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Ius Novum

2025, vol. 19, no. 2, pp. 71–85

‘MODERNISATION WITHOUT MODERNISM’: CHANGES IN POLISH CRIMINAL PROCEDURE IN THE LAST DECADE AND VISIONS OF THE CRIMINAL PROCESS OF THE FUTURE*

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DOI 10.2478/in-2025-0014

Abstract

The legislatively complex fate of Polish criminal law, including criminal procedure, over the last ten years, as well as the currently open prospect of further reforms in this area, prompts one to reflect from a distance on how these multidirectional changes position themselves within the broader trends in the development of the criminal process worldwide, and to what extent the Polish criminal process is in fact being ‘modernised’ in its essence, rather than merely ‘modernised’ in a technological sense. This reflection leads to the question of how these ‘modernisations’, regardless of their level, relate to the functioning of the Polish criminal process in the postmodern era and whether postmodernism, as an intellectual current, can offer something to the criminal process, especially in the area of the problems that trouble it and require urgent solution. What emerges from the analysis is a picture of legislative randomness and impermanence of changes, and the covering of what is obsolete in Polish criminal procedure with technological novelties in its organisational layer. For this reason, it is vital to urgently discuss the reformist demands being made for criminal procedure – so that they do not remain purely academic considerations, but are translated into real changes to the law and social practices constituting the criminal process.

Key words: criminal trial, postmodernism, modernisation, postmodernity, adversarial reform, reform of criminal law and procedure, decodification, conflict theory

* This article was written to develop and supplement a conference paper delivered at the 25th Faculty Conference of the Faculty of Law and Administration of the University of Warsaw ‘The Future of Law’ (‘Przyszłość prawa’) on 5 April 2024.

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PRELIMINARY REMARKS

The titular 'modernisation without modernism'[1] is of course to some extent a journalistic term, but it succinctly describes a phenomenon observed by social and cultural researchers from various disciplines (sociologists, cultural anthropologists, historians, etc.), whereby social institutions accept the material achievements of the modern era, particularly contemporary technologies of various kinds, without the simultaneous adoption (internalisation) of the values on which the modern era was founded, such as reason (or even in its extreme form – faith in reason), progress, humanism and order.[2] Throughout the world, this phenomenon can be seen in many places on a macro scale: the foreign example closest to us would probably be Russia, but the Persian Gulf countries, among others, are also cited in this respect. In all these cases, the adoption of modern technology or visible economic growth does not translate into social progress or the independent creation of technological innovation.[3] Moreover, this concerns not just progress seen in terms of a 'Western-style' transformation of social axiology, but even in terms of economic and social change, if only because the fruits of economic development in these countries have not been redistributed.

Modernisation limited precisely to certain external forms is even sometimes referred to, using such countries as an example, as 'modernisation of poverty'.[4] Such discrepancies between form and substance could, of course, also be sought among the conditions of social life in Poland. However, in order not to engage in a political discussion, to which such a search would inevitably lead, I would like to focus on the question of whether the title slogan 'modernisation without modernism' can be applied to the needs of legal research, i.e. to the assessment of the state of Polish law, and more specifically to criminal procedure (it is not, of course, precluded that a similar endeavour would also make sense in other areas of law). I would like to argue that one characteristic of Polish criminal procedure in recent years is the presence of selective, purely formal modernisation, limited to organisational and technical issues, but without respect for the values of a modern criminal process, let alone an attempt to direct it in any way onto a new path, responding to the current

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[1] This term was used – following the distinction between these two components of modernity as identified by F. Jameson – by J. Sowa in *Fantomowe ciało króla. Peryferyjne zmagania z nowoczesną formą*, Kraków, 2011, p. 529, in order to criticise those who demand technological modernity without modernising culture or values.

[2] See, regarding these values as foundations of modernity, which postmodernism abandons, Z. Bauman, *Ponowoczesność jako źródło cierpień*, Warszawa, 2000, passim; in the context of law – L. Morawski, *Co może dać nauce prawa postmodernizm*, Toruń, 2001, pp. 36–37.

[3] On the occurrence of economic growth without modernisation (including, e.g. technical modernisation), A. Leszczyński, *Skok w nowoczesność. Polityka wzrostu w krajach peryferyjnych*, Warszawa, 2013, pp. 39–40, who points to, *inter alia*, the example of Arab countries whose economies are based on the extraction and export of oil; the situation of China, on the other hand, is specific – as it is an autocratic country as well, founded on values rather alien to European modernism, yet one that until recently was undergoing dynamic economic and social development and was highly innovative in terms of technology (applying these advanced technologies to the extreme surveillance of its citizens, which clearly illustrates the antinomy of 'modernisation without modernism').

[4] J. Sowa, *Fantomowe ciało...*, op. cit., pp. 31–32.

era or even the future. The proposed attempt starts from the assumption that the phenomenon referred to above, since it is recorded by researchers of society-wide processes, also occurs at (at least some) lower levels of social organisation, of which the law is indisputably a component.

To further elaborate on the title of the study, it should be made clear that, although it may suggest a focus on the past, the point is rather that the future, without reflection on the past, cannot, in my view, be discussed constructively. J. Bardach wrote that such an approach 'makes it possible to avoid a very dangerous conviction of the omnipotence of legal regulation by showing the place of law in the general current of changes, its variability, and the conditions of this variability'.[5] Illustrating the main argument of this paper by means of historical (meaning past – even though chronologically very recent) examples is intended to help identify it as a barrier, without the removal of which it will be impossible to find such a vision of the criminal process of the future that allows the realisation of the goals this legal institution is supposed to achieve and makes it a viable tool for regulating social relations emerging in response to crime.

ASSESSING THE MODERNISING DIMENSION OF THE 2015 ADVERSARIAL REFORM

It is worth starting in this context with the famous so-called adversarial reform of the 2015 criminal procedure,[6] constituting an extensive and profound change to the regulations of the Code of Criminal Procedure (CCP). The essence of this change was succinctly presented by R. Zawłocki who indicated that its three pillars were adversarialism, consensualism and compensation.[7] The first pillar is, of course, an expression of the model choice made by the legislator,[8] of fundamental importance from the perspective of criminal trial theory, which gave this reform its name. The idea was to conceptually transform – at least within the judicial process – the previously accepted model of a mixed trial, operating with an apparent skew towards inquisitorial elements. The court hearing was to become the forum for the full realisation of the adversarial principle: the goal was to make it a dispute between two equal litigants, the prosecutor and the accused (defence), where the court would occupy the role of an impartial and uninvolved arbiter. This change itself constituted a revolution for Polish legal society – as it required prosecutors to assume more responsibility than before for the fate of cases after indictment, forced judges to restrain themselves from

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[5] J. Bardach, 'Themis a Clio, czyli o potrzebie podejścia historycznego w prawoznawstwie', in: Bardach J., *Themis a Clio, czyli prawo a historia*, Warszawa, 2011, pp. 13–15.

[6] Introduced by the Act of 27 September 2013 amending the Act on the Code of Criminal Procedure (Journal of Laws, item 1282), which entered into force on 1 July 2015.

[7] R. Zawłocki, 'Ocena społecznej szkodliwości czynu w kompensacyjnym, konsensualnym i kontradyktoryjnym procesie karnym', in: Bojarski M., Brzezińska J., Łucarz K. (eds), *Problemy współczesnego prawa karnego i polityki kryminalnej: księga jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław, 2015, p. 400.

[8] M. Langer, 'The Long Shadow of the Adversarial and Inquisitorial Categories', in: Dubber M.D., Hörnle T. (eds), *The Oxford Handbook of Criminal Law*, Oxford, 2014, p. 891.

engaging in the investigation of the case at trial, gave new options to defence lawyers, but also new obligations related to the representation of the interests of the accused (procedural passivity, permissible on the part of the defence due to the presumption of innocence, could become purely praxeologically unprofitable).

Consensualism was to be expressed in the increased role of the – already statistically very important at the time – measures of simplified recognition of the case, modelled upon the idea of plea bargaining, in which the accused agrees to accept certain consequences of conviction, specified in agreement with the prosecutor, as seen in, first and foremost, the institutions of conviction without trial (Article 335 CCP) and voluntary submission to punishment (Article 387 CCP). Such a change was intended to further simplify and expedite the criminal process in those cases where the accused chose not to take an active defence, instead hoping for lenient treatment or at least a quicker assumption of the consequences of their criminal responsibility being established. This was to allow the courts to focus on those cases where, for various reasons, the so-called consensual procedures could not be applied.

The compensatory character, meanwhile, was to be a manifestation of a greater integration of restorative justice into the *instrumentarium* of both substantive and procedural criminal law. The key role here was played by the distinction of compensatory measures in substantive law and the introduction of compensatory discontinuation of proceedings under the now repealed Article 59a of the Criminal Code – which allowed, in minor cases, criminal prosecutions to be dropped because the damage caused by the crime had been repaired. In combination with the Act on Protection of and Assistance to the Victim and Witness (implementing EU regulations) passed in 2014,[9] the Polish criminal process was supposed to better protect the rights and interests of crime victims.

The reform referred to above was abandoned after only nine months in force. The new parliamentary majority (after the 2015 elections) declaratively reinstated the previous regulations of the Code of Criminal Procedure, leading to the establishment of a somewhat hybrid procedure that retained certain elements of the 2015 reform, inconsistent with the reinstated former regulations.[10] The legislative justification for this amendment can hardly be regarded as a manifestation of rational lawmaking – it constituted a purely ideological disagreement with the introduced changes, with the subsequent amendments to the Criminal Code and the Code of Criminal Procedure (some of which will be discussed further on) vividly illustrating the actual reason for the change. For the record, however, it is also necessary to refer, even if briefly, to the academic criticism of the adversarial reform. It was accused (apart from its legislative or conceptual shortcomings), *inter alia*, of having stopped 'in mid-step' and of not having taken the trouble to fully reform the pre-trial proceedings, thereby continuing the subservience of the judicial phase to this part of the procedure – something that had been criticised for years and was alien to the classical model of both mixed and

[9] Act of 28 November 2014 on Protection of and Assistance to the Victim and Witness (Journal of Laws of 2015, item 14, as amended).

[10] Act of 11 March 2016 amending the Act on the Code of Criminal Procedure and Certain Other Acts (Journal of Laws, item 437).

adversarial trials.[11] A number of allegations concerned the lack of organisational or even – here closely linked to the slogan 'modernisation without modernism' – mental preparation of the Polish criminal justice system for such a reform.[12] It was even stated that the reform had been designed without answering the fundamental question of what the Polish criminal process is in its essence (or is supposed to be).[13]

Ultimately, it is important to consider to what extent this reform was a leap into the future at all, and to what extent it was an attempt to catch up with a certain backwardness. This 'catching up' is, incidentally, closely related to the topic at hand, as numerous works analysing the condition of Polish society indicate that for centuries one of the dominant motives (or 'engines') of Polish public life has been precisely 'catching up with the West': sometimes rational, sometimes blind.[14] It seems that the goal was precisely to catch up with certain trends, particularly in the area of consensualism and even more so with regard to compensation. The most problematic, however, was adversarialism, because the adversarial principle by itself does not constitute a sign of the 'modern nature' of the criminal process. This was more of an axiological choice, stemming from the conviction (all in all correct and constituting a *communis opinio doctorum* of the science of criminal process)[15] of the superiority of this form of truth-seeking in the criminal trial over the inquisitorial principle. However, the literature[16] cautioned against repeating the failed experiment in which extensive adversarialism was introduced into Italian criminal procedure in the late 1980s and early 1990s. This change did not succeed at all – it was undone by the rulings of the Italian Constitutional Court and the interpretations of the Court of Cassation, which remained deeply rooted in the traditional mentality of the mixed process. Also speaking in the Polish press,[17] the professor of comparative law from Yale University, J.Q. Whitman, argued that the attempt to transplant

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[11] J. Tylman, 'Postępowanie przygotowawcze w świetle nowelizacji z lat 2013–2016', in: Grzegorczyk T., Olszewski R. (eds), *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, Warszawa, 2017, pp. 471, 484, who also draws attention to the generally 'overly-optimistic' justification of the amendment in terms of the objectives it set for itself; R.A. Stefański, 'O nieadekwatności projektowanych zmian w zakresie postępowania przygotowawczego do proponowanego modelu rozprawy głównej', in: P. Wiliński (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, pp. 225 et seq., where the 'selective nature' of the entire adversarial reform is highlighted.

[12] This is how one can interpret the statements of participants in a discussion recorded in the aforementioned volume *Kontradyktoryjność w polskim procesie karnym*, namely those of R. Hernand or Ł. Chojniak, who drew attention to the force of habit and possible organisational inertia (despite, in the case of Ł. Chojniak, general enthusiasm for the reform); the then Prosecutor General also distanced himself from the reform – see A. Seremet, 'Prokuratura a kontradyktoryjny model postępowania sądowego. Wyzwania i możliwe zagrożenia', *Prokuratura i Prawo*, 2015, No. 1–2.

[13] T. Gardocka, 'Zamęt w wymiarze sprawiedliwości karnej', in: Gardocka T., Jagiełło D., Herbowski P., *Zamęt w wymiarze sprawiedliwości karnej*, Warszawa, 2016, pp. 2–3.

[14] See the works of J. Sowa and A. Leszczyński cited above.

[15] See other studies and voices in the discussion, collected in the aforementioned volume: P. Wiliński (ed.), *Kontradyktoryjność…*, op. cit.

[16] A. Lach, 'Zasada kontradyktoryjności w postępowaniu sądowym w procesie karnym *de lege lata* i *de lege ferenda*', *Palestra*, 2012, No. 5–6.

[17] E. Świętochowska, 'Amerykański model procesu jest wydajny, ale…' (interview with J.Q. Whitman), *Dziennik Gazeta Prawna*, 23 December 2014.

Anglo-American adversarialism into continental conditions – carried out in the way planned in the 2015 reform – would not succeed, as adversarialism is only one component of the American criminal process, closely related to others that had not been introduced (most notably, the rules of evidence).

ASSESSING THE MODERNISING DIMENSION OF THE 2016–2023 AMENDMENTS TO CRIMINAL PROCEDURE

Subsequent years have brought, as I have already noted, numerous changes depicting a very different philosophy of the criminal process from that which underpinned the adversarial reform. It is, of course, necessary to consider these changes in a broader context – particularly with regard to amendments to the Criminal Code and the system of common courts and public prosecutors. The changes to the substantive law were in many cases regarded as pure penal populism,[18] or even as a straightforward return to the patterns of criminal law of the People's Republic of Poland.[19] Meanwhile, the changes to the system of common courts and public prosecutors were aimed at limiting judicial independence and abolishing the independence of prosecutors, which remained only as an empty statutory declaration, devoid of practical manifestation.

The changes being made to criminal procedure were assessed in a similar manner (as regressive).[20] It is worth drawing attention here to three areas that have been shaped in a way that does not correspond to the contemporary tendencies in the development of the criminal process, common in Euro-Atlantic legal culture. The first area is the principle of equality of arms, considered a component of the fair trial standard entrenched in the European Convention on Human Rights. The changes in question have brought about a gradual disruption of this equality, of course to the benefit of the prosecutor, who is becoming less and less an advocate of the public interest and more and more a representative of the executive power in the criminal process. The prosecutor has been given the power to submit a number of procedural declarations binding on the court, in the form of objections: to the exclusion of the hearing from public view (Article 360 § CCP), to the stipulation of bail when applying the so-called conditional pre-trial detention (Article 257 § 3 CCP), and to the issuance

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[18] T. Kaczmarek, 'O reorientacji badawczej i metodologicznej współczesnej nauki prawa karnego i kryminologii oraz jej wpływie na procesy prawotwórcze (w okresie zmian ustrojowych w Polsce po 2015 r.)', in: Zalewski W. (ed.), *Prawo karne jutra – między pragmatyzmem a dogmatyzmem*, Warszawa, 2018.

[19] This is discussed at length in the expert report: A. Barczak-Oplustil, M. Małecki, Sz. Tarapata, M. Iwański, *Populistyczna nowelizacja prawa karnego. Ustawa z dnia 7.07.2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk senacki nr 762)*, 19 July 2022, Krakow Institute of Criminal Law, https://kipk.pl/ekspertyzy/populistyczna-nowelizacja-prawa-karnego/ [accessed on 13 May 2025].

[20] For example, J. Zagrodnik, 'Model procesu karnego *status quo* i *status futurus* – kilka refleksji na temat dwóch rzeczywistości, nie tylko normatywnych', in: Szumiło-Kulczycka D., Czarnecki P. (eds), *W pogoni za rzetelnym procesem karnym. Księga dedykowana Profesorowi Stanisławowi Waltosiowi*, Warszawa, 2022, pp. 120–123; and earlier – numerous studies in: S. Steinborn, K. Woźniewski (eds), *Polski proces karny w dobie przemian. Zagadnienia ogólne*, Gdańsk, 2018.

of a letter of safe conduct (Article 281 § 2 CCP). Previously, all these rulings were, regardless of the positions of the parties, at the sole discretion of the court. The prosecutor's consent to voluntary submission to punishment is now also required (Article 387 § 2 CCP; previously, the lack of an active objection was sufficient), and the prosecutor is also allowed to initiate the procedure of transferring the case out of the competent court in the interest of the justice system (Article 37 §§ 1 and 2 CCP). Other parties to the proceedings, especially the accused confronted with the prosecutor, do not have such powers. What is particularly bizarre is that the powers referred to above are not only not granted to benefit other parties, but also limit the role of the court as the ruling authority of the trial (*dominus litis*) in the judicial phase.

The second area is the guarantees of the right of defence. The accused and the defence lawyer have been hindered in their procedural activities not only by the expansion of the prosecutor's powers, but also by allowing the court to conduct the evidentiary proceedings in the excused absence of the defence and/or the accused, while the accompanying 'remedial' procedure, supposed to correct the violation of the right of defence in this way, is obviously ineffective (Article 378a CCP). The compatibility of this regulation with EU law, i.e. the provisions of the so-called Defence Directive,[21] is also highly questionable. Other provisions, for example, allow, at least in the observed judicial practice, the trial to be closed and the closing remarks to be made despite the excused absence of the accused (Article 117 § 3a CCP), thus depriving the accused of the right to the 'last word'. These changes *de facto* lead to the introduction into the Polish criminal trial, through the back door, of a quasi-*in absentia* sentencing, which would seem to be generally unthinkable in modern criminal procedure. The justification for these changes – reflected in an allegedly profound scale of procedural obstruction by absentee accused or defence lawyers – is not supported by any empirical evidence.

The third area concerns the rights of the victim. A number of amendments in recent years have followed under the slogan of protecting the rights of victims, although in fact the rights of victims have been curtailed in at least one very important aspect. This is because the path of appeal by the victim against the decision to discontinue the investigation has been made longer, with the prosecution having the option to postpone the final decision in this regard (Article 330 § 2 CCP). As long as there is no such decision, the victim cannot file a subsidiary indictment. The prosecutor has thus gained a tool for inhibiting victims from pursuing, in a complementary way, a public indictment not pursued by the public prosecutor. This solution actually contradicts the principle of legalism, which is central to the prosecution's activities, because, as has been emphasised in the doctrine for years, a subsidiary indictment is supposed to safeguard this principle.[22] This also limits the procedural autonomy

[21] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

[22] K. Dudka, 'Oskarżyciel posiłkowy subsydiarny', in: Hofmański P., Kulesza C. (eds), *System Prawa Karnego Procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016, p. 412.

of the victim as a potential autonomous subsidiary prosecutor. Moreover, even if the victim succeeds in filing a subsidiary indictment, the public prosecutor has recently gained a competence equivalent to that of the court to check whether the person filing is in fact the victim, which allows the prosecutor to refuse to send the case files to the court (Article 330 § 4 CCP). In principle, it is not clear why, according to the drafters of this amendment, judicial control of this issue would be insufficient. The only evident observation about these changes is the desire to completely reserve the prosecuting functions in the criminal trial to the public prosecution and to exclude any initiative by individuals in this regard. However, this is a paternalistic and outdated solution (which, of course, does not necessarily mean that the prosecution function would be privatised – it is merely a matter of limiting the public prosecutor's strict monopoly on this issue, which does not always serve society).

Simultaneously, changes in criminal procedure aim at its technological modernisation (digital files in the prosecutor's office – Article 156 § 5 CCP, Article 321 § 1 CCP; service of letters through the court's official information system – Article 133a CCP; remote participation of the prosecutor or persons deprived of liberty in hearings – Article 374 § 3 and 4 CCP). All of this is intended to expedite and simplify criminal proceedings and reduce their costs. These 'technical' changes, however, go hand in hand with the conceptual shifts discussed earlier, which in essence revert the criminal process back to bygone eras, doing so without any connection to the objective needs of criminal policy. It is difficult not to get the impression that these changes (as with the previously mentioned changes to substantive criminal law) were motivated by populist propaganda promoting an image of an 'effective' executive power pursuing criminals.

THE POSSIBILITY OF A POSTMODERN CRIMINAL PROCEDURE

As things stand, therefore, we have a criminal procedure whose normative framework is substantially disorganised, with solutions that raise reservations and doubts as to whether they fit the circumstances of the era in which they occur. This is because the aforementioned manifestations of technological modernisation are merely a façade, moreover – used rather for the convenience of the judicial authorities. For example, in principle, remote participation in a hearing without any restrictions is only possible for the prosecutor (depending on the prosecutor's request and the technical availability of such a solution – Article 374 § 3 CCP), while for other parties it is only possible when they are deprived of liberty (in the case of the accused, the defence lawyer has the choice whether to appear in court or to be with the accused at their place of detention); moreover, it is mandatory for a law enforcement officer to be present at that person's place of stay. The same is true of the latest innovation, the service of pleadings via the courts' official information system: only the courts are free to send letters this way, but this possibility for parties is closed for the foreseeable future.[23]

[23] Although, as it has recently turned out, not necessarily distant, given the projected possibility of allowing professional actors to file pleadings through the information portal – see the bill

There is thus no balance in this regard, and it is apparent that the digitalisation of criminal procedure is being carried out in the interests of the procedural authorities rather than those of the parties.

Meanwhile, the three areas of change in criminal procedural regulation described earlier appear to be regressive, being phenomena that run against the tide of the fundamental contemporary trends in the development of the criminal process.[24] Indeed, the areas of equality of arms and defence rights must be linked to the theory of procedural guarantees and fairness, and the changes introduced – which is probably obvious – serve neither procedural guarantees nor fairness. It should, of course, be noted that certain forms of limiting the defence rights, simplifying evidence, and expanding the powers of the public authorities to interfere with the rights of the individual are sometimes justified by the need to protect society and public safety from serious crime – especially terrorism and organised groups. Indeed, the events of the last 25 years in the West may have shaken the sense of security that many had previously felt. It is even pointed out in the literature that a so-called 'preventive turn' has been taking place in criminal law and procedure around the world in recent years, whereby the regulations of this area of law are beginning to be used more and more extensively in order to prevent the commission of a crime, as a tool for actively preventing criminal behaviour, rather than merely reacting to it.[25] The point is, however, that – at least in Poland – there is no data-based justification, in terms of the statistical scale and types of criminal offences committed, for reconstructing the criminal process in a way that increases the efficiency of prosecution at the expense of its 'due process' dimension.[26] There is, in fact, no pathological proliferation of crime that would justify the restrictions imposed on citizens' rights that have already been introduced and are still being proposed to facilitate the suppression of criminal phenomena.

The area of victims' rights, on the other hand, should be associated with the victimology strand, oriented towards the protection of the dignity, autonomy, and rights of the victim of crime. There can be no doubt that the changes referred to above do not serve this purpose – for the victim, at a certain stage, loses any influence over whether the case will ever go to court. The paternalistic primacy of the prosecutor's office is, contrary to the assumptions of this trend, significantly reinforced. This also entails a reduction in the importance of the consensual trend – i.e. the abandonment of certain forms, such as the compensatory discontinuation already mentioned, or the lack of impetus for the development and use of mediation in criminal cases. The criminal process is being made an entirely 'public issue', while the currents of victimology and consensualism were supposed to herald a move away from this trend towards the more important 'private' aspects of criminal justice.

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of 31 December 2024 amending the Act on the Code of Criminal Procedure and Certain Other Acts; No. UD143 on the list of legislative works of the Council of Ministers.

[24] These currents are classified and described by M. Rogacka-Rzewnicka, *Proces karny w perspektywie ewolucji naukowej i współczesnych trendów rozwojowych*, Warszawa, 2021, pp. 365 et seq.; the ensuing argumentation refers back to this typological proposal.

[25] A. Lach, 'Zwrot prewencyjny w polskim prawie i procesie karnym', *Państwo i Prawo*, 2021, No. 10.

[26] If one were to assume in advance that the guarantee dimension and efficiency must be at odds.

All this gives an image of chaos, incoherence, polyphony – something truly 'postmodern', but in a colloquial, rhetorical sense rather than a scientific and descriptive one. Postmodernism, although it is indeed difficult to define its positive agenda (both in science and in social practice),[27] is nevertheless not completely devoid of substance and cannot be defined solely as a kind of 'cacophony of dissent'. The point, however, is that the ideas and values to which postmodernism refers pose a significant challenge to the law. The ideas of postmodernism question concepts that are apparently axiomatic for modern legal systems – for example, the existence of a systemic hierarchy of legal norms and sources of law. Instead of the 'pyramid' as a geometric expression of the structure of the legal system, it is argued that the system of law has taken on the characteristics of a 'network', particularly in terms of how it is created.[28] One could speak in this context of the polycentricity of contemporary legal systems – and this is a proposition that is taught during basic law lectures,[29] and thus does not constitute a preliminary scientific idea to be developed or a part of an ongoing 'higher' academic discussion, which is indicative of the rather commonplace presence of these observations and the fact that the legal system already manifests certain postmodern characteristics in contemporary times.

This does not, however, mean that the postmodern ideas have been tightly integrated into the existing concepts of the legal system and no longer pose any difficulties for it. A prominent example of this, and of capital importance for the application of law, i.e. actual practice, is the postmodern approach to textual interpretation. Legal interpretation, as a variant of humanistic interpretation, is, of course, largely utilitarian in nature, but if one were to adopt a postmodern view of the issue, the fundamental assumptions regarding the purpose and methods of interpretation would collapse. Indeed, postmodernism, following earlier structuralism in the humanities and social sciences, rejects in the first place the importance of authorial intention or the circumstances of a text production in the process of interpretation. In the practice of legal interpretation, this would mean a break, at the minimum, with the assumption of the legislator's rationality, with the need to refer to the *ratio legis* of a given normative act, and with the use of legislative work materials when interpreting legal provisions. However, this stream of thought goes further – namely, it rejects not only the authorial intention, but also the immanent intention (meaning) of the text itself. 'The text is just a pretext to activate the creative invention of the interpreter with post-structuralist (deconstructivist) inclinations'[30] – and thus any 'objective' meaning of the text is negated. In such a situation, the text of the law – if everyone could derive whatever they wanted from it – would lose any norm-making role. Possibly, this would not lead to a state of complete anomy, but it would constitute a rejection

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[27] A. Szahaj, enumerating the features of postmodern thinking, lists as many as seven out of eleven given characteristics that start with the prefix 'anti-' – which emphatically illustrates, first and foremost, the oppositional, critical character of this intellectual trend (A. Szahaj, *Ponowoczesność i postmodernizm dla średniozaawansowanych*, Warszawa, 2021, p. 169).

[28] F. Ost, M. van de Kerchove, 'De la pyramide au réseau? Vers un nouveau mode de production du droit?', *Revue interdisciplinaire d'études juridiques*, 2000/1, Vol. 44.

[29] T. Chauvin, T. Stawecki, P. Winczorek (eds.), *Wstęp do prawoznawstwa*, Warszawa, 2019, pp. 163–164, and further references to the literature cited therein.

[30] A. Szahaj, *Ponowoczesność*…, op. cit., p. 186.

of the authority of the written legal act – a gesture with far-reaching consequences from the perspective of the current assumptions of the legal system.

There are numerous examples as well as detailed considerations of this kind, but it is nevertheless worthwhile, in order to make more concrete the proposition made here about the discrepancies between the assumptions of contemporary legal systems and those of postmodernism, to flesh them out in the field of criminal law, which is central to this argument. For if postmodernism opposes the central place of truth in cognition ('anti-truthocentrism'),[31] then the guiding and, for many, unshakeable principle of the criminal process, i.e. the principle of material truth, loses its *raison d'être*; similarly, if there is no borderline between logic and rhetoric, and the image takes the place of writing in interpersonal communication, then, as already signalled above, the future of legal interpretation is uncertain, particularly in criminal law, which is so attached to the text and to the objectified properties of language, especially in the semantic sphere (it would be rather frightening for a modern lawyer to imagine criminal interpretation as the 'imaginative play' of the interpreter). Taking this a step further: if postmodernism abrogates the 'objective-subjective' opposition, one might ask how it is at all possible to render a judgment resolving a dispute in which, according to the postmodern ideal, each side is 'subjectively' right. The question is whether this is what the criminal process of the postmodern era is (or should be) heading towards,[32] and (more broadly) to what extent postmodernism can be a source of a positive programme for the entirety of law at all, rather than merely a critical revision of the existing theory.

Contrary to the argument that this theory, i.e. legal positivism, is an obsolete myth or even a fossil,[33] its ideas, beliefs and habits still persist in Polish law-making, interpretation, and application. No other paradigm (in T. Kuhn's terms) has so far replaced this one, while attempts at such different approaches to law are present in the academic sphere, but do not spread more widely within legislative or judicial practice. The 'postmodern' state of the criminal process, as referred to above, is more a side effect of legislative changes than the realisation of an intended goal. It should be noted that, despite everything, the Code of Criminal Procedure has not (so far) been affected to a greater extent by the phenomenon of decodification (which is present and described, for example, in private law), i.e. abandoning the central position of the code and the dispersion of regulations previously contained in the code among other normative acts, which – as I believe, sharing the intuitions of other authors – should be associated precisely with the functioning of law in the postmodern era.[34] Decodification

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[31] I borrow the terms for the characteristics of postmodernism cited in this paragraph from A. Szahaj (ibidem; also p. 41).

[32] M. Rogacka-Rzewnicka, *Proces karny*…, op. cit., pp. 338–365; L. Morawski, *Co może dać*…, op. cit., pp. 71–75 (on the advantages and disadvantages of 'polyvocal' legal interpretation).

[33] T. Gizbert-Studnicki, 'Pozytywistyczny park jurajski', *Forum Prawnicze*, 2013, No. 1, pp. 50–51.

[34] A similar view is expressed by P. Święcicka, who discusses decodification in the context of the frequently proclaimed 'ends' (of an era, of the entire history, etc.), as 'an element of the postmodern narrative of legal reality' – P. Święcicka, 'Kodeks zdemitologizowany – metafora, w której ciągle żyjemy', in: Longchamps de Bérier F. (ed.), *Dekodyfikacja prawa prywatnego. Szkice do portretu*, Warszawa, 2017, pp. 38, 84.

is a gradable phenomenon,[35] and that is why, even though in the case of the Code of Criminal Procedure there are no significant gaps in regulation or matters transferred outside the Code, the aforementioned issues and difficulties show the instability of its normative structures and the disruption of the code's, as an ideal type, imperative and top-down normative model, according to which the code is drawn up and applied.

CONDITIONS OF AND PROPOSALS FOR BUILDING THE CRIMINAL PROCEDURE OF THE FUTURE

While the criminal process of the future is likely to be multifaceted, as it is currently difficult to imagine that any of the aforementioned developmental trends would be completely abandoned, there is also a need to call for a certain order and vision to govern criminal procedure. It is necessary to attempt to codify this multifacetedness,[36] as the ideal of a code does not exclude drawing on different approaches, visions, or traditions in shaping criminal procedure. At the same time, one must not fall into a reformist intoxication with mere technological progress in criminal procedure, for, as I have tried to show, this alone does not demonstrate that criminal procedure is modern. It may result in greater speed or lower cost, but it would be a grave mistake to regard these essentially secondary aspects as signs of a 'forward-looking' reform of the criminal justice process.

A very interesting and worthwhile proposal, which combines – on Polish grounds – the postulates of order and the multiplicity of considered trends, is the concept developed in recent years by P. Wiliński.[37] It is based on the premise that the object of a criminal trial is, as a matter of fact, the social conflict caused by the commission of a crime, and that it is therefore a fundamental purpose of the criminal trial to resolve that conflict. To this end, the legislator should introduce a kind of gradation of forms and models for settling this conflict: from the most simplified form, concerning misdemeanours and minor offences, where restitution (compensation for the damage caused by the offence) and registration of the case would be sufficient, without initiating proceedings; through the procedural form, where proceedings would be conducted, but as a result of restitution (compensation) it would be possible to close the case without a judgment; to the consensual procedural form – where a judgment would be made, but based on the agreement of the parties; and the adversarial procedural form – corresponding to the traditional course of a criminal trial as a dispute between the parties. P. Wiliński concludes that the current criminal procedural regulation extensively features the last two forms, the

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[35] T. Giaro, 'Dekodyfikacja. Uwagi historyczno-teoretyczne', in: Longchamps de Bérier F. (ed.), *Dekodyfikacja prawa prywatnego. Szkice do portretu*, Warszawa, 2017, p. 22.

[36] I would like to refrain from engaging once again in a discussion on the advantages and disadvantages, or the opportunities and threats of decodification, as this would require a separate paper (see the previously cited studies in: Longchamps de Bérier F. (ed.), *Dekodyfikacja*…, op. cit.), and argue instead for maintaining the ideal of a code as a certain conceptual *status quo*.

[37] P. Wiliński, *Zarys teorii konfliktu w prawie karnym*, Warszawa, 2020.

third has been introduced only residually as compensatory discontinuation, while the first form has yet to be discussed and developed.

The common characteristic of the aforementioned guarantee, victimological and consensual trends and theories and of the proposal made here is, in my view, one fundamental demand: to bring the object of the criminal process closer to the individuals concerned. They are to be more empowered, regardless of which side of the conflict they are on. I do not mean to suggest that the history of criminal law is about to come full circle, but just as the tendency of its development over the centuries was to make it 'public',[38] today – it seems – the pendulum has swung too far in the direction of this public character of criminal law, losing sight of the individual or even private elements.[39] It seems that reconciliation between these trends is the first and essential condition for any change to be successful. This is an extremely difficult task, entangled above all in the paradox of inconsistent social expectations: on the one hand, a number of studies show how much people value informalised forums of mediation or conciliation used for settling cases, while also identifying decreasingly rigorous expectations regarding criminal policy,[40] and on the other hand, there is still frequent discussion of highly punitive attitudes within Polish society. Here, however, the fundamental problem is the destructive role of penal populism. It is unclear whether these alleged punitive expectations and attitudes are genuine, or whether politicians engaging in punitive populism, posing as tribunes of the people, are merely claiming (without any real foundation) that this is what society expects, equating their own opinions with the 'voice of the people'.[41]

In addition to this initial condition for constructing a new criminal process, there are a number of second-level, though not secondary, problems. I would like to highlight one of them, very controversial in recent public debate and a good illustration of the need to build a minimum of social consensus around the various institutions of public life. This issue concerns the status of the prosecutor's office. The main problems in this debate are well known: first, a constitutional problem, i.e. the separation of the prosecutor's office and the Ministry of Justice versus the personal union of the Minister and the Prosecutor General; and second, a procedural problem, i.e. the role of the prosecutor's office in criminal proceedings (whether the prosecutor is to be an investigator or an accuser). Regardless of the final answers to these questions, one thing seems essential to me – the inclusion of this leading institution among law enforcement bodies in the Constitution. The silence of the current Constitution on this subject is, in the long run, entirely unacceptable, as the position of the prosecutor's office can, in principle, be

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[38] See on this subject: M. Rogacka-Rzewnicka, 'O wątpliwej przynależności współczesnego prawa karnego (procesu karnego) do prawa publicznego. Analiza systemowo-historyczna', in: Kasiński J. et al. (eds), *Artes serviunt vitae sapientia imperat. Proces karny sensu largo. Rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorczyka z okazji 70. urodzin*, Warszawa–Łódź, 2019, pp. 85, 87.

[39] T. Kirchengast, *The Victim in Criminal Law and Justice*, London, 2006, pp. 13–14.

[40] T. Szymanowski, *Przestępczość i polityka karna w Polsce w świetle faktów i opinii społeczeństwa w okresie transformacji*, Warszawa, 2012, pp. 310–311.

[41] T. Kaczmarek, 'O reorientacji badawczej…', op. cit.; K. Krajewski, 'Punitywność społeczeństwa polskiego', in: Czapska J., Kury H. (eds), *Mit represyjności albo o znaczeniu prewencji kryminalnej*, Kraków, 2002, pp. 178–179.

radically changed with every four-year parliamentary term. However, amending the Constitution requires broad political and social consensus.

It is with this thought in mind that this paper shall be concluded: the law (including criminal procedural law) has been and will continue to be a convention, that is, a social construct based on agreement and on the consensual respect of certain rules of conduct by the members of a community governed by this law. Shaping the criminal process of the future will therefore require a broad social consensus, otherwise the process risks stagnation, regression or even decomposition. Even the best proposals for change, if not supported by such consensus, will contribute little or nothing at all. The modern nature of a criminal trial cannot be equated with its use of videoconferencing or digital record-keeping – these are useful tools but, from the perspective of the purpose of the trial and its social functions, they remain incidental. They are no substitute for deeper conceptual reflection on the improvement of criminal justice, not only in terms of quantitative factors (expediency and the cost of proceedings), but above all in terms of qualitative factors (such as the correctness and authority of rulings and the achievement of socially important goals through the criminal process).

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Cite as:

Oleksy K. (2025), *'Modernisation without modernism': changes in polish criminal procedure in the last decade and visions of the criminal process of the future*, Ius Novum (Vol. 19) 2, 71–85. DOI 10.2478/in-2025-0014