

The New Polish 'Memory Law': A Short Critical Analysis

di Mikołaj Małeckie, Piotr Mikuli

Keywords: memory law; Holocaust law; Poland.

1. – The new Polish statute penalising the attribution of the Polish nation for taking part in Nazi crimes has evoked a number of discussions both in Poland and abroad, causing unnecessary tensions in the relations with Israel and with the US, as well as in a clash with Ukraine. This short article includes several critical comments related to the new statute from the perspective of constitutional and criminal law.

2. – The new statute was passed by the Sejm (the first chamber of Polish Parliament) on 26 January 2018 r. and by the Senate several days after. The President of the Republic, despite strong domestic and international criticism, decided to sign the statute and immediately refer it to the Constitutional Tribunal (within the so-called abstract *a posteriori* constitutional review). This action may rise justified doubts as to its correctness because according to the Polish Constitution, if the President of the Republic has constitutional objections towards a bill, he or she should refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution instead of signing it (M. Matczak, *Reviewing the Holocaust Bill: The Polish President and the Constitutional Tribunal*, *VerfBlog*, 2018/2/07, <https://verfassungsblog.de/reviewing-the-holocaust-bill-the-polish-president-and-the-constitutional-tribunal>, last access: 08.03.2018). In this context, the surprise has been much greater because in the justification of his application, the President described some questioned statutory regulations as creating a possible 'chilling effect' on the freedom of expression, which means that his constitutional objections were extremely serious. Because of the presidential decision, the statute will be a part of the generally binding law system until the Constitutional Tribunal's ruling. At the same time, President Duda expressed his conviction that the statute protects Polish interests, the dignity of Poles and the historical truth so that the Poles could be judged fairly in the world and not be slandered as a state and as a nation (See www.bbc.com/news/world-europe-42959076).

3. – The statute, from a formal perspective, constitutes an amendment to 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 and the Act on the Responsibility of Collective Entities for Acts prohibited under Penalty. The provision which has triggered the deepest emotion is the new Art. 55a para. 1 of the amended Act on the Institute of National Remembrance, according to which 'whoever publicly and contrary to the facts attributes to the Polish Nation or to the Polish State responsibility or co-responsibility for the Nazi crimes committed by the German Third Reich, as specified in Article 6 of the Charter of the International Military Tribunal -

Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, executed in London on 8 August 1945 (Journal of Laws of 1947, item 367), or for any other offences constituting crimes against peace, humanity or war crimes, or otherwise grossly diminishes the responsibility of the actual perpetrators of these crimes, shall be liable to a fine or deprivation of liberty for up to 3 years. The judgment shall be communicated to the public' (translation available at the official website of the Ministry of Justice, www.ms.gov.pl/pl/informacje/news.10368.nowelizacja-ustawy-o-ipn--wersja-w-jezyku.html, last access: 03.03.2018). Simultaneously, para. 2. of this article states that if the perpetrator of the act specified above acts unintentionally, he or she shall be liable to a fine or restriction of liberty. In turn, para. 3 stipulates that an offence is not committed if the perpetrator of the prohibited act acted within the context of an artistic or scientific activity.

4. – The above quoted provisions seem to not conform to several provisions of the Polish Constitution, such as the following: Art. 2 from which the so-called principle of decent legislation may be derived, Art. 42 para. 1 expressing the rule *nullum crimen sine lege* and Art. 54 para. 1 on the freedom to express opinions. In his application, the President argued that the provisions of the statute may be incoherent with the principle of proportionality included in Art. 31 para. 3 of the Constitution.

5. – The statute, first of all, does not meet the standards of a properly created and appropriately formulated repressive law. In this context, The President rightly paid attention to the fact that this requirement should be perceived in light of the general requirement of the specificity of legal regulations, which, according to case law of the Constitutional Tribunal, can be derived from the principle of a democratic state ruled by law, included in Art. 2 of the Constitution. It requires that legal provisions be expressed in a correct, precise and clear way. Doubts are induced by the term 'attributes', which has an evaluative character. In practice, as the President emphasises, a certain statement may include both factual and interpretative elements. The President also questioned the phrases used in the other statute provisions which criminalise the denial of crimes committed by 'Ukrainian nationalists' and members of Ukrainian formations collaborating with the German Third Reich. According to the President, the wording 'Ukrainian nationalists', in particular, is unclear and, in this connection, also raises justified doubts in conformity with Art. 2 of the Constitution.

Furthermore, the statutory expression indicating criminal exemption if an act has been committed within an artistic or scientific activity is too ambiguous, as the precise definition of these activities does not exist. We can add that this wording may lead to the conclusion that the formulation of a thesis which is inconsistent with the facts as a part of a lecture popularising science or a lecture by a history teacher (in this case, it is considered only as education, not science) raises the risk of responsibility for defaming the Polish nation or the Republic of Poland for co-responsibility in Nazi crimes (reminder: the act does not have to be committed intentionally!).

6. – The juxtaposition of the definition of an offence and the above-mentioned exclusion of responsibility by referring to an artistic or scientific activity makes setting the scope of an illegal act difficult. This is why it infringes the *nullum crimen sine lege* rule expressed by Art. 42 para. 1. In practice, an organ executing the law would have wide discretionary power to determine what constitutes an infringement of the statute. This is also doubtful from the point of view of a proportional test prescribed by Art. 31 para. 3 of the Constitution. The Constitution provides that 'Any limitation upon the exercise

of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights'. According to the Constitutional Tribunal, one of the criteria that should be considered in assessing the limitation of a constitutional right or a freedom is whether it is necessary (essential) for the protection of interests with which this limitation is connected. Whether the questioned regulation could pass this test is highly doubtful. The freedom to express opinions is a prerequisite in a democratic state, and the President rightly referred to the hitherto constitutional case law and emphasised that the term 'opinion' encompasses a wide scope of statements that are therefore not only interpretative but also descriptive. In this context, words about a possible 'chilling effect' restricting the freedom of speech have been made here. Another important accusation that could be made against the statute is that in the scope of the questioned regulation, the principle of territoriality is limited. It states that the law will be applicable to a Polish citizen, as well as a foreigner, in the event of the commission of the offences, irrespective of the law being applicable at the place of commission of the prohibited act (Art. 55b). This makes the effectiveness of the law highly doubtful, as other states usually prohibit the extradition of their citizens, and the possible handing over of a perpetrator is connected with criminalisation of the act also by their own law. In principle, the same can be said in the context of the procedure of the European Arrest Warrant.

7. – To sum up this part of the paper, we are of the opinion that the arguments contained in the president's application deserve full recognition. We believe that the Constitutional Tribunal should recognise the unconstitutionality of the challenged provisions. Yet, the sentence will possibly have an interpretative character by either finding its constitutionally acceptable understanding or by determining its unconstitutional excludible construction.

8. – Apart from constitutional reference norms, the described statute seems to evoke doubts as to its conformity with Art. 10 of the European Convention of Human Rights (ECHR), which is a counterpart of Art. 54 para. 1 of the Polish Constitution. These doubts remain because of a possible similar argumentation, despite the fact that the European Court of Human Rights elaborated in such cases an exceptional regime based on the so-called abusive clause included in Art. 17 of the Convention (P. Lobba, 'Holocaust Denial', *The European Journal of International Law* Vol. 26 no. 1, 237–253). On this basis, the ECHR accepted the criminalisation of Holocaust denial in some European countries. In particular, the unintentional part of an offence seems not to be in conformity with the proportional principle as not necessary in a democratic society (I.C. Kamiński, 'Trzeba przemyśleć ustawę o IPN', *Gazeta Prawna*, 08.03.2018) This remark is quite important because the right of an ordinary Polish court to review statutes on the basis of their inconformity with the Convention is not questioned. Thus, it may happen, notwithstanding the Constitutional Tribunal approach in the discussed matter. Moreover, one may also argue that a pro-constitutional interpretation should always be used by ordinary courts, especially before the Constitutional Tribunal's ruling. This is described as the so-called direct application of the Constitution. The court could make an appropriate modifying interpretation of the statute by referring to the above-mentioned constitutional reference norms.

9. – The discussed regulations also raise doubts from the perspective of criminal (repressive) law creation standards. It should be noted in the first place that the adopted regulation cannot achieve the basic purpose of its introduction articulated in the explanatory statement to the governmental draft as follows:

‘For many years in public discussion, also abroad, have been appearing such terms as ‘Polish death camps’, <Polish extermination camps>, or <Polish concentration camps>. It happens that such terms are repeatedly used by the same persons, press titles, television or radio stations. There are also publications and auditions that deliberately falsify history, especially the latest one. There is no doubt that such statements, contrary to the historical truth, have significant consequences directly damaging the good name of the Republic of Poland and the Polish Nation, and act destructively on the image of the Republic of Poland, especially abroad. They cause the impression that the Polish Nation and the Polish State are responsible for the crimes committed by the Third German Reich.

[...] In this state of affairs, it is necessary to create effective legal instruments allowing Polish authorities for persistent and consistent historical policy in the field of counteracting falsification of Polish history and protection of the reputation of the Republic of Poland and the Polish Nation’.

The drafter of the discussed statute assumed that the introduced regulation would allow the prosecution of perpetrators by using the term ‘Polish death camps’ or those analogous to it (case of Barack Obama, see *White House apologizes for Obama’s ‘Polish death camp’ gaffe*, “The Times of Israel,” www.timesofisrael.com/obama-offends-poles-in-death-camp-slip-up, last access: 03.03.2018). The content of the adopted Art. 55a para. 1 does not, however, authorise such an opinion. According to this provision, as already mentioned, criminal responsibility depends on attributing responsibility or co-responsibility to the Polish nation or to the Polish State for Nazi crimes or for other crimes against peace and humanity, or for war crimes. The very use of the controversial term with the adjective ‘Polish’ to name one of the concentration camps (extermination camps) located in the occupied Polish Republic cannot be considered an attribution of a specific crime to the Polish nation.

First, this term cannot be interpreted without taking into consideration the context in which it was formulated. For example, the controversial statement of the former US President at the ceremony of honouring the Polish hero Jan Karski with the Presidential Medal of Freedom did not obviously include the statement attributing to the Poles the crimes committed by the Third German Reich.

Second, the term ‘Polish extermination camp’ does not indicate the commitment of an alleged specific crime by the Polish Nation because, in accordance with the properties of a natural language (e.g. English), this term may only indicate the location, in a geographical sense, of the certain object referred to (i.e. the death camp located in Poland but not built or supervised by the Polish State).

Third, Art. 55a para. 1 requires the issuance of a statement contrary to facts (‘against the facts’). It must be noted, however, that only sentences, not words or terms, can be in accordance with facts or contrary to them. In itself, the phrase ‘Polish death camp’ is neither false nor true without considering its context and the content of the whole statement.

The presented considerations show that the adopted provision is in conflict with the basic principle of substantive criminal law, according to which criminal provisions should be enacted only if they can realise the objective of protecting a specific legal good set by the legislator. In addition, the provisions of the law should clearly reflect the assumptions adopted by the legislator on which the criminalisation is based. In the discussed case, the content of the law does not match the idea of this law presented by

the drafter of the discussed Act. However, this did not stop the drafter from claiming that the degree of threat to the interests of the Republic of Poland requires a radical reaction, one aimed at the criminalisation of the usage of the indicated terms in public space, which was to be addressed by the amendment (therefore, it is an example of so-called penal populism - J. Pratt, *Penal Populism*, London: Routledge 2006; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2012, 62–63).

10. – The analysis of the elements of the prohibited act stated in Art. 55a raises further doubts concerning the scope and meaning of certain premises of criminal liability.

The false attribution of responsibility for a crime to a specific person or even to a group of people does not mean that the commitment of this crime is attributed to the entire nation or state. The discussed provision requires, as it may seem, a general formula that indicates the responsibility of the entire nation or state. Therefore, such a statement as 'Inhabitants of village of XYZ, who were Poles, murdered Jews', if it turns out to be contrary to the facts, should not be punishable because it does not attribute responsibility to the Polish nation or the Polish State but only to a specified group of people. Doubts in this context are also raised by the notion of a 'nation' because it does not have an unambiguous legal definition (See *Black's Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, ed. H. Campbells Black, St. Paul, Minn. West Publishing CO.1968, 1175, <http://heimatundrecht.de/sites/default/files/dokumente/Black'sLaw4th.pdf>, last access: 03.03.2018).

11. – One of the elements of the analysed crime is to act 'against the facts'. A statement diminishing responsibility for the crimes committed by a particular regime, if it can be verified in terms of compliance or non-compliance with facts, must be one that concerns facts, not just an assessment of or an opinion about facts. For example, the making of the statement 'The Nazis murdered only a few Poles in the extermination camps' will not be punishable because it is only an assessment/opinion about the scale of Nazi crimes, not the reduction of Nazis responsibility contrary to facts. In this case, the word 'many', as used in the quoted sentence, plays a crucial role. Facts do not indicate whether many or only a few victims are involved. Depending on the context, there can be relatively many of them or relatively few. Thus, only those statements that point to objectively verifiable data, for example, the specific number of victims which is undisputedly false or the occurrence or non-occurrence of certain events (denial of the Holocaust as a whole), are subject to the discussed criminal provision. The requirement to issue a statement 'against the facts' assumes that the incriminated statement must refer to the events already sufficiently researched and described in the scientific literature, however this expression was already used in the original version of the law, i.e. before the amendments and referred to the denial of Nazi and communist crimes. Thus, the process of discovering the truth or of obtaining data that allows the establishment of facts cannot be punishable. The testimonies of witnesses about certain events that allow the verification of older hypotheses, even if they prove to be negative for people of Polish nationality, do not constitute this new crime.

The type of prohibited act described in Art. 55a para. 2 seems to be contrary to the standards of repressive law. According to this Article, as we mentioned at the beginning of this paper, criminal liability is also provided for the unintentional commitment of the discussed crime. The perpetrator does not need to be aware that he or she makes a claim contrary to the facts or to know that he or she does it publicly, or even to realise that he or she ascribes to the Poles the responsibility of participating in a specific crime that falls into the category of offenses listed in Art. 55a para. 1. This

criminalisation, including cases that should be dealt with through a civil law response or diplomatic action, is too far reaching.

12. – The above considerations do not allow the positive assessment of the adopted amendment to the Act on the Institute of National Remembrance neither from the perspective of constitutional nor criminal law. One more issue should also be noted here. Independent of the rational arguments presented by the President in his application, the problem of delegitimising the Polish Constitutional Tribunal exists. The Tribunal was captured by the ruling Law and Justice party by a number of measures taken in the last two years. The Tribunal's situation must be perceived on the wider context of undermining the independent constitutional institutions safeguarding the rule of law (see for instance: T.T. Koncewicz, *Constitutional Capture in Poland 2016 and Beyond: What is Next?* (<http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next>); P. Mikuli, *An Explicit Constitutional Change by Means of an Ordinary Statute? On a Bill Concerning the Reform of the National Council of the Judiciary in Poland*, Int'l J. Const. L. Blog, Feb. 23, 2017, at: www.iconnectblog.com/2017/02/an-explicit-constitutional-change-by-means-of-an-ordinary-statute-on-a-bill-concerning-the-reform-of-the-national-council-of-the-judiciary-in-poland; M. Matczak, *Self-defence of public institutions in the Polish constitutional crisis*, *VerfBlog*, 2017/6/03, <https://verfassungsblog.de/self-defence-of-public-institutions-in-the-polish-constitutional-crisis> last access: 10.03.2018). One of the most important delegitimation factors involves including on the bench three persons who were elected as constitutional judges by the current Parliament, despite the fact that the previous Parliament filled these vacancies. Even though these unduly elected judges were not appointed to the panel, which is supposed to rule on the presidential application, oddly enough, all the five judges in the panel were elected by the current Parliament, whilst the law on the Constitutional Tribunal stipulates that judges should, in principle, be designated in alphabetic order. These five judges, however, seem not to be chosen in this manner. The diplomatic crisis in relation to the important foreign partner countries, as well as the worldwide criticism of the new Polish memory law, makes one suggest that the hitchhiked Tribunal may be simply used to mitigate the disputes. Thus, a danger exists that the verdict will not be a result of deep legal analyses but will rather be an instrument for the political resolution of the problem.