CRIMINAL LITIGATION

This month we take a look at the ins and outs of the Polish Criminal Litigation system. To this end we speak to Aleksandra Kowalik, a member of the Disctrict Bar Council in Bydgoszcz since 2009. Before her call to the Bar, she was a judical trainee for three years.

Aleksnadra runs her own individual practice which covers criminal litigation, civil litigation, taxation, international law and immigration law. She is also a member of the European Criminal Bar Association in London, Solicitors Regulation Authority (Registered European Lawyer), and Academy of European Law in Trier. She also started with her PhD at The Faculty of Law and Administration of Nicolaus Copernicus University in Toru at the Department of the Criminal Procedure.

The revised Polish Criminal Procedure Code entered into force in July 2015, which introduced complex changes to court proceedings. Can you tell me about the main points of the revised Code and what impact it is expected to have on the field of Criminal Litigation?

Indeed, on 1st July 2015 the great amendment of the Polish criminal procedure took place. The amendment was enacted on 27th September 2013 and the vacatio legis lasted till 1st July 2015.

The amendment changed not only the particular articles but it actually completely modified the system. Untill 1st July 2015 the criminal procedure has been based on the inquisitional structure which meant that apart from the defence the main entitlement to conduct the evidences including asking questions and requesting for the further discloures of evidences has been granted to the Judge (or Judges). The judge's rights were so far going that appliaction for the further disclosure of evidences could have been dismissed without the possibility to appeal against that decision or rewiev. The Judge or judges (depended of the court which dealt with tha case) had a power to dismiss the defence's questions if it has been considered as unnecessary - still one has to bear in mind that the Judge acted as a Judge and quasi procesution.

In conclusion, the "battle" for the judgment took place between the Judge (or Judges) and defence.

The modified system has been constructed upon the adversarial grounds and became similar to the British one - of course still there is no jury trail mode.

The wide amendments also covered the investigation proceedings.

The main direction of amendments in a view of the defence:

a) the elimination of inquisitional parts of the proceedings namely releasing the Judge (or Judges) of the obligation to look for the evidences for the defendant's guilt which meant that the Judge (or Judges) indeed had to join the role of the prosecution and judge. The amendment established strengthening of the Judge's (or Judges') position as the independent and unprejudiced authority whose the main task is to consider the criminal responsibility issue for the charges. Unforntunately, the legislator reserved to the Court (Judge or Judges) the right to interfere in the evidence procedures and applications "in the specific case" but forgot to give the definition of the "specific cases" and to describe the limits of the mentioned entitlement. This, in my opinion can lead to stay the door of the inquisitional trail opened and that was the aim of the amendments. Notwithstanding the system expects the authority responsible for the leading the evidences is prosecution.

b) pathology's termination of instances regarding the evidences disclosure or evidences related appliactions- the "September amendment" has widen the possibilities of reformative judgments of the Court of Appeal. In addition, the Court of Appeal has been granted with the entitlement to "meet" with the evidences ad quem.

c) the increase of the agreements' role between the prosecution and defence;

d) the wider entitlements of the defence to present the case which in my opinion doesn't change anything because the defence must always had been very active to defend the case before due to the fact that the real opponent was the Judge (or Judges) who had an unlimited possibilites regarding the way how the trail will be led as the Judge (or Judges) was the "host" of the proceedings.

e) the transfer of the decision regarding the defence's evidence application to the prosecution during the investigation which in my view is contradictory to the adversarial trail rules and fair trial rule because the prosecution decides about the defence's appliactions taking into consideration the aims of the investigation while it is commonly known that the purpose of the investigation for the procesution and the defence are different. The mentioned rule is contradictory to facta non praesumuntur, sed probantur as the defence has been limited to follow that rule with the prosecution entitlements.

f) article 455a implementation regarding that the form of the judgment's reasons will not be the ground for appeal any more. The old system predicted if the reasons did not fulfill the expected by the legislator conditions i.e. it was unclear or it didn't consider all the facts or the Judge (or Judges) did not explain why the specific facts have been assessted as credible or not, it was the ground for appeal. Following the current system this sort of inconsistency will not be able to justify the appeal any more.

Following my submissions relating to discussed issue, the reasons of the court of the first instance are to enable the defence (or the prosecution) to lodge an appeal and to allow the Court of Appeal for reviewing the correctness of the judgment thus the article 455a states a nonadherence to the requirement of the highest diligence while constructing the reasons.

Have these changes raised any concerns amongst your peers? Can you tell me about them and whether you think they are justified?

The legal society's concerns related to the amendments are similar to mine but the new system binds only since 1st July 2015 and many trials are still being continued within the old system. The "fresh" system will, in my opnion, achieve a great impetus in the forthcoming months and then will be the right time to give any assessment of the amendments.

What quirks does the Polish criminal law system possess that make it unique?

The question about the unique quirks of the Polish Criminal Law in a view of its' amendments - amendments which provided approaches from the British procedures must be verified in comparison to the Anglo-Saxon system. In conclusion, the quirk is definately the fact that there are no witness statements prepared for the trail by the defence - the only statements are being provided by the prosceution during the investigation without our presence. The effect is that we (the defence) are unable to predict what the witnesses call by us will say during the hearing. The other difference called quirk is the prohibition to ask the leading questions so we can only exemine in chief all the wintess inlcuding the prosecution ones.

Do you see the need for any further legislative changes to this area? If so, please tell me about them.

Regarding the further requirement of the legislative changes, I consider that the current stage is too early to comment as the prospective gaps can be fulfilled with the Highest Court (Supreme Court) judgments and doctrine which amount, due to the short time since the system's updating, is infinitesimal.

Is there anything else you would like to add?

In conclusion, regarding the last amendments of the Polish Criminal Procedures, although my concerns about the new system still "dura lex sed lex" and our- the defence task is to represent our clients with the highest diligence no metter the legal updatings. **LM**