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On Public Attribution of Responsibility (Co-Responsibility) for Nazi Crimes Perpetrated by the German Third Reich to the Polish Nation or the Polish State. The Actual Normative Content of Now Repealed Article 55a of the Institute of National Remembrance Act**

To begin with, let us recall that the provision in question, Article 55a of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation ('IPN Act'), became part of the law on account of Article 1(6) of the 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 War Cemetery and Grave Act, the Museum Act, and the Act on Collective Responsibility for Acts Prohibited on Pain of Punishment[1]. By virtue of this provision, Article 55a was introduced into the IPN Act of 18 December 1998[2]. still in force, and worded as follows:

> Article 55a. 1. Any person who publicly and contrary to facts attributes to the Polish Nation or the Polish State responsibility and/or co-responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the Charter of the International Military Tribunal annexed to the Agreement for the prosecution and punishment of the major war criminals of the European Axis,

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[1] See Polish journal of laws Dz.U. 2018, item 369.
[2] See Dz.U. 2016, item 1575 and Dz.U. 2018, item 5.

signed at London, on 8 August 1945 (Dz.U. 1947, item 367) and/or for other offences constituting crimes against peace, humanity or war crimes or in some other way flagrantly diminishes the responsibility of the actual perpetrators of such crimes shall be punished by a fine and/or imprisonment of up to 3 years. The judgment shall be made public.
2. If the perpetrator of the act defined in paragraph 1 above acts unintentionally, he/she shall be punished by a fine or restriction of liberty (community service).
3. No offence is committed by the perpetrator of the prohibited act as defined in paragraphs 1 and 2 above if he/she has perpetrated it as part of artistic or scholarly activity.

The limitations of this article make the presentation of a comprehensive interpretation of the above provision obviously impossible. The plurality of issues related thereto – at times very complex – is so great that it would take a sizeable monograph to discuss responsibly all on their merits. This is why the text below concentrates on those that have featured prominently in the heated media debate, which at times has been very critical of the provision in point. Coincidentally, some time ago, the present author already had an opportunity to consider the relevant issues, writing a legal opinion on the crucial problems of interpretation of the entire Article 55a of the IPN Act. Opinion was sought on answers to the following five fundamental questions:

1. Does the use by the legislator of the phrases 'contrary to facts' and 'Polish Nation', while specifying the *actus reus* of the offence, preclude the application of the provision to people relating real crimes committed by groups of Polish citizens or even crimes on which historians have different opinions?
2. Does Article 55a(1) and (2) of the IPN Act prevent historical research and the publication of its results?
3. Does the IPN Act, in Article 55a(1) and (2), prevent public debate on Nazi or other crimes, as defined in Article 55a(1), including the question of the participation of people of Polish nationality in these crimes?
4. Does the IPN Act, in Article 55a(1) and (2), prevent making public the cases of the participation of people of Polish nationality and Polish citizens in Nazi crimes? In particular, is criminal responsibility provided for so-called testimonies of truth, describing the reprehensible behaviour of people of Polish nationality and Polish citizens?
5. Does the expression 'attributes responsibility' cover the behaviour consisting in mentioning Polish camps?[3].

Let us tackle the problems touched upon in the above questions.

To begin with, it must be observed that Article 55a(1) of the IPN Act, crucially important for this discussion, was a so-called plural provision, because it comprised

[3] The questions, thus, narrowed down the opinion solely to problems of interpretation. Consequently, it has not touched upon in the least the questions of legitimacy/illegitimacy of the regulation laid down in the IPN Act, Article 55a(1), (2) and (3). This article will not touch upon these questions either.

many legal norms[4]. In addition, the plurality of the provision was diversified, because it encoded both many sanctioned norms and many sanctioning norms related to the former. On account of the fact that most of the questions posed, including the first one, directly concerned the content of the norms of the first kind, let us name the norms of this kind that are reconstructible from the article in question. It yielded the following (let us say: preliminary)[5] sanctioned norms:

1. Prohibiting public attribution to the Polish Nation, contrary to facts, of responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945 ('IMT Charter');
2. Prohibiting public attribution to the Polish State, contrary to facts, of responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the IMT Charter;
3. Prohibiting public attribution to the Polish Nation, contrary to facts, of co-responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the IMT Charter;
4. Prohibiting public attribution to the Polish State, contrary to facts, of co--responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the IMT Charter;
5. Prohibiting public attribution to the Polish Nation, contrary to facts, of responsibility for offences other than those named above, constituting crimes against peace or humanity or war crimes;
6. Prohibiting public attribution to the Polish State, contrary to facts, of responsibility for offences other than those named above, constituting crimes against peace or humanity or war crimes;
7. Prohibiting public attribution to the Polish Nation, contrary to facts, of co-responsibility for offences named in point 5 above;
8. Prohibiting public attribution to the Polish State, contrary to facts, of co--responsibility for offences named in point 5 above;
9. Prohibiting public flagrant diminishing of responsibility of the actual perpetrators of crimes against peace, which is contrary to facts and other than the types of behaviour named in points 1–8 above;
10. Prohibiting public flagrant diminishing of responsibility of the actual perpetrators of crimes against humanity, which is contrary to facts and other than the types of behaviour named in points 1–8 above;
11. Prohibiting public flagrant diminishing of responsibility of the actual perpetrators of war crimes, which is contrary to facts and other than the types of behaviour named in points 1–8 above.

[4] On the plurality of a legal provision, see M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2010, 134 et seq.

[5] With a particularized approach, these norms could – and actually should – be broken up further into smaller ones, e.g. by relating each norm to a single, precisely defined, crime of a given type, for instance, to a single specific Nazi crime, a single specific crime against peace, a single specific crime against humanity or a single specific war crime.

I. An answer to the first question must relate – quite obviously – to those of the above-named norms that concern the attribution to the Polish Nation or the Polish State of responsibility (co-responsibility) for specific crimes.

For a start, a breach of these norms had to consist in the attribution of responsibility (co-responsibility) for crimes named in Article 55a(1) of the IPN Act, including Nazi crimes as defined in Article 6 of the IMT Charter[6], to the Polish Nation or the Polish State. On account of the incontrovertible circumstance that the perpetrator of the crimes named in Article 55a(1) of the IPN Act, may be only a man[7], the attribution of responsibility (co-responsibility), referred to in the article, was a construction founded on the idea that responsibility (co-responsibility) for the crime named therein and committed by an individual is borne by the community as well[8].

In the case at hand, the community was the Polish Nation[9] and the Polish State. The idea – as everybody knows – is also very well known to jurisprudence[10], which

[6] To remind: under Article 6 of the said Charter: 'The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) *Crimes against peace:* namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (b) *War crimes:* namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) *Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan'.

[7] Fully instructive and still relevant today, the argument by Czesław Znamierowski reads as follows: '… when we say that a community shares some conviction, that it judges something or that it does something, we mean something else than when we relate these predicates to an individual. A community has no head with which to think, no heart with which to feel emotions or no hands with which to do something. That a community thinks something, feels some emotion or does something means in short that it is the way all or very numerous of its members think, feel or do, or that this is the behaviour of few individuals who are given a special position by the structure of a given community', Cz. Znamierowski, *Rozważania wstępne do nauki o moralności i prawie*, Warszawa, 1964, 97.

[8] In a simplified version and not accurate enough, the idea could be expressed by the formula that a crime committed by an individual is actually a crime of the community the individual is a member of.

[9] To remind: the term 'Polish Nation' means – according to the Preamble to the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483, as amended) now in force – all the citizens of the Republic.

[10] Besides, it also exists in the Polish legal system. Its extreme variety is provided for in the Act of 28 October 2002 (Dz.U. 2002, No. 197, item 1661, as amended) on the Responsibility of Collective Entities for Prohibited Punishable Acts. The Act provides for the punitive responsibility of a collective entity for a prohibited act committed by a natural person. Elementary information on the principles governing this type of responsibility is given in almost every textbook covering the general part of criminal law – for instance, W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, 176–177. At this juncture, it is worthwhile to remind the reader – for this might prove helpful in the search for right answers to the questions posed – that under Article 3 of the cited Act:
'A collective entity shall bear responsibility for a prohibited act which is behaviour by a natural person:
1) acting in the name or interest of the collective entity under a power or duty to represent it, to make decisions on its behalf, to perform an internal audit or in excess of this power or failing in this duty;
2) permitted to act as a result of the person mentioned in subparagraph 1 acting in excess of his/her powers or failing in his/her duty;
3) acting in the name or interest of the collective entity with the consent and/or knowledge of the person mentioned in subparagraph 1;

emphasises, in addition, that for it to be considered legitimate in a specific case, the behaviour of an individual must show strong ties to the community. In Article 55a(1) of the IPN Act the ties – quite obviously – could not consist only in the membership in a community on an ethnic basis. By no means can it be assumed that for every crime committed by an individual of Polish nationality, responsibility (co-responsibility) is borne by the Polish Nation.

For analogous reasons, the ties cannot consist only in the possession of a specific citizenship, because – by the same token – not for every crime committed by a Polish citizen, is responsibility (co-responsibility) borne by the Polish State. In a word, a different criterion must have been meant here. It is safe to assume therefore that in the case of Article 55a(1) of the IPN Act (and, consequently, in the case of paragraph 2 of this Article) the ties consisted in the social (as far as the Polish Nation is concerned) or legal[11] (as far as the Polish State is concerned) authorization of an individual by a community to commit a crime mentioned in the Article.

Considering the above, it must be assumed that a public statement in which a person truthfully indicated that a Polish citizen had committed a crime defined in Article 55a(1) of the IPN Act is behaviour that by no means could be held to be a breach of the norms named in points 1–8 above, if

(1) the statement did not mention the responsibility (co-responsibility) of the Polish Nation or the Polish State for that crime;
(2) in the event the statement did mention the responsibility (co-responsibility) of the Polish Nation or the Polish State for that crime – providing the statement was underpinned by a (authentic, actually having occurred) fact, of which the person making the statement was aware, proving the existence of an authorization from the Polish Nation or the Polish State for a Polish citizen to commit that crime.

Therefore it shall be argued that in order to commit the *actus reus* contrary to Article 55a(1) or (2) of the IPN Act, two interdependent acts as it were, need to have been expressed in a given public statement. First, where the person making it truthfully indicated that a Polish citizen had committed a crime defined in Article 55a(1) of the IPN Act, and second, at the same time wrongfully attributed to the Polish Nation or the Polish State responsibility (co-responsibility) for the said

3a) being an entrepreneur who directly cooperates with the collective entity, working towards a lawful goal;
4) (abrogated)
– provided that the behaviour gave or could give advantage to the collective entity, even a non-financial one'.
Thus, in this case too – as a matter of fact in compliance with the rule mentioned earlier – we are dealing with the attribution of responsibility (legal and punitive in this case) to a collective entity (community) for (specific) behaviour connected with it exhibited by an individual and prohibited and penalized. On the impossibility of the commission of a prohibited act by a community see also W. Wróbel, A. Zoll, *Polskie prawo...*, 177, who rightly assert that – in agreement with Cz. Znamierowski's view cited above – 'Despite many similarities between the responsibility of a collective entity and criminal responsibility, it must be held that an offence, in the Polish legal system too, may be committed only by a natural person. The responsibility of a collective entity depends on the commission of a prohibited act by a natural person and is thus dependent in this respect. A collective entity bears punitive responsibility for a prohibited act committed by a natural person in the name of the collective entity and in conditions that may give advantage to the collective entity, even a non-financial one'.

[11] Moreover, both individual and general norms (including authorizations) may come into play here. On such norms see in particular Z. Ziembiński, *Logika praktyczna*, Warszawa, 1963, 105.

crime (due to the lack of any fact proving the existence of an authorization from the Polish Nation or the Polish State for a Polish citizen to commit that crime)[12].

With respect to that part of the question which concerns crimes where historians have different opinions, it must be said that such differences on whether there was an authorization for a Polish citizen from the Polish Nation or Polish State to commit a crime named in Article 55a(1) of the IPN Act, would rule out the possibility of committing a prohibited act defined in that provision and in Article 55a(2).

The above findings – understandably – find application to crimes defined in Article 55a(1) of the IPN Act, committed by groups of Polish citizens.

II. In answer to the second question, it must be said first that under Article 55a(3) of the IPN Act, artistic and scholarly activities were accorded the status of circumstances precluding unlawfulness. At the same time, the provision unequivocally opted for such an interpretation of these circumstances that did not deprive the behaviour displayed under them, being the commission of the *actus reus* defined in Article 55a(1) or (2) of the IPN Act, of the feature of penalization. In a word, the cited provision clearly opted for such a view of the types of activity named in it that is tantamount to the rejection of a legal excuse as a circumstance being the negative *actus reus* of a prohibited act[13]. This followed – and quite indisputably so – from the IPN Act, Article 55a(3), that after all said directly, using the phrase '[n]o offence is committed by the perpetrator of the prohibited act', that under the conditions described therein a prohibited act is perpetrated[14]. In sum, the provision acknowledged that artistic and scholarly activities were circumstances in which the sanctioned norm, encoded in Article 55a(1) and (2) of the IPN Act, was legally breached.

Taking this into account, it must be found that the norms expressed by the IPN Act in Article 55a(1) and (2), prohibited the behaviour described therein also when

[12] The *actus reus* defined in the IPN Act, Article 55a(2), would be committed when the person making the statement – failing to exercise sufficient care – was wrongly convinced that the fact he/she invoked, supposedly bearing out the said authorization, was actually the fact bearing out such authorization.

[13] The literature on the substantive-law function of a legal excuse is vast. Among the Polish criminal law studies, *see* especially the works by: Władysław Wolter (*Funkcja błędu w prawie karnym*, Warszawa, 1965; *Z problematyki struktury przepisów karnych*, Państwo i Prawo 11(1978); *Wokół problemu błędu w prawie karnym*, Państwo i Prawo 3(1983)); Andrzej Zoll (*Stosunek kontratypów do ustawowej określoności czynu*, Państwo i Prawo 4(1975); *Okoliczności wyłączające bezprawność czynu (Zagadnienia ogólne)*, Warszawa, 1982; *Jeszcze raz o problemie błędu w prawie karnym*, Państwo i Prawo 8(1983); *Kontratypy a okoliczności wyłączające bezprawność czynu* [in:] J. Majewski (ed.), *Okoliczności wyłączające bezprawność czynu*, Toruń, 2008; *W sprawie kontratypów*, Państwo i Prawo 4(2009)); Łukasz Pohl (*Struktura normy sankcjonowanej w prawie karnym. Zagadnienia ogólne*, Poznań, 2007); Tomasz Kaczmarek (*O tzw. okolicznościach „wyłączających" bezprawność czynu*, Państwo i Prawo 10(2008); *O kontratypach raz jeszcze*, Państwo i Prawo 7(2009)); Zbigniew Jędrzejewski (*Bezprawność jako element przestępności czynu. Studium na temat struktury przestępstwa*, Warszawa, 2009)); Jacek Giezek (*„Zezwolenie" na naruszenie dobra prawnego – negatywne znamię typu czy okoliczność kontratypowa* [in:] Ł. Pohl (ed.), *Aktualne problemy prawa karnego*, Poznań, 2009) and Jarosław Majewski (*Okoliczności wyłączające bezprawność czynu a znamiona subiektywne*, Warszawa, 2013).

[14] I believe, though – to which I shall return – that this approach could have given rise to serious doubts, especially with respect to artistic activity. For one can hardly share the view that, for instance, a statement in a feature film, in which an actor, as part of his/her role, utters words about the responsibility (co-responsibility) of the Polish Nation or the Polish State for crimes named in Article 55a(1) the IPN Act, was a prohibited act contrary to paragraph 1 or 2 of this Article. After all, the behaviour by an actor is originally lawful; this is so because in this case we are not faced with a real assault on a legally protected interest and, consequently, with an infringement of such an interest. Meanwhile – as everybody knows – in the case of a circumstance being a legal excuse, an attack (excused of course by the situation and constitutive for the excuse) on a legally protected interest is by all means a real assault on this interest and, consequently, an absolutely real interference with the said interest.

it was part of artistic or scholarly activity. However, the fact that paragraph 3 of this Article was in force, precluded the responsibility of the perpetrator in such situations because this provision accorded to the named types of activity the status of circumstances precluding the unlawfulness of the perpetrator's behaviour. All in all, the perpetrator's behaviour, on account of the substantive-law consequence defined therein of the legal excuses named therein was ultimately lawful (secondarily lawful)[15].

Speaking of historical research, it is undeniably a kind of scholarly activity and, it must be emphasised, irrespective of whether the person conducting it has formal, i.e. historical education in this field. Arguably, the scholarly character of a given activity is decided exclusively on its merits seen in its skilful pursuit and not on the formal aspect that does not – as everybody knows – fully guarantee such skills. Wherefore, it must be concluded that as part of historical research – on account of Article 55a(3) of the IPN Act – a prohibited act defined in Article 55a(1) and (2) of the IPN Act could not be unlawfully committed[16].

III. The third question has already been answered together with the first question. To reiterate: Article 55a(1) and (2) of the IPN Act by no means restricted public debate on the participation of people of Polish nationality in the crimes enumerated in these provisions.

IV. The fourth question has already been answered, too, together with the first question. To reiterate: Article 55a(1) and (2) of the IPN Act by no means prevented making public – which is ethically necessary – the cases of the participation of people of Polish nationality and Polish citizens in Nazi crimes. It must be strongly stressed therefore that the norms laid down in these provisions by no means proscribed so-called testimonies of truth, exposing the criminal behaviour of people of Polish nationality and Polish citizens. What the norms did proscribe was – and it should be repeated emphatically – only wrongful claims making the Polish Nation or the Polish State responsible (co-responsible) for such criminal behaviour.

V. The final question asked whether the expression 'attributes responsibility' covered the use of words about Polish camps. The right stance to be taken in this

[15] For Article 55a(3) of the IPN Act, actually provided for a right to commit a prohibited act contrary to Article 55a(1) and (2) of the IPN Act. The right – viewing the matter from the perspective of deontic logic – is founded on a normative (deontic) operator known as strong permission. On this question see Ł. Pohl, *Struktura normy*..., 193 et seq., and further literature on the subject quoted and analysed there, in particular the works by J. Woleński (*Logiczne problemy wykładni prawa*, Kraków, 1972) and Z. Ziemba (*Analityczna teoria obowiązku. Studium z logiki deontycznej*, Warszawa, 1983).

[16] It is another matter if the solution was justified in an entirely convincing manner. This author believes that this is very doubtful. The issue shall be discussed further, but let us note already now that it appears that with the relevant law being as it was at that time more was demanded of a non-professional entity than of a person conducting historical research; the latter, unlike the non-professional entity, was allowed to commit lawfully the *actus rei* of prohibited acts defined in Article 55a(1) and (2) the IPN Act; e.g. he/she was allowed in the course of research to attribute wrongly to the Polish Nation or the Polish State responsibility (co-responsibility) for crimes named in Article 55a(1) of the IPN Act. Thus, by this approach, the principle of 'levelling up the standards' was ignored, one that is by all means desirable in criminal law. How important the principle is for it can be seen not only in determining the degree of guilt of a person who by his/her behaviour carried out the *actus rei* of a prohibited act, but also in determining the scope of criminalization and legal excuses.

case was that the said expression, being a feature of the *actus reus* of prohibited acts defined in Article 55a(1) and (2) of the IPN Act, covered the said behaviour only when a person used the words in question ('Polish camps', 'Polish concentration camps', etc.) to denote the responsibility of the Polish Nation or the Polish State for crimes mentioned in Article 55a(1) of the IPN Act. Consequently, it had to be assumed that if a person used the words only to denote the location of these camps, his/her statement would not be the *actus reus* in point. In a word, an answer to the fifth question depends on the meaning assigned to these words by their speaker. Hence, every instance of using these words would have to be considered individually, according to the law as it stood then. To sum up, speaking about Polish concentration camps is a behaviour that – quite obviously – does not have to entail the attribution to the Polish Nation or the Polish State of responsibility (co-responsibility) mentioned in Article 55a(1) and (2) the IPN Act.

VI. Having, thus, obtained – in the light of the above findings – a fairly clear picture of the scope of criminalization set by the wording of Article 55a(1) the IPN Act, we can move to the critical reflection, announced earlier, on paragraph 3 of this Article and, consequently, to more general conclusions. To remind yet another time, under this paragraph: 'No offence is committed by the perpetrator of the prohibited act as defined in paragraphs 1 and 2 above if he/she has perpetrated it as part of artistic or scholarly activity'.

As already mentioned, it is not a matter of controversy that the circumstances mentioned therein, precluding the criminality of an act, were accorded the status of circumstances precluding the unlawfulness of a prohibited act. Specifically, they were given the character of circumstances secondarily legalizing a prohibited act, because they depended on the condition of committing such an act. Thus, they were not formulated in accordance with the principle considering a legal excuse as the negative *actus reus* of a prohibited act; after all, it should be stressed yet again that – pursuant to Article 55a(3) of the IPN Act – as part of artistic or scholarly activity, a prohibited act could be committed as defined in Article 55a(1) or (2) of the IPN Act.

As matters stand, the question springs to mind whether the solution adopted in Article 55a(3) of the IPN Act was right; specifically if it was legitimate from a theoretical point of view. As already mentioned, there are doubts on this particular question.

The most serious doubts concern artistic activity, which – in the opinion of this author – cannot, in the nature of things, really threaten an interest protected then by Article 55a(1) of the IPN Act, and thus cannot really destroy the said interest. For the interest protected by the provision in question is – to use Władysław Wolter's nomenclature – a social value related to an ideal object (good name of the Polish Nation, good name of the Polish State)[17]. Hence, it is an interest that by no means can be threatened by artistic behaviour. This is so because an attack on such

[17] See W. Wolter, *Nauka o przestępstwie. Analiza prawnicza na podstawie przepisów części ogólnej kodeksu karnego z 1969*, Warszawa, 1973, 42–43.

interests carried out as part of artistic activity is only a feigned attack, a type of behaviour being only a pretence of an attack. This, in turn, is a consequence of an unwritten social contract[18], having an obvious and absolutely sufficient axiological justification, whereby the domain of artistic activity is exempted from the norms proscribing the infringement of social values related to an ideal object. Arguably, the above is a parallel world of a kind where the scope of criminal law regulation is narrower.

In a word, with respect to ideal objects, this domain is one where only socially acceptable human behaviour is found and which, therefore, lies outside the scope of criminal-law sanctioned norms[19]. It can be said, in the light of the above, that the lawfulness of such behaviour is original, since in its case – for the reasons given above – the norms are not breached (because they cannot be breached). From the point of view of deontic logic, which uses weak and strong permissions, these types of behaviour would be classified as weakly permitted. Wherefore, the solution adopted in Article 55a(3) of the IPN Act, in as much as it applies to artistic activity, must be considered wrong as it made an artist the subject of a prohibited act without any substance.

Now let us consider scholarly activity. In its case, too, it has already been said that considering it a legal excuse with respect to behaviour defined in Article 55a(1) and (2) of the IPN Act may raise doubts. Before this behaviour is described in greater detail, though, it has to be observed that unlike in the case of artistic activity, in scholarly activity – one geared at learning the truth – an attack on the interest protected by the then Article 55a(1) of the IPN Act, is no longer feigned, but real. In the theoretical framework adopted here, for the breach of a norm sanctioned by criminal law to occur it is necessary that the behaviour infringing a legal interest infringe, in addition, rules of dealing with such an interest[20], including rules of careful treatment of the interest concerned. In this context, these will concentrate around the rule of honest conduct of research.

In a word, as long as the researcher's behaviour complies with the said rule, he/she cannot be attributed either intentional or unintentional commission of the prohibited act defined in Article 55a of the IPN Act. Moreover, the compliance with the rule in question by no means depends on the correspondence between the researcher's findings and facts. Specifically, the researcher may be wrong (he /she has the right to a justified error) and against the facts, for instance, attribute to the Polish Nation or the Polish State responsibility for crimes defined in Article 55a(1) of the IPN Act, provided that, to emphasize yet again, his/her research meets the condition of honesty imposed by the rule in question. The question of honesty will be decided by the criterion of legitimacy of the researcher's scholarly findings.

[18] The constitutional guarantee of artistic creation and scientific research stems from it – see the Constitution of the Republic of Poland, Article 73.

[19] Obligatory in the process of interpreting any legislative text, the presumption that the norm maker rationally encodes norms makes us assume each time that only socially unacceptable behaviour is prohibited. Otherwise, we will be left with a result impossible to be classified as the product of a rationally acting entity. For it cannot be maintained that a rational norm maker prohibits socially acceptable behaviour. More on this issue see for instance in Ł. Pohl, *Struktura normy*..., 99 et seq., and for norms of caution in general see the exceptionally competent discussion by M. Byczyk, *Normy ostrożności w prawie karnym*, Poznań 2016, 470.

[20] See Ł. Pohl, *Struktura normy*..., 99 et seq.

If, therefore, scholarly activity is limited solely to behaviour complying with the rule of honesty in research, the solution adopted in Article 55a(3) of the IPN Act was wrong, because such behaviour – in agreement with the said rule – remained clearly outside the scope of the prohibitive norms encoded in Article 55a(1) and (2) of the IPN Act.

However, the fact of the matter is that what is also considered scholarly activity is certain manifestations of such activity that clearly fail to meet the aforementioned standard. It is with respect to these that serious doubts arise whether they should be accorded the status of secondarily legalized behaviour. While there is no need to discuss their incompliance with the sanctioned norm (after all, this incompliance was noticed by the legislator, who laid down the condition of committing a prohibited act in Article 55a(3) of the IPN Act), the condition of social advantageousness of the behaviour breaching the said norm, constitutive of every legal excuse, may be seriously questioned.

If, however, the freedom of research and dissemination of its results is absolutized and considered a value in itself, one that would *per se* satisfy the condition, then those would be right who maintain that the difference between the original lawfulness of human behaviour and its secondary lawfulness is too serious a matter to be hidden in the formula of a uniform lawfulness of an act. The difference – to finally attempt some general conclusions – is seen in the fact that in the case of originally lawful behaviour, the very behaviour of a person is socially acceptable, because this is the way the person behaves, whereas in the case of secondarily legalized behaviour it is not so. This is so because the legalizing effect always depends on the assessment of some additional context, such as a situation, i.e. a context that makes the offender's behaviour justified despite the infringement of the rules of dealing with a legally protected interest (concerning the way it is treated). The justification is strong enough to allow us to pronounce the behaviour – at the end of the day – socially advantageous in spite of the breach of a norm sanctioned in criminal law.

Summing up, there are grounds to uphold this distinction, because of the qualitative – in my view – difference between the situation where a norm is not breached and the situation where a breach is considered justified. It is another matter, naturally, if the justification is right and convincing. In the studied example, there are serious doubts, as already mentioned. Perhaps, it is these doubts that lend support to the idea of secondary lawfulness. After all, with originally lawful behaviour, no such doubts arise, do they? If this conjecture were to be considered right, it would be thus necessary to assume that the behaviour constituting a legal excuse may attract varied assessments. The condition of a legal interest infringement and its social advantage appears not to be based on a binary formula, but rather one that requires partial assessments based on hierarchy.

A few words in place of conclusions. The above findings reveal that the discussion of the regulation in question, often very critical, was superficial, that is – at the end of the day – insufficiently substantive. The fact that the desired scholarly insight was deficient reinforces the thesis of those who claim that legislative measures, including the swift derogation of the article in question, are not always – and it is regrettable that this is the case – in accord with the conclusions of a critically oriented – in the proper sense of the term – scholarly reflection.

Summary

Łukasz Pohl, *On Public Attribution of Responsibility (Co-Responsibility) for Nazi Crimes Perpetrated by the German Third Reich to the Polish Nation or the Polish State. The Actual Normative Content of Now Repealed Article 55a of the Institute of National Remembrance Act*

As is well known, the provision in question has aroused considerable controversy among many commentators. One may venture a statement that it was the controversy that made the Polish legislator remove the provision from the legal system relatively quickly. A thorough interpretation of the provision suggests, however, the controversy was partially due to a highly superficial analysis. The comments below shall attempt to prove this superficiality.

Keywords: *Nazi crimes of the German Third Reich, co-responsibility for international crimes, Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (IPN)*

Streszczenie

Łukasz Pohl, *O publicznym przypisywaniu Narodowi Polskiemu lub Państwu Polskiemu odpowiedzialności (współodpowiedzialności) za zbrodnie nazistowskie popełnione przez III Rzeszę Niemiecką – uwagi o rzeczywistej zawartości normatywnej nieobowiązującego już art. 55a ustawy o Instytucie Pamięci Narodowej*

Jak wiadomo, tytułowy przepis uchodził w ocenie wielu jego komentatorów za przepis rodzący rozliczne kontrowersje. Można zaryzykować stwierdzenie, że to właśnie ta jego właściwość legła u przyczyn powzięcia przez polskiego ustawodawcę decyzji o stosunkowo rychłym usunięciu go z systemu prawnego. Pogłębiona wykładnia tego przepisu skłania jednak do wniosku, że podnoszone kontrowersje były niejednokrotnie wynikiem analizy dalece powierzchownej. Poniższe uwagi poświęcone są wykazaniu jej powierzchowności.

Słowa kluczowe: *zbrodnie nazistowskie III Rzeszy Niemieckiej, współodpowiedzialność za zbrodnie międzynarodowe, Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu*

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