 2018, t. 17, https://sip.lex.pl/#/commentary/587388334/565445 (25.07.2019).

(past tense). In a sense, the situation regulated in Art. 57, § 2 sentence two of the Criminal Code weakens the guarantee of the prohibition under Art. 14, § 2 sentence three of the Criminal Code and allows to consider that participation of the public prosecutor in the tender process, in which the indictment was withdrawn from the state auxiliary prosecutor, is *a mutatis mutandis* revocation of his earlier declaration of withdrawal of the indictment.

Even though the indictment is a procedural document, its withdrawal may be made through an oral declaration. A phrase "I withdraw the indictment" is not required, though from a professional public prosecutor one can certainly expect that he will be using statutory sentences. Nevertheless, in accordance with Art. 118, § 1 of the Criminal Code, the significance of a legal Act is assessed according to the content of the submitted declaration, and improper marking does not deprive it of its legal significance (§ 2). Due to the oral hearing, withdrawal of the indictment "during the court proceedings" will be usually accompanied by an oral expression of the accused party, in relation to the possible consent. Consideration of the rights of the defense may result in the need to interrupt the trial in order to allow the accused party to reflect on the situation or freely consult the relevant consent with a lawyer. Since the possible consent of the accused party is a prerequisite for further action in a situation considering a withdrawal of the indictment "during the court proceedings", hence there is no need for notification of the currently not engaged in the case auxiliary prosecutor of an injured party, before the accused party has verbalized his position, about a possibility of proceeding with a case pursuant to Art. 54, § 2, sentence two of the Criminal Code for it would be premature.

Withdrawal of the indictment does not deprive the powers of the auxiliary prosecutor, for it leads to a situation, in which the outside auxiliary prosecutor becomes an auxiliary subsidiary prosecutor, what causes certain complications which will be discussed later on. The above is accepted in the doctrine by E. Kruk[15] and M. Rogalski[16], and negated by S. Steinborn, who in an auxiliary prosecutor, acting after withdrawal from the criminal trial of the public prosecutor, seeks, "despite some similarity in the process system", "outside auxiliary prosecutor", whom the author itself defines as "autonomous"[17]. Although such a view has some support in the content of Art. 54, § 2, sentence one of the Criminal Code about retaining rights ("no deprivation of rights"), and not about their extension[18]. However, it simply ignores the fact that about "outside character" of the public prosecutor it can be

[15] E. Kruk, *Skarga oskarżycielska*…, p. 294.

[16] M. Rogalski, *Zasada legalizmu w procesie karnym po noweli do kodeksu postępowania karnego, 27 September 2013*, „Prokuratura i Prawo" 2015, No. 1–2, p. 54.

[17] S. Steinborn, comment on Art. 14 of the Criminal Code, Lex 2016, t. 6, https://sip.lex.pl/#/commentary/587696219/493659 (30,07.2018).

[18] Which is an apparent counterargument, if we consider that "there is a similarity between legal remit of those prosecutors" – cf. E. Kruk, *Skarga oskarżycielska*…, p. 277.

spoken when his procedural position is ancillary in relation to the principal prosecutor, which in the cases prosecuted ex-officio before all the courts is a procurator (Art. 45, § 1). It does not seem that in the case referred to in Art. 54, § 2, sentence two of the Criminal Code, it was necessary to look for new entities, where it is enough to apply the rules widely known to science and judicature. Defending the thesis that as a result of the withdrawal of the indictment, the current outside auxiliary prosecutor takes on the features of a subsidiary auxiliary prosecutor, we may notice how the range of resources is widening, which "restrict the prosecutor's «monopol» of the public complaint and provides him with an exclusive prosecution initiative in cases related to offenses prosecuted ex-officio"[19].

The guarantee that the injured party will keep the acquired prosecution rights, explains why we cannot talk about his unequal treatment in comparison with the situation of the accused party, who has the power to consent to the subject withdrawal of the indictment by the public prosecutor. Auxiliary prosecutor is not asked for the opinion on the withdrawal of the indictment by the public prosecutor, however, he retains his full prosecution rights within the limits set by the indictment prepared by the procurator. If he does not agree with the decision of the public prosecutor, he may continue to support the accusations; otherwise, he may withdraw from the prosecution. Nevertheless, the aforementioned guarantee concerns only the injured party, who has earlier proceeded with a case as an auxiliary prosecutor. A participation of the injured party in the tender process is possible in a moment when a public prosecutor brings an indictment to the court, which can be inferred from the condition which begins the provision of Art. 54, § 1 of the Criminal Code ("if the indictment was brought"). Thus, the statement made by the aforementioned injured party will be ineffective, with a *pro futuro* attitude and in addition to the authority conducting or supervising preparatory proceedings, for it should be submitted to the authority conducting the jurisdiction proceedings[20].

Provision of Art. 54, § 2, sentence one of the Criminal Code for the aforementioned "conversion" does not require any separate declaration from the injured party, although he may give up his support for the accusation, claiming that it is beyond his strength. Nor a declaration submitted pursuant to Art. 54, § 1 of the Criminal Code, nor the transformation of the position of the auxiliary prosecutor requires a separate court decision. Failure of imposing of the obligation to submit a separate statement, on the already injured party may be dictated by the fact that the statement submitted pursuant to Art. 54, § 1 of the Criminal Code

[19] R. Kmiecik, *Posiłkowa skarga subsydiarna czy kontrola sądu nad zaniechaniem ścigania?* [in:] *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, eds. A. Gerecka-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński, Warszawa 2008, p. 175.

[20] Decision of SA in Gdańsk from 22 November 2017 (II AKa 58/17), „Kwartalnik Sądowy Apelacji Gdańskiej" 2018, No. 1, Item 7.

contains not only the will "to proceed with a case", but first of all the will of "accusation" within the objective and subjective limits of the accusation, indicated by a complaint previously brought up by the public prosecutor. Not all the injured parties are aware of it and therefore count on the activity of the public prosecutor, and create themselves as a kind of auditors of the prosecuto's actions before the court. Taking over the accusation from the public prosecutor and auxiliary prosecutor referred to in Art. 14, § 2 sentence one of the Criminal Code, he still remains "an entitled prosecutor". However, he gets the benefits owing to the prosecutor's withdrawal from the case of procedural independence.

In turn, the accused party who did not appear in the case, in which the indictment was withdrawn by the public prosecutor may, within 14 days from court's notification of this withdrawal, proceed with a case as an auxiliary prosecutor. If the public prosecutor withdrew the indictment "in the course of a trial, before the court of the first instance" (Art. 14, § 2, sentence two of the Criminal Code), then a regulation included in Art. 54, § 2, sentence two of the Criminal Code should be analyzed in the category of a derogation from the rule that a proceeding of an injured party with a case, instituted by the public prosecutor, may take place "until opening of court proceedings" (Art. 54, § 1 of the Criminal Code). The legislator reasonably recognized that in such a case it ought "to restore" the injured party's ability to support the accusation, which he had not done before, for he hoped that it would be done by the public prosecutor. In both discussed cases, the accusation retains its "public" or "official" nature, unlike the situation referred to in Art. 60, § 4 of the Criminal Code, where the injured party declares itself on the subject related to "upholding the accusation as a private one"[21]. However, neither sentence one and sentence two of Art. 54, § 2 of the Criminal Code does predict such an eventuality. The injured party, who has not been involved in the case so far, does not have a possibility to bring his own indictment. Nevertheless, he may at most declare himself on the subject of "participation in a tender process as an auxiliary prosecutor" (Art. 54, § 2, sentence two of the Criminal Code).

In a situation where the indictment was withdrawn "until the commencement of the trial at the first main hearing" (Art. 14, § 2, sentence one of the Criminal Code), the period of 14 days set by Art. 54, § 2, sentence two of the Criminal Code will occur simultaneously in the preceding period of the opening of court proceedings, for rarely any court decides to schedule a hearing before the final clarification of a given issue, which was included in the aforementioned notification. However, this does not mean that when the commencement of the trial will take place after the deadline for the injured party pursuant to Art. 54, § 2, sentence two

[21] It considers only this injured party, who in the event of the waiver of indictment by a procurator, considering the act of private prosecution, has not decided to bring the own indictment within 14 days from the day on which he was notified about such a waiver of indictment.

of the Criminal Code, then the injured party, who did not meet the aforementioned deadline of 14 days, will keep a possibility of proceeding with a case. An example of which could be the fifteenth and every subsequent day, as long as it is before "the commencement of the trial at the main hearing". The lack of such a possibility is a consequence of the exceptional nature of Art. 54, § 2, sentence two of the Criminal Code, which alleviates the situation of the injured party, who has not decided to participate in the tender process for legal proceedings, making the relevant decision in other procedural realities, but also its special relationship to Art. 54, § 1 of the Criminal Code, to the extent that it sets a new deadline for the injured parties, who were notified about the new state of affairs. The reason of such an inability is the fact that the term contained in Art. 54, § 1 of the Criminal Code is applied to the situation in which the indictment was "brought", and not "withdrawn" by the public prosecutor. However, both the term included in Art. 54, § 1, and its § 2 sentence two of the Criminal Code is characterized by a precise deadline[22].

The injured party previously appearing in the case as an auxiliary prosecutor, as a result of the withdrawal of the indictment by the public prosecutor, does not lose his rights (Art. 54, § 2, sentence one of the Criminal Code). The injured party who is informed about the withdrawal of the indictment may declare that proceeds with the case as an auxiliary prosecutor (Art. 54, § 2, sentence two of the Criminal Code). Following the recognition that it is a subsidiary auxiliary prosecutor, it should be noted that in the event of proceeding with a case of further injured parties, they will acquire the status of the outside auxiliary prosecutor, or – what is emphasized by T. Grzegorczyk – there can be only one auxiliary prosecutor[23] in a given case. If there has not been any auxiliary prosecutor in the case so far, then the first injured party, who following the notification pursuant to Art. 54, § 2, sentence two of the Criminal Code will apply for accession to the case, and as a consequence will become a subsidiary auxiliary prosecutor, each subsequent one will be the outside prosecutor.

Upon the withdrawal of the indictment by the public prosecutor and his withdrawal from the criminal trial, a doubt arises as to the validity of the procedure previously made by the court pursuant to Art. 56, § 1 of the Criminal Code about limitation of the number of auxiliary prosecutors. From the content of Art. 14, § 2 of the Criminal Code it is not clear whether such a restriction is still binding, or should the court revise its previous position on this matter, especially that the dismissal of the public prosecutor's case had its consequences in the "release" of one seat on the prosecution side. It seems that in the case of the withdrawal of the indictment by the public prosecutor, the court will still be bound by its earlier

[22] M. Błoński, B. Najman, *Umorzenie postępowania wskutek cofnięcia aktu oskarżenia*, „Studia Prawno-Ekonomiczne" 2015, Vol. XCIV, p. 36.

[23] T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. I: *Artykuły 1–467*, Warszawa 2014, p. 281.

decision and such a decision cannot be changed. Bearing in mind that the limitation of Art. 56, § 1 of the Criminal Code equally affects the auxiliary prosecutors, who take part in proceedings initiated both as a result of complaint by a public prosecutor, and as a result of complaints made by a subsidiary prosecutor (Art. 55, § 3 of the Criminal Code). Such a maintenance of this limitation in force, also after the deadline of revocation of the indictment by the public prosecutor, will affect the actions of the court, followed by the revocation. It seems that the continuing reduction in the number of the accused parties will result in pursuant to Art. 54, § 2, sentence two of the Criminal Code inability of injured parties to join the aforementioned case, and only one that does not exceed the limit previously determined by the court. As a result, if this limit has already been exhausted in the case, the court pursuant to Art. 54, § 2, sentence two of the Criminal Code should not inform the other injured parties about a possibility of proceeding with a case, but ought to notify them about the withdrawal of the indictment and to possibly instruct them on the right to present a written position (Art. 56, § 4 of the Criminal Code). If, however, the limit under Art. 56, § 1 of the Criminal Code has not been exhausted, the court operates pursuant to Art. 54, § 2, sentence two of the Criminal Code until it is found that a certain number of the injured parties decided to participate in the case as auxiliary prosecutors. There are no obstacles for the court to limit the number of auxiliary prosecutors, after the indictment has been withdrawn by the public prosecutor pursuant to Art. 56 of the Criminal Code it does not follow that relevant decision[24]. Pursuant to Art. 56, § 1 of the Criminal Code, the court may operate in advance, but also in *ex post*. In the latter case, it will usually be an action forced by an increased interest of the injured party, which the court was unable to predict at the beginning of the jurisdictional phrase. 2019 novel did not change anything in this respect, basically limiting itself to transferring the mention of the non-appealability of the court decision pursuant to Art. 56, § 1 of the Criminal Code with the previous regulation § 3, to the newly added regulation § 1[25].

Eventually, it should be noted that the amended Art. 14, § 2 of the Criminal Code seems to predict derogation from the principle of legalism, according to which, among others: "public prosecutor [is also obliged] to bring and support the indictment – considering the Act prosecuted ex-officio". However, this is not the case if we consider that this principle was formulated by the legislator in a rational and purposeful manner. If the principle of legalism is to really serve what is provided

[24] The doctrine postulates that it is essential to make a relevant decision early enough, in order to save the injured parties unnecessary expenses and efforts. It is also possible to make a decision with retroactive effect, it means that it can also affect, with equal legal value, those injured parties who commence to proceed with the case, and also those who has already made a statement to that effect. Cf. E. Kruk, *Skarga oskarżycielska*…, p. 273.

[25] Art. 56, § 1a provided by Art. 1, point 7, letter a) of Act of 19 July 2019 (Dz.U. 2019, Item 1694).

for in Art. 10, § 2 of the Criminal Code, which, moreover, in the doctrine is noticed by numerous and recognized authors, that is holding any offender to criminal liability[26], it is in the actions of the public prosecutor to establish the innocence of the accused party and as a result of the aforementioned revoking the indictment. However, it is difficult to notice a contrary action to such a formulated objective[27]. Indeed, the purpose of accusation is not to convict someone at any cost, but what should be taken into account is the conviction that is reasonable and possible in the reality of a specific case. It is impossible to achieve the purpose of Art. 10, § 2 of the Criminal Code when the wrong person has been accused. It could be even believed that a withdrawal of indictment in the situation referred to in Art. 14, § 2 of the Criminal Code will allow to lead the preparatory proceedings in the right direction, and as a result of making new findings, bring the indictment, this time against the actual perpetrator of the Act that is the subject of any investigation (Art. 10, § 1 of the Criminal Code). Article 14, § 2 of the Criminal Code does not constitute unequal treatment of the accused party and cannot be considered as – notified by Art. 10, § 2 of the Criminal Code – dismissal from criminal liability under statute or international law for a committed crime. Article 14, § 2 of the Criminal Code can therefore be treated as a solution to ensure compliance with the principle of legality[28], and not as a solution "not conducive to (…) implementation" of this principle, as it is critically evaluated by M. Rogalski[29]. Although on the ground of the Criminal Code the legislator does not specify the reasons for withdrawing the indictment, but whether has to do it, considering that a sentence of criminal proceedings should be directed against the perpetrators of the prohibited Acts, and only they should be of interest to the judicial authorities.

The same Art. 14, § 2 of the Criminal Code may be considered as a distant "echo" of the adversarial principle, which is based on the procedural functions strictly separated among the participants of the criminal proceedings[30]. If the public prosecutor's function is to accuse (the function of accusation), then it is impossible to imagine a situation in which he would be able to achieve it without internal conviction as to the validity of the allegation covered by the prosecution complaint.

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[26] S. Waltoś, *Proces karny. Zarys systemu,* Warszawa 2005, p. 289; J. Tylman, *Zasada legalizmu w procesie karnym*, Warszawa 1965, p. 175; M. Rogalski, *Zasada legalizmu*…, p. 47.

[27] However, according to C. Kulesza, implementing to Art. 14, § 2 of the Criminal Code an institution of "withdrawal of indictment by public prosecutor" leads to legal restriction in terms of an impact of principle of legality on the court". C. Kulesza, comment on Art. 14 of the Criminal Code, https://sip.lex.pl/#/commentary/587774625/572065 (27.09.2019).

[28] T. Grzegorczyk, *Odstąpienie oskarżyciela od oskarżania w sprawach o przestępstwa ścigane z urzędu* [in:] *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*, ed. J. Skorupka, Warszawa 2009, p. 295 n.

[29] M. Rogalski, *Zasada legalizmu*…, p. 49.

[30] D. Solodov, *Zasada kontradyktoryjności postępowania karnego a rozwój teorii obrony*, „Studia Prawnoustrojowe" 2014, No. 26, p. 282.

It goes without saying that the subject of withdrawal may be an indictment drawn up in accordance with the principles referred to in Art. 332ff of the Criminal Code and subsequently brought up (sent) to the court in the form of the procedural document, but also as a "new indictment" formulated by the public prosecutor pursuant to Art. 398, § 1 of the Criminal Code even if it did not take the form of a "new" or "additional indictment" referred to in Art. 398, § 2 of the Criminal Code. Although the legislator uses the term "withdrawal of indictment", the use of this term was primarily intended to distinguish the new institution from the old renouncement of the accusation, and not to limit the public prosecutor's right to dispose of the indictment only to those cases which took the form of a separate pleading. Hence the indictment, which has not been recorded in the new or additional indictment, may be withdrawn, pursuant to Art. 14, § 2 of the Criminal Code under the conditions specified therein. Such a view is accepted in the doctrine, among others by J. Kosonoga[31].

There is a possible scenario, in which a prosecutor withdraws the indictment returned to him pursuant to Art. 337, § 1 of the Criminal Code. The doctrine notes that by the fact of returning the Act of indictment to the public prosecutor, which does not meet the formal conditions, it does not become again "the host of proceedings"[32]. The case remains pending before the court to which such an incomplete indictment was submitted, and the fate of such a procedure depends on the seriousness of the observed shortcomings[33]. Although the Act obliges the public prosecutor, who does not complain about the return order, to provide a corrected or supplemented indictment within 7 days (Art. 337, § 3 of the Criminal Code). Nevertheless, it will not matter in a situation in which the same prosecutor will note unjustified indictment made by himself. These comments do not apply to a situation where the court transfers the case to the prosecutor in order to complete any investigation, if the case files indicate significant shortcomings of this procedure pursuant to Art. 344a, § 1 of the Criminal Code. However, there is a possible situation in which the prosecutor, who – after completing investigation – brought a new indictment or stated that supports the previous one (Art. 344b of the Criminal Code), and subsequently will revoke the new or previous Act of indictment.

There is a good reason why Art. 14, § 2 of the Criminal Code does not contain premises for a decision to withdraw the indictment, for their inclusion in this provision would mean the necessity to indicate the procedural body responsible

[31] J. Kosonoga, comment on Art. 14 of the Criminal Code, Lex 2019, t. 21, https://sip.lex.pl/#/commentary/587741087/538527 (30.09.2019).

[32] K. Eichstaedt, comment on Art. 337 of the Criminal Code Procedure, Lex 2019, t. 23, https://sip.lex.pl/#/commentary/587748657/600270 (30.09.2019). However, he stays "the host of the indictment" – the Supreme Court panel in the judgement of 14 May 2019, II DSI 3/19, Lex No. 2680295.

[33] Resolution on the Supreme Court panel of 31 August 1994, I KZP 19/94, OSNKW 1994, No. 9–10, Item 56.

for their verification. This, in turn, would bring the institution of withdrawal of the indictment closer to the erstwhile withdrawal of the indictment. Decision to withdraw the indictment, although is not the subject to the control of the process, does not relieve the public prosecutor of the responsibility within the public prosecutor's office itself. The same procurator, even though in the court does not have to indicate the reasons for his decision, ought to consider, whether the criterion pursuant to Art. 64, paragraph 2 of the Law on the Prosecutor's Office[34] that is whether essentially "the results of the court proceedings do not confirm the charges", which in the doctrine is interpreted rigorously as a failure to in any way"[35] confirm these allegations. The same procurator being guilty of his decision to withdraw the Act of indictment should inform the immediate superior public prosecutor. It is rightly pointed out in the doctrine that owing to the amendment to Art. 14, § 2 of the Criminal Code, procurator – despite bringing the indictment – retained the position of the administrator of this complaint, who – under certain conditions – may withdraw them[36], which makes this activity cancellable.

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[34] The Act of 28 January 2016 – the Law on the Prosecutor's Office (Dz.U. 2019, Item 740).

[35] A. Kiełtyka, W. Kotowski, A. Ważny, comment on Art. 64 of the Law on the Prosecutor's Office, Lex 2017, https://sip.lex.pl/#/commentary/587740308/537748 (27.09.2019).

[36] J. Kosonoga, comment on Art. 14 of the Criminal Code, Lex 2019, https://sip.lex.pl/#/commentary/587741087/538527 (27.09.2019).

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Summary

This article discusses the issues related to the application of regulations included in Art. 14, § 2 of the Criminal Code where the withdrawal of the indictment by the public prosecutor was regulated. Moreover, the results of such an activity and the conditions of its performance were indicated. The rights of the accused and the injured party related to the withdrawal of the indictment and also the prohibition of the re-indictment against the same defendant in relation to the same criminal Act were discussed.

Keywords: indictment, withdrawal of indictment, waiver of indictment, public prosecutor, accused party, injured party, auxiliary prosecutor, criminal proceedings, discontinuation of criminal proceedings, procedural guarantees

OD „ODSTĄPIENIA OD OSKARŻENIA" DO „COFNIĘCIA AKTU OSKARŻENIA". UWAGI NA TLE ART. 14 § 2 K.P.K.

Streszczenie

W tekście omówiono problematykę związaną ze stosowaniem przepisu art. 14 § 2 k.p.k., w którym uregulowano tzw. cofnięcie aktu oskarżenia przez oskarżyciela publicznego. Wskazano na skutki tej czynności oraz warunki jej dokonania. Omówiono uprawnienia oskarżonego i pokrzywdzonego związane z cofnięciem aktu oskarżenia, a także zakaz ponownego wniesienia oskarżenia przeciwko temu samemu oskarżonemu o ten sam czyn karalny.

Słowa kluczowe: akt oskarżenia, cofnięcie aktu oskarżenia, odstąpienie od oskarżenia, oskarżyciel publiczny, oskarżony, pokrzywdzony, oskarżyciel posiłkowy, postępowanie karne, umorzenie postępowania karnego, gwarancje procesowe