

PROLEGOMENA TO A NEW CRIMINAL TRIAL PROCEDURE IN POLAND FOLLOWING THE AMENDMENT OF THE CODE OF CRIMINAL PROCEDURE OF 27.09.2013: FROM INQUISITORIAL TOWARDS ADVERSARIAL PROCEDURE OF WITNESS EXAMINATION IN CRIMINAL TRIALS

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Abstract: The purpose of this paper is twofold. Firstly, it introduces the transformations, which the criminal trial procedure in Poland will undergo following the amendment of the Code of Criminal Procedure of 27 September 2013. Secondly, it explains the consequences that the altered criminal law will have on Polish courtroom discourse. The paper comprises three major parts. It commences with the demonstration of the inquisitorial procedure of witness examination in criminal trials as investigated, described, and expounded by Bednarek (2014)¹, prior to the amendment of criminal law in Poland. Subsequently, it presents the criticism of the inquisitorial criminal trial by the representatives of academia and legal practitioners in Poland, and explains the reasons for the transformation of the inquisitorial criminal trial into an adversarial one. Finally, it demonstrates the new regulations of the Code of Criminal Procedure pertaining to the criminal trial and establishes what effects they will have on Polish courtroom discourse. The paper ends with concluding remarks emphasizing the pressing need for novel and thorough investigations of the language used by judges, attorneys for the prosecution and attorneys for the defense in criminal trials in Poland following the amendment of the criminal law.

Key words: Polish courtroom discourse, criminal trial, amendment of the Code of Criminal Procedure of 27.09.2013 in Poland, transformation of the inquisitorial criminal trial in Poland into adversarial criminal trial, consequences of the momentous amendment of criminal law in Poland on Polish courtroom discourse.

¹At the time when this paper is being written the study of courtroom discourse conducted by Bednarek (2014) is the only investigation of talk in interaction in the milieu of Polish courts that focuses on the modus operandi of witness examination from the point of view of linguistics.

**PROLEGOMENA DO NOWEJ PROCEDURY DOTYCZĄCEJ
PRZEPROWADZENIA PROCESU KARNEGO W POLSCE W
KONSEKWENCJI ZMIANY KODEKSU POSTĘPOWANIA KARNEGO Z DNIA
27.09.2013: OD INKWIZYCYJNEJ DO KONTRADYKTORYJNEJ
PROCEDURY PRZESŁUCHIWANIA ŚWIADKÓW W PROCESACH
KARNYCH.**

Abstrakt: Głównym celem artykułu jest przedstawienie transformacji, jakiej ulega procedowanie rozpraw karnych w Polsce w konsekwencji modernizacji k.p.k. z dnia 27 września 2013, a także wyjaśnienie skutków zmian prawa karnego na polski dyskurs sądowy. Artykuł składa się z trzech części. Rozpoczyna się prezentacją inkwizycyjnej procedury przesłuchania świadków w sprawach karnych, które zbadała, opisała i objaśniła Bednarek (2014). Następnie demonstrowa uwagi krytyczne polskich przedstawicieli nauki oraz praktyków pod adresem inkwizycyjnej rozprawy karnej, a także wyjaśnia przyczyny transformacji rozprawy karnej z inkwizycyjnej na kontradyktoryjną. Ostatnia część artykułu demonstrowa nowe przepisy k.p.k. odnoszące się do rozprawy karnej oraz omawia skutki, jakie one spowodują w polskim dyskursie sądowym. Artykuł kończą uwagi podkreślające pilną potrzebę przeprowadzenia nowych, kompleksowych badań dotyczących języka używanego przez sędziów, prokuratorów i obrońców w rozprawach karnych w Polsce w świetle zmiany prawa karnego.

Słowa kluczowe: polski dyskurs sądowy, rozprawa karna, reforma Kodeksu Postępowania Karnego z dnia 27.09.2013, transformacja inkwizycyjnego procesu karnego na kontradyktoryjny proces karny, konsekwencje historycznej zmiany prawa karnego w Polsce na dyskurs sądowy.

1. Introduction

This paper is devoted to courtroom discourse, a type of institutional talk, or institutional interaction understood as a form of action that is meaningful in context and that is shaped by talk that occurs in the courtroom setting. Its primary objective is first of all to introduce the revolutionary modifications of the criminal proceedings in courts in Poland following the momentous amendment of the Code of Criminal Procedure and of other laws of 27 September 2013, and subsequently explain the apparent consequences, which the new criminal law is going to have on Polish courtroom discourse, and more specifically on the modus operandi of witness examination – the key part of the evidential phase of the criminal trial. The paper encompasses three major parts. Part one provides a concise overview of the procedure of witness examination during criminal trials in Poland prior to the amendment of the criminal law, that is to say it addresses and explains the inquisitorial procedure of witness examination under Civil Law in Poland. The subsequent part presents stark criticism of the inquisitorial criminal trial by members of the academia and legal practitioners in Poland and explains why the long awaited change from the inquisitorial criminal justice towards an adversarial criminal justice appears to

be indispensable. The final part introduces the new criminal law and demonstrates how the revised law is likely to influence Polish courtroom discourse.

2. Polish courtroom discourse: a concise overview of the inquisitorial procedure of witness examination in criminal trials in the light of the research conducted by Bednarek (2014)

In Poland, courtroom discourse, i.e. the language used by judges, attorneys for the prosecution and attorneys for the defense during courtroom proceedings in criminal trials has been studied by Bednarek (2014), whose research is deeply anchored in linguistics and more specifically within the area of discourse analysis. A functionalist study of the language used by the representatives of the legal professions in criminal trials, the research devoted to courtroom discourse published by Bednarek (2014) examines how members of the legal speech community communicate and interact with one another in a particular speech situation and speech event and how through the use of language lawyers participating in the criminal trial perform certain social roles under a particular legal system. The study of courtroom discourse conducted by Bednarek (2014) draws on a number of disciplines, including: the theory and philosophy of law, comparative law, comparative criminal justice, sociology and anthropology of law, sociology, anthropology and anthropological linguistics, which makes it highly interdisciplinary. The work employs the concepts and methods of research developed by the following approaches to discourse analysis: (1) the ethnography of communication; (2) Conversation Analysis (CA), and (3) pragmatics, which allowed her to provide a holistic picture of Polish courtroom discourse, which she compares with American courtroom discourse pointing to the similarities and disparities between them. The major focus in her study falls on the evidential phase, and in particular on the comparative analysis of adversarial and inquisitorial procedures of witness examination under two entirely disparate legal systems, Common Law and Civil Law, as two distinct ways of seeking the truth and two distinct methods of pursuing justice.

The investigation of courtroom discourse presented by Bednarek (2014) ensues from two major hypotheses. Hypothesis one assumes that each courtroom discourse is culturally varied. Hypothesis two presupposes that each courtroom discourse is socially conditioned. Bednarek (2014: 14) explains that the first hypothesis is founded on the postulation that each courtroom discourse is highly

influenced by the socio-cultural, historical, institutional, and legal context in which it takes place. That is to say, in each country, the language through which law is promulgated and enforced emerges and develops for hundreds of years within a specific legal system and as such it acquires certain idiosyncratic qualities that make it entirely different from all other languages of law that develop under dissimilar legal systems. The second hypothesis is based on the postulation that under a particular legal system the society sets certain legal norms, which in turn govern the social conduct of the major participants of criminal trials, i.e. judges, attorneys for the prosecution and attorneys for defense. Bednarek (2014) argues that owing to the fact that each courtroom discourse is shaped by a given socio-cultural, historical, institutional, and legal milieu in which it exists, each courtroom discourse needs to be perceived as a phenomenon *sui generis*, a distinctive example of linguistic genre.

The necessity to make use of the ethnography of communication to study Polish courtroom discourse is validated in the following manner: (1) firstly, the ethnography of communication treats language as a socially situated cultural form; (2) secondly, the ethnography of communication examines language not as an abstract form, but in specific communicative situations allowing the researcher to investigate the patterns of speech and communicative conduct of lawyers in Poland participating in criminal trials making it possible to present the broad socio-cultural, historical, institutional, and legal setting in which Polish courtroom discourse takes place. The use of the ethnography of communication in her research allowed Bednarek (2014) to employ the legendary SPEAKING grid devised by Hymes (1972b). Here is how Bednarek (2014) has described the socio-cultural, historical, institutional, and legal setting in which Polish courtroom discourse occurs by means of the SPEAKING grid.

As far as the (1) *Setting* is concerned, Polish courtroom discourse takes place under the Civil Law legal system. It is the legal system that began in the times of the patrimonial monarchy, continued its existence in the Noble's Republic, as well as the times of partitions and feudalism, the times of capitalism, the period of the Second Polish Republic, World War II, and the period of the Polish People's Republic (Jurek 1998). As far as the court system in Poland goes, it is a procedure that takes place in any of the following courts: district courts, regional courts, appellate courts, administrative courts or military courts. (2) *Participants* appearing in the court proceedings in criminal trials under Civil Law in Poland include: (1) the judge, (2) attorneys for the prosecution, and (3) attorneys for the defense, who all boast of unique professional qualifications, who are appointed to the positions under specific terms distinct from those in other countries under distinct legal systems and who

perform idiosyncratic social roles typical for the Civil Law in Poland. (3) The major objective, that Hymes (1972b) referred to as the *Ends*, of the entire criminal trial is to establish whether crime was committed, who committed the crime, and under what circumstances. If the defendant is found guilty, the major aim of the trial then is to adjudicate and execute penalty. The aim of the examination of witnesses is to enable the judge, who is the chairperson of the adjudicating body, to elicit testimony from the witnesses, reveal all the circumstances under which the crime was committed, establish the criminal responsibility of the accused person, in other words, to establish the substantive truth associated with commitment of the crime. Following art. 2 section 2 of the Code of Criminal Procedure in Poland, the basis for all the resolutions of the Court are the real and true facts (Waltoś 2009: 221). (4) As far as the structural organization of the evidential phase is concerned, which Hymes called *Act sequence*, the examination of witnesses under the Civil Law in Poland encompasses two major stages: (1) in case of the defendant it is to provide: (a) a free and unrestricted explanation, to which defendants have the right; and (b) the examination of the defendant by the judge, attorney for the prosecution and attorney for the defense, who may ask the so called supplementary questions in cases when certain ambiguities associated with the circumstances in which a crime was committed need to be elucidated; and (2) in case of witnesses it is to provide: (a) a free and unrestricted testimony; and (b) the examination of the defendant by the judge, attorney for the prosecution and attorney for the defense, who may ask the so called supplementary questions, in cases when certain facts linked with the commitment of the crime need to be clarified. The subsequent element studied is (5) the tone and atmosphere, i.e. the *Key*, in which the inquisitorial procedure of witness examination occurs, which in criminal trials is always dignified, serious, and solemn, owing to the fact that when proven guilty the defendants may lose their freedom for years to come, or even for life. For all those persons, however, who fail to observe the rules of conduct characteristic for courts, as well as those, who show disregard for the Court (Judge) or those, who obstruct justice, judges have at their disposal different means to punish them. (6) *Instrumentalities*: Under art. 365 of the Code of Criminal Procedure in Poland, criminal trials in Poland constitute a verbal phenomenon, which is subject to the following legal (7) *Norms of interaction*: (a) the principle of substantive truth; (b) the principle of objectivity; (c) the principle of cooperation with society and other institutions in prosecuting crimes; (d) the principle of presumed innocence and *in dubio pro reo*; (e) the principle of unrestricted evaluation of evidence; (f) the principle of directness; (g) the principle of adversarial and inquisitorial procedure; (h) the principle of legality;

(i) the principle of right to defense; (j) the principle of a public trial; (k) the principle of public control of the trial; and (l) the principle of a fair trial (Waltoś 2013-334). Of them all, the principle of substantive truth is the key principle – it assures that all the facts must be consistent with reality, which stands in opposition to the principle of formal truth (under Common Law in the USA and UK), whereby the procedural law does not compel the judge to study, whether the facts provided by the parties are consistent with reality (Waltoś 2009: 221). (8) Genre: under the definition of the “genre” provided by Swales (1990: 9), both the speech situation, i.e. the criminal trial and the speech event, i.e. the procedure of witness examination in the trial are both instantiations of communicative events.

Having established the socio-cultural, historical, institutional, and legal backdrop in which the Polish inquisitorial procedure of witness examination takes place, Bednarek (2014) narrows the scope of the research and concentrates on the talk itself, which is why she subsequently applies conversation analysis (CA) approach to discourse analysis that developed from ethnomethodological research in sociology and which allowed her to analyze the following key aspects of Polish courtroom discourse: (1) the structural organization of the examination of witnesses in criminal trials; (2) courtroom interaction during the evidential phase; (3) the system of turn-taking; (4) the social roles of the major participants of the procedure of witness examination; and (5) types of questions used in the evidential phase.

As has been described above, the inquisitorial procedure of witness examination in criminal trials under Civil Law in Poland primarily involves two major stages. In case of defendants it embraces: (1) the free and unrestricted explanations and (2) the examination of the defendant by the judge, attorney for the prosecution and attorney for the defense and lastly experts in various branches of science; and in case of witnesses it encompasses: (1) the free and unrestricted testimony by a witness and (2) the examination of the witness by the judge, attorney for the prosecution and attorney for the defense and lastly experts in various branches of science (Bednarek 2014)².

Bednarek (2014: 129) explains that under art. 366 of the Code of Criminal Procedure in Poland the person responsible for conducting the procedure of witness examination under Civil Law in Poland is the judge, who is also the chairman of the adjudicating panel. Further, under art. 385 section 1 of the said code, the evidential phase begins with the process of reading of the act

²In her book, Bednarek (2014: 129-138) has described and explained the structure of the entire criminal trial in Poland.

of indictment by the attorney for the prosecution, and in case of very long acts of indictment it commences with the presentation of the charges brought to court against the defendant (Bednarek 2014: 132). Next, the judge is required under the law in force to ask the obligatory questions to the defendant that will confirm whether s/he understood the act of indictment and if the answer is negative it is the onus of the attorney for the prosecution to explain it to the defendant (Bednarek 2014: 132). Having established that all the counts have been understood, the defendant is subsequently advised on her/his rights arising from art. 386 section 1 of the Code of Criminal procedure to provide explanations or to withhold from providing explanations or answering the questions followed by the obligatory question whether the defendant pleads guilty or not guilty of committing the crime (Bednarek 2014: 132). Next, under art.175 section 1, the defendant is free to provide explanations and the witness to provide testimony, which arise from this regulation and while they do that they may, pursuant to art. 171 section 1, reveal and describe all that they know in connection with the committed crime in response to just one single question in the form that is as long as they wish (Bednarek 2014: 133). Once the defendant or witness have completed her/his explanation or testimony respectively, they may be asked supplementary questions to elucidate any ambiguities in connection with circumstances of the committed crime by the judge, attorney for the prosecution and attorney for the defense, who may do so under art. 370 section 1 of the code mentioned above (Bednarek 2014: 133).

The questioning of the defendant and witnesses commences with establishing the key information about them, including inter alia: their forename, surname, place of residence, profession, relation to the accused person. Prior to that, however, the judge is required to instruct the person providing an explanation or testimony about the criminal liability for contributing untrue information or withholding the truth that arise from art. 191 section 1 of the Code of Criminal Procedure (Bednarek 2014: 134).

In the light of the research performed by Bednarek (2014: 129-138), the social roles that the key partakers play during the inquisitorial procedure of witness examination are as follows: (1) the judge, who as observed previously in this paper is the chairman of the court proceedings and the adjudicating panel, calls in the witnesses to the witness stand and examines the defendant and witnesses; his/her role is to establish the circumstances in which the crime was committed. The judge instructs the defendant/s and witness/es on their rights and obligations. In other words, the judge conducts an inquisition, whose purpose is to look for the truth concerning the circumstances under which the crime was committed; (2) attorney for the prosecution reads the act of indictment or

presents the charges against the defendant, s/he may ask the so called supplementary questions to the defendant or witnesses once they have completed providing explanations or testimony and as soon as the judge has terminated asking them questions; (3) attorney for the defense guarantees that the rights of the defendant are upheld throughout the entire criminal trial, s/he may, similarly to the attorney for the prosecution, ask the supplementary questions provided that the judge and attorney for the prosecution have finalized questioning the defendant or witness.

As for the system of turn-taking, Bednarek (2014: 138-140) established the following facts: (1) during the inquisitorial procedure of witness examination in criminal trials, talk always takes the form of questions and answers with the judge enjoying the right to ask the question "What do you know in connection with the committed crime?" and the defendant or a witness may proceed with their unrestricted explanation and/or testimony respectively, which may subsequently be followed by a series of supplementary questions posed by: the judge, attorney for the prosecution or attorney for the defense, and experts; (2) the system of taking turn in the procedure of witness examination is strictly pre-allocated and determined by the law in force in Poland that empowers the judge to conduct the examination of witnesses, it also allows attorneys for the prosecution and attorneys for the defense to ask questions; (3) turns at talk always take place between two persons, the judge and the defendant, the judge and the witness, attorney for the prosecution and the defendant or witness, attorney for the defense and the defendant or witness, or an expert and the defendant or witness. Self-selections during the court proceedings are strictly prohibited; only the judge holds the power to grant the permission to take the floor to all the participants, both professional and lay (Bednarek 2014: 139).

The analysis of the questions asked during the inquisitorial procedure of witness examination displayed that in contrast to the adversarial procedure of witness examination under Common Law in the USA, the Polish judge, attorney for the prosecution, attorney for the defense and experts ask all types of questions interchangeably, except for the leading questions, which may never be posed due to restrictions in law (Bednarek 2014: 146-151). Owing to the fact that under the law in force in Poland both the defendant and witnesses may provide unrestricted information while providing verbal evidence, the number of questions asked during the inquisitorial procedure of witness examination is significantly abridged in comparison with the American adversarial procedure of witness examination, wherein both parties ask literally thousands of questions making substantial use of questions and who are allowed to use the leading questions in the cross-examination part of the evidential phase (Bednarek 2014:

66-75). As explained by Bednarek (2014: 147-149), Polish lawyers employ Yes/No-questions and Wh-questions on equal terms, no special techniques appear to be used while questioning the defendant and witnesses, lawyers do not seem to display any penchant for the use of any special types of questions, which is most probably the immediate consequence of the observance of the principle of substantive truth that provides that the judge is required to establish the objective truth concerning the circumstances in which the crime was committed, so the achievement and establishment of the entire substantive truth pertaining to the crime prevails and influences both courtroom interaction, as well as all the talk during the inquisitorial procedure of witness examination.

The use of pragmatics to investigate Polish and American courtroom discourse as the final method of research allowed Bednarek (2014) to concentrate on the smallest units of the language used during courtroom interaction, namely the *speech acts*, which are commonly perceived as more than mere linguistic acts and are seen as social acts (Geis 1995: xii). Bednarek (2014: 151) makes references to Grice's (1975: 45) seminal essay "Logic and Conversation", wherein he urges all the conversationalists to make their contributions as required and in accordance with the major purpose of the talk. The four maxims that this renowned philosopher propagated caution interlocutors to: (1) to make their speech as informative as required; (2) to avoid providing information that is far from the truth, or for which they lack evidence; (3) be relevant; and (4) be brief and orderly and evade ambiguity and obscurity.

The analysis of Polish courtroom discourse during the evidential phase under Civil Law conducted by Bednarek (2014) has shown that the overwhelming majority of witnesses in criminal trial under investigation observed maxim in that they provided true information associated with the committed crime during the examination, thus respecting art. 233 section 1 of the Polish Criminal Code in force, which cautions anyone, who in providing testimony, which is to serve as evidence in court proceedings, gives false testimony or hides the truth is subject to severe penalty of deprivation of liberty for up to three years. Despite the stern consequences that the said article of the Criminal Code in Poland anticipates for all those, who do not comply with this article when they provide testimony, Bednarek (2014: 152) has also established some evident instances of attempts to conceal the truth, as well as examples of testimony, whose veracity and reliability was not only dubious, but also quite easily questioned and contradicted by verbal evidence provided by other key witnesses.

As concerns maxim two, following which interlocutors are to provide only as much information as is asked of them and refrain from providing more information than is required, Bednarek (2014: 153) has found out that in contrast

to the American criminal justice rules of conduct applied in criminal trials, Polish witnesses and defendants are allowed to give as much information and for as long as they wish in connection with the committed crime, which is in conformity with the principle of substantive truth that governs the procedure of witness examination in criminal trials in Poland and which allows judges to get access to *all* the information about the circumstances of the committed crime in order to give an objective verdict, as opposed to the adversarial method of witness examination under Common Law in the USA, whereby prosecutors generally provide the information that will allow them to prove the defendant is guilty beyond reasonable doubt, whereas the defense only reveals the evidence that proves the innocence of their client/s.

Bednarek (2014: 155) has confirmed that defendant's explanations and witnesses' testimony appear to be relevant to the legal case under investigation in court, that is to say their talk and conduct appears to be in compliance with Grice's (1975) maxim three, so seem to be the contributions provided by the defendant and witnesses referring to maxim four that advises conversationalists to avoid ambiguity and obscurity and that advises interlocutors to make their contributions brief and orderly. The qualitative analysis performed by Bednarek (2014: 155ff) has shown that the explanations and testimony provided in this case are comprehensible, intelligible, presented in a rather orderly manner, except for the testimony of one witness. The language provided by experts in psychiatry, however, appeared to be more sophisticated and presented in a more logical way than that given by lay witnesses (Bednarek 2014: 156).

Bednarek (2014: 157) has proved that although certain floutings of Grice's (1975) principle of co-operation in conversation exist, the defendant and witnesses in their overwhelming preponderance follow conversational maxims proposed by the said philosopher that enables the judge to conduct the procedure of witness examination swiftly and in accordance with the binding laws.

In order to establish that both legal professionals and lay participants share common knowledge that enables them to communicate effectively during the trial Bednarek (2014: 158-164) has examined the speech acts introduced by Austin (1962) in his book published posthumously *How to Do things with Words*. The study displayed that the *Representatives* constituted the most frequently employed type of speech acts used to describe persons, actions and phenomena, i.e. to give account of the circumstances of the committed crime, whereas *Directives*, which took the form of requests, commands and orders, on the other hand, were not so commonly applied and neither were *Commissives* that allow witnesses and defendants to commit to certain actions and which are generally introduced by such words as: swear, warrant, promise, threaten or vow

(Bednarek 2014: 158-161). Bednarek (2014: 162) has discovered that the incidence of *Expressives*, which are employed to convey, inter alia: thanks, apologies, congratulations, and condolences, was regular. The prevalence of *Declaratives*, however, which are used to appoint, arrest, baptize, bid, declare, deem, define, pass sentence, resign, and whose occurrence during the entire criminal trial is usually high, have been found to be sporadically applied during the evidential phase.

The research conducted by Bednarek (2014) has confirmed that Polish courtroom discourse is unique, and should be perceived as a phenomenon *sui generis*, it is an example of a distinctive linguistic genre, wherein the major participants of talk-in-interaction play unique social roles. It is both culturally varied, and socially conditioned as hypothesized at the onset of the study.

3. Criticism and the major reasons for a change of the inquisitorial criminal process in Poland

Although in his seminal book dedicated to the description and explanation of the criminal process in Poland, Waltoś (2009: 216-217) insists that Polish criminal trial is adversarial in its nature, which, as he argues, is reflected in the battle between the prosecution and defense governed and resolved by the sovereign Court, his opinion has been contested by professionals in criminal law in Poland, such as Hofmański (2013: 33), Grzegorzczuk (2013: 46), and Skorupka (2013: 76), to name but a few.

One of the arguments that appears to contradict the point of view presented by Waltoś (2009) is the fact that although during a criminal trial in Poland two parties appear *prima facie* to be engaged in an argument, their conduct may hardly be perceived as a battle, or an argument owing to the fact that the prosecution and defense in Poland do not have the right to conduct the procedure of witness examination, which, as explained earlier in this paper, is the responsibility of the judge (Hofmański 2013: 33).

Another reason that appears to challenge the point of view proposed by Waltoś (2009) is the fact that the prosecution and defense in Poland do not present two contrasting versions of events, two stories of the circumstances under which the crime was committed, as is the case in the USA under Common Law, wherein the prosecution and defense provide two dissimilar narratives, or accounts of the events in which the crime is committed, which they elicit in the form of testimony from their witnesses.

Although, it is true that the Polish criminal proceedings exhibit certain features of the adversarial criminal process, it must be indicated that such features are outnumbered by the attributes, which are typical for the inquisitorial

criminal trial, e.g.: (1) the criminal proceedings are dominated by the preliminary procedure in which the prosecution is liable for explaining all the circumstances of the committed crime, as well as for collecting and providing evidence, whereas the judge in the court is merely responsible for confirming its veracity, as well as for issuing of the verdict; (2) although it is true that Polish courts enjoy sovereignty, Polish courts are not always impartial in their actions, as the courts in the USA under Common Law, which may be attributed to the fact that following the Polish law, Polish courts play an active role; they are engaged in conducting the examination of witnesses, which implies that Polish judges are liable for contesting the presumption of innocence of the defendant, as well as for proving the truth of all the accusations presented in the act of indictment by the prosecution (this also means that the judge may introduce evidence against the defendant only in cases when such evidence may not be eliminated); (3) the prosecution and defense do not enjoy equal rights before courts – that is to say, the prosecution, which is supported by the state, not only enjoys the right to obtain evidence in numerous ways, which the defense does not, but it may also introduce such evidence in the process, while the rights of the defense in this respect appear to be radically limited³; (4) there is hardly any proof confirming the adversary nature of the criminal process in the preliminary stage of the criminal proceedings; thus, although there is a dispute between the prosecution and defense, it does not refer to the major object of the process (Hofmański 2013: 34).

Following Hofmański (2013: 33), such status quo of the Polish criminal process may be credited to the pernicious influence of the soviet model of criminal justice, which it exerted on the east-European countries, and which is so difficult to do away with.

One of the most unfavorable remarks pertaining to the criminal process in Poland is the fact that the criminal trial in Poland is founded on the *repetitive actions performed by the Polish courts during the evidential phase, which had already been conducted by the prosecution in the preliminary stage of the criminal process*, when the prosecution prepare and gather evidence to be presented in court (Hofmański 2013: 35). The old criminal procedure has also been disapproved of for being: (a) lengthy; (b) timeworn, and (c) inappropriate to the social changes taking place in our society, (d) the evolution of crime, and (e) emergence of new threats (Hernand 2013: 156; Małolepszy 2013: 209). In its

³The limitation of this right is reflected in the fact that evidence obtained by the prosecution from independent experts may be submitted without restrictions in the process, whereas such evidence obtained from an expert obtained by the defense does not at all constitute evidence; it merely indicates the need for obtaining new opinion provided by an expert (Hofmański 2013: 34).

Justification for the Bill of Amendment of the Law – Criminal Code and Code of Criminal Procedure and some other laws, the Criminal Code Codification Committee acting at the Minister of Justice in Poland reprimanded the Polish criminal process for the protracted nature of the criminal proceedings and unnecessary lengthy temporary detention of the accused, which confirms the fact that there is a pressing necessity for a change of the criminal process in Poland for reasons that the old procedure has exhausted its possibilities due to: (1) substitution of the adversarial procedure with the inquisitorial proceedings regarding the evidential phase targeted at achievement of the substantive truth related to the circumstances in which the crime was committed; (2) excessive formalism of the activities, which prolongs and delays the criminal procedure; (3) superfluous and unwanted activation of judges in activities that might be performed by other participants; (4) inappropriate realization of the Constitutional standards.

In the light of the foregoing, the said Committee has expressed its firm conviction that the present model of the criminal process requires profound transformation following consultation with experts in theory and practice in criminal justice. In order to take note of these opinions, the Committee organized three conferences in 2010 dedicated to the following aspects of the criminal process: (1) the model of preliminary and jurisdictional procedure; (2) application of coercive measures in the criminal process; and (3) models of supervision of courts, both internal and external. With reference to these issues, the Committee carried out a survey, which was subsequently analyzed by external experts and discussed during conferences by academic experts in criminal law, as well as by legal practitioners. On the basis of all that, the Codification Committee then published the postulations and guidelines for the reform of criminal law in Poland followed by the introduction of the draft of the amended Code of Criminal Procedure and other laws in 2011. In response to that emerged numerous opinions, which members of the Codification Committee analyzed thoroughly. The Bill is the final result of all these activities. Owing to the fact that some of the expert opinions expressed markedly diverging points of view, it was not feasible to include them in the Bill, wherein the Codification Committee encompassed those solutions that were relevant, accurate, and were not controversial.

The major objectives of the Bill are as follows:

- (1) to remodel the current mode of criminal procedure towards an adversarial procedure that will create better conditions for explanation of the substantive truth and will best guarantee respect and observance of the rights of the participants to the criminal proceedings;
- (2) to remodel – to the necessary extent – the preliminary proceedings in order to assure the adversarial criminal process especially with regard to its objectives;

- (3) to improve and expedite the proceedings thanks to creation of the legal framework for a wider application of consensual ways to terminate the criminal proceedings and usage of the idea of justice and rehabilitation;
- (4) to remove the “pretentiousness” of the proceedings thanks to a new manner of proceedings due to the resignation of a number of activities that neither bring the Court closer to the truth nor respect the warranties of the participants to the proceedings;
- (5) to shape anew the application of preventive measures in the manner averting their excessive usage in practice and assuring achievement of their aims;
- (6) to limit the length of the proceedings thanks to a new appeal procedure;
- (7) to take the burden off the judges, court presidents and chairmen of the court departments through authorizing Court Referendaries to make decisions and as a result allow judges to make use of their time more efficiently;
- (8) to guarantee compliance of the statutory solutions with the standards of the Constitutional Court and the European Tribunal of Human Rights;
- (9) to remove all the evident flaws, as well as flaws revealed by jurisprudence in the regulations.

4. The new criminal laws: towards an adversarial criminal process. The effects that the modernized laws will have on Polish courtroom discourse

As indicated above, in their justification for the amendment of the Criminal Code and the Code of Criminal Procedure in Poland, legal experts argue that one of the shortcomings of the present criminal process and reasons for a change of the hitherto criminal law in Poland is the fact that the Courts in Poland duplicate the evidential procedure conducted by the prosecution that holds the responsibility for gathering and securing the evidence pertaining to the committed crime at the pre-trial stage. Legal experts have expressed their conviction that there are two possible solutions that could prevent such an unnecessary repetition, which are as follows: (1) to introduce the office of an examining magistrate, also known as an investigative judge or a prosecuting magistrate; (2) to diminish the importance of the evidential procedure in the preliminary part of the criminal process and increase the role of the adversarial explanation of the evidence before the Court. Following the heated discussions and debates in this respect, the Codification Committee opted for the second solution, which transforms the hitherto inquisitorial criminal trial into an adversarial one. In what follows the reader will learn how this will be done.

As a result of this transformation, the evidential proceedings undertaken during the preliminary part of the criminal process will constitute the background of the prosecutorial accusation, that is to say these proceedings will be conducted for the benefit of the prosecution, not the Court, as it used to be. Following art. 297 § 1 point 5 of the Code of Criminal Procedure, the Court will retain its right to carry out the evidential proceedings only in exceptional circumstances. The procedure, which prior to the amendment of the law stipulated that the major objective of the preliminary proceedings was to “gather, secure and record the evidence *for the Court*”, currently stipulates that the major aim of the preliminary proceedings is to “gather, secure and record the evidence in order to introduce it *to the Court*.” Although the amendment may *prima facie* seem trivial, legal experts indicate that it is crucial, because such a formulation shifts the responsibility for these actions from the Court and delegates it to the prosecution. The Court, as they argue, should play the role of a *referee*, who will issue the verdict after the prosecution and defense conduct the evidential phase, as it is in the USA under Common Law.

In connection with that remains the reform of art. 167 of the Code of Criminal procedure, which prior to the alteration provided that the evidential phase is conducted *at the request of the parties* (the prosecution and defense) or *ex officio* (by the Court- judge), and which now in §1 provides that the evidential phase is carried out *by the parties*, i.e. the prosecution and defense, when the chairman of the proceedings or the Court allow it. As indicated earlier, in exceptional and justified circumstances the Court will still hold the right to conduct the evidential phase *ex officio*. These modifications appear to be the most important ones owing to the fact that they constitute the background of the momentous transformation in Poland of the criminal trial, that is to say they alter the hitherto inquisitorial procedure of witness examination, wherein the judge was responsible for examining the defendant and witnesses, into the adversarial one, wherein the judge assumes the role of an arbiter/referee with the right to examine the witness only in exceptional and justified cases, whereas the prosecution and defense get their right to introduce evidence and examine the defendant and witnesses.

In addition to the said modifications, there are other alterations of the provisions of the Criminal Code and Code of Criminal Procedure that affect the criminal trial in Poland. By way of illustration, until the introduction of the new law, the evidential phase in Poland in a criminal trial opened with the reading of the act of indictment, and in cases when the act of indictment was long it began with the introduction of the charges against the defendant presented by the prosecution (art. 385 § 1 and 2). Following the modification of art. 385 § 1, *the*

evidential phase of a criminal trial at present commences with a concise introduction of the charges against the defendant by an attorney for the prosecution. According to art. 370 § 1, when the person examined has ended providing her/his explanation or testimony (under art. 171 § 1), s/he may be questioned by the following persons participating in the process in the following order: 1) the public prosecutor; 2) the auxiliary prosecutor; 3) the plenipotentiary of the auxiliary prosecutor; 4) the private prosecutor; 5) the plenipotentiary of private prosecutor; 6) the expert; 7) the attorney for the defense; 8) the defendant; 9) the members of the adjudicating panel. Following art. 370 § 2 the party that introduces the evidence enjoys the right to question the witnesses first. In cases, when the judge examines the witnesses, the members of the adjudicating panel are the first, who examine the witnesses. Another very important change involves the defendant, whose participation in the trial prior to the amendment of the law was mandatory (cf. art. 374 § 1), and who these days is not forced to participate in the trial, but who enjoys the right to participate in the criminal trial under art. 374§1. Following art. 374 § 1 the Court may recognize the presence of the defendant obligatory (in felony cases).

The new regulations within the field of criminal law, which came into force on 1 July 2015 will profoundly affect the use of language by the members of the legal speech community during the courtroom proceedings in criminal trials in Poland, as well as the process of communication between them and between the lawyers and the lay people, i.e. the defendant and witnesses. Owing to the fact that the amended criminal laws have modernized the entire procedure of a criminal trial in court in Poland, Polish courtroom discourse will gain an entirely new image. At the time, when this paper is being written, we may only hypothesize or conjecture what consequences the amended law is going to have on Polish courtroom discourse.

By way of illustration, one of the consequences that the momentous transformation of the criminal law in Poland will have is an entirely new structural organization of the criminal trial, including a new structural organization of the procedure of witness examination, undoubtedly one of the major components of a trial that occupies more than 80% of the trial.

Another serious outcome of the amendment of the criminal law in Poland will be the new social roles of the major legal participants taking part in the criminal trial, e.g. the judge, attorney for the prosecution, and attorney for the defense. Under the new law, the judge will become a referee, a moderator of the talk, whereas attorneys for the prosecution and attorneys for the defense will now hold the responsibility for examining the defendant and witnesses. However, it must be remembered that the judge retains the right to examine the

defendant and witnesses in exceptional and justified cases. This implies that the judge will still play an active role in the procedure of witness examination, in certain cases. It is very difficult, in fact, even impossible, at the present time to anticipate how often the judge is going to exercise her/his right to examine the witnesses on the one hand, and to what extent the judge will refrain from examining the defendant and witnesses during the trial.

The new social roles that the judge, attorneys for the prosecution and attorneys for the defense will from now on play during the criminal trial will have another significant effect on Polish courtroom discourse, that is to say they will alter the number of questions posed by various participants. Since the judge has now lost her/his right to examine the witnesses, with the exception to conduct the examination of witnesses in exceptional and justified cases, the high number of questions that the judge posed to the defendant and witnesses prior to the amendment of the criminal law is now very likely to decline significantly, especially in those cases when the judge will not exercise the right to examine the witnesses the number of questions posed to the defendant and witnesses will be zero. It is very difficult to anticipate the number of questions posed by the judge to the defendant and witnesses in trials, when the judge will exercise her/his right to conduct the examination of witnesses in the so called exceptional and justified cases. As concerns the number of questions asked by attorneys for the prosecution and attorneys for the defense, their number is expected to rise from now on, as it is the attorneys for the prosecution and attorneys for the defense that will now be liable for examining the defendant and witnesses.

In order to demonstrate the new portrait, the new image of Polish courtroom discourse, it is therefore relevant to study anew: (1) the context in which Polish courtroom discourse occurs, especially the new legal norms that govern the criminal trial proceedings; and (2) the effects that the new context will have on Polish courtroom discourse. In linguistics, the fact that the context of the situation in which language use takes place is crucial for understanding what is being said and how it is being said is well established. As once indicated by Hymes (1974: 3-4), any analysis of language in use in order to be complete should inevitably encompass the context of the situation in which the language occurs. The origins of such a view take us directly to the ideas propagated by Bronisław Malinowski, who in his seminal essay "The Problem of Meaning in Primitive Languages" (Malinowski 1923: 302) insisted that "linguistic analysis inevitably leads into the study of all the subjects covered by Ethnographic field work". The analysis of language in use needs to take account of the fact that "*a statement spoken in real life is never detached from situation in which it is*

uttered. The utterance has no meaning except in the context of situation” (Malinowski 1923: 302).

Within the field of discourse analysis, the relevance of the notion of context for production and understanding of language use is fundamental, although, as is commonly known, the term “context” as some maintain “(...) is one of those linguistic terms, which is constantly used in all kinds of context but never explained” (Asher 1994: 731, as cited by Fetzer 2004: 1). Indeed, one homogenous definition of context does not exist, which researchers attribute to the fact that discourse analysis comprises a number of distinct approaches founded on dissimilar theoretical and methodological assumptions (Duranti and Goodwin 1992:2; Schiffrin 1994: 364-365). Schiffrin (1992) has reviewed these approaches in order to understand how context is defined in them. Yet this subject will not be addressed in this paper.

However, it is important to emphasize that the socio-cultural, institutional, and legal context is extremely relevant for the proper understanding of courtroom discourse. Each and every language of law that lawyers use as the major tool to formulate, enact and construe law strongly relies on the setting in which it exists. In each country, the language of law, including that used in courtroom interaction, develops for hundreds of years in different socio-economic, and political conditions. Whenever the conditions change, so does the language of law. In all the legal systems, societies formulate the law, which not only regulates the behavior of the people, but which also regulates the social roles that the legal representatives of a particular society play when they partake in different legal procedures. The historic change of the criminal law in Poland alters the criminal proceedings in courts, the communicative competence that judges, attorneys for the prosecution and attorneys for the defense have to communicate effectively during the criminal trial to exercise correctly the social roles that practicing their professions entails. The amended criminal law will undoubtedly alter the portrait of Polish courtroom discourse as has been described and explained in this paper, which as the title indicates should be perceived as the introduction – the prolegomena – to a further study of the language used by judges, attorneys for the prosecution and attorneys for the defense in criminal trials in Poland under the new criminal law.

5. Concluding remarks

The major objective of the present paper has been to introduce the new criminal laws in Poland that came into effect on 1 July 2015 and explain the prospective consequences that they will have on Polish courtroom discourse. As has been expounded in the paper, languages do not occur in the vacuum, for they emerge and evolve in certain socio-economic, institutional, and legal settings. Whenever the settings change so does the language. For this reason in order to understand what is being said during a criminal trial in Poland and how it is being said under the new criminal law will have to be studied afresh. Owing to the momentous alteration of the criminal law in Poland the new image of Polish courtroom discourse is at the present time an enigma that requires a thorough investigation anew from a number of different perspectives.

The reform of the criminal justice system in Poland also needs to be perceived as one of the numerous efforts that various nations around the world undertake in order to enhance and strengthen their own systems of justice. By way of illustration, Uruguay, Brazil and Cuba have adopted some versions of the adversarial criminal justice that replaced the inquisitorial one. So have Japan, South Korea, and Taiwan, wherein significant transformations of criminal justice have taken place in the direction of the adversarial criminal justice. In Europe, Italy is the country, which started the reform of its criminal justice system in the late 80-ies in the same direction as the Polish criminal justice. China has also introduced the reform of their judicial system implementing the key adversarial criminal justice features. Although the motives for the reform of the system of justice in all of these countries most probably differ from country to country, any modifications of the system of justice seem to be a natural response to a number of key factors that seem to take place around the world, e.g.: 1) steady economic development and social advancement; 2) rapid increase in crime; 3) globalization; 4) spread of democracy; and 5) respect for human rights. Looking for better and more advanced systems of justice that will allow nations to deal with the ever growing process of law-breaking all the countries rely on the field of study of comparative criminal justice that investigates and evaluates national systems of justice in order to: a) learn and profit from the experience of the others; b) extend our understanding of different cultures and approaches to various problems; c) help us handle various forms of transnational crime; and d) adjust our justice systems to such values as: democracy, human rights, human safety, and equality of justice for everyone (Dammer 2014: 5).

6. References

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Internet resources:

Uzasadnienie projektu ustawy o zmianie Ustawy Kodeks karny, Kodeks postępowania karnego i niektórych ustaw. <https://bip.ms.gov.pl/pl/projekty-aktow-prawnych/prawo-karne//>