



Ordo Iuris Institute for Legal Culture

**Report on Article 55a of the
Act amending the Act on the Institute of National Remembrance**

The world-wide discussion on the Polish draft law amending the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation (Sejm Paper no. 771) shows the difference between the letter of the law and its creative and often selective interpretation in the public debate. As a result, two contradictory positions have been visible in the comments on the bill. On the one hand, the Article 55a has been seen as an attempt to clamp down historical debate on unlawful acts committed by Polish citizens during World War II or limit "testimonies of the Holocaust survivors", on the other, the concern for historical truth, dignity and Polish politics of memory has been emphasized.

A legal analysis of the bill should start from a platitude - the responsibility for the atrocities and crimes committed during the Second World War on citizens of many countries occupied by Third German Reich (including Poland) rests with the Third German Reich.

Historical background: millennium of peaceful coexistence

To understand Polish efforts to protect the historical truth about the actual perpetrators responsible for the Holocaust, it is necessary to remind the traditional and long-lasting peaceful coexistence of Jewish and Polish communities in Poland. Polish Kingdom respected customs, religion and autonomy of Jewish communities as confirmed by many statutes issued by kings and princes. Polish king Casimir III the Great confirmed in 1334 the privileges granted to Jews in 1264 by Bolesław V the Chaste and allowed them to settle in Poland in great numbers as "people of the king". Polish Kingdom became an asylum for Jews who were harassed in other countries.

Before Second World War, Polish independent state (Second Polish Republic 1918-1939) guaranteed equal rights and freedoms for Jewish minority (10% of population). Many Jews ran active and

successful political careers (Joshua Gotlieb, Waclaw Wiślicki, Herman Lieberman, Jerzy Rosenblatt). Between 1922-1927 there were 35 members of Polish House of Deputies, who represented Jewish political parties. Many Polish Jews were active in the field of culture (e.g. Isaac Bashevis Singer – writer, Władysław Szpilman – musician, Jan Kiepura – musician, Jan Brzechwa – poet) and education (e.g. historian Szymon Askenazy) of the Second Polish Republic. Jews established their own newspapers (*Nasz Przegląd – Our Review*), exercised freely their religion freedom. In 1939 Poland was home to the largest Jewish community in Europe.

It is important to underline that the attitude of Poles to Jews during Second World War was unique in comparison to other nations under the occupation of Third German Reich. Polish Nation did not establish any form of institutional collaboration with Germans. Polish Underground State was established in 1939 by the government in exile in London with primary mission to oppose the German occupation. According to laws issued by Polish authorities, all acts of collaboration with the Nazis were threatened with death penalty. Any actions against Jews were forbidden and severely punished. The army of the Underground State called *Armia Krajowa (Home Army)* executed almost 4.000 of judgements given by the Secret Courts against those who collaborate with German occupant.

In 1942 Polish government in exile in London published report of Jan Karski informing officially the Allied forces for the first time about the mass extermination of Jews. Polish demand for immediate reaction of US and British governments followed. Also in 1942, the Directorate of Civil Resistance, part of the Polish Underground State, issued a following declaration: *For nearly a year now, in addition to the tragedy of the Polish people, which is being slaughtered by the enemy, our country has been the scene of a terrible, planned massacre of the Jews. This mass murder has no parallel in the annals of mankind; compared to it, the most infamous atrocities known to history pale into insignificance. Unable to act against this situation, we, in the name of the entire Polish people, protest the crime being perpetrated against the Jews; all political and public organizations join in this protest.*

‘Delegatura’, the supreme political body of the Polish Underground State, financed and sponsored Council to Aid Jews (‘Żegota’) with around 100 cells distributing relief funds to Jewish community. Since 1942 ‘Żegota’ was granted by ‘Delegatura’ nearly 29 million zlotys (over \$5 million; or, 13.56 times as much in today's funds). ‘Żegota’ children’s section was headed by Irena Sendler, nominated for a Nobel Prize before her death in 2008, who organized help for children from the Warsaw Ghetto and saved almost 2.500 of them. The Polish Underground State provided special assistance, funds,

arms and supplies to Jewish resistance organizations (like Jewish Combat Organization – Żydowska Organizacja Bojowa).

Under the German occupational regulations from 1941 any form of help for Jews on the Polish occupied territory was punished with death. Nevertheless, even up to 1 million Polish people [related to historian Richard Lucas (2012)] decided to support their Jewish neighbors. Many of them paid the highest price of their lives (e.g. execution of Ulm's Family in 1944; pacification of village Bór Kunowski in 1943).

6706 Polish people were decorated with the Righteous Among the Nations honorific by Yad Vashem and State of Israel, constituting the most numerous group of awards granted to citizens of a single country.

However, it is also true that during the German Nazi occupation there were disgraceful cases of Polish citizens handing over Jews to Nazi authorities, taking over their property or committing ordinary murders and beating them up. Nobody questions today that documented outrageous incidents are worthy of condemnation.

In 2013 POLIN Museum in Warsaw was opened with its mission to recall and preserve the memory of the history of Polish Jews, contributing to the mutual understanding and respect amongst Poles and Jews as well as other societies of Europe and the world.

"Polish death camps" phrase is close to the Holocaust denial by diminishing responsibility of actual perpetrators

Presentation of the historical context is essential for correct analysis and understanding of the draft law in question. In the rationale for the legal act, the bill authors stressed that the amendment is aimed at combating the false nations of "Polish concentration camps", "Polish death camps" or "Polish extermination camps", that appeared increasingly frequently instead of name pattern internationally accepted for Konzentrationslager Auschwitz-Birkenau: "Former German Nazi Concentration and Extermination Camp".

Due to the lack of dedicated legal instruments, Polish jurisprudence has indicated the application of moral rights protection under the Civil Code when German Nazi responsibility for Holocaust is

diminished by blaming Polish nation and the state with complicity. In a famous case brought against ZDF by Karol Tendera, former prisoner of German Nazi Concentration and Extermination Camp Auschwitz-Birkenau, the Court of Appeal in Krakow stated on 22nd of December 2016: *“the wording «Polish death camps» violates moral rights of the plaintiff (...) such as human dignity, national identity and national dignity. For this is a false statement that falsifies history and suggests that the Polish nation is the perpetrator of Nazi crimes.”* The verdict has been officially recognized and enforced by German court in January 2018.

Court-law have confirmed that the harmful statements about allegedly “Polish concentration camps” entitle every member of the Polish nation to take legal action. In the judgment of the District Court in Warsaw of 5 January 2018, it can be read that *“the wording, the rectification of which was demanded by the plaintiff, concerning concentration camps defined as Polish or created by Poles directly affect the plaintiff’s assessment as a person belonging to the Polish nation.”* This is perfectly confirmed by the position of the Court of Appeal in Warsaw, which stated on 31st of March 2016: *“In the opinion of the Court of Appeal, in order to recognize the violation of the sense of national identity as a result of statements about Polish concentration camps, it is not necessary to include in its content any reference to a specific person as part of the Polish national community. The above-mentioned statement directly menaced the values related to the individual’s participation in the community, naturally shaping his or her personality. It enters the sphere of values underlying the protection of respect conceived as personal dignity. It affects the sphere of continuation associated with participation in the Polish national community, being the same, retaining continuity. The present existence of the national community is an extension of existence in the past. The words about Polish concentration camps violate the plaintiff’s right to identify with the people who experienced the crime of concentration camps and whose ancestors (grandparents) were persecuted in concentration camps”.*

One step further to protect historical truth

Since there is no doubt that from the point of view of historical facts and the jurisprudence of common courts, the wording "Polish concentration camps" or "Polish death camps" entitle every member of the Polish nation to instigate civil proceedings for offensive wording, the originators of the wording of Article 55a went a step further. They have provided for the most far-reaching criminal sanction.

Hence, it is included in chapter 7 of the 1998 Act on the Institute of National Remembrance - the Commission for the Prosecution of Crimes against the Polish Nation entitled "Penal Regulations".

The proposed provision of Article 55a if of the following wording:

Art. 55a. 1. Anyone attributing, in public and against facts, responsibility or co-responsibility to the Polish Nation or to the Polish State for the Nazi crimes committed by the Third German Reich defined in Article 6 of the Charter of the International Military Tribunal annexed to the International Agreement on the prosecution and punishment of major war criminals of the European Axis, signed in London on 8 August 1945 (Journal of Laws of 1947, Item 367), or for other offenses constituting crimes against peace, humanity or war crimes or otherwise grossly reducing the responsibility of the actual perpetrators of these crimes shall be subject to a fine or imprisonment of up to 3 years. The judgment shall be made public

2. Should the perpetrator of the act referred to in Section 1 act unintentionally, they shall be subject to a fine or restriction of liberty.

3. Perpetrator of the act referred to in Section 1 and 2 does not commit a crime if he has committed this act as part of their artistic or scientific activity.

Article 55a provides for criminal liability for three types of conduct”

The first is " in public and against the facts of responsibility or co-responsibility” to the Polish Nation or the Polish State for the Nazi crimes committed by the Third German Reich as defined in Article 6 of the Charter of the International Military Tribunal annexed to the International Agreement on the prosecution and punishment of major war criminals of the European Axis, signed in London on 8 August 1945 (Journal of Laws of 1947, Item 367). The provisions of Article 6 of the Charter defined the jurisdiction of the Tribunal and stated its competence in judging 1) crimes against peace, 2) war crimes and 3) crimes against humanity committed by persons in the interest of the so-called Axis states. All the three categories were defined in detail in an international act. Thus, crimes against peace were to consist in “planning, preparing, initiating or conducting an aggressive war or war that is in violation of international treaties, agreements or guarantees, or in participation in a plan or collusion in order to commit one of the above-mentioned acts.” A “war crime” was defined as “violation of war rights and customs”, in particular, it includes “murder, misconduct or deportation for forced labour or for other purposes of civilians in the occupied territories or from this area”, killing hostages; mindless demolition of settlements, cities or villages or ravages of “unjustified by the

necessity of the war”. Finally, the act of international law listed acts classified as “crimes against humanity”: murder, extermination, enslaving people, deportation and other inhumane acts that were committed against any civilian population, before or during the war, or persecution for political or racial or religious reasons in committing any crime within the jurisdiction of the Tribunal or in connection with it, regardless of whether it was in compliance with or defiance of the law of the country in which the crime was committed.

The second type of conduct penalized under Article 55a is “attributing in public and against the facts the responsibility or co-responsibility” to the Polish Nation or the Polish State for other offenses constituting crimes against peace, humanity or war crimes. In contrast to the first type of criminal conduct, which only concerns the crimes of the Third German Reich (for example, the recognition of Poles as those establishing Nazi extermination camps), this offence concerns all crimes against peace, humanity or war crimes. The legislator defined the concept of “a crime against humanity” in Article 3 of the Act of 18 December 1998 on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation. According to the wording of this provision, these in particular include crimes of genocide within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948 (Journal of Laws of 1952, Items 9, 10 and 213 and Journal of Laws of 1998, Item 177), as well as other serious persecution because of belonging to a particular ethnic, political, social, racial or religious group if they were carried out or inspired or tolerated by public officials. The acts of international law and the provisions of Chapter XVI of the Criminal Code may prove helpful in understanding the concept of the above-mentioned crimes.

Criminal liability will only apply to inculpation of the "Polish State" or the "Polish Nation". This underlines the general dimension of the sanction itself. In the opinion of the bill initiators, it is unacceptable to attribute responsibility for crimes committed by the Third German Reich, or for example the USSR, to the entire Polish Nation or the Polish State. The term "Nation" (used, for example, in Article 133 of the Criminal Code) must be understood as the entirety of Polish citizens living both in the Republic of Poland and abroad. It seems that the concept of the Nation should also include people of Polish nationality who are not Polish citizens. Consequently, a perpetrator who states, for example, that "the Polish Nation committed the extermination of Jews" or "the Polish State mass murdered the Armenians" will be subject to criminal liability, however, a Holocaust survivor informing about the commission of crimes against Jews by individual Poles will not be subject to it.

The third type of conduct penalized under Article 55a of the act is gross trivialization of the responsibility of the actual perpetrators of crimes against peace, humanity or war crimes (in particular, of the Third German Reich). This implements Article 1 Item 1 (c) and (d) of the 2008 Framework Decision of Justice and Internal Affairs Council no. 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. The wording of the provision translates into a close connection between the attribution of responsibility or co-responsibility to the Polish State or the Polish Nation for the offences listed in the regulation with the “diminishment of the responsibility of the actual perpetrators of the crime”. In other words: criminal liability for inculcating Poles with responsibility results not from a simple desire to protect their good reputation, but from the need to protect historical memory of crime against “washing away” of responsibility of the actual perpetrators.

The third type of conduct described in the provision in question in fact supplements the already applicable Article 55 of the 1998 Act, providing for criminal liability for so-called negationism, and therefore denial "in public and contrary to facts" of, among others, Nazi (i.a. Holocaust denial), communist and other crimes against peace, humanity or war crimes "committed on persons of Polish nationality or Polish citizens of other nationalities (including Jews)". At present, therefore, "gross diminishment of perpetrators' liability" of this type of offences will be penalized, which strengthens the protection of memory mainly of Shoah Victims.

It should be noted that the bill provides for the extension of the catalogue of crimes protected by virtue of Article 55 of the Act on the Institute of National Remembrance to include the category of “crimes of the Banderian nationalists and members of formations collaborating with the Third German Reich” (the wording of Article 1 Item 1 (a) of the Act recommended in an additional report of the Committee on Justice and Human Rights – Sejm Paper No. 993A). The initiator draws attention to the need to also recognize the "participation in the extermination of the Jewish population and genocide on the citizens of the Second Republic of Poland in the areas of Volhynia and Eastern Lesser Poland" as a crime of the "Banderian nationalists and members of the formation collaborating with the Third German Reich” (added Article 2a).

Huge controversy in the public debate was aroused by the criteria of the offense under Article 55a of the Act on the Institute of National Remembrance, consisting in a "public" inculpation of Polish State or the Polish Nation with the responsibility for the above-mentioned crimes "against facts". Both criteria appear already in the mentioned Article 55 of the Act on the Institute of National

Remembrance (which penalizes, inter alia, the Holocaust denial), effective since the Act's entry into force in 1999, and have not yet raised any doubts. The action of the perpetrator can be said to be performed "in public" when it is addressed to an undisclosed number of people (e.g. in the media, on the Internet, during a speech). It will not be, for example, a conversation with others in a closed circle. This criterion appears already in Article 255 § 1-3 Criminal Code, Article 256 § 1 Criminal Code or Article 257 Criminal Code. The second condition of criminal liability under the provision of Article 55a should be an action performed "against facts". This is a reference to the findings of historians regarding those responsible for crimes against peace, humanity or war crimes. In the course of criminal proceedings on the implementation of this type of criterion, it will usually be decided by an expert in the field of history. In other cases (such as in the case of a statement that "The Polish State launched an invasion war on 1 September 1939 against the Third German Reich"), it will be sufficient to refer to the notorious facts (commonly known and not requiring evidence) as defined in Article 168 of the Code of Criminal Procedure.

As for the criteria of the perpetrator of the offence under Article 55a, it will be possible to commit it intentionally (in both forms of intent) and unintentionally (Section 2). The initiators have therefore come to the conclusion that punishment should also be imposed in case of wording inculcating the entire Nation or State that arises from the failure to observe caution in the given circumstances, despite the fact that the perpetrator predicted or could have predicted the possibility of committing the offense (e.g. lack of fair journalism).

Prosecution also to be held abroad

The initiators of the bill entrust the initiation and conduct of investigations in cases concerning offences under Article 55a to prosecutors of the departmental commissions for the prosecution of crimes against the Polish Nation. The provision of Article 55b provides that criminal liability under Article 55a (and Article 55) will be attributed to a Polish citizen and a foreigner irrespective of the law applicable at the place where the offense was committed (Article 55b). This is an exception to the principle of double criminality of an act (Article 111 § 1 of the Criminal Code) according to which the prosecution of an offense committed abroad shall be determined by recognition of it as a crime also by the law in force at the place where it was committed. Consequently, the prosecutor will have

an obligation to conduct proceedings in the case of anyone suspected of committing a crime, regardless of the place where it was perpetrated (e.g. a foreign journalist, a foreign politician).

The authors of the bill pointed out that the perpetrator of the offense referred to in Section 1 and 2 does not commit a crime if this offence is perpetrated as part of one's artistic or scientific activity. This is a solution based on the provisions of Article 256 § 3 of the Criminal Code. Therefore, this provides for the so-called justification of artistic or scientific activity. Consequently, for example, a teacher or historian who, as part of one's activities, states that Poles bear responsibility for murdering Jews during the Second World War shall not be subject to criminal responsibility. If it is determined that the action of the perpetrator in this case was not of a fake nature, the prosecutor should refuse to instigate an investigation (or possibly discontinue it) under Article 17 § 1 Item 2 of the Code of Criminal Procedure.

In the event of conviction for an offence under Article 55a, the verdict is obligatorily made public, which is a solution based on the provisions of Article 55 of the Act on the Institute of National Remembrance.

Article 55a from a constitutional and international perspective

The authors of the bill decided to punish one of the forms of the so-called historical lie, encompassing different forms of legal protection against Holocaust denial and genocide denial. The punishment of this type of conduct is already effective in a number of countries. For example, in Austria, Hungary and Belgium, those who "negate, understate or justify the genocide of the National Socialist dictatorship" are subject to criminal liability (in Austria, this is punishable by up to 25 years of imprisonment). A similar provision is in force in Israel (with the penalty of up to 5 years in prison), however, a reliable and scientifically correct publication which does not express sympathy and praise for the Nazis shall not be punishable. In the Czech Republic it was decided to punish conduct referring to communist crimes (with the penalty of up to 3 years of imprisonment). Similar rules apply in France and Germany, referring to the crimes identified by the International Criminal Court in Nuremberg.

Introduction of the regulation of Article 55a undoubtedly restricts freedom of expression, guaranteed in Article 54 Section 1 of the Constitution of the Republic of Poland or a series of acts of international law (e.g. Article 10 Section 1 of the Convention for the Protection of Human Rights and Fundamental

Freedoms of 1950). However, its restriction is acceptable in this case. In the judgment of 21 September 2015, Case file np. K 28/13, the Constitutional Tribunal found Article 49 § 1 of the Code of Petty Offences, which provides for liability for the offense of a person who "demonstrates, in a public place, disregard for the Polish Nation, the Republic of Poland or its constitutional bodies" to be compliant with the Polish Constitution. The Tribunal indicated the restriction of freedom of expression in this case as admissible, justified and proportionate (Article 31 (3) of the Constitution) and restated that the freedom of expression is not unlimited. In addition, in its judgment of 6 July 2011, Case file no. P 12/09, arguing the constitutionality of the crime of the so-called insult of the President of the Republic of Poland (Article 135 § 2 of the Criminal Code) the Constitutional Tribunal stated that lowering the prestige of the constitutional body of the State, "leading to a decreased level of identification of citizens with the State, menaces the Republic of Poland - the common good of all citizens." Order and social peace, as factors integrating society, ensure "harmonious existence and development of the community in conditions free from internal unrest" and make up "the constitutional condition of public order mentioned in Article 31 Section 3 of the Constitution."

Moreover, in the context of international law, the provisions of Article 55a are admissible and do not violate Article 10 of the Convention. The European Court of Human Rights spoke on the admissibility of penalization of the reduction of responsibility for genocide in several of its rulings. In the case of *Garaudy v. France* (no. 65831/01), the Court ruled that "the denial of crimes against humanity is one of the most serious forms of defaming Jews and inciting hatred against them". In addition, it stated that the denial or revisionism of "clearly established historical facts - such as the Holocaust - (...)" would not be subject to protection under Article 10 (*Lehideux and Isorni v. France*, no. 24662/94).

Devil is not so black as he is painted

The analysis clearly shows that many myths and misunderstandings have arisen around the bill of Article 55a of the Act on the Institute of National Remembrance. The authors of the bill unequivocally uphold the jurisprudence line of Polish common courts and the Constitutional Tribunal that allows penalization for false and public statements blaming entire Polish Nation or Polish state for the crimes against peace, humanity or war crimes. This complies with the constitutional system founding principles of Article 1 and 5 of the Constitution. The provision clearly links the fact of inculpating other nations with crimes, e.g. Nazi ones, due to the need to protect the memory of the victims of

World War II. It is supposed to protect historical memory of the actual perpetrators of the crimes. At the same time, it does not clamp down those who want to talk about cases of disgraceful behaviour of some Poles, examine a given issue or talk about their experiences. In the context of legislative amendments included in the bill which provide even more protection to the memory of victims of anti-Semitic and racist purge (for instance by subjecting the Banderian crimes on Jews to this protection), it is difficult to accuse the authors of the bill of their willingness to rewrite memory of the mass extermination of the Jews planned by the Third German Reich. It seems that such misunderstandings result from the lack of proper analysis of the provisions of this Article and completely unnecessarily introduce confusion in diplomatic relations between Poland and Israel.

Warsaw, 2nd of February, 2018

On behalf of Ordo Iuris Institute for Legal Culture,



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Ordo Iuris Institute for Legal Culture

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