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# **Performative Linguistic Rituals in Polish Criminal Law**

*Myth [and ritual – author’s addition] attempts to negate the accidental nature of the world<sup>1</sup>.*

## **Introduction**

Linguistic ritual is a term often used in the context of linguistic research. Language scholars study linguistic rituals in different social life domains (and aspects within them): linguistic politeness during greetings, farewells, family and social gatherings<sup>2</sup>, when establishing, maintaining and rectifying interpersonal relationships<sup>3</sup>, as well as the linguistic structure of Holy Mass<sup>4</sup>. Furthermore, linguists use the above term in analyses of the speech

» 1 Leszek Kołakowski, *Obecność mitu* (Wrocław: Wydawnictwo Dolnośląskie, 1994), 92.

» 2 See Małgorzata Kita, *Językowe rytuały grzecznościowe* (Katowice: Wyższa Szkoła Zarządzania Marketingowego i Języków Obcych, 2005); Małgorzata Marcjanik, *Polska grzeczność językowa* (Kielce: Wyższa Szkoła Pedagogiczna im. Jana Kochanowskiego, 2000); Jolanta Antas, "Polskie zasady grzeczności," in: *Język trzeciego tysiąclecia II*, vol. 1, ed. Grzegorz Szpila (Kraków: Krakowskie Towarzystwo Popularyzowania Wiedzy o Komunikacji Językowej Tertium, 2002), 347–363.

» 3 See Beata Drabik, *Językowe rytuały tworzenia więzi interpersonalnej* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2010).

» 4 See Hanna Stypa, "Bracia i Siostry – rytuały językowe na przykładzie mszy świętej,"

of sports journalists during football matches<sup>5</sup>, in the context of the language of politics and power<sup>6</sup>, or the language of educational publications<sup>7</sup>.

Ritual<sup>8</sup> is a communicative behaviour of a social and symbolic nature, which performs several functions. The most important ones include integrative and differentiating (strengthening the cohesion of a social group), encoding basic structural principles (confirming social order), normative (establishing and reinforcing group norms), cognitive (enhancing reflection on the world)<sup>9</sup>. Furthermore, ritual performs a performative or causal function (it has capacity to create a new state of affairs) and a communicative function<sup>10</sup>. In the context of linguistic research, the last two functions seem to be of prime significance; this text will focus on the former.

A linguistic code is reported to be one of the optional components of ritual<sup>11</sup>. There are many definitions of linguistic ritual<sup>12</sup>. This text adopts the understanding of the term as proposed by Agata Małyska. The scholar indicates that a linguistic ritual is: “a linguistic and/or extra-linguistic activity having the following constitutive features: 1) institutional character - it involves following certain patterns; 2) social character - it takes place in a group and is geared towards a particular social group; 3) repetition - regularity of use in the same situations; 4) motivational context - the ritual is motivated by a certain sense that it is meant to preserve and by values that it is meant to protect”<sup>13</sup>. Other important features of linguistic rituals

in: *Język, rytuał, pleć*, ed. Marek Cieszkowski, Jacek Szczepaniak (Bydgoszcz: Bydgoskie Towarzystwo Naukowe, 2011), 219–226.

- » 5 See Beata Grochala, “Nowy – stary rytuał językowy dziennikarzy sportowych,” *Język a Kultura*, 26 (2016): 221–230.
- » 6 See Kazimierz Ożóg, “Rytualizacja w języku władzy komunistycznej PRL,” *Oblicza Komunikacji*, 7 (2014): 37–50.
- » 7 See Małgorzata Bortliczek, “Językowe rytuały fatyczne w publikacjach edukacyjnych,” *Edukacja Elementarna w Teorii i Praktyce*, 16, 4/62 (2021): 81–92.
- » 8 It is treated, according to the literature on the subject, inseparably from the category of myth, whose narrative reinforces, if not enables, the realisation of the above functions of ritual. Separately, ritual, together with myth, fulfils multiple psychological and psychotherapeutic functions (mythotherapy as an element of culturotherapy), which are not analysed in this text. See Andrzej Pankalla, *Psychologia mitu. Kultury tradycyjne a współczesność* (Warszawa: Eneteia, 2000).
- » 9 Drabik, *Językowe rytuały...*, 29–30.
- » 10 Drabik, *Językowe rytuały...*, 29–30.
- » 11 Drabik, *Językowe rytuały...*, 37.
- » 12 Here, referring to the category of linguistic ritual fundamental to the text, it is once again worth pointing out that myth is a constitutive part of ritual. Myth, among other things!, can be located in the area of language or, in Barthes’ terms, the word. The links between myth, including mythical thinking and Polish criminal law, do not constitute the essence of this text, but the linguistic magic mentioned further on corresponds to selected aspects of them. See *Mity kultury współczesnej. Perspektywa psychoantropologiczna*, ed. Monika Obrębska, Andrzej Pankalla (Poznań: Wydawnictwo Nauk Społecznych i Humanistycznych UAM, 2020).
- » 13 Agata Małyska, “Pojęcie rytuału na tle innych zjawisk językowych,” in: *Rytualizacja w komunikacji społecznej i interkulturowej*, ed. Jan Mazur (Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2004), 18.

include: the connection with performative speech acts, because of their causal and creative power, and the connection with politeness and linguistic magic, due to the frequent occurrence of highly conventionalized, repetitive, and clichéd linguistic formulas<sup>14</sup>.

The primary research question in this text is whether a relationship exists between ritual, particularly linguistic ritual, and law. If one accepts that law is bound closely to morality and religion, if not arises out of religion<sup>15</sup>, it seems impossible to avoid ritualism in law. It has been pointed out that originally law and religion were one and were later separated due to social progress<sup>16</sup>. Moreover, as Peter A. Winn highlights, rituals can be observed in virtually all social institutions, especially legal ones aimed at resolving disputes<sup>17</sup>. In legal science, the term is relatively rarely used. It is more frequently applied in the context of historical or “primitive” (original) legal systems or in the context of legal defects<sup>18</sup>. Researchers address the ritual of punishment on the basis of the Babylonian talion law<sup>19</sup>, as well as biblical, linguistic rituals of expressing violence<sup>20</sup>, or the Roman *poena cullei*<sup>21</sup>. Another subject of interest is the ritual nature of a courtroom discourse<sup>22</sup> or the ritualism of punishable offences<sup>23</sup>.

The scholarly objective of the article is to show that linguistic rituals contribute to Polish substantial and procedural criminal law. The researched ritualistic and linguistic aspect of criminal law can also be precisely identified, defined and characterised by means of a number of examples given below, additionally emphasising their performative function. A number of linguistic rituals make up the Polish criminal law system, starting from the grounds for initiating proceedings, i.e. the criminal act itself, through the formula of the trial, up to the level of punishment. We may distinguish at least four categories of legally relevant linguistic rituals: 1) linguistic rituals constituting the object of protection of Polish criminal law, i.e. the object of attack by those committing criminal acts, 2)

» 14 Drabik, *Językowe rytuały...*, 30–47.

» 15 See Robert A. Yelle, “Rhetorics of law and ritual: a semiotic comparison of the law of talion and sympathetic magic,” *Journal of the American Academy of Religion*, 69, 3 (2001): 627–628.

» 16 Robert A. Yelle, “Rhetorics of law...”, 628.

» 17 Peter A. Winn, “Legal ritual,” *Law and Critique*, 2 (1991): 207.

» 18 Winn, “Legal...”, 207.

» 19 Yelle, “Rhetorics of Law...”, 627–647.

» 20 Scott Noegel, “The Ritual Use of Linguistic and Textual Violence in The Hebrew Bible and Ancient Near East,” in: *State, Power, and Violence*, ed. Margo Kitts, Bernd Schneidmüller, Gerald Schwedler, Eleni Tounta, Hermann Kulke, Uwe Skoda (Wiesbaden: Harrassowitz, 2010), 33–46.

» 21 Maciej Jońca, “*Poena cullei*. Kara czy rytuał?”, *Zeszyty Prawnicze*, 5, 1 (2017): 83–100.

» 22 E.g. Mark Cammack, “Evidence Rules and The Ritual Functions of Trials: Saying Something of Something,” *Loyola of Los Angeles Law Review*, 25, 3 (1992): 783–796.

» 23 David Skarbek, Peng Wang, “Criminal Rituals,” *Global Crime*, 16, 4 (2015): 288–305.

linguistic rituals constituting an element of the object side of the criminal act, *inter alia*, the manner in which it was committed, 3) linguistic rituals performed in the course of criminal proceedings by law enforcement authorities in preparatory proceedings and by participants in judicial proceedings, and, finally, 4) linguistic rituals influencing the sentence and putting the convicted person on probation, intended to foster interaction between the perpetrator and the victim.

### **Linguistic ritual and the object of protection**

The Polish Criminal Code<sup>24</sup> identifies a number of punishable offences in which the element of the object of protection (of the attack) is the freedom to participate in linguistic rituals. The object of protection (of the attack) comprises socially significant legal goods, such as life, liberty, security, and secrecy of correspondence. The perpetrators of criminal offences assault these goods, either violating or endangering them. From the perpetrator's perspective, a specific legal good will be the object of the attack, and from the legislator's perspective, the object of protection, as the Code provides for criminal liability for perpetrators<sup>25</sup>. The linguistic rituals (or more precisely, acts having a ritualistic and linguistic character) protected by criminal law may include: 1) religious acts of a church or other religious association with a regulated legal situation (Article 195 § 1 of the Criminal Code), 2) funerals, ceremonies and mourning rites (Article 195 § 2 of the Criminal Code), 3) nuptial rituals (Article 206 of the Criminal Code), the course of a court hearing, the official acts of a court, a witness's testimony, the presentation of an expert evidence, the accusation of committing a criminal act (Articles 232 of the Criminal Code, 233 of the Criminal Code, 234 of the Criminal Code), the conduct of elections, including a pre-election assembly (Article 249 of the Criminal Code), meetings, assemblies and marches taking place in line with the law (Article 260 of the Criminal Code).

Thus, the legislator protects the freedom to participate in rituals with a regulated legal situation and significant social, religious or political significance. It also protects the proper course of rituals, as disruptions may affect the performative, *i.e.* causal and creative function. A perjured witness's testimony will affect the ineffectiveness of evidentiary proceedings, while a disruption of an election may necessitate its repetition. Furthermore, the legal status of the participant may invalidate the performative function of a ritual, as in the case of the offence of bigamy. Offences that violate or endanger the linguistic ritual may include interfering with religious acts, disrupting the conduct of an election, disrupting the conduct of

» 24 Act of 6 June 1997 - Criminal Code (Journal of Laws No. 88, item 553, as amended).

» 25 See Lech Gardocki, *Prawo karne* (Warszawa: Wydawnictwo C. H. BECK, 2019), 90–91.

a lawful meeting, influencing the official acts of a court, or making a perjured testimony.

However, threatening offences may also include insult, defamation, propagation of fascism and totalitarianism, insulting a group of people or a person because of their national, ethnic, and racial background, on grounds of their religion or lack of it. The above speech offences are regularly committed during public events, ceremonies, marches, and national or religious holidays, which is important in the context of the social damage they cause.

By way of example of an incriminated action against a linguistic ritual, let us discuss the offence of obstructing religious acts (195 §1 of the Criminal Code). The Criminal Code states that: "Whoever malevolently obstructs the public performance of a religious act of a regulated church or other religious association shall be subject to a fine, restriction of liberty or imprisonment for up to 2 years". The protected good here is the freedom (liberty) to publicly perform religious worship by manifesting one's faith together with other believers<sup>26</sup>. The causative activity will be malevolent obstruction, or a series of acts disrupting the course of a religious act or its dignity, including "ridiculing, shouting, parodying or other behaviour incompatible with socially accepted patterns of behaviour in a given situation"<sup>27</sup>.

A case recognized by the District Court of Giżycko concerned a disruption of a Holy Mass<sup>28</sup>. It is possible to consider this religious act protected by law also (although not primarily, especially for religious people) as a linguistic ritual. We deal with an institutional character of a linguistic ritual; the religious act follows patterns established by the Catholic Church. It has a social character in that it takes place in a group of believers of the same denomination. It is repetitive in that it takes place regularly, every Sunday and on religious holidays, and finally it is based on a motivational context, i.e. expresses the need to worship and to externalise the faith. The structure of a religious act contains clichéd, unchanging linguistic formulas, recited in a fixed order (In the name of the Father, and of the Son and the Holy Spirit, Amen; The Lord be with you - And with your Spirit). Its essence, moreover, are performative speech acts (offering one another a sign of peace or transubstantiation).

In this specific case, an oral utterance was subject to review during the criminal proceedings. The accused explained that: "he was at Mass because he wanted to speak to the parish priest. When he did not see him during the service, on impulse he stood under the pulpit and asked a priest

» 26 See Sławomir Hypś, "Art. 195 KK," in: *Kodeks karny. Komentarz*, ed. Alicja Grześkowiak, Krzysztof Wiak (Warszawa: Wydawnictwo C. H. Beck, 2021), <https://legalis.pl/> (10.09.2022).

» 27 Hypś, "Art. 195", <https://legalis.pl/> (10.09.2022).

» 28 Judgement of the District Court in Giżycko of 25 May 2021, file ref. no. V K 94/20.



where the parish priest was. He then proceeded to leave the church [...]”<sup>29</sup>. It would seem that inquiring about the presence of the parish priest does not significantly disrupt the religious act and its dignity. However, the witnesses supplement the accused’s explanation with the exact content of his question and the extralinguistic context of the event: “in church, he disrupted the May Marian service; he was loud and vulgar to the worshippers who were in church at the time. Eventually he went up to the pulpit and to the priest who was there [and] shouted ‘where is the parish priest, give me the parish priest’”<sup>30</sup>. The court explained that this action met the criteria of the offence because, among other things, the accused had “disrupted the mood of contemplation”<sup>31</sup>. The Court may be seen to have emphasised the particular value of the social and motivational nature of the ritual, i.e. a gathering of a group of the faithful for prayer.

It seems that verbal utterances will more often be the subject of proceedings for interfering with religious acts. Written language cases are also pending in Polish prosecutors’ offices and courts. In a district court in Poznań, proceedings are underway for the disruption of Holy Mass by a group of people who approached the altar holding banners with the slogans: “Catholic women also need abortion”, “Abortion without limits”, in this way expressing opposition to the verdict of the Constitutional Court of 22 October 2020<sup>32</sup>. The Sejm also approved the prosecution’s request to waive the immunity of an MP who, together with her husband, held banners saying: “Woman! You can decide for yourself”, and “Women should have the right to decide whether to give birth or not. Not the state based on Catholic ideology”<sup>33</sup>. However, none of these proceedings have been concluded and we do not know the final decisions of the court.

### Language rituals and the objective side of a punishable offence

Can linguistic rituals be considered as punishable acts under the Criminal Code? There are a number of crimes whose object side may contain ritual elements. Gardocki points out that the objective side of a crime consists of: the act of the subject, the effect of the act, the time and place of the act, the

» 29 Judgement of the District Court in Giżycko of 25 May 2021, file ref. no. V K 94/20.

» 30 Judgement of the District Court in Giżycko of 25 May 2021, file ref. no. V K 94/20.

» 31 Judgement of the District Court in Giżycko of 25 May 2021, file ref. no. V K 94/20.

» 32 See Maciej Orłowski, “Ruszył proces 32 osób, które przerwały mszę po wyroku TK ws. aborcji. ‘Uczono mnie, by nie być obojętnym’”, <https://www.newsweek.pl/polska/polityka/ruszył-proces-32-osob-ktore-przerwały-msze-po-wyroku-tk-ws-aborcji-uczono-mnie-by-nie-rdf2txh> (10.09.2022).

» 33 “Joanna Scheuring-Wielgus odpowie za protest w kościele. Jest zgoda Sejmu”, <https://www.polsatnews.pl/wiadomosc/2022-11-04/joanna-scheuring-wielgus-odpowie-za-protest-w-kościele-jest-zgoda-sejmu/> (04.11.2022).

situation in which the act was committed, as well as the manner of committing the act and the object of execution of the act<sup>34</sup>. A linguistic ritual, for example, can be a means of committing hate speech crimes, i.e., among others, the crime of propagating fascism and totalitarianism (Article 256 of the Criminal Code) and the crime of insulting a group or person because of national, ethnic, and racial background, religion or lack thereof (Article 257 of the Criminal Code). Noteworthy among other crimes are offences of insulting religious feelings (Article 196 of the Criminal Code), membership in an organised criminal group (Article 258 of the Criminal Code), crimes against life and health, and crimes against sexual freedom and morality.

A case in point here would be the activities of pseudo sports fans who belong to hate groups, or associations “promoting hatred and prejudice on racial, ethnic, religious, and sexual grounds”<sup>35</sup>. Regular visits to stadiums, aimed not so much at supporting a chosen sports team, but at a deliberate and pre-meditated dissemination of hate speech, focused on a particular national, ethnic or religious group, can be considered a linguistic ritual. The culmination of meetings of representatives of hate groups is the presentation of slogans promoting hatred, via spoken language (e.g., stadium chants) or in writing, i.e. on banners or posters brought to the sports event. Slogans often take the form of repetitive, symbolic, and cliched language formulas, referring to the idea or name of a particular organisation. In the case of international organisations, slogans are sometimes translated into the language of members coming from a particular country (e.g. White Power, White Supremacy, Blood and Honor). In the case of exclusively Polish groups, characteristic features include the repetitive slogans of anti-Semitic groups - e.g. “Jews, Jews, Jews - all of Poland is ashamed of you!”<sup>36</sup>, or hate speech directed at followers of Islam: “Islamists dirty motherf\*\*\* [...] - will not hold a candle to us Poles. The whole stadium chants with us: refugees, get the [...] out!”<sup>37</sup>

The preparation of a stadium chant or the printing of banners of considerable size shows the unity of a particular group and its pursuit of specific goals through time-consuming and expensive preparations. The meeting place is planned as conducive to promoting views, integrating the group’s participants, as well as recruiting new members. A sports event, as

» 34 Gardocki, *Prawo...*, 69.

» 35 Justyna Jurczak, *Działalność Policji wobec zjawiska stadionowej mowy nienawiści* (Warszawa: Biuro Rzecznika Praw Obywatelskich, 2015), 110.

» 36 See Mariusz Jurczewski, *Prawno-kryminalistyczna problematyka przestępczości stadionowej* [Doctoral dissertation, University of Białystok], 2014, <https://repozytorium.uwb.edu.pl/jspui/handle/11320/1272> (10.09.2022), 149.

» 37 See Olga Pankalla, “Opinia biegłego sądowego z zakresu językoznawstwa jako środek dowodowy w postępowaniu karnym – praktyka orzecznicza polskich sądów powszechnych,” *Poznański Półrocznik Językoznawczy*, 30, 1 (2021): 67.

a public event, which is additionally often televised, makes it possible to communicate hateful and discriminatory content to a wide audience. This allows the perpetrators to achieve their primary goal, which is to do harm to many people belonging to the targeted social group. Equally planned are the pseudo fans' clothes or tattoos, often with symbols of a particular group, a manifesto that strengthens the linguistic message and allows identification.

The rich symbolism of groups propagating hate speech refers to Nazi and fascist ideas (white fist, black sun, death's head, wolf's hook)<sup>38</sup>. Often these are camouflaged symbols whose underlying connotation is known mainly to the initiated criminals and specialists in stadium violence, such as the number 88 or the abbreviation KKK<sup>39</sup>. Thus, the activities of hate groups fulfil all the characteristics of linguistic ritual: an institutional and social character, repetitiveness and motivational context, the occurrence of cliched linguistic formulas, as well as the participants' belief in causal and symbolic action.

Such a punishable linguistic ritual took place on 29 April 2011. In a judgement of 25 October 2013, the District Court for Warsaw-Śródmieście in Warsaw found the defendants guilty of committing an act under Article 256 § 1 of the Criminal Code. This is an offence crime involving the public propagation of a fascist or other totalitarian state system or incitement to hatred based on national, ethnic, racial, religious differences or on grounds of having no religion<sup>40</sup>. The group of defendants chanted the slogan "Hamas, Hamas, Juden auf den gas" four times during the match<sup>41</sup>. The chanting of the slogan was accompanied by non-verbal behaviour. As indicated in the verdict: "While raising this slogan, the aforementioned individuals raised one or both hands with clenched fists, and some of them bent their hands at the elbows or were simply standing,"<sup>42</sup> and also, according to the court's interpretation of the video evidence: "The conduct of the people chanting this slogan, i.e. not only their gestures but also their facial expressions, showed that these people were aware of what they were chanting"<sup>43</sup>. The verdict further indicated that the addressees of the slogan were the supporters considered by the defendants to be Jews.

» 38 Jurczak, *Działalność Policji...*, 116.

» 39 Jurczewski, *Prawno-kryminalistyczna problematyka...*, 147–148.

» 40 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

» 41 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

» 42 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

» 43 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

The defendants' line of defence consisted of an attempt to convince the Court that: they did not understand the meaning of the words they uttered, they shouted slogans with a different content, they did not intend to offend the Jewish people, and the offence was related to fan pressure exerted by the other participants in the event. One of the defendants stated that: "he confessed because he thought the whole thing would be over quickly and now he doesn't confess because he didn't incite hatred against the Jewish people, although the slogan he shouted incites evil. He was unaware of the meaning of the slogan when he shouted it and the whole point of cheering is that one generally shouts with the crowd"<sup>44</sup>.

Another defendant pointed out that he is "no racist, the content of the slogan he shouted was known to him; he understood its meaning historically. He recognized that the entire stand was shouting, so he joined the others, which in retrospect he viewed as a mistake. He shouted because he didn't want to be pointed the finger at as the one who wasn't cheering, as he had once seen happen to other people. At first, he didn't know what he was shouting and cried 'humus'"<sup>45</sup>. Another of the defendants also tried to convince the Court that he shouted a slogan with a different content: "awas, awas, Jude anti gas"<sup>46</sup>. The argument raised during the trial was that the gesture, without the verbal context, may not be seen as one of the criteria for a punishable offence: "he made a gesture that is erroneously described as 'heil, Hitler.' Such an error of originates in the fact that he made the gesture but did not utter these words"<sup>47</sup>. Still another argument concerned a linguistic error, which would also exonerate him: "he did not admit to committing the alleged act and explained that he did not admit to such a description of the act because he shouted this slogan, yet not with the words 'auf den' but 'on den'"<sup>48</sup>.

No forensic expert in linguistics was appointed in the case. The court found incredulous the defendants' explanations to the effect that they had had no knowledge of the meaning of the slogan, that they had shouted slogans with a different wording, or about the nature of the linguistic error. The court pointed out that the defendants are adults with an appropriate degree of socialisation and at least elementary education. The simplicity of the slogan supports the fact that it is familiar to an average citizen, even

» 44 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

» 45 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

» 46 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

» 47 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

» 48 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

if he does not speak German. The alleged spontaneity of the chant or the linguistic errors were also irrelevant. In the Court's opinion: "Indeed, for the acceptance of criminal responsibility of the defendants, it is sufficient to establish that they shouted two words in succession, that is, 'Juden' and 'gas'"<sup>49</sup>. The defendants were found guilty of the offence.

### Linguistic rituals and the criminal proceedings

Criminal proceedings are conducted to establish if an offence has been committed, identify its perpetrator, and mete out punishment. The main subject of the trial is the question of the criminal responsibility of a certain person for the crime they are charged with<sup>50</sup>. Can we conclude that the criminal trial is a linguistic ritual? It seems to have its key features: institutional, social and repetitive nature, motivational context, performativity, and use of clichéd linguistic formulas. In addition, the stages and components of the process, e.g., the individual steps of pre-trial and court proceedings, are such linguistic rituals, too. The scalar theory of a linguistic ritual put forth by Beata Drabik can be applied here: "By comparing a ritual with a speech act, I aim to speak of a certain scalar nature of the ritual phenomenon. Indeed, the speech act can be considered a kind of ritual, the smallest and structurally simplest ritual. [...] Structurally simple rituals in turn make up the most complex and structurally elaborate ones"<sup>51</sup>. The criminal trial will be the overarching most complex ritual, consisting of separate simpler rituals.

#### Institutionality and repetitiveness

The institutional and repetitive nature of the criminal proceedings, its subordination to specific patterns and regularity of use in the same situations, is evident. Criminal proceedings are rigorously structured by the Polish legislator in the Code of Criminal Procedure<sup>52</sup>. The institution of an investigation (inquiry) can only occur when there is a reasonable suspicion that an offence has occurred (Article 303 of Code of Criminal Procedure). The Code specifies procedures for initiating, suspending and terminating proceedings (e.g., Article 303 of Code of Criminal Procedure), defines the place where a given matter is to be reviewed and the jurisdiction of a rel-

» 49 Judgement of the District Court for Warsaw-Śródmieście in Warsaw of 25 October 2013, file ref. no. II K 279/12.

» 50 Jerzy Skorupka, "Art. 1 KPK", in: *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warszawa: Wydawnictwo C. H. BECK, 2021), <https://legalis.pl/> (10.09.2022).

» 51 Drabik, *Językowe rytuały...*, 42.

» 52 Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws No. 89, item 555, as amended).

evant institution, i.e. a specific district or regional court (e.g., Articles 24 and 25 of Code of Criminal Procedure), specifies the status and number of participants to the proceedings, i.e. the adjudicating panel during the main trial (Article 28 of Code of Criminal Procedure), the deadlines for the procedure, e.g., the duration of an investigation (Article 310 of Code of Criminal Procedure). The proceedings are divided into stages, which have different objectives, procedures and participants, who acquire a new status and the related duties and entitlements.

Pre-trial proceedings (investigation or inquiry) are carried out by the public prosecutor or the police (Article 298 of Code of Criminal Procedure), while the parties include the victim and the suspect (Article 299 of Code of Criminal Procedure). Then, after the investigation (inquiry) is concluded and an indictment is filed, we move on to judicial proceedings (which consists of stages, i.e. is carried out in judicial instances). The parties here are the prosecutor (e.g., public, private, auxiliary) and the defendant (e.g., Article 385 of Code of Criminal Procedure). The various activities, such as gathering evidence (examination of a witness, inspection, summoning of an expert or a community inquiry), carried out during criminal proceedings must be carried out in the manner prescribed by law. The culmination of the trial will be, among others, a verdict which is drawn up in writing and includes mandatory statutory elements. Among other, it indicates the court of law making the decision, the date, the identity of the accused, and the content of the decision (Article 413 of Code of Criminal Procedure).

### Motivational context and social character

The motivational and social nature of criminal proceedings is made apparent in the overarching legal principles governing the entire process. The social nature, i.e. the fact that some action is taking place in a group and targets a particular social group, is emphasised and clarified, among other things, by the principle of participation of a representative of a larger community laid down in the Code. It states that: “Within the scope laid down in the legislation, criminal proceedings shall be conducted with the participation of a representative of the community” (Article 3 of Code of Criminal Procedure). The legislator stresses that the judicial bodies should “engage the collaboration” of citizens and social institutions<sup>53</sup>. The institution of a lay judge is a case in point; lay judges take part in proceedings of highest importance and concerning cases of the highest social detriment, i.e. under Article 28 of Code of Criminal Procedure: in cases concerning

» 53 See Stanisław Waltoś, Piotr Hofmański, *Proces karny. Zarys systemu* (Warszawa: Wolters Kluwer, 2020), 245.

crimes, offences punishable with a life sentence, and optionally “because of a unique complexity of the case or its significance”. In principle, lay judges have identical duties and rights as professional judges (with exceptions, however, e.g. they cannot preside over court proceedings). Another example of the social nature of the trial will be the so-called public representative (representative of a social organisation). Their participation in the proceedings will be possible if, under Article 90 § 1 of Code of Criminal Procedure, “if there is a need to defend a community interest within the statutory purposes of such an organisation, especially in matters pertaining to the protection of human rights and freedoms”.

The motivational context of criminal proceedings is also detailed by other legal provisions. One example is the principle of material truth (Article 2 § of Code of Criminal Procedure), considered crucial and overriding<sup>54</sup>. It indicates that the basis of any decision should be a true factual finding. A true finding is one that is proven but relates to findings unfavourable to the accused<sup>55</sup>. The principle cannot conflict with the principle of presumption of innocence (Article 5 § 1 of Code of Criminal Procedure), according to which: “The accused shall be presumed innocent until their guilt has been proven and established by a valid and final judgement”. Nor can it be at odds with the principle of *in dubio pro reo* (Article 5 § 2 of Code of Criminal Procedure): “Unresolvable doubts shall not be resolved to the prejudice of the accused”. The legal principles of the Code form a complex system of values, often requiring interpretation in the context of the exercise of the law. However, they undeniably inspire the idea of a trial, providing an overall sense and reference basis for judges, defence lawyers and prosecutors.

### Scalar, causal and cliched linguistic formulas

Specific procedural actions, such as collecting evidence, are components of the criminal proceedings. According to the above scalar theory, these activities can be referred to as “rituals within a ritual.” The individual activities have all the characteristics of a linguistic ritual and are also part of a complex overarching ritual. There is a scalar nature of several levels. Examples of “rituals in ritual” include the questioning of a witness, the summoning of an expert, and the public announcement of a verdict. Let us illustrate the scalar nature, performativity and petrification of linguistic formulas using the example of questioning a witness during a court hear-

» 54 Andrzej Sakowicz, “Art. 2 KPK,” in: *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (Warszawa: Wydawnictwo C. H. BECK, 2020), <https://legalis.pl/> (10.09.2022).

» 55 Jerzy Skorupka, “Art. 2 KPK,” in: *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warszawa: Wydawnictwo C. H. BECK, 2021), <https://legalis.pl/> (10.09.2022).

ing. Witness examination can be an element of the following structure of linguistic rituals:

Criminal proceedings / judicial proceedings / main trial / judicial process / witness examination / oath (speech act)

Criminal proceedings constitute the most complex ritual, which consists of stages. After the pre-trial stage (investigation or inquiry) and the filing of an indictment, the trial stage takes place. The main trial is part of the judicial proceedings. An important part of it is the hearing, during which evidentiary actions are carried out. One such activity is the questioning of a witness, a personal source of evidence. The examination includes simpler linguistic rituals, known as speech acts. One of these is the oath to tell the truth.

Instruction and oath are two interconnected linguistic formulas of utmost importance, which the witness has to deal with in the courtroom. Before the beginning of the examination, the witness should be instructed about the criminal liability for perjury or concealing the truth (Article 190 of Code of Criminal Procedure). It is also necessary for the witness to take an oath, whose wording is precisely defined in the Code of Criminal Procedure: “Being fully aware of the significance of my words and of my responsibility before the law I solemnly promise to state the truth and not to conceal anything known to me” (Article 187 of Code of Criminal Procedure).

The oath is a solemn act. The significance and seriousness of the speech act is highlighted by the behaviour of all the persons present in the courtroom: “When a pledge is being made, all persons present, including the judges, shall stand” (Article 188 § 2 of Code of Criminal Procedure). Under the doctrine of the law, the pledge should “mobilise the witness to give a truthful testimony”<sup>56</sup>. Thus, it should realise a self-locutionary purpose, i.e. to influence the mental state of the performer of the speech act<sup>57</sup>. Thus, the performativity of the oath is clearly emphasised in the doctrine of law, as the effectiveness of the speech act impacts the entirety of the evidentiary proceedings.

The law prescribes the order and form of the stages of questioning. The witness is first asked to provide their name, age, and occupation, followed by questions relating to previous criminal convictions for perjury or being accused in any case, as well as their relationship to the parties

» 56 See e.g. Sakowicz, “Art. 188 KPK,” in: *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (Warszawa: Wydawnictwo C. H. BECK, 2020), <https://legalis.pl/> (10.09.2022).

» 57 Michał Buchowski, “Logika sprawczej mocy obrzędów,” in: *Między sensem a genami*, ed. Barbara Tuchońska (Warszawa: Wydawnictwo Naukowe PWN, 1992), 105–126, za: Drabik, *Językowe rytuały...*, 42.



(Article 191 of Code of Criminal Procedure). Subsequently, two phases of questioning take place: 1) the phase of free statement, during which the witness „spontaneously, of their own accord, describes the event that is the subject of the case,”<sup>58</sup> and 2) the phase of cross-examination, where questions are put to the witness in the appropriate order by the participants in the hearing (Article 370 § 1 of Code of Criminal Procedure). The witness is thus questioned in accordance with a repetitive, rigid statutory order.

### Linguistic rituals versus probation and punishment

Apology, forgiveness and reconciliation are three criminal law institutions that have the characteristics of linguistic rituals. Apology to the wronged party can be, inter alia, a probationary obligation imposed on the offender in a sentence which provisionally discontinues the proceedings (Article 67§3 of the Criminal Code) or a sentence conditionally suspending the execution of the sentence (Article 72§1 subsection 2 of the Criminal Code). Reconciliation, on the other hand, is a bilateral act of the perpetrator and the victim, which has an impact on, inter alia, extraordinary leniency (Article 60 § 2 subsection 1 of the Criminal Code) or discontinuance of private prosecution (Article 492 §1 of Code of Criminal Procedure). It consists of several concomitant actions of the participants in the criminal proceedings: apology, regret and remorse on the part of the offender and forgiveness on the part of the victim<sup>59</sup>.

Let us identify the features of the linguistic ritual using the example of apology which is an obligation of an offender put on probation. The court places the offender on probation, specifying its duration. At the same time, it imposes obligations on the offender aimed at preventing re-offending<sup>60</sup>. One such obligation may be to apologise to the victim. This is a unilateral act which requires action solely on the part of the offender. In the judgement, the court may impose a deadline for the fulfilment of this obligation, as well as the form (e.g. written) and the exact wording of the apology.

An apology, unlike an act of apologising in everyday life, is obligatory in this situation and has different, legally relevant functions. It has an institutional and recurrent character as it is an obligation determined by the court in a judgement, based on the provisions of the law. Undoubtedly,

» 58 Bartłomiej Chorąży, Marcin Poprawa, "Zeznanie świadka w postępowaniu sądowym – wybrane problemy lingwistyki kryminalistycznej," in: *Lingwistyka kryminalistyczna. Teoria i praktyka*, ed. Monika Zaško-Zielińska, Krzysztof Kredens (Wrocław: Uniwersytet Wrocławski: Quaestio, 2019), 112.

» 59 See Grzegorz Maroń, "Przeproszenie, przebaczenie i pojednanie w polskim prawie karnym – wybrane aspekty," *Prokuratura i Prawo*, 3 (2020), <https://legalis.pl/> (10.09.2022).

» 60 Gardocki, *Prawo...*, 208.

the social character of the apology is also important. It is an attempt to repair the relationship and to end the conflict with another litigant. The motivational context, however, is the subject of extensive discussion in the doctrine of law. What values are protected by the implementation of this obligation, what is the sense of imposing it on the offender in the judgement? As Maroń points out, there are two basic purposes of apology: 1) “the educational value towards the offender, seen in the effect [...] on the convicted person’s attitude, by forcing him to show a gesture of contrition and inducing self-reflection”<sup>61</sup> and 2) the compensatory function for the victim: “in the form of moral reparation or a sense of moral satisfaction”<sup>62</sup>.

Again, the performative nature of ritual is emphasised in criminal law. Apologising is supposed to be a perlocutionary act as the speech act is supposed to influence the psyche of the perpetrator (self-perlocution) and the victim. It is worth noting that, according to John Austin’s speech act theory, the verb “apologise” belongs to the so-called group of expressive verbs, or behabitives. These are verbs expressing the attitude or mental state of the sender<sup>63</sup>. The purposes of apology under criminal law are at odds with this theory. The apology is not supposed to be an expression of the offender’s mental state, i.e. sincere regret, remorse or desire to improve. Rather, the performance of the duty is intended to induce such a mental state.

Reluctance to apologise on one’s own initiative is cited in court judgments as an argument for imposing a probationary obligation. In a judgement of the District Court in Nowy Sącz it was indicated that: “the accused, despite the lapse of 10 months from the date of the incident, has not apologised in any way to the victim and, worse yet, her attitude [...] indicates that she does not in any way regret her behaviour”<sup>64</sup>. In another criminal case, the purpose of the obligation is to “humble oneself in front of the victim”, which “gives a moment of reflection on one’s earlier approach [...]”<sup>65</sup>.

The incompatibility of the expressive verb with the mental state of the offender leads to situations where the convicted person does not want to fulfil the probation obligation<sup>66</sup> or, after the obligation has been fulfilled, states that they changed their mind and nevertheless uphold the

» 61 Maroń, *Przeproszenie...*, <https://legalis.pl/> (10.09.2022).

» 62 Maroń, *Przeproszenie...*, <https://legalis.pl/> (10.09.2022).

» 63 John Langshaw Austin, *Mówienie i poznawanie*, transl. Bohdan Chwedeńczuk (Warszawa: Wydawnictwo Naukowe PWN, 1993), 695, quoted after: Grażyna Osika, “Teorie aktów mowy,” *Zeszyty Naukowe Politechniki Śląskiej. Seria: Organizacja i Zarządzanie*, 6 (2001): 8.

» 64 Judgement of the District Court in Nowy Sącz of 23 September 2021, file ref. no. II K 755/21.

» 65 Judgement of the District Court in Nowy Sącz of 26 April 2021, file ref. no. II K 626/20.

» 66 See e.g. judgement by the District Court in Grudziądz of 26 July 2022, II K 1003/21.

offence they committed<sup>67</sup>. There are criminal cases in which the convicted person does apologise but at the same time does not admit guilt, or else the convicted person apologises for what happened and not for what he did<sup>68</sup>. Despite the Supreme Court's thesis that: "the act of apology (regret) detaches itself from emotions and feelings [in the procedural aspect],"<sup>69</sup> the strong reluctance of the offender to comply with this obligation is the subject of controversy in criminal law doctrine, inter alia in the context of the constitutional right of freedom of expression. The unintentional perlocutionary purpose is sometimes even referred to in legal doctrine as an "act of despicable self-denigration" by the perpetrator<sup>70</sup>.

The form and content of the apology is sometimes imposed on the perpetrator. It often makes a symbolic reference to the way the offence was committed or to the person of the victim. The District Court in Zawiercie referred to the place where the crime was committed, imposing an obligation to: "to apologise to the victim R. S. by reading out, at the nearest session of the Town Council in P. after the judgement became final, the following statement: 'I apologise to R. S. for the remarks I made to him at the sessions of the Town Council of P. on 23 December 2019 and 27 January 2020 words bearing similarity to those of Nazi criminals'"<sup>71</sup>.

The District Court in Golub-Dobrzyń highlighted the essence of on-line space, as well as the form and extent of the offence committed via one's oral statements:

R. A. made his threats via his social media account, doing so in a vulgar and harassing manner. He called R. S. a "motherf\*\*\*r". The entry of 8 June 2020 indicates that R. S. killed the accused's father, without even specifying that it was a road accident to which the deceased may have contributed. The entry on the social network may have reached a significant group of people. The screenshot shows that it was shared by third parties. Under the circumstances, it seems necessary for the accused to apologise to the victims in the same form in which he threatened them. This will send a clear signal to social media users that the conduct of the accused has been adequately dealt with by judicial authorities<sup>72</sup>.

» 67 Maroń, *Przeproszenie...*, <https://legalis.pl/> (10.09.2022)

» 68 Maroń, *Przeproszenie...*, <https://legalis.pl/> (10.09.2022)

» 69 Resolution of the Supreme Court of 28 June 2006, file ref. no. III CZP 23/06, LEX no. 182872.

» 70 See "Z profesorem Bogusławem Wolniewiczem rozmawiają Stanisław Starnawski i Ziemowit Gowin, Jak się jest w środku nurtu, to się walczy, a nie dokonuje nad nim refleksji," *Teologia Polityczna* 6 (2014): 10, quoted after: Maroń, *Przeproszenie...*, <https://legalis.pl/> (10.09.2022).

» 71 Judgement of the District Court in Zawiercie of 30 March 2021, file ref. no. II K 431/20.

» 72 Judgement of the District Court in Golub-Dobrzyń of 5 March 2021, file ref. no. II K 168/20.

## Conclusions

Polish criminal law includes multiple linguistic rituals. Linguistic ritualism applies to culturally significant objects which are protected by criminal law: Holy Mass, funerals, and nuptials. It is a means of committing offences but also a means of prosecuting offenders and bringing them to justice. Rituals have an institutional character as they are subordinated to the patterns and characteristics of the operation of the judiciary. They also have a social character as the justice system is created with the citizens of a state in mind and performs preventive and protective functions. The legislator convinces us that rituals consist of many repetitive formulas, regularly used in the same situations. Their motivational context is extremely important; it involves values protected through rituals, expressed, for example, in provisions of legal codes.

Performativity, or the ability to create new states of affairs, turns out to be an important feature of the ritual and linguistic aspect. Criminal law explicitly protects the performativity of statutory civil and religious rituals. At the same time, by criminalising certain acts, it tries to prevent changes in reality that are harmful to citizens, e.g. by hurting their religious feelings.

The efficacy of the criminal proceedings is also closely linked to changes in the mental state of its participants. Agency and symbolism become apparent in performative speech acts during court hearings or after the verdict is handed down. The rigid sequence of fixed and law-imposed linguistic formulas reinforces the gravity of the witness's oath. The obligation to apologise, on the other hand, is under the legal doctrine intended to induce self-reflection on the part of the convict and to ensure moral recompense to the victim. Performative linguistic ritualism is thus constitutive of Polish criminal law and has a crucial impact on its implementation. ●

## Abstract

The aim of the article is to distinguish and characterise the aspect of linguistic rituality in Polish substantive and procedural criminal law. We can distinguish four criminal-ly relevant categories of linguistic rituals: linguistic rituals constituting the object of protection; rituals considered as a means of committing a crime; rituals performed during a criminal trial; and rituals related to the probation period and punishment of the offender. The legislator protects the freedom to participate in selected linguistic rituals – a mass, a funeral, an election. Other rituals may be considered as a means of committing a crime, such as stadium violence expressed in the form of hate speech. A criminal trial, of which, for example, the oath of a witness is a component, can be considered a complex, scalar linguistic ritual. A key feature of linguistic rituality is performativity, which contributes to the execution of the law.

Keywords:

linguistic ritual, criminal law, criminal proceedings, performativity, speech acts, hate speech

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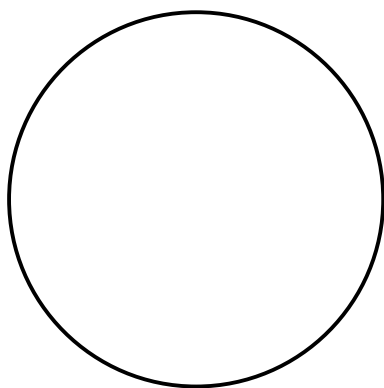
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