

Karolina Palka-Stolorz

Jagiellonian University, Kraków

karolina.palka@doctoral.uj.edu.pl

ORCID: <https://orcid.org/0000-0002-7213-2569>

The critical analysis of Art. 55a of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (*de lege derogata*)

<http://dx.doi.org/10.12775.SIT.2022.019>

1. Introduction

In January 2018, a discussion on a new form of the Holocaust denial (also called the “Auschwitz lie”) began on the Polish political scene. These events were a consequence of the legislative process aimed at amending the Act of December 18, 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation¹ by adding new criminal provisions, i.e., Art. 55a and 55b. Since 1999, there has already been an Art. 55 in this act, which provided for the crime of Holocaust denial, thus penalizing, among other things, the denial of Nazi crimes, such as the Holocaust.² However, there were no laws that

¹ Journal of Laws of 2011, item 177 (consolidated text), hereinafter referred to as: “the Act on the Institute of National Remembrance”.

² Official English translation of the Act provided by the Institute of National Remembrance as at 16 June 2016, before the amendments (access: 15.10.2021).

criminalized other manifestations of proclaiming historical untruth, such as the understatement of the number of victims of the Auschwitz-Birkenau camp, or the statement that the Germans are not responsible for the extermination and related crimes. This gap was to be filled by new penal provisions, i.e. Art. 55a and 55 of the Act on the Institute of National Remembrance.³

The legislative process in Poland consists of three main phases. The first of them is the submission of a bill, the so-called “legislative initiative”. In this case, the draft of new criminal legislation was submitted by the Council of Ministers in August 2016.⁴ In most cases, draft laws must have a justification, which includes, for example, information on the motives for adopting a new law or the implications of the new law. The explanatory memorandum to

³ This provision had the following wording: ‘Art. 55a. 1. Whoever claims, publicly and contrary to the facts, that the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich, as specified in Art. 6 of the Charter of the International Military Tribunal enclosed to the International agreement for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945 (Polish Journal of Laws of 1947, item 367), or for other felonies that constitute crimes against peace, crimes against humanity or war crimes, or whoever otherwise grossly diminishes the responsibility of the true perpetrators of said crimes – shall be liable to a fine or imprisonment for up to 3 years. The sentence shall be made public. 2. If the act specified in clause 1 is committed unintentionally, the perpetrator shall be liable to a fine or a restriction of liberty. 3. No offence is committed if the criminal act specified in clauses 1 and 2 is committed in the course of the one’s artistic or academic activity’ (quoted: Act of 26 January 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the Act on War Graves and Cemeteries, the Act on War Graves and Cemeteries, the Act on Museums and the Act on Responsibility of Collective Entities for acts prohibited under penalty (Journal of Laws, item 369)), translation source: K. Gauba, *Rethinking ‘Memory Laws’ from a Comparative Perspective*, in: *The Indian Yearbook of Comparative Law 2018*, eds. M. Pal Singh, N. Kumar, Springer, Singapore 2019, p. 237.

⁴ Print of the Sejm of the 8th term No. 806, justification to the draft act amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the Act on War Graves and Cemeteries, the Act on Museums, the Act on Responsibility of Collective Entities for Acts Prohibited under Penalty and the Act on Prohibition of Promoting Communism or Other Totalitarian System by the Names of Buildings, Objects and Public Facilities, p. 1.

the draft act emphasized that the new criminal law regulations are to prevent falsification of history in the form of attributing responsibility for crimes committed by other nations to Poles,⁵ what, in the applicant's opinion, is to use mainly the terms "Polish death camp" and related terms.⁶ Statements of this kind correspond to the scope of the Auschwitz lie, also called "soft" by the literature.⁷ Art. 55a and 55b proposed in the Act were intended to supplement the pre-existing Art. 55 of this Act, penalizing the Holocaust denial in the strict sense.⁸ Both Art. 55 and Art. 55a of the Act on the Institute of National Remembrance had the task of preventing not only the Auschwitz lie, but also other manifestations of historical lies, such as the Katyń lie, for example.⁹

The second stage of the legislative process in the Polish legal system is, as a rule, its reading three times, as well as voting on it in both chambers of the Polish Parliament. The first such reading took place in October 2016.¹⁰ Only after a year and a half, i.e. on 25 and 26 January 2018, the second and third reading and voting of this law took place. It was a special moment – every year on January 27, International Holocaust Remembrance Day is celebrated, closely linked to the celebration of the liberation of the Auschwitz concentration camp. Instead of commemorating the victims and remembering the historical importance of those tragic events, the commemoration focused on discussing the voting of the Polish Parliament. During her speech at the event, the Israeli Ambassador to Poland, Anna Azari, called for an amendment to the proposed

⁵ Ibidem, p. 2.

⁶ Ibidem, p. 1.

⁷ R. Guzik, *Komentarz do ustawy o Instytucie Pamięci Narodowej – w zakresie zmian wprowadzonych ustawami z dnia 26 stycznia 2018 r. oraz z dnia 27 czerwca 2018 r.*, Lex, 2018, Art. 55a.

⁸ Ibidem.

⁹ W. Kulesza, "Kłamstwo o Auschwitz" jako czyn zabroniony w polskim i niemieckim prawie karnym, in: *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, ed. Ł. Pohl, Poznań 2009, p. 310.

¹⁰ The legislative process, <http://www.sejm.gov.pl/Sejm8.nsf/Przebieg-Proc.xsp?nr=806> (access: 28.10.2021).

law and stated that it was unacceptable. She also pointed out that the law will make it impossible for witnesses of the Holocaust to tell the historical truth.¹¹ Despite a number of critical voices, on 1 February 2018, the Polish Senate adopted the above law.

The last stage of the legislative process is to present the law to the President of the Republic of Poland for signature and to make a decision about it. The bill was signed by the President of the Republic of Poland on 1 February 2018,¹² and also addressed to the Constitutional Tribunal, which in Poland, among others, examines the compliance of laws with the Constitution. In this respect, this specialized court was to decide, inter alia, whether Art. 55a of the IPN Act is consistent with the right to freedom of speech, as well as whether this provision is sufficiently specified, i.e. whether its wording precisely determines what acts are considered a crime.

In addition to the Israeli ambassador to Poland, some of the former prisoners of the camp, including an Italian woman, Liliana Segre, joined the critical voices of the act, pointing out that the new regulations are a preparation for the denial of history.¹³ The new law has also been criticized in Germany.¹⁴ Also the US Secretary of State Rex W. Tillerson criticized the new regulations,¹⁵ as well did the European Commission Vice-President Frans Timmermans.¹⁶

¹¹ *Ambasador Izraela: Izrael wie, kto zbudował Auschwitz*, <https://www.rp.pl/Dyplomacja/180129352-Ambasador-Izraela-Izrael-wie-kto-zbudowal-Auschwitz.html> (access: 19.10.2021).

¹² *“Postanowiłem podpisać nowelę ustawy o IPN i skierować ją do TK”*, <https://www.prezydent.pl/aktualnosci/wydarzenia/art,883,postanowilem-podpisac-nowele-ustawy-o-ipn-i-kieruje-ja-do-tk.html> (access: 10.10.2021).

¹³ *Była więźniarka Auschwitz: ustawa o IPN to krok do negowania historii*, <https://dzieje.pl/aktualnosci/byla-wiezniarka-auschwitz-ustawa-o-ipn-krok-do-negowania-historii> (access: 19.10.2021).

¹⁴ *Niemiecka prasa krytykuje polską ustawę. “TAZ”: “Polacy chcą uniemożliwić dyskusję o kolaboracji”*, <https://www.gazetaprawna.pl/artykuly/1100817,-niemiecka-prasa-krytykuje-polska-ustawe-o-ipn.html> (access: 2.10.2021).

¹⁵ *US ‘disappointed’ over Poland’s new anti-defamation law*, <http://archiwum.thenews.pl/1/10/Artykul/348025,US-disappointed-over-Polands-new-antidefamation-law> (access: 29.10.2021).

¹⁶ *Polish “Holocaust law” meets soft response by EU*, <https://www.brusselstimes.com/news/eu-affairs/46317/polish-holocaust-law-meets-soft-response-by-eu/> (access: 21.10.2021).

Among Polish commentators, opinions were divided – there were both approving and opposing opinions on the new criminal law. The first ones appeared most often from people connected with the Polish ruling party – Law and Justice. Former Polish Prime Minister Beata Szydło assessed the new regulations highly positively.¹⁷ Prime Minister Mateusz Morawiecki said that the new penal provisions in the Act on the Institute of National Remembrance are necessary to defend the honor and image of Poland and this was to be guaranteed by the new penal provisions which, in his opinion, criminalized suggestions that Poles were responsible for genocide.¹⁸

On the other hand, the words spoken by Stanisław Karczewski (Law and Justice party), who was the Marshal of the Senate at the time, seem particularly shameful in the context of these provisions. He pointed out that until the Constitutional Tribunal ruled on the compatibility of the new criminal provisions with the Constitution – Art. 55a would not be applied in practice.¹⁹ There are no legal mechanisms in Poland that would allow for the non-application of regulations that have entered into force. Therefore, his words should be considered as completely contrary to the basic principles of Polish law.

However, it seems that in Poland opinions condemning the new penal provisions of the Act on the Institute of National Remembrance dominated. For example, the former Polish Prime Minister and at the same time an attorney – Jan Olszewski called the act “a legal bubble”. In his opinion, criminal regulations in this form

¹⁷ *Szydło o ustawie o IPN: Porozumienie nie może się odbyć kosztem prawdy*, <https://www.tvp.info/35833670/szydlo-o-ustawie-o-ipn-porozumienie-nie-moze-sie-odbyc-kosztom-prawdy> (access: 30.10.2021).

¹⁸ *Morawiecki: Ustawa o IPN jest konieczna, by bronić honoru i wizerunku Polski*, <https://www.rmfm24.pl/raporty/raport-spor-ustawie-ipn/fakty/news-morawiecki-ustawa-o-ipn-jest-konieczna-by-bronic-honoru-i-wi,nId,2549018> (access: 25.10.2021).

¹⁹ *Karczewski: Ustawa o IPN przez jakiś czas nie będzie działać*, <https://www.dorzeczy.pl/obserwator-mediow/56609/karczewski-ustawa-o-ipn-przez-jakis-czas-nie-bedzie-dzialac.html> (access: 30.09.2021).

could not prevent the use of the terms “Polish death camp”.²⁰ The public narrative omitted the aim of the act, which was to punish for “Polish death camps”. (the validity of the assumptions of the Act will be discussed later in the article). In turn, the Helsinki Foundation for Human Rights pointed out in its opinion that the new criminal regulations may threaten freedom of expression, and instead of criminal sanctions, it would be more sensible to introduce universal education, indicating what historical truth really looks like.²¹

It is worth noticing at this point that in June 2018, after all the criticism mentioned before and the question about the constitutionality of the provision, another amendment to this legal act was passed in Poland, thus, repealing the controversial criminal provisions.²² One of the reasons for the repeal was the United States’ government dissatisfaction, as well as the relations with other Poland’s allies.²³ This change of course was very welcomed by governments around the world²⁴ and the joint Polish-Israeli statement was signed on 27th June, where both governments agreed on promoting the education and preserving the memory of Holocaust as well as condemned the term “Polish death camps” and honored the acts of Poles that helped the Jews.²⁵ From this moment and on, these regulations do not apply. Thus, the Polish Constitution-

²⁰ J. Nizinkiewicz, *Jan Olszewski: Ustawa o IPN jest buble m prawnym*, <https://www.rp.pl/Konflikt-Polska-Izrael/302059911-Jan-Olszewski-Ustawa-o-IPN-jest-buble-m-prawnym.html> (access: 1.10.2021).

²¹ *The amendment to National Remembrance Institute Act adopted by the Sejm*, <https://www.hfhr.pl/en/the-amendment-to-national-remembrance-institute-act-adopted-by-the-sejm/> (access: 11.10.2021).

²² The Act of 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and the Act on the liability of collective entities for acts prohibited under penalty (Journal of Laws 2018, item 1277).

²³ *Poland’s Holocaust Law Weakened After ‘Storm and Consternation’*, <https://www.nytimes.com/2018/06/27/world/europe/poland-holocaust-law.html> (access: 21.10.2021).

²⁴ *Ibidem*.

²⁵ *Poland-Israel PMS’ joint declaration*, <https://polandin.com/37940818/polandisrael-pms-joint-declaration-text> (access: 21.10.2021).

al Tribunal did not manage to rule on their compliance with the Constitution. In January 2019, it discontinued proceedings in this respect.²⁶

2. Materials and methods

Continental, and in particular Polish legal science to study the described phenomena most often uses the so-called “dogmatic method”.²⁷ According to the views of Professor Władysław Wolter, this method consists in examining the legal language, i.e. individual words contained in the article. The above activities must also take into account the examination whether the penal provision fulfills the functions for which it was created.²⁸ The analysis of Art. 55a of the Act on the Institute of National Remembrance, presented in the further part of the article, will be based on the aforementioned method. What is more, the author will also try to indicate whether the above regulations could have fulfilled the functions for which they were created, i.e. whether, first of all, on the basis of these regulations someone could be effectively held criminally responsible, and thus sentenced for a crime, and secondly, whether, on the basis of these regulations, it was a crime to use the expression “Polish death camp”.

The Art. 55a of the Act on the Institute of National Remembrance is within a scope of law called ‘memory laws’, which are legislative enactments done to regulate the public memory of crucial historical events and to preserve state-sanctioned versions of

²⁶ *Nowelizacja ustawy o Instytucji Pamięci Narodowej*, <http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10463-nowelizacja-ustawy-o-instytucji-pamieci-narodowej/> (access: 27.10.2021).

²⁷ D. van Kędzierski, *Metodologia i paradygmat polskich szczegółowych nauk prawnych*, “Transformacje Prawa Prywatnego” 2018, No. 3, p. 5.

²⁸ R. Zawłocki, *O metodzie interpretacji przepisów prawa karnego*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2004, No. 4, p. 82.

history.²⁹ They can be divided into declaratory laws where there is no government action authorized, or regulatory laws with some government action, which can be further divided into non-punitive and punitive laws.³⁰ The Holocaust denial laws in Poland and the provision of Art. 55a of the Act on the Institute of National Remembrance, are regulatory, punitive laws, that are used to punish people that do not preserve the historical memory. The shape of memory law of a country reflects its history, depending on whether the country has been occupied, subject to mass murders and genocides or human rights violations.³¹ Researchers created the terms of an 'expressive weight' and 'substantive weight' statements, the first one being a statement that has the opportunity to be heard and discussed, the second being persuasive on factual or normative basis.³² There are correlations between those contexts, as a statement could have strong expressive and substantive weight, weak expressive and substantive weight or a mixture of both.³³ The claims of Holocaust denialists could have different contexts depending on person who speaks, the society, the education of recipients of a statement. As the Holocaust denial views are usually claims that have weak both the expressive and substantive weight, the law reflects that and aspires to dissipate them.³⁴ The idea of creating a Holocaust denial law for most countries is that it should allow free discussion about certain events, but also protect the memory of the victims and historical events. There are also risks that too harsh attitude of regulations could result in a reaction that strengthens the radical and undesirable views.³⁵ The provisions of Art. 55a of the Act on the Institute of National Remembrance were

²⁹ K. Gauba, *Rethinking 'Memory Laws'*, p. 236.

³⁰ E. Heinze, *Beyond 'memory laws': Towards a general theory of law and historical discourse*, in: *Law and Memory: Addressing Historical Injustice by Law*, eds. U. Belavusau, A. Gliszczyńska-Grabias, Cambridge 2017, p. 417.

³¹ *Ibidem*, p. 434.

³² *Ibidem*, p. 415.

³³ *Ibidem*, p. 423.

³⁴ *Ibidem*, p. 429.

³⁵ E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford 2016, p. 151.

not an ordinary ban on Holocaust denial, but went deeper with banning the discussion about the complicated situation of Polish population in Holocaust.

3. The analysis of objective terms

The first questionable term is “attribution of responsibility or co-responsibility”. A similar passage is contained seven times in the Polish Criminal Code.³⁶ The criminal law system assumes that identical statutory expressions should mean the same thing on the basis of different legal acts. The term “attribution of responsibility or co-responsibility” within the meaning of the Polish criminal code means a statement that it is a person who is the perpetrator of a given criminal act. Thus, the “attribution of responsibility or co-responsibility” means a statement that it is the Polish Nation or the Republic of Poland that are the perpetrators of the crimes that were in fact committed by the Nazis or other groups listed in the Act on the Institute of National Remembrance or that they were equally responsible for them as the actual perpetrators. The explanatory memorandum to the draft law clearly indicated that the introduction of Art. 55a of the Act on the Institute of National Remembrance would lead to the possibility of criminal prosecution of persons who use the terms ‘Polish death camp’ or ‘Polish concentration camp’.³⁷ It seems, however, that in this kind of facts, it is not possible to determine unequivocally whether the person who is saying these words aims to indicate the location of these camps (in the sense of: “on the territory of today’s Poland”) or really wants to accuse Poles of doing so. As for such statements, it will not be possible to state unambiguously which context has been formulated in them. Therefore, the legislator’s intention that

³⁶ Act of 6 June 1997 – Criminal Code (uniform text: Journal of Laws 2018, item 1600 as amended), hereinafter: CC.

³⁷ Print of the Sejm of the 8th term No. 806, justification to the draft act, p. 1.

these provisions should punish the statement “Polish camp” has not been fulfilled.

The aim of Art. 55a of the Act on the Institute of National Remembrance was to hold criminally responsible persons who claim that it is the Polish Nation or the Polish State that is responsible for the crimes. However, one should consider whether such acts were not already crimes under Polish law. The Act on the Institute of National Remembrance contains yet another, aforementioned, penal provision relevant to this study. According to Art. 55 of this legal act, it is a crime to deny the mentioned war crimes.³⁸ It seems, however, that by attributing responsibility to another nation there is in fact a denial that these crimes are called ‘Nazi’. In cases where the potential perpetrator accuses Poles, for example, of causing the Holocaust, he will deny that the crime is ‘Nazi’ by stating that it was ‘Polish’.

To sum up, the change of the perpetrator is penalized under Art. 55 of the Act on the Institute of National Remembrance, not because it meets the term “denies crimes”, but because it denies that the Nazis are responsible for it. Each of the above interpretations leads to the conclusion that Art. 55 of the Act on the Institute of National Remembrance has already sufficiently punished the attribution of responsibility for Nazi crimes to persons who were not their perpetrators. Thus, it should be stated that Art. 55a of the Act on the Institute of National Remembrance provides for a crime that already existed in Polish law (in terms of statements that the perpetrators of the crime were Poles).

Further negative statements in relation to Art. 55a of the Act on the Institute of National Remembrance concerned the term “contrary to the facts”. It was alleged that such a formulation of the provision could lead to the creation of a new, untrue version of history that would deny the annihilation or participation of Poles

³⁸ Anyone who publicly and contrary to the facts denies crimes referred to in Art. 1(1) shall be subject to a fine or the penalty of imprisonment of up to 3 years. The sentence shall be made public’ (quote from Act on the Institute of National Remembrance).

in some crimes against Jews.³⁹ However, the allegation that this solution was inappropriate cannot be accepted. First of all, this term also appears in the above-mentioned Art. 55 of the Act on the Institute of National Remembrance. In the practice of the judiciary, this term did not cause major practical difficulties. What is more, the interpretation of the term “facts” refers only to information which meets the requirements of reliability and scholarly integrity proper to historical sciences. The set of information that has been granted these qualities is not constant and unchangeable, because the data can be changed – this will be the case if a specific proof of truth is presented that the historical facts were different. It must, however, meet the requirements of reliability and scholarlyness mentioned here. In cases where the perpetrator is unable to do so and the facts he denies have been duly proven, he will commit a crime. On the other hand, in situations where the given facts are not confirmed historically – the term ‘contrary to the facts’ will not be met or the perpetrator will show proper research which confirms his theses – it will not be possible to speak of committing a crime under Art. 55a of the Act on the Institute of National Remembrance.

Much more interpretation problems than in the case of the term “contrary to the facts” are associated with the term “Polish nation”. This term also appears in the Constitution of the Republic of Poland and means “all citizens of the Republic”⁴⁰. The term “Polish Nation” in Art. 55a of the Act on the Institute of National Remembrance should, however, be interpreted by giving it a specific, legal and historical meaning. The question is whether it is an abstract collective entity, or people who make up the concept of the Polish Nation⁴¹. According to research these will be people who

³⁹ *Izrael potępia polską ustawę o IPN i wzywa do zmiany. MSZ odpowiada*, <https://www.rmfm24.pl/fakty/polska/news-izrael-potepia-polska-ustawe-o-ipn-i-wzywa-do-zmiany-msz-odp,nId,2515046> (access: 10.11.2021).

⁴⁰ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483).

⁴¹ Amicus Curiae brief by the International Association of Jewish Lawyers and Jurists in the matter of Polish President’s application to verify whether certain provisions of the Act of 18 December 1998 on the Institute of National

have Polish citizenship and are not only ethnically Polish.⁴² Due to the complexity of the history of the Second World War, it is not clear who exactly is the designation of this notion – i.e. for which moment the attribute of Polish citizenship should be determined. First of all, Polish citizenship before September 1, 1939 was held by other people than after the end of the warfare. The fact that the attack of Germany and the USSR did not deprive persons holding Polish citizenship before September 1, 1939, and the functional interpretation of that provision indicate,⁴³ that the designates of the term will be exclusively people who then (i.e. on 1 September 1939) had Polish citizenship. However, this interpretation is not sufficiently undisputed. It follows from the above that the term “Polish nation” is imprecise. Individual provisions of criminal law should be so clear that it is possible to clearly indicate what constitutes an offence and what does not. Otherwise, such a provision cannot be applied.

The term “Polish State” was another novelty compared to other Polish criminal law regulations. It is not synonymous with the term “Republic of Poland”, which consists of three elements: population, sovereign power and territory.⁴⁴ The definition of the population corresponds to the previously discussed term “Polish nation”, so it should be excluded from further analysis. Obviously, the territory itself, as an artificially defined borderline, cannot commit any crimes and it would be absurd to attribute them to it. Of the three factors mentioned above, only one remained, that is, sovereign power. It follows that the term “Polish State” should be interpreted

Remembrance – Commission for Investigation of Crimes Against Polish Nation (as consolidated in Journal of Laws 2016, item 1575, and subsequently amended), as amended by the Act to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation (Journal of Laws 2018, item 369), are compatible with Polish Constitution, https://www.ijl.org/wp-content/uploads/2018/06/Amicu_Curiae_ANG-scanned.pdf, p. 28 (access: 21.10.2021).

⁴² R. Guzik, *Komentarz do ustawy*, Art. 55a.

⁴³ The main function of this provision was to prevent the preaching of historical lies in the form of accusing Poles of Nazi crimes.

⁴⁴ P. Kardas, in: *Kodeks karny Część ogólna*, Vol. 1: *Komentarz do art. 1–52*, eds. W. Wróbel, A. Zoll, Warszawa 2016, p. 172.

precisely as “sovereign authority”. Here, too, one must take into account the specific nature of the crime of Holocaust denial, anchored at some point in history. In the years 1939–1945, two main Polish governments can be mentioned, i.e. the Polish National Liberation Committee and the Polish Government in London. It follows that, also in this case, it is impossible to clearly define which of the governments should be attributed the Nazi crimes in order to commit this crime. Thus, the term “Polish State”, as imprecise, is also not applicable in practice.

Another problem with Art. 55 of the Act on the Institute of National Remembrance was the term “grossly diminishes”. The linguistic interpretation leads to the interpretation of the term “grossly” as “striking, glaring”.⁴⁵ The same expression appears eleven times in the Polish Criminal Code, however, in none of these cases does the term refer to the number of phenomena, as it most often appears in the list “grossly violates the legal order”, referring to behaviours that violate fundamental principles in a drastic, demonstrative or persistent manner.⁴⁶ However, it is much easier to assess whether a given violation of the legal order is of a gross magnitude – this will be evidenced, for example, by the motivation of the perpetrator. On the other hand, diminishing the actual size of the crime under Art. 55a of the Act on the Institute of National Remembrance refers to statistics recognized by historians, where it is very difficult to draw a line between unpunished, non-threatening diminution of the number of victims, and punishable and gross diminution. For example, historians are mostly unanimous that approximately 1.1 million people died in Auschwitz-Birkenau.⁴⁷ For example, the reduction of the number of victims by half on the one hand still indicates the enormity of crimes committed there,

⁴⁵ S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 3: P–Ś, Warszawa 2003, p. 893, a Polish dictionary.

⁴⁶ V. Konarska-Wrzosek, in: *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Warszawa 2016, p. 409.

⁴⁷ *Narodowość i liczba ofiar Auschwitz*, http://70.auschwitz.org/index.php?option=com_content&view=article&id=65&Itemid=176&lang=pl (access: 25.10.2021).

but on the other hand completely omits the victim of 550 thousand people. So is it grossly?

In fact, the only “grossly” reduction that will not raise any doubts will be the proclamation of the theory that up to several hundred people died in Auschwitz. In most cases, these views accompany the statements of the negationists, who claim that this took place not as a result of the planned extermination, but because of illness and accidents. Often, therefore, this will already be a denial of the crime, with the consequence that it will be a crime under Art. 55 of the Act on the Institute of National Remembrance, and not under Art. 55a. Therefore, the provision that introduced the crime of “grossly diminishing the crime” was, on the one hand, unclear and, on the other, unnecessary. This is due to the fact that the criminal liability under Art. 55a, sec. 1 of the Act on the Institute of National Remembrance may have been brought very rarely, in a few factual states.

4. The analysis of subjective terms

As indicated above, the Polish science of criminal law distinguishes two types of terms contained in criminal law regulations. Firstly, these are objective terms, i.e. describing the offender’s behaviour, and secondly, subjective terms, which describe his or her psycho-intellectual relationship to the crime. This will of the perpetrator may occur in two basic situations. The first is when the offence is committed intentionally, when the perpetrator wants to commit it, or when he anticipates this possibility and agrees to it (in this case, the perpetrator does not want to commit it, he does not care). The second is when the offence is committed unintentionally, when the perpetrator has no intention of committing it, but commits it as a result of carelessness, even though he anticipated or could have anticipated the possibility of committing it.⁴⁸

In the Polish literature the authors indicate that the offence under Art. 55 of the Act on the Institute of National Remembrance

⁴⁸ Art. 9 CC.

consisting in denial of the crimes may be committed only if the perpetrator wants to commit this prohibited act.⁴⁹ The term ‘contrary to the facts’, which means that the perpetrator must be aware of these facts and, moreover, must be aware that he denies historically established events.⁵⁰

Assuming the above assumptions, it should be stated that the offence under Art. 55a sec. 1 of the Act on the Institute of National Remembrance can only be committed if the perpetrator wants to.

However, it seems that the psychological-intellectual relationship of the perpetrator to the crime under Art. 55 of the Act on the Institute of National Remembrance is not evidenced by the term “contrary to the facts”, but the verb “denies” – the legislator has not decided to use a much less explicit verb “questions”, which could indicate that the perpetrator may be indifferent. Referring to a linguistic interpretation, it should be considered that a very clear “denial” is proof that this offence can only be committed if the perpetrator wants to commit it. Thus, the issue of the form of an intention of a prohibited act under Art. 55a, sec. 1 of the Act on the Institute of National Remembrance is still unclear, because it cannot be interpreted in the same way as in the case of Art. 55 of the Act on the Institute of National Remembrance. Thus, an offence under Art. 55a sec. 1 of the Act on the Institute of National Remembrance can be committed both when the perpetrator wants to commit it or when he foresees such a possibility and agrees to it.

The Auschwitz lie crime under Art. 55a, sec. 2, could also be committed unintentionally, i.e. when the perpetrator is aware that in pursuing the goal he has set himself, he can fulfill the terms of the prohibited act, which he does not agree with and want, or when he is not aware that he can commit a prohibited act and

⁴⁹ M. Bojarski, W. Radecki, *Pozakodeksowe prawo karne*, Vol. 1: *Przestępstwa przeciwko pamięci narodowej, obronności, bezpieczeństwu osób i mienia, zdrowiu. Komentarz*, Warszawa 2002, p. 69, a Polish commentary on offences against national memory.

⁵⁰ *Ibidem*.

when it was objectively predictable.⁵¹ However, there is no such possibility as regards Art. 55 of the Act on the Institute of National Remembrance, i.e. denial of the crimes. Thus, in Art. 55a, sec. 2 of the Act on the Institute of National Remembrance, the legislator decided to extend criminal liability to a very large extent, especially in comparison with Art. 55 of the Act on the Institute of National Remembrance. It seems that unconscious denial of crimes, which is not a crime under Polish law, is much more harmful than, for example, their unconscious attribution or grossly diminishing.

The allegation of the possibility of restricting a fair public debate on the subject of the Holocaust and extermination was particularly well founded in this case. For example, this crime could have been committed by a person who was only meant to engage in a non-scientific discussion about the course of history, even if he or she had no knowledge of the facts, but should objectively possess it. Moreover, this provision does not establish a sufficient standard of care, that would allow to check whether the maker of the statement could attributed the responsibility for the war crimes to Polish Nation or Polish State and this attribution is clear for an average person.⁵²

Of course, it should be indicated that the application of this provision would be significantly limited, resulting from the aforementioned ambiguity of the terms of the act under Art. 55a, sec. 1 of the Act on the Institute of National Remembrance.

5. Lawful excuses from committing a crime under Art. 55a sec. 3 of the Act on the Institute of National Remembrance

Article 55a sec. 3 of the Act on the Institute of National Remembrance introduced a regulation according to which crimes were not committed by persons who grossly diminished the responsibility

⁵¹ W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2014, p. 218.

⁵² Amicus Curiae brief, p. 36.

of the perpetrators of crimes or attributed them to the Polish State or the Polish Nation, acting within the framework of scientific or artistic activity.⁵³

This provision can also be accused of being superfluous. An attack on the legal good is necessary to commit a crime in Polish criminal law. For example, a scientist who conducts research in order to revise certain historical facts, e.g. the number of victims, will not attack any legal good (e.g. victims' memory, historical truth), because he conducts this research according to the rules of art.

A person who, for example, directs a play about an alternative vision of history, without the events of the Second World War, does not attack this legal good. For instance, a French writer, Éric-Emmanuel Schmitt, wrote a novel entitled *The Alternative Hypothesis*, in which he describes an alternative version of Hitler's life if he had entered the Academy of Fine Arts. What if the author had described in it the absence of concentration camps? This is purely literary fiction, and so it does not infringe any legal good.

What is more, the provision also introduces a certain danger which results from the fact that people who really want to reduce the responsibility or attribute it to the Polish Nation or the Polish State can only act under the cover of artistic and scientific activity so as to freely preach their negationist theories. These acts will not be accompanied by the fear of incurring criminal liability.

6. Conclusion

This article presented the most important issues concerning the subject of the so-called "hard" Auschwitz lie, which was a crime in Poland from March 2018 until its repeal in June 2018. This provision deserves devastating criticism, because it was completely wrong, but also unnecessary.

First of all, there is a need to criticize the moment when the bill was drafted, under which the new provisions were to enter into force. This took place in January 2018. Every year, on

⁵³ Act of 26 January 2018.

January 27th, ceremonies commemorating the liberation of the camp in 1945 take place at the former Nazi concentration camp Auschwitz-Birkenau. The day is also celebrated as International Holocaust Remembrance Day. At such a time, it is the memory of the victims that should be the most important, and not a political debate about the legitimacy of regulations.

The new penal provision of Art. 55a of the Act on the Institute of National Remembrance was widely criticized, both abroad and in Poland. It was attacked by diplomats, politicians and historians alike. The provision was mainly, wrongly accused of blocking the desired historical debate. However, this accusation was not justified – under this provision, it was not possible to effectively convict someone for committing a crime. It was imprecise, unclear, and thus contradictory to the basic principles of the rule of law. Particularly imprecise subject terms were “Polish State” and “Polish Nation”, which resulted from the impossibility of interpreting these terms.

The legal provision, the aim of which was to punish “Polish death camps”, was not successful. It seems that a much better way to counteract such statements is to introduce a broad education about the history of the Second World War, especially about the fact that the camps Belzec, Treblinka, Sobibor, Kulmhof, Auschwitz, Majdanek or Gross Rosen are located on the territory of today’s Poland, but were built by the Third Reich and it is the Third Reich that is responsible for the millions of victims killed in them. Combating these statements by means of criminal law results in accusations of excessive restriction of freedom of speech, completely ignoring the factual discussion of historical facts. Sometimes, in the context of memory laws, not to legislate is also to legislate.⁵⁴

Particularly dangerous was the regulation of Art. 55a, sec. 3 of the Act on the Institute of National Remembrance, which provided that persons who act within the framework of scientific or artistic activity are not criminally liable. This could have led to the protection of perpetrators who would have been to proclaim historical untruth, only masking it with art or scientific research.

⁵⁴ E. Heinze, *Beyond ‘memory laws’*, p. 425.

The criminal responsibility for negationism in many cases can scare potential perpetrators of this type of crime by giving up their false theories. The criminal responsibility for negationism in many cases can scare potential perpetrators of this type of crime by giving up their false theories.

STRESZCZENIE

Krytyczna analiza art. 55a ustawy o Instytucie Pamięci Narodowej
(*de lege derogata*)

Artykuł jest poświęcony tematyce penalizacji kłamstwa oświęcimskiego na podstawie art. 55a ustawy o Instytucie Pamięci Narodowej, który to przepis był szeroko komentowany podczas 73. rocznicy wyzwolenia byłego nazistowskiego obozu koncentracyjnego Auschwitz-Birkenau. We wstępie zaprezentowano okoliczności towarzyszące uchwaleniu przepisu, jego główne założenia, a także opinie na jego temat, jakie pojawiały się w przestrzeni publicznej. Analiza tekstu prawnego została dokonana przede wszystkim z zastosowaniem metody dogmatycznej, z elementami metody funkcjonalnej, przy stopniowej analizie znamion tego przepisu. W dalszej części tekstu została zawarta krótka analiza prawno-porównawcza przedstawiająca regulacje innych państw. Ostatnia część jest krótkim podsumowaniem.

Słowa kluczowe: kłamstwo oświęcimskie; art. 55a ustawy o IPN; negacjonizm

SUMMARY

The critical analysis of Art. 55a of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (*de lege derogata*)

This article is presenting the Holocaust denial crime under Art. 55a of the Act on the Institute of National Remembrance, which was widely criticized during the 73rd anniversary of the liberation of the former Nazi concentration camp Auschwitz-Birkenau. The introduction to the text presents the circumstances surrounding the passing of this provision, its main

assumptions, as well as the opinions of particular persons about it. The study is dominated by the dogmatic method of conceiving the legal text, with elements of functional analysis. The legal part of the study includes an analysis of particular terms contained in the provision. In the next one, examples of other countries where denial of Nazi crimes is punishable are indicated. In the last part of the study, a summary can be found, containing the most important conclusions from the study.

Keywords: Holocaust denial; Art. 55a of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation; historical negationism

BIBLIOGRAPHY

- Ambasador Izraela: Izrael wie, kto zbudował Auschwitz*, <https://www.rp.pl/Dyplomacja/180129352-Ambasador-Izraela-Izrael-wie-kto-zbudowal-Auschwitz.html>.
- Amicus Curiae brief by the International Association of Jewish Lawyers and Jurists in the matter of Polish President's application to verify whether certain provisions of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation (as consolidated in Journal of Laws 2016, item 1575, and subsequently amended), as amended by the Act to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation (Journal of Laws 2018, item 369), are compatible with Polish Constitution, https://www.ijl.org/wp-content/uploads/2018/06/Amicu_Curiae_ANG-scanned.pdf.
- Bojarski M., Radecki W., *Pozakodeksowe prawo karne*, Vol. 1: *Przestępstwa przeciwko pamięci narodowej, obronności, bezpieczeństwu osób i mienia, zdrowiu. Komentarz*, Warszawa 2002.
- Była więźniarka Auschwitz: ustawa o IPN to krok do negowania historii*, <https://dzieje.pl/aktualnosc/byla-wiezniarka-auschwitz-ustawa-o-ipn-krok-do-negowania-historii>.
- Dubisz S. (ed.), *Uniwersalny słownik języka polskiego*, Vol. 3: *P–Ś*, Warszawa 2003.
- Gaubka K., *Rethinking 'Memory Laws' from a Comparative Perspective*, in: *The Indian Yearbook of Comparative Law 2018*, eds. M. Pal Singh, N. Kumar, Springer, Singapore 2019.

- Guzik R., *Komentarz do ustawy o Instytucie Pamięci Narodowej – w zakresie zmian wprowadzonych ustawami z dnia 26 stycznia 2018 r. oraz z dnia 27 czerwca 2018 r.*, Lex, 2018.
- Heinze E., *Beyond ‘memory laws’: Towards a general theory of law and historical discourse*, in: *Law and Memory: Addressing Historical Injustice by Law*, eds. U. Belavusau, A. Gliszczyńska-Grabias, Cambridge 2017.
- Heinze E., *Hate Speech and Democratic Citizenship*, Oxford University Press, 2016.
- Izrael potępia polską ustawę o IPN i wzywa do zmiany. MSZ odpowiada, <https://www.rmfm24.pl/fakty/polska/news-izrael-potepia-polska-ustawe-o-ipn-i-wzywa-do-zmiany-msz-odp,nId,2515046>.
- Karczewski: Ustawa o IPN przez jakiś czas nie będzie działać, <https://www.dorzeczy.pl/obserwator-mediow/56609/karczewski-ustawa-o-ipn-przez-jakis-czas-nie-bedzie-dzialac.html>.
- Kardas P., in: *Kodeks karny Część ogólna*, Vol. 1: *Komentarz do art. 1–52*, eds. W. Wróbel, A. Zoll, Warszawa 2016.
- Kędziński van D., *Metodologia i paradygmat polskich szczegółowych nauk prawnych*, “Transformacje Prawa Prywatnego” 2018, No. 3.
- Konarska-Wrzošek V., in: *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzošek, Warszawa 2016.
- Kulesza W., “Kłamstwo o Auschwitz” jako czyn zabroniony w polskim i niemieckim prawie karnym, in: *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, ed. Ł. Pohl, Poznań 2009.
- Morawiecki: Ustawa o IPN jest konieczna, by bronić honoru i wizerunku Polski, <https://www.rmfm24.pl/raporty/raport-spor-ustawe-ipn/fakty/news-morawiecki-ustawa-o-ipn-jest-konieczna-by-bronic-honoru-i-wi,nId,2549018>.
- Narodowość i liczba ofiar Auschwitz, http://70.auschwitz.org/index.php?option=com_content&view=article&id=65&Itemid=176&lang=pl.
- Niemiecka prasa krytykuje polską ustawę. “TAZ”: “Polacy chcą uniemożliwić dyskusję o kolaboracji”, <https://www.gazetaprawna.pl/artykuly/1100817,niemiecka-prasa-krytykuje-polska-ustawe-o-ipn.html>.
- Nizinkiewicz J., *Jan Olszewski: Ustawa o IPN jest bublek prawnym*, <https://www.rp.pl/Konflikt-Polska-Izrael/302059911-Jan-Olszewski-Ustawa-o-IPN-jest-bublek-prawnym.html>.
- Nowelizacja ustawy o Instytucie Pamięci Narodowej, <http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10463-nowelizacja-ustawy-o-instytucie-pamieci-narodowej/>.

Official English translation of the Act provided by the Institute of National Remembrance as at 16 June 2016, before the amendments, <https://ipn.gov.pl/en/about-the-ipn/documents/327/The-Act-on-the-Institute-of-National-Remembrance.html>.

Poland's Holocaust Law Weakened After 'Storm and Consternation', <https://www.nytimes.com/2018/06/27/world/europe/poland-holocaust-law.html>.

Poland-Israel PMs' joint declaration, <https://polandin.com/37940818/polandisrael-pms-joint-declaration-text>.

Polish "Holocaust law" meets soft response by EU, <https://www.brusselstimes.com/news/eu-affairs/46317/polish-holocaust-law-meets-soft-response-by-eu/>.

"Postanowiłem podpisać nowelę ustawy o IPN i skierować ją do TK", <https://www.prezydent.pl/aktualnosci/wydarzenia/art,883,postanowilem-podpisac-nowele-ustawy-o-ipn-i-kieruje-ja-do-tk.html>.

Szydło o ustawie o IPN: Porozumienie nie może się odbyć kosztem prawdy, <https://www.tvp.info/35833670/szydlo-o-ustawie-o-ipn-porozumienie-nie-moze-sie-odbyc-kosztem-prawdy>.

US 'disappointed' over Poland's new anti-defamation law, <http://archiwum.thenews.pl/1/10/Artykul/348025,US-disappointed-over-Polands-new-antidefamation-law>.

Wróbel W., Zoll A., *Polskie prawo karne. Część ogólna*, Kraków 2014.

Zawłocki R., *O metodzie interpretacji przepisów prawa karnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2004, No. 4.