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WAKING UP DEMONS: BAD LEGISLATION FOR AN EVEN WORSE CASE

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ABSTRACT: Recent history knows few cases of national legal regulations which receive such a negative echo as the Polish Act on the Institute of National Remembrance of 14 February 2018 amending the Act on the Institute of National Remembrance. This Act introduces criminal liability for attributing responsibility or co-responsibility for Nazi crimes committed by the Third Reich to the Polish State or Nation. One of the objectives of the Act was to create a mechanism to prevent the use of the term "Polish death camps" to describe Nazi concentration camps. This direct objective is also an element of the Polish authorities' persistent and consistent historical policy to prevent the falsification of Polish history and to protect the good name of the Republic of Poland and the Polish Nation. One of the unusual aspects of the Act was its immediate signing into law by the President of the Republic of Poland who, on the day of its promulgation, submitted a motion to the Constitutional Tribunal to consider its most important regulations as violating the Polish Constitution. However, the Constitutional Tribunal had no chance to consider the President's motion in the part concerning criminal responsibility because the Polish Parliament overturned the most controversial regulations concerning criminal responsibility in June 2018. The legislative process now over, the President's request for control of constitutionality regarding other parts of the Act is currently pending. Meanwhile, the dispute over the essence of Poland's "historical policy" is ongoing.

KEYWORDS: anti-semitism – Nazi crimes – defamation of a nation – memory laws – memory governance – Institute of National Rememberance.

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I. Introduction

Happy is a society that is able to evaluate the history of its own nation as objectively and neutrally as possible, with its most beautiful (which is easy) and most dramatic events (which is not). This applies both to distant history and, what is more difficult, recent history. Polish society, like other societies, has a serious problem with this. This is particularly true concerning the Second World War, when Poland was occupied first since 1939 by Germany and the Soviet Union (1939-1941), and, from June 1941, only by Germany. The problem concerns, among others, various behaviors – some of them criminal – of certain members of society towards their fellow citizens, the fight against the occupation authorities, but also – as it happened – the cooperation of individual citizens with the occupier. A special element of the war's drama was the establishment by the Germans of several large extermination camps in occupied Poland, in which millions of European citizens, in particular Polish and European Jews, were murdered.[1] The fact that the death camps were located on German-occupied territories belonging to Poland resulted in the creation of the term "Polish death camps", which had no justification in the facts or in the language describing the events of the Second World War. These were German death camps, located on the territory of Poland occupied by the Germans. Poland, which did not exist as a State in 1939-1945, had nothing to do with German death camps. However, the language cliché was surprisingly durable: the death camps were located in occupied Poland, so they were "Polish" death camps. This inaccurate language *cliché* was also defamatory, for it presupposed the responsibility or co-responsibility of the Polish nation or the Polish State for crimes committed by the German or Soviet occupiers.[2]

II. The legislative initiatives of 2006

The authorities of the Republic of Poland reacted in different ways to public allegations – made both in the mainstream press and social media – that the Polish nation and State were complicit in the participation of German and Soviet crimes during the Second World War. One such reaction in 2006 was the amendment of the Penal Code by adding Art. 132a. This provision provided that "anyone who publicly accuses the Polish Nation of participating in, organising, or being responsible for communist or Nazi crimes may be imprisoned for up to 3 years". At the same time, the Penal Code was amended in such a way

[1] T. Snyder, *Bloodlands: Europe Bertween Hitler and Stalin*, New York: Basic Books, 2012. On Holocaust memory in Eastern Europe, including Poland, see J. Subotić, *Yellow Star, Red Star. Holocaust Rememberance after Communism*, Ithaca, London: Cornell University Press, 2019.

[2] See Nikolay's Koposov's discussion on the special form of self-victimisation in Eastern Europe in the first part of this Special Section: N. Koposov, *Historians, Memory Laws, and the Politics of the Past*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 107 *et seq*.

that not only Polish citizens, but any person could be liable for slander, regardless of the provisions in force in the place where the crime was committed.[3]

The justification for the 2006 Penal Code's amendment – a provision that was originally contained in the Act on the Institute of National Remembrance (IPN), and was then transferred to the penal code by the Senate – highlighted the necessity of prosecuting slander, because: "very often in the international arena we witness false accusations directed against both the Nation and Polish citizens about alleged help or collaboration with criminal regimes – Nazi and communist. The proposed change is to equip the Institute of National Remembrance with new tools aimed at improving and accelerating the prosecution of such crimes and defending historical truth".[4] It is interesting that there is no reference to the notion of "Polish death camps" in the explanatory memorandum to this draft legal regulation. The explanation is simple – the parliamentary legislative initiative (20 members of the League of Polish Families) was a reaction to the publication of Tomasz Gross's book *Neighbors* describing the crime committed in 1941 in Jedwabne.[5] The inhabitants of the village of Jedwabne, under the supervision of the German authorities occupying the territory of Poland, took part in the murder of about 300 neighbors of Jewish origin. This was the reason why this initiative was named "lex Gross" in journalism, including legal journalism.[6]

The Ombudsman contested the Act's constitutionality before the Constitutional Tribunal by alleging that legislators violated Art. 54, para. 1, of the Polish Constitution, which guarantees to everyone the freedom to express opinions, to acquire and to disseminate information, as well as Art. 73 of the Constitution which guarantees to everyone the freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture. The Ombudsman linked the violation of the aforementioned constitutional provisions with the violation of the principle of proportionality in the operation of public authority (Art. 31, para. 3, of the Constitution). The Ombudsman further argued that the regulation contained in the Criminal Code may lead to a situation in which awareness of the threat of criminal sanctions will produce the effect of refraining from public statements and sci-

[3] See K. Wierczyńska, *Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a Ground for Prosecution of Crimes against Humanity, War Crimes and Crimes against Peace*, in *Polish Yearbook of International Law*, 2017, p. 275 *et seq.*; I.C. Kamiński, *Kontrowersje prawne wokół przestępstwa polegającego na pomawianiu narodu o popełnienie zbrodni*, in *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2010, p. 5 *et seq.*

[4] Poselski projekt ustawy o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu oraz o zmianie niektórych innych ustaw, druk 334 (Parliamentary print no. 334/V kad.).

[5] T. Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland*, Princeton: Princeton University Press, 2001.

[6] I.C. Kamiński, *Kontrowersje prawne wokół przestępstwa polegającego na pomawianiu narodu o popełnienie zbrodni*, cit., p. 7.

entific research on communist and Nazi crimes, which may lead to the limitation of public debate on the recent history of Poland.[7]

In its ruling in 2008, the Constitutional Tribunal did not assess the compliance of the contested provisions against freedom of speech and freedom of scientific research and artistic creation as enshrined in the Constitution. Instead, the Trubunal found procedural violations in the legislative process, which it found was a sufficient reason for rendering the relevant provisions unconstitutional. The procedural violations consisted in the introduction of a provision to the penal code which was not subject to the full legislative procedure required to incorporate changes to the codes, but was added to the penal code at the last stage of legislative work (an amendment of the Senate approved by the Sejm).[8]

III. The 2018 amendments to the Act on the Institute of National Remembrance

Twelve years after the 2008 Constitutional Tribunal's decision concerning the 2006 amendments, the issue of accusing the Polish Nation of committing a specific type of crime has again become the subject of legislative work. In January 2018, a law amending the Act on the Institute of National Remembrance came into force, which introduced a new crime to the act, punishable by imprisonment of up to three years: publicy and falsely "attributing responsibility or co-responsibility to the Polish Nation or to the Polish State for the crimes committed by the German Third Reich" as specified in the Charter of the International Military Court or "for any other crimes that are crimes against peace, crimes against humanity or war crimes, or who otherwise glaringly trivializes the responsibility of their actual perpetrators" (Art. 55, let. a). The amendment further expanded the list of crimes covered by the Act on the Institute of National Remembrance to "crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich" (Art. 1, let. a) and labelled as genocide crimes committed by "Ukrainian nationalists" against Polish citizens on the territory of Volhynia and eastern Lesser Poland (Art. 2).[9]

The similarity begins and ends with the fragment of the regulation which concerns Nazi or communist crimes and extends responsibility to all persons, regardless of nationality and place of residence, who committed the crime.

Let us therefore consider the differences between the 2006 Act and the 2018 Act, which are both formal in nature and are primarily related to the scope and substance of the 2018 Act.

[7] Substantation of the Appeal of the Ombudsman of 15 January 2007, RPO-545868-II-06/ST.

[8] Constitutional Tribunal, judgment of 19 September 2008, K5/07.

[9] See P. Grzebyk, *Amendements of January 2018 to the Act on the Institute of National Rememberance – Commission for the Prosecution of Crimes Against the Polish Nation in Light of International Law*, in *Polish Yearbook of International Law*, 2017, p. 287 *et seq.*

First of all, the 2018 Act, which is the subject of the current legal and political controversy, provides for criminal liability for the crimes specified in it, but does not, as in the previous Act, change the Penal Code. Legislators seem to have learned a lesson from the previous regulation and, by decodifying the penal code once again, amended the Act on the Institute of National Remembrance and other acts, and not the Penal Code.

Secondly, although the original proposal was drafted by a group of parlimentarians, the final draft of the 2018 law was delivered to Parliament by the government. Indeed, the government took over the parliamentarian's initiative and extended the scope of the proposed regulation. The government's legislative initiative is related to the need for meeting requirements related to, among others, justifying the need for the proposed change in the existing legislation, subjecting the draft legislation to interministerial agreements, and indicating the effects of regulations and other requirements aimed at, among others, reducing the initial level of irrationality and unconstitutionality of the legislative initiative.

Thirdly, the drafters changed the scope of the IPN's tasks, by specifying in Art. 1, para. 1, of the 2018 Act which provides for the recording, collection, storage, preparation, security, access to and publication of documents of security authorities of the Polish State, which have been created and collected from 22 July 1944 to 31 July 1990. Importantly, that article also addresses access to and publication of documents of security authorities of the Third German Reich and the Union of Soviet Socialist Republics "concerning crimes on the persons of Polish nationality or Polish citizens of other nationalities committed between 8 November 1917 and 31 July 1990: Nazi crimes; communist crimes; crimes commited by the Ukrainian nationalists and the members of Ukrainian formations collaborating with the Third German Reich as well as other crimes constituting crimes against peace, humanity or war crimes".

The legislators defined the above-mentioned notion of "crimes committed by Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich" as:

> "acts committed by Ukrainian nationalists between 1925 and 1950, consisting in the use of violence, terror or other forms of human rights violations against individuals or groups of people. The crime of Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich means also participation in the extermination of the Jewish population and genocide against the citizens of the Second Republic of Poland in the areas of Volhynia and Malopolska".[10]

Fourthly, the legislature introduced the concept of protection of the good name of the Polish Nation, but also added the protection of the good name of the Polish State, in

[10] Malopolska Wschodnia was a geographical and administrative term describing the part of the territory of Poland in the years 1918 and 1939 in the the east-south part of Poland.

such a way that the provisions of the Act of 23 April 1964 concerning the protection of personal rights are applicable to the protection of the good name of the Republic of Poland and the Polish Nation. A legal claim for the protection of the good name of the Republic of Poland or the Polish Nation may therefore be brought by a non-governmental organisation within the scope of its statutory tasks. In this case, the State Treasury shall be entitled to compensation or reparation. Legal claims for the protection of the good name of the Republic of Poland or the Polish Nation may also be brought by the Institute of National Remembrance, which has judicial capacity in these matters. This regulation applies regardless of which state law is applicable, and therefore in fact extends the scope of application to the whole world.

Fifthly, and this is particularly important from the standpoint of the Constitutional Tribunal's decision analyzed in the following sections, a new type of offence has been introduced into the system of Polish law, stipulating that whoever publicly and contrary to the facts attributes to the Polish Nation or the Polish State responsibility or co-responsibility for Nazi crimes committed by the Third German Reich as defined in Art. 6 of the Charter of the International Military Tribunal annexed to the International Agreement on the Prosecution and Punishment of the Basic War Criminals of the European Axis, signed in London on 8 August 1945, or for other crimes constituting crimes against peace, humanity or war crimes, or otherwise grossly diminishes the responsibility of the actual perpetrators of these crimes, shall be subject to a fine or imprisonment for up to three years (Art. 55, let. a) of the Act).

Legislators did not, as before, use the notion of "slander" but introduced the notion of "imputation". It is important to mention that under the Penal Code the notion of slander is known, especially in connection with the crime of defamation (Art. 212 of the Penal Code). Established jurisprudence allows for a relatively precise definition of the term, thus limiting the risk of abuse of a norm of criminal law in the process of its application. However, criminal law does not know the notion of "imputation".

The 2018 Act, in order to determine the essence of the crime, refers to the Charter of the International Military Tribunal. Art. VI of the Charter defines the notions of crimes against peace, war crimes and crimes against humanity.

A crime against peace, as defined in the Nuremberg Charter, is "the planning, preparation, initiation or conduct of a war of aggression or war in violation of international treaties, agreements or guarantees, or complicity in a plan or collusion to commit one of the acts mentioned". The Nuremberg Charter further defines war crimes as:

> "violations of laws and customs of war. Such violation shall include, but is not be limited to, the murder, wrongful handling or deportation for forced labour or other purposes of the civilian population in or from the occupied territory, the murder or wrong handling of prisoners of war or persons at sea, the killing of hostages, the robbery of public or

private property, the thoughtless demolition of settlements, towns and villages or the havoc not justified by the necessity of war".[11]

Finally, crimes against humanity, as defined in the Nuremberg Charter, comprise "murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during war or persecution for political, racial or religious reasons in connection with the committment of any crime within the jurisdiction of, or in connection with the competence of the Tribunal, whether consistent with or contrary to the law of the country in which the crime was committed".

Furthermore, the Nuremberg Charter provided that "leaders, organisers, instigators and accomplices participating in or complicit in the formulation or implementation of a common plan, or in a conspiracy to commit any of the above crimes, are liable for any acts committed by or in connection with the implementation of any such plan".[12]

Sixth, the 2018 Act allows for the possibility of committing an act of imputation of responsibility or co-responsibility for the aforementioned crimes to the Polish Nation or the Polish State as an unintentional act. In such a case, the perpetrator of the act shall also be subject to a fine or a penalty of restriction of liberty. Moreover, the judgment for the crime described above is to be made public by law.

Seventh, the Act stipulates that liability for the crimes referred to in Arts 55 and 55, let. a), is not only borne by natural persons, but also extends to "collective entities". A collective entity is a legal entity as well as an organisational unit without legal personality, to which other provisions grant legal capacity; at the same time, the State Treasury, territorial self-government units and their associations are not considered as collective entities. Moreover, a collective entity is also a commercial company with Treasury shareholding, a local government unit or an association of such units, a capital company in an organisation, an entity in liquidation and an entrepreneur who is not a natural person, as well as a foreign organisational unit. The Act also envisages the responsibility of the collective entity for: *1*) acting on behalf of or in the interest of the collective entity in the framework of a power or obligation to represent it, to make decisions on its behalf or to exercise internal control, or if this power or obligation is exceeded or not fulfilled; *2*) be allowed to act as a result of the exceeding of rights or failure to fulfil obligations by the persons mentioned above; *3*) acting on behalf of or in the interest of a collective entity, with the consent or knowledge of the aforementioned person; *4*) being an entrepreneur who directly cooperates with a collective entity to achieve a legitimate aim, if the conduct has resulted or could have resulted in the conduct of the entity.

Eighth, the 2018 Act contains an exception stating that anyone attributing responsibility or co-responsibility for acts specified in Art. 55, let. a), of the Act on the Institute of

[11] Charter of the International Military Tribunal of 8 August 1945, reproduced in UN Doc. A/CN.4/5 (1949), p. 4.

[12] *Ibid*.

National Remembrance to the Polish Nation or the Polish State does not commit a crime if they act within the framework of artistic or scientific activities.

Moreover, in the course of legislative work, two new elements of regulation were added, which were not included in the draft Act. Firstly, the Act changed the scope of activity of the INP by specifying in its Art. 1, para. 1, that it regulates the recording, collection, storage, preparation, security, access to and publication of documents of state security authorities created and collected from 22 July 1944 to 31 July 1990 as well as of security authorities of the Third German Reich and the Union of Soviet Socialist Republics "concerning persons of Polish nationality or Polish citizens of other nationalities committed in the period from 8 November 1917 to 31 July 1990", Nazi crimes, communist crimes, crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich, other crimes constituting crimes against peace, humanity or war crimes. Secondly, the law introduces a definition of the crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich.

IV. Submitting the 2018 Act to the Constitutional Tribunal

The Act of 26 January 2018 amending the Act on the IPN was signed by the President of the Republic of Poland on 12 February 2018 and published on 14 February 2018. The Act entered into force on 1 March 2018.

On the day the Act was published, the President of the Republic of Poland submitted a request to the Constitutional Tribunal to examine its constitutionality in the following terms:

1) whether Art. 55, let. a), of the Act meets the requirement of Art. 2 of the Constitution (democratic State ruled by law) and Art. 42, para. 1, (principles of criminal responsability), in conjunction with Art. 31, para. 3, (proportionality) and Art. 54, para. 1, (freedom of expression), in conjunction with Art. 31, para. 3, (proportionality) of the Constitution, *i.e.* the constitutionality of criminal liability of up to three years imprisonment for acts specified in that provision, and

2) Art. 1, point (a), as replaced by the following Art. 1, let. a), third indent, in the part covering the words "Ukrainian nationalists" and Art. 2, let. a), in the part covering the words "Ukrainian nationalists" and the words "and Eastern Małopolska" in Art. 2 (democratic State ruled by law) and Art. 42, para. 1, (principles of criminal responsability) in conjunction with Art. 31, para. 3, (proportionality) of the Constitution.[13]

The President challenged the amendment to the Act on the Institute of National Remembrance before the Constitutional Tribunal using his constitutional power to request the examination of the constitutionality of the Act (Art. 191, para. 1, in conjunction with Art. 188 of the Constitution).

[13] See the request of the President of 14 February 2018, case K1/18, available at ipo.trybunal.gov.pl.

One of the most significant circumstances is that the request was made two days after the President signed the law. The weight of the arguments suggesting the violation of constitutional norms by the legislators is such that it is difficult to imagine that they were formulated within a dozen or so hours between the signing of the law and sending the request for control of its constitutionality. The President's control of constitutionality prerogative is well-known to both lawmaking bodies and public opinion. The Chancellery of the President monitors all legislative work on an ongoing basis, in particular through the prism of its constitutionality. Constitutional compliance analyses are carried out at each drafting stage from the start of the legislative process. The deadline of 21 days for signing a law (or applying a constitutional veto or political veto) set out in Art. 122, para. 2, is a regulation that creates temporary and situational premises, in the form of possible consultations and analyses, for the final reflection preceding the President's decision.

The President, as one of the guardians of the Constitution, has the duty to give the fullest effect to the essence of the constitutional order and has a number of measures at his disposal to discharge this duty. The analysis of the constitutionality of the laws submitted to the President for signature is one of the most representative tasks of the President under this heading. In doing so, the office of the President has various instruments at its disposal, which the Constitution defines in terms of substance, gradation and order of application. One of these instruments is the proposal to review the constitutionality of laws before they are signed (known as preventive control of constitutionality). Its application is intended to prevent the occurrence of irreversible consequences stemming from an unconstitutional law, and from the consequences of a potential statement of unconstitutionality in the form of e.g. resumption of proceedings or claims for compensation for illegal activities of public authorities.

Once again, it is significant that the President has not used his powers to refer the law to the Constitutional Tribunal in the form of preventive control. After all, the nature and burden of the arguments indicating the incompatibility of the challenged provisions with the indicated constitutional norms (patterns of control of constitutionality) is so serious that it raises a question about the rationality of the internal decision-making process concerning the control of constitutionality of law by the President.

It should be assumed that, prior to the signing of the law, there were no serious doubts as to the constitutionality of the law to warrant referral to the Court. However, several hours after the signing of the law, there was no longer any doubt that the law was unconstitutional. The President was confident that Parliament violated the Constitution. The courtesy formulae in the text of the motion for control of the constitutionality of the law ("emerging doubts about the scope [...] of application", "may raise doubts") do not change either the content or the pronunciation of the motion of the President. After all, in the part constituting the essence of the motion, the President uses the wording: "I accuse this law of incompatibility of the indicated statutory norms with the indicated constitutional norms". Doubts may be raised before signing, and if these doubts are sufficiently

justified, the President has no other option, from the perspective of the Constitution, than to submit a motion to the Constitutional Tribunal by way of preventive control of the constitutionality of laws. After all, during the several dozen hours between the signing of the law and the sending of the motion to the Tribunal, no new circumstances arose which would justify a motion of the President in the mode of follow-up control. Moreover, at the time the motion was submitted to the Tribunal, the Act had not yet entered into force, and by not applying it, it could not cause any situations that would indicate that during its application doubts arose as to its constitutionality. No new circumstances, unknown at the time of signing the law, have arisen either. During these hours, the jurisprudence of the Constitutional Tribunal or the Supreme Court, quoted in the motion, did not change, nor was there any judgment of the European Court of Human Rights, which was not known or binding at the time of the act's signing.

There would have to be other compelling reasons why the President has set in motion a mechanism to control the constitutionality of the law in a way that deviates from its essence, which is enshrined in the Constitution. Such a conclusion is also indicated by the justification of the motion, which disqualifies the constitutionality of results of the legislator.

Two days after the signing of the Act, the President of the Republic of Poland had no constitutional doubts: the challanged norms are unconstitutional. The argumentation of the motion, in the form of a confrontation of the provisions of the Act with the constitutional models, leaves no doubt that, in the President's opinion, the indicated provisions of the law grossly violated the Constitution. The President's argumentation in the motion submitted to the Constitutional Tribunal complains of a lack of "decent legislation" in the field of criminal law in line with the established jurisprudence of the Constitutional Tribunal; unacceptable use of evaluation terms; inability to determine the meaning of terms used by the legislator by way of binding rules of law interpretation; irrationality of extending the scope of the unlimited protective principle (allowing for the extraterritorial prosecution of offenders); breach of the standard of required caution in the event of extending the scope of penalisation to unintentional acts; the "cascading" use of evaluation terms by the legislator to define the features and essence of a criminal act, which prevents proper decoding of the criminal norm (the President politely formulates "may cause difficulties"), and which is a deadly sin of criminal law regulations; blatant violation of the principle of proportionality as one of the most important constitutional principles, both in terms of blatant criminal sanctions and blatant violation of freedom of speech, clearly creating a whole mechanism causing a "freezing effect" on public debate, and access by the public to information.

As if that were not enough, the Act uses concepts unknown to the legal system, but what is more – impossible to define precisely. For example: "Eastern Małopolska" and the motion of the President: "[T]he sanctioning norm, reconstructed from Article 55 in conjunction with Article 1.1.1.a third indent and Article 2a of the Act on the Institute of National Remembrance, does not meet the standard resulting from the principle of *nul-*

lum crimen sine lege [...] Precise delimitation of the borders of Eastern Małopolska is necessary for a comprehensive identification of the type of a prohibited act". However, it is impossible to precisely define the borders of Eastern Malopolska, even for the Sejm of the Republic of Poland.

One more quotation from the motion of the President is in order: "[F]ailure to define precisely the notion of 'Ukrainian nationalists' may lead to freedom of interpretation of the type of prohibited act under Art. 55 of the Act on the Institute of National Remembrance, which goes far beyond the framework permitted by the requirement of specificity of criminal law norms". A more serious accusation is difficult to find. And yet, all this could have been easily avoided if the President had not signed the law and sent it to the Constitutional Tribunal in the mode of preventive control of the constitutionality of law.

The argumentation of the President's motion was fully supported by the Ombudsman, who joined the proceedings before the Constitutional Tribunal. Two other participants in the proceedings, the Sejm and the Prosecutor General, expressed a view on the full compliance of the challenged provisions with the Constitution.[14]

V. The amendments in practice

Following the entry into force of the amendment to the Law on the Institute of National Remembrance, a lively debate has begun, both in Poland and internationally.[15] It should be remembered that in the justification of the January 2018 amendment, the most important source of the proposed regulation was to be situations when the terms "Polish death camps", or "Polish concentration camps" appeared in public circulation. Such statements, contrary to historical truth, cause significant results, harm the good name of the Republic of Poland and the Polish Nation and have a destructive effect on the image of the Republic of Poland, especially abroad. In order to protect these values in criminal law, the legislator is to introduce a new type of crime (Art. 55, let. a), extending the scope of criminalisation to include unintentional acts. The existing measures in the form of reactions of Polish citizens, non-governmental organisations or the use of diplomatic means of intervention have been ineffective. In this state of affairs "it is necessary to create effective legal tools allowing to conduct a persevering and consistent historical policy of the Polish authorities in the field of counteracting counterfeiting of

[14] See the opinion of the Prosecutor General of 20 March 2018, case K1/18, available at ipo.trybunal.gov.pl.

[15] See for example M. Bucholoc, *Commemorative Lawmaking: Memory Frames of the Democractic Backsliding in Poland After 2015*, in *Hague Journal on the Rule of Law*, 2018, p. 85 *et seq.*; A. Gliszczyńska-Grabias, G. Baranowska, A. Wójcik, *Law-Secured Narrative of the Past in Poland in Light of International Human Rights Law Standards*, in *Polish Yearbook of International Law*, 2018, p. 59 *et seq.*; U. Belavusau, A. Wójcik, *La criminalisation de l'expression historique en Pologne: la loi mémorielle de 2018*, in *Archives de politique criminelle*, 2018, p. 175 *et seq.*; U. Belavusau, *The Rise of Memory Laws in Poland: An Adequate Tool to Counter Historical Disinformation*, in *Security and Human Rights*, 2019, p. 36 *et seq.*

Polish history and protection of the good name of the Republic of Poland and the Polish Nation".[16] Due to the official explanatory memorandum of the bill, this "effective" measure was to be criminalisation of behaviours specified in Art. 55, let. a), of the Act, while the threat of a fine or a penalty of up to three years' imprisonment was to be "adequate to the degree of social harmfulness of this crime and corresponding to current norms on penalties for crimes of a similar nature". At the same time, the scope of criminalisation was extended not only to include acts specified in Art. 55, let. a), committed unintentionally, but the draft amendment to the January amendment assumed:

> "the extension of the absolute protection principle resulting from Art. 112 of the Penal Code, according to which the Polish Penal Act applies to perpetrators of crimes that particularly harm Polish interests, regardless of the nationality of the perpetrator and provisions in force at the place where the crime was committed. Considering that potentially many of the offences referred to in the proposed Art. 55a of the Act on the Institute of National Remembrance will be committed abroad, the proposed regulation should be considered necessary to ensure the effectiveness of their prosecution".

An important systemic novelty was to be the regulation concerning the recovery of claims arising from the infringement of the good name of the Republic of Poland and the Polish Nation. Potential legal bases for civil law claims against entities using the term "Polish concentration camps" in the public space may be provisions providing for: a claim for compensation for damage to property; claims for the protection of personal rights, including claims for compensation and claims arising from the press law. In order to ensure that "Polish provisions on the protection of the good name of the Republic of Poland and the Polish Nation apply in any case, regardless of which law is applicable under the Act – Private International Law, it is proposed to add a provision [...] explicitly determining that these are the so-called mandatory provisions".

Immediately after the adoption of the new law on the Institute of National Remembrance in January 2018, the negative reaction of foreign public opinion and top-level political authorities, in particular in Israel and the USA, as well as the outrage of public opinion in Ukraine, were pointed out. Incidentally, the Ministry of Foreign Affairs warned against such a reaction from abroad, noting that, as regards the January amendment, "the justification of the act does not include a discussion of the compliance of the act with the freedom of expression regulated both by the Constitution of the Republic of Poland (Article 54) and the European Convention for the Protection of Human Rights and Fundamental Freedoms".[17] The freezing effect of the Act was pointed out as a deterrent to researching and debating the co-responsibility of Poles for murdering Jews and looting their property during and immediately after the Second World War,

[16] Government draft law amending the Act on the Institute of National Remembrance of 29 August 2016, (druk sejmowy 806), orka.sejm.gov.pl.

[17] Ł. WARZECHA, *Bicz na własne plecy*, in *DoRzeczy*, 19-25 March 2018, dorzeczy.pl, p. 56.

deteriorating the reputation of Poland and exposing them to allegations of falsifying the historical truth about the Holocaust. Moreover, "the imposition of criminal sanctions on the possibility of exercising freedom of speech not only reinforces feelings of anti-Semitism and encourages all those who deny the Holocaust, but also damages Poland and its relations with the Jewish community".[18]

However, the "public debate" signalled by the government as a source of reflection on the senselessness of the January amendment is also a direct and immediate increase in interest in the issue of "Polish death camps" and an increase in the symptoms of anti-Semitism, especially online. Opinion polls and analyses of public statements, which took place immediately after the adoption of the January amendment, indicate an increase in "classical conspiracy anti-Semitism" and the domination of "secondary anti-Semitism", which is characterized by, among others, putting the martyrdom of Poles and the extermination of Jews during the Second World War on an equal footing, or criticizing the behaviour of Israelis towards Poles. What is more worrying, "this anti-Semitism directly appeared in public statements and media reports, where until now anti-Semitic prejudices were rather a taboo subject that excluded the person using such a language from public debate".[19]

The analysis of online content in the days following the adoption of the January amendment proves that not only was the goal of the novella not achieved, but we were dealing with a phenomenon that the designers probably could not predict, and certainly did not want to cause. Firstly, the frequency of online searches of the phrase "Polish death camp" and "German death camp" has increased nine times in comparison to the period before January 2018. Secondly, the Act "most likely, contrary to the assumptions of its authors, has led to an increase in the number of searches for the phrase". Thirdly, and most generally, the bill, which, in the intention of the initiators, as expressed in the justification for the draft bill, was to limit the use of defective memory codes – paradoxically, it led to an increase in the universality of their use. The number of people searching for the phrase "Polish concentration camps" in Google increased significantly (more than five times as compared to the period preceding the introduction of the Act, while the number of searches for the phrase "Nazi concentration camps" did not increase significantly). Among American, Canadian or British Google search engine users, who until recently most often searched for the term "German death camps", nowadays the search for a faulty memory code dominates: "Polish death camps". The increase in the frequency of using the defective memory code in the world is nine-fold – despite the fact that the percentage of people searching for information about Nazi death camps has not increased.[20]

[18] M. Linzen, *Keep speech free, keep the history of the Holocaust alive*, in www.intjewishlawyers.org.

[19] M. Babińska, M. Bilewicz, D. Bulska, A. Haska, M. Wiśniewski, *Stosunek do Żydów i ich historii po wprowadzeniu ustawy o IPN*, in *Centrum Badań nad Uprzedzeniami (analiza przygotowana na zlecenie Rzecznika Praw Obywatelskich)*, 2018, www.rpo.gov.pl, p. 11.

[20] *Ibid.*, p. 45.

The experience of the six-month application of the January amendment shows that the effect of the regulation is limited in terms of quantity. The Institute of National Remembrance received only a few more than 80 notices of crimes, and some of them were self-incrimination notices. It turned out that prosecutors did not undertake any investigation in any case and in ten cases refused to start an investigation.[21]

The period of six months of the Act's validity cannot be conclusive for drawing general conclusions on the meaning of criminal law regulations, but the indicated information on the fact that the analysed provision is not applied in practice confirms the assumption concerning the impact of the Act on prosecutors of the Institute of National Remembrance, contained in Parliamentary Paper no. 806.[22] The government states that "an increase in the number of criminal proceedings initiated by the Institute of National Remembrance in connection with suspicion of crimes under Article 55a of the Act may be expected. Due to a small number of such cases, the impact of the Act on these entities will not be significant. A noticeable increase in cases against collective entities is also not expected". A surprising addition to this forecast is the statement of the Council of Ministers that "due to the small overall number of criminal cases concerning crimes provided for in the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (3 convictions within the last 14 years), the expected increase in the number of such cases conducted pursuant to the amended provisions of the said Act will have a negligible impact on the costs of functioning of law enforcement agencies and the judiciary, as well as on revenues related to, for example, the execution of financial penalties imposed".

Three problems that were not highlighted either in the parliamentary legislative procedure or in the positions of the participants in the proceedings by the Constitutional Tribunal should also be mentioned.

Firstly, the scope of the exception, which covered situations in which the perpetrator of the offence did not commit a crime, was the one who committed the acts specified in Art. 55, let. a), within the framework of artistic or scientific activity. However, this exception did not cover other types of public activity, such as journalistic or political activity. Consequently, such a person "had to take account of criminal liability when presenting his or her personal point of view".[23]

[21] A. ŁUKASZEWICZ, *Prokuratorzy nie rwą się do wszczynania śledztw*, in *Rzeczpospolita*, 4 July 2018, www.rp.pl.

[22] Government draft law amending the Act on the Institute of National Remembrance of 29 August 2016, cit.

[23] P. BACHMAT, *Odpowiedzialność karna za przestępstwa z art. 55a ust. 1-2 oraz kontratyp z art. 55a ust. 3 ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*, in *Zeszyty Prawnicze BAS Kancelarii Sejmu*, no. 3, 2018, orka.sejm.gov.pl, p. 121.

Secondly, the case of committing the act specified in Art. 55, let. a), because the act could have been committed both in the case of direct and possible intent and in the case of conscious unintention and unconscious unintention.[24]

Thirdly, the effects of the Act in the period between the entry into force of the January amendment and the entry into force of the June amendment on persons who at that time engaged in conduct that constituted prohibited acts as defined in Art. 55, let. a), paras 1 and 2, of the Act are relevant. In particular, if such persons have been subject to criminal proceedings but no conviction has taken place, then the proceedings should be discontinued (or, depending on the stage of the case, a decision should be taken to refuse to initiate criminal proceedings). Second, if the person(s) were subject to conviction, the conviction would be erased by virtue of law. These consequences are spelled out in Art. 4, para. 1, let. b), of the Directive 1 of the Penal Code due to the fact that the new act (the June amendment), having a decriminalising effect on the alleged act, is more lenient and will be applicable to facts committed during the period of validity of the January amendment.[25]

VI. Amending the amendments

The above circumstances, in particular the surprisingly strong negative stance of international opinion, prompted the Polish political authorities to reflect on and withdraw from that part of the statutory regulation which provided for criminal liability for acts specified in the law. The Polish Parliament quickly amended the law in force since January 2018.

On the morning of 27 June 2018, the Sejm received a governmental draft 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 Criminal Proof. On the day of the amendment, the government bill was published on the website of the Government Legislative Centre with the notice that comments on the bill would be accepted by 10 p.m., of the previous day (the documents were dated 26 June 2018). On the day of the receipt of the bill in the Sejm, the first reading of the bill was held, after which the motion to proceed immediately to the second reading was accepted. The Speaker of the Sejm ruled out any discussion in the second reading, which enabled him to move on to the immediate third reading, which concerned the entire bill. Less than three hours passed between the submission of the draft law to the Sejm and the completion of the parliamentary legislative procedure.[26]

The law was immediately notified to the President and the Senate for further legislative action. The Senate did not amend the law and the law was formally handed over to the President for signature. The President was in Latvia on the day of the adoption of

[24] *Ibid.*, pp. 121-122.
[25] *Ibid.*, pp. 115-116.
[26] M. Kolanko, *Legislacyjny ekspres*, in *Rzeczpospolita*, 28 June 2018, archiwum.rp.pl.

this amendment and – "after consultations with the law office and the system of the Presidential Chancellery, after additional legal opinions"[27] placed an electronic signature under the law.

The explanatory memorandum to the draft amendment of June 2018 refers to the "conduct of public debate". Another element of the "public debate" is the joint declaration of the Prime Ministers of Poland and Israel, signed by everyone in their country, but coordinated timewise, shortly after the signing of the bill by the President. The declaration refers directly to the January amendment and its justification, stating that:

> "[W]e do not agree with the actions of blaming Poland or the entire Polish nation for the atrocities committed by the Nazis and their collaborators from various countries. The sad truth is, unfortunately, that at that time, some people – irrespective of their origin, religion or belief – revealed their darkest face. [...] We advocate freedom of expression about history and freedom of research into all aspects of the Holocaust so that it can be carried out without any fear of legal obstacles by students, teachers, researchers, journalists, and certainly also by Survivors and their families – they will not be liable for the exercise of the right to freedom of speech and academic freedom in relation to the Holocaust".[28]

This is a purely political reference to the accusations made against the regulation contained in the January amendment. Immediately after its adoption, the negative reaction of public opinion and representatives of the highest level of political authorities, especially in Israel and the USA, and the outrage of public opinion in Ukraine was pointed out.[29] Incidentally, the Ministry of Foreign Affairs warned against such a reaction abroad, pointing out in regards to the January amendment that "the justification of the act does not include a discussion of the compliance of the act with the freedom of expression regulated both by the Constitution of the Republic of Poland (Art. 54) and by the European Convention for the Protection of Human Rights and Fundamental Freedoms". The freezing effect of the Act was pointed out as a deterrent to researching and debating the co-responsibility of Poles for murdering Jews and looting their property during and immediately after the Second World War, deteriorating the reputation of Poland and exposing them to allegations of falsifying the historical truth about the Holocaust. Moreover, "the imposition of criminal sanctions on the possibility of exercising freedom of speech not only reinforces feelings of anti-Semitism and encourages all those who deny the Holocaust, but also damages Poland and its relations with the Jewish community".[30]

[27] Statement of Minister K. Szczerski, see Prezydent podpisał nowelizacje ustawy o IPN, 27 June 2018, www.prezydent.pl.

[28] See the declaration on the webpage of the Prime Minister of Poland, www.premier.gov.pl.

[29] For a broader perspective on Ukraine and its memory laws, see the *Article* by Cherviatsova in the first part of this Special Section: A Cherviatsova, *On the Frontline of European Memory Wars: Memory Law: Memory Laws and Policy in Ukraine*, in *European Papers*, Vol 5, No 1, 2020, www.europeanpapers.eu, p. 119 *et seq*.

[30] M. Linzen, *Keep Speech Free, Keep the History of the Holocaust Alive*, cit.

VII. Judgment of the Constitutional Tribunal

At the time of the amendment of the Act on the Institute of National Remembrance in June 2018, the President's request to control the constitutionality of the January amendment was pending. As a result of the June amendment, the provisions of Arts 55, let. a), and 55, let. b), of the Act on the Institute of National Remembrance, which contained provisions on criminal liability for public acts and contrary to the facts denying Nazi, communist or other crimes constituting crimes against peace, humanity or war crimes committed against Polish nationals or Polish citizens of other nationalities in the period from 8 November 1918 to 31 July 1990, were removed from the applicable law (defamation of the Polish State or the Polish Nation).

Almost a year after the President's request to control the constitutionality of the amendment to the Act on the Institute of National Remembrance was received, the Constitutional Tribunal issued a verdict on the amendment of the law. The ruling had to take into account the effects of the June amendment, which was the repeal of the provisions of Arts 55, let. a), and 55, let. b), of the Act. An obvious consequence of this state of affairs was the discontinuance of proceedings in the scope of criminalisation of behaviours specified in these provisions. The situation known a dozen or so years ago was repeated: the Tribunal did not express its substantive opinion on the compliance with the Constitution (in particular, the constitutional principle of determination of criminal law regulations and the limits of freedom of speech) by discontinuing proceedings in the scope of substantive control of the compliance of the contested provisions with constitutional norms.

The only subject of the proceedings before the Tribunal was therefore the question of the unconstitutionality of the terms "Ukrainian nationalists" and "Eastern Małopolska". The President of the Republic of Poland argued in his application to the Constitutional Tribunal that these concepts, by failing to meet the requirements of a sufficiently precise legal regulation, violate the principle of a democratic state of law and the constitutional requirement for the necessary determination of a criminal law norm. The latter allegation stems from the fact that failure to precisely define the notion of "Ukrainian nationalists" may lead to freedom of interpretation of the type of act prohibited in Art. 55 of the Act on the Institute of National Remembrance, which "goes far beyond the framework permitted by the requirement of the definition of a criminal law norm".

Using the concept of the crimes of Ukrainian nationalists, legislators used the concept of Eastern Malopolska, which has no legal definition. By not defining the territory of the Second Republic of Poland in a sufficiently precise manner, legislators led to a situation where the sanctioning norm does not meet the standard resulting from the principle of *nullum crimen sine lege*; precise delimitation of the boundaries of Eastern Malopolska is, in the opinion of the President, necessary for a comprehensive identification of the characteristics of the type of prohibited act.

The President's view was shared by the Ombudsman, who stated that on the one hand it was not possible to unambiguously define the term "Ukrainian nationalist", and

on the other hand it was not possible to precisely define, on the basis of the contested regulations, the geographical boundaries of Eastern Małopolska. The other participants in the proceedings – the Sejm and the Prosecutor General – took the view that the use of these terms by the legislator was consistent with Art. 2 and Art. 42 in connection with Art. 31, para. 3, of the Constitution of the Republic of Poland.

The Constitutional Tribunal ruled that the use of the terms "Ukrainian nationalists" and "Eastern Małopolska" is inconsistent with the principle of certainity of the law derived from Art. 2 of the Constitution of the Republic of Poland and from Art. 42, para. 1, of the Constitution.

The justification of the judgment states that the Constitutional Tribunal shared the doubts of the President of the Republic of Poland and ruled, firstly, that the provisions in question are inconsistent with the principle of lawfulness derived from Art. 2 of the Constitution and from Art. 42, para. 1, of the Constitution, expressing the principle that a ban or order with a criminal sanction should be formulated in a precise and strict manner. Moreover, the judgment stated that the terms "Ukrainian nationalists" and "Eastern Małopolska" were not defined by the legislator in the Act on the Institute of National Remembrance. This is important in so far as the questioned provisions are closely related to Art. 55 of the Act on the Institute of National Remembrance, *i.e.* a provision containing a criminal law rule according to which whoever publicly denies crimes referred to in Art. 1, para. 1, of this Act, despite facts, is subject to a fine or imprisonment for up to three years. Finally, the judgment pointed out that it is impossible to unambiguously reconstruct the meaning of the questioned notions on the basis of either normative acts from the period of the Second Republic or binding legislation. Furthermore, in the common language, these notions do not evoke unambiguous, undisputed connotations.

Therefore, in the opinion of the Tribunal, there was a justified assumption that in practice, the application of the challenged provisions of law enforcement agencies and courts could have serious problems with determining the scope of criminal liability provided for in Art. 55 of the Act on the Institute of National Remembrance. Thus, the provisions questioned by the President of the Republic of Poland violate Art. 2 and Art. 42, para. 1, of the Constitution.

The consequence of the Court's ruling is that the contested provisions remain in the legal system without the indicated words "Ukrainian nationalists" and "by Ukrainian nationalists" as well as "and Eastern Małopolska". This means that the disputed regulations concern "crimes of members of Ukrainian formations collaborating with the Third German Reich", and that:

"Crimes of Ukrainian formations collaborating with the Third German Reich, within the meaning of the Act, are acts committed [by members of these formations] in the years 1925-1950, involving the use of violence, terror or other forms of human rights violations against individuals or groups of people, and in particular against the Polish population. The crime of Ukrainian formations collaborating with the Third Reich is also

participation in the extermination of the Jewish population and genocide against the citizens of the Second Republic of Poland in the Volhynia area".

VIII. Conclusions

The amendment of the Act made in June 2018 resulted in an extremely narrowed scope of the subject matter of the President's motion and of the patterns of control over the constitutionality of the contested provisions. The subject of the decision was only the use of the terms "Ukrainian nationalists" and "Eastern Małopolska", and out of the four constitutional models, only two remained – in the Court's opinion: Art. 2 and Art. 42 of the Constitution. This does not mean, however, that the whole process of amending the law and controlling the constitutionality could be reduced to a known "much ado about nothing". On the contrary: the effects of Parliament's ill-considered actions are dramatic. Demons of anti-Polonism, anti-Semitism and anti-Ukrainianism have revived.